

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

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# 1 Executive Summary

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## 1.1 Overview

The Public Interest Law Clearing House (Vic) Inc. (**PILCH**) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee (**Committee**) in relation to the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (**Draft Bill**).

PILCH commends the Australian Government on the Draft Bill and recommends that the Committee support its passage by Parliament. The consolidated legislation will simplify and strengthen protections against discrimination in Australia. The Draft Bill presents significant improvements in clarity, efficiency, fairness and accessibility and offers a balanced approach to addressing discrimination in Australia.

PILCH also commends the Government for referring the Exposure Draft to the Committee for review and public consultation prior to its formal introduction to Parliament.

This submission is informed by PILCH's expertise and experience as a provider of pro bono legal services and referrals to a diverse range of people and organisations, including older people, people experiencing or at risk of homelessness, people with a disability, LGBTI people, asylum seekers and refugees, as well as Victoria's not-for-profit organisations. More information about PILCH, our work and our client groups is set out in **Annexure 1**.

This submission is divided into two sections:

- ▶ Key strengths of the Draft Bill – identifying key aspects of the Draft Bill that, in PILCH's view, will bring significant benefits in terms of stronger, more accessible, more efficient protections from discrimination that must be retained; and
- ▶ Potential to improve the Draft Bill – commenting on aspects of the Draft Bill that could be strengthened or improved.

This submission reiterates a number of the points made in PILCH's submission to the Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws dated 1 February 2012 (**PILCH Consolidation Submission**) and should be considered together with that document. The recommendations made in the PILCH Consolidation Submission are set out in **Annexure 2**.

## 1.2 Summary of recommendations

**1) PILCH recommends that the Committee support the passage of the Bill.**

**2) PILCH strongly supports the following aspects of the Draft Bill and commends the Government for these improvements in the clarity, fairness, efficiency and accessibility of Australia's human rights and anti-discrimination protections:**

- a) The simplified definition of discrimination contained in clause 19 of the Draft Bill.
- b) The inclusion of sexual orientation and gender identity as protected attributes in clauses 17(1)(e) and 17(1)(g) of the Draft Bill (subject to recommendations in points 3(c), (d) and (h) below regarding the protection of intersex Australians and exceptions for religious organisations).
- c) The introduction of the shifting burden of proof in clause 124 of the Draft Bill.
- d) The introduction of an approach to costs which facilitates access to justice in clause 133 of the Draft Bill (subject to the recommendations in point 3(i) below regarding the court's discretion to award costs to successful applicants).

**3) PILCH recommends that the following provisions are incorporated into human rights and anti-discrimination protection in Australia:**

*Protected attributes*

- a) Social status (including, homelessness, unemployment and receipt of social security payments) and victim or survivor of domestic or family violence should be protected attributes under clause 17 of the Draft Bill and discrimination on the ground of these attributes should be prohibited in all areas of public life.
- b) Criminal record should be a protected attribute in the Draft Bill and discrimination on the ground of this attribute should be prohibited in all areas of public life. Alternatively, the Government should:
  - i) clarify how it intends to ensure that obligations assumed by Australia in relation to discrimination on the basis of criminal record under the *Discrimination (Employment and Occupation) Convention 1958 (ILO Convention 111)* will be complied with;
  - ii) confirm in the Draft Bill or supporting materials the continued availability of the Australian Human Rights Commission's non-complaint functions including preparation of guidelines and reporting on measures that should be taken by the Government in relation to discrimination on the basis of criminal record; and
  - iii) include protection against discrimination on the basis of criminal record as part of the three year review under clause 47 of the Draft Bill.<sup>1</sup>
- c) The definition of 'gender identity' should be based on the definition in the Anti-Discrimination Amendment Bill 2012 (Tas).
- d) 'Intersex' should be included as a separate protected attribute using the definition in the Anti-Discrimination Amendment Bill 2012 (Tas).

*Objects of the Act*

- e) The object in clause 3(1)(d) of the Draft Bill should be amended to read: 'to promote recognition and respect within the community for the principle of substantive equality and the inherent dignity of all people' and the objects should be reordered to reflect the importance of substantive equality.<sup>2</sup>
- f) Clause 3 of the Draft Bill should be amended to include a clause which states that one of the objectives of the Act is: 'to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation'.

*Exceptions*

- g) Clause 23 of the Draft Bill should be amended to clarify the context of 'legitimate aim' for the purposes of the justifiable conduct exception. Guidelines and regulations should also accompany the Act, which provide clear, practical guidance about what constitutes a legitimate aim for the purposes of this exception.

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<sup>1</sup> See Australian Human Rights Commission, *Exposure Draft Human Rights and Anti-Discrimination Bill 2012: Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Committee* (December 2012) 8 (**AHRC Exposure Draft Submission**).

<sup>2</sup> See Discrimination Law Experts Group, *Submission of Discrimination Law Experts Group to Senate Legal and Constitutional Affairs Committee: Inquiry into Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (December 2012) 11 (**Expert Group Submission 2012**).

- h) The exceptions for religious organisations should be removed and religious organisations should instead rely on the general exception of justifiable conduct in clause 23 of the Draft Bill. If these exceptions remain in the Draft Bill:
  - i) the Draft Bill should require religious organisations to publish a written statement of their reliance on the exception, the extent of the exception and of the religious doctrine or sensitivity being relied on; and
  - ii) the exception should not be available to religious organisations in respect of 'functions of a public nature' and in particular, functions undertaken by them pursuant to a contract with Government or pursuant to Government funding.

#### Costs

- i) Clause 133(3) of the Draft Bill should be amended to include the below circumstances that the court must consider in deciding whether there are circumstances that justify the making of an order for costs or security for costs:
  - i) the complaint is successful and the matter is a public interest matter; and
  - ii) an individual complainant has been successful against a respondent that is a government entity or is eligible to claim its legal expenses as a tax deduction.<sup>3</sup>

#### *Protected areas of public life*

- j) In relation to volunteers:
  - i) the Draft Bill should be amended to include volunteering as a specifically listed area of public life in clause 22(2) to which the legislation applies;
  - ii) alternatively, the Draft Bill should be amended to include 'voluntary and unpaid work' as part of the definition of 'work and work-related areas' in its own right, rather than as part of the definition of 'employment';
  - iii) a definition of 'volunteer' should be included in the Draft Bill; and
  - iv) guidance material should clarify that the 'inherent requirements of work' exception applies in circumstances where a volunteer-involving organisation cannot access reasonable insurance cover for a volunteer.
- k) In relation to clubs and member-based associations:
  - i) the Draft Bill should exclude the phrase 'provide and maintain facilities, in whole or in part, from the funds of the association' from the definition of clubs and member-based associations, and limit coverage to associations that have 'at least one employee' or are incorporated; and
  - ii) the Draft Bill should be amended so that the exclusion allowing clubs and member-based associations to discriminate in restricting access to benefits or services (clause 35(4)(a)(ii)) should be for a purpose that is consistent with the objects of the Draft Bill.
- l) In relation to vicarious liability:
  - i) the Draft Bill should limit the coverage of vicarious liability for unlawful conduct (clause 57) of volunteers to situations where a community organisation exerts a level of direction, control and supervision over its volunteers (such as occurs in various state-based civil wrongs legislation);

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<sup>3</sup> See *ibid* 36.

- ii) clause 57(3) of the Draft Bill should be limited to situations where the principal exercised ‘reasonable’ due diligence; and
  - iii) specific examples of how ‘vicarious liability’ may work in a volunteering/ not-for-profit (**NFP**) context should be included in guidance material.
- m) In relation to support and education for the NFP sector:
- i) adequate provision should be made in guidance material and the explanatory memorandum specific to the NFP sector; and
  - ii) a comprehensive education and awareness-raising campaign to inform the not-for-profit sector about their new obligations and potential liabilities is implemented.

*Tiered protections, equality before the law, review, special measures, positive duty and representative proceedings*

- n) The Draft Bill should cover discrimination on the basis of all protected attributes in all areas of public life.
- o) Equality before the law should be protected in relation to all attributes, not just race.
- p) The three year review of exceptions under the Act should be expanded to include consideration of the addition of further protected attributes to the legislation.
- q) In relation to special measures under clause 21 of the Draft Bill, PILCH endorses the recommendations of the Human Rights Law Centre, which are set out in part 3.8 below.
- r) The Draft Bill should contain a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation, modelled on part 4 of *the Equal Opportunity Act 2010 (Vic)*.
- s) Clause 122 of the Draft Bill should be amended to include standing provisions for organisations with a significant interest in a matter.

## 2 Key strengths of the Draft Bill

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PILCH strongly supports all of the provisions of the Draft Bill identified in the submission of the Australian Human Rights Commission (**AHRC**) as ‘advances on existing law’.<sup>5</sup> Our comments in relation to four of these provisions, including why PILCH supports these changes, are set out in more detail in this section.

### 2.1 Definition of discrimination

PILCH welcomes the simplified definition of discrimination contained in clause 19 of the Draft Bill.

The changes, in particular the removal of the complicated distinction between direct and indirect discrimination and the unwieldy comparator test, are consistent with Recommendation 2 of the PILCH Consolidation Submission.

This simpler, more consistent definition will reduce complexity and uncertainty and make it easier for individuals and duty holders to understand their rights and obligations.

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<sup>4</sup> *Equal Opportunity Act 2010 (Vic)* pt 9. See also, Victorian Equal Opportunity and Human Rights Commission, *Equal Opportunity Act 2010: Positive Duty* (available at: <http://www.humanrightscscommission.vic.gov.au>).

<sup>5</sup> AHRC Exposure Draft Submission, above n 1, 5–6.

## 2.2 Inclusion of sexual orientation and gender identity as protected attributes

PILCH strongly supports the inclusion of sexual orientation and gender identity as protected attributes in the Draft Bill (clauses 17(1)(e) and 17(1)(g)).

