



**Submission to The Senate Standing Committee on Legal and
Constitutional Affairs**

***Inquiry into the Human Rights and Anti-Discrimination Bill 2012 –
Exposure Draft Legislation***

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Part 1 - Overview of this Submission

INTRODUCTION

This submission is made by the National Association of Community Legal Centre (**NACLC**) and the Kingsford Legal Centre (**KLC**) to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft Legislation (**the Inquiry**). This submission makes recommendations in relation to the Exposure Draft Legislation and draws from NACLC's previous submissions to the Commonwealth Attorney-General's Department in relation to the drafting of the Exposure Draft Legislation.

NACLC and KLC welcome the Government's decision to consolidate Commonwealth anti-discrimination laws, and the invitation to make a submission to this Inquiry. The process represents a significant opportunity to modernise, improve and simplify the anti-discrimination regime, and to address gaps in the current system. The Exposure Draft Legislation provides a number of measures that will enhance discrimination protections in Australia, and promote the implementation of our international human rights into domestic law, and promote substantive equality. We strongly welcome the objects clause which is focused on the implementing of international human rights conventions, eliminating discrimination and achieving substantive equality. NACLC and KLC also commend the Government for providing a unified definition of discrimination, removing the requirement for a comparator and recognising intersectional discrimination as necessary steps to simplify and support fairness in this complex area of law. However we have concerns that the operation of the Act will not fulfill the objects clause in relation to addressing substantive equality, and make a number of recommendations aimed at strengthening the Draft in this regard.

We also welcome the additional protected attributes and areas of public life, although in relation to the former, we make a number of recommendations to expand protected attributes to ensure a broader application of anti-discrimination laws to additional vulnerable and marginalised groups, including the homeless, survivors and victims of domestic and family violence, intersex persons, and persons with irrelevant criminal histories, amongst others.

NACLC and KLC generally favour the Exposure Draft Legislation's treatment of the complaints system, particularly the shared burden of proof and the general rule that parties bear their own costs. However, we have a number of recommendations that aim to strengthen the Draft in relation to key access to justice issues, such as promoting fairness in the conciliation process, introducing a specialist division of the relevant courts, and expanding the powers of AHRC Commissioners.

ABOUT NACLC AND CLCS

NACLC is the peak national organisation representing community legal centres (**CLCs**) in Australia. Its members are the state and territory associations of CLCs that represent over 200 centres in various metropolitan, regional, rural and remote locations across Australia.

CLCs are not-for-profit, community-based organisations that provide legal advice, casework, information and a range of community development services to their local or special interest communities. CLCs' work is targeted at disadvantaged members of society and those with

special needs, and in undertaking matters in the public interest. CLCs have been advocating for a rights based approach to equitable access to the justice system for over 30 years. CLCs are often the first point of contact for people seeking assistance and/or the contact of last resort when all other attempts to seek legal assistance have failed.

The CLCs that have contributed to this submission have substantial expertise in discrimination law. This submission draws on CLCs' many years of practical experience assisting clients to navigate both the Commonwealth and state or territory systems. CLCs bring particular expertise and understanding of what the barriers are to accessing justice for people who have experienced discrimination as we work every day with clients to overcome these barriers.

ABOUT KINGSFORD LEGAL CENTRE

Kingsford Legal Centre (**KLC**) is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government Areas since 1981. KLC provides specialist legal advice in discrimination law (NSW wide) and employment law. KLC provides general advice on a wide range of legal issues and undertakes casework for many clients who, without their assistance, would be unable to afford a lawyer. KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

KLC is also involved in monitoring Australia's compliance with human rights mechanisms and working with other organisations to provide shadow reports to United Nations Committees on the attainment of human rights in Australia. KLC does this through identifying areas where their clients have experienced human rights breaches and monitoring the operation of laws and policies in Australia.

LIST OF SUPPORTING ORGANISATIONS

Eastern Community Legal Centre

Federation of Community Legal Centres Victoria

Hawkesbury Nepean Community Legal Centre

Human Rights Law Centre (HRLC)

Inner City Legal Centre (Sydney)

LGBTI Legal Service

Marrickville Legal Centre

Mid North Coast Community Legal Centre

Prisoners' Legal Service

Public Interest Advocacy Centre (PIAC)

Queensland Association of Independent Legal Services (QAILS)

Redfern Legal Centre

SCALES Community Legal Centre

The Tenants' Union of NSW

Townsville Community Legal Service

Welfare Rights and Legal Centre

Women's Legal Services Australia

Women's Legal Service NSW

Women's Legal Centre ACT & Region

Women's Legal Service Victoria

STRUCTURE OF THIS SUBMISSION

This submission is divided into 4 parts:

- Part 1 – Introduction
- Part 2 – Summary of Recommendations
- Part 3 – Positive Developments
- Part 4 – Recommendations to Strengthen the Exposure Draft Legislation

'ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES' AND 'ABORIGINAL PEOPLES'

Throughout this submission, Aboriginal and Torres Strait Islander peoples are referred to as 'Aboriginal peoples'. NACLC and KLC acknowledge the diversity in culture, language, kinship structures and ways of life within Aboriginal and Torres Strait Islander peoples, and recognises that Aboriginal peoples and Torres Strait Islander peoples retain their distinct cultures irrespective of whether they live in urban, rural or remote parts of the country. The use of the word 'peoples' also acknowledges that Aboriginal peoples and Torres Strait Islander peoples have a 'collective, rather than purely individual dimension to their livelihoods'.¹

NACLC'S PREVIOUS SUBMISSIONS ON CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

This submission draws on NACLC's previous submissions to the Commonwealth Attorney-General's Department in relation to the drafting of consolidated anti-discrimination legislation. They are available for download at the NACLC website (<http://www.naclc.org.au>) and are annexed to this submission:

- NACLC Submission to the Commonwealth Attorney-General, Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation, March 2011;
- NACLC Submission to the Attorney-General, Areas for increased protection in discrimination law: Consolidation of Federal Discrimination Legislation, April 2011; and
- NACLC Submission to the Attorney-General's Department, Response to the *Consolidation of Anti-Discrimination Laws Discussion Paper* (September 2011), 1 February 2012.

¹ Australian Human Rights Commission, *Social Justice Report 2009* (2009), 6, available at http://www.hreoc.gov.au/social_justice/sj_report/sjreport09/index.html.

GLOSSARY OF TERMS FREQUENTLY USED THROUGHOUT THIS SUBMISSION

ADA	<i>Age Discrimination Act (Cth)</i>
AHRC	Australian Human Rights Commission
CLCs	Community Legal Centres
DDA	<i>Disability Discrimination Act (Cth)</i>
RDA	<i>Racial Discrimination Act (Cth)</i>
SDA	<i>Sex Discrimination Act (Cth)</i>

Part 2 - Summary of Recommendations

1. The objects clause in section 3 of the Exposure Draft Legislation be retained.
2. The definition of human rights in section 6 of the Exposure Draft Legislation be retained.
3. The shared burden of proof in section 124 of the Exposure Draft Legislation be retained.
4. Section 133(3) of the Exposure Draft Legislation be amended to limit the circumstances in which the court may award costs against a complainant to circumstances in which making the complaint was vexatious, frivolous or lacking in substance.
5. The Australian Human Rights Commission's Discrimination Commissioners be given the power to investigate and initiate proceedings in relation to conduct that appears unlawful, without the requirement of an individual complaint.
6. The role and powers of the Commissioners be expanded to increase the role of the Australian Human Rights Commission and Commissioners in addressing systemic discrimination. These powers should include monitoring of respondents, commencing complaints, intervening in matters, and reporting to Federal Parliament and the public on discrimination matters.
7. To promote the objects of the Act to address systemic discrimination, section 64 review powers be amended to allow any interested or affected party, including non-government organisations or individuals affected, to make an application for review to the Australian Human Rights Commission, and that this review power be extended to policies or programmes.
8. A positive duty of equality should be imposed on public and private bodies.
9. The Australian Human Rights Commission should be empowered to facilitate and enforce compliance with positive obligations without first receiving a complaint.
10. Section 60 of the Exposure Draft Legislation should be amended to protect the right to equality before the law for all protected attributes.
11. Section 122 of the Exposure Draft Legislation should include provision for 'representative complaints' and complaints by groups on behalf of, or in the interests of, members.
12. Consistent with Australia's human rights obligations, the Exposure Draft Legislation should be amended to include a non-exhaustive list of protected attributes and include the ground of 'other status' in order to recommend to Government any further attributes that should be protected.

13. If 'other status' is not fully protected as an attribute, the Australian Human Rights Commission should still be able to receive complaints on this basis. The Australian Human Rights Commission should monitor new and emerging trends in relation to discrimination on 'other status' and make recommendations to the Government on the inclusion of new attributes in order to ensure the protection of new and emerging attributes as protected attributes.
14. Section 17(1)(d) of the Exposure Draft Legislation should be amended to provide for Aboriginal peoples' cultural understandings of family in a manner consistent with section 5 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and section 10 of the *Family Violence Protection Act 2008* (Vic).
15. Protection from discrimination on the basis of family or carer responsibilities should also include a failure to make reasonable adjustments.
16. Section 17(1) list of protected attributes should be expanded to include status as a victim or survivor of domestic or family violence, and that in the context of leave provisions in relation to this protected attribute, that there be complementarities between the Act and the Fair Work Act 2009 (Cth).
17. If this does not occur, status as a victim or survivor of domestic or family violence should be considered as a priority for inclusion as an additional protected attribute at the three year review of the legislation, the mandate of which should be extended to include additional protected attributes to the legislation.
18. Section 17(1) of the Exposure Draft Legislation should retain 'sexual orientation' as a protected attribute. It should also be amended to include the use of appropriate terminology that captures the whole of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) communities, and people perceived to be part of these communities. It should make specific and appropriate use of the terms homosexuality, lesbianism, bisexuality, gender identity, gender non-conformity, intersex, and indeterminate sex.
19. Section 17(1) of the Exposure Draft Legislation should include irrelevant criminal record as a protected attribute.
20. Section 17(1) of the Exposure Draft Legislation should include 'social status' as a protected attribute in all areas of public life, not just employment. 'Social Status' should be defined to mean a person's status as homeless, unemployed, or a recipient of social security payments.
21. The definition of disability in section 17(1)(c) of the Exposure Draft Legislation should be amended to specifically include obesity.
22. The definition of special measure in section 21 of the Exposure Draft Legislation should include all the key features set out in the Committee on the Elimination of Race Discrimination's *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial*

Discrimination. Additional key features should include that the special measures further the objects of the Act and be beneficial for the affected group.

23. The Exposure Draft Legislation should be amended to include a general limitations clause that replaces all current exemption clauses that deem discriminatory actions or conduct to be lawful when they are a reasonable, necessary and proportionate means of achieving a legitimate aim, subject to the following conditions being met:
 - a. the general limitations clause must replace all current exemptions; and
 - b. the general limitations clause should include a provision stating that it is not applicable to the protected attribute of race; and
 - c. the judiciary must be required to consider the Objectives of the Act when determining the application of the general limitations clause; and
 - d. the judiciary determining discrimination complaints must have specialist training and knowledge of beneficial nature of discrimination law; and
 - e. AHRC have the power to initiate discrimination complaints; and
 - f. organisations must be able to initiate representative complaints; and
 - g. the defence of unjustifiable hardship must be a separate provision, distinct from a general limitations clause.
24. If the recommended conditions for the introduction of a general limitations clause in the consolidation bill cannot be met by the Government, NACLC and KLC do not recommend the introduction of a general limitations clause and instead recommends that permanent exemptions for religious organisations be removed and religion included as a protected attribute.
25. The exemptions in relation to work and work-related areas in section 22(3) of the Exposure Draft Legislation be amended to make discrimination unlawful in relation to all protected attributes, in all areas of public life protected by international human rights instruments.
26. The Exposure Draft Legislation should impose a specific positive duty to make reasonable adjustments to accommodate persons with all protected attributes in all protected areas of life.
27. The Exposure Draft Legislation should define a reasonable adjustment in section 25 as 'the provision of additional or specialised assistance, the modification of existing measures, the flexible application of existing measures, and the removal of a barrier or obstacle, which does not constitute an unjustifiable hardship'.
28. The Exposure Draft Legislation should provide that the failure to make a reasonable adjustment is, by itself, unlawful discrimination on the basis of a protected attribute.
29. Permanent exemptions for religious organisations be removed and religion included as a protected attribute.

