Submission to the Senate Legal and Constitutional Affairs Committee on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012

Prepared by JobWatch Inc's Legal Practice:
Ian Scott (Principal Lawyer)

Job Watch Inc

© Job Watch Inc. December 2012

Contents

1. INTRODUCTION 3

2. ABOUT JOBWATCH 4

3. CONCERNS AND RECOMMENDATIONS 4

3.1 IRRELEVANT CRIMINAL RECORD 5
Recommendation 1: 7
That *'irrelevant criminal record'* be made a protected attribute giving rise to fully enforceable rights. 7

3.2 BROAD RELIGIOUS EXCEPTIONS 7
Recommendation 2: 8
That clause 33 be removed from the Bill. 8

3.3 EXCEPTION FOR JUSTIFIABLE CONDUCT 9
Recommendation 3: 10
That clause 23 "justifiable conduct" be removed from the Bill. 10
Recommendation 4: 11
That there be included in the Bill a clause to the effect that motive is irrelevant in discrimination. 11

3.4 SHARED/SHIFTING BURDEN OF PROOF 11
Recommendation 5: 12
The Bill should clarify the standard of proof required of an applicant before the burden of proof shifts to the respondent. 12

1. Introduction

Job Watch Inc (“***JobWatch”***) welcomes the opportunity to continue participating in the process of consolidating Commonwealth anti-discrimination laws by making a submission in relation to the exposure draft of the Human Rights and Anti-Discrimination Bill (“***the Bill”***).

Overall, JobWatch commends the Bill’s many positive, albeit overdue, developments in simplifying federal anti-discrimination law, clarifying and strengthening protections against discrimination and providing more certainty and consistency regarding equal opportunity rights and responsibilities.

Specifically, JobWatch congratulates the Commonwealth for making provisions in the Bill for the following:

a) sexual orientation, gender identity and same sex relationship status as new protected attributes;

b) intersectional discrimination;

c) a “shared” burden of proof in relation to complaints of discrimination;

d) the awarding of costs only in limited circumstances;

e) the removal of the “comparator test” in what was direct discrimination; and

f) the removal of the “cannot comply” requirement in what was indirect discrimination.

Nevertheless, JobWatch believes further improvements could still be made to the Bill to better achieve its objectives of eliminating discrimination and promoting substantive equality for workers and other vulnerable and disadvantaged members of the community.

As JobWatch has already responded to many of the issues outlined in the Attorney-General’s Discussion Paper dated September 2011 in our previous submission dated February 2012 (see Appendix 1) (**Discussion Paper Submission**), this submission will focus on concerns that JobWatch has with the Bill and options for improvement in those areas. To that end, JobWatch’s submission will compare relevant clauses in the Bill to relevant recommendations in JobWatch’s Discussion Paper Submission with a view highlighting the need for certain amendments to be made to the Bill.

2. About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Commonwealth funding bodies to do the following:

- Provide information and referral to Victorian workers via a free and confidential telephone information service;
- Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;
- Represent and advise disadvantaged workers; and
- Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, we have maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected over **150,000** records. Each record may canvass multiple workplace problems, including, for example, discrimination, sexual harassment, bullying and underpayment of wages. Our database allows us to report on our callers' experiences, including their particular workplace issues and what remedies, if any, may be available at any given time.

JobWatch's comments on the Bill are made from the perspectives of our lawyers, their clients and callers to our telephone information service.

3. Concerns and Recommendations

JobWatch's main concerns in relation to the Bill are as follows:

a) Lack of protection against discrimination due to 'irrelevant criminal record';

b) Broad religious exceptions;

c) Exception for justifiable conduct; and

d) Shared/shifting burden of proof.

3.1 Irrelevant Criminal Record

JobWatch is deeply concerned that "irrelevant criminal record" has not been made a protected attribute in the Bill.

Currently, the only recourse for workers who have been discriminated against on the basis of an irrelevant criminal record is to lodge an unenforceable complaint with the Australian Human Rights Commission (***'the Commission'***) under the 'equal opportunity in employment scheme' or the International Labour Organization (ILO) stream of the *Australian Human Rights Commission Act 1986 (*Cth) (***'AHRC Act'***).

When a complaint is lodged, the Commission can inquire into the conduct which has been alleged to be discriminatory on the basis of a person's irrelevant criminal record and conduct a conciliation. If the Commission thinks it appropriate, it can recommend the alleged discriminator pay compensation to the complainant and/or undertake various other forms of remedial action. Unfortunately, the alleged discriminator is not required to follow the Commission's recommendations as they are not enforceable nor is the complainant entitled to take any further legal action.

In the Bill, the Commission's already weak power to investigate these complaints has been further reduced, as ostensibly only 'Commonwealth conduct', as opposed to conduct of private actors such as private employers, can be the subject of complaint.

JobWatch considers the current protection afforded by federal anti-discrimination law to be grossly inadequate. Consequently, the Bill's further diminution of an already weak and unenforceable complaints mechanism is totally unacceptable.

There are strong moral, economic and social policy justifications as to why irrelevant criminal record should be a protected attribute in the Bill, especially in the area of employment. Many of the following justifications are adapted from a previous JobWatch co-publication with Fitzroy Legal Service, 'Criminal Records in Victoria: Proposals for Reform' (2005) in relation to arguments in favour of a spent convictions scheme which are relevant here:

- *'People should not be unnecessarily re-penalised for conduct that has already been punished.'*
- *'Many people who have been convicted of an offence are never convicted again, especially when the offences were committed during adolescence.'*

- *'The older a conviction becomes, the less relevant it is when predicting a person's future conduct.'*

- *'Employment is recognised as a key factor in sustaining desistance from crime not only as a source of income but also as a source of structure, social contact, and self worth'*. Therefore, discrimination on the basis of an irrelevant criminal record in employment stifles the possibility of rehabilitation of an ex-offender.

- '*Anti-discrimination protection for people with an irrelevant criminal record 'is consistent with government philosophy of promoting community safety, crime prevention and protection of civil liberties while supporting an offender's rehabilitation'*.

- Discrimination of this sort unnecessarily excludes those who are capable and willing to work from the pool of available labour.

JobWatch does not agree with the reasons in the Bill's Explanatory Notes for excluding *'irrelevant criminal record'* from the protected attributes, i.e. that the concept of *'irrelevant criminal record'* is uncertain and that there are *'differences in understanding of what constitutes a relevant or irrelevant record'*.

In JobWatch's opinion, any alleged uncertainty can be dealt with via a clear definition of the protected attribute and there are already legislative precedents such as the Tasmanian *Anti-Discrimination Act 1998* definition of *'irrelevant criminal record'*.

The Bill's Explanatory Notes also suggest that it is *"bad policy"* to have a complaints mechanism regarding conduct that is not unlawful. The solution presented by the Bill, however, is a cop-out. Rather than make irrelevant criminal record discrimination unlawful along with the other ILO stream attributes that will be protected attributes under the Bill, e.g. industrial history, thereby putting an end to alleged *"bad policy"*, the Bill consigns *'irrelevant criminal record'* discrimination to the rubbish bin in breach of the Commonwealth's ILO obligations.

This is clearly a diminution in rights such as was meant to be avoided by the consolidation project. It is trite for the Explanatory Notes to suggest that, because 'irrelevant criminal record' discrimination wasn't previously enforceable, it wasn't really a right and so removing the right to complain is not a diminution in rights. This argument is rhetorical and circular. Clearly, if it's not a right, then it should have been made a protected attribute under the Bill so as to conform with the Australia's international obligations under the

International Labour Organisation *Discrimination (Employment and Occupation) Convention* (1958) which is an object of the Bill.

JobWatch recognises that there are further reforms required in Victoria (and elsewhere in Australia) to supplement any positive change in anti-discrimination law so as to more adequately protect those who suffer discrimination due to their irrelevant criminal record. Examples of further reform are the introduction of a spent convictions scheme and a statute-based criminal record management system in Victoria.

These reforms are now long overdue and we believe that the project of consolidating Commonwealth anti-discrimination laws is a golden opportunity for the current Commonwealth Government to lead the way in taking a more compassionate and rehabilitative approach towards persons with a criminal record by extending to them protection against discrimination.

Recommendation 1:

That *'irrelevant criminal record'* be made a protected attribute giving rise to fully enforceable rights.

(For further information see Appendix1 – see page 27)

3.2 Broad Religious Exceptions

JobWatch is concerned about the unnecessary breadth of Clause 33 in maintaining broad religious exceptions to discriminatory conduct.

Sub-clause 33(2) of the Bill allows a body established for religious purposes to discriminate in all areas of public life (including in the area of work) on the basis of the following attributes: gender identity, marital or relationship status, potential pregnancy, pregnancy, religion and sexual orientation.

Sub-clause 33(3) of the Bill allows religious educational institutions to discriminate in the area of work on the basis of the following attributes: gender identity, marital or relationship status, potential pregnancy, pregnancy, religion and sexual orientation.

The exceptions will come into operation if the discrimination, *'engaged in good faith'*, passes one of these tests:

1. *'conforms to the doctrines, tenets or beliefs of that religion'*; or

2. *'is necessary to avoid injury to the religious sensitivities of adherents to that religion'*.

JobWatch reiterates its opposition to broad religious exceptions in the Bill. JobWatch recognises that a balance has to be struck in anti-discrimination law between competing but equally legitimate human rights, i.e. the right to equality and to be free from discrimination, and the right to freedom of religion. However, JobWatch is of the opinion that broad religious exceptions undermine the fundamental goals of discrimination law, i.e. to eliminate discrimination and promote substantive equality for all people.

The attributes listed above that can be the subject of discrimination by religious bodies and religious educational institutions under the Bill do not ordinarily, if at all, bear any significance in relation to person's ability to carry out the duties, responsibilities or inherent requirements of a particular job. For example, the relationship status or sexual orientation of a person who is employed to perform cleaning duties at a church or a person who is employed as a mathematics teacher at a religious school are irrelevant as those attributes do not provide any meaningful information in relation to determining how well they can perform their respective jobs. Likewise, a person who is employed to perform cleaning duties at a church or a person who is employed as a mathematics teacher at a religious school does not need to '[conform] to the doctrines, tenets, or beliefs of that religion' to be able to adequately perform their duties.

JobWatch is concerned that the test of *'necessity to avoid injury to the religious sensitivities of adherents to that religion'* covers too wide a range of discriminatory conduct. We do not consider *'religious sensitivities'* sufficient reason to justify the sacrifice of a person's right to equality and to be free from discrimination.

However, JobWatch does recognise that there are circumstances, for example, the appointment of priests or ministers, where it is appropriate for the religious body to be selective about who they appoint so as to '[conform] to the doctrines, tenets, or beliefs of that religion'. In JobWatch's opinion, Clause 32 already sufficiently provides for that 'inherent requirement' which is, in practice, already self-policing.

Recommendation 2:

That clause 33 be removed from the Bill.

(For further information see Appendix 1 – page 41).

3.3 Exception for Justifiable Conduct

JobWatch strongly opposes the inclusion in the Bill of a general limitations clause.

As JobWatch stated in its Discussion Paper Submission at page 39:

> ***"there should not be a general limitations clause because it will be ambiguous, complex and uncertain and create an abundance of case law leading to further complexity which is the opposite aim of the consolidation project."***

Clause 23 of the Bill creates an exception for justifiable conduct which is a form of general limitations clause because it applies in relation to all protected attributes. Clause 23 (2) and (3) state as follows:

> *"(2) It is not unlawful for a person to discriminate against another person if the conduct constituting the discrimination is justifiable.*

When conduct is justifiable

> *(3) Subject to subsection (6), conduct of a person (the first person) is justifiable if:*
>
> *(a) the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim; and*
> *(b) that aim is a legitimate aim; and*
>
> *(c) the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and*
>
> *(d) the conduct is a proportionate means of achieving that aim."*

The clause goes on to explain what must be considered in determining whether conduct was justifiable.

In JobWatch's opinion, clause 23 effectively provides every alleged discriminator with an arguable defence to a complaint of discrimination which they will be entitled to have heard in Court because each case will, due to the nature of this clause, have to be determined on a case by case basis.

For example, if an employer removed the ability of its employees to sit on chairs whilst working because it wanted to increase productivity and/or present the impression of a vibrant and active workforce to its customers,

regardless of the fact that this requirement may disadvantage workers with certain health issues, the employer will be entitled to argue that the requirement was justified for legitimate business reasons and to use that as a defence to a complaint of discrimination.

In these circumstances, it is very difficult for a complainant argue, regardless of whom has the burden of proof, that the employer's conduct was not done in good faith, to achieve a particular legitimate aim, was not proportionate and that a reasonable person in the same circumstances would not have considered that engaging in the conduct would achieve the aim.

Recommendation 3:

That clause 23 "justifiable conduct" be removed from the Bill.

(For further information see Appendix 1 – page 38).

3.3.1 Motive should be irrelevant

It has been long held that, in anti-discrimination law, the motive of the alleged discriminator is not a relevant consideration in assessing whether or not unlawful discrimination has occurred[1]. The defence of justifiable conduct overturns this convention and opens the door to a return to notions of "benevolent discrimination" and a hierarchical order of who knows best.

Further, depending on the nature of the employer's business, this defence may or may not be successful meaning, once again, that success or failure of the exception of justifiable conduct can only be judged on a case by case basis.

As discussed above, this will not only make genuine instances of discrimination more difficult to prove, it will also unnecessarily make Commonwealth anti-discrimination law more ambiguous, complex and uncertain leading to an abundance of divergent case law and ultimately effectively undermining the viability of the Bill when it becomes law. In other words, the defence will be effectively useless in creating a body of jurisprudence that will clarify and strengthen the law.

[1] For example, see *Equal Opportunity Act 2010* (Vic), section 10.

Recommendation 4:

That there be included in the Bill a clause to the effect that motive is irrelevant in discrimination.

3.4 Shared/Shifting Burden of Proof

Clause 124 of the Bill states as follows:

> *"(1) If, in proceedings against a person under section 120, the applicant:*
>
> *(a) alleges that another person engaged, or proposed to engage, in conduct for a particular reason or purpose (the **alleged reason or purpose**); and*
>
> *(b) adduces evidence from which the court could decide, in the absence of any other explanation, that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct;*
>
> *it is to be presumed in the proceedings that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct, unless the contrary is proved."*

Essentially, this means that so long as the applicant can adduce "prima facie" evidence of discrimination, the burden of proof shifts to the respondent to prove that the reason or purpose etc for the conduct was not unlawful.

Whilst JobWatch agrees with reversing the onus of proof such that the alleged discriminator has to disprove the allegations, JobWatch is concerned that the requirement that the applicant adduce "prima facie" evidence of discrimination may be too high a bar for certain self-representing applicants (e.g. applicants from culturally and linguistically diverse backgrounds and/or applicants with an intellectual disability or mental health issues).

For this reason, JobWatch suggests that the Bill be amended or at least a note be added to clause 124 clarifying that the standard of proof required for an applicant to comply with the first part of sub-clause (b) is not meant to be to the standard of "on the balance of probabilities" but that it is enough if the applicant can put into evidence a version of events based on which the court could find discrimination had occurred if the burden of proof was met.

Recommendation 5:

The Bill should clarify the standard of proof required of an applicant before the burden of proof shifts to the respondent.

Thank you for considering our concerns.

JobWatch would welcome the opportunity to discuss any aspect of this submission further.

If you have any queries about this submission, please contact Ian Scott on .

