

18 December 2012

Ms Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
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Parliament House
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Australia

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Dear Ms Dennett,

INQUIRY INTO EXPOSURE DRAFT OF THE HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

We strongly endorse the Human Rights and Anti-Discrimination Bill 2012, subject only to necessary refinements and corrections which we describe in the attached submission.

The Bill replaces a confusing and inconsistent collection of statutes which has failed to promote a culture of equality, or to provide accessible and affordable processes for resolving complaints. The Bill addresses a notoriously complex area of law with great clarity, ensuring that it is easily read and understood. In doing so, the Bill both updates the federal anti-discrimination regime with contemporary principles and procedures, while maintaining consistency with many established principles and procedures.

We commend the government for seeking to simplify and enhance human rights protection in Australia, and for releasing this Bill in the form of an exposure draft of proposed legislation, which enables very effective consultation

We urge the Committee to support the Bill as a modern, principled, pragmatic, fair and balanced approach to addressing discrimination in Australia. We invite the Committee to consider adopting the recommendations in the attached submission, which are designed to further enhance the Bill's qualities.

We are available at any time to assist the Committee in its inquiry and deliberations.

Yours sincerely,

For the Discrimination Law Experts Group

**SUBMISSION OF DISCRIMINATION LAW EXPERTS GROUP
TO**

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

**INQUIRY INTO EXPOSURE DRAFT OF THE
HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012**

December 2012

CONTENTS

1. Recommendations.....	3
2. Summary of position.....	9
3. Guiding principles	10
4. Objects of the Bill.....	10
5. Attributes.....	12
6. Definition of Discrimination.....	18
7. Areas of public life	22
8. Exceptions/Defences	23
9. Burden of Proof	30
10. Compliance Measures	31
11. Complaints and Compliance Framework	36
12. Confidentiality and research.....	39
13. Drafting.....	39
Appendix	40

The Authors

The Discrimination Law Experts Group comprises academics from a range of universities across Australia who have researched and published widely in the fields of discrimination and equality law. The Group met in Melbourne on Monday 3 December 2012 to collaborate on this submission to the Senate Legal and Constitutional Affairs Committee. This submission draws on and refers to the Group's two submissions in respect of the Consolidation of Commonwealth Anti-Discrimination Laws Project dated March 2011 and December 2011.

The members of the Experts Group who contributed to the development of this submission are listed in the Appendix. The 3 December 2012 Working Group meeting and drafting of this submission were coordinated by Dr Belinda Smith.

1. RECOMMENDATIONS

Recommendation 1: The Committee support the passage of the Bill.

Recommendation 2: The object in cl 3(1)(d) should be amended to read: ‘to promote recognition and respect within the community for the principle of substantive equality and the inherent dignity of all people;’

Recommendation 3: The Objects should be reordered to reflect the importance of substantive equality as an object of the Bill.

Recommendation 4: Object cl 3(1)(a) should be amended to delete the word ‘sexual’.

Recommendation 5: The objects clause should also state: ‘to provide an effective remedy for victims of discrimination, harassment and vilification’.

Recommendation 6: The Interpretation Note following cl 3(1)(g) [objects clause] should be contained in a clause 3(4) rather than a note.

Recommendation 7: The term ‘sexuality’ should be used instead of ‘sexual orientation’, and the definitions of ‘sexuality’ and ‘gender identity’ should be as proposed in the submission of the ANU College of Law, Australian National University *Equality Project*

Recommendation 8: The definition of ‘gender identity’ should include an intersex person, being a person who does not identify as either male or female or who does not present as either male or female. Alternatively, ‘intersex’ should be a protected attributed.

Recommendation 9: The attribute ‘political opinion’ should be defined to include not having a political opinion, and should clarify whether it includes some or all of political ‘affiliation’, ‘activity’, ‘belief’ and ‘conviction’.

Recommendation 10: The attribute ‘religion’ should be defined to include not having a religion, and should clarify whether it includes some or all of religious ‘belief’, ‘conviction’, ‘activity’ and ‘affiliation’.

Recommendation 11: Discrimination on the ground of the attributes set out in cl 23(3) should be unlawful in all areas of public life.

Recommendation 12: Omit the parenthetical phrase in clause 22(3), leaving cl 19(1) and 19(3)(c) to address intersectionality for discrimination connected with work when one of two or more attributes is from cl 22(3).

Recommendation 13: Criminal record – or the attribute of having a criminal history as defined – should be a protected attribute in the Bill and discrimination on the ground of this attribute should be prohibited in all areas of public life.

Recommendation 14: That the terminology of ‘family responsibilities’ be widened to ‘family and carer’s responsibilities’ to ensure better consistency between the HRAD Act, *the Fair Work Act 2009* and the *Workplace Gender Equality Act 2012*.

Recommendation 15: That an alternative definition of family and carer’s responsibilities be used, such as the one found in s 4(1) of the *Equal Opportunity Act 1984 (WA)*.

Recommendation 16: ‘Victim or survivor of domestic violence’ should be a protected attribute in the Bill and discrimination on the ground of this attribute should be prohibited in all areas of public life.

If this attribute is not included, at least the 3 year review of exceptions should be extended also to consider additional attributes including this one.

Recommendation 17: Clause 19(2)(b) should be deleted.

Recommendation 18: The duty to provide reasonable adjustments should be part of the definition of definition of discrimination at least in relation to disability.

Recommendation 19: The explicit duty to provide reasonable adjustments should be applicable to all attributes.

Recommendation 20: The provision in cl 8 for conduct engaged in for multiple reasons should be the same provision as currently exists in the Sex, Disability and Age Discrimination Acts to make clear that conduct is prohibited for a particular reason even if it is not the dominant or substantial reason.

Recommendation 21: To enable and promote positive action that promotes substantive equality the 'sole or dominant purpose' test for special measures in cl 21(2) of the Bill should be replaced with a 'sole or significant purpose' test.

Alternatively the 'sole or dominant purpose test' should be retained for race, but the test for other attributes should be sole purpose 'as well as other purposes, whether or not that purpose is the dominant or substantial one'

Recommendation 22: The provision in cl 21(2)(b) that recognises a special measure on the basis of the 'reasonable person' test should be amended to substitute a requirement that the proposed special measure has been developed in consultation with the people for whose benefit the measure is proposed.

Recommendation 23: The process for making special measure determinations described in cl 80 should be amended as described below.

Recommendation 24: The Bill should be amended so that the rates of salary or wages paid to people with disabilities cannot be the subject of a special measure exemption.

Recommendation 25: That cl 60 be amended to extend the principle of equality before the law to all persons with a protected attribute.

Recommendation 26: A Note should be inserted after cl 22(1) and cl 57 to draw attention to the definition of the phrase 'connected with' in cl 7.

Recommendation 27: The inclusive list of areas of public activity in cl 22(2) should be re-drafted, by deleting the struck out text as set out below:

- (a) work and work-related areas;
- (b) education or training;
- (c) ~~the provision of~~ goods, services or facilities;
- (d) ~~access to~~ public places;
- (e) ~~provision of~~ accommodation;
- (f) ~~dealings in~~ estates or interests in land (otherwise than by, or to give effect to, a will or a gift);

- (g) ~~membership and activities of clubs or member-based associations;~~
- (h) ~~participation in sporting activities (including umpiring, coaching and administration of sporting activities);~~
- (i) ~~the administration of Commonwealth laws and Territory laws, and Commonwealth programs and Territory programs.~~

Recommendation 28: Part (f) of the definition of ‘services’ in cl 6 should be amended by adding the phrase ‘, including the performance and carrying out of statutory duties and functions’.

Recommendation 29: In cl 23(3)(b), replace the phrase ‘that aim is a legitimate aim’ with the phrase ‘that aim is consistent with achieving the objects of the Act’.

Recommendation 30: The Explanatory Notes at [147] should be amended to make clear that cl 23(4) sets out a range of matters that must be taken into account in determining all the factors in cl 23(3).

Recommendation 31: Clause 23(6)(a) should be amended to replace the phrase ‘there is a reasonable adjustment’ with the phrase ‘there was a reasonable adjustment’ and cl 25(3) should be amended as follows:

(3) In determining whether making an adjustment would have caused the first person unjustifiable hardship, all relevant matters must be taken into account, including the following:

(a) the nature of any benefit or detriment likely to have accrued to, or to have been suffered by, any person concerned;

(b) the effect of any disability of any person concerned;

(c) the financial circumstances of the first person at the relevant time, and the estimated amount of expenditure that the first person would have to have incurred in order to make the adjustment;

(d) the availability of financial and other assistance to the first person at the relevant time;

(e) any relevant guidelines at the relevant time prepared by the Commission under clause 62;

(f) any relevant action plans at the relevant time given to the Commission under clause 68

Recommendation 32: The inherent requirements defence in cl 24 should be deleted, leaving cl 23 (justification) to be used for such situations (with an associated revision of cl 23 to ensure reasonable adjustments are taken into account in respect of disability).

Alternatively, if cl 24 is not deleted, it should at least be limited to the attribute of disability to ensure that in respect of all attributes duty bearers in work are required to explore the availability and feasibility of less discriminatory options to justify discriminatory conduct (as required by cl 23).

Recommendation 33: In cl 33(1)(d), delete ‘pregnancy, or replace it with a more specific combination of attributes that is justified by religious needs.

Recommendation 34: The Bill should be amended by deleting cl 33(1)(c) ‘potential pregnancy’.

Recommendation 35: Clause 33(4)(c)(i) should be omitted, and the heading to the provision amended accordingly.

Recommendation 36: The Bill should require religious organisations that intend relying on an exception in cl 33 to give written notice of that intention to prospective employees and students before any employment or enrolment occurs that the organisation.

Recommendation 37: The exclusion of publicly funded aged care in cl 33(3) should apply to all Commonwealth-funded services in the educational, health, social, community, commercial and other sectors.

Recommendation 38: The Bill and/or the Explanatory Notes should clarify whether reference to ‘priests, ministers of religion or members of any religious order’ in cl 32 is intended to apply to people of equivalently styled positions in all organised faiths.

Recommendation 39: Clause 39 of the Bill should be deleted.

Recommendation 40: If cl 39 is not deleted, then cl 39(5)(b) of the Bill should be deleted.

Recommendation 41: Clause 40 of the Bill should be deleted.

Recommendation 42: Clause 44 of the Bill should be clarified to specify whether its operation is limited to the provision of accommodation for reward.

Recommendation 43: Clause 47 of the Bill should be amended to specify that the review is to be a review of the operation and effect of the exceptions, having regard to the objects of the Act.

Recommendation 44: No change should be made to the terms of cl 124 of the Bill.

Recommendation 45: A court should only be permitted to ‘have regard to a review report’ (under clause 66(2)) if the report has been made available either publicly or at least to the complainant.

Recommendation 46: Consultation requirements should not rely only on provisions of the *Legislative Instruments Act 2003*. Effective consultation must be an essential precondition to the making of a valid disability standard, compliance code, temporary exemption or special measure determination. It should require public notice, notice specifically to groups likely to be affected, a minimum period for submissions, and good faith consultation with affected groups in a manner that will enable the affected groups to make their views known.

Recommendation 47: The powers in cll 70, 75, 79 and 83 can only be exercised after an adequate consultation process has enabled those affected, or their representatives, to be informed about the applications and make submissions and present arguments.

Recommendation 48: A person affected by a Compliance Code, Special Measures Determination or Temporary Exemption should be able, with leave of the Commission, to seek amendment or revocation of the code or determination.

Recommendation 49: The process described in cl 80 should be amended to require that:

- before making a determination, the Commission be satisfied that the proposed special measure has been developed in consultation with the people for whose benefit the measure is proposed; and
- before amending or revoking a determination, the Commission be satisfied that the proposed amendment or revocation has been the subject of consultation with the people for whose benefit the measure is in place.