30. If exemptions for religious organisations are not removed from the Exposure Draft Legislation, the scope of the religious exemption should be narrowed to allow discrimination only when it is necessary to fulfil the inherent requirements of a position directly associated with the operation of a religion and should not be applicable to the protected attributes of race or disability.
31. The section 40 blanket exemption to discrimination on the ground of disability in relation to the Australian Defence Force and the Australian Federal Police should be removed from the Exposure Draft Legislation.
32. The current exemptions for the Australian Defence Force for women in combat duties should include an end date of 2014.
33. Temporary exemptions in sections 83-86 of the Exposure Draft Legislation should be publicly transparent process and should be assessed and granted by the Australian Human Rights Commission. They should be granted on a time limited basis. The Australian Human Rights Commission should not approve exemptions which are inconsistent with the objects of the Act.
34. Section 43 of the Exposure Draft Legislation should be removed to ensure that there are no exemptions for employment to perform domestic duties, other than those in the section 24 'Inherent requirements of work' exception.
35. The Exposure Draft Legislation should make vilification based on a protected attribute, or the intersection of two or more protected attributes, unlawful. The prohibition should be based on Part IIA of the RDA and be subject to the defences set out in that Part.
36. The Exposure Draft Legislation should be revised to set out a clear process for the referral of a complaint of racial vilification from the Australian Human Rights Commission to the Australian Federal Police for investigation and prosecution by the Commonwealth Director of Public Prosecutions and a joint investigation framework between the Australian Human Rights Commission and the Australian Federal Police.
37. The section 52 provision for requesting or requiring information for discriminatory purposes include provision that it is 'irrelevant whether the request or requirement is made orally, in writing, in an application form or otherwise'.
38. The Exposure Draft Legislation should make provision for agreements reached in settlement to be legally binding through registration with the court. Applications to the court for enforcement should be simple and low cost.
39. Section 110 of the Exposure Draft Legislation should be amended to ensure that complainants be allowed legal representation at the conciliation stage of a discrimination complaint.

40. A complainant should be able to make an application directly to a court, rather than first going through investigation and conciliation by the Australian Human Rights Commission.
41. The relevant Commissioner should be able to initiate an application to a court, either on behalf of an individual or for the benefit of a group of people or a section of the community. The ability of the AHRC to intervene or appear as amicus in discrimination cases in section 146 of the Exposure Draft Legislation should be retained.
42. A specialist division of the Federal Court and the Federal Magistrates Court should be established to hear discrimination law matters. Judicial members should have ongoing training in discrimination issues.
43. The specialist division should develop rules and procedures that increase the ability of self represented litigants to conduct their own cases.
44. The regulation of Commonwealth anti-discrimination laws should remain with the Australian Human Rights Commission and the courts and not delegated to the corporate sector through a process of co-regulation as proposed in relation to Compliance Codes in section 75 of the Exposure Draft Legislation.

Part 3 - Positive Developments

1. CHAPTER 1, PART 1-1, DIVISION 2 (SECTION 3): OBJECTS OF THIS ACT

NACLC and KLC strongly support the inclusion of an Objects section in the Exposure Draft Legislation. Section 15AA of the *Acts Interpretation Act 1901* (Cth) states that:

in the interpretation of provision of the Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that object or purpose.

Accordingly, we support the detailed objects clause which is focussed on a statement of the beneficial nature of the Act, implementing international human rights conventions, eliminating discrimination and achieving substantive equality (including by reference to reasonable adjustments and special measures), and noting the need to identify and remove systemic discrimination. There have been concerns for many years that the courts have interpreted existing Commonwealth anti-discrimination laws narrowly and not to the benefit of groups with protected attributes, including the failure to consider issues of systemic discrimination and human rights norms. We submit that the current construction of section 3 will address these concerns, and will promote the effective implementation of Australia's human rights obligations as they relate to anti-discrimination law which will, in turn, promote measures to address systemic discrimination.

<p>RECOMMENDATION: The objects clause in section 3 of the Exposure Draft Legislation be retained.</p>
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2. CHAPTER 1, PART 1-2, DIVISION 2 (SECTION 6): THE DICTIONARY

2.1. Associate

NACLC and KLC support the adoption of a provision similar to section 7 of the DDA, and the inclusion of a definition which includes a non-exhaustive list of relationships that could be defined as an 'associate'. In order to ensure the effectiveness of the law in this area, courts should be able to determine whether a person is an 'associate' based on the facts of the case, rather than an exhaustive definition. Accordingly, NACLC and KLC welcome the definition of associate in section 6 of the Exposure Draft Legislation.

2.2. Human Rights

NACLC and KLC welcome the definition of human rights in section 6 of the Exposure Draft Legislation to mean 'the rights and freedoms recognised or declared by the human rights instruments'. NACLC and KLC support amending the definition of 'human rights' to include the seven core human rights treaties to which Australia is a party. This will ensure consistency with the definition in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and will provide greater human rights protection, albeit limited to inquiries by the AHRC, and not just individual protection of human rights through the courts.

The inclusion of the seven core treaties will also promote human rights education about the extent and diversity of Australia's human rights obligations. In the absence of a bill of rights,

the Exposure Draft Legislation represents an opportunity to play an important educative role for Australia in understanding the broad nature and application of human rights beyond civil and political rights.

RECOMMENDATION: The definition of human rights in section 6 of the Exposure Draft Legislation be retained.

2.3. Voluntary workers

NACLC and KLC welcome the inclusion of 'voluntary or unpaid work' in the definition of employment in section 6 of the Exposure Draft Legislation. We strongly support the inclusion of voluntary workers as protected under discrimination law and believe that all employers and organisations utilising voluntary workers have a responsibility to ensure a discrimination free workplace.

Case Study

Juan was a volunteer with a local charity shop selling second hand clothes. He had worked there for 9 years. When he turned 65 years old, he was told that they didn't need his help any more. They wanted some other younger volunteers to take over. Volunteering for this agency had been an important part of his life, so Juan was devastated when he could no longer work there.

3. CHAPTER 2, PART 2-1, DIVISION 1 (SECTION 17): PROTECTED ATTRIBUTES

NACLC and KLC strongly commend the inclusion of breastfeeding, gender identity, potential pregnancy, pregnancy, and sexual orientation in the list of protected attributes in section 17 of the Exposure Draft Legislation.

NACLC and KLC have a number of comments to make in relation to the exclusion of intersex, irrelevant criminal record and homelessness (social status), and to strengthening the definitions of disability, family responsibilities, and sexual orientation and gender identity. These are set out in section 10 below.

4. CHAPTER 2, PART 2-2, DIVISION 2 (SECTIONS 19 – 20): MEANING OF DISCRIMINATION

4.1. Unified definition

NACLC has previously expressed support for the qualified adoption of a unified definition of discrimination, providing that doing so would not reduce the current protections for both direct and indirect discrimination. Section 19 of the Exposure Draft Legislation provides for a unification of the tests for discrimination by recognising their potential overlap, and we support the definitions of direct and indirect discrimination on this basis.

4.2. Comparator

NACLC and KLC also welcome the removal of the comparator element from the test for indirect discrimination. We had concerns that the use of a comparator in anti-discrimination

law has limited the potential for discrimination cases to succeed and has distracted the judiciary from the core questions of whether unfavourable treatment has occurred, and the reasons for that treatment. In many cases, there is no comparator, or questions over the characteristics of the comparator become technical discussions on which a case can succeed or fail.² In NACLC and KLC's view this is concerning in legislation designed to protect fundamental human rights. We have further previously submitted that the comparator test posed a significant challenge to the application of protections against intersectional discrimination. Accordingly, NACLC and KLC strongly supports the removal of the comparator test from the definition of discrimination in the Exposure Draft Legislation.

4.3. Intersectional discrimination

NACLC and KLC also welcome the inclusion of intersectional discrimination in the section 19 definition of discrimination. If discrimination law in Australia is to adequately recognise and deal with the way in which individuals may experience complex forms of discrimination, then protection against intersectional discrimination is fundamental.

Current Australian discrimination law fails to adequately recognise and deal with the way in which individuals may experience complex forms of discrimination. The failure of anti-discrimination law to address this type of discrimination has meant that the law has not been utilised by the most disadvantaged people in our community – that is, people experiencing complex forms of discrimination. The Exposure Draft Legislation has the potential to address this, and accordingly NACLC and KLC support the inclusion of intersectional discrimination in the section 19 definition of discrimination.

4.4. Harassment

Finally, NACLC and KLC welcome the explicit acknowledgement that harassment is a form of unfavourable treatment in the Exposure Draft Bill at section 19(2). Harassment of a person on the basis of a protected attribute, or a combination of two or more protected attributes, should be unlawful in all areas of public life. It is also essential that persons with more than one protected attribute are able to complain of harassment that is based on a combination or intersection of attributes.³ The Exposure Draft Legislation achieves this.

5. CHAPTER 2, PART 2-2, DIVISION 3 (SECTION 22): AREAS OF PUBLIC LIFE

Section 22(2) of the Exposure Draft Legislation provides a non-exhaustive list of areas of public life in which it is unlawful for a person to discriminate against another person. NACLC and KLC welcome the inclusion of a non-exhaustive list in Exposure Draft Legislation as having the potential to address broad areas of public life. We submit that discrimination protections articulated in this way will ensure that a number of areas of life which have not been caught by the current Commonwealth anti-discrimination law will be addressed in the Exposure Draft Legislation. These include employment, voluntary employees, and all partnership arrangements, regardless of size. This approach is also consistent with Australia's international human rights obligation to provide comprehensive protection against discrimination.

² See for example, *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR.

³ For example, a woman with intellectual disability may be subject to harassment both on the basis of her gender and on the basis of stereotypical views that she is either less sensible or that she is promiscuous because of her cognitive impairment.

6. CHAPTER 3, PART 3-1 (SECTIONS 61 – 86): MEASURES TO ASSIST COMPLIANCE

NACLC and KLC support the inclusion of compliance mechanisms available to the AHRC pursuant to sections 64 – 86, and the increased discretion of the AHRC to report in relation to human rights complaints in section 115 of the Exposure Draft Legislation. We have made some recommendations to improve the provisions for temporary exemptions, and the ability of the AHRC to address systemic issues in Part 9 below. However, as a general observation, NACLC and KLC welcome the compliance measures as an important feature of an anti-discrimination law regime, but recommends that the specific measures be concrete and measurable.

7. CHAPTER 4, PART 4-3, DIVISION 2 (SECTION 124): BURDEN OF PROOF

The Exposure Draft Legislation provides that in applications to the court alleging unlawful conduct (section 120), there is a shared burden of proof (section 124). NACLC and KLC welcome the introduction of a shared burden of proof. The current burden of proof requirements placed too great an evidentiary burden on the individual complainant. In our experience, the burden of proof is often impossible for complainants to satisfy in the absence of ready access to evidence, which is usually held by the respondent.

Case Study

Jamie works in a factory as a store person. She recently approached her boss about changing her hours from the morning shift to the afternoon shift so she can be at home with her children while her husband is at work in the evening. Jamie's boss tells her it is difficult to fit her into the morning shift but that he'll see what he can do. Jamie doesn't get a response from her employer but assumes he will get back to her once he's made a decision. A few weeks later Jamie is told that, because a major client has stopped using the warehouse, her position has been made redundant and she is dismissed. Jamie is the only employee to lose her job – all the other employees who work in her division have been relocated to other parts of the company. Jamie asks her boss why she was chosen and the other employees weren't – she asks whether it is because she is the only woman in her division or whether it is because she wanted to swap shifts to care for her children. Her boss is vague and doesn't really give her a response. Jamie can't think of any other reason why she was made redundant and other employees weren't – she is one of the longer serving employees in her division and she exceeds all her productivity targets each month. The new provisions of the Exposure Draft Legislation on the onus of proof would assist Jamie, as the onus does not rest entirely on her, as is the case under existing anti-discrimination laws.

RECOMMENDATION: The shared burden of proof in section 124 of the Exposure Draft Legislation be retained.

8. CHAPTER 4, PART 4-3, DIVISION 4 (SECTION 133): COSTS

NACLC and KLC welcome the provision in section 133 of the Exposure Draft Legislation that the general rule will be that parties bear their own costs. This is one of the most significant changes in the draft legislation and brings consistency with state and territory law and the Fair Work Act.

However, we note that section 133(2) provides that in certain circumstances, the court has discretion to make orders as to costs providing that it has regard to a number of matters set out in section 133(3), including the financial circumstances of the parties to the proceedings. We recommend that section 133(2) be amended to limit the circumstances in which the court may award costs against a complainant to circumstances in which the conduct of the complainant in making, defending, or continuing proceedings was vexatious, frivolous or lacking in substance; largely based on the position taken in American law.⁴

As a result of the risk of an adverse costs order, many complainants are reluctant to even lodge complaints at the AHRC, preferring state-based tribunals where parties bear their own costs. Where matters are contested at a federal level, NACLC and KLC's experience is that most cases settle – even very strong discrimination complaints. As a result, courts at the federal level have not developed robust jurisprudence in this area of law. Decisions by the judiciary are critical to the development of discrimination law in Australia, and in discrimination law developing a strong normative role within the community. The system as it presently stands, and as envisaged in the Exposure Draft Legislation, is a war of attrition, where even strong cases are settled because individual complainants cannot face the risks and pressure of litigation against well-resourced respondents.