Yours sincerely,

Ian Scott
Principal Lawyer
Job Watch Inc

APPENDIX 1

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

Prepared by JobWatch Inc's Legal Practice:
Fiona Warner, Ian Scott and Gabrielle Marchetti

With the assistance of Volunteers:
Sue Reid and Melissa Favasuli

Job Watch Inc

© Job Watch Inc. February 2012

Contents

APPENDIX 1 ..... **13**

INTRODUCTION **18**

ABOUT JOBWATCH **18**

SUMMARY OF OUR RECOMMENDATIONS **19**

RECOMMENDATION 1: 24

THERE SHOULD BE A UNIFIED TEST FOR DISCRIMINATION THAT ENCAPSULATES THE TWO CONCEPTS OF DIRECT AND INDIRECT DISCRIMINATION. 24

ALTERNATIVELY, IF THERE ARE TO BE SEPARATE PROVISIONS FOR DIRECT AND INDIRECT DISCRIMINATION, THE 'DETRIMENT TEST' USED IN THE EQUAL OPPORTUNITY ACT 2010 (VICTORIA) SHOULD BE ADOPTED. 24

RECOMMENDATION 2: 25

THE BURDEN OF PROOF SHOULD FALL ON THE RESPONDENT AFTER THE COMPLAINANT ALLEGES UNLAWFUL DISCRIMINATION; IE, THE PROTECTED ATTRIBUTE SHOULD BE PRESUMED TO BE THE REASON FOR THE DISCRIMINATORY CONDUCT UNLESS THE RESPONDENT PROVES OTHERWISE. 25

RECOMMENDATION 3: 27

SPECIAL MEASURES SHOULD COVER ALL PROTECTED ATTRIBUTES AND SHOULD BE DEFINED IN A SEPARATE PROVISION. THE OBJECTIVE SHOULD BE TO PROMOTE AND ACHIEVE SUBSTANTIVE EQUALITY ACROSS ALL PROTECTED ATTRIBUTES. 27

RECOMMENDATION 4: 30

THE DUTY TO ACCOMMODATE OR MAKE REASONABLE ADJUSTMENTS SHOULD BE CLARIFIED BY PROVIDING A SEPARATE, STAND ALONE PROVISION. 30

RECOMMENDATION 5: 30

THE DUTY TO ACCOMMODATE OR MAKE REASONABLE ADJUSTMENTS SHOULD BE EXTENDED TO ALL PROTECTED ATTRIBUTES, BUT AT THE VERY LEAST TO THE ATTRIBUTES OF AGE, FAMILY/CARERS' RESPONSIBILITIES AND PREGNANCY. . 30

RECOMMENDATION 6: 31

POSITIVE DUTIES TO ELIMINATE DISCRIMINATION AND HARASSMENT SHOULD BE IMPOSED ON THE PUBLIC SECTOR IN ORDER TO ADDRESS SYSTEMIC DISCRIMINATION AND TO PROMOTE SUBSTANTIVE EQUALITY. 31

RECOMMENDATION 7: 34

THE CURRENT PROHIBITIONS ON ATTRIBUTE-BASED HARASSMENT SHOULD BE EXTENDED TO ALL PROTECTED ATTRIBUTES AND PROTECTED AREAS OF PUBLIC LIFE. 34

RECOMMENDATION 8: 37

THE TERM 'SEXUAL ORIENTATION' SHOULD BE THE PREFERRED TERM IN THE BILL. 37

RECOMMENDATION 9: 37

THE TERM 'GENDER IDENTITY' SHOULD BE THE PREFERRED TERM IN THE BILL. 37

RECOMMENDATION 10: 37

THE DEFINITION OF GENDER IDENTITY SHOULD BE MODELLED ON THE DEFINITION IN SECTION 4 OF THE EO ACT. 37

RECOMMENDATION 11: 37

THE BILL SHOULD EXTEND COVERAGE OF ASSOCIATES TO ALL PROTECTED ATTRIBUTES IN ALL PROTECTED AREAS OF PUBLIC LIFE. 37

RECOMMENDATION 12: 42

THE CURRENT PROTECTIONS AGAINST DISCRIMINATION ON THE BASIS OF THE ATTRIBUTES LISTED IN THE AHRC ACT SHOULD BE STRENGTHENED BY EXTENDING THEM TO ALL AREAS OF PUBLIC ACTIVITY (BEYOND EMPLOYMENT) AND MAKING THEM FULLY ENFORCEABLE. 42

RECOMMENDATION 13: 45

New protected attributes should be created, including "homelessness" and "survivors of domestic violence". 45
Recommendation 14: 46
The Bill should protect against intersectional discrimination so that people who experience discrimination on multiple grounds or because of two or more aspects of their identity, are protected. 46
Recommendation 15: 47
Voluntary workers should be protected from unlawful discrimination and sexual harassment. 47
Recommendation 16: 49
There should be a separate provision to prohibit people for asking questions requestion information regarding a criminal record which could be used to form the basis of discrimination. 49
Recommendation 17: 50
There should not be any blanket exceptions to or exemptions from the proposed Commonwealth Equality Act. 50
Recommendation 18: 50
A general limitations clause should not be adopted. 50
Recommendation 19: 51
An 'inherent requirements' exception should be preferred over a 'genuine occupational qualification' exception. 51
Recommendation 20: 57
The Bill should diverge from the system of exceptions contained within the current Commonwealth anti-discrimination acts and instead include an 'inherent requirements of the job' exemption which may be granted by the Commission on application by the entity seeking the exemption. 57
Recommendation 21: 59
If a specific religious exception is included in the Bill, its application should be limited to positions in religious bodies and schools which genuinely require adherence and commitment to the particular beliefs and tenets of the religion in order to carry out the inherent requirements of the position. 59
Recommendation 22: 60
Exemptions should only be temporary. 60
Recommendation 23: 60
The current maximum life of an exemption, being 5 years, should be reduced to maximum of 2 years so as to ensure that temporary exemptions are regularly reviewed without the need to appeal to the Administrative Appeals Tribunal. 60
Recommendation 24: 60
The Bill should include a clause specifically stating that the Commission must exercise its power to grant temporary exemptions in accordance with the objects of the Bill. 60
Recommendation 25: 61
There should be a single discreet special measures provision included in the Bill. 61
Recommendation 26: 61
It should be mandatory that an individual undertake an equal opportunity training course as approved by or conducted by the Commission before being appointed as a director of a company that is or will be an employer. 61
Recommendation 27: 64
The Commission should offer a variety of alternative/appropriate dispute resolution mechanisms including Mediation and Early Neutral Evaluation. 64
Recommendation 28: 64

THE CONCILIATOR SHOULD BE EMPOWERED TO ISSUE A CONCILIATION CERTIFICATE STATING, WHERE POSSIBLE, WHETHER OR NOT THE COMPLAINT HAS A REASONABLE PROSPECT OF SUCCESS. 64
RECOMMENDATION 29: 65
THE COMMISSION SHOULD BE EMPOWERED TO ISSUE A "LEGAL COSTS IMMUNITY CERTIFICATE" IN TEST CASE/PUBLIC INTEREST MATTERS. 65
RECOMMENDATION 30: 66
THERE SHOULD BE MECHANISMS IN PLACE WHEREBY COMPLAINANTS CAN ENFORCE BREACHED TERMS OF SETTLEMENT AGREEMENTS AGAINST RESPONDENTS WITHOUT THE NEED TO SUE FOR BREACH OF CONTRACT. 66
RECOMMENDATION 31: 66
REPRESENTATIVE ACTIONS SHOULD BE PERMITTED IN THE FEDERAL COURT AND THE FEDERAL MAGISTRATES COURT. 66
RECOMMENDATION 32: 66
RESPONDENTS SHOULD BEAR THEIR OWN COSTS IN UNLAWFUL DISCRIMINATION PROCEEDINGS EXCEPT IN LIMITED CIRCUMSTANCES SUCH AS WHERE THE COMPLAINT IS FOUND TO BE FRIVOLOUS, VEXATIOUS OR LACKING IN SUBSTANCE. WHERE A COMPLAINANT IS SUCCESSFUL, COSTS SHOULD FOLLOW THE EVENT. 66
RECOMMENDATION 33: 66
THE BILL SHOULD PROVIDE THE COURT WITH GUIDANCE AS TO THE RANGE OF POSSIBLE ORDERS IT IS EMPOWERED TO MAKE. 66
RECOMMENDATION 34: 68
ORDERS FOR COMPENSATION NEED TO BE HIGH ENOUGH TO DISCOURAGE DISCRIMINATION AND TO MAKE IT FINANCIALLY VIABLE TO LITIGATE A COMPLAINT 68
RECOMMENDATION 35: 69
COURTS SHOULD BE EMPOWERED TO ORDER PENALTIES AGAINST OFFENDING RESPONDENTS. 69
RECOMMENDATION 36: 69
THE COMMISSION OR OTHER INDEPENDENT STATUTORY BODY SHOULD BE ABLE TO PROSECUTE OFFENDING RESPONDENTS. 69
RECOMMENDATION 37: 70
IN ORDER TO PROVIDE A TRULY EFFECTIVE AND MEANINGFUL COMPLIANCE REGIME, THE COMMISSION SHOULD BE GIVEN ENFORCEABLE REGULATORY AND COMPLIANCE POWERS. 70
RECOMMENDATION 38: 75
THE BILL SHOULD CONTAIN PROVISIONS (MIRRORING THOSE IN THE FAIR WORK ACT 2009 (CTH)) THAT DEAL WITH MULTIPLE ACTIONS. 75
RECOMMENDATION 39: 75
EMPLOYEE PROTECTIONS AGAINST UNLAWFUL DISCRIMINATION IN THE FAIR WORK ACT 2009 (CTH) SHOULD NOT BE REDUCED BY THE BILL. 75
RECOMMENDATION 40: 77
COMMONWEALTH ANTI-DISCRIMINATION LAWS SHOULD NOT COVER THE FIELD. 77
RECOMMENDATION 41: 77
COMPLAINANTS SHOULD BE ALLOWED TO CHANGE JURISDICTIONS FROM STATE TO COMMONWEALTH IN CERTAIN CIRCUMSTANCES. 77
RECOMMENDATION 42: 77
THE BILL SHOULD NOT PROVIDE ANY EXCEPTIONS OR EXEMPTIONS FOR ACTS DONE IN DIRECT COMPLIANCE WITH STATE AND TERRITORY LAWS. 77
RECOMMENDATION 43: 77
COMMONWEALTH ANTI-DISCRIMINATION LAWS SHOULD APPLY TO THE CROWN IN RIGHT OF THE COMMONWEALTH AND THE CROWN IN RIGHT OF THE STATES AND TERRITORIES WITHOUT EXCEPTION. 77

APPENDIX 1..... 78

Introduction

Job Watch Inc (**JobWatch**) welcomes this opportunity to make a submission on the Consolidation of Commonwealth Anti-Discrimination Laws.

JobWatch strongly agrees that there is a need to simplify the system, clarify and strengthen the protection ns where appropriate, reduce inconsistencies between the existing pieces of anti-discrimination legislation and provide more certainty about equal opportunity rights and responsibilities.

We have formulated our submission in response to the questions raised in the Attorney-General's Discussion Paper dated September 2011. We have used case studies to highlight particular issues where we have considered it appropriate to do so. The case studies are those of actual but de-identified callers to JobWatch's telephone information service and/or legal practice.

JobWatch's comments on the proposed consolidation project are made both from the perspective of the legal practitioners who represent clients in equal opportunity matters and from the perspective of the callers to our telephone information service, who are often unrepresented in these matters.

About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by the Victorian Government to do the following:

- Provide information and referral to Victorian workers via a free and confidential telephone information service;
- Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;
- Represent and advise disadvantaged workers; and
- Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, we have maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected over **148,000** records (we start a new record for each new caller or for callers who have rung us before but who are calling about a new matter. One record may canvass multiple workplace problems, including, for example, discrimination, sexual harassment, bullying and underpayment of wages). Our database allows us

to report on our callers' experiences, including what workplace problems they face and what remedies, if any, they may have available at any given time.

Summary of our recommendations

1. There should be a unified test for discrimination that encapsulates the two concepts of direct and indirect discrimination

   Alternatively, if there are to be separate provisions for direct and indirect discrimination, the 'detriment test' used in the Equal Opportunity Act 2010 (Victoria) ("EO Act")should be adopted.

2. The burden of proof should fall on the Respondent after the Complainant alleges unlawful discrimination; ie, the protected attribute should be presumed to be the reason for the discriminatory conduct unless the Respondent proves otherwise.

3. Special measures should cover all protected attributes and should be defined in a separate provision. The objective should be to promote and achieve substantive equality across all protected attributes.

4. The duty to accommodate or make reasonable adjustments should be clarified by providing a separate, stand alone provision.

5. The duty to accommodate or make reasonable adjustments should be extended to all protected attributes, but at the very least to the attributes of age, family/carers' responsibilities and pregnancy.

6. Positive duties to eliminate discrimination and harassment should be imposed on the public sector in order to address systemic discrimination and to promote substantive equality.

7. The current prohibitions on attribute-based harassment should be extended to all protected attributes and protected areas of public life.

8. The term 'sexual orientation' should be the preferred term in the Bill.

9. The term 'gender identity' should be the preferred term in the Bill.

10. The definition of gender identity should be modelled on the definition in section 4 of the EO Act.

11. The Bill should extend coverage of associates to all protected attributes in all protected areas of public life.

12. The current protections against discrimination on the basis of the attributes listed in the Australian Human Rights Commission Act ("*AHRC Act*") should be strengthened by extending them to all areas of public activity (beyond employment) and making them fully enforceable.

13. New protected attributes should be created, including "homelessness" and "survivors of domestic violence".

14. The Bill should protect against intersectional discrimination so that people who experience discrimination on multiple grounds or because of two or more aspects of their identity, are protected.
15. Voluntary workers should be protected from unlawful discrimination and sexual harassment.
16. There should be a separate provision to prohibit people for asking questions requesting information regarding a criminal record which could be used to form the basis of discrimination.
17. There should not be any blanket exceptions to or exemptions from the proposed Commonwealth Equality Act.
18 A general limitations clause should not be adopted.
19. An 'inherent requirements' exception should be preferred over a 'genuine occupational qualification' exception.
20. The Bill should diverge from the system of exceptions contained within the current Commonwealth anti-discrimination acts and instead include an 'inherent requirements of the job' exemption which may be granted by the Human Rights Commission (*"the Commission"*) on application by the entity seeking the exemption.
21. If a specific religious exception is included in the Bill, its application should be limited to positions in religious bodies and schools which genuinely require adherence and commitment to the particular beliefs and tenets of the religion in order to carry out the inherent requirements of the position.
22. Exemptions should only be temporary.
23. The current maximum life of an exemption, being 5 years, should be reduced to a maximum of 2 years so as to ensure that temporary exemptions are regularly reviewed without the need to appeal to the Administrative Appeals Tribunal.
24. The Bill should include a clause specifically stating that the Commission must exercise its power to grant temporary exemptions in accordance with the objects of the Bill.
25. There should be a single discreet special measures provision included in the Bill.
26. It should be mandatory that an individual undertake an equal opportunity training course as approved by or conducted by the Commission before being appointed as a director of a company that is or will be an employer.
27. The Commission should offer a variety of alternative/appropriate dispute resolution mechanisms including Mediation and Early Neutral Evaluation.
28. The Conciliator should be empowered to issue a conciliation certificate stating, where possible, whether or not the Complaint has a reasonable prospect of success.

29. The Commission should be empowered to issue a "legal costs immunity certificate" in test case/public interest matters.

30. There should be mechanisms in place whereby Complainants can enforce breached terms of settlement agreements against Respondents without the need to sue for breach of contract.

31. Representative actions should be permitted in the Federal Court and the Federal Magistrates Court.

32. Respondents should bear their own costs in unlawful discrimination proceedings except in limited circumstances such as where the complaint is found to be frivolous, vexatious or lacking in substance. Where a Complainant is successful, costs should follow the event.

33. The Bill should provide the Court with guidance as to the range of possible orders it is empowered to make.

34. Orders for compensation need to be high enough to discourage discrimination and to make it financially viable to litigate a complaint.

35. Courts should be empowered to order penalties against offending Respondents.

36. The Commission or other independent statutory body should be able to prosecute offending Respondents.

37. In order to provide a truly effective and meaningful compliance regime, the Commission should be given enforceable regulatory and compliance powers.

38. The Bill should contain provisions (mirroring those in the Fair Work Act 2009 (Cth)) ("*FW Act*") that deal with multiple actions.

39. Employee protections against unlawful discrimination in the Fair Work Act 2009 (Cth) should not be reduced by the Bill.

40. Commonwealth anti-discrimination laws should not cover the field.

41. Complainants should be allowed to change jurisdictions from State to Commonwealth in certain circumstances.

42. The Bill should not provide any exceptions or exemptions for acts done in direct compliance with State and Territory laws.

43. Commonwealth anti-discrimination laws should apply to the Crown in right of the Commonwealth and the Crown in right of the States and Territories without exception.

Question 1:

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

Unified test for discrimination

JobWatch's preferred view is that in principle, there should be a unified test for discrimination, as argued by the Discrimination Law Experts' Group in its submission dated 13 December 2011. Any unified definition of discrimination must encapsulate the two concepts of direct and indirect discrimination, that is, both the 'detriment test' and the test of reasonable requirement, condition or practice.