Recommendation 50: Clause 79 should explicitly refer to the definition of special measures in clause 21, as cl 80(2) does.

Recommendation 51: The Bill should require the Australian Human Rights Commission to maintain an accessible and up-to-date public register of all Special Measure Determinations.

Recommendation 52: Clause 83 should exclude 'race' as an attribute from power to grant temporary exemptions.

Recommendation 53: Part 3-1 Division 8 of the Bill should be amended to specify that a temporary exemption is available only to allow the taking of measures to address current non-compliance with the Act, and only when it is consistent with the object of achieving substantive equality.

Recommendation 54: Clause 84 of the Bill should be amended to require:

- applicants for a temporary exemption to give public notice of the application;
- a time for the making of submissions on the merits of the application;
- publication of reasons for granting or refusing the application; and
- a public register of all applications granted and the terms on which they were granted.

Recommendation 55: The Bill should make express in plain English that a compliance code is not mandatory but compliance with an applicable code provides a complete defence to a claim of unlawful conduct.

Recommendation 56: Clause 76(2) should be amended to provide that the AHRC cannot make a compliance code unless the Commission is satisfied that the code does not unnecessarily reduce protections under the Act.

Recommendation 57: The *Inspector-General of Intelligence and Security Act 1986* (Cth) should be amended to require the Inspector-General to investigate on a complaint referred under cl 103(1) of the Bill, and to report to the parties to the complaint and the AHRC.

Recommendation 58: Clause 133(3) should be amended to include as a consideration that an individual complainant has been successful against a respondent that is a government entity or is eligible to claim its legal expenses as a tax deduction.

Recommendation 59: Having regard to our earlier, more detailed submissions, the Bill should be amended as follows:

- the AHRC should be able to initiate complaints on its own motion; and
- the AHRC should have the capacity and resourcing to support selected cases which are in the public interest.

Recommendation 60: Clause 90(1)(a) should be amended to replace the phrase 'has already been made' with the phrase currently in s 49PH(1)(f) of the Australian Human Rights Commission Act: 'has been adequately dealt with'.

Recommendation 61: Clause 90(2) should be amended to include a provision allowing a complaint to be lodged under the Act provided that any previous complaint in the jurisdictions listed in cl 90(1) has not proceeded to any substantive step (such as conciliation) and has been discontinued before the complaint is lodged.

Recommendation 62: The AHRC should be given regulatory powers to assist with enforcement of the law. Powers to conduct strategic litigation on behalf of a complainant should be given to the AHRC or an alternative body, to be funded through a strategic enforcement or test cases fund.

Recommendation 63: There should be a regular review of progress towards the objective of eliminating discrimination and harassment by the AHRC reporting to the Minister, who should table it in Parliament, not less often than every 5 years.

Recommendation 64: Clause 194 should be amended to require the AHRC:

- to publish on its website de-identified information about the content and outcome of each complaint;
- to collect and publish de-identified socio-demographic descriptive data about the complaints it receives, the complainants who make them, and the respondents to the complaints; and
- to allow access, for research purposes, to otherwise confidential information held by the AHRC and the courts, so long as the research is approved by an institutional ethics committee.

Recommendation 65: The following drafting errors be corrected:

- cl 19(7) is unnecessarily unclear. We suggest that it be replaced by 'Subsections (1) and (3) are not mutually exclusive.'
- cl 21(4), replace the word 'after' with the word 'when'.
- cl 22(3), replace the phrase 'is only unlawful if' with the phrase 'is unlawful only if'.
- cl 92 (1) and (3), replace 'claimant' with 'complainant'.
- cl 103(1), replace 'or that is otherwise' with 'or is otherwise'.

2. SUMMARY OF POSITION

Recommendation 1: The Committee support the passage of the Bill.

We support the bill in principle and welcome the key changes that it makes to:

- simplify and harmonise the law
- include an objects clause
- add sexual preference and gender identity attributes;
- provide single definition of discrimination
- provide a single prohibition
- provide shifting burden of proof;
- establish a default no costs rule; and
- add further mechanisms to support.

However, we have a number of concerns that are raised in this submission. They relate to the following issues:

- The proposed objects are potentially conflicting and not sufficiently focused on substantive equality;
- Some proposed attributes have not been adopted and some are too narrowly defined;
- Some defences/exceptions are too wide or not sufficiently clear
 - Justification;
 - inherent requirements; and
 - religious belief;
- The process for making the new compliance measures (compliance codes, special measures determinations, and temporary exemptions) does not include an effective consultation requirement;
- There are reductions in protection in some important areas, contrary to the government's undertaking:
 - multiple reasons test;
 - temporary exemptions for race; and
 - loss of any legislative basis for human rights protection for criminal record;
- In areas important to challenging systemic discrimination, the Act has not been extended. These include:
 - Failure to give the AHRC extended enforcement powers;
 - Limiting equality before the law to the attribute of race;
 - Not applying the requirement to make reasonable adjustments to all attributes; and
 - Failing to make provision for research access to data held by the AHRC.

3. GUIDING PRINCIPLES

In developing this submission we have drawn on the principles articulated in our two earlier submissions to the federal anti-discrimination law consolidation process:

- Discrimination harms society as a whole and every member individually, not merely the identified aggrieved persons. For this reason, an obligation to address discrimination should be shared widely across society, and the identified aggrieved person should not bear an onerous burden in driving change.
- Discrimination unfairly excludes women and members of particular groups and limits their capacity to fulfil their potential in our society. It manifests in a wide variety of ways, ranging from blatant and intentional prejudicial conduct to the unintentional imposition of apparently neutral barriers. To address discrimination fairly and effectively in its many manifestations, anti-discrimination law needs to be wide in its coverage but also sophisticated and nuanced so that it can apply to the great diversity of human experiences, goals and needs.
- Simplicity should be a goal of regulatory reform but only to the extent that it serves to enhance both compliance and efficiency.
- In designing effective anti-discrimination laws it is important to appreciate and articulate connections between the definition of discrimination, the nature and scope of prohibitions and exceptions that justify or permit some forms of discrimination. A wide definition of discrimination provides a clear and simple message, but necessitates rules and mechanisms that enable fair and efficient identification of discrimination that is justifiable.

Anti-discrimination legislation should recognise the systemic nature of discrimination, which requires an active approach to enforcement rather than one that is merely reactive and rests on victims, who may have very little capacity to enforce the law. The draft Bill admirably reflects these principles.

4. OBJECTS OF THE BILL

We support the inclusion of an objects provision in the Bill. We have three recommendations to enhance its usefulness.

4.1 Substantive equality

The objects clause is the keystone of the legislation. It should clearly and unequivocally set out the values inhering within the legislation, as a statement to inform and guide the community, and judicial interpretation. The objects are presently inadequate in that they do not focus sufficiently on the aim of substantive equality.

The objects fail to inform and guide accurately when, in cl 3(1)(d), they give the same status to both formal and substantive quality. Formal equality, which involves treating everyone in the same way, can be at odds with substantive equality, which recognises patterns of disadvantage. Indeed, formal equality may be compatible with the grossest inequality. The hollowness of a purely formalistic approach is famously captured by Anatole France:

The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread — the rich as well as the poor.¹

The limitations of formal equality have been recognised in Australia by the High Court. Brennan J in *Gerhardy v Brown* said:

... it has long been recognised that formal equality before the law is insufficient to eliminate all forms of racial discrimination ...

Formal equality must yield on occasions to achieve what the Permanent Court [of International Justice] in the *Minority Schools of Alabama Opinion* called 'effective, genuine equality'.²

Formal equality is a central norm of the Australian legal system, so adverting to it as an object of the Bill is unnecessary. The real work to be done by an anti-discrimination law is to achieve substantive equality; this should be stated in the objects clause, and the objects clause should be re-ordered to reflect the primacy of that objective.

Recommendation 2: The object in cl 3(1)(d) should be amended to read: 'to promote recognition and respect within the community for the principle of substantive equality and the inherent dignity of all people;'

Recommendation 3: The Objects should be reordered to reflect the importance of substantive equality as an object of the Bill.

The revised ordering we propose is set out below.

CURRENT	PROPOSED
(a) eliminate discrimination etc	(a) eliminate discrimination etc
(b) give effect to international instruments	(d) equality and dignity
(c) AHRC	(e) special measures
(d) equality and dignity	(f) ADR
(e) special measures	(g) compliance
(f) ADR	(b) give effect to international instruments
(g) compliance	(c) AHRC

4.2 Elimination of harassment

The opening object in cl 3(1)(a) is 'to eliminate discrimination, sexual harassment and racial vilification'. This is inaccurate, as the Bill will operate to address harassment more generally and not only sexual harassment. Although 'discrimination' is defined to include 'harassment', it is not appropriate that the meaning of an objects clause can be understood only by reference to a later interpretive provision. An objects clause is a public statement of Government policy, and is referred to domestically and internationally as a signal of Australia's provision for human rights protection. On its face, the objects clause says that the Bill is concerned only with sexual harassment, and fails to signal the Bill's attempt to eliminate harassment more generally.

¹ Anatole France, *The Red Lily*, Brentanos, New York, 1898) p 117.

² *Gerhardy v Brown* (1985) 159 CLR 70.

Recommendation 4: Object cl 3(1)(a) should be amended to delete the word ‘sexual’.

4.3 Provision of a remedy

Although compliance and complaint resolution are referred to, the Bill overlooks stating one of its central objects: to provide victims of discrimination with a remedy.

Recommendation 5: The objects clause should also state: ‘to provide an effective remedy for victims of discrimination, harassment and vilification’.

4.4 Interpretation note

A persistently narrow doctrinal interpretation by the courts has undermined the efficacy of anti-discrimination legislation. Most judges have tended to ignore the beneficial purpose of the legislation and the UN instruments on which the legislation is based. *Purvis* (2003)³ and *Amery* (2006)⁴ are notable examples of judicial decisions which have skewed the interpretation of the legislation.

The Interpretation Note following cl 3(1)(g) goes some way towards meeting this concern, but it should be accorded enhanced status by being contained in a new clause, cl 3(4), rather than being confined to a Note. This approach has been taken in, for example, the *Freedom of Information 1982* (Cth) and the *Equal Opportunity Act 2010* (Vic).

Recommendation 6: The Interpretation Note following cl 3(1)(g) [objects clause] should be contained in a clause 3(4) rather than a note.

5. ATTRIBUTES

5.1 Sexual orientation and gender identity

We support the inclusion of protection against discrimination on the ground of sexual orientation and consider this to be a crucial component of Australia’s human rights protections. The definition is, however, inadequate.

The terminology and definitions of ‘sexual orientation’ and ‘gender identity’ reinforce out-dated and unnecessarily rigid ideas about sexuality and gender. We endorse the submissions made by the ANU College of Law, Australian National University ‘Equality Project’⁵ that:

- The protected attribute should be ‘sexuality’ not ‘sexual orientation’, as ‘sexuality’ is a more inclusive term that allows for a sexual identity not dependent on a specific orientation;
- ‘Sexuality’ should be defined as including sexual attraction, sexual identity and sexual behaviour;
- ‘Gender identity’ should be defined to include: the gender related identity of a person; the gender presentation of a person and/or the mannerisms or other gender related characteristics of a person, with or without regard to the individual’s designated sex at birth. As well, it should be defined to include intersex, as we propose separately below.

³ *Purvis v New South Wales* [2003] HCA 62; 217 CLR 92; 202 ALR 133.

⁴ *New South Wales v Amery* [2006] HCA 14; (2006) 226 ALR 196.

⁵ For more detail, see ANU College of Law ‘Equality Project’ Submission to the Senate to the Senate Standing Committee on Legal and Constitutional Affairs’ Inquiry into the Human Rights and Anti-Discrimination Bill 2012.