Case Study

Max was listening to the radio when he heard a well-known radio personality make fun of "Asian people". Max was of Asian background and was offended by what was said. He wrote a letter to the radio station's management. The response he received was dismissive, and management refused to apologise. Max filed a race vilification complaint at the AHRC. The matter failed to conciliate, as the radio station's management refused to negotiate a settlement, even though all Max wanted was a retraction and an apology. Max was left with the only option of pursuing the matter to the Federal Court. A CLC advised Max that his prospects of success were good, but that there was a risk of costs if he were unsuccessful at Court. Max felt strongly about the case, but was scared of receiving a costs order if he lost, as it could mean putting his house and savings at risk. He also took into account that he was not seeking financial compensation at the Court, but an apology and retraction. Max eventually decided that he did not want to go ahead with a Court application, as the risk of costs was too great. This means that the radio announcer and radio station were able to avoid any legal consequences from their unlawful conduct.

⁴ *Christianberg Garment Co. v EEOC*, 434 U.S. 4012 (1978).

The costs issue means that the majority of CLCs advise complainants who have a choice, against using the federal system in matters that are likely to be litigated. This represents one of the most significant barriers to accessing justice and to the development of Commonwealth discrimination law.

Case Study

Darren worked as a labourer. He lived in western Sydney with his young family and had a mortgage. He was sacked from his job as his employer believed he had a medical condition that could affect his job in the future. Darren disputed that he did have a medical condition and therefore did not believe it affected his ability to do his job. Darren's doctor supported his position.

Darren lodged proceedings with the AHRC which failed to settle. A CLC assisted Darren and told him that his case had the potential to be a test case. Darren lodged proceedings in the Federal Magistrates Court. Despite advice from the CLC and a barrister that his case was relatively strong, Darren accepted a low figure settlement at a Federal Magistrates Court mediation. Darren did this as he was worried about an adverse costs order and the subsequent risk that he may lose his house. He wanted to seek justice but felt the risks just seemed too great.

In NACLC and KLC's experience, most discrimination cases settle. However, we believe that many settle on terms that do not reflect the seriousness of the discrimination or that result in inadequate compensation to the complainant. Our experience is that compensation offered in conciliation agreements is generally very low (often below \$10,000). The decision to litigate in a costs jurisdiction is made even more difficult when legal costs for the latter could easily be three or four times this amount. We also believe that the AHRC is often keen to conciliate and settle complaints, but this is not always appropriate where the issues raised are an entrenched, systemic problem.

Case Study

Mary used a wheelchair and felt she had experienced discrimination from a public transport provider. As a result of their conduct she had been unable to get home and had felt extremely vulnerable. She lodged a discrimination complaint with the AHRC. Her primary focus was to try and ensure that what happened to her did not happen to someone else in the future, but she also sought compensation for pain and suffering. The matter did not settle and as Mary felt passionately about the issue she lodged proceedings in the Federal Court. She received advice that it was a potential test case and a CLC acted for her. The respondents employed a large law firm and a barrister. They fought the claim vigorously and said that Mary's claim had no merit and that they would pursue her for their costs. Although Mary was worried about this, she continued her case.

The case settled at Federal Court mediation on the terms Mary had offered at the AHRC, nine months earlier. Tens of thousands of dollars were expended on legal fees. The CLC that assisted Mary believed the matter had not resolved at the AHRC because the respondent did not believe Mary would commence proceedings at Court, and that the matter would simply go away if it did not settle.

However, NACLC and KLC recommend that the list of matters in section 133(3) that a court must consider if it makes a discretionary costs order under section 133(2) be amended to remove sub-sections (d) (whether the case was “wholly unsuccessful”) and (e) (whether a settlement offer was made) in favour of “whether making the complaint was vexatious, frivolous or lacking in substance”. In NACLC and KLC’s experience, sub-sections (d) and (e) ignore the reality that many complaints of unlawful conduct are not underpinned by financial compensation, and these provisions would restrict the ability of individuals to run test cases. Not every complainant seeks a settlement offer, and imposing an obligation on complainants to do so impedes the development of discrimination law. This amendment would also ensure consistency with adverse action claims under the *Fair Work Act 2009* (Cth).

RECOMMENDATION: Section 133(3) of the Exposure Draft Legislation be amended to limit the circumstances in which the court may award costs against a complainant to circumstances in which making the complaint was vexatious, frivolous or lacking in substance.

Part 4 - Recommendations to Strengthen the Exposure Draft Legislation

9. CHAPTER 1, PART 1-1, DIVISION 2 (SECTION 3): MEASURES TO ADDRESS SYSTEMIC DISCRIMINATION

NACLC and KLC are concerned that despite the focus on the identification and removal of systemic discrimination in the objects clause, the Exposure Draft Legislation does not adequately address these issues. Rather, the Draft operates in much the same way as current Commonwealth discrimination law, which relies on individual complaints that are most commonly resolved through private conciliation. The limitations of this system for dealing with repeat discriminators, and for entrenched practices and systemic discrimination, have been widely discussed.⁵

Case Study

Over a period of some years, the same CLC represented a number of women who all complained of discrimination on the basis of pregnancy, family responsibility or sexual harassment against the same large company. None of the women knew each other or of each others' complaints. Each complaint settled at the conciliation stage of the process. The complainants received compensation and a statement of service. While the individual complainants were happy with the outcomes of their cases, the CLC recognised that there were entrenched problems in the company, and that there is no way to systematically address such problems in the current system.

NACLC and KLC make a number of recommendations to amend the Exposure Draft Legislation to ensure that systemic discrimination is adequately addressed.

9.1. Expanded Role for AHRC Discrimination Commissioners

We note and welcome the Exposure Draft Legislation's section 135 inquiry function for the AHRC, and the AHRC's power pursuant to sections 64-66 to conduct reviews of policies and programs for compliance on request, as measures which may address systemic discrimination. However, despite the gains made in the Exposure Draft Legislation, NACLC and KLC recommend that the powers and functions of the AHRC and its Commissioners be expanded to better address systemic discrimination. We also recommend that the section 64 review power be clarified and expanded. Each are discussed in turn below.

9.1.1. Expanded Role

We recommend that the various Discrimination Commissioners and the AHRC be given the power to investigate, of their own motion, conduct that appears to be unlawful under discrimination law, and power to commence proceedings without having to rely on an

⁵ See, for example, Australian Senate, *Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2009), available at http://www.apf.gov.au/senate/committee/legcon_ctte/sex_discrim/report/index.htm. See also, Gaze, E., 'The Costs of Equal Opportunity – will changes to HREOC solve the problem of anti-discrimination law enforcement?' (2000) 25:3 *Alternative Law Journal* 125-130.

individual complaint. The Commissioners should be adequately resourced to perform this role.

Specifically, the Exposure Draft Legislation should be amended to include the role of the Commissioners to:

- regulate, monitor and enforce legislative responsibilities to prevent discrimination and promote all forms of equality;
- monitor respondents, and investigate, report and prosecute parties who repeatedly breach the Legislation;
- have the power to commence complaints of their own motion and without the need for a specific complaint;
- report directly to Commonwealth Parliament on equality with a requirement that Parliament respond to these reports; and
- report publicly on the inconsistency of any enactment or proposed enactment with the Legislation.

RECOMMENDATION: The Australian Human Rights Commission's Discrimination Commissioners be given the power to investigate and initiate proceedings in relation to conduct that appears unlawful, without the requirement of an individual complaint.

RECOMMENDATION: The role and powers of the Commissioners be expanded to increase the role of the Australian Human Rights Commission and Commissioners in addressing systemic discrimination. These powers should include monitoring of respondents, commencing complaints, intervening in matters, and reporting to Federal Parliament and the public on discrimination matters.

9.1.2. Clarity and expansion of section 64 review powers

NACLC and KLC recommend that section 64 be amended to make it clear who can apply for a review. The current construction of section 64 makes it unclear whether, for example, the person affected by the actions of the discriminating company applies for the review, or whether the applicant must be the company itself or whether a concerned third party can apply for a review. We recommend that the review process should be able to be initiated by an 'affected person or body' or the person, company or government department itself.

RECOMMENDATION: To promote the objects of the Act to address systemic discrimination, section 64 review powers be amended to allow any interested or affected party, including non-government organisations or individuals affected, to make an application for review to the Australian Human Rights Commission.

9.2. Positive Duties

An important way of addressing systemic discrimination is to impose positive duties to promote equality. NACLC and KLC submit that developing a culture of positive duties is crucial to reducing the extent to which individuals experience discrimination and to address larger systemic issues.

We recommend that the Exposure Draft Legislation include positive duty measures that apply to both public and private bodies and which:

- places positive obligations to assess, monitor, consult and take remedial action to address discrimination where necessary;
- is sustainable and has enforcement mechanisms;
- takes account of the duty holder's size, circumstances and resources; and
- is normative and not merely an exercise in form-filling or box-ticking.

NACLC and KLC recommend that the AHRC be empowered to facilitate and enforce compliance with the positive obligations without first receiving a complaint.⁶ The AHRC could also create standards or best-practice guidelines under the powers proposed in Chapter 3 of the Exposure Draft Legislation, which would assist in the implementation and assessment of positive duties.⁷

Examples of how duty holders could discharge this duty include:

- a health service introducing an outreach program targeted towards people with certain types of disabilities who are less likely to access existing services;
- a transport company ensuring that young people are specifically consulted in relation to a new ticketing policy; and
- the development of an education program on homophobic bullying in schools.

In addition to the examples outlined in the case study below, positive duties exist in Northern Ireland, South Africa, Canada, and the United States, amongst others.⁸

Case Study

The Equal Opportunity Act 2010 (Vic) includes a new positive duty aimed at encouraging proactive self-regulation. The Act requires duty holders to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible.

The Victorian Equal Opportunity and Human Rights Commission may investigate possible breaches of the duty that are likely to be serious and affect a class or group of people.

⁶ The Commonwealth Government would also ensure that the AHRC was adequately resourced to perform this regulatory role.

⁷ The UK's Equality and Human Rights Commission recently issued a series of guides for public authority's on the UK's new public sector equality duty. The guides cover what public authorities should do to meet the duty, including legal requirements and recommended actions. See, <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance/>.

⁸ s 75 and Schedule 9 *Northern Ireland Act 1998* (UK); *Fair Employment and Treatment (NI) Order 1998* (UK); *Employment Equity Act 1998* (Sth Af); s 5 *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (Sth Af); *Employment Equality Act 1995* (Can); *Executive Order 11246 of Sept. 24, 1965 – Equality employment opportunity* (US).

RECOMMENDATION: A positive duty of equality should be imposed on public and private bodies.

RECOMMENDATION: The AHRC should be empowered to facilitate and enforce compliance with the positive obligation without first receiving a complaint.

9.3. Equality Before the Law (section 60)

Section 60 of the Exposure Draft Legislation limits equality before the law to the protected attribute of race. NACLC and KLC recommend that equality before the law be extended to all other protected attributes.

Equality before the law is an important principle of international human rights law.⁹ The right to equality before the law requires all individuals to be treated equally by the law and to be afforded equal protection of the law. A comprehensive equality before the law provision is essential to ensure that Australia's laws are non-discriminatory in operation and effect.¹⁰ Accordingly, NACLC and KLC recommend that the coverage currently contained in the Exposure Draft Legislation be extended to all other protected attributes.

RECOMMENDATION: Section 60 of the Exposure Draft Legislation should be amended to protect the right to equality before the law for all protected attributes.

1.1. Representative Complaints (section 122)

Case Study

A disability organisation made a complaint to the AHRC on behalf of a number of individuals across Australia in relation to accessible cinemas. The disability organisation was not able to continue to represent the complaints at the Federal Court. Pursuing the complaints by commencing representative proceedings under Part IV of the Federal Court Act 1976 (Cth) raised questions as to standing and would have been a difficult and uncertain case to run.

Section 122 of the Exposure Draft Legislation maintains the position in current Commonwealth discrimination law in relation to 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. NACLC and KLC are also concerned that although section 89(1)(b) permits complaints to be made to the AHRC on behalf of someone else, the Exposure Draft Legislation does not permit a non-government organisation to make a complaint to the AHRC about specific conduct or behaviour.