Definition of direct discrimination

In the alternative, if there are to be separate provisions for direct and indirect discrimination, JobWatch believes that the comparator test currently used for direct discrimination should be abolished.

There are significant difficulties and complexities associated with the comparator test (which is used in the *Age Discrimination Act 2004* (AD Act), (*Disability Discrimination Act 1992* (DD Act) and *Sex Discrimination Act 1984* (SD Act), which requires a comparison to be made between the person with a protected attribute and a real or hypothetical person without that attribute. This necessitates identification and construction of a relevant comparator, which can produce uncertain and unpredictable outcomes. The difficulty for Complainants in using this test to prove unlawful discrimination was highlighted in the High Court decision of *Purvis v NSW (Department of Education and Training)* (Purvis)[2].

JobWatch does not support the alternative approach used in the *Racial Discrimination Act 1975* (Commonwealth) (RD Act), which requires the Complainant to show that the treatment suffered by the Complainant has nullified or impaired their recognition, enjoyment or exercise of a human right or fundamental freedom in the political, economic, social, cultural/other field of public life[3]. This test includes the unnecessary additional element of having to prove that the treatment nullified or limited the Complainant's enjoyment of a human right, which is burdensome and complex.

JobWatch submits that the test for direct discrimination should be modeled on the 'detriment test' used in the EO Act. Under this test, direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute[4]. That is, the unfavourable treatment must cause the complainant to experience

[2] *Purvis v NSW* [2003] HCA 62
[3] Section 9(1), *Racial Discrimination Act* (Commonwealth) 1975
[4] Section 8, *Equal Opportunity Act* 2010 (Victoria)

disadvantage or detriment and the treatment must have been caused by the protected attribute. This approach does not require the identification of a comparator. It makes compliance easier and it is simpler and more concise than the comparator test.

Definition of indirect discrimination:

JobWatch believes that the test for indirect discrimination should be modelled on the EO Act as this approach is clearer, simpler and more consistent than the current approach.

Under this test, the person (Respondent) who imposes or proposes to impose the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable.[5] The reason for this is that imposing the reasonableness requirement on the Complainant is difficult and unnecessarily stringent as it involves the examination of what has been described as 'apparently neutral requirements' used to establish whether employees with a particular attribute are unfairly disadvantaged.[6] In many cases, any evidence that may assist a Complainant exists only in the mind of the Respondent. This approach does not align with the objectives of Australian anti-discrimination law and of the principles surrounding the issue of indirect discrimination[7]. Effectively such a provision is designed and supposed to attack "structural or systemic inequality'[and deal with] disadvantage which results from the way practices may be structured..[and] with which some groups cannot conform".[8]

Additionally, the test should also give greater weight to the 'reasonableness' of the Complainant's proposal as an alternative to the discriminatory requirement, condition or practice.[9]

The test should not include the additional element (as is the case in other Australian Acts such as the DD Act and the RD Act) that the Complainant does not, or cannot comply with the requirement, condition or practice. This requirement is stringent and unnecessary.

Further, in order to assist in interpretation and provide clarity, additional guidance should be given as to when a condition, requirement or practice will be reasonable by providing

[5] For example, section 9(2), *Equal Opportunity Act* 2010 (Victoria)
[6] Sutherland, Carolyn, *Applying Victoria v Schou: The approach of VCAT and the Federal Magistrates Court* (2007) 29 ABR 45
[7] A similar point was made in the Submission of JobWatch to the Victorian Attorney-General's Independent review of the Equal Opportunity Act 1995 (Vic) (p.9)
[8] Adams, K Lee, *Defining Away Discrimination* (2006) 19 AJLL 263
[9] This point was made in the Submission of JobWatch to the Victorian Attorney-General's Independent review of the Equal Opportunity Act 1995 (Vic) (p.9)

an indicative list of factors to be considered in assessing reasonableness, mirroring the provisions in the EO Act[10] and the SD Act[11].

Recommendation 1:

There should be a unified test for discrimination that encapsulates the two concepts of direct and indirect discrimination.

Alternatively, if there are to be separate provisions for direct and indirect discrimination, the 'detriment test' used in the Equal Opportunity Act 2010 (Victoria) should be adopted.

Question 2:

How should the burden of proving discrimination be allocated?

JobWatch believes that the current approach of requiring the Complainant to bear the onus of proving matters relating to the Respondent's state of mind is unreasonable and problematic. In most cases, only the Respondent will possess this evidence. This can be difficult particularly in complaints relating to sexual harassment, systemic discrimination, vicarious liability or a complaint where the Respondent's financial and legal resources greatly exceed those of the Complainant.[12] Furthermore, the High Court ruling of *Purvis* has raised the burden of proof in cases relating to direct discrimination to almost insurmountable heights. The above factors pose significant barriers to Complainants filing or continuing on with their claims.[13]

A solution to this problem would be to reverse the onus of proof in discrimination matters so that the Respondent must prove that its conduct did not constitute unlawful discrimination.

JobWatch believes that the same approach to burden of proof for direct discrimination should be adopted as the General Protections provisions of the FW Act[14] in that once the Complainant alleges that a person took action for a particular reason, this is presumed to be the reason for the action unless the Respondent proves otherwise[15]. That is, the Respondent would be required to demonstrate that the reason for their conduct was not

[10] Section 9(3), *Equal Opportunity Act* 2010 (Victoria)
[11] Section 7B, *Sex Discrimination Act* 1984 (Commonwealth)
[12] This point was made in the Submission of JobWatch to the Australian Human Rights Commission on the protection from discrimination on the basis of sexual orientation and sex and/or gender identity, August 2010, p 14
[13] This point was made in the Submission of JobWatch to the Australian Human Rights Commission on the protection from discrimination on the basis of sexual orientation and sex and/or gender identity, August 2010, p 14
[14] Section 361(1), *Fair Work Act* 2009
[15] Section 361, *Fair Work Act* 2009

discriminatory once the Complainant made out the other elements of direct or indirect discrimination. In many cases, this model would make it easier for a Complainant to succeed in a discrimination complaint.

Additionally JobWatch submits that the test for discrimination should mirror the 'multiple reasons' test in the FW Act (in regards to the General Protections provisions)[16]. Under this test, a person is deemed to take action for a particular reason if the reasons for the action *include* that reason. To be successful, the protected attribute would not need to be the dominant or even a substantial reason for the unfavourable treatment; it would be sufficient if the protected attribute was an 'operative factor' in the decision-maker's mind. JobWatch believes this is the best way of consolidating the multiple reasons test in each Act[17] as this test is clearer and more succinct and it would additionally further the objective of eliminating, as far as possible, unlawful discrimination.

As a majority of unlawful discrimination complaints are in the area of employment, modelling the provision on the approach used in the FW Act is appropriate. It would harmonise the burden of proof for discrimination in the employment area at a Commonwealth level and allow jurisprudence in relation to both Acts to develop simultaneously.

Recommendation 2:

The burden of proof should fall on the Respondent after the Complainant alleges unlawful discrimination; ie, the protected attribute should be presumed to be the reason for the discriminatory conduct unless the Respondent proves otherwise.

Question 3:

Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

JobWatch believes that special measures are necessary to achieve and promote substantive equality for disadvantaged and vulnerable groups in the community. The concept of special measures has been endorsed at an international level as an effective

[16] Section 360, *Fair Work Act* 2009

[17] For example, section, *Race Discrimination Act* 1975, section 8, *Sex Discrimination Act* 1984, section 16, *Age Discrimination Act* 2004

way to achieve substantive equality[18]. Currently, Federal and State anti-discrimination laws provide inconsistent approaches to special measures and they fail to adequately address all forms of discrimination.

JobWatch submits that there should be a single special measures provision covering all protected attributes. This would provide a comprehensive, consistent approach to special measures at a Federal level.

The relevant provision should be modelled on section 12 of the EO Act, which provides a comprehensive and clear framework for special measures. This provision is now arguably broader and has been given greater emphasis in order to allow discrimination to be engaged in as a means to progressively realise equality. For example, in the area of employment, employers are able to carry out initiatives to increase diversity on their boards, senior management or the workforce.

The definition of special measures in the EO Act should be adopted, which states that a person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute[19]. The provision should provide detailed examples and set out criteria which the special condition must meet, for example, that the special measure must be justified because the members of the group have a particular need for advancement or assistance[20]. The person who undertakes the special measure should have the burden of proving that the measure is a special measure in accordance with the provision.

Additionally, a person, for example an employer, who wishes to rely on a special measure, should be required to apply to the Commission (or other relevant tribunal) by way of filing a formal document before it can take the special measure. In applying to take the special measure, the person should explain why the group requires the special measure, the nature of the group's disadvantage and how the special measure would assist to achieve substantive equality. This additional requirement may prevent abuse of the provision and it may assist the Commission where a complaint is filed in relation to a particular special measure.

In considering whether to grant a special measure, the relevant tribunal/Commission should have to consider the objectives of the Consolidation Bill ("*the Bill")* (including the objective to eliminate discrimination as far as possible), the public interest and any other

[18] For example, Article 4 of the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW)
[19] Section 12(1), *Equal Opportunity Act* 2010 (Victoria)
[20] Section 12 (3)(d), *Equal Opportunity Act* 2010 (Victoria)

relevant considerations, including whether the special measure is necessary. Any special measure granted should only be temporary and should only be authorised so long as the objective of substantive equality has not been achieved.

Recommendation 3:

Special measures should cover all protected attributes and should be defined in a separate provision. The objective should be to promote and achieve substantive equality across all protected attributes.

Question 4:

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

Clarification of the DD Act

JobWatch believes that the requirement to make reasonable adjustments in the DD Act should be clarified. We recommend that the approach taken in the EO Act (for example section 20, which relates to reasonable adjustments in the area of employment) be adopted. This would entail introducing a separate, standalone provision containing an explicit, positive duty to make reasonable adjustments, a contravention of which would allow a complaint to be made to the Commission.

In order to assist in interpretation and understanding of the provision, additional guidance should be given by including a non-exhaustive list of factors to be taken into account in determining whether an adjustment is reasonable. For example, the EO Act states that all relevant facts and circumstances must be considered, including the person's circumstances, the nature of the impairment, the nature of the adjustment required to accommodate the impairment and the employer's financial circumstances.[21]

The above approach would provide greater protection and clarity than the current provisions under the DDA, which do not impose positive duties in a separate provision but rather contain the duty to make reasonable adjustments in the tests for direct and indirect discrimination[22].

[21] Section 20 (3), *Equal Opportunity Act* 2010 (Victoria)
[22] Section 5(2) and section 6(2), *Disability Discrimination Act* (Cth)1992

Application to other Attributes

JobWatch submits that the duty to "accommodate" or make "reasonable adjustments" should be extended to **all** protected attributes, so that, like in Canada, anyone with a protected attribute would be entitled to have their needs reasonably accommodated.

At the very least, we believe that the requirement to accommodate / provide reasonable adjustments should be extended to the attributes of age, pregnancy and family and carers' responsibilities.

In the employment context, we are of the view that extending the reasonable adjustments obligations to other attributes (beyond disability) would have the effect of increasing workforce participation as employees would be better able to balance their work with their respective needs and responsibilities.

As stated above, JobWatch is of the view that section 20 of the EO Act provides a good model to adopt for the reasonable adjustments duty. This section requires employers to make "reasonable adjustments" for employees (including people to whom employment has been offered) with a disability.

Sections 17 and 19 of the EO Act also provide good models for draft sections on the obligation to accommodate a protected attribute. These sections require employers to reasonably accommodate the parental or carer needs of their employees (including people to whom employment has been offered). Examples are given of how an employer may be able to accommodate an employee's responsibilities as a parent or carer by allowing the employee to work from home on a Wednesday morning or have a later start time on a Wednesday or, if the employee works on a part-time basis, by rescheduling a regular staff meeting so that the employee can attend[23]. The sections also provide that, for the purpose of determining whether an employer has unreasonably refused to accommodate those responsibilities, all relevant facts and circumstances should be considered, including the nature of the employee's role, the nature of the arrangements required to accommodate those responsibilities and the financial circumstances of the employer.

In respect to employees with family responsibilities who require flexible work arrangements, JobWatch believes that the right of employees to request a change to their work arrangements in the FW Act[24] does not go far enough to provide adequate protection. The protection is limited because it only extends to parents or carers of children under school age or children under 18 years old with a disability, it only applies to

[23] Section 19(1), *Equal Opportunity Act* 2010 (Victoria)
[24] Section 65, *Fair Work Act* 2009 (Part 2.2 – National Employment Standards)

employees with a minimum of 12 months' continuous service and it is not a civil penalty provision, meaning that it is not enforceable.

In relation to the attribute of age, JobWatch is of the firm view that older workers, in particular, need to have their needs accommodated in the workplace. Some of the following points have been extracted from JobWatch's contribution to the Submissions prepared by the Federation of Community Legal Centres' Elder Law Working Group in response to the Inquiry into the Opportunities for Participation of Victorian Seniors (dated 13 September 2011):

Reasonable adjustments – older employees

Age discrimination is a growing problem in the Victorian workforce. Over the last three financial years, from 1 July 2008 to 30 June 2011, approximately 28% of callers to the JobWatch Telephone Information Service were people aged 45 and over.

JobWatch regularly assists older employees who have experienced discrimination in employment, including by being denied opportunities for promotion and training, being pressured to retire early or convert to part-time or casual employment, and experiencing underlying negative attitudes and stereotypes.

Case study – "Magda"

Magda is a retail assistant in her sixties. She has asked her employer for time off work to see her doctor for a heart health assessment, to discuss her risk of heart disease. Her boss refuses to give her sick leave for this, saying that she is not unfit for work because of illness or injury.

JobWatch's position is that older employees would greatly benefit from the right to request that their employers accommodate/make reasonable adjustments for their particular needs. This would enable older employees to take time off work for the purposes of necessary health checks or to request flexible working arrangements in the years leading up to retirement, if they do not want to stop working but nevertheless need to make some changes to their working arrangements.

By imposing an obligation on employers to reasonably accommodate the needs of older workers, older workers could, for example, reduce their working hours to pursue personal pursuits or take time off work to attend medical appointments,

which is often an increasing necessity for older workers as they face the challenge of the inevitable health issues associated with old age.

JobWatch believes that these changes would be beneficial for employers (who would retain valued and experienced employees), older workers (who could continue to be gainfully and productively employed, benefiting their health, wellbeing and financial position), and the wider community.

Recommendation 4:

The duty to accommodate or make reasonable adjustments should be clarified by providing a separate, stand alone provision.

Recommendation 5:

The duty to accommodate or make reasonable adjustments should be extended to all protected attributes, but at the very least to the attributes of age, family/carers' responsibilities and pregnancy.

Question 5:

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

Anti-discrimination laws at the Commonwealth level currently only impose negative duties not to discriminate in the protected areas of public life. JobWatch believes that this does not adequately protect people from unlawful discrimination because in order to enforce a contravention of this duty, a person must have been the subject of unlawful discrimination. It is submitted that a more effective and proactive way to address systemic discrimination and to promote substantive equality would be to introduce positive duties on public and private sector organisations, to eliminate discrimination and promote equality.

Ideally, JobWatch believes that, at least in the area of employment, the positive duty to eliminate discrimination and harassment should be extended to the private sector.

JobWatch proposes that Part 3 of the EO Act could be adopted in this regard. Section 15 of the EO Act places a duty on employers and duty holders under the Act to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible. Specific factors are identified in determining whether a particular measure is reasonable and proportionate including the size of the employer's business, the nature and circumstances of the business and the practicability and cost of

the measures. These duties may form the basis on which the Victorian Equal Opportunity and Human Rights Commission investigates possible cases of systemic discrimination.

Similarly, JobWatch believes that such a provision could be modelled on the public sector equality duty in the United Kingdom's *Equality Act 2010*[25] (Equality Act), the general aim of which is to integrate consideration of equality and good relations into the day-to-day business of public authorities.[26] Under section 149(1) of the Equality Act, put simply, a public authority must, in the exercise of its functions, have due regard to the need to eliminate discrimination, harassment and victimisation, advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and foster good relations between those persons.

These positive duties would similarly apply to government authorities such as government departments, education and transport bodies, police and local authorities. JobWatch believes that public agencies should lead by example and additionally have adequate resources to ensure compliance.