Recommendation 7: The term 'sexuality' should be used instead of 'sexual orientation', and the definitions of 'sexuality' and 'gender identity' should be as proposed in the submission of the ANU College of Law, Australian National University *Equality Project*

5.2 Intersex

We support the Bill's recognition of 'gender identity' as a protected attribute, but note that the recognition is incomplete. Intersex is a gender identity, but the Bill fails to recognise this.

Meaning of the term

People are intersex when, because of their physiological characteristics at birth, they do not identify as exclusively female or exclusively male. The attribute does not include people who have changed or are changing their identity between male and female, and is not covered by the definition in the Bill of 'gender identity'. Other terms commonly used to describe a person who is intersex, though not necessarily accepted as accurate by intersex people, are androgynous and hermaphrodite. Another common term is 'intersex condition', which is objected to by some intersex people as suggesting that intersex is an abnormal departure from the usual status of being female or male.

Section 169B of the ACT *Legislation Act 2001* defines an intersex person as 'a person who, because of a genetic condition, was born with reproductive organs or sex chromosomes that are not exclusively male or female'. In its recent report on the legal recognition of transgender and intersex people, the ACT Law Reform Advisory Council recommended that this definition be amended by removing the phrase 'because of a genetic condition'.⁶

Existing Commonwealth protection

A person's status as intersex is recognised by the Commonwealth Passport Office, which issues an Australian passport or Document of Identity that shows an X for the sex of an intersex person. As the Passport Office notes, 'this initiative is in line with the Australian Government's commitment to remove discrimination on the grounds of sexual orientation or sex and gender identity'.⁷ It is consistent with this commitment that discrimination on the ground of the attribute of intersex be made unlawful.

If the Bill does not extend to protect the attribute intersex, it will be inconsistent with the recognition already given by the Commonwealth to that attribute through the policy of the Passports Office, and the Commonwealth will fail to fulfil its commitment to remove discrimination on the ground of gender identity.

Recommendation 8: The definition of 'gender identity' should include an intersex person, being a person who does not identify as either male or female or who does not present as either male or female. Alternatively, 'intersex' should be a protected attributed.

5.3 'Political opinion'

The attribute 'political opinion' is said by the Explanatory Notes to 'take its ordinary meaning'. The deliberate failure to define the attribute of 'political opinion' (Explanatory Notes [95]) is not explained, and the absence of a definition will create uncertainty.

⁶ ACT Law Reform Advisory Council, *Beyond the Binary: legal recognition of sex and gender diversity in the ACT*, July 2012.

⁷ Australian Passport Office at: <https://www.passports.gov.au/web/sexgenderapplicants.aspx>

Having regard to anti-discrimination legislation in States and Territories it is unclear if the term's 'ordinary meaning' includes, or is intended to include, some or all of political 'affiliation', 'activity', 'belief' and 'conviction'. If the term includes political 'activity', then it should be distinguished from 'industrial activity' (see eg *Neville Abolish Child Support v Telstra Corporation Limited* [1997] VADT 44).

Further, the 'ordinary meaning' of the term does not include not having a political opinion, but it is as important to protect a person who is discriminated against because they do not have a political opinion as it is to protect a person who is discriminated against because they do. The Bill's definition of industrial history, for example, includes *not* doing any of the things said to be industrial history. Anti-discrimination laws in each of Tasmania, Victoria, Western Australia and the Northern Territory define the attribute to include not holding a political belief, opinion etc.

Recommendation 9: The attribute 'political opinion' should be defined to include not having a political opinion, and should clarify whether it includes some or all of political 'affiliation', 'activity', 'belief' and 'conviction'.

5.4 'Religion'

The attribute 'religion' is said by the Explanatory Notes to 'take its ordinary meaning'. The deliberate failure to define the attribute (Explanatory Notes [98]) is not explained, and the absence of a definition will create uncertainty.

Having regard to anti-discrimination legislation in States and Territories it is unclear if the term's 'ordinary meaning' includes, or is intended to include, some or all of religious 'belief', 'conviction', 'activity' and 'affiliation'.

Further, the 'ordinary meaning' of the term does not include not having a religion, but it is as important to protect a person who is discriminated against because they do not have religion as it is to protect a person who is discriminated against because they do. The Bill's definition of industrial history, for example, includes *not* doing any of the things said to be industrial history. Anti-discrimination laws in each of Queensland, Tasmania, Victoria and Western Australia define the attribute to include not holding a religious belief, opinion etc.

Recommendation 10: The attribute 'religion' should be defined to include not having a religion, and should clarify whether it includes some or all of religious 'belief', 'conviction', 'activity' and 'affiliation'.

5.5 Further attributes

We support the inclusion in cl 22(3) of the attributes currently protected under the 'equal opportunity in employment' complaints scheme in the *Australian Human Rights Commission Act 1986* (Cth).

However, limiting protection on these grounds, along with family responsibilities, to discrimination in connection with work and work-related issues creates an irrational disparity between the status accorded to these attributes and that accorded to other attributes protected by the Bill.

There is constitutional power to make discrimination on the basis of these further attributes unlawful in all areas of public life, relying on the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights*. It is not true to say that doing so will increase a compliance burden; the obligation not to discriminate on the basis of these attributes already exists – in varying forms and to varying degrees – in State and Territory legislation, and already exists in federal law for employment, the area of public life where most complaints are made.

Recommendation 11: Discrimination on the ground of the attributes set out in cl 23(3) should be unlawful in all areas of public life.

5.6 Intersectional (combined attribute) complaints

We support the provision in the Bill enabling conduct engaged in on the ground of more than one attribute to be complained of in a single complaint. However, the terms in which a complaint is made could preclude a person from engaging the Bill.

Clause 22(3) of the Bill says:

Discrimination on the ground of any of the following protected attributes (or a combination of protected attributes that includes any of the following protected attributes) is only unlawful if the discrimination is connected with work and work-related areas (etc):

A complainant may complain of discrimination on the ground of a combination of attributes. If one attribute is from those listed in cl 17 (say sex), and the other is from those listed in cl 22(3) (say family responsibilities), then the complaint is covered by cl 22(3) because it complains of discrimination ‘on the ground of ... a combination of protected attributes that includes any of the following protected attributes’. However, the discrimination may be connected with an area *other than* work and work-related areas, in which case it cannot be unlawful; discrimination on the ground of a cl 22(3) attribute, even in combination, can only be unlawful when connected with work and work-related areas.

This problem arises because of the parenthetical phrase ‘(or a combination of protected attributes that includes any of the following protected attributes)’. This phrase is an attempt to allow for intersectionality. But intersectionality is already addressed in cl 19(1) and 19(3)(c) in a way that will capture the 22(3) attributes, so the parenthetical phrase is superfluous.

Removing the parenthetical phrase solves the problem. For example, if a person complains of discrimination on the grounds of, say sex and family responsibilities, in the area of, say, accommodation:

- under the current draft of cl 22(3), the Bill is not engaged at all;
- under the proposed amendment to cl 22(3), the Bill will be engaged but only for a complaint on the ground of sex.

Recommendation 12: Omit the parenthetical phrase in clause 22(3), leaving cl 19(1) and 19(3)(c) to address intersectionality for discrimination connected with work when one of two or more attributes is from cl 22(3).

5.7 Criminal record

We do not support the exclusion of ‘criminal record’ from the list of protected attributes in cl 17 of the Bill. A complaint can currently be made to the Australian Human Rights Commission (‘AHRC’) of discrimination in employment on the basis of a criminal record, so this omission represents a reduction in existing human rights protections in Australia.

The obligations assumed by Australia in relation to discrimination on the basis of criminal record under the International Labour Organisation *Discrimination (Employment and Occupation) Convention* (1958) should be met by including this attribute in the Bill.

In 2011-2012, the AHRC received 290 enquiries and 67 complaints of discrimination in employment on the basis of a criminal record. This was the most common complaint made under ILO 111, and represented 13 per cent of all human rights complaints under the *Australian Human Rights Commission Act*.⁸ It is clear that employment discrimination on the basis of a criminal record is a relatively small but significant problem in Australia.

Criminal record discrimination or similar provisions ('irrelevant criminal record' discrimination) is unlawful in Tasmania and the Northern Territory⁹, and other States allow for convictions to be removed from a person's record under 'spent convictions' schemes.¹⁰ In addition, federal and State laws protect against unfair dismissal on the basis of criminal record.

The omission of criminal record discrimination protections in the federal Bill leaves a patchy and confusing collection of laws regulating this area, and is contrary to the Government's commitment not to reduce discrimination protection.

Recommendation 13: Criminal record – or the attribute of having a criminal history as defined – should be a protected attribute in the Bill and discrimination on the ground of this attribute should be prohibited in all areas of public life..

5.8 Family responsibilities

We do not support the way in which family responsibilities have been defined in the Bill.

In proscribing discrimination on the ground of family responsibilities in cl 22(3) and in the definitions set out in clause 6, the Bill has drawn directly on the current definition of 'family responsibilities' in s 7A of the *Sex Discrimination Act 1984* (Cth). The definition of family responsibilities in the Bill provides that:

Family responsibilities of a person means responsibilities of the person to care for or support:

- (a) a child of the person who is wholly or substantially dependent on the person; or
- (b) any other member of the person's immediate family who is in need of care and support.

'Immediate family' is further defined as including:

- (a) a spouse, former spouse, de facto partner or former de facto partner of the person; and
- (b) a child, parent, grandparent, grandchild or sibling of the person, or of a spouse, former spouse, de facto partner or former de facto partner of the person.

This is a narrow definition that focuses more on the relationship between people than their caring obligations. It also excludes the network of relationships and care obligations of specific groups including, but not limited to, Aboriginal and Torres Strait Islander communities.

In the context of a Bill that covers race and age discrimination as well as discrimination on the grounds of disability, sex, gender identify and sexual orientation, it is important that the definition of family

⁸ Australian Human Rights Commission, *Annual Report 2011-2012*, Commonwealth of Australia (2012), Appendix.

⁹ *Anti-Discrimination Act 1992* (WA) and *Anti-Discrimination Act 1998* (Tas). The relevant attribute is properly described as 'criminal record' not 'irrelevant criminal record', as its relevance is the fact in issue to be decided in the circumstances: see *Pereira v NT Police* (30 April 2012, 1 May 2012), NTADC.

¹⁰ All States and Territories other than Victoria offer varying forms of spent conviction scheme.

responsibilities is an inclusive one, capable of recognising the variety of different family, caring and kinship relationships of all those groups specifically protected by the Bill.

We recommend that ‘family responsibilities’ be changed to ‘family and carer’s responsibilities’ to ensure consistency with the terminology used in sections 195(1), 351(1), 578 and 772(1) of the *Fair Work Act 2009* (Cth). The newly enacted *Workplace Gender Equality Act 2012* (Cth) also refers to ‘family and caring responsibilities’ in its objects and in the provisions on gender equality indicators. Increased consistency of terminology between these three related federal laws will simplify compliance and reduce the burden on employers.

Correspondingly, we recommend an alternative more inclusive definition of family and carer’s responsibilities. Section 4(1) of the *Equal Opportunity Act 1984* (WA) defines ‘family responsibility or family status’ to mean:

- (a) having responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment
- (b) the status of being a particular relative, or
- (c) the status of being a relative of a particular person.

‘Relative’ in relation to a person means a person who is related by blood, marriage, affinity or adoption and includes a person who is wholly or mainly dependent on, or is a member of the household of the first mentioned person.

We endorse this more expansive and inclusive definition. Paragraph (a) is broadly conceived and arguably includes any relationship in which a person has the responsibility for the care of another person so that there is no requirement for the carer to be related or married to the person being cared for. Family relationships are also broadly defined in paragraphs (b) and (c) and include family relationships through marriage and through affinity.