⁹ 'Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights': Human Rights Committee, *General Comment No. 18: Non-Discrimination (Thirty-seventh session, 1989) Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003) [1].

¹⁰ See *Mabo v Queensland* (1989) 166 CLR 186 per Deane J at 230.

NACLC and KLC submit that the Inquiry should recommend the amendment of sections 89 and 122 to include provision for 'representative complaints' and complaints by groups on behalf of, or in the interest of members, in order to remove barriers to action that may address systemic discrimination. The current construction of these sections raises similar issues to those which already exist under the current Commonwealth discrimination legislative regime, which is set out in detail below.

Additionally, individual complainants must then carry the burden of the complaint which they have been personally affected by. Frequently these complainants are disadvantaged either through race, disability, gender or having been harassed. To bring a complaint and then follow it through to hearing is a very onerous task.

Case Study

Mei was dismissed from her job in a rural area when she got pregnant. Her boss told her that in her particular industry, women shouldn't be working due to fumes which could affect her in pregnancy. She had already checked it out herself and believed it to be safe for her and her pregnancy to continue working. Because she was dismissed, she no longer had any income from work so her income dropped substantially. She lived in a small town so it was very difficult for her to get another job. She couldn't work within the same industry except for the one employer who had fired her. She knew that other women had also been dismissed when they became pregnant while working in this industry because of the prevailing view that women shouldn't work there when pregnant. Although she had a community legal centre lawyer to assist her, she had to deal with the complaint throughout her pregnancy and the life of her baby, and the process took over 18 months to finalise. The emotional cost of having to pursue this complaint at a stressful time in her life, with pregnancy and birth, and in a small town where she was clearly identified made it very difficult for her to continue with her complaint. She ultimately settled for a sum of money but never got her job back.

In *Access for All (Hervey Bay) v Hervey Bay City Council*,¹¹ the court found that the applicant did not have standing to commence proceedings in the Federal Court because the majority of its members were not directly affected by the relevant conduct. This decision came out of a conflict between the representative complaints provision in the *Australian Human Rights Commission Act* (Cth) and the *Federal Court of Australia Act 1976* (Cth).

Under section 46P(c) of the *Australian Human Rights Commission Act* (Cth), a complaint can be made 'by a person or trade union on behalf of one or more persons aggrieved by the alleged unlawful discrimination'. However, under section 46PO(1), in order to proceed beyond the AHRC to the Federal Court or the Federal Magistrates Court with such a complaint, only an individual 'who was an affected person in relation to the complaint' may make a complaint. In order to proceed as a representative complaint, a member of the

¹¹ [2007] FCA 615.

representative class must commence the proceedings and be able to name at least seven members of the class who consent.

The result is that systemic discrimination issues cannot be dealt with through representative organisations representing the class of people affected, unless seven members of a class can be identified, or unless it can be proven that it itself is affected by the conduct. Given these barriers, representative complaints are rarely made. Advocacy organisations are now reluctant to bring complaints to challenge instances of systemic discrimination due to uncertainty as to whether the organisation will be found to have standing to do so if the matter proceeds beyond the AHRC level. Section 122 of the Exposure Draft Legislation does not address this issue. If a complaint is not brought in relation to a specific issue or service it will continue to be discriminatory, and the current lack of an effective mechanism to facilitate this impedes the objects of the Act in relation to addressing systemic discrimination.

RECOMMENDATION: Section 122 of the Exposure Draft Legislation should include provision for ‘representative complaints’ and complaints by groups on behalf of, or in the interests of, members.

2. CHAPTER 2, PART 2-1, DIVISION 1 (SECTION 17): PROTECTED ATTRIBUTES

NACLC and KLC submit that the list of protected attributes should extend coverage to a broader range of attributes than those currently proposed in section 17(1), to ensure consistency with international best practice and human rights law standards where the discrimination faced by particular groups is well-evidenced. Our recommendations in relation to particular attributes are set out below.

2.1. ‘Other Status’ and non-exhaustive list of attributes

NACLC and KLC submit that the list of protected attributes in the Exposure Draft Legislation should be a non-exhaustive list which specifically prohibits discrimination on the ground of ‘other status’. This would be consistent with Australia’s obligations under international human rights law and with recognised international best practice.¹² The *International Convention on Civil and Political Rights (ICCPR)* and *International Covenant on Economic, Social and Cultural Rights (ICESCR)* prohibit discrimination on certain grounds which include any ‘other status’. Other status has been found to refer to a clearly definable group of people linked by their common status.¹³ Such a mechanism for extending protection to additional attributes

¹² See, for example, Article 5 of the Declaration on Principles on Equality which provide that discrimination based on any other ground (in addition to those enumerated) must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds (accessed at <http://www.equalrightstrust.org/endorse/index.htm>).

¹³ The Committee on Economic, Social and Cultural Rights (CESCR) considered the effect of the words ‘other status’ in their General Comment No. 20 in which they stated that in their view, ‘other status’ indicated that the list of grounds is not exhaustive and that other grounds may be incorporated into the category (see generally, S Joseph, S Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (2nd ed, 2004) at 689, which discusses the UN Human Rights Committee decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of ‘other status’).

would ensure that Australia's anti-discrimination laws are able to respond to social change and new forms of discrimination over time.¹⁴

We submit that an alternative to adding 'other status' as a fully protected attribute would be to allow complaints on the basis of 'other status' to be received by the AHRC but for these complaints not to be a cause of action justifiable in the federal court, similar to complaints currently under the ILO complaints stream in the AHRC Act.¹⁵

RECOMMENDATION: Consistent with Australia's human rights obligations, the Exposure Draft Legislation should be amended to include a non-exhaustive list of protected attributes and include the ground of 'other status' in order to recommend to Government any further attributes that should be protected.

RECOMMENDATION: If 'other status' is not fully protected as an attribute, the Australian Human Rights Commission should still be able to receive complaints on this basis. The Australian Human Rights Commission should monitor new and emerging trends in relation to discrimination on 'other status' and make recommendations to the Government on the inclusion of new attributes in order to ensure the protection of new and emerging attributes as protected attributes.

2.2. Family Responsibilities

NACLC and KLC recommend that the definition of family responsibilities in the Exposure Draft Legislation (section 17(1)(d)) be expanded to include carer responsibilities, and include domestic relationships and cultural understandings. In particular, we note that the current construction of section 17(1)(d) does not recognise kinship groups and Aboriginal peoples' cultural understandings of family. The Exposure Draft legislation should be amended to recognise Aboriginal peoples' cultural understandings of family and we refer the Senate Inquiry to section 5 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and section 10 of the *Family Violence Protection Act 2008* (Vic) for a model of how to incorporate Aboriginal understanding of immediate family into the definition of family responsibilities in the Exposure Draft Legislation.¹⁶

We also submit that protection from discrimination on the basis of family or carer responsibilities should include a failure to make reasonable adjustments.

¹⁴ See, generally, S Joseph, S Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (2nd ed, 2004) at 689, which discusses the UN Human Rights Committee decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'.

¹⁵ AHRC Act Part II Division 4.

¹⁶ Section 5, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) defines 'domestic relationship' as including at (h) 'in the case of an Aboriginal person or a Torres Strait Islander, is or has been part of the extended family or kin or the other person according to the Indigenous kinship system of the person's culture'. Section 10 of the *Family Violence Protection Act 2008* (Vic) provides that the definition of 'relative' for Aboriginal peoples 'includes a person who, under Aboriginal or Torres Strait Islander tradition or contemporary social practice, is the person's relative'. See also, section 19(4) of the *Domestic and Family Violence Protection Act 2012* (Qld) recognises that Aboriginal peoples may have a wider concept of a relative than what is defined in the Act.

It is important that carer and family responsibilities – and other characteristics associated with sex and disability – be protected under consolidated anti-discrimination legislation. In that regard, NACLC and KLC welcome the inclusion of specific recognition for the characteristics of pregnancy or potential pregnancy, family responsibilities, and breastfeeding.

RECOMMENDATION: Section 17(1)(d) of the Exposure Draft Legislation should be amended to provide for Aboriginal peoples' cultural understandings of family in a manner consistent with section 5 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and section 10 of the *Family Violence Protection Act 2008* (Vic).

RECOMMENDATION: Protection from discrimination on the basis of family or carer responsibilities should also include a failure to make reasonable adjustments.

2.3. Status as a victim or survivor of domestic or family violence

NACLC and KLC recommend that the list of protected attributes in section 17(1) include an additional attribute of 'status as a victim or survivor of domestic or family violence'.¹⁷ In general, NACLC and KLC support the approach set out by Belinda Smith and Tashina Orchiston in their article, *Domestic Violence Victims at Work: A Role for Anti-Discrimination Law?*¹⁸ We note that the issue of domestic and family violence in the anti-discrimination context is a broader issue than just workplace discrimination, and recommend that this protected attribute apply to all areas of public life.

A significant number of Australians experience domestic or family violence over the course of their lifetime¹⁹ and domestic/family violence is the leading preventable cause of death, disability and illness for Australian women under 45 years of age.²⁰ The economic cost of domestic/family violence is set to rise to \$9.9 billion by 2021/2022 unless the rate and extent of violence is reduced.²¹

NACLC and KLC support the definition of domestic/family violence that is presented in Smith and Orchiston's article, which is based on the ALRC and NSW Law Reform Commission's proposed definition. In particular, the definition should reflect the broad range of behaviours that are used to coerce or control others in the domestic/family violence context, as well as the broad types of relationships that fall within the category of domestic/family relationship.

¹⁷ 'Victim or survivor' is preferred in order to indicate that domestic/family violence is a process of victimisation, but that those who experience it – mainly women – can also survive it and move on with their lives. 'Domestic or family violence' is preferred due to variation among state and territory legislation (e.g. *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Family Violence Protection Act 2009* (Vic)), and because while 'domestic violence' is the older term, many Aboriginal and Torres Strait Islander people and members of CALD communities prefer the term 'family violence'.

¹⁸ Belinda Smith and Tashina Orchiston, 'Domestic Violence Victims at Work: A Role for Anti-Discrimination Law?' (2012) 25 *Australian Journal of Labour Law* 209

¹⁹ ABS, *Personal Safety Survey*, 2006 at 11.

²⁰ VicHealth, *The Health Costs of Violence*, 2004, p 10.

²¹ National Council to Reduce Violence Against Women and their Children, *The Cost of Violence Against Women and Their Children*, March 2009, p 66.

Case Study

Brenda, a young woman experiencing ongoing violence from her ex-boyfriend, was dismissed from her workplace after he turned up at the office, threatened her, and caused a scene in front of clients.

Case Study

Silvia, a university student, missed a final exam after her husband prevented her from leaving the house. Her faculty told her she would not be eligible for a supplementary exam as she was not sick on the exam date and there were no 'special circumstances'. Silvia received a fail grade for the unit and dropped out of the course, she felt that no one believed her.

CLC clients have also reported experiencing domestic/family violence in other areas of public life, such as accessing accommodation. Domestic/family violence continues to be a major cause of homelessness for women.²² For example, clients have reported that they have had difficulty in obtaining rental accommodation in the public and private rental markets when their status as a victim/survivor of domestic/family violence is known to decision-makers.

Case Studies

Mary was in a violent relationship and her application for private rental accommodation was denied due to 'personal issues'. She eventually found accommodation elsewhere from a landlord who didn't know about the domestic/family violence.

Teresa had been a victim of domestic/family violence in the past, and had great difficulty trying to obtain public housing. Everyone she dealt with believed that she would return to her violent ex-partner or enter into another abusive relationship and so they said there was no point in assisting her with accommodation or reunification with her children. Fortunately, Teresa obtained the support of a local government member who was able to advocate for housing for her.

²² For more detail, see Spinney, A and Blandy, S, *Homeless prevention for women and children who have experienced domestic and family violence: innovations in policy and practice*, Australian Housing and Urban Research Institute, June 2011.

Case Study

Magda has three children and speaks English as a second language. She was unable to secure any rental properties when trying to exit a caravan park after fleeing domestic/family violence with her children. She believes that the biggest problem was that she had three young boys in tow when she went to see real estate agents. Luckily Magda was helped by women from her children's play group, even though she didn't know them very well. They looked after her children while she bought new clothes from the op shop and then went to the real estate offices where she was taken more seriously. While Magda's story suggests that she may have been discriminated against on the basis of her family responsibilities, it is unlikely that she would be able to prove this without also needing to have recourse to arguments based on her protected status as a victim/survivor of domestic/family violence.²³

Significantly, specific protection on the ground of status as a victim or survivor of domestic or family violence is consistent with Australia's international human rights obligations.²⁴ In particular, the CEDAW Committee has recognised that gender based violence against women is both a manifestation and a cause of discrimination against women under article 1 of CEDAW. The Committee has recognised that discrimination seriously inhibits women's ability to enjoy and exercise their human rights and fundamental freedoms.²⁵ The CEDAW Committee has also recommended that Australia 'develop strategies to prevent homelessness resulting from domestic violence'.²⁶ It is therefore consistent with Australia's obligations under CEDAW to protect victims and survivors of domestic/family violence from discrimination.