These duties would require effective monitoring and enforcement. The Equality and Human Rights Commission (UK) has published guidance to assist English public bodies to understand how they can meet the requirements of the Equality Act. Similarly, the Commission could provide assistance and information to duty holders, for example by providing education programs and assistance with compliance.

The Equality and Human Rights Commission (UK) is also armed with the responsibility of enforcing the equality duty by encouraging voluntary compliance and, where necessary, conducting an investigation or initiating court action. Similarly, the Commission should also be given the power to enforce compliance by initiating legal action in the Federal Court or the Federal Magistrates' Court in respect to non compliance. Similar regulatory regimes currently exist in Australia and could be used as a model.[27]

Recommendation 6:

Positive duties to eliminate discrimination and harassment should be imposed on the public sector in order to address systemic discrimination and to promote substantive equality.

[25] Section 149(7), *Equality Act* 2010 (UK)
[26] Equality and Human Rights Commission, Vol. 1 of 5, *Equality Act 2010 guidance for English public bodies*, January 2011, p6
[27] For example the Fair Work Ombudsman

Question 6:
Should the prohibition against harassment cover all protected attributes? If so, how would this most clearly be expressed?

JobWatch notes that none of the existing Commonwealth anti-discrimination laws explicitly prohibit all attribute-based harassment across all areas of public life. Harassment is only specifically prohibited on the basis of disability under the DD Act[28], which prohibits harassment in the areas of employment, education and the provision of goods and services. Sexual harassment is also prohibited under the SD Act in the areas of employment, educational institutions, provision of goods and services, facilities and accommodation, dealing with land, clubs and the administration of Commonwealth laws and programs[29]. At the State/Territory level, few anti-discrimination laws prohibit harassment[30] and not all the protected attributes are covered by the legislation.

JobWatch believes that the current prohibitions on attribute-based harassment are inadequate. Protection should be extended to all protected attributes and all protected areas of activity.

JobWatch proposes that the Bill should explicitly deem harassment to be a form of discrimination, consistent with the approach that has been adopted in Europe. The prohibition on harassment should cover all protected attributes in all protected areas of public life. This protection should also extend to volunteers, which is now the case under the EO Act, which protects volunteers from sexual harassment. This approach would provide consistency and it would clarify obligations and coverage with respect to harassment.

Harassment – Age

JobWatch is particularly concerned with harassment on the basis of age in the employment context, which is a major concern for many older employees and is a significant impediment to older employees remaining in the workforce. This can include

[28] Sections 35-37, *Disability Discrimination Act* 1992
[29] Section 28A, *Sex Discrimination Act* 1984
[30] For example s.17(1) of the *Anti-Discrimination Act* (Tasmania) 1998 prohibits harassment on the basis of pregnancy, breastfeeding, gender, parental status, family responsibilities, marital status and relationship status (and sexual harassment) and s.49A-9C of the *Equal Opportunity Act* 1984 (WA) prohibits racially based harassment in the area of employment, education and accommodation.

adverse treatment such as being ignored, isolated and bullied, in some cases in an effort to force them out of the workplace.

The following case studies illustrate types of harassment commonly encountered by older Victorians in the workplace. For a detailed commentary and further case studies, we refer the Committee to the 2009 JobWatch report, "*Workplace Conditions and Practices: Barriers to Older Persons' Participation"* (available on JobWatch website: www.jobwatch.org.au) and the Australian Human Rights Commission's 2010 report, "*Age Discrimination: Exposing the Hidden Barrier for Mature Age Workers"* (available on the Commissions' website: www.hreoc.org.au) .

Case study: "Noel "

Noel is 65. He has a permanent full-time job in the manufacturing industry. His supervisor, a younger man, recently told him they're bringing in a new computer system at work and, given Noel's age, he would probably struggle with it. The supervisor told Noel he thought it was time for Noel to retire. Noel felt insulted and complained in writing to a more senior manager, who reassured him that he would not be forced to retire. Noel's supervisor then began to micro-manage Noel, harassing him and bullying him in what Noel felt was an effort to push him out of the workplace. Noel contacted JobWatch and subsequently lodged an age discrimination and victimisation complaint with the Victorian Equal Opportunity and Human Rights Commission (VEOHRC). He went on stress leave for two months. When he returned to work, a few weeks before his scheduled conciliation date, his supervisor effectively asked him, "Who gave you permission to come back?" He was stood down pending the outcome of the VEOHRC conciliation. The matter did not resolve at conciliation. Noel's claim has been referred to the Victorian Civil and Administrative Tribunal (VCAT).

Case study: "George"

George is in his 50s and works as a car detailer. He and his older colleagues are being harassed by a much younger car mechanic who works with them. The younger man frequently makes derogatory and ageist comments, which are impacting on George's health.

Recommendation 7:

The current prohibitions on attribute-based harassment should be extended to all protected attributes and protected areas of public life.

Question 7:

How should sexual orientation and gender identity be defined?

Job Watch fully supports the introduction of sexual orientation and gender identity as protected attributes in the Bill.

This part of JobWatch's submission is based on our submission to the Australian Human Rights Commission on the protection from discrimination on the basis of sexual orientation and sex and/or gender identity, dated August 2010 (available on the Commissions' website: www.hreoc.gov.au).

Existing Legislation:

Currently, State and Territory anti-discrimination legislation provides some protection from discrimination on the basis of actual or assumed sexual orientation, sex and/or gender identity and lawful sexual activity. However there are numerous inconsistencies between the various Acts, which have the effect of protecting some attributes in certain States but not others.

For example, in New South Wales the *Anti-Discrimination Act 1977 (NSW)* protects people from being discriminated against on the basis of 'homosexuality', where 'homosexual' is defined to mean a 'male or female homosexual'. This means that an employee whose employment is terminated because they are bisexual may not have express access to anti-discrimination protection.

Case Study – "Belinda"

Belinda was employed at a confectionary company on a full-time fixed term basis. After working there for a little less than three months, she met with the Manager and he gave her a very positive review. In the following week, she decided to disclose to some co-workers that she was bisexual. A week later, she was called in to an impromptu meeting with the General Manager. During the meeting, the General Manager informed her that she was being dismissed, but was unable to give a reason. The separation certificate stated that the termination was due to Belinda being within the probationary period of the ostensible fixed term contract, despite having no performance issues at all.

If Belinda was a Victorian employee then she could make a complaint under the EO Act as this protects Victorians from being discriminated against on the basis of sexual orientation, which includes a person who is heterosexual, homosexual, lesbian or bisexual.

However if Belinda was an employee in New South Wales, the *Anti-Discrimination Act 1977 (NSW)* would only protect her if the less favourable treatment was on the basis of her being a 'female homosexual'. Arguably, this would be more difficult for her to prove[31].

Federal legislation covering all sexual orientations would ensure that a bisexual person who is treated less favourably due to their bisexuality would have express protection from this treatment, regardless of which State or Territory this conduct occurred in.[32]

JobWatch believes that Federal legislation providing protection against discrimination on the basis of sexual orientation and gender identity would provide consistency and it would give additional protection where the existing protections fail to operate[33].

In the area of employment, the FW Act prohibits discrimination on the grounds of, among other things, 'sexual preference'. This term is not defined within the FW Act. There is no protection against discrimination on the ground of gender identity[34].

Sexual Orientation

JobWatch submits that the preferred term to use in the Bill is 'sexual orientation'. This term is preferred to other terms such as 'LGBTI' which is broadly understood to describe people who identify as lesbian, gay, bisexual, trans or intersex. Although there are benefits to specifically listing all specific groups, there is a danger that certain groups will be inadvertently excluded and that such a term would need modification to cover emerging groups[35].

Additionally JobWatch believes that the term 'sexual orientation' is preferable to a more general term such as 'sexuality' or 'sexual preference' which may focus too heavily on a 'choice' aspect which can be misleading as to the origins of a person's sexual orientation and/ or be unnecessary.[36]

---

[31] This point was made in JobWatch's Submission to the Australian Human Rights Commission on the protection from discrimination on the basis of sexual orientation and sex and/or gender identity, August 2010, p7-8

[32] This case study and comments were included in JobWatch's Submission to the Australian Human Rights Commission on the protection from discrimination on the basis of sexual orientation and sex and/or gender identity, August 2010, p7-8

[33] This point was made in JobWatch's Submission to the Australian Human Rights Commission on the protection from discrimination on the basis of sexual orientation and sex and/or gender identity, August 2010, p4-5

[34] Ibid

[35] This point was made in JobWatch's Submission to the Australian Human Rights Commission on the protection from discrimination on the basis of sexual orientation and sex and/or gender identity, August 2010, p12

[36] This point was made in JobWatch's Submission to the Australian Human Rights Commission on the protection from discrimination on the basis of sexual orientation and sex and/or gender identity, August 2010, p12

JobWatch believes that it is preferable to use a conceptual definition (as opposed to referring to 'labels') because such a definition would cover the broad notion of a person's sexual attraction to, and (lawful) sexual activity with, people of a particular gender. Additionally such a definition would include situations that fall outside the scope of those terms.

Gender Identity

JobWatch submits that 'gender identity' is the preferred term to use in the Bill in relation to discrimination against individuals based on their experience of gender.

The definition of 'gender identity' should be modelled on the definition used in the EO Act.

Section 4(1) of the EO Act defines 'gender identity' as:

(a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such):

(i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or

(ii) by living, or seeking to live, as a member of the other sex; or

(b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such):

(i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or

(ii) by living, or seeking to live, as a member of that sex;[37]

Case Study – "Nicole"

Nicole has worked as a professional Communications Officer for over 11 years in a medium sized company. She has had a good work history, having always performed well. She had a sex change operation this year and since returning to work she has been consistently discriminated against, by way of abusive remarks and other unfavourable treatment. She has mentioned this to management, however they have only responded by reminding her that her employment may be terminated for poor performance.

As Nicole is an employee in Victoria, she would be protected by the EO Act as 'gender identity' is a protected attribute and this includes people who assume characteristics of the other sex, including via medical intervention. However, Nicole would not be able to make an application under the General Protections Provisions concerning discrimination in the FW ACT (see section 351) as they do not extend to gender identity.

[37] Section 4(1) of the *Equal Opportunity Act* 2010 (Vic)

In Western Australian, Nicole would need to prove that the discriminatory conduct was because of her 'gender history'. (See sections 4(1) and 35AA of the Equal Opportunity Act 1984 (WA). The protection in WA is, we think, much narrower than the Victorian protection.[38])

Recommendation 8:

The term 'sexual orientation' should be the preferred term in the Bill.

Recommendation 9:

The term 'gender identity' should be the preferred term in the Bill.

Recommendation 10:

The definition of gender identity should be modelled on the definition in section 4 of the EO Act.

Question 8:

How should discrimination against a person based on the attribute of an associate be protected?

JobWatch considers that the existing protection at Federal and State/Territory level for people who are discriminated against because they are an associate of a person who has a protected attribute is inadequate. Although there is some protection at the Federal level (under the DD Act and the RD Act) and at State/Territory level (except in South Australia and Western Australia), these provisions are not consistent and some protected attributes are not covered.

JobWatch submits that the Bill should extend coverage of associates to all protected attributes in order to provide clarity and uniformity.

Recommendation 11:

The Bill should extend coverage of associates to all protected attributes in all protected areas of public life.

Question 9:

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

[38] This case study and comments were included in JobWatch's Submission to the Australian Human Rights Commission on the protection from discrimination on the basis of sexual orientation and sex and/or gender identity p.13

In order to reduce inconsistent protection between jurisdictions, JobWatch believes that all protected attributes under State and Territory anti-discrimination laws, the FW Act and the AHRC Act should be protected under Federal anti-discrimination legislation. JobWatch believes that the Bill should contain a comprehensive list of protected attributes.

Furthermore JobWatch believes that the regulatory gap that exists with regard to the ILO discrimination complaints stream (under the AHRC Act) must be addressed. Currently the Commission's function is to conciliate such complaints in the employment area, however a Complainant is not able to take the matter to a Federal court if the matter is unable to be resolved at conciliation. Rather, the Commission must report the matter to the Attorney-General if it believes that discrimination has occurred.

The attributes covered by the ILO discrimination complaints stream include criminal record, religion, political opinion, industrial activity, nationality and medical record. These protections are limited to the area of employment. JobWatch submits that the Bill should extend protection to these attributes to make them enforceable across all areas of public life.

Irrelevant Criminal Record

This aspect of JobWatch's submission is based on the Submission of JobWatch to the Victorian Attorney-General's *"Independent review of the Equal Opportunity Act 1995 (Vic)"* (available on the Federation of Community Legal Centres Victoria website: www.fclc.org.au) and the Submission of JobWatch and Fitzroy Community Legal Service Inc entitled *"Criminal Records in Victoria: Proposals for Reform"*[39], (available at the Commissions' website: www.hreoc.gov.au).

JobWatch reiterates its previous position regarding protection from discrimination on the basis of irrelevant criminal records due to the potential for individuals with a criminal record to be treated unfairly and for the criminal justice system to be undermined.

We are particularly concerned for Complainants in Victoria as the EO Act does not provide protection for this attribute. This means that individuals who wish to lodge a complaint of irrelevant criminal record discrimination can only do so under the AHRC Act, which gives limited protection as it only empowers the Commission to investigate and conciliate matters in the area of employment and, beyond this, it does not allow any Court or Tribunal to hear and determine **any** discrimination matters of this kind.

[39] JobWatch & Fitzroy Legal Service Inc, *Criminal Records in Victoria: Proposals for Reform* (2005)

Other State and Territory jurisdictions have addressed the gap in protection under the AHRC Act. In both the Northern Territory and Tasmania, there exist protections against discrimination on the basis of 'irrelevant criminal record'. Subject to limited exceptions, this prohibition extends to all the areas covered by the anti-discrimination legislation of these jurisdictions (including but not limited to, employment, accommodation, education, provision of goods and services and activities of clubs). In these jurisdictions, substantive remedies are available.

In the Australian Capital Territory, the *Discrimination Act 1991* (ACT) protects people from discrimination on the basis of a 'spent conviction within the meaning of the Spent Convictions Act 2000'[40]. This applies across the areas of work, education, access to premises, accommodation, clubs and in the provision of goods, services and facilities.

In Western Australia, the *Spent Convictions Act 1988* (WA) makes it unlawful[41] to discriminate against a person on the basis of a 'spent conviction', in both employment and employment-related areas.

JobWatch supports the inclusion of a new ground of discrimination in all protected areas of public activity, on the basis of irrelevant criminal record (as well as the insertion of this ground in all areas of activity presently covered by the EO Act).[42]

JobWatch further submits that, in an employment context, any statutory prohibition should extend to job applicants and contract workers, as well as employees.

It is also proposed that separate provision be made to prohibit people (not only employers, but all those who engage in areas of activity which are presently covered by the Act, such as service providers) from asking questions or requesting information regarding a criminal record which could then be used to form the basis of discrimination. Such a prohibition could be subject to strict limitations, including the following:

a. An exception where the request for information is made with a statutory authority;[43] and

b. An exception where the request is reasonable, having regard to all the surrounding circumstances.

---

[40] S.7(1)
[41] Part 3 Division 3.
[42] See *Criminal Records in Victoria: Proposals for Reform*, Report by Fitzroy CLC and Job Watch Inc, 2005
[43] It is likely that such an exception would, in any event, be applicable as a general exception to any act of discrimination, not just to this prohibition. In practical terms, such an exception would, for example, allow people to seek criminal record information pursuant to any future Victorian Working with Children legislation or in relation to particular professions or occupations for which disclosure of a criminal record must be made.

This latter exception, if implemented, would need to be carefully and narrowly drafted in order to achieve the dual aims of appropriately balancing the rights of former offenders and those of the broader community and, at the same time, eliminating, as far as possible, discrimination on the basis of irrelevant criminal record.

Finally, JobWatch submits that any statutory prohibition against discrimination on the basis of irrelevant criminal record should also provide for a requirement that an individual be given an opportunity to explain their criminal record before a decision is made which might otherwise result in direct or indirect discrimination.[44] Such a requirement could be framed in broadly similar terms to section 387 of the FW Act, which requires Fair Work Australia, in determining whether a termination of employment was harsh, unjust or unreasonable, to consider whether the employee was given an opportunity to respond to any reason for the termination which related to capacity or conduct. In the view of JobWatch it is likely that such a provision would assist in eliminating discrimination on this ground.