Our comments on the exceptions for religious organisations and the way that these negate some of the benefits of this positive development, and our recommendations about the protection of intersex Australians, are set out in parts 3.1.4 and 3.3.2 below.

PILCH supports the Draft Bill's provision that Commonwealth-funded aged care services are not able to rely on exceptions for religious organisations in service provision (clause 33(2) of the Draft Bill). This carve out recognises the barriers that older same sex couples face in accessing aged care services run by religious organisations. PILCH welcomes the Government's recognition that: '[w]hen such services are provided with Commonwealth funding, the Government does not consider the discrimination in the provision of these services is appropriate'.<sup>6</sup>

PILCH reminds the Committee that it has been 17 years since the Senate first spoke about including sexual orientation and gender identity protections in Federal law. The time has well and truly come to make it unlawful to discriminate against a person on the basis of their sexual orientation or gender identity.

## 2.3 Shifting burden of proof

PILCH strongly supports the introduction of the shifting burden of proof in clause 124 of the Draft Bill.

This is consistent with Recommendation 4 in the PILCH Consolidation Submission, which explains PILCH's reasoning in more detail and contains a case study identifying the negative impact on access to justice of a burden of proof that rests too heavily with the complainant.<sup>7</sup>

We reiterate that it makes sense that a complainant is required to establish a prima facie case (i.e. the presence of a protected attribute, unfavourable treatment and connection to an area of public life) because this is information that complainants have available to them. It makes further sense that the respondent is then required to explain the non-discriminatory reasons for the conduct and to establish the existence of any defences.

PILCH supports the sensible 'policy rationale' of the Government: 'the respondent is in the best position to know the reason for the discriminatory action and to have access to the relevant evidence'.<sup>8</sup>

We point out that references to the evidentiary responsibility in clause 124 of the Draft Bill as a 'reverse onus' provision are inaccurate.<sup>9</sup> As the Discrimination Law Experts Group (**Experts Group**) points out, clause 124 'imposes a real evidentiary burden on an applicant, and only when it is discharged does the burden shift to the respondent'; the applicant's obligation to adduce probative evidence 'is a genuine burden which will deter frivolous claims'.<sup>10</sup>

As pointed out by the Experts Group, 'all major comparable countries use some mechanism to require the respondent to produce evidence of the basis for their action'.<sup>11</sup> A shifting burden of proof focuses the parties'

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<sup>6</sup> Australian Government Attorney-General's Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes* (November 2012) [190] (**Explanatory Notes**).

<sup>7</sup> Public Interest Law Clearing House (Vic) Inc, *Submission to Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws* (1 February 2012) 10–11 (**PILCH Consolidation Submission**).

<sup>8</sup> Explanatory Notes, above n 6, 89.

<sup>9</sup> See, eg, Ben Packham and Lanai Vasek, 'Change in proof discrimination laws worries opposition' *The Australian* (20 November 2012).

<sup>10</sup> Expert Group Submission 2012, above n 2, 30–1.

<sup>11</sup> See Discrimination Law Experts' Group, *Consolidation of Commonwealth Anti-Discrimination Laws Submission* (2011) (2011) 12 (**Expert Group Submission 2011**). See also Expert Group Submission 2012, above n 2, 31, which cites: *Equality Act 2010* (UK) s 136; *Employment Equality Act 1998–2004* (Ireland) s 84A; *Constitution of the Republic of South Africa 1996* (South Africa) s 9(5);



attention on the key issue – the basis for the action – and clarifies the evidence that respondents are required to produce. This has the potential to lead to more efficient and effective pre-litigation negotiation, as well as to reduce the complexity of court hearings by focussing on the key issues: what happened and was it discriminatory?

PILCH is strongly of the view that the shifting burden of proof in clause 124 is a significant step forward for the effectiveness and efficiency of anti-discrimination protection and it is an element of the Draft Bill that must be retained.

## 2.4 Costs

PILCH supports the introduction of an approach to costs which facilitates access to justice i.e. clause 133 of the Draft Bill, which provides that each party to proceedings under the Bill in the Federal Court or the Federal Magistrates' Court bears their own costs.

As set out in the PILCH Consolidation Submission, as a pro bono referral service for public interest matters, PILCH has observed that the cost of bringing an anti-discrimination complaint in the Federal Court is high and can be prohibitive for clients with meritorious claims. The PILCH Consolidation Submission noted that the risk of an adverse costs order is 'a major disincentive for a complainant to proceed to court, having exhausted the conciliation process'.<sup>12</sup>

PILCH predicts that this change will make successful conciliation more likely, because litigation will be a more realistic prospect for both parties and the incentive to negotiate is therefore greater. Previously, the less well resourced party (generally the complainant) was at a disadvantage because of the underlying knowledge of both parties that the matter was unlikely to be pursued further even if it was not successfully conciliated. The change to costs allocation in the Draft Bill means that negotiation will take place on a more even playing field.

PILCH is aware of concerns that the removal of the prospect of costs being awarded when a claim is successful may make it difficult for applicants to access legal representation on a cost contingent basis (for example, through no-win no-fee firms). PILCH suggests that we need to be mindful of this risk and to monitor courts' use of the power under clause 133(2) of the Draft Bill to 'make such order as to costs, and security for costs, whether by way of interlocutory order or otherwise, as the court considers just'.

PILCH also notes, though, that under the current system where the losing party is liable for costs, clients with seemingly meritorious matters often approach PILCH after having their matter rejected by a no-win no-fee firm. The PILCH Consolidation Submission suggested that it might be the case that no-win no-fee firms do not accept discrimination matters because the potential monetary remedy is unlikely to cover the costs of legal representation; and that the rule that costs follow the event in the Federal Court is therefore not maximising access to justice for low to medium income clients.

PILCH recommends that a pragmatic drafting solution would be to include situations where the complaint is successful and the matter is a public interest matter as a circumstance that the court must consider in deciding whether there are circumstances that justify the making of an order for costs or security for costs under clause 133(3) of the Draft Bill. We also support Recommendation 58 of the Experts Group: 'Clause 133(3) should be amended to include as a consideration that an individual complainant has been successful against a respondent that is a government entity or is eligible to claim its legal expenses as a tax deduction'.<sup>13</sup>

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*Employment Equity Act 1988 (South Africa) s 11; Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (South Africa) s 36.*

<sup>12</sup> PILCH Consolidation Submission, above n 7, 38.

<sup>13</sup> Expert Group Submission 2012, above n 2, 36.

## 3 Potential to improve the Draft Bill

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### 3.1 Protected attributes

PILCH notes with disappointment that the Draft Bill does not include protections from discrimination for people who:

- ▶ experience homelessness, unemployment or are reliant on social security payments; or
- ▶ experience or have experienced domestic or family violence.

PILCH also notes with concern that protection against discrimination on the basis of criminal record has been reduced in the Draft Bill.

This section discusses the importance of protecting against discrimination on the basis of these attributes and recommends that they are included in the Draft Bill. Alternatively, PILCH recommends that the Government commits to considering including protection against discrimination on these grounds as part of the three year review under clause 47 of the Draft Bill.

This section also contains recommendations on the current drafting of provisions regarding discrimination on the basis of sexual orientation and gender identity.

#### 3.1.1 Social status – homelessness

PILCH reiterates its recommendation in the PILCH Consolidation Submission that a person's social status – which includes homelessness, unemployment or receipt of social security payments – should be a protected attribute under clause 17 of the Draft Bill.

##### 3.1.1.1 Why social status should be a protected attribute

In addition to PILCH, a number of other organisations that work directly with, or advocate for, people experiencing homelessness (including the National Association of Community Legal Centres,<sup>14</sup> the Human Rights Law Centre<sup>15</sup> and the Public Interest Advocacy Centre)<sup>16</sup> have recommended the introduction of legislative protection against discrimination on the basis of social status.

The PILCH Consolidation Submission presented evidence regarding social status discrimination and its impact on disadvantaged clients. In summary, it:

- ▶ Explained what discrimination on the basis of social status looks like on the ground:
  - 'direct' – unfair and inaccurate assumptions are made about a person's lifestyle, character or ability to pay for goods and services on the basis of their homelessness, appearance, source of income (for example, Centerlink benefits) and/or association with a support agency (for example, which is paying their first month's rent or bond); and
  - 'indirect' – requirements are imposed to access goods, services, employment or accommodation, which people experiencing homelessness are unable to meet (for example, provision of a fixed address);

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<sup>14</sup> See, eg, National Association of Community Legal Centres and Kingsford Legal Centre, *Submission to The Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft Legislation* (21 December 2012) (**NACLC Submission 2012**).

<sup>15</sup> Human Rights Law Centre, *Realising the Right to Equality: The Human Rights Law Centre's Recommendations for the Consolidation and Reform of Commonwealth Anti-Discrimination Laws* (January 2012) (**HRLC Consolidation Submission**).

<sup>16</sup> Public Interest Advocacy Centre Ltd, *Improving Access to Equality: Submission to the Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (1 February 2012) 37–44 (PIAC uses the term 'housing status' in its submission).

