Law Council
OF AUSTRALIA

Exposure Draft - Human Rights and Anti-Discrimination Bill 2012 (Cth)

Senate Legal and Constitutional Affairs Committee

24 December 2012

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Executive Summary

1. The Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (Cth) (the Draft Bill)[1] forms part of the Commonwealth Government's commitment under Australia's Human Rights Framework (the Framework) to harmonising and consolidating Commonwealth anti-discrimination laws to: remove unnecessary regulatory overlap; address inconsistencies across laws; and to make the anti-discrimination 'system' more user-friendly.[2]

2. The Draft Bill has been referred to the Senate Legal and Constitutional Affairs Committee (the Senate Committee) for inquiry. A Discussion Paper on the proposed consolidation of Commonwealth anti-discrimination laws preceded the Draft Bill.[3]

3. If enacted, the Draft Bill will replace the five existing Commonwealth Acts that protect against discrimination.[4]

4. Among its many features, the Draft Bill extends the scope of protection provided by the existing Commonwealth anti-discrimination regime to cover new attributes, such as sexual orientation and gender identity; and to cover new areas, including all areas of public life, for certain attributes. It also contains a definition of discrimination that applies to all attributes, and a streamlined approach to exceptions, including a justifiable conduct exception. The Draft Bill also consolidates and streamlines the complaints process and the powers and functions of the Australian Human Rights Commission (AHRC). It introduces changes to the burden of proof and to the usual approach to costs in court proceedings. The Draft Bill also retains certain protections specific to particular attributes, such as the requirement to make 'reasonable adjustments' in relation to disability based discrimination.

5. The Law Council supports efforts to consolidate the existing Commonwealth Acts into a single Act to provide clarity and certainty in the area of anti-discrimination law. This is critical to ensuring that all parties are able to understand and access their rights and comply with their legal obligations. The Law Council also supports efforts to improve the scope of human rights protection at the Commonwealth level and to protect and promote substantive equality in line with Australia's international obligations.[5]

6. For this reason, the Law Council supports the Draft Bill as the basis for legislation to be introduced into Parliament (Recommendation 1).

7. The Law Council is, however, concerned about a number of issues raised by the test of discrimination in subclause 19(2) and the justifiable conduct exception in clause 23. The Law Council recommends that:

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[1] See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/info/index.htm

[2] Australia's Human Rights Framework, released on 10 April 2010, available at http://www.ag.gov.au/RightsAndProtections/HumanRights/HumanRightsFramework/Pages/default.aspx . As discussed below, the Draft Bill also forms part of the Government's response to the recommendations following the 2009 National Human Rights Consultation and the Governments response to the Senate Legal and Constitutional Affairs Committee's Inquiry into the effectiveness of the *Sex Discrimination Act 1984* (Cth).

[3] See http://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20of%20Commonwealth%20Anti-Discrimination%20Laws.pdf

[4] These Acts are the *Age Discrimination Act 2004* (Cth) (ADA), the *Disability Discrimination Act 1992* (Cth) (DDA), the *Racial Discrimination Act 1975* (Cth) (RDA), the *Sex Discrimination Act 1984* (Cth) (SDA) and the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act)

[5] The Law Council's advocacy in relation to anti-discrimination laws is available at http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/discrimination.cfm; the Law Council's broader human rights advocacy is summarised at http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/human-rights_home.cfm

- The provision regarding the meaning of discrimination should be amended to clarify that an objective standard applies by either removing the terms 'offends, insults or intimidates' from the definition of 'unfavourable treatment' or by replacing the test for discrimination currently contained in subclauses 19(1) and (2) with a provision based on that contained in section 8 of the *Discrimination Act 1991* (ACT) (the ACT Act) or section 8 of the *Equal Opportunity Act 2010* (Vic) (the Victorian EO Act) (Recommendation 2).
- The 'justifiable conduct' exception contained in clause 23 be replaced with an exception based on 'reasonableness', to be objectively determined in light of all the circumstances of the case, and having regard to a set of prescribed criteria. Alternatively, the Law Council recommends that subclause 23(3), which currently contains a proportionality based test, be removed from the Draft Bill, or that clause 23 be amended to provide that the 'justifiable conduct' exception does not apply to the definition of discrimination on the basis of unfavourable treatment in clause 19(1) (Recommendation 3).

8. The Law Council recognises that there are limits to the scope of reforms that can be incorporated into a Draft Bill that seeks to consolidate existing laws. It also appreciates the need to provide clarity and certainty in this area of law to reduce regulatory burdens and to ensure that protections can be implemented.
9. The Law Council is also of the view that the consolidation process provides an important opportunity to achieve best practice in enhancing and strengthening those aspects of the existing laws that have been identified as in need of reform.
10. For this reason, the Law Council recommends that the Draft Bill's provision for a review within three years of the exceptions in the legislation should be expanded to allow for consideration of matters such as:

    (a) including a more explicit reference in the objects clause to the right to equality as a key obligation that Australia has accepted under international law and broadening the definition of 'human rights instruments' in clause 3;

    (b) extending the protected attributes to include those relating to irrelevant criminal record, domestic violence and homelessness and ensuring that the definitions of 'gender identity' and 'sexual orientation' are sufficiently comprehensive in scope;

    (c) extending coverage so that discrimination in respect of all protected attributes is unlawful in all areas of public life;

    (d) ensuring that 'special measures' in clause 21 are formulated in a manner that reflects the full range of Australia's obligations under international law;

    (e) extending the duty to make 'reasonable adjustments' and the right to equality before the law to all protected attributes;

    (f) including a general positive duty provision encompassing the duty to take reasonable measures to eliminate victimisation;

    (g) addressing specific concerns in relation to exceptions relating to religious organisations, migration laws and to unlawful conduct undertaken in accordance with other laws and regulations;

(h) reviewing whether the provision relating to sexual harassment only is necessary in the light of the protections against harassment relating to all attributes;

(i) enhancing the role and powers of the AHRC and strengthening the complaints processes outlined in the Draft Bill, for example through:

(i) providing the AHRC with the power to investigate incidents of discrimination of its own volition;

(ii) including complaints regarding conduct contrary to the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) in complaints that can be made in relation to Commonwealth conduct contrary to human rights;

(iii) ensuring practical measures to support the conciliation services provided by the AHRC such as the conduct of conciliation by teleconferences or videoconferences;

(iv) ensuring access to appropriate legal and other assistance in the preparation of complaints;

(v) having regard to the interaction of the AHRC conciliation process and relevant alternative dispute resolution (ADR) processes available under the jurisdiction of the Federal Court;

(vi) including guidance as to the level of monetary and types of non-monetary remedies that can be provided as outcomes of ADR processes, including conciliation;

(vii) providing an optional mechanism for complainants to proceed directly to court; and

(viii) adding to the range of considerations the court is to have regard to when determining whether to award costs under clause 133 (Recommendation 4).

11. Provided that the recommendations outlined in this submission are addressed, the Law Council considers that the Draft Bill can offer broader, more meaningful protections for people experiencing discrimination, while at the same time making it easier for employers, businesses, service providers and others to understand and comply with their responsibilities.