Case study – "Renato"

Renato was employed for seven months as a Service Technician by a medium sized company. His duties included installing and maintaining automation devices in high rise buildings. At no stage was he asked about his criminal history by his employer; nor was he asked to consent to a police check. There were never any issues raised about his work performance. Unexpectedly, he was called to meet with his boss, who said he had been informed by a third party that Renato had a criminal record and that consequently Renato should resign.

The boss did not ask for any details about the criminal record and Renato was not given any opportunity to discuss or explain his record or his options with the employer. The boss indicated that any record at all was completely incompatible with employment with that company, especially as the company was the holder of a security license. This had never been raised as an issue around the time of Renato's appointment.

Case study – "Sue"

[44] Such a decision would include, for example, a decision not to employ or to dismiss someone, a decision not to admit someone as a student, a decision to refuse a person's application for accommodation etc.

Sue was employed as a Personal Care Attendant at an aged care facility for many years. She was a well-regarded employee and had received several certificates of gratitude from her employer. After conducting a police check of all staff, the facility discovered that Sue had several findings of guilt without conviction for the offence of obtaining advantage by deception. The court findings were from several years ago.

Sue explained to her employer that the court findings were not relevant to her employment. She advised that she had been charged with the offences after failing to declare her earnings correctly to Centrelink after she entered the workforce to support her husband, who had developed cancer and dementia, and her children. Sue explained that she was suffering from post-traumatic stress disorder at the time of the offences and this was taken into account by the court in deciding not to record convictions against her. Sue told her employer that she had subsequently received counselling and her counsellor confirmed with the employer that she was not a risk to the facility's residents.

Nevertheless, Sue's employment was terminated. The employer expressed a concern that residents' families might be unhappy about the facility employing someone with a 'criminal record'. Sue developed serious depression as a result of her dismissal and is currently unfit to return to work. She is also concerned that she will not be employed again given that police record checks are now mandatory in the aged care industry.

Remedies

JobWatch submits that provision should be made for a number of enforceable remedies in the event of an adverse finding of discrimination on the basis of an irrelevant criminal record. The Commission should be empowered to make orders including:

a. An injunction preventing the Respondent from committing any further unlawful acts;
b. Orders for damages (including special, general or aggravated damages); and
c. An order compelling a Respondent to in any other way redress the loss or damage suffered by the Complainant, for example, an order for reinstatement, an apology, an undertaking regarding staff training etc); and
d. Any similar orders.

In addition, it may be appropriate to ensure that any Court or Commission vested with the power to hear discrimination complaints on the basis of an irrelevant criminal record has

the power to cancel contracts or agreements or vary their terms so as to rectify any discriminatory provisions.

Recommendation 12:

The current protections against discrimination on the basis of the attributes listed in the AHRC Act should be strengthened by extending them to all areas of public activity (beyond employment) and making them fully enforceable.

Aside from the attributes listed in the AHRC Act, JobWatch supports the inclusion of new grounds for discrimination (in all protected areas of public activity). Specifically, we are in favour of recognising new grounds of "homelessness" and "survivor of domestic violence."

Homelessness

On this issue, JobWatch endorses the Position paper of the PILCH Homeless Persons' Legal Clinic entitled *"Discrimination on the Basis of Homelessness"* (available at PILCH website: www.pilch.org.au).

Definition

Homelessness is defined in section 4 of the *Supported Accommodation Assistance Act* 1994 as a person who has 'inadequate access to safe and secure housing'. Under the Act, a person is taken to have inadequate access to safe and secure housing if the only housing to which the person has access:

a. damages, or is likely to damage, the person's health; or
b. threatens the person's safety; or
c. marginalises the person through failing to provide access to:
    i. adequate personal amenities; or
    ii. the economic and social supports that a home normally affords; or
d. places the person in circumstances which threaten or adversely affect the adequacy, safety, security and affordability of that housing.

International Law Obligations

Despite the prevalence of discrimination on the basis of homelessness in Australia and the grave long term effects of such discrimination (on an individual and societal level), there is currently no protection from discrimination on the basis of homelessness in Australia at State/Territory or Federal level. This is despite Australia's obligations to promote and protect human rights by virtue of it being party to various human rights instruments which

effectively guarantee many rights which are jeopardised by homelessness.[45] For example, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC).

Homelessness, Employment and Discrimination

JobWatch notes that there are high unemployment levels amongst homeless people due to the difficulty they experience in finding and maintaining employment.

Homeless people may be unable to provide a fixed address, satisfy identity requirements or they have criminal records stemming from offences committed as a result of their homelessness. They may be discriminated against in their search for employment or on the basis of these factors. They may also have difficulty maintaining employment due to their unstable living arrangements, mental illness or substance addiction and/or need to manage urgent issues such as organising sleeping arrangements.

JobWatch therefore endorses the inclusion of a homelessness attribute in the Bill.

Survivors of domestic violence

There is presently no anti-discrimination protection for domestic violence survivors under Australian law. JobWatch endorses the inclusion of an attribute in the new legislation that a person be a survivor of domestic or family violence.

The existing protected attributes under Commonwealth anti-discrimination legislation do not provide sufficient protection for survivors of domestic violence. Whilst in some circumstances, a survivor of domestic violence may be protected from discrimination under the SD Act (on the basis of sex, pregnancy, breastfeeding, marital status or family responsibilities) and the DD Act (on the basis of disability), in certain circumstances it will not be possible for such a person to show that the discrimination occurred due to that particular protected attribute[46].

For example, the DD Act may protect a person who has a disability due to being a survivor of domestic violence (and who is discriminated against because of their disability) however it would not provide protection where a person is discriminated against due to the fact that they are a survivor of domestic violence (not due to a disability). Similarly, a female

[45] Hidden Homelessness in Australia (media release), 18 November 2003: Australian Census Analytic Program:… "Counting the Homeless" (CAT.No.2050.0)

[46] Consolidation of Commonwealth Discrimination Law, Australian Human Rights Commission Supplementary Submission to the Attorney-General's Department, 23 January 2012
p5-6

survivor of domestic violence would only be protected under the SD Act where she could prove that one of the reasons for the discrimination was her sex, pregnancy, breastfeeding, marital status or family responsibilities. Such a person would not be protected if the dominant or substantial reason for the discrimination was that she was she was a survivor of domestic violence.[47]

Definitions & Terminology

JobWatch accepts that domestic violence is perpetrated against men and within same-sex relationships. Domestic violence however is most commonly perpetrated against women by their male partners and the terminology used in this submission reflects this fact.

JobWatch supports a broad definition of domestic violence in the legislation, inclusive of physical, sexual, emotional, psychological, social, economic and spiritual abuse.

JobWatch submits that the term "survivor of domestic violence" be preferred over the term "victim of domestic violence" to avoid the negative connotations associated with the term "victim". In this respect JobWatch endorses the submissions of the National Association of Community Legal Centres, "*Areas for Increased Protection in Discrimination Law: Consolidation of Federal Discrimination Legislation*", page 11.

On this issue, JobWatch also endorses the Supplementary Submissions to the Attorney-General's Department prepared by the Commission entitled 'Consolidation of Commonwealth Discrimination Law' (dated 13 January 2012). JobWatch proposes that the definition of domestic and family violence be gender neutral and not limited to any one type or type of domestic or family relationship due to the fact that they occur in all relationships and family situations, regardless of the sex, sexual orientation or sex or gender identity of the persons involved[48].

Prevalence

Domestic violence is widespread in Australia however the extent of the problem is difficult to gauge. Domestic violence occurs within private relationships and often goes unreported.[49]

A paper released by the Department of Parliamentary Services, '*Domestic Violence in Australia – An Overview of the Issues*' notes that VicHealth has declared that "domestic violence is the leading risk factor contributing to death, disability and illness in Victorian women aged 15 to 44."[50]

---

[47] Ibid, p6-7

[48] *Consolidation of Commonwealth Discrimination Law*, Australian Human Rights Commission Supplementary Submission to the Attorney-General's Department, 23 January 2012, p.11

[49] Mitchell. L, *'Domestic Violence in Australia – An Overview of the Issues'*, Department of Parliamentary Services, (23 November 2011) p.3

Discrimination on the basis of domestic violence (in all public domains) is a growing and serious problem in Australia. For example in the employment context, discrimination (for example, a reduction in working hours, bullying or dismissal) can be experienced where a woman is forced to take time off work due to being in a violent relationship or where a woman's abusive partner frequently visits her workplace. It is widely accepted that employment plays a crucial role in helping domestic survivor survivors to remove themselves from these abusive situations[51].

Attribute Description

It is clear that domestic violence survivors require protection from discrimination.

JobWatch believes that the legislation should be drafted carefully so as to avoid potential abuse and to keep away from condoning violence by encouraging it to become mainstream. For example if "domestic violence leave" were to be enacted. Such leave would concede the widespread nature of domestic violence however such mainstream recognition may to some minds downplay its severity and convert the understanding of its commonality into acceptance. JobWatch proposes that any leave entitlements intended to cover domestic violence survivors be broadly drafted using terminology such as "emergency leave".

Furthermore JobWatch proposes that coverage of the ground of domestic violence extend to all areas of public life, actual or imputed status as a survivor of domestic violence and discrimination based on past and current experiences of domestic violence[52].

Recommendation 13:

New protected attributes should be created, including "homelessness" and "survivors of domestic violence".

Question 10:

Should the consolidation Bill protect against intersectional discrimination? If so, how should this be covered?

JobWatch believes that the Bill should protect against intersectional discrimination so that people who experience discrimination on multiple grounds or because of two or more

[50] *Ibid*, p.23
[51] Consolidation of Commonwealth Discrimination Law, Australian Human Rights Commission Supplementary Submission to the Attorney-General's Department, 23 January 2012, p4
[52] Consolidation of Commonwealth Discrimination Law, Australian Human Rights Commission Supplementary Submission to the Attorney-General's Department, 23 January 2012, p.13

aspects of their identity, are protected. For example, an elderly woman who is discriminated against on the grounds of both her age and sex should be better protected in recognition of the intersectional discrimination.

Presently under Commonwealth anti-discrimination laws, due to the separation of protected attributes into four pieces of legislation, such a complainant would not be adequately protected. Intersectional discrimination recognises that discrimination can be experienced as a mix of many factors as opposed to one single factor.

Therefore intersectional discrimination should be explicitly covered under the Bill by the inclusion of a provision clarifying that any discriminatory act/practice under the Act includes an act/practice based on one or more prohibited grounds or a combination of protected characteristics. This approach would address inconsistencies in the regulation of discrimination that occurs as a result of the attributes being protected under four separate pieces of legislation.

JobWatch proposed that the definition of intersectional discrimination be modelled on section 14 of the United Kingdom's *Equality Act 2010* to encapsulate multiple characteristics. Simply put, the definition would state that a person discriminates against another person if, because of a combination of two or more relevant protected characteristics, the first person treats the second person less favourably than they treat or would treat a person who does not share those characteristics. For the purpose of establishing a contravention, the Complainant would not be required to show that the treatment was direct discrimination because of each of the characteristics in the combination (taken separately).

Recommendation 14:

The Bill should protect against intersectional discrimination so that people who experience discrimination on multiple grounds or because of two or more aspects of their identity, are protected.

Question 13:

How should the consolidation bill protect voluntary workers from discrimination and harassment?

Volunteers should be included in the definition of *"employee"* for the purpose of discrimination and sexual harassment. The fact that a volunteer is not paid a wage does not mean they cannot experience discrimination and sexual harassment. Accordingly,

volunteers should be able to seek general damages for injury to feelings, even if they cannot seek special damages for lost income. [53]

Recommendation 15:

Voluntary workers should be protected from unlawful discrimination and sexual harassment.

Question 14:

Should the consolidation bill protect domestic workers from discrimination? If so, how?

The following submission is made in reliance on our submission, '*The Exceptions Review: Submission to the Review of the Exceptions to and Exemptions from the Equal Opportunity Act 1995'* (2008).

JobWatch submits that domestic workers should be protected from discrimination in the Bill. Any exceptions in the legislation which would allow for an employer to lawfully discriminate when employing people to provide domestic or personal services in their home has the potential to be abused.

While it may be argued that "community standards" require that the home be free from external regulation, this contention is untenable from the perspective of general equal opportunity and employment law principles. While there is a social expectation that, as a matter of general principle, everyone should be free to express themselves and live comfortably in their homes, this should not create an unfettered right to unfairly discriminate against potential domestic workers.

Regardless of whether paid work is performed in a large organisation, a small business or in the domestic sphere, it constitutes employment and must be subject to a level of regulation if the paramountcy of human rights is to be respected. A domestic or personal services exception however, seems to be at odds with this principle and sends an ambiguous message when viewed within the context of other anti-discrimination legislation. It suggests that although discrimination on the basis of an attribute is generally unacceptable and should be discouraged, if it occurs within employment in a domestic context it is acceptably beyond reach of the operation of the law. The exception would therefore create an unfortunate inference about the importance of eliminating

[53] Submission of JobWatch to Victorian Attorney General's Independent Review of the Equal Opportunity Act 1995 (Vic), January 2008, para 3.4.8.3, p38

discrimination and would undermine the effective operation of the Act and the promotion of the value of equality of opportunity for all.

In practice, excluding such an exception would not mean that potential domestic employers would have unsuitable candidates imposed on them. Rather, it merely means that they would not be able to use an attribute such as gender identity, sexual orientation, race or sex as the basis for declining to employ someone should they choose to enter the employment market. This would not create an unreasonable burden on employers but rather it would provide an opportunity for all workers, regardless of their particular attributes. In any event, many, if not most, domestic employers would continue to offer domestic work using means other than the public employment market, and it is unlikely that claims will arise in such circumstances.

From this perspective, any exception is both unjustifiable and unnecessary and therefore does not represent a reasonable limitation on human rights.

Discrimination can have detrimental consequences on an individual in an employment relationship even when the work place has just two people. Also known as bullying

The FW Act covers partnerships in those States and territories who have taken up the FW Act: NSW, QLD, VIC, SA, NT, TAS excluding WA.

Question 18:

How should the consolidation bill prohibit discriminatory requests for information?

As discussed under question 9 under the heading "*Irrelevant Criminal Records"* JobWatch proposes that a separate provision be made to prohibit people from asking questions or requesting information regarding a criminal record which could then be used to form the basis of discrimination.

In addition, JobWatch is concerned about the number of calls it receives each year where people are asked potentially discriminatory questions about their medical history at the recruitment stage and are concerned that if they do not co-operate and provide the information, they won't be offered the job but feel it may be a risk if they do divulge the information, this will impact upon whether they are offered the job. We recommend that the approach taken by the EO Act (Sec 107 & 108) be adopted in the Bill.

Recommendation 16:

There should be a separate provision to prohibit people for asking questions requestion information regarding a criminal record which could be used to form the basis of discrimination.

Question 20:

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

Principles underlying this aspect of JobWatch's submission:

1. The right to work is a fundamental human right. This right extends to all persons, irrespective of their protected attributes, and it is this principle which the Bill ought to implement.

2. Any limitations (exceptions or exemptions) in the Bill should not be used to limit access to employment opportunities but rather, should either serve to advance substantive equality between various groups in society, as befits beneficial legislation, or should be limited to only those provisions which are necessary to ensure fairness and reasonable practical application of equal opportunity principles. For instance, JobWatch recognises that it is unjust to require a particular sector of the community to make unreasonable accommodations to permit a person to perform work, the inherent requirements of which they would otherwise be incapable of performing. So it is sound for an "inherent requirements of the job" exception, strictly contained and strictly applied, to be included in the Bill. However, any arbitrary exceptions which unfairly serve to limit the opportunities of a particular group should be removed.

3. Recruitment, selection and employment-related decisions should be based on sound and defensible criteria, such as ability, merit, performance, behaviour and the operational requirements of the employer, untainted by irrelevant and unjust reference to a person's attributes. For example, it is acceptable for an employer to discriminate against job applicants if they are unsuitable for particular employment for any reason not based on an attribute, such as a lack of requisite skills or qualifications for the position.

4. Equal opportunity legislation should not be used to satisfy a constituency at the expense of others' legitimate interests or protect the exclusionary interests of particular sectors of society.