- ▶ Summarised the HPLC's 2006 consultations with over 180 homeless Victorians about their experience of discrimination (**Discrimination Consultations**) and the nature and extent of social status discrimination in Victoria:
  - approximately 70% of the respondents reported that they had experienced discrimination on the basis of social status by accommodation providers. Respondents experienced discrimination in private rental, boarding houses, transitional or crisis accommodation, hotels and public housing;<sup>17</sup>
  - almost 50% of the respondents reported that discrimination on the ground of homelessness or social status had prolonged their homelessness and made it difficult to find a sustainable pathway out of homelessness;<sup>18</sup> and
  - almost 60% of respondents reported being discriminated against by goods and services providers on the basis of their homelessness, most often by restaurants, cafes or bars, banks, retail shops, hospitals and telecommunications providers;<sup>19</sup>
- ▶ Presented four case studies showing the impact of discrimination on the basis of social status on people's ability to access accommodation and goods and services;
- ▶ Explained the impacts of discrimination on the basis of social status, including:
  - hindering access to accommodation and goods and services;
  - acting as a barrier to getting and maintaining employment;
  - exacerbating social exclusion and stigmatisation;
  - entrenching homelessness; and
  - harmful psychological effects;<sup>20</sup>
- ▶ Identified that the inclusion of social status as a protected attribute would:
  - establish a norm of non-discrimination against homeless people;
  - create public awareness that homeless people should not be treated less favourably; and
  - give homeless people an avenue to complain and seek redress when they have experienced discrimination; and
- ▶ Noted that, in addition to the acute personal costs for individuals experiencing discrimination, there is also an economic cost, citing a City of Sydney study which found that the public financial cost of someone remaining homeless is as much as \$34,000 per person every year.<sup>21</sup>

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<sup>17</sup> PILCH Homeless Persons' Legal Clinic, *Report to the Department of Justice: Discrimination on the Ground of Homelessness or Social Status* (2007) 12–13. Private rental or real estate agents (41% or 75 respondents), boarding houses (24% or 44 respondents), transitional or crisis accommodation (20% or 36 respondents), hotels and public housing (each 19% or 35 respondents) and caravan and backpackers (each 17% or 32 respondents).

<sup>18</sup> Ibid 17.

<sup>19</sup> Ibid.

<sup>20</sup> PILCH Consolidation Submission, above n 7, 2 citing VicHealth, *More than Tolerance: Embracing Diversity for Health* (2007), which found that people who suffer from discrimination (on the basis of race) are more likely to experience depression and anxiety.

<sup>21</sup> City of Sydney and St Vincent's Hospital Emergency Department, *Help the Homeless: Spend Less – Spend Wisely*. See also Guy Johnson, Daniel Kuehnle, Sharon Parkinson and Yi-Ping Tseng, *Meeting the Challenge? Transitions Out of Long Term Homelessness – A randomised controlled trial examining the 24 month costs, benefits and social outcomes from the Journey to Social inclusion pilot project* (2012).

As identified by the Human Rights Law Centre, a number of comparable overseas jurisdictions provide legal protections against social status discrimination, including:

- ▶ the prohibition in the New Zealand *Human Rights Act* 1993 of discrimination on the basis of 'employment status', which is defined as being unemployed, receiving an income support benefit or receiving accident compensation payments;<sup>22</sup>
- ▶ the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which has been interpreted as prohibiting discrimination on the basis of social status, including socio-economic status and homelessness,<sup>23</sup> and
- ▶ the Canadian *Charter of Rights and Freedoms* 1982, which contains a non-exhaustive list of prohibited grounds of discrimination and has been interpreted to provide protection to people who are in receipt of social security assistance, unemployed, homeless or poor. A number of Canadian states also have legislation that prohibits discrimination on the basis of 'source of income', 'receipt of public assistance' or 'social condition'.<sup>24</sup>

### 3.1.1.2 Recommendations in relation to discrimination on the basis of social status

As mentioned above, PILCH's strong view is that social status should be a protected attribute in the Bill and discrimination on the ground of this attribute should be prohibited in all areas of public life.

Alternatively, PILCH recommends that the Government commits to considering the protection against discrimination on the basis of social status in the three year review process provided for under the Draft Bill.

### 3.1.2 Criminal record

PILCH does not support the exclusion of 'criminal record' from the list of protected attributes in clause 17 of the Draft Bill.

This change removes the current complaint jurisdiction of the AHRC in relation to discrimination in employment on the basis of criminal record. In our view, this is a diminution in protection from discrimination, which is contrary to the Government's commitment in relation to the consolidation project.<sup>25</sup>

PILCH is strongly of the view that criminal record should be a protected attribute under the new legislation.

#### 3.1.2.1 Why criminal record should be a protected attribute

The PILCH Consolidation Submission presented evidence regarding criminal record discrimination and its impact on disadvantaged clients. In summary, it:

- ▶ Noted that criminal record checks are increasingly becoming a standard part of the recruitment process irrespective of the nature of the job or the relevance of a criminal record to that job<sup>26</sup> (for

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<sup>22</sup> HRLC Consolidation Submission, above n 15, 24–25 citing *Human Rights Act* 1993 (NZ) s 21(2).

<sup>23</sup> Ibid citing, eg, *Pottinger v City of Miami* 810 F Supp 1551, 1578 (SD Fla 1992) in which the court held: (1) The plaintiffs (three men experiencing homelessness who applied on behalf of approximately 6,000 other homeless people living in the City of Miami) have shown that the City has a pattern and practice of arresting homeless people for the purpose of driving them from public areas; (2) The City's practice of arresting homeless individuals for harmless, involuntary conduct which they must perform in public is cruel and unusual in violation of the Eighth Amendment to the United States Constitution; (3) Such arrests violate plaintiffs' due process rights because they reach innocent and inoffensive conduct; (4) The City's failure to follow its own written procedure for handling personal property when seizing or destroying the property of homeless individuals violates plaintiffs' fourth amendment rights; (5) The City's practice of arresting homeless individuals for performing essential, life-sustaining acts in public when they have absolutely no place to go effectively infringes on their fundamental right to travel in violation of the equal protection clause.

<sup>24</sup> Ibid citing Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (23 June 2000).

<sup>25</sup> See Attorney-General, Robert McClelland and Minister for Finance and Deregulation, Lindsay Tanner, 'Reform of Anti-Discrimination Legislation' *Joint Media Release* (21 April 2010): 'Importantly, there will be no diminution of existing protections currently available at the federal level' (**Consolidation Media Release**).

example, PILCH recently spoke with a worker whose client was being subjected to a criminal record check when applying for a job stacking trolleys at the local supermarket);

- ▶ Stated that individuals with a criminal record will often self-exclude when applying for positions that require a criminal record check as they believe that the existence of a criminal record – regardless of how irrelevant, minor or old – will prevent them from being fairly considered for the position;
- ▶ Presented case studies providing examples of criminal record discrimination in the context of applying for employment and private rental properties;
- ▶ Explained the impacts of criminal record discrimination, including:
  - hindering access to employment, accommodation, goods and services;
  - increasing the likelihood of recidivism;<sup>27</sup>
  - exacerbating social exclusion and stigmatisation; and
  - harmful mental and psychological effects; and
- ▶ Identified that the inclusion of criminal record as a protected attribute would:
  - establish a norm of non-discrimination against people with an irrelevant criminal record;
  - create public awareness that former offenders should not be treated less favourably;
  - give people an avenue to complain and seek redress when they have experienced discrimination on the basis of an irrelevant criminal record; and
  - impose an obligation on duty holders to respect the right to non-discrimination on the basis of irrelevant criminal record and refrain from discriminating on that basis.

### 3.1.2.2 PILCH's concerns with the Draft Bill in relation to criminal record discrimination

PILCH is concerned that the omission of criminal record from clause 17 of the Draft Bill constitutes a reduction in existing protections in Australia, which is contrary to the Government's commitment in relation to the consolidation project.<sup>28</sup> It is also inconsistent with Australia's obligation under the *Discrimination (Employment and Occupation) Convention 1958 (ILO Convention 111)* to 'declare and pursue a national policy designed to promote ... equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof'.<sup>29</sup>

The exclusion of criminal record as a protected attribute also creates complication and inconsistency between State and Territory regimes, which it was the intention of the Draft Bill to remove.<sup>30</sup> As noted by the

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<sup>26</sup> See, eg, Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform* (2005).

<sup>27</sup> PILCH Consolidation Submission, above n 7, 21, which cites United Kingdom research which shows that employment can reduce offending by between a third to a half: United Kingdom Home Office, *Breaking the Cycle: A Report on the Review of the Rehabilitation of Offenders* (2002) [3.16].

<sup>28</sup> Consolidation Media Release, above n 25.

<sup>29</sup> In 1989, Australia added criminal record as a specified ground of non-discrimination under ILO 111: *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth). See Human Rights Law Centre, *Realising the Right to Equality: The Human Rights Law Centre's Recommendations for the Consolidation and Reform of Commonwealth Anti-Discrimination Laws* (January 2012) 21–22.

<sup>30</sup> See PILCH Homeless Persons' Legal Clinic, *Discrimination in Employment on the Basis of Criminal Record: Submission to the Human Rights and Equal Opportunity Commission Inquiry into Discrimination in Employment on the Basis of Criminal Record* (February 2005) 15–16.

Experts Group: 'The omission of criminal record discrimination protections in the federal Bill leaves a patchy and confusing collection of laws regulating this area'.<sup>31</sup>

PILCH notes that 2011–2012, the AHRC received 290 enquiries and 67 complaints of discrimination in employment on the basis of criminal record. This was the most common complaint made under ILO 111, and represented 13% of all human rights complaints under the *Australian Human Rights Commission Act 1986 (Cth)*.<sup>32</sup> In a practical sense, PILCH is concerned that the absence of the complaints mechanism in relation to discrimination on the basis of criminal record in employment will have an adverse impact on people affected by discrimination who are presently able to seek resolution of complaints.

### 3.1.2.3 Recommendations in relation to criminal record discrimination

As mentioned above, PILCH's strong view is that criminal record should be a protected attribute in the Bill and discrimination on the ground of this attribute should be prohibited in all areas of public life.