12. The Law Council looks forward to the introduction of legislation based on the Draft Bill.

Introduction

13. The Law Council is pleased to provide the following submission to the Senate Committee's Inquiry into the Draft Bill. If enacted, the Draft Bill will 'be the single consolidated Commonwealth anti-discrimination law.'[6] It will replace the *Age Discrimination Act 2004* (Cth) (ADA), the *Disability Discrimination Act 1992* (Cth) (DDA), the *Racial Discrimination Act 1975* (Cth) (RDA), the *Sex Discrimination Act 1984* (Cth) (SDA) and the A*ustralian Human Rights Commission Act 1986* (Cth) (AHRC Act).[7]

14. The Draft Bill forms part of the Commonwealth Government's commitment to harmonising and consolidating Commonwealth anti-discrimination laws to 'remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly'.[8]

15. It also forms part of the Government's response to the recommendations following the 2009 National Human Rights Consultation[9] and the Government's response to the 2008 Report of the Senate Committee's inquiry into the effectiveness of the SDA (the SDA Report).[10] The Draft Bill is also referred to in the recently released National Human Rights Action Plan.[11]

16. The Law Council advocates for improving human rights protection at the Commonwealth level and supports promoting formal and substantive equality in line with Australia's international obligations.[12] Formal equality assumes that equality is achieved if the law treats all people in the same way. However, when individuals or groups are not identically situated (due to factors such as historical disadvantage), the formal equality model may not be sufficient to address discrimination arising from an inequality in circumstances. For this reason, the Law Council supports an approach to anti-discrimination law that focuses on achieving substantive equality, which allows different groups to be treated differently so that they can, in the end, enjoy their human rights equally.

17. The Law Council also supports efforts to provide clarity and certainty in the area of anti-discrimination law, which is critical to ensuring that all parties are able to understand and access their rights and comply with their legal obligations.

18. For these reasons, the Law Council supports the consolidation of the existing Commonwealth Acts in a single Act provided that this process preserves or enhances existing protections against discrimination and improves the ability of the regime to

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[6] Explanatory Notes to the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth) (the Explanatory Notes) p. 1.
[7] In this submission, these five Acts will be collectively referred to as the "existing Commonwealth Acts".
[8] Australia's Human Rights Framework, above, note 2.
[9] On 10 December 2008 the Commonwealth Attorney-General launched the National Human Rights Consultation to seek the views of the Australian community on how human rights and responsibilities should be protected in the future. The Consultation was run by an independent Committee, led by Father Frank Brennan. The Consultation enjoyed a high rate of participation from the Australian community, including the Law Council. The Report and Recommendations arising from the Consultation and the Law Council's submission, are available at http://www.humanrightsconsultation.gov.au/Pages/default.aspx
[10] Further information about this inquiry, the Report and Recommendations, the Law Council's submission and the Government's response to the Senate Committee's recommendations, is available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/sex_discrim/index.htm
[11] The National Human Rights Action Plan was released by the Attorney General on 10 December 2012. Further information is available at http://www.ag.gov.au/Consultations/Pages/NationalHumanRightsActionPlan.aspx
[12] Above, note 5.

promote substantive equality, as well as removing the regulatory burden on business.[13]

19. The Law Council is pleased that the Commonwealth Government has released the Draft Bill and Explanatory Notes for public consultation.

20. The Law Council is also pleased that the Government has provided a range of other opportunities for the Law Council and others to comment on the development of the Draft Bill, including:

    - facilitating or supporting meetings and public forums to discuss the proposal to consolidate the existing Commonwealth anti-discrimination laws (the consolidation project);
    - releasing a Discussion Paper on the Consolidation of Anti-Discrimination Laws (the Discussion Paper);[14] and
    - preparing a Regulation Impact Statement (RIS) in respect of the Draft Bill.[15]

21. In response to these opportunities the Law Council has:

    - developed a Policy Position on the Consolidation of Commonwealth Anti-Discrimination Laws (the Policy Position). This was approved by Law Council Directors in March 2011 and was provided to the Attorney-General and the Attorney-General's Department (AGD) in April 2011;
    - provided two written submissions to the AGD regarding the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper in February 2012 and April 2012 (the Discussion Paper Submissions);
    - participated in formal and informal meetings with the AGD regarding the consolidation project, including on 17 December 2012 in relation to the Draft Bill; and
    - participated in formal and informal meetings and forums with other interested organisations, including the AHRC.

22. The Law Council also made written and oral submissions to the Senate Committee's inquiry into the effectiveness of the SDA, and referred to the consolidation project in a range of other submissions, including those to international human rights bodies.[16]

23. This engagement with the consolidation project forms the basis of the Law Council's comments and recommendations in response to the Draft Bill.

24. In this submission, the Law Council will refer to the key developments preceding the release of the Draft Bill and provide a brief overview of the key features of the Draft Bill and the Law Council's position on the Draft Bill.

25. The submission will then provide more detailed comments on a number of key provisions of the Draft Bill, including those provisions regarding: the objects of the Draft Bill; the protected attributes; the test for discrimination; the exceptions, including the justifiable conduct exception; the process for making temporary exemptions and

[13] Law Council Policy Statement on the Consolidation of Commonwealth Anti-Discrimination Laws, approved by Law Council Directors in March 2011 (the Policy Position) available at http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/discrimination.cfm

[14] Above, note 3.

[15] A copy of the Regulation Impact Statement (RIS) is available at http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx

[16] For example, see the Law Council of Australia's submission to the UN Human Rights Committee on the List of Issues Prior to Reporting for Australia (July 2012) and the Law Council of Australia's submission to the Attorney- General's Department's consultations on the Draft National Human Rights Action Plan (February 2012), both available at http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/bill-of-rights.cfm

for determining special measures; the powers of the AHRC and the complaints process.

26. This discussion supports the following recommendations by the Law Council:

Recommendation 1: that the Draft Bill be introduced as a Bill into Parliament subject to the amendments proposed below and having regard to the matters outlined below for further consideration.

Recommendation 2: that the provision regarding the meaning of discrimination in clause 19 should be amended to clarify that an objective standard applies by either:

(a) removing the terms 'offends, insults or intimidates' from the definition of 'unfavourable treatment'; or

(b) replacing the test for discrimination in subclauses (19)(1) and (2) with a provision based on that contained in section 8 of the ACT Act or section 8 of the Victorian EO Act.

Recommendation 3: that the justifiable conduct exception in clause 23 be replaced with an exception based on 'reasonableness', which would be required to be objectively determined in light of all the circumstances of the case, and having regard to a set of prescribed criteria. Alternatively, the Law Council recommends:

(a) that subclause 23(3) be removed from the Draft Bill, or

(b) that clause 23 be amended to provide that the justifiable conduct exception does not apply to the definition of discrimination on the basis of unfavourable treatment in clause 19(1).

Recommendation 4: That the provision for the review of exceptions in the legislation should be expanded to allow for consideration of matters such as:

(a) including a more explicit reference in the objects clause to the right to equality as a key obligation that Australia has accepted under international law and broadening the definition of 'human rights instruments' in clause 3;

(b) extending the protected attributes to include those relating to irrelevant criminal record, domestic violence and homelessness and ensuring that the definitions of 'gender identity' and 'sexual orientation' are sufficiently comprehensive in scope;

(c) extending coverage so that discrimination in respect of all protected attributes is unlawful in all areas of public life;

(d) ensuring that 'special measures' in clause 21 are formulated in a manner that reflects the full range of Australia's obligations under international law;

(e) extending the duty to make 'reasonable adjustments' and the right to equality before the law to all protected attributes;

(f) including a general positive duty provision encompassing the duty to take reasonable measures to eliminate victimisation;

(g) addressing specific concerns in relation to exceptions relating to religious organisations, migration laws and to unlawful conduct undertaken in accordance with other laws and regulations;

(h) reviewing whether the provision relating to sexual harassment only is necessary in the light of the protections against harassment relating to all attributes;

(i) enhancing the role and powers of the AHRC and strengthening the complaints processes outlined in the Draft Bill, for example through:

- providing the AHRC with the power to investigate incidents of discrimination of its own volition;
- including complaints regarding conduct contrary to the rights contained in the ICESCR in complaints that can be made in relation to Commonwealth conduct contrary to human rights;
- ensuring practical measures to support the conciliation services provided by the AHRC such as the conduct of conciliation by teleconferences or videoconferences;
- ensuring access to appropriate legal and other assistance in the preparation of complaints;
- having regard to the interaction of the AHRC conciliation process and relevant ADR processes available under the jurisdiction of the Federal Court;
- including guidance as to the level of monetary and types of non-monetary remedies that can be provided as outcomes of ADR processes including conciliation;
- providing an optional mechanism for complainants to proceed directly to court; and
- adding to the range of considerations the court is to have regard to when determining whether to award costs under clause 133.