5. The community's best interests are afforded by facilitating genuine equality of opportunity for all its members. It is only in rare circumstances that competing interests, rights or "community standards" justify limiting the operation of beneficially intended human rights based legislation.

6. Particular religious groups seem to want to be exempted from anti-discrimination law so that they have the right to discriminate against people with particular attributes that are not an inherent requirement of a job whilst at the same time wanting protection against discrimination on the basis of their religious beliefs. This is itself an injustice and is therefore untenable.

Recommendation 17:

There should not be any blanket exceptions to or exemptions from the proposed Commonwealth Equality Act.

As a result, JobWatch's ideal position is that there should not be any blanket limitations (exceptions to or exemptions) in the Bill because this would defeat the primary objective of the Bill being, presumably, to eliminate discrimination as far as possible.

If an employer wishes to seek an exemption, then it should be required to apply to the Commission (or other relevant tribunal as the case may be) for an order that it be exempted.

In considering whether to exempt the employer, the relevant tribunal should have to consider the objectives of the Bill/Act (including the objective to eliminate discrimination as far as possible), the public interest, any hardship on the employer of not receiving the exemption, the effect on current and prospective employees of granting the exemption and any other relevant considerations including whether the exemption is necessary. Any exemption granted should only be temporary.

Recommendation 18:

A general limitations clause should not be adopted.

Further, if there are going to be exceptions and exemptions, there should not be a general limitations clause because it will be ambiguous, complex and uncertain and create an abundance of case law leading to further complexity which is the opposite aim of the consolidation project.

Question 21:

How should a single inherent requirements / genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

If there are to be any exceptions in the Bill, then the 'inherent requirements' exception should be preferred over the 'genuine occupational qualification' exception.

Whilst occasionally there may be an exact correspondence between an 'inherent requirement' and a 'genuine occupational requirement', the relatively narrow scope of the 'genuine occupational qualification' exception makes it clear that there are very few situations in which the genuine occupational requirements of a particular position will be determined by a person's particular attributes. These situations seem to be limited to very particular situations such as the preservation of decency or privacy where, for example, employment involves fitting clothing, conducting body searches or entering lavatories or other areas where people are in a state of undress or in relation to the offering of dramatic or artistic work or any other employment, if it is necessary to do so for reasons of authenticity or credibility.

It is also potentially open to abuse, for example, where an alleged genuine occupational requirement such as a particular gender or physical attribute is mandated as necessary by an employer or an employer's peak body, but is in fact not an inherent requirement of the job. For example, a religious school or body requiring all employees to be adherents to a particular faith even though that faith would have nothing to do with a person's job as a cleaner.

Recommendation 19:

An 'inherent requirements' exception should be preferred over a 'genuine occupational qualification' exception.

Therefore, the Bill should include an ‘inherent requirements exception’ based on the following:

1. A statement that discrimination in employment is prohibited, unless a person is unable to perform the inherent requirements of the particular employment after the making of reasonable adjustments to accommodate the employee’s protected attribute.

2. A list of the factors to be considered when determining whether a particular requirement is “inherent” to a position. This list should include:

    a. Whether a particular task is genuinely essential to the position.

    b. The skill set and qualifications required to do the position.

    c. Whether the position could be performed with adjustments being made to accommodate the performance of the job by a person with a protected attribute.

    d. Whether public standards of decency require that the position be filled by a person of a particular sex.

    e. Whether reasons of artistic credibility require the position to be filled by someone with a particular attribute.

    f. Whether it is a genuine occupational requirement that a person be of a particular sex, such as a necessary physical characteristics particular to people of one sex, other than strength or stamina; or the preservation of decency or privacy; for example where employment involves fitting clothing, conducting body searches or entering lavatories or other areas where people are in a state of undress.

    g. Whether the most effective delivery of welfare services to a particular group requires that the job be performed by a person with a specific attribute.

    h. Whether adherence and commitment to the particular beliefs and tenets of a religion are required in order to carry out the fundamental requirements of a position with a religious body or religious school.

    i. Consideration also ought to be given to when a required adjustment might be considered reasonable or not.

Question 22:

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

Introduction

Under cover of its submission that there should not be any blanket limitations under the Bill, JobWatch supports the inclusion of a religious exemption to the extent that it operates to protect the rights of people to freely practice their religion. Indeed this stance is in accordance with the United Nations *Declaration on the Elimination of all Forms of Intolerance Based on Religion or Belief.*[54]

JobWatch submits however that equal opportunity legislation should not be used to satisfy a constituency at the expense of others' legitimate interests or protect the exclusionary interests of particular sectors of society.[55] Any exemptions in anti-discrimination legislation should not be used to limit access to employment opportunities, but rather should serve to advance substantive equality between various groups in society. In the event that exemptions are enacted they should be limited to only those provisions which are necessary to ensure fairness and the reasonable practical application of equal opportunity principles on a case by case basis.[56]

Recruitment, selection and employment related decisions should be based on sound and defensible criteria, such as ability, merit, performance, behaviour and the operational requirements of the employer, untainted by irrelevant reference to a person's attributes for example sexual orientation and gender identity.[57]

Current Law: International and Domestic

The issues raised by the above question involve negotiating the delicate balance between two separate yet overlapping human rights, that is, the right to religious freedom and the right to equality in employment. These two human rights are enshrined in international law.[58]

The *International Covenant on Civil and Political Rights* (**ICCPR**) declares that*:*

---

[54] JobWatch, '*Submission to Freedom of Religion and Belief in the 21st Century, Race and Discrimination Unit: Education and Partnerships Section, HREOC,* February 2009, p.6

[55] JobWatch, '*Submission to the Parliament of Victoria Scrutiny of Acts and Regulations Committee Inquiry into Exceptions and Exemptions in the Equal Opportunity Act 1995,* July 2009, p.5

[56] JobWatch, *Op Cit 1*, p.5

[57] *Ibid*

[58] *Ibid*

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination.[59]"

Further, equality of opportunity in employment translates to a recognition of the right to work.[60] This right is specifically recognised in the *Universal Declaration of Human Rights* which provides that:

"everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.[61]"

The ICCPR also declares that:

"Everyone shall have the right to freedom of… religion which includes *the freedom to have a religion or whatever belief of his choice, and freedom… to manifest his religion or belief in worship, observance, practice and teaching.[62]"*

The *Declaration on the Elimination of all Forms of Intolerance Based on Religion or Belief* states that the right to freedom of religion includes the right:

"to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief. [63]*"*

These rights have been incorporated to some extent into Australia's domestic legislation, for example, in the AD Act and the SD Act.[64]

Section 37 of the SD Act is reproduced below:

Nothing in Division 1 or 2 affects:

(a) the ordination or appointment of priests, ministers of religion or members of any religious order;

(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;

---

[59] International Covenant on Civil and Political Rights, Article 26
[60] JobWatch, *Op Cit 1*, p.6
[61] *Ibid* & *Universal Declaration of Human Rights*, Article 23(1)
[62] JobWatch, *Op Cit 1* p.6 & *International Covenant on Civil and Political Rights*, Article 18
[63] JobWatch *Op Cit 1* p.6 & *Declaration on the Elimination of all Forms of Intolerance Based on Religion or Belief*, Article 6
[64] JobWatch, *Op Cit 1*, p.5

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

(d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.[65]

Section 35 of the AD Act is reproduced below:

This Part does not affect an act or practice of a body established for religious purposes that:

(a) conforms to the doctrines, tenets or beliefs of that religion; or

(b) is necessary to avoid injury to the religious sensitivities of adherents of that religion. [66]

<u>The Federal Balance Between the Right to Religious Freedom and the Right to Equality in Employment</u>

JobWatch submits that the current federal anti-discrimination law framework does not provide an adequate balance between the right to religious freedom and the right to equality in employment.[67]

It is stated in the Discussion Paper that both the AD Act and the SD Act contain a general exemption for bodies established for religious purposes.[68] These exemptions apply to any acts or practices that either conform to the doctrines, tenets or beliefs of the relevant religion or are necessary to avoid injury to the religious sensitivities of adherents of that religion.[69]

The SD Act contains additional exemptions for the ordination or appointment of priests, Ministers or members of any religious order and accommodation provided by a religious body as well as coverage for educational institutions established for religious purposes in

[65] *Sex Discrimination Act* (1984)(Cth), Section 37
[66] *Age Discrimination Act* (2004)(Cth), Section 35
[67] JobWatch, *Op Cit 1*, p.6
[68] Attorney-General's Department, '*Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*', September 2011, p.40
[69] *Ibid*

relation to the employment of staff and the provision of education and training.[70] The relevant sections are reproduced above.

JobWatch submits that the religious exemptions in the SD Act and AD Act are not a measured and proportionate approach to the inherent conflict between equally important human rights, namely, the right to religious freedom and the right to equal opportunity in employment.[71] Currently these Acts protect the right to religious freedom at the expense of an individual's right to equality in employment.[72] The exemptions granted to religious organisations in the SD Act and AD Act are too wide, which can result in the right to equality in employment being unreasonably derogated.[73]

JobWatch submits that exemptions for religious bodies are unnecessary in many instances. The following example is taken from the Commission's Consultation Report, '*Addressing sexual orientation and sex and/or gender identity discrimination*'. (The Consultation Report)

> *"Tania was employed by a church run disability service. After working for 18 months Tania attended work and found that the homepage on her work computer displayed a bible quote that said negative things about gay people. Tania assumed that this was a mistake and drew her team leader's attention to the quote. The next day the quote remained. Tania wrote a letter to the management explaining that she felt upset and unsafe having to look at that quote everyday and asked that it be replaced with a bible quote that did not vilify gay people. Three of Tania's colleagues also signed the letter. Tania was singled out and told that her gay agenda had no place in a Christian work place. Tania's professional reputation was then attacked, she was accused of poor work performance. Tania was also assigned shifts that she had previously indicated she would be unable to take or were inappropriate. Tania contacted the [Anti-Discrimination Board] to see if she could lodge a complaint and was told that her employer may be able to rely on the religious exception in the Act. Tania left her job due to ongoing harassment."* [74]

JobWatch is concerned that there is potential for any religious exemption to be misused if it is relied upon to exclude certain groups from employment on no more than a pretence.[75]

---

[70] *Ibid*
[71] JobWatch, *Op Cit 1*, p.6 - in relation to the SD Act
[72] *Ibid* - in relation to the SD Act
[73] Ibid, pp.5-6 - in relation to the SD Act.
[74] Australian Human Rights Commission, '*Addressing sexual orientation and sex and/or gender identity discrimination'* 2011, pp.9-10
[75] JobWatch, *Op Cit 1*, p.7

Any legislation providing exemptions protecting religious freedom must ensure that the exemption is not misused or misapplied such that certain groups are disingenuously excluded from employment.[76] For example, while the marital status or sexual orientation of an employee may be of relevance if that person is a religious instructor, these attributes are of limited, if any, significance for persons performing roles such as teaching maths, cleaning or administrative duties, and should not be claimed in any circumstances other than limited ones involving genuine religious content in the relevant job.[77]

New Exemption: Inherent Requirements

Recommendation 20:

The Bill should diverge from the system of exceptions contained within the current Commonwealth anti-discrimination acts and instead include an 'inherent requirements of the job' exemption which may be granted by the Commission on application by the entity seeking the exemption.

An inherent requirements exemption would confine the scope of any exemption to the actual requirements of a position and not the employer's preferences rendering it less open to abuse.

Additionally JobWatch recommends the implementation of a system similar to that in section 89 of the EO Act, whereby in order to rely on the 'inherent requirements' exemption, applications would have to be made to the Commission or other relevant Court or Tribunal on a case by case basis.[78] Applicants would also bear the onus of proving that the exemption from anti-discrimination laws is necessary or at least reasonable in the circumstances and should be granted for public interest reasons.[79] Additionally applications by persons requesting an exemption should be dealt with using a quick, informal and inexpensive process.[80]

In relation to applications made by religious bodies the Commission or relevant Court or Tribunal is arguably better placed to make impartial decisions about where to draw the line when balancing competing human rights than religious bodies themselves.[81] For example, considerations in favour of applying discrimination law in relation to religious bodies may

[76] *Ibid*
[77] *Ibid*
[78] *Ibid*, p.7
[79] *Ibid*
[80] *Ibid*
[81] *Ibid*

include whether the organisation receives public funding, the significance of the social or economic impact of the activity and whether it is in the public interest.[82] Considerations in favour of awarding an exemption could include whether the activity falls within the private sphere and the centrality of a particular activity to a religion.[83]

If a specific religious exemption is included in the new legislation we recommend its application be limited to positions in religious bodies and schools which genuinely require adherence and commitment to the particular beliefs and tenets of the religion in order to carry out the inherent requirements of the position.[84]

Allowing religious bodies to make such decisions themselves allows them to effectively police themselves in relation to their observance of the rights of others.

JobWatch notes that a liberal application of religious exemptions amounts to religious institutions effectively opting out of the legislation. The right of religious institutions to discriminate is preserved however if the legislation protects religious institutions from discrimination. This is unjust and therefore untenable.

Cultural Impact / Tasmanian Experience

It was stated in the Consultation Report that many comments submitted remarked that Federal legislation prohibiting discrimination on the basis of sexual orientation or sex/gender would send a strong message that discrimination on this basis is unacceptable.[85]

JobWatch submits that this hypothesis also applies to eradicating exemptions for religious bodies to discriminate on the basis of sexual orientation and gender identity and introducing a general inherent requirements exemption.

JobWatch points to Tasmanian experience. Tasmania has no religious exemptions in relation to sexual orientation and has only general exemptions and exemptions relating to religious belief and practice.[86] It is clear however that these exemptions do not apply to sexual orientation.[87]

Tasmanian experience has illustrated that the introduction of legislation prohibiting discrimination on the ground of sexual orientation has resulted in widespread cultural

[82] *Ibid*
[83] *Ibid*
[84] *Ibid*
[85] Australian Human Rights Commission, *Op Cit 21*, p.17
[86] *Ibid*, p.34
[87] *Ibid*

changes beyond those in the legal sphere.[88] The following is an extract from the Consultation Report:

> *"However, since the passage of the Anti-Discrimination Act in 1998, which included provisions against incitement to hatred, such written and verbal statements have virtually ceased. Tasmania's public debate on GLBTI issues continues to be vigorous but it is profoundly more mature, respectful and constructive than it was before 1998."*[89]

JobWatch also submits that the removal of exemptions applying to religious bodies sends a particularly strong message as a result of the position of religious institutions in society and the role they play in many people's lives.

Recommendation 21:

If a specific religious exception is included in the Bill, its application should be limited to positions in religious bodies and schools which genuinely require adherence and commitment to the particular beliefs and tenets of the religion in order to carry out the inherent requirements of the position.

Question 23:

Should temporary exemptions continue to be available?

If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

As JobWatch has previously stated in its submission, ideally there should not be any blanket limitations in the Bill because any limitations would defeat the presumed primary objective of the Bill being to eliminate discrimination as far as possible.

However, if there are to be any exemptions, then those exemptions should only be temporary. The current maximum life of an exemption, being 5 years, should also be reduced to maximum of 2 years so as to ensure that temporary exemptions are regularly reviewed without the need to appeal to the Administrative Appeals Tribunal.

[88] *Ibid*, p.17
[89] *Ibid*

Recommendation 22:

Exemptions should only be temporary.

Recommendation 23:

The current maximum life of an exemption, being 5 years, should be reduced to maximum of 2 years so as to ensure that temporary exemptions are regularly reviewed without the need to appeal to the Administrative Appeals Tribunal.

In considering whether to exempt an employer, the Commission should have to consider the objectives of the Bill (including the objective to eliminate discrimination as far as possible), the public interest, any hardship on the employer of not receiving the exemption and the effect on current and prospective employees of granting the exemption as well any other relevant considerations including whether the exemption is necessary or at least reasonable in the circumstances.

Recommendation 24:

The Bill should include a clause specifically stating that the Commission must exercise its power to grant temporary exemptions in accordance with the objects of the Bill.

From JobWatch's perspective, it is difficult to imagine any temporary exemptions that would truly further the primary objective of the Bill being, presumably, to eliminate discrimination as far as possible. A quick read of the temporary exemption decisions published by the Commission reveals that they are really only authorising discrimination.