Specific protection on this ground is also consistent with national policy response to domestic/family violence, set out in the Council of Australian Governments' National Plan to Reduce Violence Against Women and Their Children 2010-2022 ('**National Plan**').

The National Plan aims to reduce violence experienced by Australian women and their children and support their 'full social and economic participation'.²⁷ Protection from discrimination is necessary to facilitate social inclusion; it plays a normative role in discouraging negative stereotyping and prejudice and would empower people who

²³ Magda's example also supports reform of anti-discrimination legislation to more genuinely take account of indirect and intersectional discrimination.

²⁴ *Convention on the Elimination of All forms of Discrimination against Women*, CEDAW General Recommendations 12 and 19, ICCPR Articles 2, 3, 7 and 26, and ICESCR Articles 3 and 10. Further, in its 2010 review of Australia, the Committee on the Elimination of Discrimination against Women recommended that Australia develop strategies to prevent homelessness resulting from domestic violence.

²⁵ CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992) and CEDAW Committee, *General Recommendation No. 28: Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (2010).

²⁶ Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women –Australia*, 30 July 2010, CEDAW/C/AUL/CO/7 at paragraph 29 accessed on 12 December 2012 at:

<http://www2.ohchr.org/english/bodies/cedaw/cedaws46.htm>

²⁷ *National Plan* at 10.

experience domestic or family violence to seek support where needed.²⁸ Protection from discrimination is also necessary to enhance economic participation: it would enable people who experience domestic or family violence to obtain and maintain jobs by making it easier to disclose information about domestic or family violence, where relevant, without fear of repercussion.²⁹

Furthermore, although progress has been made in increasing the availability of paid leave for victims and survivors in the workplace through 'domestic/family violence clauses' in enterprise agreements and awards, this does not replace or reduce the need for specific discrimination protection. First, paid leave is an entitlement to take leave where required, for example, where time off is needed to go to court; it does not address negative treatment, attitudes and stereotyping that lead to unfair treatment. Second, these entitlements are only available to employees with 'secure' jobs, contract and casual workers generally have no access to paid leave and research shows that victims and survivors of domestic or family violence are more likely to be employed on a casual basis. This leaves the most marginalised workers without protection.

Additionally, this protection is limited to employment only and not to all areas of public life. The protection against domestic/family violence should apply in all areas of public life. It should cover people who have experienced domestic/family violence in the past, who are currently experiencing domestic/family violence or who are adversely treated because of the possible future consequences of domestic/family violence. It should also apply to actual victims or survivors, as well as perceived victims/survivors, and to associates of persons who are victims/survivors.

NACLC and KLC therefore recommend that the list of protected attributes in section 17(1) of the Exposure Draft Legislation include an additional attribute of 'status as a victim or survivor of domestic/family violence'. At a minimum, if this protected attribute is not included in the final Act, NACLC and KLC recommend that it be considered a priority issue for inclusion as an additional protected attribute in the three year review of the legislation. We note that section 47 includes a review of exceptions within three years. We recommend this review also includes consideration of adding additional protected attributes to the legislation.

Finally, NACLC and KLC endorse the ALRC's view that it should not be necessary for people experiencing family violence to 'engage in complex legal analysis to demonstrate discrimination', and that the general protections provisions under the *Fair Work Act 2009* (Cth) are designed to complement – and are necessarily linked to – Commonwealth, state and territory-anti discrimination legislation.³⁰ We recommend that in addition to the inclusion of domestic and family violence as a protected attribute in the Exposure Draft Legislation, that there be consideration in the drafting to ensure complementarities between domestic and family violence leave provisions in the Act and the *Fair Work Act 2009* (Cth).

²⁸ Tashina Orchiston and Belinda Smith, 'Empowering Victims of Family Violence: Could Anti-Discrimination Laws Play a Role?' *Australian Review of Public Affairs*, March 2012.

²⁹ Australian Human Rights Commission, *Independent Interim Report on CEDAW*, August 2012 at 12.

³⁰ Australian Law Reform Commission, *Submission to the Fair Work Act Review*, 2012, para 5.9

RECOMMENDATION: Section 17(1) list of protected attributes be expanded to include status as a victim or survivor of domestic or family violence, and that in the context of leave provisions in relation to this protected attribute, that there be complementarities between the Act and the *Fair Work Act 2009* (Cth).

If this does not occur, status as a victim or survivor of domestic or family violence should be considered as a priority for inclusion as an additional protected attribute at the three year review of the legislation, the mandate of which should be extended to include additional protected attributes to the legislation.

2.4. Gender Identity, Sexual Orientation and Intersex

NACLC and KLC welcome the inclusion of gender identity and sexual orientation in the list of protected attributes. However, we have concerns in relation to the definitions of sexual orientation and gender identity in the Exposure Draft Legislation. We support the use of appropriate terminology that captures the whole of Lesbian, Gay, Bisexual, Transgender and Intersex (**LGBTI**) communities, and people perceived to be part of these communities. We support the terms 'sexual orientation, gender identity, gender non-conformity, and intersex'. We also support the inclusion of specific protections for LGBTI communities.

2.4.1. Sexual orientation

The inclusion of sexual orientation in the list of protected attributes is consistent with Australia's obligations under international human rights law,³¹ and is in accordance with anti-discrimination legislation in comparable jurisdictions.³² We support the use of this term.

NACLC and KLC are concerned about the definition of sexual orientation in the Exposure Draft Legislation, as it is defined to include, in sub-section (b), a person's sexual orientation towards persons of the opposite sex. The Explanatory Memoranda to this Exposure Draft Legislation notes that it is aimed at achieving equality for disadvantaged groups, rather than allow for a complaint mechanism for heterosexual persons, a position that NACLC and KLC support. We submit that interpretations of the final legislation should consider the explicit aims of the legislation to achieve equality and to ensure human rights are respected.

2.4.2. Gender identity

NACLC and KLC welcome the Exposure Draft Legislation's definition of gender identity that refers to a person's self identification and gender expression, rather than surgical requirements in order for anyone to be recognised under the law. This is consistent with Australia's international human rights obligations.³³

³¹ Article 26 of the *International Covenant on Civil and Political Rights* prohibits discrimination based on sexual orientation. See, *Toonen v. Australia* (CCPR/C/50/D/488/1992) and *Young v Australia* (CCPR/C/78/D/941/2000). Article 2 of the *International Covenant on Economic, Social and Cultural Rights* covers discrimination on the grounds of sexual orientation. See General Comment 20 of the Committee on Economic, Social and Cultural Rights.

³² Including, the United Kingdom, New Zealand Canada and South Africa. See, s 12 *Equality Act 2010* (UK); s 21 *Human Rights Act 1993* (NZ); s 2 *Canadian Human Rights Act 1985* (Can); ss 1 *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (RSA).

³³ Article 6 of the ICCPR preserves the right to physical integrity. This right has been interpreted as comprising two components: Firstly, the protection against violation of and offences against the body by others. Secondly, the right to determination over one's own body, the right of self determination (see Smith, J., *Male Circumcision and the Rights of the Child*,

However, NACLC and KLC submit that gender non-conformity has not been adequately dealt with in the definition of gender identity. Gender non-conformity is a crossover issue for both the LGB and TI communities. In the LGB communities, examples of gender non-conformity may include 'butch' women, 'femme' boys or 'gender queer' expressions. Gender non-conformity is often a 'tell' or trigger for discrimination. Unless given specific consideration, gender non-conformity may not be captured by definitions of LGBTI. If an individual's identity is not captured neatly by definitions of LGBTI, help may not become available until it is too late, and violence or the threat of violence has escalated.

Case Study

Emmett is a gay man living in an apartment in the inner city. Emmett likes his house to be beautiful and has spent lots of time decorating it. He cultivates flowers and has them arranged on his front doorstep. Emmett also has fairy statues amongst the flowers. Emmett loves music and enjoys dancing. Emmett also enjoys baking and is more than happy to share treats with his neighbours. Some of Emmett's neighbours have become more and more hostile, calling him female names as well as offence terms like 'faggot'. The violence escalated until Emmett's life was put at risk.

Within gender diverse and intersex communities, appearing to have a characteristic from one gender can lead a person to being 'outed'. This 'outing' is often a precursor to actual discrimination. For these reasons, NACLC and KLC submit that it is important that the Exposure Draft Legislation provide specific protections to those discriminated against or vilified because of their gender non-conformity.

2.4.3. Intersex

NACLC and KLC recommend that intersex people be specifically covered by consolidated equality legislation.³⁴ In defining intersex, we refer to the definition provided by Organisation Internationale des Intersexues Australia, which is as follows:

Intersex people are people who, as individuals, have generic, hormonal and physical features that may be thought to be typical of both male and female at once. That is, we may be thought of as being male with female features, female with male features, or indeed we may have no clearly defined sexual features at all.

<http://www.cirp.org/library/legal/smith>). If the state requires transgender people to have surgery as a prerequisite to enjoy legal protections, this is counter to the absolute right to physical integrity. The result being a state created group that is required to be sterilised, medicated and surgically altered, at their own cost, in order to access the same rights as other citizens.

³⁴ Article 6 of the ICCPR preserves the right to physical integrity. This right has been interpreted as comprising two components: Firstly, the protection against violation of and offences against the body by others. Secondly, the right to determination over one's own body, the right of self determination (see Smith, J., Male Circumcision and the Rights of the Child, <http://www.cirp.org/library/legal/smith>). If the state requires transgender people to have surgery as a prerequisite to enjoy legal protections, this is counter to the absolute right to physical integrity. The result being a state created group that is required to be sterilised, medicated and surgically altered, at their own cost, in order to access the same rights as other citizens.

Based on this definition, NACLC and KLC suggest that both 'indeterminate sex' and intersex are used in the Exposure Draft Legislation. The reason for this is that some people do not identify as any sex – while some people will prefer to identify as intersex.³⁵ At present, the Exposure Draft Legislation only includes 'indeterminate' as part of the broader definition of gender identity.

RECOMMENDATION: Section 17(1) of the Exposure Draft Legislation should retain 'sexual orientation' as a protected attribute. It should also be amended to include the use of appropriate terminology that captures the whole of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) communities, and people perceived to be part of these communities. It should make specific and appropriate use of the terms homosexuality, lesbianism, bisexuality, gender identity, gender non-conformity, intersex, and indeterminate sex.

2.5. Irrelevant criminal record

NACLC and KLC recommend that irrelevant criminal record be added to the section 17(1) list of protected attributes.

Case Study

Dimitri had a history of drink driving and had even spent a short time in jail because of it. He had never been charged or found guilty of dishonesty offences. He secured employment as a cleaner in a large suburban shopping complex. After working for three weeks his employers learned of his criminal history and terminated his employment. He was told that his services were no longer required because of his prison record. Dimitri was devastated, having completely run his own cleaning business in the past.³⁶

People with a criminal record are regularly discriminated against even if their criminal record is very old and no longer relevant.³⁷ Having a criminal record can be a significant barrier to obtaining meaningful employment in a wide range of fields as well as presenting barriers in other areas of life, such as housing. The prevalence of this form of discrimination can prevent the rehabilitation of offenders and impede their reintegration into society.³⁸ Ultimately, by

³⁵ Intersex (as opposed to 'intersexed') is always the preferred term, as in 'I am an intersex woman', 'I am intersex', 'I am an intersex man', and so on. The reason for this is that 'intersexed' tends to indicate something has been done to the person and that reinforces the notion of a condition or a disorder. Intersex is about the sex differences and not about gender roles. This distinction should be reflected in the Exposure Draft Legislation.

³⁶ Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform*, 2005 (available at http://www.jobwatch.org.au/uploaded_files/144623crvpr0706.pdf) at 28.

³⁷ Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion Paper, 2004, at 6-7; Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform*, 2005 (available at http://www.jobwatch.org.au/uploaded_files/144623crvpr0706.pdf).

³⁸ For example, research in the UK has shown that employment can reduce re-offending by between a third and a half – see Home Office, *Breaking the Circle: Report on the Review of the Rehabilitation of Offenders Act*, July 2002.

impeding reintegration, this form of discrimination contributes to the increased risk of re-offending, a significant social and economic cost to the broader community.