27. These recommendations are discussed in detail below.

28. The Law Council notes that a number of reforms contemplated in the Draft Bill are critical to ensuring that the protections against discrimination at the Commonwealth level adhere to Australia's human rights obligations under international law. Many of the reforms are also necessary to address gaps in the coverage of the existing regime, such as those providing protection against discrimination on the grounds of sexual orientation and gender identity.
29. The Law Council looks forward to the introduction of legislation based on the Draft Bill into Parliament in early 2013.

Background

30. The current Commonwealth anti-discrimination regime provides an important legislative framework for promoting equality in Australia and contains many positive features that operate to protect against certain forms of discrimination in certain circumstances. However, the current Commonwealth regime also deals with different grounds of discrimination in different ways. Four grounds of discrimination - sex, age, disability and race – are dealt with under specific Acts.[17] Each of these Acts contains a complaints process which includes a process of investigation and conciliation. If this process does not resolve the complaint, an application may be made to court. More limited protections are provided under the AHRC Act for discrimination on other grounds such as sexual preference, trade union activity or political opinion.[18]

[17] Above, note 4.
[18] These other grounds under the AHRC Act relate to breaches of human rights such as discrimination on the basis of sexual preference, criminal record, trade union activity, political opinion and religion or social origin. If the Australian Human Rights Commission ('the AHRC') cannot resolve such complaints, it can only refer them to the Attorney-General. However, if the AHRC cannot resolve a discrimination complaint under the ADA,

Complaints on these grounds may only be investigated and conciliated by the AHRC and applications cannot be made to court under the AHRC Act. This results in a confused and fragmented scheme.

31. It is also clear that the current Commonwealth anti-discrimination regime fails to provide protection against all forms of discrimination and to promote equality for all members of the Australian community. This was reflected in the feedback received during the 2009 National Consultation on Human Rights. The Report following that consultation (the NCHR Report) documents the concerns of many individuals and groups within the Australian community who experience discrimination and confirms that the notion of substantive equality remains out of reach for some.[19] The NCHR Report recommended that the Commonwealth Government:

    conduct an audit of all federal legislation, policies and practices to determine their compliance with Australia's international human rights obligations, regardless of whether a Human Rights Act is introduced. The government should then amend legislation, policies and practise as required so that they become compliant.[20]

32. It was further recommended that when conducting the audit, the Commonwealth Government give priority to anti-discrimination legislation, policies and practices.[21]

33. On 21 April 2010, in response to the recommendations of the NCHR Report, the Attorney General released the Framework. [22] One of the key initiatives arising from the Framework was the consolidation project.

34. The purpose of the consolidation project is described in the Framework as:

    - focusing on removing unnecessary regulatory overlap, addressing inconsistencies across existing anti-discrimination laws and making the system more user-friendly in order to reduce compliance costs for individuals and business;
    - including consideration of the complaints handling processes and the related role and functions of the AHRC; and
    - feeding into the development of nationally harmonised laws across Australia.

35. It was also noted that the consolidation project would form part of the Government's response to the SDA Report[23] in which the Government had indicated that it would consider a number of the Senate Committee's recommendations during the consolidation project.

36. The Government also announced that it would introduction legal protections against discrimination on the grounds of sexual orientation and gender identity as part of the consolidation project.[24]

37. Following the release of the Framework, the AGD advised that there would be a public consultation in relation to the consolidation project.

DDA, RDA or SDA there is a right for the complainant to take the matter to the Federal Magistrates or Federal Court.

[19] National Human Rights Consultation Committee Report, Chapter 2, above note 9.
[20] National Human Rights Consultation Committee Report, Recommendation 4, above note 9.
[21] National Human Rights Consultation Committee Report, Recommendation 4, above note 9.
[22] Australian Human Rights Framework, above, note 2.
[23] Above, note 10.
[24] Attorney-General, the Hon Robert McClelland MP, and Minister for Finance and Deregulation, the Hon Lindsay Tanner MP, Media Release: Reform of Anti-discrimination Legislation (21 April 2010) available at www.attorneygeneral.gov.au

38. In preparation for this consultation, the Law Council developed its Policy Position, which draws upon the Law Council's past advocacy in relation to the prohibition of discrimination and the promotion of equality and its submissions on each of the existing Commonwealth anti-discrimination laws.[25] It expresses support for the consolidation process, 'provided that this process preserves or enhances existing protections against discrimination and improves the ability of the regime to promote substantive equality, as well as removing the regulatory burden on business.'[26] It also outlines the Law Council's general position in relation to matters including: the objects and purpose of a consolidated Act; the inclusion of new protections and the enhancement of existing protections; the review and reform of existing provisions; the streamlining and enhancement of the existing complaints process and the interaction of a consolidated Act with other laws.

39. When the Discussion Paper was released in September 2011 the Law Council prepared two submissions in response the many issues and questions raised in it. The first submission in February 2012[27] outlined the Law Council's response to a number of issues, but also indicated that it intended to provide comments on a range of matters following further consultation with its Constituent Bodies, Sections and Committees. A supplementary submission addressed issues such as: the definition of discrimination; the burden of proof; 'special measures'; 'reasonable adjustments'; harassment; protected attributes; vicarious liability; exceptions and exemptions; conciliation and court processes; and interactions with other laws. It was provided to the AGD in April 2012.[28]

40. The Policy Position and two submissions in response to the Discussion Paper, along with the Law Council's other relevant advocacy including its written and oral submissions to the Senate Committee as part of its 2008 inquiry into the effectiveness of the SDA, form the basis of the Law Council's response to the Draft Bill. This submission has also been informed by further consultation with the Law Council's Constituent Bodies, Sections and Committees regarding particular provisions of the Draft Bill.

41. As noted above, the Law Council has also benefited from having a number of opportunities to discuss the consolidation project with officers of the AGD, as well as with the AHRC and a range of other non-government organisations.

42. Following the release of the Draft Bill, the Law Council also issued a media release expressing its general support for the proposed reforms, while highlighting a number of areas in need of further consideration.[29]

Overview of the Bill

43. The Draft Bill was released on 20 November 2012 and referred to the Senate Committee for inquiry and report. The Government has indicated that it hopes to introduce legislation based on the Draft Bill in Parliament early in 2013.