For example, on 21 December 2010 the Commission granted a temporary exemption to Carnival plc (trading as Carnival Australia) for a temporary exemption pursuant to s 44(1) of the *Age Discrimination Act 2004* (Cth) (ADA) allowing it to discriminate against "Schoolies" (i.e. young people who have just completed secondary school and their friends) in the offering of cruise ship travel and accommodation even though the Commission recognised "…that the Applicant's policy allows conduct which is inconsistent with the objects of the AD Act"[90].

This is opposed to the concept of "special measures". For example, section 12 of the *EO Act* allows the taking of a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute. An example of a special measure would be where a law firm sets aside a certain percentage of partnership places for women. It is therefore not unlawful discrimination to take a special measure.

[90] Australian Human Rights Commission, Age Discrimination Act 2004 (Cth) 44(1)
Notice to grant a temporary exemption re: Carnival Plc (trading as Carnival Australia) 21 December 2010

Recommendation 25:

There should be a single discreet special measures provision included in the Bill.

Complaints and Compliance Framework

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

JobWatch supports the introduction of any mechanisms that would enhance the capacity of duty holders to better comply with Commonwealth anti-discrimination legislation including those measures outlined in the Discussion Paper being action plans, co-regulation, standards and certification of special measures.

In conjunction with these measures, the Commission should be empowered and funded to provide on-going community education programs aimed to improve duty holders' understanding of their obligations and to enhance generally the community's knowledge and understanding of the rights afforded by anti-discrimination legislation.

To this end, JobWatch submits that it should be mandatory for a person to undertake an equal opportunity training course as approved by or conducted by the Commission before being appointed as a director of a company that is or will be an employer[91].

Recommendation 26:

It should be mandatory that an individual undertake an equal opportunity training course as approved by or conducted by the Commission before being appointed as a director of a company that is or will be an employer.

It is JobWatch's overwhelming experience that most small business operators, e.g. sole director companies, do not have and do not necessarily want to have any knowledge or understanding of anti-discrimination law whatsoever.

The reasons usually given for this lack of understanding are that, because they run a small business, the director just doesn't have the time or the money to attend courses or to

[91] This recommendation may require amendments to other relevant statutes e.g. *the Corporations Act 2001* (Cth).

engage a lawyer for advice. Whilst it may be true that small business operators are busy and do not necessarily have much money at their disposal, it is also JobWatch's experience that certain small business operators just don't care about complying with anti-discrimination laws.

When a complaint about discrimination is made to such an employer by a current or former employee, the response is often along the lines of "We don't have those laws here" or "but I've been good to you" or simply "I don't know what you are talking about".

Case study – " small business"

Nathan worked as a sales consultant in a small business. He was employed on a permanent full time basis for over seven years until his employment was abruptly terminated by the company director. When Nathan asked for the reason why he was dismissed, the director told him that the company was not legally obliged to give him one.

This ignorance could be easily addressed by this recommendation and small business operators will quickly realise how relevant and important a knowledge of anti-discrimination law is when they learn about the potential costs to them, both personally and to the company they direct, in terms of the level of damages/compensation that may be ordered by the Court, legal costs (solicitor/client and party/party) and the general disruption to their business.

If it was a legislated mandatory requirement that directors of companies with employees must have undertaken equal opportunity training prior to their appointment as a director, JobWatch believes that there should be a significant increase in compliance. In other words, if employers know what the law is, they are less likely to offend.[92]

In addition, JobWatch's position is that this mandatory training should be supported by giving the Commission regulatory powers (see Recommendation 37).

Question 25:

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

[92] JobWatch is well placed to help contribute towards the provision of these training services.

In JobWatch's opinion, the conciliation process (including the expedited process) at the Commission is of a very high standard and the conciliators themselves are highly professional and effective in their role.

Nevertheless, whilst the compulsory conciliation process itself may not necessarily require improvement, JobWatch's position is that other options for alternative/appropriate dispute resolution should also be made available by the Commission including the following:

1. Voluntary conciliation – where the complainant can elect to proceed directly to the Federal Court or the Federal Magistrates' Court rather than have an initial conciliation at the Commission;

2. Mediation – where the Commission provides an external mediator who is accredited under the National Mediator Accreditation System and who is selected by agreement between the parties to mediate the complaint[93];

3. Early Neutral Evaluation – rather than voluntary arbitration, JobWatch suggests the Commission bring in an option for the parties to have their matter evaluated early and neutrally by a suitably qualified person e.g. a lawyer with expertise in the area.

   Early Neutral Evaluation involves the relevant person, i.e. the evaluator, investigating the complaint e.g. putting together a statement of agreed facts, interviewing the parties and potentially other witnesses and providing to the parties a non-binding opinion on the likely outcome of the complaint should it be heard in the Federal Court or the Federal Magistrates Court.

   There may or may not be consequences of the parties or a party failing to adopt the opinion of the evaluator. For example, it may be an issue in a costs application by the successful party where the unsuccessful party failed to adopt the opinion of the evaluator that they would be unsuccessful in Court.

   The Magistrates' Court of Victoria currently operates an Early Neutral Evaluation Scheme.

   Early Neutral Evaluation is preferable to voluntary arbitration because:

   a) It is less expensive for the parties; and

   b) Voluntary arbitration is unlikely to be utilised very often due to its expense, inconvenience, uncertainty, the apparent lack of an appeal mechanism and

[93] JobWatch is well placed to provide these external mediation services.

other related factors. In other words, parties are more likely just to use the Court system rather than agree to be bound by the decision of an arbitrator.

Nevertheless, voluntary arbitration should still be available as an option to the parties to resolve their dispute.

Recommendation 27:

The Commission should offer a variety of alternative/appropriate dispute resolution mechanisms including Mediation and Early Neutral Evaluation.

4. Another way to potentially improve the current conciliation process is to empower the conciliator to issue a conciliation certificate when the matter is not settled that gives reasons for stating one of the following:
   a) The Complainant has a reasonable prospect of success;
   b) The Complainant has no reasonable prospect of success; or
   c) The Conciliator cannot provide an opinion as to the prospects of success of the complaint due to the parties' having substantially different versions of the facts.

   The purpose of the conciliation certificate would be to discourage unmeritorious claims and to encourage settlement of meritorious claims after the conciliation stage. The conciliation certificate may be relevant on the questions of legal costs should the matter proceed to hearing.

Recommendation 28:

The Conciliator should be empowered to issue a conciliation certificate stating, where possible, whether or not the Complaint has a reasonable prospect of success.

5. In relation to the question of legal costs, JobWatch submits that the Commission should be empowered to issue a "legal costs immunity certificate" in test case/public interest matters which would encourage Complainants to proceed to Court with complaints of this nature i.e. which might not necessarily succeed at first instance but which ultimately might end up better clarifying the law.

Recommendation 29:

The Commission should be empowered to issue a "legal costs immunity certificate" in test case/public interest matters.

6. In JobWatch's experience, it is not uncommon for complaints to be resolved at conciliation, usually by way of formal terms of settlement being signed by both parties at the conclusion of the conciliation, but then for the Respondent to breach the terms of settlement by failing to pay any of the agreed amount to the Complainant whatsoever.

   When this occurs, already vulnerable and disadvantaged Complainants are left with little or no real or practicable legal recourse. For example, in these circumstances the appropriate legal course of action is for the Complainant to sue the Respondent for breach of contract. The Complainant cannot usually continue their discrimination complaint because it has been resolved regardless of the fact that the Respondent has failed to comply with the terms of settlement.

   However, it is not financially or emotionally realistic for a Complainant who may have been dismissed by the Respondent and still be unemployed and/or unable to work due to a work related illness or injury suffered as a result of the Respondent's unlawful conduct to then engage a commercial litigation lawyer to sue the Respondent in breach of contract.

Case study – "breach of settlement agreement"

Don worked in a fly screen business but was sacked when he turned 70. He felt he had been discriminated against and he made a complaint. The matter was settled at conciliation with the Respondent agreeing to financially compensate Don but the Respondent never complied with the terms of settlement. Don can't afford a lawyer to enforce the terms of settlement so he has given up.

JobWatch submits that there are three possible ways to remedy this problem being:

a. The Commission could be empowered to enforce settlement agreements on behalf of the Complainant in a court of competent jurisdiction;

b. It could be legislated and the Commission's standard terms of settlement could state that a Complainant be able to obtain a form of summary/default

judgment against the Respondent for the amount of compensation agreed in the terms of settlement in a court of competent jurisdiction; or

c. It could be legislated and the Commission's standard terms of settlement could state that a Respondent is not released from a complaint of discrimination until it has complied with the agreed terms of settlement. This would allow the Complainant to continue their discrimination complaint where the Respondent has not complied with any agreed terms of settlement.

Recommendation 30:

There should be mechanisms in place whereby Complainants can enforce breached terms of settlement agreements against Respondents without the need to sue for breach of contract.

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

Options to improve the court stage of the complaints process

JobWatch agrees generally with the options outlined in the Discussion Paper.

Recommendation 31:

Representative actions should be permitted in the Federal Court and the Federal Magistrates Court.

Recommendation 32:

Respondents should bear their own costs in unlawful discrimination proceedings except in limited circumstances such as where the complaint is found to be frivolous, vexatious or lacking in substance. Where a Complainant is successful, costs should follow the event.

Recommendation 33:

The Bill should provide the Court with guidance as to the range of possible orders it is empowered to make.

Additionally, JobWatch submits that the amount of general damages/compensation for hurt, distress, humiliation and general injury to feelings ordered by the Courts is traditionally so low that Court ordered remedies are failing to deter unlawful behavior.

The following is extracted from JobWatch's 2008 submission to the Senate Legal and Constitutional Affairs Committee inquiry into the effectiveness of the Commonwealth *Sex Discrimination Act* 1984 in eliminating discrimination and promoting gender equality:

> **"Amounts awarded as Compensation**
>
> JobWatch's casework experience shows that, because of the modest amounts of compensation awarded by the courts under the SDA, employers are more likely not to make reasonable offers to settle a complaint during the conciliation stage.
>
> In a paper presented by Barrister-at-law, Kellie Edwards, Denman Chambers, Nov 2006, Ms Edwards reviewed case law awarding damages under the SDA over the past ten years, and found the review indicated that earlier decisions of the Federal Court (such as *Gilroy v Angelov*[94] and *Elliott v Nanda & Cth*[95]) awarded much larger amounts of compensation than more recent cases such as *Frith v The Exchange Hotel*[96] and *Ware v OAMPS Insurance Brokers Ltd.*[97]
>
> Further, neither earlier nor recent federal decisions come close to the kinds of damages awarded in common law cases – such as *Nikolich v Goldman Sachs JB Were Services Pty Ltd*[98] and *Walker v Citigroup.*[99]
>
> Chris Ronalds SC has also commented on the issue of the "modest" amounts of general damages for hurt, humiliation and distress:[100]
>
>> *"The damages in the discrimination arena under this head are relatively modest and amounts between $8 000-$20 000 are common. It appears that the courts have not accorded much weight or significance to the emotional loss and turmoil to an applicant occasioned by acts of unlawful discrimination and harassment."*
>
> JobWatch submits that such modest awards of compensation do not act as a deterrent. May LJ, in *Alexander v Home Office,*[101] said:
>
>> *"Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect."*

---

[94] (2000) FCA 1775 ($24,000 awarded).
[95] (2001) FCA 418 ($15,000 + $5,000 aggravated damages).
[96] (2005) FMCA 402 ($10,000 awarded).
[97] (2005) FMCA 664 ($10,000 awarded).
[98] (2006) FCA 784 ($500,000+).
[99] (2006) FCAFC 101($2.5million).
[100] Chris Ronalds SC, *Discrimination Law and Practice*, 3rd ed, 2008, at p. 223.
[101] (1988) 2 All ER 118.

JobWatch also submits that "modest" amounts make it difficult to commit limited resources to pursuing a complaint through the courts. In *Clarke v Catholic Education Office,*[102] however, Madgwick J rejected the suggestion "that an award should not be so low that it might be eaten up by non-recoverable costs."

Finally, it is our experience (also acknowledged by Driver FM in *Cooke v Plauen Holdings Pty Ltd*[103]*)* that an apology is frequently worth more to an applicant than money. JobWatch submits that, as in *Cooke*, the applicant's entitlement to an apology should be taken into account in assessing the appropriate award of damages – and where an apology has not been offered, damages should be increased.

See Appendix 1 for an extract of the HREOC *Federal Discrimination Online*, Chapter 7, which gives an overview of damages awarded in sexual harassment cases under the SDA since the transfer of the hearing function to the FMCA and the Federal Court on 13 April 2000."

Recommendation 34:

Orders for compensation need to be high enough to discourage discrimination and to make it financially viable to litigate a complaint.

Nevertheless, JobWatch acknowledges that a Complainant cannot and should not be entitled to more damages/compensation to that which they have actually suffered or lost.

Civil penalties

Under the FW Act, a court of competent jurisdiction can order an employer that has breached a civil penalty provision (which includes relevantly the discrimination and workplace rights protections) to pay a penalty of up to $33,000 per breach if the employer is a company and up to $6,600 where the employer is an individual. Persons involved in the contravention can also be penalised and it is available to the Office of the Fair Work Ombudsman (FWO), trade unions and individuals to pursue a penalty against an offending employer[104]. Penalties are usually payable into consolidated revenue but the Court can order penalties to be payable to the individual or their union etc.

[102] (2003) 202 ALR 340.
[103] (2001) FMCA 91.
[104] See generally *Fair Work Act 2009* (Cth) Chapter 4, Part 4-1.

The FWO is very well resourced and has obtained millions of dollars in penalties against offending employers[105]. When the Office of the Fair Work Ombudsman obtains an order against an offending employer, it issues a media release with a view to the information about the penalties obtained acting as a deterrent.

To better deter employer companies and individuals from contravening anti-discrimination laws, courts should be empowered to order penalties against offending companies and individuals similar to those available under the FW Act and the Commission or other independent statutory body should be able to prosecute offending companies and individuals.

These powers would be in addition to current powers to award compensation to Complainants etc.

Recommendation 35:

Courts should be empowered to order penalties against offending Respondents.

Recommendation 36:

The Commission or other independent statutory body should be able to prosecute offending Respondents.

Question 27:

Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

Options for reforming the roles and functions of the Australian Human Rights Commission

JobWatch submits that, if the Commonwealth Government is serious about eliminating unlawful discrimination as far as possible, then real and meaningful action needs to be undertaken as soon as possible rather than just giving lip service to the concepts of equal opportunity and human rights.

For too long have anti-discrimination protections relied on an individual complaints-based system with all of its inherent problems, for too long has there been quasi anti-discrimination laws with no enforcement mechanism e.g. irrelevant criminal record discrimination, for too long have there been discussions, submissions, reports and

[105] For example, according the Office of the Fair Work Ombudsman Annual Report for the year ending 30 June 2011, it achieved court ordered penalties of more than $2.1 million across 40 matters.

inquiries without the achievement of meaningful change. The Australian Government should lead the way as, where avoidable, no person in Australia should be subject to unlawful discrimination or discrimination that should otherwise be unlawful. This is self-evident.

Recommendation 37:

In order to provide a truly effective and meaningful compliance regime, the Commission should be given enforceable regulatory and compliance powers.

On this view, the ideal reforms to the role and function of the Commission so as to provide a truly effective compliance regime, in addition to its current functions and in order of importance, would be as follows:

1. **Compliance and enforcement powers**

   The Commission (or other new independent statutory body as may be created so as to avoid any perception of bias or interest conflict) should be empowered to investigate potential breaches of anti-discrimination laws (whether or not there has been a complaint), compel the giving of oral and documentary evidence and to bring actions for breaches of anti-discrimination laws in the Federal courts.

   These suggested reforms would do away with the problems associated with a complaints based system (although individual complaints would still be allowed), allow the Commission to target systemic discrimination and allow it to gain litigation outcomes (hopefully including penalty orders against contraveners that act as a significant deterrent against offending.

   When potential offenders know that, rather than just being able to offer a Complainant a token amount of money at conciliation to settle a complaint, they will instead have to defend a complaint by the Commission (or other body) who is duty bound to take a matter to final hearing in a federal court, behaviour in society will start to change due to enhanced awareness of the laws and the threat of litigation.

   For example, employers will be more inclined to have equal opportunity policies and procedures in place, to provide employees with regular equal opportunity training and to take internal complaints seriously by taking timely, appropriate and effective action when a complaint is received or unlawful discrimination is suspected.