Recommendation 14: That the terminology of ‘family responsibilities’ be widened to ‘family and carer’s responsibilities’ to ensure better consistency between the HRAD Act, the *Fair Work Act 2009* and the *Workplace Gender Equality Act 2012*.

Recommendation 15: That an alternative definition of family and carer’s responsibilities be used, such as the one found in s 4(1) of the *Equal Opportunity Act 1984* (WA).

5.9 Victims of domestic violence

The Bill does not provide protection against discrimination on the basis of being a victim or survivor of domestic violence but it should.

Despite numerous submissions to the Consolidation process, made in response to the suggestion in the Discussion Paper that the Bill should extend protection against discrimination to victims of domestic violence, this attribute has not been included in the Bill. We endorse the submission of the National Association of Community Legal Centres (NACLC) on this point:

NACLC recommends that the list of protected attributes in section 17(1) include an additional attribute of ‘status as a victim or survivor of domestic or family violence’.* In general, NACLC supports the position taken by Belinda Smith and Tashina Orchiston in their article ‘Domestic

Violence Victims at Work: A Role for Anti-Discrimination Law?' [(2012) 25 *Australian Journal of Labour Law* 209].

A significant number of Australians experience domestic or family violence over the course of their lifetime* and domestic/family violence is the leading preventable cause of death, disability and illness for Australian women under 45 years of age.* The economic cost of domestic/family violence is set to rise to \$609 million by 2021/2022 unless the rate and extent of violence is reduced.*

There is strong evidence that discrimination protection on this ground is necessary: victims and survivors of domestic or family violence experience discrimination across the spectrum of public life* and they may also experience intersectional discrimination.¹¹

Recommendation 16: 'Victim or survivor of domestic violence' should be a protected attribute in the Bill and discrimination on the ground of this attribute should be prohibited in all areas of public life.

If this attribute is not included, at least the 3 year review of exceptions should be extended also to consider additional attributes including this one.

6. DEFINITION OF DISCRIMINATION

We support the proposed single definition of discrimination to apply to all protected attributes across all areas of public life. A single definition will reduce regulatory complexity, increase consistency, and promote understanding and compliance. However, the following refinements are necessary to ensure that the new definition is workable in practice.

6.1 Definition of discrimination

We support the explicit acknowledgment in cl 19(2)(a) that unfavourable includes harassment. However, cl 19(2)(b) causes confusion.

It seems from the Explanatory Note at [107] that the drafters' intention is that (b) expands on (a), providing further examples of what might constitute 'harassing' as a form of unfavourable treatment. However the words used suggest the concept of vilification as it is defined in cl 51, meaning that the Bill's definition of unfavourable treatment encompasses not only harassment but also vilification. This (mis)understanding of the Bill is already widespread – see the recent speech given by the Hon James Spigelman.¹²

Clause 19(2) is said to 'avoid doubt' but its drafting causes doubt. The meaning of unfavourable treatment is a question of fact in the circumstances of a case, and the Bill reflects the current jurisprudence when it explicitly acknowledges that unfavourable includes harassment. Nothing further is needed, and the further provision in cl 19(2)(b) is misleading.

Recommendation 17: Clause 19(2)(b) should be deleted.

¹¹ NACLC draft submission to Senate Standing Committee on Legal and Constitutional Affairs *Inquiry into exposure draft of the Human Rights and Anti-Discrimination Bill 2012* [footnotes omitted]

¹² James Spigelman, 'Where do we draw the line between hate speech and free speech?' (Human Rights Oration, Sydney, 10 December 2012) available at www.humanrights.gov.au/about/media/news/2012/132_12.html

6.2 Reasonable adjustments

The obligation to provide reasonable adjustments has been moved to the exceptions rather than left where it is now in the *Disability Discrimination Act 1992* (Cth), in the definition of discrimination. The *Disability Discrimination Act* reached this position through amendments in 2009 in response to the *Purvis* decision, in order to make it clear that the making of reasonable adjustments is relevant to assessing whether disability discrimination has occurred. Omitting the reference to reasonable adjustments from the definition of discrimination reverts to the pre-2009 position and is a reduction of protection against disability discrimination. It would make the obligation less explicit and thus weaker in effect. It arguably creates the misleading impression that reasonable adjustments are relevant only at the stage of defending a claim, rather than being an element that is essential to consider in determining whether discrimination occurred.

Further, the obligation to provide reasonable adjustments operates only in respect of disability in the Bill. This results in inconsistency across grounds, and may incorrectly suggest that adjustments are not required in respect of other grounds. Under the current legislation, duty-holders bear an implicit obligation to provide reasonable adjustments to persons with protected attributes, and under the *Disability Discrimination Act* this obligation is explicit. This obligation is implicit under current legislation in the definition and prohibition of indirect discrimination, whereby requirements and conditions that disadvantage protected groups can be imposed if they are *reasonable*, so duty-holders must ensure that they adjust their requirements and conditions to ensure that they are reasonable.

In the Bill the obligation to provide reasonable adjustments has been moved to the exceptions rather than left where it is now in the *Disability Discrimination Act*, in the definition of discrimination. This makes the obligation less explicit, and thus weaker in effect.

Further, in the Bill the explicit obligation to provide reasonable adjustments operates only in respect of disability. This results in inconsistency across attributes, and may incorrectly suggest that adjustments are not required in respect of other attributes.

Recommendation 18: The duty to provide reasonable adjustments should be part of the definition of definition of discrimination at least in relation to disability.

Recommendation 19: The explicit duty to provide reasonable adjustments should be applicable to all attributes.

6.3 Multiple reasons

The Bill, in cl 8, requires the prohibited reason or purpose to be the 'sole' reason or purpose, or one of the reasons or purposes, for the impugned conduct, but does so in terms that depart from usual practice, without justification.

By changing this formulation, the Bill could be interpreted to be substituting a different and unique test that has the effect of excluding a significant reason for the conduct. The rationale for these provisions is that any decision or conduct which is tainted by a discriminatory motivation should be prohibited. Failing to retain the original formulation would be a significant dilution of non-discrimination rights.

Each of the *Racial Discrimination Act 1975* (Cth) ss 18, 18B, *Sex Discrimination Act* s 8, *Disability Discrimination Act* s 10 and *Age Discrimination Act 2004* (Cth) s 16 provides that the prohibited ground need be only one of the reasons for the conduct, and need not be the dominant or a substantial

reason for it. By changing this formulation, the Bill could be interpreted to be substituting a different and unique test that has the effect of excluding a *significant* reason for the conduct. The rationale for these provisions is that any decision or conduct which is tainted by a discriminatory purpose should be prohibited. Failing to retain the original formulation would be a significant dilution of non-discrimination rights.

Recommendation 20: The provision in cl 8 for conduct engaged in for multiple reasons should be the same provision as currently exists in the Sex, Disability and Age Discrimination Acts to make clear that conduct is prohibited for a particular reason even if it is not the dominant or substantial reason.

6.4 Special measures test

We support the Bill's provision for special measures, which replaces a confusing range of different provisions in the existing laws. However, the Exposure Draft Explanatory Notes are not accurate when they state, at [130], that the provision continues the policy goals of all the existing laws.

The 'sole or dominant purpose' test in cl 21(2) of the Bill is slightly wider than the test in s 8 of the *Racial Discrimination Act* which invokes the 'sole purpose' test in Art. 1(4) of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD). The strength of this test reflects a policy that recognises the particular sensitivity of race-based distinctions, and it is diluted to some extent by adding 'or dominant purpose' in the Bill.

At the same time, the 'sole or dominant purpose' test in cl 21(2) of the Bill is narrower than the test in s 7D(3)(b) of the *Sex Discrimination Act* which allows for a sole purpose 'as well as other purposes, whether or not that purpose is the dominant or substantial one'. The breadth of this test is very important for allowing scope for the taking of voluntary measures towards achieving substantive gender equality, often through the provision of programs by employers and other organisations, which might otherwise be regarded as discriminatory. This important facilitative function would be restricted to some extent by the Bill's removing reference to 'or substantial'. The effect may substantially limit the capacity of employers and other organisations to undertake positive, voluntary action, thereby impeding progress towards substantive equality.

Appropriately, the test in the Bill is more precise than the tests in the *Disability Discrimination Act* ('an act that is reasonably intended') and the *Age Discrimination Act* (an act that 'provides a bona fide benefit' or is 'intended to' meet a need or reduce a disadvantage).

In a consolidated Act, the challenge is to find a test that best reflects the policy aims of both the *Racial Discrimination Act* and the *Sex Discrimination Act*. In our view, the breadth of the test in the *Sex Discrimination Act* ought be maintained, by replacing 'dominant purpose' in the Bill with 'substantial' purpose. This is a weaker test than that in the *Racial Discrimination Act*, but not so much so that the policy aim of giving effect to CERD is unduly compromised.

Alternatively, if it is preferred not to reduce the strength of the test for the attribute of race, then a different standard could be adopted for race, and the Sex Discrimination Act test could be retained for other attributes. This would reflect the position under the Equal Protection clause of the US Constitution whereby racial classifications are subjected to strict scrutiny, while other 'suspect classifications' like sex are subjected to a lower level of scrutiny.

Recommendation 21: To enable and promote positive action that promotes substantive equality the ‘sole or dominant purpose’ test for special measures in cl 21(2) of the Bill should be replaced with a ‘sole or significant purpose’ test.

Alternatively the ‘sole or dominant purpose test’ should be retained for race, but the test for other attributes should be sole purpose ‘as well as other purposes, whether or not that purpose is the dominant or substantial one’

6.5 Special measures requirement for consultation

We strongly oppose the Bill’s reliance on a ‘reasonable person test’ as an alternative to consultation and agreement with the group to be benefited by the special measure.

The Bill’s provision for special measures is based on the international human rights treaties, which require prior consultation with, and the agreement of, the members of the group who are intended to benefit from the measure proposed.¹³ Brennan J in *Gerhardy v Brown* said that a measure is not established as a special measure:

... by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.¹⁴

The Bill fails to make this fundamental requirement of a proponent of a special measure. The Explanatory Notes fail to address the issue. Instead, in cl 21(2)(b) the Bill, without apparent precedent, substitutes for consultation the view of ‘a reasonable person in the circumstances of the person or body’. It offends human dignity, and is not acceptable in Australia law, that a well-intended external party can propose and impose what they purport is a special measure for the benefit of a group of people who have not been consulted with, and who have not agreed to that measure. In practice, the imposition of such a measure will be seen by the affected group as patronising and illegitimate.

The Bill must in cl 21, and again in Division 7 (special measure determinations), require prior consultation with, and the agreement of, the members of the group who are intended to benefit from the measure proposed.

Recommendation 22: The provision in cl 21(2)(b) that recognises a special measure on the basis of the ‘reasonable person’ test should be amended to substitute a requirement that the proposed special measure has been developed in consultation with the people for whose benefit the measure is proposed.

Recommendation 23: The process for making special measure determinations described in cl 80 should be amended as described below.

¹³ See, eg, Committee for the Elimination of Racial Discrimination, *General recommendation 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, 2009*, [18].

¹⁴ *Gerhardy v Brown* (1985) 159 CLR 70.

6.6 Special measures allowing lower wages for people with disabilities

It can happen that measures taken in good faith to benefit a group in one respect can be to the group's disadvantage in another. The risk of this is reduced if proper consultation and agreement occurs, as we recommend above. Nevertheless, the Bill wrongly omits a safeguard that is currently in the *Disability Discrimination Act*.

Proposals to pay people with disabilities lower wages can be characterised as a special measure to promote employment for people with disabilities. This is not desirable, and has been rejected as a matter of policy, reflected in s 45(2)(b) of the *Disability Discrimination Act* which does not extend an exception of special measures to 'the rates of salary or wages paid to persons with disabilities'. That provision is not replicated in the Bill but should be.