Research demonstrates that a criminal record is often an unreliable indicator of future behaviour.³⁹ Unfortunately, despite the lack of reliability as an indicator of future behaviour, there is an increasing reliance on criminal record vetting processes as a risk management tool in relation to any form of paid or voluntary work. In 2010-11, Crim Trac, the government agency responsible for providing national criminal history checks for accredited agencies, processed approximately 2.9 million checks to 100 different accredited agencies over a twelve month period, which is more than a five-fold increase from the reporting period 2000 to 2001.⁴⁰

Case Study

Mark is a 19 year old Aboriginal man. He was recently selected to be part of an employment program for Aboriginal and Torres Strait Islander school-leavers run by a major airline. The program gives young people a job in the airline as well as specialised mentoring and support from other staff. His family are all very proud of Mark and his parents have told everyone they know about his new job with such a well known international company.

As part of his job offer, Mark had to provide a criminal record check. One day Mark is called into HR. He is told there is a problem with his criminal record – he has two convictions; “possess thing intended for use in damaging property” and “destroy or damage property”. He is told that any offences that relate to damage to property are considered ‘serious offences’ by the company and make him ineligible for the program. Mark explains that the offences were not as serious as they sound – he was mucking around with some mates at a train station and wrote his name with a black marker on one of the seats on the platform. He was convicted and sentenced to \$100 fine and a 12 month good behaviour bond which he has now served. He tells HR he has grown up a lot since then and hasn’t had any trouble with the police since. He says he takes this job very seriously and doesn’t want to jeopardise it. Mark is very worried that a stupid decision he made as a teenager might ruin his opportunity to have a career with the airline – he is also worried he might not be able to get a

³⁹ Federation of Community Legal Centres (Vic), *Submission: Draft Model Spent Convictions Bill*, May 2009, at 6. In 1987, the Australian Law Reform Commission stated that ‘an old conviction, followed by a substantial period of good behaviour, has little if any value as an indicator of how the former offender will behave in the future’ (see Australian Law Reform Commission, *Spent Convictions*, ALRC 73, 1987). The Sentencing Advisory Council has similarly stated that ‘research has shown that the most serious crimes against the person are committed by offenders who have not previously been convicted of a violent offence, and who will not go on to be convicted for future violent offences’ (see Kelb, K., *Recidivism of Sex Offenders*, Sentencing Advisory Council, 2007, at 1). Further, UK research suggests that most people who are found guilty of an offence only offend once, and the offences are more likely to have been committed when the person was young (see Home Office (UK), *Criminal careers of those born between 1953 and 1978*, Home Office Statistical Bulletin, 4/2001).

⁴⁰ Crim Trac Annual Report 2010-11, at 32. For example, bus drivers, supermarket attendants and volunteers at community organisations are routinely required to undergo criminal record checks.

good job anywhere else because of his record. Mark doesn't know what to do. He is very embarrassed and doesn't want to disappoint all his family and friends who have been so proud of him.

Including 'criminal record' as a protected attribute would simplify as well as strengthen the existing legal framework, which provides partial and inconsistent protection from criminal record based discrimination. Currently federally, complainants who have experienced discrimination on the basis of their criminal record are able to complain to the AHRC, but are unable to enforce their rights through the Federal judicial system. In Victoria, New South Wales, South Australia and Queensland, anti-discrimination laws do not prohibit discrimination on the basis of criminal record. Spent convictions legislation also operates in some Australian state and territories which, in effect, operates to prevent discrimination on the basis of criminal record by limiting what information can be used by an employer. However, the application of such legislation is limited in that it only has effect after the relevant crime-free period has expired.⁴¹

Discrimination on the basis of irrelevant criminal record is also prohibited under international law. Australia has ratified the International Labor Organisation Convention III, the Discrimination (Employment and Occupation) Convention 1958 (**ILO III**) which requires the Australian Government to pursue policies to ensure criminal record-based discrimination is eliminated.⁴² International jurisprudence indicates that discrimination on the grounds of criminal record is likely to be protected under the description 'other status'.⁴³ The European Court of Human Rights, for example, has interpreted non-discrimination on the grounds of 'other status' to include non-discrimination on the basis of criminal record.⁴⁴

When the Government announced the reform of anti-discrimination legislation in April 2010, it stated that "importantly, there will be no diminution of existing protections currently available at the federal level".⁴⁵ NACLC and KLC submit that the removal of the ability to make a complaint on the basis of irrelevant criminal history constitutes a 'diminution'. Additionally, the arguments in the Explanatory Notes to the Exposure Draft Legislation about the difficulty of ascertaining what an irrelevant criminal record is are not persuasive given the complexity of other legal aspects of discrimination law.

⁴¹ In every Australian state and territory, either legislation or policy dictates that with the passing of a certain length of time, the majority of convictions will be treated as spent. Note, however, that in Victoria and South Australia, spent convictions regimes are contained only in police policy relating to the circumstances and content of police record disclosure.

⁴² ILO 111 was ratified by Australia in 1973 and incorporated into domestic law by virtue of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

⁴³ Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record*, Discussion Paper, 2004, at 11; *Thlimmenos v Greece*, 6 April 2000, Application No. 34369/97.

⁴⁴ See, *Thlimmenos v Greece*, 6 April 2000, Application No. 34369/97.

⁴⁵ Hon. Robert McClelland MP (Attorney-General), The Hon Lindsay Tanner MP (Minister for Finance and Deregulation, *Reform of Anti-discrimination Legislation*, Media Release, Minister for Finance and Deregulation, 21 April 2010, available at http://www.financeminister.gov.au/archive/media/2010/mr_292010_joint.html (accessed 11 December 2012).

For these reasons, and in order to give effect to Australia's international obligations, NACLC and KLC recommend that prohibition on the basis of irrelevant criminal record be prohibited by the Exposure Draft Legislation.

RECOMMENDATION: Section 17(1) of the Exposure Draft Legislation should include irrelevant criminal record as a protected attribute.

2.6. Homelessness/Social Status

Section 17(1)(r) of the Exposure Draft Legislation includes 'social origin' as a protected attribute, but the legislation does not provide a definition.

NACLC and KLC recommend that section 17(1) of the Exposure Draft Legislation be amended to include 'social status' as a protected attribute which incorporates a person's status as homeless, unemployed or a recipient of social security payments.

Case Study

I have been refused by many real estate agents based on the fact that I was receiving parenting payments from Centrelink. I was told on several occasions by agents specifically that was the reason. I have also been refused from private landlords for the same spoken reason.

I was successful in filling out an application for private rental because I presented well until I filled out my income and address details, then nobody wanted me. I was refused private rental because my bond cheque was coming from the Office of Housing.⁴⁶

NACLC and KLC recommend that the Exposure Draft Legislation prohibit discrimination and promote equality on the basis of 'social status'. For the purpose of this submission, we use the term 'social status' to include not only persons who are homeless, but also those who are at risk of – or recovering from – a period of homelessness. The term 'social status' should encompass a person's status as homeless, unemployed or a recipient of social security payments.

People experiencing homelessness suffer direct and indirect discrimination on a regular basis. In a 2006 study by the PILCH Homeless Persons' Legal Clinic, it was found that amongst the 183 people experiencing homelessness that were surveyed, almost 70 per cent experienced unfair treatment in the area of accommodation on the grounds of homelessness or social status. A further 60 percent experienced unfair treatment on the same grounds in the area of goods and services. Discrimination systemically excludes people from access to goods, services, the justice system, health care, housing and employment and by doing so,

⁴⁶ Council to Homeless Persons, *Submission to the Scrutiny of Acts and Regulations Committee: Equal Opportunity Bill 2010*, March 2010 (accessed at http://www.chp.org.au/public_library/items/2010/00258-upload-00001.pdf), at 3.

contributes to the continuing experience of homelessness.⁴⁷ In this way, homeless is both a cause and a consequence of discrimination. The Special Rapporteur on Adequate Housing has stated that:⁴⁸

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

Discrimination on the basis of homelessness is often compounded by other forms of discrimination, such as discrimination on the basis of a person's disability or social status as a victim of family violence.

Protecting people experiencing homelessness from discrimination under the law would enable these individuals to access employment, accommodation and other goods and services on an equal footing with others. It would support the Commonwealth Government's policy priorities of tackling and reducing homelessness in order to increase social inclusion and create a healthier, happier, more productive community. By contributing to the reduction in homelessness, these changes would also deliver economic benefits, given that the costs of an individual remaining homeless can amount to \$34,000 per year.⁴⁹

Whilst there is no protection from discrimination on the grounds of social status (or homelessness on any other similar ground) in any state or territory or at the Commonwealth level, a number of jurisdictions include social status or similar attributes as a protected ground in their anti-discrimination legal framework.⁵⁰ These protections have been operating for a number of years in these jurisdictions.

RECOMMENDATION: Section 17(1) of the Exposure Draft Legislation should include 'social status' as a protected attribute in all areas of public life, not just employment. 'Social Status' should be defined to mean a person's status as homeless, unemployed, or a recipient of social security payments.

2.7. Disability

NACLC and KLC recommend that the definition of disability in section 17(1)(c) of the Exposure Draft Legislation be amended to include obesity.

There is a high incidence of prejudice against obese people in our society and a social stigma attached to being obese. The current definition of 'disability' is inadequate to address this community prejudice and current levels of discrimination.

⁴⁷ PILCH Homeless Persons' Legal Clinic, *Discrimination on the Basis of Homelessness: Position Paper of the PILCH Homeless Persons' Legal Clinic*, available at http://www.pilch.org.au/Assets/Files/HPLC_position_paper_discrimination-homelessness.pdf.

⁴⁸ Kothari, M., *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, UN Doc E/CN.4/2005/43, [3].

⁴⁹ City of Sydney and St. Vincent's Mental Health Service, *Help the Homeless: Spend Less, Spend Wisely* (<http://www.mhcc.org.au/images/uploads/CitySydney-HelpHomeless.ppt#257>).

⁵⁰ For example, New Zealand, Canada, the United States, the United Kingdom, and Europe.

Case Study

Maxine works as a cleaner in a shopping centre. Her boss has frequently made negative comments about her weight and eventually calls her into a meeting where he expresses concern that she is damaging her health by being obese. Maxine denies that she is sick in any way, and points to the fact that she has no trouble performing her duties at work. Her boss says that her health is still a big worry, and that she is bound to get sick as she is so overweight, and makes her agree to start losing weight, otherwise she will receive a 'warning' at work. She will also not be offered overtime, as her boss believes she would be unable to complete it because of her weight. Maxine is distressed and angered by her boss's behaviour as she believes she is a good worker and that she is being discriminated against on the basis of her weight.

In this example, Maxine has clearly been treated less favourably by her boss, however it is uncertain whether she would be able to make a complaint of disability discrimination under the DDA. At present, the medical profession in Australia does not consider obesity itself to be a disability. In the case of a person like Maxine, who is obese but who has not been diagnosed with any illness and has no real loss of her bodily functions, it would be difficult to argue that she has been discriminated against on the basis of a future of imputed disability⁵¹ however this would be technically difficult as it is not possible to ascertain what type of disability her boss is assuming she already has or will develop.

RECOMMENDATION: The definition of disability in section 17(1)(c) of the Exposure Draft Legislation should be amended to specifically include obesity.

3. CHAPTER 2, PART 2-2, DIVISION 3 (SECTION 22) SPECIAL MEASURES

Section 21 of the Exposure Draft Legislation provides that special measures to achieve equality are not discrimination, provides for a meaning of special measures to achieve equality, and places a time limit on special measures (the achievement of substantive equality).

NACLC and KLC welcome the inclusion of a single special measure provision covering all protected attributes, as we submit that this is an essential component in achieving substantive equality and eliminating discrimination in Australia. However, the meaning and scope of special measures in the Exposure Draft Legislation, as with the current Commonwealth anti-discrimination law regime, does not meet international human rights standards.

In keeping with the objects of the Exposure Draft Legislation, the definition of special measures should be drawn from international human rights standards – specifically, the Committee on the Elimination of Racial Discrimination's *General Recommendation No. 32*:

⁵¹ Under Parts (j) and (k) or the section 4 definition, DDA.

The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination.

The key features of special measures set out in the General Recommendation No. 32 are that the special measure:

- is temporary;
- aimed at achieving substantive equality;
- appropriate, legitimate and proportionate in a democratic society;
- based on accurate data;
- designed and implemented on the basis of need;
- designed in consultation with affected groups;
- implemented with the participation of affected groups; and
- membership of affected groups be self-identified.

As articulated in NACLC's previous submissions, we further recommend that other key features of a special measure be to:

- further the objects of the Exposure Draft Legislation; and
- be beneficial for the affected group.