Currently, it is often the case that internal complaints are ignored thereby forcing the aggrieved person to resign and/or to become unfit for work due to work related stress and anxiety.

Case studies – "internal complaints"

Candice has been repeatedly bullied and harassed by a co-worker for the past month. She spoke with some of the company's partners and the equal employment officer who advised her to file an internal complaint. After filing her internal complaint, Candice was advised that they had reached a resolution to the problem however nothing was ever implemented. Management has expressed no concern over their failure to implement the resolution. In fact, one manager told Candice that management will always support the other person because she is blonde and pretty. Candice is now on stress leave and is in fear of returning to work.

Sarah has been harassed and bullied by some of her co-workers since her return to work after taking extended maternity leave. After being physically assaulted by her supervisor, Sarah complained to her Shift Supervisor, who did nothing. As the bullying continued, Sarah felt forced to resign from the company.

Julia has been employed on a permanent full-time basis for one year. She lodged an internal complaint of sexual harassment but is unhappy with the way the complaint is being handled by the managing director. Julie believes that the managing director's response will either be to fire the person who sexually harassed her or become angry with Julie, effectively forcing her to resign.

Unless these reforms are made, which are no different or of little difference to the current powers of the FWO and the Australian Building and Construction Commission, there will be no point tinkering around the edges of anti-discrimination law with other amendments that on their face improve the law and bolster people's rights but in reality will rarely, if ever, be enforced by vulnerable, disadvantaged and impoverished individuals.

Case study – "cost of legal action"

Lydia was due to return from maternity leave and wrote to her employer to confirm that she was going to return as a permanent part-time employee. Lydia fell ill the week she was due to return to work and arranged to take sick leave. On the first day of her leave, Lydia received a call from Human Resources informing her that they no longer had a position for her. Lydia was given the option of either returning to work full time or not at all. Lydia is reluctant to take legal action as she cannot afford a lawyer.

2. Enforceable undertakings/memoranda of understandings

Where legal action is threatened or taken by the Commission and where a Respondent has inadvertently contravened and has agreed not to re-offend or where the Respondent has otherwise made an early admission of liability, other options for resolution of the complaint could be exercised by the Commission such as entering into enforceable undertakings or binding memoranda of understandings.

Essentially, enforceable undertakings and binding memoranda of understandings are formal settlement agreements that would allow the Commission (or other body) to achieve a litigation outcome which could be made public without the need to take the matter to final hearing thereby saving resources for all the parties and stakeholders involved. In certain cases, the Commission (or other body) may settle only part of a complaint with a Respondent but still take the matter to hearing on the question of, for example, appropriate penalties that should be ordered etc

This option would give the Commission (or other body) some flexibility in settling legal actions thereby allowing it to be a model litigant.

3. Educative functions

Hand in hand with its proposed regulatory and compliance functions, the Commission's educative functions should be increased so as to meet the demand for education and training that would be likely as a result of its new enforcement powers. Training and education services should be free of charge[106].

4. Other matters

[106] JobWatch would be well placed to provide community education regarding Commonwealth anti-discrimination laws.

Other options raised in the discussion paper e.g. monitoring, formal inquiries, reporting to parliament, *amicus curiae*, etc (excluding the power to grant temporary exemptions) are commendable but should not be initiated at the expense of the above recommendations.

See JobWatch's previous discussion for JobWatch's submission in relation to exemptions and exceptions.

Perceptions of bias or interest conflict

There are concerns that, if the Commission was given enforceable regulatory and compliance powers, this function would conflict with its role as neutral conciliator. However, this should not be a concern as the neutrality of the conciliation team could easily be preserved through the use of information barriers and other clearly defined policies and procedures.

Further, the Commission would only continue to conciliate individual complaints and not proceedings initiated by itself.

Additionally, under the alternative/appropriate dispute resolution model proposed by JobWatch , conciliation would be a voluntary process as opposed to the current mandatory process and there would be an option for the parties to choose an external mediator, at the expense of the Commission, to mediate the complaint.

Therefore, if a party perceived that the Commission conciliation process may not be neutral, they could opt not to proceed with conciliation at all or to proceed with external mediation.

Other than this issue, there should be no other issues with the Commission carrying on all its other proposed functions including regulation, compliance and education as the FWO carries on these functions without any allegations of bias or conflict of interest.

Duplication issues

There appear to be concerns that if the Commission was given regulatory and compliance powers that there would be a potential overlap with some of the functions of the FWO. This is misconceived as the reality is that the FWO rarely litigates discrimination complaints

under the FW Act. For example, in the year ended 30 June 2011, the FWO only litigated 2 complaints of workplace discrimination[107].

Question 28:
Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

Whilst there is a significant overlap between the FW Act's general protections against discrimination in employment and State and Federal anti-discrimination laws generally, JobWatch submits that this overlap is currently being managed appropriately and that, as the relevant laws are not identical e.g. in relation to burden of proof, remedies etc, Complainants/Applicants should retain choice of jurisdiction however complicated that may be.

Currently, under the FW Act, Division 3, Chapter 6, Part1-6 aims to prevent multiple actions. Sections 725 (applications that relate to a dismissal) and 734 (applications other than in relation to a dismissal) state the general rule being essentially that where a person has already made a complaint or application under the FW Act or other State or federal law, they cannot make a second complaint to Fair Work Australia (FWA) or an application to court in relation to the same conduct unless the first action has been withdrawn, discontinued or failed for want of jurisdiction.

JobWatch submits that this provision is clear, understandable and works quite well in practice. Therefore, no specific mechanisms need to be included in the Bill for managing interactions with the FW Act.

JobWatch submits that the Bill should contain a similar division that effectively mirrors the FW Act's sections relating to preventing multiple actions. The Commission should also retain the power to not accept a complaint which is a secondary action in relation to the same conduct and the Federal courts should be given express power to strike out such secondary actions.

[107] Office of the Fair Work Ombudsman Annual Report 2010/11.

Recommendation 38:

The Bill should contain provisions (mirroring those in the Fair Work Act 2009 (Cth)) that deal with multiple actions.

JobWatch notes that the drafters of the Bill should be weary not to exclude actions that may be essentially about the same or similar conduct but in fact are not multiple actions.

For example, an employee who has been bullied or demoted during their employment due to their race and who is then later dismissed may legitimately make 2 separate legal claims, one about the discriminatory conduct during employment and one about the termination of his or her employment.

Further interaction between the Fair Work Act 2009 (Cth) and Federal anti-discrimination legislation

Additionally, the Australian Government should note that by including exceptions to unlawful discrimination in the Bill (which JobWatch submits should not be included), it will effectively be amending the FW Act to reduce employee protections against unlawful discrimination.

Section 351 (2) of the FW Act states that the general protections against discrimination do not apply "to action that is not unlawful under any anti-discrimination law in force in the place where the action is taken" and anti-discrimination law is defined to include the Federal anti-discrimination acts.

JobWatch submits that the Australian Government should be careful not to inadvertently reduce employee protections against unlawful discrimination under the FW Act by increasing exceptions to discrimination in the Bill.

Recommendation 39:

Employee protections against unlawful discrimination in the Fair Work Act 2009 (Cth) should not be reduced by the Bill.

Question 29:

Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

As anti-discrimination laws are beneficial human rights legislation the effect of which should be maximal and as complainants should continue to have choice of jurisdiction,

JobWatch submits that the Bill should deal with the interaction between State and Territory and Commonwealth laws in the following ways:

1. Commonwealth anti-discrimination law should not *"cover the field"* and State and Territory anti-discrimination laws capable of operating concurrently should be preserved without the requirement that they be consistent with or even have an underlying international convention.

2. Currently, Complainants who have made a complaint under a State or Territory anti-discrimination law cannot discontinue their complaint and then make a complaint under a Commonwealth ant-discrimination law.

   This limitation should be removed as it disadvantages unrepresented litigants who may have erroneously commenced a complaint under a State or Territory law prior to being advised that the Commonwealth jurisdiction is more appropriate forum for their complaint.

   The removal of this limitation would not allow forum shopping as the Commission would still have the power to dismiss a complaint that had been substantially heard, as opposed to merely filed, in another jurisdiction. Likewise, a Complainant would be stopped from filing a complaint in a Federal court pursuant to the concept of issue estoppel where their complaint had been substantially heard in another jurisdiction.

3. In an effort to eliminate unlawful discrimination as far as possible, the Bill should not provide any exceptions or exemptions for acts done in direct compliance with State and Territory laws. Rather, discriminatory State and Territory laws should be void as inconsistent under section 109 of the Commonwealth Constitution.

Recommendation 40:

Commonwealth anti-discrimination laws should not cover the field.

Recommendation 41:

Complainants should be allowed to change jurisdictions from State to Commonwealth in certain circumstances.

Recommendation 42:

The Bill should not provide any exceptions or exemptions for acts done in direct compliance with State and Territory laws.

Question 30:

Should the consolidation bill apply to State and Territory Governments and instrumentalities?

In order to eliminate discrimination as far as possible, Commonwealth anti-discrimination laws should apply to the Crown in right of the Commonwealth and the Crown in right of the States and Territories without exception.

Recommendation 43:

Commonwealth anti-discrimination laws should apply to the Crown in right of the Commonwealth and the Crown in right of the States and Territories without exception.

Appendix 1

The following table from the HREOC *Federal Discrimination Online*, Chapter 7, gives an overview of damages awarded under the SD Act (excluding sexual harassment cases) since the transfer of the hearing function to the Federal Magistrates Court of Australia and the Federal Court on 13 April 2000.

Table 2: Overview of damages awarded under the SDA

	Case	**Damages awarded**
(a)	*Font v Paspaley Pearls Pty Ltd* [2002] FMCA 142	Total Damages: $17,500 $7,500 (exemplary damages) $10,000 (non-economic loss)
(b)	*Grulke v KC Canvas Pty Ltd* [2000] FCA 1415	Total Damages: $10,000 $7,000 (economic loss) $3,000 (non-economic loss)
(c)	*Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91	$750 (non-economic loss)
(d)	*Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31	Total Damages: $22,222 (approx) $10,000 (non-economic loss) $244.44 per week from 21 February 2001 until the date of judgment, less $977.76 already paid (economic loss)
(e)	*Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122	Total Damages: $7,325.73 $2,500 (non-economic loss) $4,825.73 (economic loss)
(f)	*Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209	Total Damages: $39,294 $30,695 (economic loss: includes salary, motor vehicle benefits and superannuation) $5,000 (non-economic loss) $3,599 (interest) (*minus an amount due for income tax, to be paid to the Australian Taxation Office*)

	Case	Damages awarded
(g)	*Evans v National Crime Authority* [2003] FMCA 375, partially overturned on appeal: *Commonwealth v Evans* [2004] FCA 654	Total Damages: $41,488.57 $12,000 (non-economic loss – reduced from $25,000 on appeal) $7,493.84 (interest – subject to recalculation after appeal) $21,994.73 (economic loss – not challenged on appeal)
(h)	*Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160	$10,000 plus interest (non-economic loss)
(i)	*Kelly v TPG Internet Pty Ltd* (2003) 176 FLR 214	$7,500 (non-economic loss)
(j)	*Gardner v All Australia Netball Association Ltd* (2003) 197 ALR 28	$6,750 (non-economic loss)
(k)	*Ho v Regulator Australia Pty Ltd* [2004] FMCA 62	$1,000 (non-economic loss)
(l)	*Howe v Qantas Airways Ltd* (2004) 188 FLR 1*; Howe v Qantas Airways Ltd (No 2)* [2004] FMCA 934	Total Damages: $27,753.85 (plus interest) $3,000 (non-economic loss) $24,753.85 (economic loss) plus interest
(m)	*Dare v Hurley* [2005] FMCA 844	Total Damages: $12,005.51 $3,000 (non-economic loss) $9,005.51 (economic loss)
(n)	*Fenton v Hair & Beauty Gallery Pty Ltd* [2006] FMCA 3	Total Damages: $1,338 $500 (non-economic loss) $838 (economic loss – including associated contractual claim)
(o)	*Rankilor v Jerome Pty Ltd* [2006] FMCA 922	$2,000 (non-economic loss including out-of-pocket expenses)
(p)	*Iliff v Sterling Commerce (Australia) Pty Ltd* [2007] FMCA 1960, upheld on appeal: *Sterling Commerce (Australia) Pty Ltd* [2008]	$22, 211.54 (economic loss - plus interest[108] and less tax)

	Case	Damages awarded
	FCA 702	

The following table, from the HREOC *Federal Discrimination Online*, Chapter 7, gives an overview of damages awarded in sexual harassment cases under the SDA since the transfer of the hearing function to the FMCA and the Federal Court on 13 April 2000.

Table 3: Overview of damages awarded in sexual harassment cases under the SDA

	Case	Damages awarded
(a)	*Gilroy v Angelov* (2000) 181 ALR 57	Total Damages: $24,000 $20,000 (non-economic loss) $4,000 (interest)
(b)	*Elliott v Nanda* (2001) 111 FCR 240	Total Damages: $20,100 $15,000 (non-economic loss) $100 (economic loss – cost of counseling) $5,000 (aggravated damages)
(c)	*Shiels v James* [2000] FMCA 2	Total Damages: $17,000 $13,000 (non-economic loss) $4,000 (economic loss)
(d)	*Johanson v Blackledge* (2001) 163 FLR 58	Total Damages: $6,500 $6,000 (non-economic loss) $500 (economic loss – cost of counseling)
(e)	*Horman v Distribution Group* [2001] FMCA 52	$12,500 (non-economic loss - includes cost of medication)
(f)	*Wattle v Kirkland (No 2)* [2002] FMCA 135	Total Damages: $28,035 $7,600 (economic loss - reduced from $9,100 on appeal) $15,000 (non-economic loss) $5,435 (interest)
(g)	*Aleksovski v Australia Asia Aerospace Pty Ltd* [2002] FMCA 81	$7,500 (non-economic loss)
(h)	*McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109	Total Damages: $5,100 $4,000 (non-economic loss)

	Case	Damages awarded
		$1,100 (economic loss)
(i)	*Beamish v Zheng* [2004] FMCA 60	$1,000 (non-economic loss)
(j)	*Bishop v Takla* [2004] FMCA 74	Total Damages: $24,386.40 $20,000 (non-economic loss) $13,246.40 (economic loss: medical expenses and interest) Note that the award of damages was reduced by an amount received in settlement against other respondents.
(k)	*Hughes v Car Buyers Pty Ltd* (2004) 210 ALR 645	Total damages: $24,623.50 $7,250 (non-economic loss – being $11,250 less $4,000 paid by a respondent against whom proceedings were discontinued) $5,000 (aggravated damages) $12,373.50 (economic loss - $12,086 for loss of income and $287.50 for expenses)
(l)	*Trainor v South Pacific Resort Hotels Pty Ltd* (2004) 186 FLR 132; upheld on appeal *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402	Total Damages: $17,536.80 $6,564.65 (non-economic loss – being $5,000 plus $1.564.65 interest) $1,907.50 (economic loss – medical expenses) $6,564.65 (economic loss – being $5,000 plus $1.564.65 interest) $2,500 (future loss of income)
(m)	*Phillis v Mandic* [2005] FMCA 330	$4,000 (non-economic loss)
(n)	*Frith v The Exchange Hotel* [2005] FMCA 402	Total Damages: $15,000 $10,000 (non-economic loss) $5,000 (economic loss)
(o)	*San v Dirluck Pty Ltd* (2005) 222 ALR 91	$2,000 (non-economic loss)
(p)	*Cross v Hughes* [2006] FMCA 976	Total Damages: $11,322 $3,822 (economic loss) $7,500 (non-economic loss - including aggravated damages)
(q)	*Hewett v Davies* [2006] FMCA 1678	Total Damages: $3,210 $210 (economic loss)

	Case	Damages awarded
		$3,000 (non-economic loss - including aggravated damages)
(r)	*Lee v Smith* [2007] FMCA 59	$100,000 (non-economic loss)
(s)	*Lee v Smith (No 2)* [2007] FMCA 1092.	Total Damages: $392,422.32 (approx) + interest Interest on the above figure of $100,000 from 23 March 2007 at 10.25% $232,163.22 (economic loss, plus interest on the amount of $53,572.72 at the rate of 5.125% from 5 December 2001 to 14 June 2007 and thereafter at 10.25%). $35,000 (future loss of income) $20,259.10 (economic loss – past medical expenses) $5,000 (future medical expenses)