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[25] Above, note 5.
[26] Policy Position [4].
[27] A copy of this submission is available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=3CB5B91F-FAD1-A141-6739-7B95833015D0&siteName=lca .
[28] A copy of this submission is available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=F20E96C4-F2B2-6170-CE0D-2EC8B77C860A&siteName=lca
[29] Law Council of Australia Media Release 'Law Council welcomes anti-discrimination law reform' (20 November 2012) available at http://www.lawcouncil.asn.au/media/news-article.cfm?article=1ACEE0D8-1999-B243-6E09-5D8000C0727F

44. The Draft Bill sets up a scheme which addresses unlawful conduct and Commonwealth conduct contrary to human rights:
    - Unlawful conduct involves:
        - discrimination;
        - sexual harassment;
        - racial vilification;
        - requests for information that could be used to discriminate;
        - publication of an intention to engage in unlawful conduct; and
        - victimisation.
    - Commonwealth conduct contrary to human rights is conduct engaged in by the Commonwealth or conduct engaged in according to Commonwealth law that is contrary to or inconsistent with any human right and is not a 'special measure', or the making, amending or repealing of a law.
45. A general exception for justifiable conduct and a range of specific exceptions apply.
46. Temporary exemptions can be obtained and special measures can be approved through a process involving the AHRC and the use of legislative instruments. Special measures are generally understood to be laws, policies or programs that are necessary to help a disadvantaged group achieve equality with the broader community.
47. Complaints can be made about conduct that is either unlawful conduct or Commonwealth conduct contrary to human rights or both. The AHRC can investigate and conciliate these complaints. However, complaints cannot be made about Commonwealth conduct contrary to rights under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).
48. If complaints about Commonwealth conduct contrary to human rights cannot be settled by the AHRC, it must make a finding and may report to the Minister.
49. If a complaint about unlawful conduct is 'closed', a person can make an application to a court subject to obtaining leave in some circumstances. If an application is made to a court and the applicant establishes a prima facie case that the conduct was engaged in for an unlawful reason or purpose, it is presumed that the alleged reason or purpose was the reason or purpose (or one of them) for the conduct unless the respondent proves otherwise.
50. The Draft Bill provides that each party bears its own costs unless the court considers that it is justified in making a costs order against a party.

Summary of the Law Council's Position

51. As noted above, the Law Council supports the objects and purpose of the Draft Bill.
52. The Draft Bill constitutes a significant step forward in providing comprehensive protection against discrimination and should contribute to the promotion of equality in Australia.
53. The Law Council recognises that the Draft Bill is a result of a consolidation process with the aims of removing unnecessary regulatory burdens, enhancing protections against discrimination and promoting equality.
54. With this in mind, the Law Council understands that there are limits to the type of reforms that are can be incorporated in the Draft Bill at this stage. However, the Law

Council considers that a number of matters in the Draft Bill are in need of immediate attention. These matters are described below.

55. The Law Council has also identified a range of other matters that it considers require further consideration in the future. The Law Council notes that the Draft Bill provides for a review of exceptions within three years and suggests that this review could be expanded to address the matters that require further consideration after the Bill is passed. These matters are also described below.

Positive Features of the Draft Bill

56. The Law Council supports many of the features of the Draft Bill, including:

- an objects clause that promotes substantive as well as formal equality and that reflects many of Australia's key international obligations;
- the inclusion of a broader range of attributes, including sexual orientation and gender identity, and recognition of intersecting grounds of discrimination;
- streamlined definitions and tests for discrimination and other unlawful conduct that generally apply to all protected attributes;
- clearer, streamlined complaints processes that generally apply to complaints of unlawful conduct regarding all protected attributes;
- streamlined exception provisions and the requirement to review exceptions in three years;
- streamlined approaches to temporary exemptions and 'special measures';
- the retention of attribute specific protections such as the duty to make 'reasonable adjustments' in the context of disability and the right to equality before the law in respect of race;
- broader coverage of protections to include all areas of public life for some attributes and work and work-related areas for others;
- changes to the usual burden of proof in court proceedings so that if the applicant establishes a prima facie case that conduct was engaged in for an unlawful reason or purpose, it is assumed that the alleged reason or purpose was the reason or purpose (or one of them) for the conduct unless the respondent proves otherwise;
- the inclusion of a range of mechanisms to assist people to comply with the Draft Bill and that allow the AHRC to charge fees for reviewing policies and programs, developing compliance codes and making special measures determinations; and
- a provision that each party bears its own costs unless the court considers that it is justified in making a costs order against a party.

57. The Law Council notes that formal equality assumes that equality is achieved if the law treats all people in the same way. However, when individuals or groups are not identically situated (due to factors such as historical disadvantage), the formal equality model may not be sufficient to address discrimination arising from an inequality in circumstances. For this reason, the Law Council supports an approach to anti-discrimination law that focuses on achieving substantive equality, which allows different groups to be treated differently so that they can, in the end, enjoy their human

rights equally.[30] Achieving substantive equality requires that: the effects of laws, policies, and practices are examined to determine whether they are discriminatory; the goal of equality of opportunity is established; and a legal mechanism that will achieve this goal is developed in a principled way.[31]

Matters Requiring Immediate Attention

58. While the Law Council generally supports the Draft Bill it recommends that immediate attention be given to implementing the following changes to two key provisions of the Draft Bill. Without these amendments, the Law Council is concerned that the Draft Bill will not offer the clarity and cohesion necessary to ensure that it meets its objects or realises the aims of the consolidation project.

59. Each of these issues is discussed in detail below.

Objective test for unfavourable treatment

60. The Law Council supports a simplified definition of discrimination that applies to all protected attributes and aligns with the full range of Australia's human rights obligations. It is, however, concerned that paragraph 19(2)(b) of the Draft Bill – which refers to conduct that 'insults, offends or intimidates' - raises uncertainty regarding whether an objective or subjective test is to be applied when determining unfavourable treatment in subclause 19(1).

61. To ensure that a subjective test for discrimination is not imported into the Draft Bill the Law Council recommends that sub-clause 19(2) should be amended to clarify that an objective standard applies by either:
    - deleting paragraph 19(2)(b) from the Draft Bill; or
    - replacing subclauses (19)(1) and (2) with a provision based on that contained in sub-section 8 (1) (a) of the ACT Act or section 8 of the Victorian EO Act.

Difficulties with the justifiable conduct exception

62. The Law Council supports the adoption of a single, streamlined approach to exceptions to discrimination and welcomes the inclusion of a general justifiable conduct exception clause in the Draft Bill.

63. However, the Law Council considers that there will be difficulties in applying the proportionality based test in sub-clause 23(3) for justifiable conduct. The Law Council recommends that the justifiable conduct exception in clause 23 be replaced with an exception based on 'reasonableness', to be objectively determined in light of all the circumstances of the case, and having regard to a set of prescribed criteria.

64. Alternatively, the Law Council recommends:
    - that sub-clause 23(3) be removed from the Draft Bill, or
    - that clause 23 be amended to provide that the justifiable conduct exception does not apply to the definition of discrimination in sub-clause 19(1).

[30] See Australian Human Rights Commission website on 'special measures,' available at http://humanrights.gov.au/racial_discrimination/guide_law/special_measures.htm .
[31] This summary of 'substantive equality' is drawn from the Canadian Housing Equality Resources website available at http://www.equalityrights.org/cher/index.cfm?nav=hr&sub=mod

Matters to be Included in a Statutory Review

65. The Law Council considers that a number of matters raised by the Draft Bill require further consideration in the future.

66. The Law Council recommends that the review of exceptions within three years, which is provided for in clause 47 of the Draft Bill should be extended to require further consideration to be given to:

(a) including a more explicit reference in the objects clause to the right to equality as a key obligation that Australia has accepted under international law and broadening the definition of 'human rights instruments' in clause 3;

(b) extending the protected attributes to include those relating to irrelevant criminal record, domestic violence and homelessness and ensuring that the definitions of 'gender identity' and 'sexual orientation' are sufficiently comprehensive in scope;

(c) extending coverage so that discrimination in respect of all protected attributes is unlawful in all areas of public life;

(d) ensuring that 'special measures' in clause 21 are formulated in a manner that reflects the full range of Australia's obligations under international law;

(e) extending the duty to make 'reasonable adjustments' and the right to equality before the law to all protected attributes;

(f) including a general positive duty provision encompassing the duty to take reasonable measures to eliminate victimisation;

(g) addressing specific concerns in relation to exceptions relating to religious organisations, migration laws and to unlawful conduct undertaken in accordance with other laws and regulations;

(h) reviewing whether the provision relating to sexual harassment only is necessary in the light of the protections against harassment relating to all attributes;

(i) enhancing the role and powers of the AHRC and strengthening the complaints processes outlined in the Draft Bill, for example through:

-providing the AHRC with the power to investigate incidents of discrimination of its own volition;

-including complaints regarding conduct contrary to the rights contained in the ICESCR in complaints that can be made in relation to Commonwealth conduct contrary to human rights;

-ensuring practical measures to support the conciliation services provided by the AHRC such as the conduct of conciliation by teleconferences or videoconferences;

-ensuring access to appropriate legal and other assistance in the preparation of complaints;

--having regard to the interaction of the AHRC conciliation process and relevant ADR processes available under the jurisdiction of the Federal Court;

-including guidance as to the level of monetary and types of non-monetary remedies that can be provided as outcomes of ADR processes including conciliation;

-providing an optional mechanism for complainants to proceed directly to court; and

-adding to the range of considerations the court is to have regard to when determining whether to award costs under clause 133.