Recommendation 24: The Bill should be amended so that the rates of salary or wages paid to people with disabilities cannot be the subject of a special measure exemption.

6.7 Equality before the Law

Restricting equality before the law to the attribute of race in s 60 undermines the inclusive tenor of the Bill and creates an unfortunate hierarchy within the protected attributes enumerated in s 17. It also directly conflicts with the principle of promoting formal and substantive equality *for all people* contained in s 3(1) as well as conflicting with Australia's international obligations under s 3(2).

Recommendation 25: That cl 60 be amended to extend the principle of equality before the law to all persons with a protected attribute.

7. AREAS OF PUBLIC LIFE

We support the Bill's strong statement of principle that no one should be permitted to engage in unjustifiable discriminatory conduct in public life. We propose only minor refinements to enhance the operation of cl 22.

7.1 'Connected with'

Users of the Bill initially will be unfamiliar with the phrase 'connected with'. The phrase is helpfully defined in cl 7, and it would assist people in understanding and giving effect to the Bill if attention was drawn to cl 7 in a Note to cl 22(1) and to cl 57..

Recommendation 26: A Note should be inserted after cl 22(1) and cl 57 to draw attention to the definition of the phrase 'connected with' in cl 7.

7.2 Description of areas of public life

Although the list of areas of public life in cl 22(2) is an inclusive list, the drafting wrongly suggests that some limitations might be drawn. For example, areas of public life are listed as 'the provision of goods, services or facilities' and 'provision of accommodation', while other areas, such as work and education, are not limited to 'providers'. There is no apparent rationale for suggesting that the unlawfulness of discrimination is limited to the *provision* of accommodation, and not referring simply to accommodation, in the same way that reference is made simply to work and education. Similarly, among the areas of public life listed in cl 22(2) are '*dealings in estates etc*' and '*membership and activities of clubs etc*', '*participation in sporting activities etc*', and '*administration of Commonwealth laws etc*'. There is no apparent rationale for suggesting that the unlawfulness of discrimination is

limited to these particular aspects of the identified areas of public life, and not referring simply to ‘estates etc’ and ‘clubs etc’, ‘sporting activities etc’, and ‘Commonwealth laws etc’.

A further example of the drafting of cl 22(2) wrongly suggesting that some limitations might be drawn around the inclusive list of areas of public life is the limited reference to services and to the administration or delivery of Commonwealth programs. When read with the definition of ‘services’ in cl 4, and specifically para (f) government services, the Bill could be read to cover only provision of government services and not the carrying out of statutory functions involving interaction with the public. A distinction between delivering government services on the one hand, and carrying out government functions and duties on the other, has been relied on an attempt to avoid anti-discrimination laws (see eg *Robinson v Commissioner of Police, NSW Police Force* [2012] FCA 770; *Jack & ors v NT Police & ors*, NTADC 21 August 2009), and it is important that the Bill make clear that it governs the full scope of Government activity.

Recommendation 27: The inclusive list of areas of public activity in cl 22(2) should be re-drafted, by deleting the struck out text as set out below:

- (a) work and work-related areas;
- (b) education or training;
- (c) ~~the provision of~~ goods, services or facilities;
- (d) ~~access to~~ public places;
- (e) ~~provision of~~ accommodation;
- (f) ~~dealings in~~ estates or interests in land (otherwise than by, or to give effect to, a will or a gift);
- (g) ~~membership and activities of~~ clubs or member-based associations;
- (h) ~~participation in~~ sporting activities (including umpiring, coaching and administration of sporting activities);
- (i) ~~the administration of~~ Commonwealth laws and Territory laws, and Commonwealth programs and Territory programs.

Recommendation 28: Part (f) of the definition of ‘services’ in cl 6 should be amended by adding the phrase ‘, including the performance and carrying out of statutory duties and functions’.

8. EXCEPTIONS/DEFENCES

8.1 Justification: ‘legitimate aim’

We support the Bill’s provision for a general exception of justification in place of the confusing array of singular and inconsistent exceptions that exist in the current laws. It focuses attention on appropriate questions about the limits of human rights. It is a simple and workable way to consider and balance all the issues and competing needs in determining whether any particular conduct or condition unfairly excludes members of society or requires traditionally disadvantaged groups to bear an unfair share of the costs of their inclusion. However, the manner in which the provision has been drafted in the Bill requires some refinement.

When proposing this approach in our previous submissions, we noted that a defence of justification will only serve the goal of eliminating discrimination if human rights principles are used to inform and constrain the determination of justification. We observed that a single definition of discrimination, combined with a general exception of justification, could lead to a significant reduction of protection against direct discrimination, which currently is not subject to a *general* exception. To allow a broad defence of justification for a direct discrimination complaint will significantly reduce current protection, contrary to the Government's commitment.

To mitigate this, we recommended two complementary measures, neither of which are in the current Bill:

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

The Bill provides for a justification defence without these important qualifications, and instead uses an inappropriate test.

The test in cl 23(3)(b) and (d) of 'proportionate means of achieving a legitimate aim' is derived from international law where it has been developed in the very different context of dealing with states and state power, to determine the deference that should be given to democratic governments in implementing domestic policy. Using this test in domestic anti-discrimination legislation would mean according the same sort of deference to private interests over the human right to non-discrimination. This undermines the nature and principle of a domestic anti-discrimination law, where the state is giving effect to its obligation to protect human rights as fundamental entitlements, not merely as interests to be balanced against other private interests.

The test for justified conduct must be suitable to apply to private rather than state action, and the term 'legitimate' must be understood in its context, as a limit on the operation of a human rights law. What is a 'legitimate' aim for a business for example, should be differentiated from what is a legitimate infringement on human rights. The Bill does not clearly differentiate between these two understandings of 'legitimate', and needs to specify clearly that action is only justifiable if it is legitimate in a human rights framework.

As currently drafted, 'legitimacy' in cl 23(3)(b) is determined only by 'taking into account' the objects of this Act (cl 23(4)(a)). Merely 'taking account' of the objects of the Act does not keep an assessment within the bounds of those objectives, illustrated by the Court of Appeal decision in *Commissioner For Equal Opportunity v ADI Limited* [2007] WASCA 261 where the objects of the Act were 'taken into account', and discriminatory conduct that was contrary to those objects was considered justified by reference to other interests.

The Bill's use of the term 'legitimate' as a criterion for justification risks misleading users of the Bill because of the fundamentally different context from which the term is drawn and because the term has a general or wider meaning and the Bill has not expressly defined the term to mean an assessment of justifiable conduct in relation to the objects of the Bill. Instead, a clear connection should be made between the justifiable nature of the conduct and the Bill's objects.

Recommendation 29: In cl 23(3)(b), replace the phrase ‘that aim is a legitimate aim’ with the phrase ‘that aim is consistent with achieving the objects of the Act’.

8.2 Justification: Explanatory Notes

The intended connection between the factors in cl 23(3) and the matters to be taken into account in cl 23(4) is further confused by the inaccurate description given in the Explanatory Notes at [147]. There it is said that ‘Subclause 23(4) sets out a range of matters that must be taken into account in determining *whether conduct is a proportionate means of achieving a legitimate aim*’ (emphasis added). This seems to limit the operation of cl 23(4) to consideration only of cl 23(3)(d), which is not apparent from an ordinary reading of the provision.

Recommendation 30: The Explanatory Notes at [147] should be amended to make clear that cl 23(4) sets out a range of matters that must be taken into account in determining all the factors in cl 23(3).

8.3 Justification: time for determining reasonable adjustments

Clause 23(6) refers to ‘a reasonable adjustment that a person *could have made*’ (emphasis added). This past tense is not used throughout the provision, which is partly expressed in the present tense. Use of the present tense risks misdirecting an inquiry into justification, as the issue is not whether there *is* a reasonable adjustment that the person could have made, but whether there *was at the relevant time* a reasonable adjustment that the person could have made. The Explanatory Notes at [150] make this point and use the correct tense: ‘if a reasonable adjustment could have been made’.

The same risk of misdirecting an inquiry into justification arises from the drafting of cl 25(3) regarding the meaning of reasonable adjustment. The drafting does not make clear that the inquiry is concerned with whether having made a reasonable adjustment would have caused unjustifiable hardship *at the relevant time*; again the Explanatory Notes at [164] make this point and use the correct tense to describe the nature of the inquiry.

Recommendation 31: Clause 23(6)(a) should be amended to replace the phrase ‘there is a reasonable adjustment’ with the phrase ‘there was a reasonable adjustment’ and cl 25(3) should be amended as follows:

- (3) In determining whether making an adjustment would have caused the first person unjustifiable hardship, all relevant matters must be taken into account, including the following:
- (a) the nature of any benefit or detriment likely to have accrued to, or to have been suffered by, any person concerned;
 - (b) the effect of any disability of any person concerned;
 - (c) the financial circumstances of the first person at the relevant time, and the estimated amount of expenditure that the first person would have to have incurred in order to make the adjustment;
 - (d) the availability of financial and other assistance to the first person at the relevant time;
 - (e) any relevant guidelines at the relevant time prepared by the Commission under clause 62;
 - (f) any relevant action plans at the relevant time given to the Commission under clause 68

8.4 Inherent Requirements

We strongly object to extension of the ‘inherent requirements’ exception (cl 24) to all attributes as a general defence. Under current law, inability to perform the inherent requirements of the job is a defence only in relation to disability discrimination. Cl 24 represents a potentially substantial broadening of its application and a reduction in protection against discrimination. The lack of a requirement to consider reasonable adjustments for attributes other than disability means cl 24 could be used to undermine the limitations on the defence of justification (cl 23). This problem is explained below.

This extension is *unnecessary* because the general justification defence under cl 23 will provide employers with sufficient scope to defend the use of job requirements as criteria for recruitment and performance management in work. For example an employer who needed to employ a man for authenticity in a drama performance could rely on the justification defence of s 23, so would have no need to rely on a new defence of inherent requirements.

In addition, as drafted the extension could operate to *significantly undermine the protective role of cl 23*. The primary purpose of introducing a general justification defence (cl 23) is to ensure that organisations have sufficient scope to achieve their legitimate aims (such as appropriate recruitment and performance management of employees), subject to appropriate constraints that require the balancing of private interests and protection of human rights. Under the inherent requirements provision in cl 24, duty bearers can determine what a job entails and how it is to be carried out (that is, its inherent requirements) *without* any obligation to examine the availability and feasibility of less discriminatory alternatives as is required under cl 23. In respect of disability, the obligation to provide reasonable adjustments has been retained (cl 25) and the inherent requirements exception is only available in situations where the person would have been unable to perform the inherent requirements even with the adjustments (cl 24(4)). But in relation to all other attributes, there is no corresponding obligation to make reasonable adjustments or to ensure that the availability and feasibility of less discriminatory alternatives is explored. Without the extension of a reasonable adjustments obligation to all attributes or the balancing constraints of the kind found in cl 23, the inherent requirements exception may be used as an alternative exception for respondents and one that provides significantly less human rights protection than the general justification defence in cl 23.

Recommendation 32: The inherent requirements defence in cl 24 should be deleted, leaving cl 23 (justification) to be used for such situations (with an associated revision of cl 23 to ensure reasonable adjustments are taken into account in respect of disability).

Alternatively, if cl 24 is not deleted, it should be limited to the attribute of disability. This would mean that for all attributes in the context of work, duty bearers would be required to explore the availability and feasibility of less discriminatory options to justify discriminatory conduct; for disability this would be through cl 24 and for all other attributes through cl 23.