The section 21 treatment of special measures does not meet this definitional threshold in relation to a number of key elements. First, the requirement for appropriateness, legitimacy and proportionality, as well as being evidenced-based, is largely subjective, with the Exposure Draft Legislation requiring only that a 'reasonable person in the circumstances. considered that [special measure] was necessary in order to advance or achieve substantive equality'. Further, there is no requirement that the special measure be designed or implemented in consultation with affected groups who are self-identified, nor that the measure be for their benefit.

In the past, special measures have been relied on by successive Commonwealth governments to implement a range of discriminatory policies, and the current wording in the Exposure Draft Legislation does not address this issue. Adopting a definition that accords with the General Recommendation No. 32 would also relate special measures to the objects of the Act.

RECOMMENDATION: The definition of special measure in section 21 of the Exposure Draft Legislation should include all the key features set out in the Committee on the Elimination of Race Discrimination's *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*. Additional key features should include that the special measures further the objects of the Act and be beneficial for the affected group.

4. CHAPTER 2, PART 2-2, DIVISION 4 (SECTIONS 23 – 47): EXCEPTIONS TO DISCRIMINATION

4.1. General Exemption

NACLC and KLC submit that permanent exemptions entrench systemic discrimination, as those who are exempt from anti-discrimination laws are not required to consider whether they could achieve the same objective by non-discriminatory means. No human rights are absolute, and when a situation arises when human rights appear to be in conflict, an attempt should be made to strike an appropriate balance between the rights in conflict.

We submit that a general limitations clause, used in the right way, would allow a more thorough examination of human rights in conflict and consideration of how they might be balanced, rather than the exemptions regime provided in the Draft Exposure Legislation. We submit that a general limitations clause be included that deems discriminatory actions or conduct to be lawful when they are reasonable, necessary and proportionate means of achieving a legitimate aim, ONLY if the following conditions are met:

- the general limitations clause must replace all current exemptions; and
- the general limitations clause should include a provision stating that it is not applicable to the protected attribute of race; and
- the judiciary must be required to consider the Objectives of the Act when determining the application of the general limitations clause; and
- the judiciary determining discrimination complaints must have specialist training and knowledge of beneficial nature of discrimination law; and
- the AHRC must be empowered to initiate discrimination complaints; and
- organisations must be empowered to initiate representative complaints; and
- the defence of unjustifiable conduct must be a separate provision, distinct from a general limitations clause.

Accordingly, NACLC and KLC recommend that the Exposure Draft Legislation be amended to include a general limitations clause that deems discriminatory actions or conduct to be lawful when they are reasonable, necessary and proportionate means of achieving a legitimate aim, subject to the conditions articulated in the dot points above.

Alternatively, if a general limitations clause is not adopted, or is adopted but fails to meet the criteria listed above, NACLC and KLC recommend that permanent exemptions for religious organisations be removed and religion included as a protected attribute. Religious exemptions is discussed in full in the paragraph below.

RECOMMENDATION: The Exposure Draft Legislation include a general limitations clause that replaces all current exemption clauses that deems discriminatory actions or conduct to be lawful when they are a reasonable, necessary and proportionate means of achieving a legitimate aim, subject to the following conditions being met:

1. the general limitations clause must replace all current exemptions; and
2. the general limitations clause should include a provision stating that it is not applicable to the protected attribute of race; and
3. complainants must have access to a no-cost jurisdiction to have their discrimination complaints determined; and
4. the judiciary must be required to consider the Objectives of the Act when determining the application of the general limitations clause; and
5. the judiciary determining discrimination complaints must have specialist training and knowledge of beneficial nature of discrimination law; and
6. AHRC have the power to initiate discrimination complaints; and
7. organisations must be able to initiate representative complaints; and
8. the defence of unjustifiable hardship must be a separate provision, distinct from a general limitations clause.

RECOMMENDATION: If the recommended conditions for the introduction of a general limitations clause in the consolidation bill cannot be met by the Government, NACLC and KLC do not recommend the introduction of a general limitations clause and instead recommends that permanent exemptions for religious organisations be removed and religion included as a protected attribute.

4.2. Work and Work-Related Exemptions (section 22)

We note that section 22(3) currently limits some grounds of protection to work and work-related areas only, and in relation to a limited number of protected attributes.

We believe this creates a level of unnecessary confusion and complexity with regards to the operation of intersectional discrimination. For example, what happens when discrimination on the basis of intersection of both medical history and disability takes place in an area other than work or work-related, such as accommodation or education? There is also no principled reason why the exemption should apply to a limited number of protected attributes.

In the interests of promoting consistency of Commonwealth and state anti-discrimination laws and clear grounds for discrimination, discrimination should be unlawful in all areas of life.

RECOMMENDATION: The exemptions in relation to work and work-related areas in section 22(3) of the Exposure Draft Legislation be amended to make discrimination unlawful in relation to all protected attributes, in all areas of public life protected by international human rights instruments.

4.3. Reasonable adjustments

NACLC and KLC welcome the recognition in the subsection 3(1)(e) of the objects clause that the achievement of substantive equality may require, amongst other things, reasonable adjustments. However, we submit that there is no principled basis upon which the duty to make reasonable adjustments should be limited to people with a disability, as provided in section 25 of the Exposure Draft Legislation. The imposition of a duty to make reasonable adjustments to accommodate the needs of people with a protected attribute is of fundamental importance to the realisation of substantive equality and the elimination of discrimination. Accordingly, the provision for reasonable adjustments in section 25 of the Exposure Draft Legislation should, in our opinion, be extended to cover all protected attributes.

NACLC and KLC further submit that the Exposure Draft Legislation should define a reasonable adjustment as ‘the provision of additional or specialised assistance, the modification of existing measures, the flexible application of existing measures, and the removal of a barrier or obstacle, which does not constitute an unjustifiable hardship’. Courts have struggled to interpret and apply the concepts of reasonable adjustment and unjustifiable hardship. Express guidance on the meaning of those concepts would assist the courts, and make it clear the extent of the onus imposed on respondents to make adjustments before they are able to claim the relief of an unjustifiable hardship defence.

Finally, we recommend that Exposure Draft Legislation be amended to provide that the failure to make a reasonable adjustment is, by itself, unlawful discrimination on the basis of a protected attribute. This recommendation is consistent with the existing provisions of the DDA.

RECOMMENDATION: The Exposure Draft Legislation should impose a specific positive duty to make reasonable adjustments to accommodate persons with all protected attributes in all protected areas of life.

RECOMMENDATION: The Exposure Draft Legislation should define a reasonable adjustment in section 25 as ‘the provision of additional or specialised assistance, the modification of existing measures, the flexible application of existing measures, and the removal of a barrier or obstacle, which does not constitute an unjustifiable hardship’.

RECOMMENDATION: The Exposure Draft Legislation should provide that the failure to make a reasonable adjustment is, by itself, unlawful discrimination on the basis of a protected attribute.

4.4. Religious Exemptions

NACLC and KLC are concerned about the retention in the Exposure Draft Legislation of permanent exemptions to religious organisations. Religious exemptions set out in section 33 of the Exposure Draft Legislation have the potential to compromise the rights of vulnerable groups already susceptible to discrimination, such as women and LGBTI communities, by allowing the right of freedom of religion to prevail over other rights afforded to those individuals by international human rights law, such as the right to live free from discrimination.

While we welcome the section 33(3) provision that the exemption will not apply if the discrimination is connected with Commonwealth funded aged care, NACLC and KLC submit that there is no principled reason why this should not extend to other Commonwealth-funded service delivery, including education, adoption services, employment assistance and child welfare, in all areas of life and in relation to all protected attributes.

According to a report by the Centre of Independent Studies, 1,127,014 students attended non-government schools in 2009, and 90% of these students were in religious schools⁵². Also in 2009, approximately \$6.3 billion was budgeted to non-government schools, the vast majority of this funding going to religious schools⁵³. By allowing publically funded organisations to discriminate against certain groups, the Government sends a message that discrimination is acceptable in our community, which goes to further entrenching systemic discrimination against vulnerable groups of people.

NACLC and KLC submit that removing religious exemptions and introducing religion as a protected attribute ensures that freedom of religion is not privileged over and above the other rights but is still adequately protected.

We are particularly concerned about the application of religious exemptions to the grounds of sexual orientation and gender identity. NACLC and KLC submit that while most state and territory anti-discrimination legislation protects against discrimination on the basis of homosexuality and specifically transgender status, religious exemptions available under those regimes have proved to be severely compromised and limit the extent of those protections.

Case Study

Toni is a transgender woman living in the inner city. Toni needed to attend a residential drug rehabilitation centre as she had been struggling with alcohol and opiate dependency. Her support worker called the local clinic, this clinic happened to be run by a religious based charity. The clinic informed Toni's support person that there was an opening for Toni and that they would hold a place for her. When Toni presented at the clinic she was refused service. When asking why she was told there was no spot for her. Toni was sure that this refusal was based on the fact that she is a transgender woman.

NACLC and KLC submit that the new protections against discrimination on the grounds of sexual orientation and gender identity in the Exposure Draft Legislation will be severely compromised by the application of religious exemptions. Accordingly, we recommend that religious exemptions should not apply to the protected attributes of sexual orientation and or gender identity and, as set out above, that a general limitations clause should apply.

⁵² Centre for Independent Studies, Jennifer Buckingham, *The Rise of Religious Schools*, 2010 at page 3 (<http://www.cis.org.au/images/stories/policy-monographs/pm-111.pdf>)

⁵³ Department of Education, Employment and Workplace Relations, *Financial Assistance Provided to Each State in respect of 2009, 2010*
<http://www.deewr.gov.au/Schooling/RecurrentGrants/NonGovSchools/Documents/GreenReport09.pdf>

Finally, if exemptions for religious organisations are not removed from the Exposure Draft Legislation, then NACLC and KLC recommend that the scope of the religious exemption be narrowed to allow discrimination only when it is necessary to fulfil the inherent requirements of a position directly associated with the operation of a religion, for example a priest, as currently set out in section 32, and should not be applicable to the protected attributes of race or disability.

RECOMMENDATION: Permanent exemptions for religious organisations be removed and religion included as a protected attribute.

RECOMMENDATION: If exemptions for religious organisations are not removed from the Exposure Draft Legislation, the scope of the religious exemption be narrowed to allow discrimination only when it is necessary to fulfil the inherent requirements of a position directly associated with the operation of a religion and should not be applicable to the protected attributes of race or disability.

4.5. Exceptions for Defence Force and Australian Federal Police (section 40)

NACLC and KLC are concerned about the section 40 blanket exception to discrimination on the ground of disability in relation to the Australia Defence Force and Australian Federal Police. We suggest that there are potentially a number of areas of employment within the Defence Force and Federal Police that could be undertaken by persons with, for example, a physical disability or hearing impairment. On that basis, we recommend that the blanket exemption to discrimination on the ground of disability be removed from the Exposure Draft Legislation.

RECOMMENDATION: The section 40 blanket exemption to discrimination on the ground of disability in relation to the Australian Defence Force and the Australian Federal Police should be removed from the Exposure Draft Legislation.

4.6. Exception for Defence Force for women in combat duties

There is currently an exception for the defence force to exclude women from combat duties. The draft legislation maintains this exception until September 2016. The Minister for Defence announced in September 2011 that women would be included in a range of duties across the Defence Force, including combat positions. This was further referred to in August 2012 by Minister Smith with a concrete implementation plan to be introduced in 2013. NACLC and KLC submit that the staged process is too slow and that this exemption should be included but with an end date of 2014.

RECOMMENDATION: The current exemptions for the Australian Defence Force for women in combat duties should include an end date of 2014.

4.7. Temporary exemptions

NACLC and KLC recommend that the criteria for temporary exemptions in sections 83-86 be amended to meet the following requirements:

- AHRC should consider whether the temporary exemption is sought as a reasonable, necessary and proportionate means of achieving a legitimate aim;
- the process for granting temporary exemptions should be public and transparent;
- they meet the recommendations made in the Discussion Paper by the Discrimination Law Experts' Group,⁵⁴ in particular that in relation to exemptions the AHRC should be required to:
 - publish criteria for the granting of an exemption;
 - publicly advertise each application for an exemption calling for comment and submissions;
 - consider the application and any objections;
 - ensure that any exemption is for conduct or condition which are not inconsistent with the objects of the legislation;
 - impose conditions that would ensure that the effect of the exemption does not undermine the purpose of the legislation;
 - require a renewal of the exemption to go through the application process;
 - publish reasons for granting or refusing the exemption; and
 - maintain a public register of applications made and exemptions granted and refused.