67. In the next section of the submission, the Law Council provides its detailed comments on a number of key features of the Draft Bill.

Comments on Key Features of the Draft Bill

Objects clause - Clause 3

68. The objects of the Draft Bill are outlined in clause 3 as follows:

- to eliminate discrimination, sexual harassment and racial vilification, consistently with Australia's obligations under the human rights instruments and the International Labour Organisation (ILO) instruments described in subclauses 3(2) and (3);
- in conjunction with other laws, to give effect to Australia's obligations under the human rights instruments and the ILO instruments;
- to provide for the continued existence of the AHRC as Australia's national human rights institution;
- to promote recognition and respect within the community for: the principle of equality (including both formal and substantive equality); and the inherent dignity of all people;
- to recognise that achieving substantive equality may require the taking of 'special measures' or the making of 'reasonable adjustments';
- to enable complaints alleging unlawful conduct to be resolved in a way that emphasises ADR, promotes just outcomes for all parties and is low-cost and accessible to all;
- to encourage and facilitate compliance with the Draft Bill.

69. Subclause 3 (1) also contains a Note that provides that when interpreting a provision, the 'interpretation that would best achieve the objects of this Act is to be preferred to each other interpretation: see section 15AA of the *Acts Interpretation Act 1901*.'

70. Human rights instruments are defined in subclause 3 (2) as the:

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD);[32]
- ICESCR;
- International Covenant on Civil and Political Rights (ICCPR);[33]

[32] Done at New York on 16 December 1966 ([1976] ATS 5.

- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[34]
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);[35]
- Convention on the Rights of the Child (CROC);[36]
- Convention on the Rights of Persons with Disabilities (CRPD).[37]

71. The ILO instruments are defined in subclause 3 (3) as the:

- ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value;[38]
- ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation;[39]
- ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities;[40]
- ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer.[41]

72. The Law Council welcomes the inclusion of clause 3 in the Draft Bill. The Law Council is particularly pleased by the inclusion of objects that:

- clearly link the objects and the interpretation of the Draft Bill with a range of Australia's international obligations;
- refer to the principle of equality, including substantive equality, and the inherent dignity of all people;
- acknowledge that the attainment of substantive equality may require 'special measures'; and
- recognise the AHRC as Australia's National Human Rights institution.

73. The Law Council is also pleased that clause 3 implements Recommendation 1 of the SDA Report by removing the caveat to eliminate discrimination 'as far as possible' which is currently found in the objects clauses of the ADA, DDA and SDA. Recommendation 3 of the SDA Report is also reflected in the Note to clause 3 which is intended to make it clear that the Draft Bill should be 'given an interpretation consistent with the law's beneficial purposes.'[42]

[33] Done at New York on 16 December 1966 ([1980] ATS 23.
[34] Done at New York on 18 December 1979 ([1983] ATS 9.
[35] Done at New York on 10 December 1984 ([1989] ATS 21.
[36] Done at New York on 20 November 1989 ([1991] ATS 4.
[37] Done at New York on 13 December 2006 ([2008] ATS 12).
[38] Done at Geneva on 29 June 1951 ([1975] ATS 45.
[39] Done at Geneva on 25 June 1958 ([1974] ATS 12.
[40] Done at Geneva on 23 June 1981 ([1991] ATS 7).
[41] Done at Geneva on 22 June 1982 ([1994] ATS 4).
[42] Explanatory Notes, p. 12 [27], above note 6.

74. The Law Council is of the view that these features of the objects clause could be further enhanced by including a more explicit reference to the right to equality as a key obligation that Australia has accepted under international law.[43] As will be discussed below, the Law Council is of the view that the right to equality before the law currently contained in section 10 of the RDA and retained in respect of the attribute of race in clause 59 of the Draft Bill should be extended to apply to the other attributes listed in clause 17.

75. Clause 3 could also be further enhanced by broadening the definition of 'human rights instruments' in subclause (2) to allow for the inclusion of other relevant instruments such as the Declaration on the Rights of Indigenous Peoples and emerging instruments, such as the possible Convention on Older Persons. The inclusion of such instruments would further promote the objects currently listed in subclause (1). The Law Council suggests that a similar mechanism to that contained in section 47 of the AHRC Act would allow for the inclusion of such instruments.

Recommendation

The Law Council welcomes the inclusion of clause 3 but considers that it could be further enhanced by:

- **including a more explicit reference to the right to equality as a key obligation that Australia has accepted under international law;**
- **broadening the definition of 'human rights instruments' in subclause (2) to allow for the inclusion of other relevant instruments such as the *Declaration on the Rights of Indigenous People* and emerging instruments, such as the possible Convention on Older Persons.**

Protected attributes – clause 17

76. Clause 17 lists the attributes that are protected under the Draft Bill. These are: age; breastfeeding; disability; family responsibilities; gender identity; immigrant status; industrial history; marital or relationship status; medical history; nationality or citizenship; political opinion; potential pregnancy; pregnancy; race; religion; sex; sexual orientation; and social origin.

77. Of these, the following are additions to the federal anti-discrimination regime:

- discrimination on the basis of sexual orientation or gender identity (which is unlawful in any area of public life) and the extension of the ground of 'marital status' to 'marital or relationship status' to include same-sex relationships; and
- discrimination on the basis of industrial history, medical history, and nationality or citizenship in the area of work.

[43] For example, Article 2 of the ICCPR includes the statement that: "Each State Party…undertakes to respect and to ensure to all individuals…the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status…" Article 26 of the ICCPR states that: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

78. The remaining attributes are drawn from the existing Commonwealth anti-discrimination laws, including the 'equal opportunity in employment' scheme under the AHRC Act.[44]

79. As will be discussed below in relation to clause 22, the scope of protection that applies to each of these attributes differs – with those attributes that derive from the 'equal opportunity in employment' scheme under the AHRC Act- generally receiving more limited protection than those deriving from the other Commonwealth anti-discrimination laws.

80. The Law Council welcomes the protections related to each of the new attributes in the Draft Bill.

Gender Identity and Sexual Orientation

81. The Law Council particularly welcomes the inclusion of the attributes of 'gender identity' and 'sexual orientation', and the extension of the ground of 'marital status' to 'marital or relationship status' to include same-sex relationships. The inclusion of these attributes fulfils the commitments made by the Commonwealth Government following the findings of the 2009 National Human Rights Consultation and inquiries conducted by the AHRC,[45] which confirmed that federal protections against discrimination on these grounds were inadequate.

82. In its past submissions and policy statements, the Law Council has not specified which particular terminology should be preferred when describing these attributes, but has recommended that the broadest coverage of people of all sex and/or gender identities is desirable.

83. The Law Council notes that while the definitions of 'gender identity' and 'sexual orientation' in clause 6 of the Draft Bill generally align with the terminology in the Victorian EO Act, further consideration may be needed to ensure that these terms cover the full range of sex characteristics and gender expression that have been identified as necessary.[46.]