We note that the Explanatory Notes at [158] refers to *Qantas Airways Ltd v Christie* (1998) 193 CLR 280. This is not the best authority for understanding the meaning of ‘inherent requirements’ in anti-discrimination law. In *Christie* McHugh J pointed out that the then *Industrial Relations Act* was ‘not a general anti-discrimination statute’, and that any interpretation of it ‘operates in the context of a free enterprise system of industrial relations where employers and employees have considerable scope for

defining their contractual rights and duties'. Further, it is difficult to reconcile the majority judgments in *Christie* discussing the meaning of the phrase 'inherent requirements of the particular position'. The phrase is more authoritatively discussed in *X v Commonwealth* (1999) 200 CLR 177, which should be referred to as the best authority for understanding the meaning of 'inherent requirements' in anti-discrimination law.

8.5 Religious exceptions

We do not support these exceptions but recognise the policy position that has been taken to permit religious bodies to discriminate where others may not. However, these provisions require refinement. Both the attributes that can be the basis of discrimination, and the allowable basis for such discrimination, have been expanded without specific justification, and the Bill should be amended to reproduce the existing policy of the *Sex Discrimination Act*.

Pregnancy

We support the Bill not including sex as an attribute in cl 33(1) for which an exception can be made. The related attribute of pregnancy should also be omitted. It is socially unacceptable that the fact of pregnancy can expose a woman to discrimination, thereby compounding their sex-related disadvantage. No justifications have been provided for discrimination against women who become pregnant. Nor can excluding a student who is pregnant from school be seen as acceptable in modern society.

A religious justification for an exception covering or including pregnancy cannot be accepted in a blanket way. If any such exception is needed, specific justification should be provided for concerns relating to pregnancy that allow any necessary exception to be narrowly and specifically tailored (for example, if it can be justified, to the particular combination of pregnancy and unmarried status), to minimise any disadvantage imposed on women or girls who become pregnant.

Recommendation 33: In cl 33(1)(d), delete 'pregnancy, or replace it with a more specific combination of attributes that is justified by religious needs.

'Potential pregnancy'

Although the Bill appropriately does not include sex as an attribute for which an exception can be made, the attribute of 'potential pregnancy' can operate as a proxy for sex discrimination in relation to all women before menopause, and may enable discrimination on the basis of sex in a covert way.

The attribute of potential pregnancy was introduced into the *Sex Discrimination Act* to protect women who experience discrimination at work because they could become pregnant at some future time. It is fundamentally a characteristic of being female (and pre-menopausal), that is, of sex. Having been introduced to protect women, it was not included in the religious exceptions in the *Sex Discrimination Act*, and should not be included in the religious exceptions in the Bill. To include this attribute in the religious exception would be a potentially significant reduction of the protection provided to women against discrimination. Any concerns religious organisations may have about pregnancy should be dealt with by the pregnancy attribute, as qualified above.

Recommendation 34: The Bill should be amended by deleting cl 33(1)(c) 'potential pregnancy'.

Scope of the exceptions

In the *Sex Discrimination Act*, s 37(a) to (c) sets out practices of religious *bodies* that are excepted from that Act, those provisions are accurately reflected in cl 32 of the Bill. The *Sex Discrimination Act* goes on to set out practices of religious *educational institutions* that are excepted from only parts of that Act in s 38, but those narrower provisions are not accurately reflected in cl 33 of the Bill, which – inadvertently, it seems – broaden the scope of the exception. The Explanatory Notes at [186] are not correct to claim that ‘Clause 33 reproduces the existing ADA and SDA general exception for conduct engaged in in good faith by a body established for religious purposes, or a religious educational institution’.

The Bill fails to maintain the *Sex Discrimination Act’s* distinction between religious bodies and religious educational institutions for purposes of exceptions in cl 33. As a result, the limits of the discrimination previously allowed to religious educational institutions have been expanded: the same conditions have been specified in cl 33(2)(b) for religious bodies as have been specified in cl 33 (4)(c) relating to religious educational institutions.

Under s 38 of the *Sex Discrimination Act* discrimination by religious educational institutions was allowed only when it was necessary in good faith to avoid injuries to religious susceptibilities of adherents of the religion or creed. But under cl 33(4)(c) of the Bill, discrimination is allowed also in the alternative, when it conforms to the doctrines tenets or beliefs of the religion. No case has been made to justify this expansion of the exception, and (as already noted) the Explanatory Notes at [186] are not correct to say that the Bill reproduces the *Sex Discrimination Act’s* exceptions. In principle, discrimination against staff, and particularly against students, in a religious school should be extremely limited.

Recommendation 35: Clause 33(4)(c)(i) should be omitted, and the heading to the provision amended accordingly.

Need for notice

People dealing with religious bodies and educational institutions may be unaware of the limitations on their human right to protection from discrimination flowing from the exception in cl 33. It is fair that potential students and employees of religious bodies and educational institutions be given clear notice of the possibility that these exceptions may apply. Without a notice provision, individuals may choose an employer or school with no knowledge or warning that they are thereby sacrificing their right to protection from discrimination. This can be a serious matter for a teacher choosing in which education system to pursue their career, or a student making a choice of school and hence education system.

Recommendation 36: The Bill should require religious organisations that intend relying on an exception in cl 33 to give written notice of that intention to prospective employees and students before any employment or enrolment occurs that the organisation.

Public funding

We support the exclusion in cl 33(3) of Commonwealth-funded aged care from the religious exception. As a matter of principle, however, public funding should not be spent on *any* activities that are discriminatory.

Allowing religious-based discrimination in publicly funded schools has the potential to undermine community harmony by allowing children to be isolated from the experiences of other groups in

society, and confined to a narrower range of experiences. This is not an effective way for a society to prepare the next generation to work together harmoniously with people who have different customs and beliefs. A religious group that operates an organisation or school with public funding should not be excused from complying with a basic human rights guarantee of non-discrimination. The same argument is made for public funding of services generally, and for health services in particular.

Recommendation 37: The exclusion of publicly funded aged care in cl 33(3) should apply to all Commonwealth-funded services in the educational, health, social, community, commercial and other sectors.

Scope of the exception to all faiths

Clause 32 refers in its heading and text to ‘priests, ministers of religion or members of any religious order’. On their ordinary meaning these terms may not be thought to include non-Christian faiths that do not use those terms or have a structure that incorporates people in equivalent positions. If the exception is intended to apply to all organised faiths then the Bill and/or the Explanatory Notes should make this clear.

Recommendation 38: The Bill and/or the Explanatory Notes should clarify whether reference to ‘priests, ministers of religion or members of any religious order’ in cl 32 is intended to apply to people of equivalently styled positions in all organised faiths.

8.6 Insurance and superannuation exceptions

We do not support the exception in cl 39 that allows discrimination in insurance for age, disability and sex, and in superannuation for age, disability, family responsibilities, marital or relationship status, and sex. The Explanatory Notes acknowledge that this exception is likely to be permitted under the general justifiable conduct exception in cl 23.

A specific exception such as this is contrary to Recommendation 36 of the Senate Standing Committee on Legal and Constitutional Affairs 2008 report, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*. Dealing specifically with the attribute of sex, the Committee recommended that such exceptions be replaced with a general limitations clause. The same is true of all attributes. The Bill provides in cl 23 the general limitations clause that the Committee had in mind, and that is how the issue of allowing discrimination in insurance and superannuation should be dealt with.

The Explanatory Notes at [208] argues that even though the provision is unnecessary in light of cl 23. ‘it has been retained to provide certainty to industry while a body of law develops in relation to the concept of justifiable discrimination’. This is a weak argument, as the concurrent operation of cl 23 and 39 will lead to uncertainty, and jurisprudence on cl 23 will develop only if cl 23 is given work to do.

Recommendation 39: Clause 39 of the Bill should be deleted.

Actuarial and statistical data

We do not support cl 39(5)(b) which allows discrimination in insurance and superannuation on the basis ‘of any other relevant factors’ if actuarial or statistical data which it is reasonable to rely is not available and cannot reasonably be obtained.

If cl 39 is not deleted, then this provision is excessively wide, and has the potential to allow discrimination in insurance and superannuation with little if any limitation. Until and unless an insurer

or superannuation fund is able to provide actuarial or statistical data on which it is reasonable to rely, they should not be able to discriminate.

Recommendation 40: If cl 39 is not deleted, then cl 39(5)(b) of the Bill should be deleted.

8.7 Defence and peacekeeping exceptions

We do not support the exception in cl 40 that replicates the blanket exception currently in the *Disability Discrimination Act* allowing disability discrimination in relation to combat and combat-related duties, or peacekeeping service, and for selection for certain Australian Federal Police peacekeeping duties.

A specific exception such as this is contrary to Recommendation 36 of the Senate Standing Committee on Legal and Constitutional Affairs 2008 report, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*. Dealing specifically with the attribute of sex, the Committee recommended that such exceptions be replaced with a general limitations clause. The same is true of all attributes.

Considering the work-related nature of this exception, it is more appropriate to rely on a general ‘inherent requirement’ provision than a general limitations clause. The blanket nature of the exceptions is unwarranted in light of the Bill’s comprehensive provisions that allow exceptions having regard to the inherent requirement of work. Use of the inherent requirement exception is a far more nuanced approach to excluding people from the workforce, and is to be preferred to a blanket exception that makes unwarranted and prejudicial assumptions about the capacity of any person because of a particular attribute.

Recommendation 41: Clause 40 of the Bill should be deleted.

8.8 Accommodation exception

It is not clear from the drafting whether this provision is limited to the provision of accommodation for reward, or extends to accommodation provided without reward, for free.

Recommendation 42: Clause 44 of the Bill should be clarified to specify whether its operation is limited to the provision of accommodation for reward.

8.9 Minister’s review of exceptions

Clause 47 obliges the Minister to review the exceptions but does not specify criteria for the review. It should be made clear that it is the actual operation and effect of the exceptions, and that they are to be reviewed having regard to the objects of the Act.

Recommendation 43: Clause 47 of the Bill should be amended to specify that the review is to be a review of the operation and effect of the exceptions, having regard to the objects of the Act.

9. BURDEN OF PROOF

We support the introduction of the shifting burden of proof in cl 124 of the Bill, and urge the Government to stay committed to it, in the interests of fairness, efficiency, and effective pursuit of the aims of the legislation.

Comments that the proposed provision implements a ‘reverse onus’ are clearly misconceived. Clause 124 imposes a real evidentiary burden on an applicant, and only when it is discharged does the burden

shift to a respondent. This is well illustrated by a comparison with the ‘burden of proof’ provision in the *Fair Work Act 2009*. The terms of s 361(1)(b) *Fair Work Act* and related jurisprudence require that an applicant (1) establish the fact of the alleged conduct and (2) *allege* a reason for that conduct. On the other hand, cl 124(1)(b) of the Bill sets a higher bar, requiring that an applicant (1) establish the fact of the alleged conduct and (2) *adduce evidence* from which a court could decide, in the absence of other evidence, that the reason for the conduct is as alleged.

The applicant’s obligation to adduce probative evidence is a genuine burden which will deter frivolous claims. The shifting onus will operate so as not to exclude claims that cannot be proven for want of evidence that is known only to the respondent, and at the same time will enable the respondent to volunteer what only they know: the reason for their conduct.

Clause 124 follows like jurisdictions such as the UK,¹⁵ Ireland,¹⁶ South Africa,¹⁷ Canada¹⁸ and the United State¹⁹ in recognising that the respondent knows the reason it acted the way it did, has access to the evidence to prove this and thus should bear responsibility for adducing that evidence.

This approach takes an inquiry straight to the issue: what happened and why? Complainants will be assisted to get their cases past the hurdle of their inability to establish the duty-holder’s motivation, and onto the central substantive issue of whether the basis for the action was unlawful or there was a sufficient non-discriminatory reason for the action. Respondents will benefit by having their legal obligations substantially clarified, and by having an early opportunity to test the plausibility of the complaint and to volunteer their own version of events.