Alternatively, PILCH reiterates the recommendations of the AHRC that:

- ▶ the Government clarifies how it intends to ensure that obligations assumed by Australia in relation to discrimination on the basis of criminal record under the ILO Convention will be complied with;
- ▶ the Draft Bill or supporting materials confirm the continued availability of the AHRC's non-complaint functions including preparation of guidelines and reporting on measures that should be taken by the Government in relation to discrimination on the basis of criminal record; and
- ▶ protection against discrimination on the basis of criminal record be included in the review of the three year review process provided for under the Draft Bill.<sup>33</sup>

### 3.1.3 Domestic or family violence

PILCH recommends that the Bill should provide protection against discrimination on the basis of being a victim or survivor of domestic or family violence in all areas of public life i.e. it should be identified as a protected attribute in clause 17 of the Draft Bill.

In particular, through the HPLC, PILCH sees the vulnerability of women who are victims of domestic or family violence to discrimination in provision of accommodation. We see women experiencing cycles of homelessness stemming from domestic or family violence, insecure employment and barriers to obtaining and sustaining safe and secure housing.

PILCH endorses the submission of the Experts Group, which endorses the submission of the National Association of Community Legal Centres, on this point:

- ▶ Victim or survivor of domestic or family violence should be a protected attribute in the Draft Bill and discrimination on the ground of this attribute should be prohibited in all areas of public life.
- ▶ If this attribute is not included, the three year review of exceptions should be extended to consider additional attributes including this one.<sup>34</sup>

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<sup>31</sup> Expert Group Submission 2012, above n 2, 16, which refers to the various protections in other States and Territories in relation to criminal record discrimination and spent convictions regimes.

<sup>32</sup> Ibid 16 citing the Australian Human Rights Commission, *Annual Report 2011–2012 (2012) Appendix*.

<sup>33</sup> AHRC Exposure Draft Submission, above n 1, 8.

<sup>34</sup> Expert Group Submission 2012, above n 2, 18 citing and endorsing NACLC Submission 2012, above n 14.

### 3.1.4 Sexual orientation, gender identity, sex characteristics and gender expression

As mentioned above, PILCH strongly supports the inclusion of sexual orientation and gender identity as protected attributes in the Draft Bill.

In relation to these protections, PILCH recommends that:

- ▶ the definition of 'gender identity' should be based on the definition in the Anti-Discrimination Amendment Bill 2012 (Tas) (which is inclusive of gender expression and presentation); and
- ▶ 'intersex' should be included as a separate protected attribute using the definition in the Anti-Discrimination Amendment Bill 2012 (Tas) (this is to recognise that intersex is not a matter of gender identity, but rather of biology).

## 3.2 Objects of the Act

PILCH supports the objects clause contained in clause 3 of the Draft Bill. In particular, the stated objects of:

- ▶ eliminating unlawful discrimination, sexual harassment and racial vilification, consistent with Australia's obligations under human rights instruments and International Labour Organization (ILO) instruments (and the absence of any qualifier in relation to this) (clause 3(1)(a));
- ▶ giving effect to Australia's obligations under the human rights and ILO instruments (clause 3(1)(b)); and
- ▶ promoting substantive equality (clause 3(1)(d)).

These are largely consistent with Recommendation 1 in the PILCH Consolidation Submission.

We note, however, that clause 3(1)(d) of the Draft Bill refers to the object of promoting recognition and respect of 'both formal and substantive equality', which presents a risk of uncertainty when these objects are opposed (i.e. when substantive equality requires something different to formal equality).

PILCH suggests that the ultimate aim of the legislation is to promote substantive equality and the wording should be reconsidered to recognise this. PILCH supports Recommendations 2 and 3 of the Experts Group on this point:

- ▶ The object in clause 3(1)(d) should be amended to read: 'to promote recognition and respect within the community for the principle of substantive equality and the inherent dignity of all people;' and
- ▶ The objects should be reordered to reflect the importance of substantive equality as an object of the Bill.<sup>35</sup>

We also reiterate the importance of recognising that discrimination is often caused by structural or systemic inequalities and of stating that the purpose of the Bill includes the identification and elimination of structural or systemic causes of discrimination. The *Equal Opportunity Act 2010* (Vic) (**Victorian EO Act**) includes a useful provision regarding systemic causes of discrimination in its objects clause. It states that one of the objectives of the Act is: 'to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation'.<sup>36</sup> PILCH recommends that wording to this effect is included in clause 3 of the Draft Bill.

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<sup>35</sup> Ibid 11.

<sup>36</sup> See *Equal Opportunity Act 2010* (Vic) s 3(c).



The objects clause of the legislation informs and guides both the community and courts and tribunals when interpreting its provisions. It is therefore important that the objects of the Draft Bill accurately reflect that '[t]he real work to be done by anti-discrimination law is to achieve substantive equality'.<sup>37</sup>

### 3.3 Exceptions

#### 3.3.1 Justifiable conduct

PILCH supports the Draft Bill's inclusion of a general exception of justifiable conduct, which seeks to address the ad hoc, inconsistent and confusing collection of exceptions and exemptions under the existing laws.

However, PILCH is concerned that the exception of justifiable conduct under clause 23 of the Draft Bill is too broad and may have unintended consequences.

Clause 23(2) of the Draft Bill provides that it is not unlawful for a person to discriminate against another person if the conduct constituting the discrimination is justifiable. Clause 23(3) provides that conduct is justifiable if:

- ▶ the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim; and
- ▶ that aim is a legitimate aim; and
- ▶ 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
- ▶ the conduct is a proportionate means of achieving that aim.

In determining whether the conduct is justifiable, clause 23(4) of the Draft Bill provides that the following matters must be taken into account:

- ▶ the objects of this Act (refer to part 3.2 in relation to the importance of the objects of the Draft Bill);
- ▶ the nature and extent of the discriminatory effect of the conduct;
- ▶ whether the first person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect; and
- ▶ the cost and feasibility of engaging in other conduct.

Based on the current formulation of clause 23, direct discrimination may be argued to be lawful if it is cheaper and more practicable for a business than alternative non-discriminatory conduct i.e. because they are pursuing a legitimate business aim. While it is strongly arguable that this is inconsistent with the objects of the Act, this message is not clear for individuals or duty holders.

As noted by the Expert Group: 'To allow a broad defence of justification for a direct discrimination complaint will significantly reduce current protection, contrary to the Government's commitment'.<sup>38</sup>

We support the statements of the Expert Group that:

- ▶ the defence of justification should be drafted narrowly in accordance with human rights principles, and construed narrowly in accordance with the objects of the Draft Bill and the beneficial nature of the legislation; and
- ▶ the objects of the Draft Bill should be focused clearly and unequivocally on the achievement of substantive equality across all attributes and areas of public life.<sup>39</sup>

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<sup>37</sup> Expert Group Submission 2012, above n 2, 11.

<sup>38</sup> Ibid 24.

<sup>39</sup> Ibid.



In particular, clarification is needed about what constitutes a 'legitimate' aim. It is important both for rights and duty holders to understand that 'legitimate' must be within the context of the human right to non-discrimination i.e. private business aims are not 'legitimate' for the purposes of excusing discrimination.

PILCHConnect points out the particular need for small not-for-profit organisations to have clear guidance about what constitutes a legitimate aim for the purposes of the justifiable conduct exception in order to support compliance and avoid confusion.

PILCH recommends that the wording of the Draft Bill is amended to clarify the context of 'legitimate aim' for the purposes of the justifiable conduct exception. Guidelines and regulations should also accompany the Act, which provide clear, practical guidance about what constitutes a legitimate aim for the purposes of this exception.

### 3.3.2 Religious organisations

PILCH is disappointed that the permanent exceptions for religious organisations have been maintained in the Draft Bill. We reiterate our position in the PILCH Consolidation Submission (Recommendation 15) that religious organisations should not be treated differently to other entities and entitled to discriminate without providing any explanation of why the differential treatment is justifiable.

The PILCH Consolidation Submission referred to the case of a five year old girl who was lawfully refused admission to a government funded kindergarten on the basis of her parents' same-sex relationship as a tangible example of the negative effect of these exceptions for religious organisations.<sup>40</sup> This example demonstrates the broad reach of the current exceptions (i.e. to education of children in government funded kindergartens). While one aspect of this problem has been addressed by the Draft Bill in that it includes sexual orientation as a protected attribute, the exceptions for religious organisations mean that this discrimination would not be unlawful under the current Draft Bill.

In practice, the exceptions for religious organisations in the Draft Bill mean that a religious hospital can refuse to employ a single mother, a religious school can refuse to enrol a gay student and a faith-based homelessness shelter can refuse to accept a transgender resident.

In PILCH's view, all organisations in receipt of government funding should be prevented from discriminating both when they employ people and when they deliver services to the community, particularly vulnerable groups such children, those with a disability or mental illness and people experiencing homelessness.

From the perspective of the HPLC, a huge number of social and homelessness services are provided by faith-based organisations. In practice, the HPLC rarely sees these organisations providing services in a discriminatory manner in reliance on the exception. In many cases, it is antithetical to the inclusive, compassionate, supportive services that these organisations aim to provide. With this in mind, we ask the Government and faith-based organisations to clearly explain why these standing exceptions – and the permission to discriminate that they bring with them – are necessary.

PILCH recommends that the exceptions for religious organisations are removed and that religious organisations instead rely on the general exception of justifiable conduct in clause 23 of the Draft Bill.