84. In its submission regarding the Draft Bill, the AHRC has suggested that 'express coverage of sex characteristics and gender expression would provide increased certainty and clarity in this area for all parties'.[47] It has recommended that the Draft Bill be amended to provide 'protection more directly against discrimination on the basis of a person's sex characteristics, intersex status, or gender expression.'[48]

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[44] Part II Division 4 of the AHRC Act permits complaints to be made alleging discrimination *in employment only* on a range of grounds in addition to those covered in the four discrimination Acts and gives effect, in part, to Australia's obligations under the ILO Conventions listed in subclause 3(3). While the AHRC can hear complaints on these grounds, such complaints cannot be pursued in the courts if they fail to be conciliated by the AHRC.

[45] For example, in 2010 the AHRC conducted a consultation to canvas the experiences and views of people who may have been discriminated against on the basis of their sexual orientation and sex and/or gender identity. Information about this consultation and its findings are available at http://humanrights.gov.au/human_rights/lgbti/lgbticonsult/index.html

[46]For example, the Law Council notes that in its submission to the Senate Committee in respect of the Draft Bill, the AHRC has recommended that, 'in addition to protection against discrimination based on gender identity, the Bill also provide protection more directly against discrimination on the basis of a person's sex characteristics and on the basis of gender expression.' See AHRC Submission to Senate Committee on Legal and Constitutional Affairs inquiry into the Exposure Draft of the *Human Rights an Anti-Discrimination Bill 2012* (December 2012) (the AHRC Submission) Recommendation 6, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/submissions.htm .

[47] AHRC Submission p. 10.

[48] Ibid.

85. The Law Council supports these observations and notes that the recent *Anti-Discrimination Amendment Bill 2012* (Tas), which contains express coverage of discrimination based on intersex status,[49] may provide further guidance in this area.

86. The Law Council also welcomes the expanded protection provided regarding the attribute of family responsibilities under the Draft Bill. Under the SDA only 'direct discrimination' regarding family responsibilities is unlawful. Expanding protection to include 'indirect discrimination' implements recommendation 13 of the SDA Report.[50]

87. 'Direct discrimination' currently involves an employer treating a person with family responsibilities less favourably than a person without such responsibilities. 'Indirect discrimination' relating to attributes such as sex is currently defined as imposing or proposing to impose a condition, requirement or practice that has or is likely to have the effect of disadvantaging persons of the same sex.[51]

Irrelevant Criminal Record

88. While the Law Council welcomes the inclusion of the attributes listed in clause 17, it is disappointed that the attribute of irrelevant criminal record has not been included in the Draft Bill.

89. The Law Council has previously expressed support for the inclusion of an attribute based on irrelevant criminal record. [52] Recently updated guidelines prepared by the AHRC suggest that it regularly receives complaints of discrimination on the grounds of criminal record in employment, and highlight the currently limited mechanisms for it to address such complaints. [53]

90. The Law Council notes that the AHRC can investigate and conciliate complaints of discrimination in employment on the ground of a criminal record. However, if conciliation is unsuccessful, the complainant cannot take the matter to court. If the AHRC is satisfied that a breach of the complainant's human rights has occurred, it may report this to the Attorney-General.[54]

91. The reasons for not including irrelevant criminal record as a protected attribute in clause 17 are set as follows in the Explanatory Notes:

> *the uncertain nature of this concept, and the differences in understanding of what constitutes a relevant or irrelevant criminal record, have made it difficult to assess what costs would result from inclusion of this ground. Consistent with the deregulatory nature of the project, the Bill does not include criminal record as a ground of discrimination.*[55]

92. The RIS accompanying the Draft Bill also concludes that:

> *the costs to business and other duty-holders of implementing the introduction of criminal record into the unlawful discrimination regime would likely outweigh*

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[49] See *Anti-Discrimination Amendment Bill 2012* (Tas), in particular clauses 4 and 8.
[50] Above, note 10.
[51] SDA, s5.
[52] See Law Council of Australia submission to the Standing Committee of Attorneys- General on the *Model Spent Convictions Bill* (2009). For further Law Council advocacy in this area see http://humanrights.gov.au/human_rights/lgbti/lgbticonsult/index.html
[53] In 2010-11 the Commission received 68 complaints on the basis of criminal record according to the RIS, above note 15, p. 76; see also Australian Human Rights Commission, *On the record Guidelines for the prevention of discrimination in employment on the basis of criminal record*, 2012 available at http://www.hreoc.gov.au/human_rights/criminalrecord/on_the_record/index.htm
[54] For an outline of this complaints process see http://humanrights.gov.au/complaints_information/info_for_people_making_complaints/complainants_human_rights_ILO.html
[55] Explanatory Notes [74]

the benefits. There may be more appropriate models for dealing with this important issue which will not impose significant costs (such as existing privacy and spent convictions schemes).[56]

93. The AHRC has pointed out that if it can not deal with complaints regarding criminal record as it currently does, this will:[57]

    - have an adverse impact on people affected by this form of discrimination, who are presently able to use the AHRC process to negotiate a remedy in some cases;

    - mean that Australia may not be complying with its obligations in relation to discrimination on the basis of criminal record under the ILO Discrimination (Employment and Occupation) Convention (1958);

    - mean that people experiencing discrimination on this ground will be limited to pursuing remedies under some State and Territory discrimination and spent convictions schemes.[58]

94. For these reasons the AHRC has recommended that:[59]

    - the Australian Government provide clarification to the Parliament on how it intends to ensure that the obligations assumed by Australia in relation to discrimination on the basis of criminal record under the ILO Discrimination (Employment and Occupation) Convention (1958) will be complied with;

    - the Bill or supporting materials be amended to confirm the continued availability of the AHRC's non-complaint functions, including preparation of guidelines and reporting on measures that should be taken by the Commonwealth, in relation to discrimination on the basis of criminal record; and

    - the review of the Human Rights Framework in 2014 [60]and the three year review process provided under the Draft Bill include further consideration of appropriate means for protection against discrimination on the basis of criminal record.

95. The Law Council supports these recommendations which align with its past submissions in relation to the protection of discrimination on the grounds of irrelevant criminal record.[61]

<u>Homelessness and domestic violence</u>

96. The Law Council is disappointed that the Commonwealth Government did not use the consolidation process to consider including protections for victims and survivors of domestic violence or those experiencing homelessness in a similar way to including protections on the new grounds of sexual orientation and gender identity.

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[56] RIS p. 78.
[57] AHRC Submission pp. 7-8, above note 46.
[58] Criminal record is not covered in the adverse action provisions of the *Fair Work Act 2009* (Cth) or in the equal opportunity laws of NSW, Victoria, Queensland or South Australia. Western Australia and the Northern Territory prohibit discrimination only on the basis of spent convictions. Only Tasmanian and the ACT provide unlawful discrimination protection directly based on criminal record.
[59] AHRC Submission Recommendation 3.
[60] The Commonwealth Government will review the operation of this Framework in 2014, to assess its effectiveness in the protection and promotion of human rights in Australia, see Australia's Human Rights Framework (April 2010) p. 10, above note 2.
[61] Above, note 52.