A shifting burden avoids time-consuming and costly preliminary technical issues, and ensures that court hearings and conciliation proceedings focus on the central issue of whether what happened was discriminatory. It will lead to clearer case law which will provide better guidance on the law.

Recommendation 44: No change should be made to the terms of cl 124 of the Bill.

10. COMPLIANCE MEASURES (CHAPTER 3)

10.1 Guidelines, Disability Standards and Action Plans

We support the Bill’s simplification of the Australian Human Rights Commission’s power to issue explanatory guidelines to aid compliance.

We support the Bill’s maintenance of Disability Standards.

We support the Bill’s retention of the voluntary Action Plan provisions and broadening to all attributes. Action Plans can be an effective means for individual organisations to anticipate and address concerns that may arise in relation to their activities. As in the case of action plans under the *Disability Discrimination Act*, because these plans are a statement of intent, and not approved by any

¹⁵ Section 136 of the *Equality Act 2010* (UK).

¹⁶ Section 84A of the *Employment Equality Act 1998-2004* (Ireland).

¹⁷ Constitution of the Republic of South Africa No 108 of 1996 (South Africa), s 9(5); Employment Equity Act No 55 of 1998 (South Africa), s 11; Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 (South Africa), s 36.

¹⁸ *Ontario Human Rights Commission and O’Malley v Simpsons-Sears Ltd* [1985] 2 SCR 536; *Bhinder v Canadian National Railway Co* [1985] 2 SCR 561.

¹⁹ *Eg, McDonnell Douglas v Green* 411 US 792 (1973).

agency as compliant with the law, we agree that compliance with a plan should be merely a relevant factor in a discrimination case, rather than necessarily a defence to a complaint.

10.2 Australian Human Rights Commission Review Reports

We support the AHRC being granted power to provide reviews of policies and programs on application (cl 64). This measure enables organisations to obtain expert guidance of the AHRC to enable greater compliance with the law.

Clause 66(2) provides that a court may ‘have regard to a review report if the court ... considers it appropriate to do so’. However, there is no obligation on the applicant person or body to make the review report public, even to persons who might be affected by it, and the AHRC is not permitted to publish the review report or any associated findings or outcomes without consent of the applicant (cl 65). There is potential for unfairness in litigation if a respondent is permitted to rely upon a review report that is not known to the complainant. It would be fairer to provide that the court could only rely upon review reports that have been made available either publicly or at least accessible to the complainant.

Recommendation 45: A court should only be permitted to ‘have regard to a review report’ (under clause 66(2) if the report has been made available either publicly or at least to the complainant.

10.3 Procedures for consultation in relation to Disability Standards, Compliance Codes, Special Measures Determinations and Temporary Exemptions

We welcome the support for pro-active compliance mechanisms provided in Chapter 3, but we are concerned that the process for adopting them currently in the legislation fails to ensure adequate consultation with people who will be affected.

As the procedures are currently expressed, they operate only to allow the applicant or proponent of the measures to put their case, and deny any explicit role to parties whose legal rights may well be abrogated. Decision-making that fails to consider the perspectives of both parties to an issue may well be uninformed and lead to bad decisions.²⁰ It is essential that the process for these measures must include publicity for the application and an opportunity for those who may be affected to be informed and to make submissions and present argument. These groups should also have a right to participate in any review of a code, exemption or determination under Part 3-1.

We do not regard the consultation procedures under the *Legislative Instruments Act 2003* (Cth) as sufficient to address this problem. Consultation requirements for legislative instruments adopted under the Bill are to be undertaken in accordance with the *Legislative Instruments Act 2003* (‘LI Act’). However, s 17 of the LI Act provides only that rule-makers ‘should’ consult, not that they must consult, and s 19 LI Act provides the failure to undertake a consultation (or presumably the undertaking of an inadequate consultation) does not affect the validity of the legislative instrument. Under these provisions, consultation is not necessary to a valid code or determination, and the consultation provisions do not necessarily take into account the special needs of groups protected under anti-discrimination legislation.

²⁰ This is the principle underlying the law of procedural fairness in administrative law, and applies with particular force where a decision may deprive a person of legal redress.

If a compliance code were to be made without consultation or with inadequate consultation, there is no basis in either the Bill or the LI Act on which it can be challenged. Because compliance with a code can deprive a person of a right otherwise conferred by Parliament, this possibility is unacceptable. The clause should be amended to require that consultation is essential to the making of a valid code or determination.

Standard forms of public notice and invitations to make submissions might not be accessible or otherwise adequate to elicit the views of persons likely to be affected. The consultation process must be transparent, and must guarantee that active and appropriate measures are taken to seek the views of persons likely to be affected. All applications should be made public to allow public scrutiny.

Recommendation 46: Consultation requirements should not rely only on provisions of the *Legislative Instruments Act 2003*. Effective consultation must be an essential precondition to the making of a valid disability standard, compliance code, temporary exemption or special measure determination. It should require public notice, notice specifically to groups likely to be affected, a minimum period for submissions, and good faith consultation with affected groups in a manner that will enable the affected groups to make their views known.

In addition to this general argument, specific arguments in relation to process for each of these measures are included below, relating to the specific nature of the decision to be made.

None of the procedural provisions in Part 3-1 (cll 71, 76, 80, 84) allows anyone other than the Commission or the applicant to seek amendment or revocation of any determination. This would be completely unacceptable in the absence of effective prior consultation procedures. However, even if there is adequate prior consultation, we do not think it is acceptable to exclude people affected from challenging such determinations, especially in the case of compliance codes, special measures determinations and temporary exemptions where only a narrow section of the public may be affected, making the matter more like an administrative determination than a broadly applicable legislative regulation. If necessary, control over challenges could occur through requiring leave of the Commission to seek amendment or revocation of a code or determination.

Recommendation 47: The powers in cll 70, 75, 79 and 83 can only be exercised after an adequate consultation process has enabled those affected, or their representatives, to be informed about the applications and make submissions and present arguments.

Recommendation 48: A person affected by a Compliance Code, Special Measures Determination or Temporary Exemption should be able, with leave of the Commission, to seek amendment or revocation of the code or determination.

10.3 Special Measures Determinations

We support the Bill's provision for a mechanism for Special Measure Determinations. However, as set out above, **we strongly oppose** the Bill's failure to provide for consultation with the group to be benefited by the special measure. We recommended above (Rec 22) that a consultation requirement be inserted into the special measures provision in cl 21. Such a consultation requirement is also essential in relation to the making of special measures determinations.

Recommendation 49: The process described in cl 80 should be amended to require that:

- before making a determination, the Commission be satisfied that the proposed special measure has been developed in consultation with the people for whose benefit the measure is proposed; and
- before amending or revoking a determination, the Commission be satisfied that the proposed amendment or revocation has been the subject of consultation with the people for whose benefit the measure is in place.

Other refinements are necessary to enhance the operation of the mechanism for Special Measure Determinations.

Recommendation 50: Clause 79 should explicitly refer to the definition of special measures in clause 21, as cl 80(2) does.

Individuals seeking to know what the law is cannot be expected to search the Federal Register of Legislative Instruments for such determinations. A register should be readily accessible, preferably on the AHRC's web site, and contain only the relevant type of decisions.

Recommendation 51: The Bill should require the Australian Human Rights Commission to maintain an accessible and up-to-date public register of all Special Measure Determinations.

The requirements set out in the *Legislative Instruments Act* for making Special Measure Determinations should be supplemented to reflect the human rights objects of the Bill, as noted above.

10.4 Temporary exemptions

We do not support the provision for temporary exemptions in its current form.

Race

The *Racial Discrimination Act* did not include any provision for temporary exemptions to the prohibition of discrimination based on race. Inclusion of power to grant exemptions relating to race is a dilution of protection against racial discrimination, and should not be adopted.

Recommendation 52: Clause 83 should exclude 'race' as an attribute from power to grant temporary exemptions.

Purpose

The Explanatory Notes at [334-335] state that provision is made for temporary exemptions 'while organisations take steps to improve compliance with the Bill'. The Explanatory Notes emphasise that the power to grant temporary exemptions is to be used 'to provide protection for organisations while they transition towards full compliance with Commonwealth anti-discrimination law, rather than to permit discriminatory conduct'. This limited use of the temporary exemptions is not apparent from its terms.

The grant of a temporary exemption is not limited by any explicit consideration other than that it must be consistent with the objects of the Act (cl 84(2)). But the objects as currently drafted give equal weight to formal and substantive equality, and so would allow a 'temporary exemption' that is consistent with achieving formal equality. This safeguard will be stronger if the objects are amended as we propose.

The intention set out in the Explanatory Notes should be explicit in the provision: a temporary exemption is available only to allow the taking of measures to address current non-compliance with the Act.

Recommendation 53: Part 3-1 Division 8 of the Bill should be amended to specify that a temporary exemption is available only to allow the taking of measures to address current non-compliance with the Act, and only when it is consistent with the object of achieving substantive equality.

Notice

It is not appropriate that permission to discriminate should be given on the basis of an *ex parte* application (cl 84(1)). There should be a process for advertising applications publicly and for accepting submissions by individuals or organisations with an interest in the subject matter. There should also be a public register kept by AHRC that is available online for inspection.

Recommendation 54: Clause 84 of the Bill should be amended to require:

- applicants for a temporary exemption to give public notice of the application;
- a time for the making of submissions on the merits of the application;
- publication of reasons for granting or refusing the application; and
- a public register of all applications granted and the terms on which they were granted.

10.5 Compliance Codes

We welcome the Government's attention shown in this Bill to developing creative ways to encourage and enable proactive efforts by persons and organisations to eliminate discrimination and promote equality. Compliance codes represent a new type of mechanism that could perform this role. However, there are a number of ways in which these provisions could be enhanced.

The Explanatory Notes provide that compliance with a code is not mandatory but that compliance would provide a complete with an applicable defence. Both of these effects are important but not made clear on the face of the legislation. Persons who are bound by the Bill should not need to look to the Explanatory Notes to understand how it operates.

Recommendation 55: The Bill should make express in plain English that a compliance code is not mandatory but compliance with an applicable code provides a complete defence to a claim of unlawful conduct.

Given that compliance with such a code constitutes a complete defence, it is essential that such codes do not reduce protection afforded by the Act. While legislative instruments cannot be wider or ultra vires, the enabling Act and cl 76 provide that the AHRC cannot make a code unless satisfied that it is consistent with the objects of the Act, cl 76(2) should state explicitly that codes cannot prescribe standards that are below those provided in the Act. Ideally compliance codes could make compliance easier for organisations, but this should be because they provide clarity and guidance, not lower standards.

Recommendation 56: Clause 76(2) should be amended to provide that the AHRC cannot make a compliance code unless the Commission is satisfied that the code does not unnecessarily reduce protections under the Act.

Further, it is essential that an appropriate process be adopted for the making, amending and revoking of compliance codes, as noted above

11. COMPLAINTS AND COMPLIANCE FRAMEWORK

11.1 Inspector-General of Security and Intelligence

When the AHRC refers a complaint to the Inspector-General of Intelligence and Security (cl 103(1)), there is then no obligation on the Inspector-General to act on that complaint: see s 8(1)(a)(v) *Inspector-General of Intelligence and Security Act 1986* (Cth).

The Explanatory Notes at [385] say that ‘Consequential amendments will be made to the *Inspector-General of Intelligence and Security Act 1986* for consistency’. When those amendments are made provision should be made to oblige the Inspector-General to act on that complaint.

Recommendation 57: The *Inspector-General of Intelligence and Security Act 1986* (Cth) should be amended to require the Inspector-General to investigate on a complaint referred under cl 103(1) of the Bill, and to report to the parties to the complaint and the AHRC.

11.2 Litigation costs

We support the provisions that each party pay their own costs, but with a reservation that can be addressed by amendment.