If these exceptions remain in the Draft Bill, PILCH recommends:

- ▶ Religious organisations wishing to rely on the exception should be required to be transparent about the extent of, and the justification for, the discrimination. The Draft Bill should require religious

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<sup>40</sup> See *The Age*, 'School forced to take same-sex couple's daughter' (14 December 2011) (available at <http://www.theage.com.au/national/school-forced-to-take-samesex-couples-daughter-20111214-1ou92.html>). This case related to NSW legislation but this discrimination would also be permitted if the Draft Bill extends the exceptions for religious organisations to sexual orientation and gender identity.

organisations to publish a written statement of their reliance on the exception, the extent of the exception (for instance, whether it applies to the organisation's educational facilities and welfare services and whether it applies to all staff or only some) and the religious doctrine or sensitivity being relied on. Religious organisations wishing to discriminate should be required to publish statements in position descriptions, on their website and in any brochures about their service, informing people about the risk of discrimination before they make a decision to purchase or access goods or services or apply for a job. Such requirements would require a level of accountability and would properly inform community members about the risk of discrimination; and

- ▶ The exception should not be available to religious organisations in respect of 'functions of a public nature' and in particular, functions undertaken by them pursuant to a contract with Government or pursuant to Government funding.<sup>41</sup>

### 3.4 Two tiers of protection

The Draft Bill provides two tiers of protection:

- ▶ Tier 1 – discrimination on the basis of age, breast feeding, disability, gender identity, immigrant status, marital or relationship status, potential pregnancy, pregnancy, race, sex or sexual orientation, is unlawful if it is connected with an area of public life (including, for example, work and work related areas, education or training, the provision of goods, services and facilities, access to public places, provision of accommodation, and membership and activities of clubs or member-based associations);<sup>42</sup> and
- ▶ Tier 2 – discrimination on the basis of family responsibilities, industrial history, medical history, nationality or citizenship, political opinion, religion and social origin, is only unlawful if it is connected with work and work related areas.

PILCH is concerned that this bifurcated protection will cause confusion and unnecessary complexity and that this will increase the regulatory burden on duty holders.

PILCH recommends that the Draft Bill should cover discrimination on the basis of all protected attributes in all areas of public life. This would be consistent with the aim of simplifying the anti-discrimination regime. Given that State and Territory laws already create obligations (in varying forms) not to discriminate on the basis of Tier 2 attributes, PILCH does not consider that the regulatory or compliance burden would be increased by this change.<sup>43</sup>

### 3.5 Protected areas of public life

#### 3.5.1 Volunteers

##### 3.5.1.1 Volunteers and employees

PILCH commends the Government for broadening the coverage of anti-discrimination protections and the areas of public life to include volunteers and unpaid workers.

However, we do not support the approach adopted in the Draft Bill of protecting volunteers by including 'voluntary and unpaid work' in the definition of 'employment' (which is covered as an area of public life under 'work and work-related areas'). As we submitted in the PILCH Consolidation Submission, this approach does not take sufficient account of the context in which volunteering frequently takes place.

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<sup>41</sup> PILCH Consolidation Submission, above n 7, 35. See also Expert Group Submission 2011, above n 11, 16.

<sup>42</sup> Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Vic) cl 22(3).

<sup>43</sup> See also AHRC Exposure Draft Submission, above n 1, 9; Expert Group Submission 2012, above n 2, 14–15.

Many not-for-profit (**NFP**) community organisations that involve volunteers are small, have very limited funds, and rely heavily (or completely) on volunteers to operate. They are often set up for a public interest purpose (for example, to support marginalised and disadvantaged Australians) and as funds are raised to support their work they often have very minimal resources to devote to reviewing, understanding and complying with legislation. In our experience many struggle to comply with increasing regulation via a myriad of often confusing and overlapping laws.

Already in 2013, the NFP sector will be faced with some significant new regulatory requirements.

The establishment of the new Australian Charities and Not-for-Profits Commission (**ACNC**) brings with it new obligations for charitable organisations including new governance and external conduct standards by 1 July 2013. Also the introduction of a statutory definition of charity and various proposed changes to NFP tax concessions create new challenges and changes for the sector. There has been a national harmonisation of occupational health and safety (**OHS**) legislation and reforms to incorporated associations laws in Victoria. While these reforms are ultimately aimed at reducing red tape and improving regulation of charities and NFPs, they are likely to prompt some initial anxiety and confusion, particularly for small charities that are struggling to keep up with the pace of reforms.

For these reasons, any further new legislation affecting the NFP sector needs to be clearly drafted and easily understood. It needs to be proportionate to the sector's capacity and written in a way which allows volunteers involved in running a NFP to understand what's required without having to seek legal advice. Where possible it should be consistent with other related legislation to ensure that it doesn't unnecessarily increase the regulatory compliance burden on NFPs. This approach is consistent with the Government's stated policy on NFP reform.

With this in mind, we are particularly concerned that volunteers (and volunteering) are not sufficiently 'visible' in the drafting of the Draft Bill. While it is positive that the Draft Bill has used the term 'work and work-related areas' as the relevant area of public life, volunteers are still included under the definition of 'employment', rather than as a stand-alone participant in work and work-related areas of public life. Defining a 'volunteer' as a type of 'employee' disregards important distinctions between these two different types of workers and would be very confusing for NFPs and volunteers.

There are key legal differences between an employee and a volunteer. Different legal obligations are owed by an organisation to their employees, as opposed to their volunteers (for example, remuneration, leave entitlements, superannuation and statutory insurance obligations for employees). The terms 'employment' and 'employee' have always had a well-known, ordinary meaning at law (and been the subject of much judicial consideration), as have the factors (particularly remuneration, leave and superannuation entitlements etc) which distinguish employment from volunteering.

PilchConnect often provides training and advice to NFPs on the distinction between an employee and volunteer. Because laws apply in different ways depending on whether a person is a volunteer or employee, we emphasise to NFPs the critical importance of being clear about (and documenting) whether a person who gets involved with their organisation is doing so as an employee or a volunteer. Merging the two concepts in the proposed legislation will only fuel confusion within the NFP sector, and may result in unintended consequences.

We recommend that the Draft Bill be amended to include volunteering as a specifically listed area of public life in clause 22(2) to which the legislation applies. This will provide clarity for the NFP sector and assist organisations in interpreting the Federal anti-discrimination laws.

If, contrary to our preferred approach, volunteering is not listed as an area of public life, the Draft Bill should at a minimum be re-drafted to include 'voluntary and unpaid work' as part of the definition of 'work and work-related areas' in its own right, rather than as part of the definition of 'employment'.

We note that this latter approach is adopted in the new *Model Work Health and Safety Act* and the Queensland anti-discrimination legislation which extends coverage to volunteers by modifying the definition

of 'work' or 'worker' to include work by both a paid worker (for example, an employee) and an unpaid worker (for example, a volunteer) rather than modifying the definition of 'employment', 'employer' and 'employee'. Similarly, New South Wales's anti-discrimination legislation uses the term 'workplace participant' to include both employee and volunteer. This approach maintains the commonly understood meanings of the terms but makes it clear that both are covered by the relevant legislation. We recommend at a minimum, a similar course of action be adopted in the Draft Bill.

### 3.5.1.2 Volunteer definition

PILCH recommends that the Draft Bill should contain a definition of a 'volunteer' – it must be clear to whom these laws apply. There are currently a number of different definitions of a 'volunteer' in legislation throughout Australia.<sup>44</sup>

Volunteering can be a relatively informal arrangement, and the selection of volunteers can occur much more randomly, compared with the employee recruitment process. The ad hoc nature of volunteering means it is even more crucial for the Draft Bill to be clear about who constitutes a volunteer and who doesn't.

While written position descriptions and role-based selection of volunteers are becoming more common within many NFPs (and we recommend this as part of a 'best practice' approach for NFPs), there are many instances where people volunteer in unstructured ways. It needs to be clear whether a 'volunteer' includes only those formally 'engaged' in a particular volunteer role, or more broadly, any person that 'assists' an organisation (even on an as-needs basis). Some volunteering-specific questions that should be made clear in the language of the legislation include:

- ▶ Are people who involve themselves in an activity of the organisation from time to time, 'volunteers'?
- ▶ Are (voluntary) members of a NFP board or committee of management considered 'volunteers'?
- ▶ Does a volunteer include someone who just 'turns up' and offers to help out an event on a one-off basis?

The answers to these questions are important because organisations need to know who their liability extends to.

Considering the vicarious liability provisions apply to the relationship of volunteer and community organisation (clause 57), it is imperative that volunteer-involving organisations are able to clearly identify who constitutes a 'volunteer' and have clarity about when their organisation may be liable.

### 3.5.1.3 Exceptions – inherent requirements of work

Based on its experience providing legal advice, training and referrals to Victorian NFP's, PILCHConnect supports the inclusion of an exception for inherent requirements of work.

However, guidance material for the legislation should make it clear that this exception extends to circumstances where, due to the age of a volunteer, the organisation cannot legitimately obtain adequate insurance to cover their position (or the cost of obtaining such a policy is exorbitant given the organisation's means). At PilchConnect, we receive many inquiries from NFPs that are concerned about this – i.e. whether the organisation can lawfully discriminate against a volunteer on the basis of age, due to (age-based) exclusions in the organisation's insurance policy. NFPs often seek advice as to whether they can rely on the 'inherent requirements' exception where a volunteer's role requires undertaking tasks that the organisation determines need to be insured against, and insurance cover is not obtainable at a reasonable cost.

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<sup>44</sup> For examples of varying definitions of volunteer applicable to the NFP sector in Victoria see PILCH Consolidation Submission, above n 7, 26.

We note that clause 39 of the Draft Bill offers an exception for insurers to discriminate in relation to the terms or conditions on which an insurance policy is offered or provided, or the refusal to offer an insurance policy. This exception only applies to the terms and conditions of an insurance policy, but does not cover the situation outlined above where an organisation is limited in its ability to engage particular volunteers due to restrictions on insurance coverage.