NACLC and KLC support the recommendation of the Discrimination Law Experts' Group that the applicant for an exemption be required to show how they will comply with the discrimination law over time.⁵⁵

RECOMMENDATION: Temporary exemptions in sections 83-86 of the Exposure Draft Legislation should be publicly transparent process and should be assessed and granted by the Australian Human Rights Commission. They should be granted on a time limited basis. The Australian Human Rights Commission should not approve exemptions which are inconsistent with the objects of the Act.

4.8. Exceptions for Inherent Requirements of Work

NACLC and KLC welcome the inclusion of a single inherent requirements exemption from discrimination in employment. The inclusion of a single inherent requirement exception

⁵⁴ Discrimination Law Experts' Group, *Submission: Consolidation of Commonwealth Anti-Discrimination Law*, 13 December 2011, at 18, and Discrimination Law Experts Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia*, 31 March 2011, at 13.

⁵⁵ Discrimination Law Experts' Group, *Submission: Consolidation of Commonwealth Anti-Discrimination Law*, 13 December 2011, at 18, and Discrimination Law Experts Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia*, 31 March 2011, at 13.

makes the Exposure Draft Legislation consistent with Article 2 of the ILO 111 and the *Fair Work Act 2009* (Cth).⁵⁶

However, NACLCL and KLC recommend that the section 43 exemption for employment to perform domestic duties be removed from the Exposure Draft Legislation. This recommendation is consistent with both the objects of the Act and in keeping with the non-exhaustive list of areas of public life to which discrimination protections are extended. The focus on protections should be on whether the discrimination occurred, rather than whether the respondent falls under a specified area of public life.

RECOMMENDATION: Section 43 of the Exposure Draft Legislation should be removed to ensure that there are no exemptions for employment to perform domestic duties, other than those in the section 24 'Inherent requirements of work' exception.

5. CHAPTER 2, PART 2-3, DIVISION 3 (SECTION 51): VILIFICATION

NACLCL and KLC welcome the inclusion of racial vilification as constituting unlawful conduct pursuant to section 51 of the Exposure Draft Bill, and inclusion of the elimination of racial vilification as an object of the Act in section 3.

We submit that the consolidated equality legislation provide that vilification in relation to all protected attributes be unlawful, on the basis that vilification is a hate-related crime. Further, NACLCL and KLC suggest that there be a joint investigation framework for vilification in relation to race and all other protected attributes. The framework should provide for the referral of incidents from the AHRC to the Australian Federal Police (**AFP**), and for joint investigations of these incidents. In the absence of such a framework, NACLCL and KLC suggest that it will be unlikely that the AFP and Commonwealth Director of Public Prosecutions (**Commonwealth DPP**) will have the expertise and skill necessary to conduct an appropriate investigation or accord these matters the priority they deserve.

RECOMMENDATION: The Exposure Draft Legislation should make vilification based on a protected attribute, or the intersection of two or more protected attributes, unlawful. The prohibition should be based on Part IIA of the RDA and be subject to the defences set out in that Part.

RECOMMENDATION: The Exposure Draft Legislation should be revised to set out a clear process for the referral of a complaint of racial vilification from the Australian Human Rights Commission to the Australian Federal Police for investigation and prosecution by the Commonwealth Director of Public Prosecutions and a joint investigation framework between the Australian Human Rights Commission and the Australian Federal Police.

⁵⁶ Sections 153, 195, 351, 772.

6. CHAPTER 2, PART 2-3, DIVISION 4 (SECTION 52): REQUESTING OR REQUIRING INFORMATION FOR DISCRIMINATORY PURPOSES

NACLC and KLC support the inclusion of a prohibition on discriminatory requests for information in section 52 of the Exposure Draft Legislation. However, we had recommended that the Government take the same approach to this prohibition as the *Equal Opportunity Act 2010* (Vic). Accordingly, we recommend that section 52 be amended to include a provision that it is 'irrelevant whether the request or requirement is made orally, in writing, in an application form or otherwise'.

RECOMMENDATION: The section 52 provision for requesting or requiring information for discriminatory purposes include provision that it is 'irrelevant whether the request or requirement is made orally, in writing, in an application form or otherwise'.

7. CHAPTER 4, PART 4-2 (SECTIONS 100-117): HOW THE COMMISSION DEALS WITH COMPLAINTS

7.1. Conciliation agreements

In NACLC and KLC's experience, although many complainants successfully settle at the AHRC, often the respondents do not comply with the terms of the settlement agreement. The failure to provide an effective mechanism to enforce conciliation agreements is a significant problem with the current Commonwealth anti-discrimination system that has been carried over into the Exposure Draft Legislation.

We also submit that there is no accurate way of determining in how many 'settled' matters the respondent fails to fully comply with the agreement. CLCs often spend many months chasing the respondent to ensure compliance. In our experience, many matters that 'settled' at the AHRC are never finalised according to the terms agreed.

The effectiveness of discrimination conciliation agreements could be improved if they could be registered with a federal court and enforced as court orders. Many state and territory anti-discrimination statutes provide for a mechanism whereby conciliation agreements are registered with a court or tribunal.⁵⁷ The provisions in s 164(3) of the Anti-Discrimination Act 1991 (Qld) and s 62 of the Human Rights Commission Act 2005 (ACT) provide good models for the compulsory registration of conciliation agreements. The process of enforcing conciliated agreements should be low-cost and straight forward.

RECOMMENDATION: The Exposure Draft Legislation should make provision for agreements reached in settlement to be legally binding through registration with the court. Applications to the court for enforcement should be simple and low cost.

7.2. Entitlement to representation at AHRC conferences (section 110)

Section 110(4) provides that an individual is not entitled to be represented at an AHRC conference that has been held in an attempt to conciliate a complaint. NACLC and KLC submit that complainants should generally be allowed legal representation in this context, as

⁵⁷ See, s 91A(6), *Anti-Discrimination Act 1977* (NSW); s 120, *Equal Opportunity Act 2010* (Vic); s 164, *Anti-Discrimination Act 1991* (Qld); s 76, *Anti-Discrimination Act 1998* (Tas); s 62, *Human Rights Commission Act 2005* (ACT).

they are frequently individuals rather than organisations or government departments, and may therefore be in a position of disadvantage vis a vis their opponent.

Pursuing a discrimination complaint is a very personal type of legal issue that can be very emotionally draining and stressful. Without legal advice and representation, many complainants simply do not pursue their complaints. The challenge for unrepresented complainants is further compounded by the shift towards a more formal style of conciliation, with respondents retaining legal representation at the conciliation phase, which significantly disadvantages unrepresented complainants.

Case Study

Igor had recently migrated to Australia in order to study. He sought a part time job in a factory. On his first day at work he was called names and racially abused. At the end of his shift, one of his the colleagues who had been abusing him played a 'prank' on him and he ended up falling over and being taken to hospital. Igor had in fact been assaulted. He returned to work some time later and was still subjected to racial taunts. He was later sacked and brought a discrimination complaint. He sought assistance from a CLC. He was still emotionally distressed by what had happened to him as a result of the assault in particular. He said that without legal representation, he did not think he would be able to pursue his claim.

Ada had been working in a community organisation. She had been experiencing unwanted sexual advances from a male colleague. These escalated and colleagues warned her that he had done this to other women before. One afternoon, he locked Ada in a room and tried to touch and kiss her. Ada was petrified as she could not escape from the room. After this incident, Ada suffered a very serious mental health breakdown and was hospitalised. She later brought a complaint with the help of a CLC but remained extremely fragile and at times suicidal. Without legal representation she simply could not have continued her claim.

Accordingly, NACLC and KLC recommend that the Exposure Draft Legislation be amended to ensure that complainants have access to legal advice and representation at the conciliation phase, and at the Federal Court and Magistrates Court. The availability of legal aid grants for discrimination matters should be increased and the eligibility criteria under existing Commonwealth legal aid guidelines should be amended so that there is no requirement to show substantial benefit being gained by the public or sections of the public. Funding provided to specialist and low cost legal services, such as CLCs, to assist people to make complaints under Commonwealth anti-discrimination law should be increased.

RECOMMENDATION: Section 110 should be amended to ensure that complainants be allowed legal representation at the conciliation stage of a discrimination complaint.

8. CHAPTER 4, PART 4-3 (SECTIONS 118 – 133): APPLYING TO THE COURT IN RELATION TO UNLAWFUL CONDUCT

8.1. Requirement for conciliation prior to application to the court (section 119)

NACLC and KLC note that section 119 of the Exposure Draft Legislation requires, for the most part, that applicants engage in conciliation prior to making an application directly to the courts. In the current Commonwealth anti-discrimination system, alternative dispute resolution in the form of conciliation is employed at the first instance. The advantage of alternative dispute resolution is that it is a relatively informal process and minimises the expenses to the parties. However, in NACLC and KLC's experience, the conciliation process can disadvantage the complainant. There is often a power imbalance between the complainant and the respondent, who is frequently a company or a government agency. This power imbalance is even more pronounced when the complainant is not represented, usually due to insufficient resourcing of advocacy and legal organisations.

Nonetheless, NACLC and KLC submit that the current complaint and voluntary conciliation process should be retained as an option for individuals. The benefits are that it is low cost and informal, it can be empowering, and it allows for flexibility in the resolution of complaints. It can usually take place in a location that is convenient for the parties.

However, in some cases, it is clear that the complaint cannot be resolved by conciliation, or that particular respondents have a fixed position in relation to discrimination complaints. In these cases, the AHRC investigation and conciliation process merely delays eventual consideration by a court and causes 'complainant attrition' where the case drags on so long that the complainant decides not to continue.

RECOMMENDATION: A complainant should be able to make an application directly to a court, rather than first going through investigation and conciliation by the AHRC.

RECOMMENDATION: The relevant Commissioner should be able to initiate an application to a court, either on behalf of an individual or for the benefit of a group of people or a section of the community. The ability of the AHRC to intervene or appear as amicus in discrimination cases in section 146 of the Exposure Draft Legislation should be retained.

1.1. Specialist Division

NACLC and KLC recommend that the Exposure Draft Legislation be amended to include the establishment of a specialist division of the Federal Court and Federal Magistrates Court to hear discrimination law matters. Under the current system, the nature of discrimination complaints are very different to other types of matters dealt with by federal level judges, both in terms of the law and the facts. As highlighted in the discussions above, a number of barriers exist that constrain complainants' access to the courts and, as a result, Federal Court and Federal Magistrates Court judges do not generally develop expertise in this area of law.

NACLC and KLC therefore recommend that in order to promote discrimination law as a recognised area of expertise, consideration should be given to creating a specialist division to hear discrimination matters. Judicial officers should be recruited based on their expertise in discrimination law and should be required to undertake ongoing professional education in the law, and also training relevant to working with protected groups (for example, disability and cross-cultural awareness training).

Another challenge to the effective handling of discrimination matters at the Federal Court-level is the highly procedural nature of the Federal Court system, which makes it difficult for self-represented litigants (or anyone other than a barrister) to effectively comply with the court rules and procedures. Therefore, NACLC and KLC recommend that the Government give consideration to developing a more litigant-in-person friendly specialist court or division where the procedures are relaxed and the processes are more accessible for individuals who conduct their own matters.

RECOMMENDATION: A specialist division of the Federal Court and the Federal Magistrates Court should be established to hear discrimination law matters. Judicial members should have ongoing training in discrimination issues.

RECOMMENDATION: The specialist division should develop rules and procedures that increase the ability of self represented litigants to conduct their own cases.

2. CO-REGULATION

NACLC and KLC note that the Explanatory Notes to the Exposure Draft Legislation refer to the Compliance Codes in section 75 as a form of co-regulation.⁵⁸ NACLC and KLC are concerned about the potential for co-regulation, as we submit that the regulation of Commonwealth anti-discrimination laws should remain with the AHRC and the courts. The international human rights treaties to which Australia is a party places the obligation to uphold and fulfil the treaties on the Australian Government. This responsibility cannot be delegated to the corporate sector.

NACLC and KLC submit that co-regulation is unlikely to have a significant impact in helping business understand and meet their obligations under the Act. A review of discrimination cases in Commonwealth and state jurisdictions and the conciliation register on the AHRC website, demonstrates that discrimination complaints are made against a very diverse range of government and non-government organisations and individuals, many of whom are small businesses. The review also revealed that a significant majority of complaints arise from personal interactions and perceived prejudices or failures to understand the circumstances of a person with a protected attribute.

RECOMMENDATION: The regulation of Commonwealth anti-discrimination laws should remain with the Australian Human Rights Commission and the courts and not delegated to the corporate sector through a process of co-regulation as proposed in relation to Compliance Codes in section 75 of the Exposure Draft Legislation.

⁵⁸ Australian Government, Attorney-General's Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes*, p 64.