Discrimination against people who were or are subject to domestic violence or homelessness has been identified as a serious concern within the community,[62] and discrimination in these areas is often associated with or a precursor to discrimination on the grounds of other protected attributes, such as sex or disability. [63]

97. In past submissions, the Law Council supported consideration of the inclusion of an attribute based on domestic violence in the consolidated Act to protect victims and survivors of domestic violence from discrimination. The Law Council notes that the AHRC has made a detailed supplementary submission to the AGD outlining its support for the inclusion of such an attribute, which offers guidance on a range of matters, including the appropriate definitions to employ.[64]

98. The Law Council has also supported consideration of inclusion of an attribute based on homelessness or social status. The Law Council notes that the need for protections against discrimination on this basis has been recommended by a range of organisations that regularly provide support and advice for this vulnerable sector of the community. The Law Council notes that careful consideration would need to be given to how this attribute would be defined and what exceptions might apply. Guidance may be obtained from a submission prepared by the AHRC in response to an inquiry into National Homelessness legislation.[65]

99. The Law Council suggests that the three year review of exceptions which is provided for in clause 47 of the Draft Bill be expanded to include consideration of adding further protected attributes (based on homelessness, domestic violence and irrelevant criminal record) into the consolidated legislation.

Recommendation

The Law Council recommends that that further consideration be given to including irrelevant criminal record as one of the attributes protected in clause 17. If this recommendation is not adopted, it recommends that:

- **the Government provide clarification to the Parliament on how it intends to ensure that the obligations assumed by Australia in relation to discrimination on the basis of criminal record under the ILO Discrimination (Employment and Occupation) Convention (1958) are to be complied with;**
- **the Draft Bill or supporting materials be amended to confirm the continued availability of the AHRC's non-complaint functions, including preparation of guidelines and reporting on measures that should be**

[62] See for example AHRC Submission to FaHCSIA on the *Exposure Draft, Homelessness Bill 2012* (7 August 2012) available at http://humanrights.gov.au/legal/submissions/2012/20120807_homelessness.html; See also AHRC Supplementary Submission to the Attorney-General's Department, *Consolidation of Commonwealth Discrimination law - domestic and family violence* (23 January 2012) available at http://humanrights.gov.au/legal/submissions/2012/20120123_consolidation.html

[63] See for example AHRC Supplementary Submission to the Attorney-General's Department, *Consolidation of Commonwealth Discrimination law - domestic and family violence* (23 January 2012), above note 62. Chapter 3, [5] notes that: 'In Australia, domestic and family violence is the leading contributor to death, disability and illness in women aged 15 to 44 years, and is responsible for more of the disease burden in women than many well-known risk factors, such as smoking and obesity. Moreover, approximately one woman is killed by her current or former partner every week in Australia, often after a history of domestic violence. Recent research has also demonstrated the enduring mental health problems that survivors often experience as a result of such violence' (footnotes omitted).

[64] Above, note 62.

[65] AHRC, Submission to the House of Representatives Standing Committee on Family, Community, Housing and Youth, 1 September 2009, Recommendation 8, paras 82-83, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=fchy/homelessness/subs.htm

taken by the Commonwealth, in relation to discrimination on the basis of criminal record; and

- **the review of the Human Rights Framework in 2014 and the three year review process provided under the Draft Bill include further consideration of appropriate means for protection against discrimination on the basis of irrelevant criminal record.**

The Law Council also recommends that further consideration be given to:

- **ensure that the definitions of 'gender identity' and 'sexual orientation' in clause 6 are comprehensive in scope;**
- **expand the review of exceptions provided in clause 47 to include consideration of the addition of protected attributes based on domestic violence and homelessness.**

Meaning of discrimination – Clause 19

100. Clause 19 of the Bill addresses the question of when a person 'discriminates' against another person.

101. It contains two definitions of 'discrimination' - one based on unfavourable treatment and the other on the imposition of policies.

102. Subclause 19(1), described as 'discrimination by unfavourable treatment', provides that:

> *A person (the first person) discriminates against another person if the first person treats, or proposes to treat, the other person unfavourably because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes.*

103. Subclause 19(2) provides that to avoid doubt, 'unfavourable treatment' of the other person includes (but is not limited to):

- harassing the other person;
- other conduct that offends, insults or intimidates the other person.

104. Subclause 19(3) provides that:

> *A person (the first person) discriminates against another person if:*
>
> *(a) the first person imposes, or proposes to impose, a policy; and*
>
> *(b) the policy has, or is likely to have, the effect of disadvantaging people who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and*
>
> *(c) the other person has that attribute or combination of attributes.*

105. Clause 20 of the Draft Bill also provides that where a person proposes to treat a person unfavourably, or proposes to impose a policy, the question as to whether the conduct is discrimination (or unlawful discrimination) is to be determined in the same way as it would be if the person had *actually treated* the other person unfavourably or had *actually imposed* the policy.

Positive Features of Clause 19

106. The definitions proposed in subclauses 19(1) and 19(3) of the Draft Bill contain many positive features that reflect the Law Council's past submissions in this area.

107. In particular, the Law Council supports an approach which provides a simplified definition of discrimination that can be applied to all of the listed attributes.

108. The Law Council notes that a number of the Law Council's Constituent Bodies, Sections and Committees have expressed dissatisfaction with the approaches to defining discrimination in the existing Commonwealth anti-discrimination Acts. For this reason, the Law Council is of the view that a single approach to defining discrimination that applies to all protected attributes should be adopted.

109. The Law Council also welcomes the removal of the 'comparator' test which is currently applied in the definitions of 'direct' discrimination under the SDA, DDA and ADA. The 'comparator test' involves identification of less favorable treatment of a person with the protected attribute compared with a person without the protected attribute. A number of the Law Council's Constituent Bodies have previously indicated that significant problems are created by the inclusion of a comparator test. For example, the Law Institute of Victoria (LIV) has explained that requiring a person experiencing disability to compare her or his situation and treatment to the treatment of someone without a disability is confusing, inappropriate and almost impossible in many cases where people with disabilities often suffer multiple different types of disabilities. It can also be difficult to identify a comparator where someone experiences intersectional discrimination based on more than one protected attribute.[66]

110. While the Law Council anticipates that comparisons will remain relevant in some cases to establish the reasons for the conduct in question, under the Draft Bill, artificial exercises in finding a comparator will no longer be required.

111. Clause 19 also includes a definition of discrimination based on the imposition of policies that have the effect of disadvantaging people who have a particular protected attribute. The term 'policy' is defined in clause 3 of the Draft Bill as including a condition, requirement or practice.

112. The Law Council considers subclause 19(3) to contain a number of positive features. For example, it dispenses with the requirement that currently exists in the RDA and the DDA which demands that the complainant show that he or she 'cannot comply' with the condition or requirement before indirect discrimination can be established. Subclause 19(3) replaces this with a disadvantage based test.

113. The Law Council also welcomes the inclusion of subclause 19(4) which provides protection against discrimination on the basis of association.

114. While it welcomes these positive features, the Law Council recommends that subclause 19(2) should be amended as discussed below.

Features of clause 19 requiring further consideration and amendment

115. The Law Council supports an approach to the meaning of discrimination that aligns with Australia's international human rights obligations, such as those contained in the CERD, the CEDAW and the CRPD.

116. As noted above, it also supports the removal of the comparator test from the definition of discrimination in the Draft Bill.

[66] The Law Council has previously advocated for the removal of the comparator test in the context of the SDA, see for example the Law Council of Australia's submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into *The effectiveness of the Sex Discrimination Act 1984* (2008), above note 5 .

117. The Law Council has previously expressed the view that it is possible to avoid the difficulties arising from the comparator test by looking at whether there has been unfavourable treatment that results in a breach of a protected right. For this reason, the Law Council generally supports an approach to direct discrimination that focuses on unfavourable treatment.

118. In its submissions in response to the Discussion Paper the Law Council has supported a definition of discrimination that is based on the concept of 'unfavourable treatment' contained in the ACT Act, which provides that 'a person discriminates against another person if the person treats or proposes to treat the other person unfavourably because the other person has [a protected] attribute'. This approach was also recommended by the SDA Report.[67] A similar approach is adopted in subsection 8(1) of the Victorian EO Act which provides that direct discrimination occurs if 'a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute'.