#### 3.5.1.4 Recommendations in relation to volunteers

PILCH recommends:

- ▶ The Draft Bill should be amended to include volunteering as a specifically listed area of public life in clause 22(2) to which the legislation applies.
- ▶ If volunteering is not listed as a specific area of public life, the Draft Bill should be amended to include 'voluntary and unpaid work' as part of the definition of 'work and work-related areas' in its own right, rather than as part of the definition of 'employment'.
- ▶ A definition of 'volunteer' should be included in the Draft Bill.
- ▶ The guidance material for the legislation should clarify that the 'inherent requirements of work' exception applies in circumstances where a volunteer-involving organisation cannot access reasonable insurance cover for a volunteer.

#### 3.5.2 Clubs and member-based associations

PILCH commends the inclusion of both licensed and non-licensed clubs in the definition of 'club or member-based association'. However, the definition of a club as one that 'provides and maintains facilities, in whole or in part, from the funds of the association' is unsatisfactory and at the very least requires further explanation.<sup>45</sup> The key concept of 'facilities' is not defined in the Draft Bill and the scope of the definition is unclear. For example, would it cover a local book club that uses member funds to rent a room each month for book-discussion meetings? We are particularly concerned that this definition may produce overly burdensome consequences for small, unincorporated groups that operate on a voluntary basis.

As discussed in the PILCH Consolidation Submission, we consider that alternative definitions of clubs and member-based organisations should be considered further. Our preferred option is a definition that adopts the same threshold test used in the new uniform workplace health and safety laws, of having 'at least one employee' i.e:

'an association (whether incorporated or unincorporated) of people associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes, and has at least one employee'.

Alternatively, consideration could be given to a definition in which the scope of coverage is defined by reference to the legal status of the organisation (i.e. extending coverage to incorporated groups only).

If, however, the approach adopted in the Draft Bill is retained, the phrase 'providing and maintaining facilities, in whole or in part, from the funds of the association' needs to be clarified by way of (a) a definition of 'facilities' in the legislation, and (b) guidance and specific practical examples (in the explanatory memorandum and educational materials) of what is within/outside the scope of the phrase.

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<sup>45</sup> We appreciate that this definition is currently used in the *Disability Discrimination Act* (s 4) and the *Sex Discrimination Act* (s 4), and is consistent with many State and Territory anti-discrimination Acts, however in our view, the boundaries of this term are not apparent on the face of the Draft Bill.

We support the exceptions for clubs and member-based associations (clause 35(2)) in relation to any attribute, where membership of the club or association is limited to persons with a particular attribute or attributes, and the purpose of limiting membership is consistent with the objects of the Draft Bill.

The exclusion in clause 35(4)(a)(ii) of the Draft Bill, allowing clubs and associations to discriminate in restricting some access to benefits or services provided by the club or association, should also be required to be for a purpose that is consistent with the objects of the Draft Bill.

PILCH **recommends** that the Draft Bill should:

- ▶ Exclude the phrase ‘provide and maintain facilities, in whole or in part, from the funds of the association’ from the definition of clubs and member-based associations, and limit coverage to associations that have ‘at least one employee’ or are incorporated.
- ▶ Be amended so that the exclusion allowing clubs and member-based associations to discriminate in restricting access to benefits or services (clause 35(4)(a)(ii)) should be for a purpose that is consistent with the objects of the Draft Bill.

### 3.5.3 Vicarious liability

While it is positive that the Draft Bill extends vicarious liability provisions to the volunteer-community organisation relationship, PILCH does not endorse the approach of extending liability (through the inclusion of volunteers and unpaid workers in the definition of ‘employee’) to any act ‘connected with’ the volunteer’s ‘employment’ (clause 57). The fact that volunteers have a different relationship and legal status to ‘employees’ highlights the difficulties associated with this drafting approach, as discussed above.

We are concerned that imposing liability on NFPs for acts done by a volunteer ‘in connection with’ their role is too broad in scope, and will lead to a reluctance by NFPs to involve volunteers for fear of incurring liability for acts that are outside the organisation’s direct authority. We reiterate our point above, that volunteers often work for community groups in more informal and ad hoc ways than employees. It is not appropriate to assume that laws which are appropriate for the employment context will automatically work in the volunteering context (especially without a definition of ‘volunteer’). Special provisions need to be made to address this specific relationship, and to ensure the vicarious liability provisions are workable in light of the circumstances in which much volunteering takes place.

We recommend that the vicarious liability provision apply where a community organisation exerts a certain level of direction, control and supervision over its volunteers, in line with provisions used in Western Australia, South Australia, Victoria, Australian Capital Territory and the Northern Territory.<sup>46</sup> Consideration should be given to wording similar to that used in the *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic) (Victorian Wrongs Act)* for imposing liability in relation to the acts of volunteers. Clause 37 of the Victorian Wrongs Act sets out that:

‘A volunteer is not liable in any civil proceeding for anything done, or not done, in good faith by him or her in providing a service in relation to community work **organised** by a community organisation.’

‘Organise’ includes ‘to direct and to supervise’.

A variation on this drafting could be adopted in the legislation to produce a more appropriate approach in relation to vicarious liability for volunteers.

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<sup>46</sup> *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic)* s 37(2); *The Volunteer Protection Act 2001 (SA)* s 5; *Volunteer (Protection from Liability) Act 2002 (WA)* s 7; *Personal Injuries (Liabilities and Damages) Act 2003 (NT)* s 7(3); *Civil Law (Wrongs) Act 2002 (ACT)* s 9.

We note that because of the anomalous inclusion of voluntary work under the definition of ‘employment’, the current drafting unfortunately does not provide scope to apply a nuanced vicarious liability provision in respect of volunteers. We are also concerned that, with the current drafting (which has no reference to volunteers), it will not be clear to a lay person that vicarious liability extends to the volunteer-community organisation relationship.<sup>47</sup>

A clear and workable definition of ‘volunteer’ is also required. As discussed above, volunteer-involving organisations need to understand when vicarious liability may attach to the organisation – especially if NFPs are to be liable for the actions of volunteers ‘in connection with’ their role.

### 3.5.3.1 Exceptions

The inclusion of an exception for a principal who took reasonable precautions (clause 57(3)) is a welcome inclusion to the Draft Bill. In our view, a community organisation should not be liable for acts committed by a volunteer where the organisation has taken reasonable steps to prevent or avoid the conduct occurring.

However, we query the additional requirement to exercise due diligence to satisfy this exception. It is not clear what level of due diligence is required to meet this criteria, and we are concerned that in the volunteering context, a requirement to conduct ‘due diligence’ on volunteers (who are likely to ‘come and go’ more frequently than employees, and who for many small community organisations, number in the hundreds) would impose a disproportionate burden on volunteer-involving organisations. We are also concerned that there is no reasonableness requirement in relation to the due diligence aspect of the exception. We submit that if this approach is retained, the language should be amended to ‘reasonable precautions’ and ‘reasonable due diligence’.

We note that the Explanatory Notes state (at page 7) that:

‘Codes could also be used to provide a more general understanding for business of some of the more technical aspects of the Bill, such as vicarious liability. That is, it could be desirable to provide greater guidance on what constitutes reasonable steps and due diligence to ensure, if followed, an employer is not liable for the actions of a rogue employee.’

We support the idea of the development of a code, but submit that a separate code would need to be developed to deal with the issues of vicarious liability in the volunteer-community organisation context. As stated earlier in our submission, the business world and the community sector operate in quite different spheres and we are concerned that the Draft Bill does not sufficiently recognise the specific needs and circumstances of the community sector, and inappropriately regards volunteers (and vicarious liability) simply as ‘add ons’ to the employment-business context.

It would certainly assist community organisations to understand (and feel confident in complying with) the legislation to have examples of how ‘vicarious liability’ may work in practice. It would also assist NFPs to have a list of actions that might constitute ‘reasonable’ precautions to help them avoid being vicariously liable for discrimination perpetrated by volunteers. Examples of questions that are likely to arise in the community sector context include:

- ▶ Would induction training for all volunteers on behaviour constituting sexual harassment and discrimination be needed (even if the person is only volunteering for a limited time/event)?
- ▶ Would providing all volunteers with a copy of a discrimination and harassment policy be sufficient?

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<sup>47</sup> Further, a community organisation would not necessarily assume that the vicarious liability provisions apply to it, considering the relationship between a volunteer and a volunteer organisation is not analogous to that of an employer and employee (or that of agent and principal) where the law of agency provides that an employer/principal can be considered responsible for the negligent acts and omissions of its employees/agents.



### 3.5.3.2 Unincorporated Associations

Many unincorporated associations are informally constituted and operate on a casual and ad hoc basis, where members, volunteers and committee members (who may be the same people) all ‘chip in’ as required, rather than having clearly defined roles or organisational systems. In light of the way that these small unincorporated groups operate, we are concerned that proposed clause 58(2) of the Draft Bill will not be workable. In our view, it is unrealistic (and would be overly burdensome) to expect small volunteer-run unincorporated groups to operate with the level of formality required to avoid liability by taking precautionary measures and undertaking due diligence. We also note it can be difficult to identify who it was that engaged/authorised a particular action, given the informal way in which unincorporated groups typically operate.

The lack of clarity surrounding the definition of a ‘club or member-based organisation’ exacerbates this problem. This is discussed above, and could be resolved by limiting the definition to clubs to organisations that have one or more employees.

We also refer to our recommendation above in relation to the need for a definition of ‘volunteer’.

PILCH **recommends** that:

- ▶ The Draft Bill should limit the coverage of vicarious liability for unlawful conduct (clause 57) of volunteers to situations where a community organisation exerts a level of direction, control and supervision over its volunteers (such as occurs in various state-based civil wrongs legislation).
- ▶ Clause 57(3) of the Draft Bill should be limited to situations where the principal exercised ‘reasonable’ due diligence.
- ▶ Specific examples of how ‘vicarious liability’ may work in a volunteering/NFP context should be included in guidance material.