The formal symmetry in relation to litigation costs in cl 133(1) is illusory. Whether successful or unsuccessful, many respondents receive a taxpayer subsidy, as they can deduct their legal costs from their taxable income. Such a taxpayer subsidy for litigation costs is not generally available to individual complainants. Under a no-costs regime, a successful complainant is disadvantaged in two ways: they are not compensated for their costs if they are successful, and whether they win or lose, they are denied deductibility of their legal costs that is almost always available to the respondent. Notoriously, chronically small damages awards in the discrimination jurisdiction are substantially, and sometimes wholly, used by a successful complainant to pay legal costs. In addition, many respondents are large corporations or departments, but complainants are always members of disadvantaged groups and frequently facing issues such as loss of employment.

Clause 133(3) recognises some matters that could disturb the presumptive formal symmetry of each party’s paying their own costs. It fails, however, to include the matter of the unfairness to a successful complainant who can neither recover costs nor receive a subsidy for them.

This can be remedied by requiring a court, when considering whether a successful individual complainant should be compensated for their costs, to take into account the factors mentioned above where the respondent is non-individual, for example a corporation, government agency, or partnership. This would lend some balance to the parties’ litigation costs, in light of the parties’ relative resources and the cost and effort needed to litigate.

Recommendation 58: Clause 133(3) should be amended to include as a consideration that an individual complainant has been successful against a respondent that is a government entity or is eligible to claim its legal expenses as a tax deduction.

11.3 The AHRC's role and functions

We do not support the policy position that has been taken not to invest the AHRC with the powers to address actively discrimination and to continue to place the burden of addressing discrimination on a victim's use of an individual complaint process. This issue was the subject of our earlier more detailed submissions. **We urge** the Committee to consider adopting our earlier recommendations:

Recommendation 59: Having regard to our earlier, more detailed submissions, the Bill should be amended as follows:

- the AHRC should be able to initiate complaints on its own motion; and
- the AHRC should have the capacity and resourcing to support selected cases which are in the public interest.

11.4 'Forum shopping'

We do not support the way in which cl 90(1)(a) has been drafted to limit the circumstances when a party can make a complaint under the Bill.

Commonwealth human rights law should aim to provide consistent and adequate coverage to all individuals throughout the country, and individuals should not be deprived of that because they cannot access expert advice before lodging a claim. The mere making of a complaint under State or Territory law should not finally preclude making a complaint under this Act.

The current Commonwealth anti-discrimination laws provide that a federal complaint cannot be lodged if a person has 'made a complaint, instituted a proceeding or taken any other action under [state or territory anti-discrimination law] in respect of an act or omission' that could be the subject of a complaint under federal law.²¹ These provisions have an unnecessarily severe effect on people who lodge their complaint in the wrong jurisdiction through lack of access to expert legal advice. Although s 90(2) allows for a complaint nevertheless to be lodged under the Act in exceptional circumstances, we are concerned that this is a very narrow exception and effectively unusable. Unfortunately, lack of access to expert legal advice is not necessarily an exceptional occurrence in this area of law, given the lack of legal aid for discrimination matters. In addition, to enable a person to discontinue their action in another jurisdiction and bring it under this Act, they need to be confident they can validly do this, which requires a clearer definition of the circumstances in which this is permitted. We suggest that there be express provision that such a change of jurisdiction is permitted provided no substantive proceedings have taken place.

In relation to the wording of cl 90, reference to a complaint or application that 'has already been made' is much more restrictive than the 'has been adequately dealt with' currently in s 49PH(1)(f) of the *Australian Human Rights Commission Act*. The Explanatory Notes at [349] are not accurate when they say that the existing policy is that 'a complainant may have a choice as to which jurisdiction to make a complaint, but once that choice has been exercised, unless the complaint failed for want of jurisdiction, the complaint cannot be made in another jurisdiction'. Current policy is concerned with how a complaint has been dealt with, not merely with whether a complaint has been made.

²¹ *Racial Discrimination Act*, s 6A(2), *Sex Discrimination Act*, s 11(4), *Disability Discrimination Act*, s 13(4) and *Age Discrimination Act*, s 12(4).

Complainants commonly make complaints without first receiving legal advice, particularly when a local anti-discrimination agency is more accessible to them, away from the AHRC's premises in the Sydney CBD.

Recommendation 60: Clause 90(1)(a) should be amended to replace the phrase 'has already been made' with the phrase currently in s 49PH(1)(f) of the *Australian Human Rights Commission Act*: 'has been adequately dealt with'.

Recommendation 61: Clause 90(2) should be amended to include a provision allowing a complaint to be lodged under the Act provided that any previous complaint in the jurisdictions listed in cl 90(1) has not proceeded to any substantive step (such as conciliation) and has been discontinued before the complaint is lodged.

11.5 Need for regulatory and strategic powers to address systemic discrimination

We support conferring wider regulatory powers to challenge discrimination and harassment on the AHRC. Such powers should include powers like issuing compliance notices, conducting audits, and accepting enforceable undertakings, that are given to regulators in other areas such as consumer and competition law and occupational health and safety law. This would remove some of the burden of enforcement from the shoulders of individuals affected by discrimination, where the entire burden currently rests, and facilitate addressing systemic discrimination which is beyond the scope of any individual complaint.

In addition, powers and funding to engage in strategic litigation to develop precedent in areas otherwise neglected should be created, preferably to be exercised by the AHRC, but if necessary to be exercised by other bodies such as legal aid services. These should include power to run a complaint on behalf of a complainant as well powers to act as amicus and intervener, conditioned, if necessary, on leave being granted by the Minister. Without these powers and resources, enforcement rests solely on the shoulders of individuals, who must pursue their own interests. As a result strategic enforcement may never occur and development of precedent is likely to be slow and uneven. This prevents the law from providing clear and thorough guidance in the most efficient way.

Recommendation 62: The AHRC should be given regulatory powers to assist with enforcement of the law. Powers to conduct strategic litigation on behalf of a complainant should be given to the AHRC or an alternative body, to be funded through a strategic enforcement or test cases fund.

11.6 Review of progress in eliminating discrimination and harassment

In order to assess whether the changes to the act are contributing to the objective of eliminating discrimination and harassment, we believe it is important that progress towards this goal should be regularly reviewed. This could be done either as part of the 3 yearly review or else in a separate review after 3 to 5 years in which the AHRC reports on progress towards the goals in light of the new legislation, decisions of the courts, and experience with conciliation.

Recommendation 63: There should be a regular review of progress towards the objective of eliminating discrimination and harassment by the AHRC reporting to the Minister, who should table it in Parliament, not less often than every 5 years.

12. CONFIDENTIALITY AND RESEARCH.

We do not support the omission from the Bill of a provision to enable access to materials about complaints for purposes of research, which was the subject of our earlier more detailed submissions.

We strongly urge the Committee to consider adopting our earlier recommendations.

One way in which an individual complaint-based approach can be made more effective, and can ensure the Act has some broader conduct-regulating effect, is to facilitate research and reporting on the operation of the legislation. It is essential that research access be available to complaint files to allow commentary on, evaluation of, and the development of statutory protections against discrimination.

An analysis of data will provide the AHRC and the community more broadly with the capacity to identify areas of systemic discrimination in relation to the attributes and different areas of public life protected by the Bill. Such an analysis will also inform the development of guidelines and compliance codes under the proposed Bill. The Government should be seen to support the independent analysis of discrimination law and policy.

Recommendation 64: Clause 194 should be amended to require the AHRC:

- to publish on its website de-identified information about the content and outcome of each complaint;
- to collect and publish de-identified socio-demographic descriptive data about the complaints it receives, the complainants who make them, and the respondents to the complaints; and
- to allow access, for research purposes, to otherwise confidential information held by the AHRC and the courts, so long as the research is approved by an institutional ethics committee.

13. DRAFTING

We have identified what appear to be drafting errors as follows.

Recommendation 65: The following drafting errors be corrected:

- cl 19(7) is unnecessarily unclear. We suggest that it be replaced by 'Subsections (1) and (3) are not mutually exclusive.'
- cl 21(4), replace the word 'after' with the word 'when'.
- cl 22(3), replace the phrase 'is only unlawful if' with the phrase 'is unlawful only if'.
- cl 92 (1) and (3), replace 'claimant' with 'complainant'.
- cl 103(1), replace 'or that is otherwise' with 'or is otherwise'.

APPENDIX

Dr Dominique Allen is a Senior Lecturer at **Deakin School of Law** and has published widely on Australian anti-discrimination law. She completed a doctoral thesis at Melbourne Law School which evaluated Australia's existing anti-discrimination protections and proposed a series of reforms for improving the law's effectiveness at tackling discrimination and promoting equality.

Dr Anna Chapman is a Senior Lecturer at **Melbourne University Law School** and a member of the Centre for Employment and Labour Relations Law. Anna's research has focused on legal regulation and sexed, heterosexed and racialised harms and systems of power in the paid labour market in Australia. This work has engaged particularly with anti-discrimination law, unfair dismissal law and anti-vilification statutory schemes. More recently Anna has commenced a project examining the relationship between law, work and care.

Dr Sara Charlesworth is a Principal Research Fellow at the Centre for Work + Life, **University of South Australia**. Sara's research has focused on gender (in)equality in employment at the institutional, industry and organisational levels. She was a member of the Victorian Equal Opportunity Board from 1988 to 1994, a member of the advisory committee to the 2007/8 Gardner Review of the Victorian *Equal Opportunity Act 1995* and a member of the ACTU Independent Inquiry into Insecure Work in 2012.

Dr Elizabeth Dickson is a Senior Lecturer in the Law School at **Queensland University of Technology**. She teaches discrimination law and researches, publishes and has particular expertise in disability discrimination law. She has consulted for a variety of education institutions on issues relating to the inclusion and accommodation of students with disabilities.

Dr Beth Gaze is an Associate Professor at **Melbourne University Law School**. She has taught and researched discrimination law for over twenty years. Her most recent book is *Enforcing Human Rights: An Evaluation of the New Regime* (2010). She was involved in Review of the Victorian *Equal Opportunity Act*, and as a consultant to the Victorian *Review of Exceptions and Exemptions* (2009). She has been a member of the Social Security Appeals Tribunal and the Victorian Mental Health Review Board.

Mr Wayne Morgan is a Senior Lecturer in the **ANU College of Law** researching discrimination law.

Dr Karen O'Connell, is a Chancellor's Postdoctoral Research Fellow at the **University of Technology, Sydney (UTS)**. Prior to joining UTS she worked in human rights and anti-discrimination law and policy for over 10 years. Karen completed her masters and doctoral degrees at Columbia University in New York. Her postdoctoral research continues her interest in equality, gender, disability and discrimination law.

Professor Simon Rice, OAM holds the Chair of Law Reform and Social Justice at the **ANU College of Law**. He was a judicial member of the NSW Administrative Decisions Tribunal in the Equal Opportunity Division from 1996 until 2011, is an ad hoc hearing Commissioner with the NT Anti-Discrimination Commission, and is chair of the ACT Law Reform Advisory Council. He is a co-author of the text *Australian Anti-Discrimination Law*.

Dr Belinda Smith is a Senior Lecturer in the **University of Sydney Law School**. She teaches and researches primarily in the area of anti-discrimination law, gender equity, and work-family conflict. In articles and chapters published in Australia, the United States and Japan she has explored alternative regulatory tools and frameworks for promoting equality.

Professor Margaret Thornton is an ANU Public Policy Fellow at the **Australian National University**. She has specialised in the area of discrimination law and policy for more than 30 years. Her publications include *The Liberal Promise: Anti-Discrimination Legislation in Australia* (OUP, 1990) and the edited collection, *Sex Discrimination in Uncertain Times* (ANU E Press, 2010).