### 3.5.4 Support and education for NFPs

Guidelines and compliance codes (Part 3-1 Division 6 of the Draft Bill) are a great way to assist compliance with the legislation and increase understanding of the obligations it imposes. However, we are disappointed that while the Explanatory Notes make mention of these measures as a means to ‘assist business to understand their obligations under Commonwealth anti-discrimination law’<sup>48</sup> and ‘are designed to provide both certainty and incentives for business to improve their anti-discrimination compliance’,<sup>49</sup> no reference at all is made to the not-for-profit sector.

As discussed earlier, many NFPs struggle to comply with increasing regulation via a myriad of often confusing and overlapping laws. The sector also bears an additional regulatory burden relating to their not-for-profit status (for example, laws regulating fundraising, charity tax status, and laws relating to volunteers). As stated earlier, recently the sector is also grappling with a range of significant regulatory reforms (for example, the establishment of the ACNC, a new statutory definition of charity, national harmonisation of OHS legislation and reforms to incorporated associations legislation in Victoria, just to name a few).

The absence of reference to the NFP/voluntary sector in the Explanatory Notes, as well as the inclusion of the term ‘volunteer’ in the definition of ‘employee’, indicates that there has been little consideration of the specific environment in which NFP and volunteer-involving organisations operate in formulating the Draft Bill. This is disappointing, both given the sector’s importance (there are over 600,000 NFPs in Australia, with volunteer work contributing \$14.6 billion to the economy)<sup>50</sup> and in particular, the emphasis the Federal

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<sup>48</sup> Explanatory Notes, above n 6, 6.

<sup>49</sup> Ibid 7.

<sup>50</sup> In 2006–2007 the direct value of volunteer work across Australia was estimated at \$14.6 billion.



Government is placing on NFP sector reform and 'reducing red tape' with other initiatives (such as the establishment of the ACNC in December 2012). It is positive that Chapter 3 of the Draft Bill provides for mechanisms to assist compliance with the anti-discrimination obligations, but as mentioned above, guidelines and codes need to be developed specifically for the not-for-profit sector.

Moreover, a comprehensive education and awareness-raising campaign will be required to inform Australia's 600,000 NFP organisations about their new obligations and potential liabilities under the legislation, beyond the publication of guidelines (clause 62). Many volunteer-involving NFPs operate in small rural and remote communities across Australia, so a city-centric awareness campaign would not be sufficient. The education campaign should include:

- ▶ plain-language information booklets and practical resources (for example, templates and tools for compliance);
- ▶ training sessions on how NFPs can ensure they are complying with the legislation; and
- ▶ website information and phone advice.

**PILCH recommends:**

- ▶ That adequate provision is made in guidance material and the explanatory memorandum specific to the not-for-profit sector; and
- ▶ A comprehensive education and awareness-raising campaign to inform the not-for-profit sector about their new obligations and potential liabilities is implemented.

### 3.6 Equality before the law

PILCH echoes the submission of the Expert Group in relation to the restriction on equality before the law to the attribute of race in clause 60 of the Draft Bill:

[i]t undermines the inclusive tenor of the Bill and creates an unfortunate hierarchy within the protected attributes enumerated in [clause] 17. It also directly conflicts with the principle of promoting formal and substantive equality for all people contained in [clause] 3(1) as well as conflicting with Australia's international obligations under [clause] 3(2).<sup>51</sup>

We reiterate Recommendation 5 in the PILCH Consolidation Submission, which calls for equality before the law to be protected in relation to all attributes.<sup>52</sup>

### 3.7 Review

PILCH recommends that the three year review of exceptions, which is provided for in clause 47 of the Draft Bill, be expanded to include consideration of the potential addition of further protected attributes to the legislation.

### 3.8 Special measures

PILCH supports the Draft Bill's provision for special measures, which replaces the confusing and inconsistent range of temporary special measures in the existing legislation.

Clause 21(1) of the Draft Bill provides that '[n]one of the following is discrimination':

- ▶ conduct that is a special measure to achieve equality;
- ▶ conduct engaged in in accordance with a special measure to achieve equality.

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<sup>51</sup> Expert Group Submission 2012, above n 2, 22.

<sup>52</sup> PILCH Consolidation Submission, above n 7, 11.

Clause 22(2) of the Draft Bill sets out that ‘a law, policy or program made, developed or adopted, or other conduct engaged in, by a person or body is a special measure to achieve equality’ if:

- ▶ the person or body makes, develops or adopts the law, policy or program, or engages in the conduct, in good faith for the sole or dominant purpose of advancing or achieving substantive equality for people, or a class of people, who have a particular protected attribute or a particular combination of 2 or more protected attributes; and
- ▶ a reasonable person in the circumstances of the person or body would have considered that making, developing or adopting the law, policy or program, or engaging in the conduct, was necessary in order to advance or achieve substantive equality.

PILCH is concerned that the reliance on the ‘reasonable person test’ is inconsistent with international human rights obligations, which require prior consultation with, and the agreement of, the members of the group who are intended to benefit from the measure proposed.<sup>53</sup>

PILCH endorses the recommendations of the Human Rights Law Centre in relation to special measures:

- ▶ The Draft Bill should be amended to include a separate special measures provision for race that contains a stricter ‘sole purpose’ test.
- ▶ Clause 21(2) should be amended to clarify that:
  - the purpose of a special measure is to further the objects of the legislation;
  - the party seeking to undertake a special measure has the burden of proving that the measure is a special measure; and
  - the participation of the proposed beneficiaries should be included in sub-clause (b), rather than the proposed ‘reasonable person’ test.
- ▶ Clause 21(2) should also include a reference to appropriateness, legitimacy and proportionality.
- ▶ The Explanatory Memorandum should be amended to include:
  - an explanation that there is a clear distinction between temporary special measures to accelerate the achievement of substantive equality, and other general social policies adopted to improve the realisation of rights by particular groups. The provision of general conditions in order to guarantee the civil, political, economic, social and cultural rights of particular groups cannot be characterised as being temporary special measures; and
  - clarification that the onus rests with the party seeking to (i.e. the state) to demonstrate that a law, policy or program is a special measure. Justification for introducing a special measure should include references to concrete goals and targets, timetables, the reasons for choosing one type of measure over another, as well as the accountable institution for monitoring implementation and progress.<sup>54</sup>

### 3.9 Positive duty

The Draft Bill could be significantly strengthened by moving from a purely complaints-based model of regulation, which relies on individuals making a complaint of discrimination and then misconduct being dealt

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<sup>53</sup> Expert Group Submission 2012, above n 2, 21 citing Committee for the Elimination of Discrimination, *General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination* (August 2009) [18].

<sup>54</sup> Human Rights Law Centre, *A Fairer, Simpler Law for All: The Human Rights Law Centre’s submission on the Human Rights and Anti-Discrimination Bill 2012* (December 2012) 24.

with, to a model imposing positive duties to promote substantive equality and eliminate systemic discrimination.

PILCH's reasons for recommending the inclusion of a positive duty were explained in detail in the PILCH Consolidation Submission.<sup>55</sup>

PILCH reiterates our concerns that the current approach places the majority of the burden of enforcing the legislation and identifying discrimination on the victims, who are often the parties with the fewest resources and least capacity to do so. This means that many instances of discrimination go unchecked because victims are not in a position to pursue complaints.<sup>56</sup>

PILCH recommends that the Draft Bill should adopt a proactive, preventative and positive approach to discrimination. Positive duties would encourage a more integrated approach by duty holders and move anti-discrimination work from legal and risk departments to operational sections of an organisation. Many larger organisations have already undertaken internal policy reviews and implemented compliance systems in relation to anti-discrimination laws. In many cases, little more work would be required by such duty holders to comply with a positive duty (which would recognise the varying capacities of duty holders to establish compliance systems).

We to the Victorian EO Act, which contains a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation,<sup>57</sup> and reiterate the statement of the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) about the benefits of a positive duty:

'Instead of allowing organisations to simply react to complaints of discrimination when they happen, the Act requires them to be proactive about discrimination and take steps to prevent discriminatory practices'.<sup>58</sup>

PILCH recommends that Australia's anti-discrimination regime includes a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation. The absence of such a provision limits the ability of the Draft Bill to promote substantive equality and address systemic discrimination.

### 3.10 Representative proceedings

Clause 122 of the Draft Bill does not rectify the current difficulties regarding representative proceedings. It provides that an application to court for unlawful conduct, or an application for leave to apply to the court, is limited to persons who are an affected party in relation to the complaint.

The PILCH Consolidation Submission recommended that the Draft Bill should make provision for standing in the Federal Court for organisations which have established a special or significant interest in a matter (Recommendation 18).<sup>59</sup>

PILCH reiterates our recommendation that the Draft Bill should allow representative actions to be brought on behalf of multiple complainants affected by a particular course of conduct, as is currently possible in the Victorian jurisdiction under section 113 of the Victorian EO Act. This would give advocacy groups and human rights organisations standing in their own right and allow them to use their expertise and resources to

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<sup>55</sup> PILCH Consolidation Submission, above n 7, 12–13.

<sup>56</sup> See, eg, State of Victoria, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review and Final Report* (2008) (**DOJ Report 2008**) [1.97].

<sup>57</sup> *Equal Opportunity Act 2010* (Vic) pt 9. See also, Victorian Equal Opportunity and Human Rights Commission, *Equal Opportunity Act 2010: Positive Duty*.

<sup>58</sup> *Ibid.*

<sup>59</sup> PILCH Consolidation Submission, above n 7, 38–39.

pursue matters involving systemic disadvantage, rather than requiring individuals to mount their own legal challenges to discriminatory practices.

The PILCH Consolidation Submission contained two case studies: one where the complainants faced the barrier of having to lodge individual complaints in relation to discrimination against a group; and another showing the significant benefits of the provision in Victoria allowing representative actions.<sup>60</sup>

We reiterate Recommendation 18 in the PILCH Consolidation Submission and recommend that, if not included in the Draft Bill, standing provisions for organisations with a significant interest in the matter should be considered in the review of the Act's operation under clause 47 of the Draft Bill.

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<sup>60</sup> *Cobaw Community Health Services Limited v Christian Youth Camps Limited & Anor* [2010] VCAT 1613 (8 October 2010).

## Annexure 1 – About PILCH

PILCH is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice;
- ▶ foster a strong pro bono culture in Victoria; and
- ▶ increase the pro bono capacity of the legal profession.

PILCH operates a number of different Programs which have contributed to this submission.

The **Referral Services Program** provides a pro bono referral service to persons seeking free legal assistance where they cannot afford to pay for such assistance. Clients who are eligible for assistance, are referred to a solicitor at a member firm or a barrister who will advise them and/or represent them on a pro bono basis. The Referral Services Program also undertakes law reform and delivers legal education to further the public interest, improve access to justice and protect human rights.

The **Homeless Persons' Legal Clinic (HPLC)** provides free legal assistance and advocacy to people who are homeless or at risk of homelessness within a human rights framework. Legal assistance is provided by pro bono lawyers at homelessness assistance services to facilitate direct access by clients. The HPLC also undertakes significant law reform, public policy, legal education and community development activities to promote and protect the fundamental human rights of people experiencing homelessness.

The **Seniors Rights Legal Clinic (SRLC)** provides free legal services to older persons at pro bono clinics located at hospitals and health centres. The SRLC undertakes law reform and advocacy in relation to laws that adversely impact the interests of older people and their access to justice and to advocate for the reform of those laws. The SRLC also undertakes a range of community and legal education to raise awareness of elder abuse and legal issues associated with aging. The SRLC is administered by PILCH as part of Seniors Rights Victoria.

**PilchConnect** provides legal help to Victorian, not-for-profit (**NFP**) community organisations. It has a range of legal services, including a legal information webportal, a low-cost legal seminar series for NFPs and it refers eligible organisations for pro bono legal assistance. It also does law reform and advocacy work in relation to the regulation of NFPs.

## Annexure 2 – Recommendations in the PILCH Consolidation Submission

Recommendation	Issue
<p><b>Recommendation 1</b></p> <p>The Consolidated Law should include an objects clause that includes the following:</p> <ul style="list-style-type: none"> <li>▶ The promotion of substantive equality (as opposed to merely formal equality);</li> <li>▶ The elimination of discrimination, without qualifiers such as ‘so far as is possible’;</li> <li>▶ A statement empowering Courts to have regard to international instruments and jurisprudence when interpreting the legislation; and</li> <li>▶ Recognition of the structural and systemic causes of discrimination.</li> </ul>	Objects of the Act
<p><b>Recommendation 2</b></p> <p>The Consolidated Law should contain:</p> <ul style="list-style-type: none"> <li>▶ one definition of discrimination for all protected attributes; and</li> <li>▶ a unified definition of discrimination (rather than the distinction between direct and indirect discrimination) which does not specify a comparator test and focuses on unfavourable treatment.</li> </ul>	Definition of discrimination
<p><b>Recommendation 3</b></p> <p>The Consolidated Law should include a special measures clause which applies to all protected attributes and is modelled on the concept of special measures under international human rights law.</p>	Special Measures
<p><b>Recommendation 4</b></p> <p>The Consolidated Law should contain a shifting burden of proof, whereby the complainant must establish a prima facie case of unlawful discrimination and then the burden of proof shifts to the respondent to establish the lawful basis for its actions.</p>	Burden of proof
<p><b>Recommendation 5</b></p> <p>The Consolidated Law should include a general ‘equality before the law’ provision applying to all protected attributes.</p>	Equality before the law
<p><b>Recommendation 6</b></p> <p>The Government should include in the Consolidated Law an enforceable positive duty to promote substantive equality and</p>	Positive duties

Recommendation	Issue
eliminate systemic discrimination.	
<p><b>Recommendation 7</b></p> <p>The Consolidated Law should extend protection against discrimination on the basis of a persons' homelessness, unemployment status or receipt of social security.</p>	Protected attributes
<p><b>Recommendation 8</b></p> <p>'Irrelevant criminal record' should be added as a protected attribute in the Consolidated Law.</p>	Protected attributes
<p><b>Recommendation 9</b></p> <p>The Consolidated Law should include a provision extending protection against discrimination to associates of persons with one or more protected attribute.</p>	Associates
<p><b>Recommendation 10</b></p> <p>The Consolidated Law should contain a provision confirming protection against intersectional discrimination and enabling complaints of intersectional discrimination to be made.</p>	Intersectional discrimination
<p><b>Recommendation 11</b></p> <ul style="list-style-type: none"> <li>▶ Volunteers should be protected against discrimination.</li> <li>▶ Volunteers should not be included in the definition of an 'employee'. The Consolidated Law should be drafted to include a separate definition of 'volunteer' and to make it clear that all 'workers' (or 'workplace participants'), whether employees or volunteers, are subject to the provisions of the legislation.</li> <li>▶ The definition of 'volunteer' needs to clearly establish which people constitute a volunteer to whom the NFP will owe anti-discrimination obligations to, and what is required of NFPs to meet their obligations.</li> <li>▶ Any new obligations should take into account the resource-constrained environment in which many NFPs operate and be reasonable and proportionate in the circumstances.</li> <li>▶ Exemptions should be available where a volunteer is unable to fulfil the inherent requirements of a particular role (including on the basis of age where an organisation is unable to obtain adequate insurance cover or the cost of such coverage is unreasonable in the circumstances) or lacks a genuine qualification required to carry out the role, subject to the principles of necessity, proportionality and legitimacy.</li> </ul>	Voluntary workers

Recommendation	Issue
<p><b>Recommendation 12</b></p> <ul style="list-style-type: none"> <li>▶ Coverage of clubs and member-based associations should not be limited to licensed clubs only. Consideration of a range of options and further consultation with the NFP sector is required to determine appropriate criteria for defining the scope of coverage of clubs and associations.</li> <li>▶ Exceptions should be available to preserve legitimate rights to freedom of association (eg. membership which is limited in order to support the needs of people of a particular age, gender or ethnicity, reduce disadvantage suffered by a people of a particular group, or preserve a minority culture) subject to the principles of necessity proportionality and legitimacy.</li> </ul>	<p>Clubs and member-based associations</p>
<p><b>Recommendation 13</b></p> <ul style="list-style-type: none"> <li>▶ The coverage of vicarious liability provisions of the Consolidated Law should specifically provide for the relationship of volunteer and community organisation.</li> <li>▶ Broadening the scope of vicarious liability provisions to acts done by volunteers that are 'in connection with' their role may be too wide in the NFP context, and lead to a reluctance on the part of community organisations to involving volunteers. Consideration should be given to other options and further consultation with the sector conducted.</li> <li>▶ A community organisation should not be liable for acts committed by a volunteer where the community organisation has taken reasonable action to prevent or avoid the conduct occurring. Importantly the defence should take into consideration (and be proportionate to) the size and resources of the organisation.</li> <li>▶ A comprehensive education and awareness-raising campaign will be required to inform the not-for-profit sector about their new obligations and potential liabilities under the Consolidated Law.</li> <li>▶ A staged commencement approach should be adopted to allow NFPs sufficient time to understand the new legislation and make necessary adjustments to their operations and practices.</li> </ul>	<p>Vicarious liability provisions</p>
<p><b>Recommendation 14</b></p> <ul style="list-style-type: none"> <li>▶ Exceptions and exemptions under the Consolidated Law should be determined on the basis of the human rights law principles of necessity, proportionality and</li> </ul>	<p>General limitations clause</p>



Recommendation	Issue
<p>legitimacy.</p> <ul style="list-style-type: none"> <li>▶ All current exceptions and exemptions should be subject to a public and transparent review process for compliance with Australia's international human rights obligations and with the principles of necessity, proportionality and legitimacy.</li> <li>▶ The Consolidated Law should specifically state that all exceptions and exemptions are required to be a necessary and proportionate means of achieving a legitimate end or purpose.</li> </ul>	
<p><b>Recommendation 15</b></p> <p>The exemptions for religious organisations contained in the <i>Sex Discrimination Act 1984</i> and the <i>Age Discrimination Act 2004</i>, should not be retained in the Consolidated Law.</p> <p>The Consolidated Law should include no exemptions for religious organisations in relation to the protected attributes of sexual orientation and gender identity.</p> <p>If any exemptions for religious organisations are to be retained they should:</p> <ol style="list-style-type: none"> <li>a. be subject to a process which requires transparency about the extent and justification of the exemption in relation to a particular religious body; and</li> <li>b. not be available in respect of 'functions of a public nature' including functions undertaken pursuant to Government funding.</li> </ol>	<p>Exemptions for religious organisations</p>
<p><b>Recommendation 16</b></p> <p>The Consolidated Law should provide a cause of action in respect of all protected attributes enabling complainants to go directly to the courts and should confer power on the Federal Court and Federal Magistrates Court to make appropriate orders where discrimination is proved.</p>	<p>Cause of action</p>
<p><b>Recommendation 17</b></p> <p>The Consolidated Law should make provision for the registration of de-identified conciliated agreements in a court of federal jurisdiction.</p>	<p>Conciliation processes</p>
<p><b>Recommendation 18</b></p> <p>The Consolidated Law should make provision for standing in the Federal Court for organisations which have established a special or significant interest in a matter.</p>	<p>Court processes</p>
<p><b>Recommendation 19</b></p> <p>The Consolidated Law should provide no exemption for acts carried out in direct compliance with State or Territory laws.</p>	<p>Provisions governing jurisdictional interactions</p>