119. In adopting this position, the Law Council also recognises that Australia has international obligations to protect the right to hold opinions and the freedom of expression, protected by Article 19 of the ICCPR.[68] For this reason, the Law Council is of the view that a balance needs to be struck between providing robust protection against discriminatory treatment, whilst at the same time ensuring that clear limits are placed on the scope of liability for unlawful conduct in order to avoid unjustifiably infringing on the right to communicate freely.

120. The Law Council is of the view that the approach adopted in clause 19 of the Draft Bill has not yet struck the right balance between these competing rights and interests.

121. A more balanced approach to a test for discrimination based on unfavourable treatment should include the following features:[69]

- the requirement of adverse or detrimental treatment, to be determined on the facts of the case by the application of an objective test; and
- the existence of a causal nexus between the treatment and the protected attribute.

122. The Law Council is concerned that paragraph 19(2)(b) of the Draft Bill – which refers to conduct that 'insults, offends or intimidates' - may imply that a subjective test is to be applied when determining unfavourable treatment in subclause 19(1).

123. In particular, by inquiring into whether the conduct 'insults, offends or intimidates', paragraph 19(2)(b) focuses on how the conduct is *received* by the aggrieved party and on how that party *feels*, rather than on the nature of the conduct or the reason or purpose for which it was undertaken. This has the potential to confuse the adverse or detrimental impact of the conduct with the way in which the conduct was received.

124. When combined with the other features of the Draft Bill, this approach also has the potential to unduly curtail the right to free speech. For example, under the Draft Bill, discrimination on the basis of certain attributes is prohibited in all areas of public life and is not limited to particular relationships or interactions, such as those between employers and employees or service providers and service recipients. This means,

[67] SDA Report Recommendation 5, above note 10.

[68] Article 19 provides that: '1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[69] Some of these features are outlined *Hopper v Mt Isa Mines* (1997) EOC 92-879: 75 per Lockhardt J

for example, that interactions between co-workers or between service recipients can give rise to claims of discrimination.

125. While the Law Council generally supports the expansion of certain protections in the Draft Bill to all areas of public life, this may have significant consequences when combined with the proposed test for discrimination in subclauses 19(1) and (2). It means, for example, that an informal verbal exchange between co-workers that involves a derogatory comment about a person's sex could fall within the definition of discrimination, if one of the parties to the exchange or anyone who hears the exchange and who shares that attribute, is offended or insulted by the comment. In such a case, the inquiry into whether the comment constituted unfavourable treatment for the purpose of subclause 19(1) would necessary involve a subjective test based on the feelings or reaction of the person aggrieved. The application of this test may result in liability for conduct that falls outside of the scope of conduct that has previously been considered as the appropriate domain of discrimination law.

126. As discussed below, the inclusion of a subjective test for discrimination also gives rise to difficulties when seeking to apply the 'justifiable conduct' exception in clause 23.

127. The Law Council understands that it may not have been the intention of the drafters to import a subjective test into the proposed unfavourable treatment test in subclause 19(1), therefore, it submits that subclause 19(2) should be amended to clarify that an objective test applies.

128. The Law Council submits that this could be achieved by adopting one of the following options:

- deleting paragraph 19(2)(b) from the Draft Bill; or
- replacing clauses (19)(1) and (2) with a provision based on that contained in section 8 of the ACT Act or section 8 of the Victorian EO Act.

129. The Law Council is of the view that these options would preserve the policy objectives outlined in the Explanatory Notes relating to subclauses 19(1) and (2) and would preserve the protection against harassment contained in paragraph 19(2)(a).

130. The Law Council notes that the unfavourable treatment test contained in subclause 19(1) of the Draft Bill would appear to offer sufficient protection against harassment on the grounds of any protected attribute regardless of whether paragraph 19(2)(b) is included. This protection is further underscored by clauses 49 and 50 of the Draft Bill which offer particular protection against harassment on the grounds of sex or race.

Recommendation

To ensure that a subjective test for discrimination is not imported into the Draft Bill the Law Council recommends that subclause 19(2) should be amended to clarify that an objective standard applies by either:

- **deleting paragraph 19(2)(b) from the Draft Bill; or**
- **replacing subclauses (19)(1) and (2) with a provision based on that contained in section 8 of the ACT Act or section 8 of the Victorian EO Act.**

Special Measures – Clause 21

131. Clause 21 outlines what constitutes a 'special measure' and how such measures can be applied under the Draft Bill.

132. 'Special measures' are generally understood to be laws, policies or programs that are necessary to help a disadvantaged group achieve equality with the broader community.[70] The Explanatory Notes provide the following example :

> *programs aimed at encouraging Indigenous people to undertake higher education will be special measures to achieve equality given the historical disadvantage of Indigenous people, in particular in educational outcomes.*[71]

133. Clause 21 of the Draft Bill makes it clear that 'special measures to achieve equality are not discrimination'. Subclause 21(2) further provides that a law, policy or program made, developed or adopted, or other conduct engaged in, by a person or body is a 'special measure to achieve equality' if:

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

134. Subclause 21(3) also makes it clear that a law, policy or program, or conduct, ceases to be a 'special measure' to achieve equality after substantive equality for the particular people, or class of people, has been achieved.

135. The Explanatory Notes provide that clause 21 is an attempt to address the variation in how 'special measures' have been addressed under the existing Commonwealth anti-discrimination laws and to provide 'a single, simplified special measures test which applies across all attributes'. [72] The Explanatory Notes state that the test in clause 21 'maintains the existing policy from the existing Acts, such that any law or policy which could constitute a special measure under the existing Acts would also constitute a special measure under the Bill.'[73]

136. Chapter 3, Part 3-1, Division 7 of the Draft Bill empowers the AHRC to determine that certain conduct, policies or programs are special measures.[74]

137. Clause 80 provides that a person or body can apply to the AHRC for the making of a special measure determination[75] in relation to a particular policy or program, or particular conduct.

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[70] Above, note 30.
[71] Explanatory Notes [127].
[72] Explanatory Notes [131].
[73] Explanatory Notes [131].
[74] Under clause 79, the AHRC may not determine that a Commonwealth, State or Territory law is a special measure. The Explanatory Notes provide that whether laws are special measures is a matter for individual Parliaments, and ultimately the courts, to determine.
[75] 'Special measure determination' is described in clause 79 as 'a determination, made by the Commission in accordance with this Division, that a policy or program made, developed or adopted (or proposed to be made, developed or adopted), or other conduct engaged in (or proposed to be engaged in), by a person or body (the *measure taker*) is a special measure to achieve equality for people, or a class of people, who have a particular protected attribute or a particular combination of 2 or more protected attributes (the *target attribute or*

138. The AHRC can make the special measure determination for a specified time not exceeding five years, if satisfied that the policy, program or conduct is a 'special measure' to achieve equality (as defined in section 21) for people who have the target attribute or combination of attributes.

139. The AHRC can also amend the special measure determination if circumstances or details change, and can revoke the determination if it is no longer satisfied that the prescribed criteria are being met.

140. Clause 82 provides that while a special measure determination has effect, the relevant measure is taken to be a 'special measure' to achieve equality for people who have the attribute(s) specified in the determination (in line with clause 21).

141. The power for the AHRC to determine that certain conduct is a 'special measure' is intended to provide certainty to organisations that are implementing 'special measures', and to encourage the taking of 'special measures' to achieve equality. The Explanatory Notes indicate that a determination is not required for conduct, policies or programs to be 'special measures'. The Notes also indicate that the AHRC 'will be able to recover costs associated with the determination process.'[76]

142. The Law Council supports the inclusion of a special measures provision in the Draft Bill that makes it clear that 'special measures' are not discrimination. However, the Law Council is concerned that clause 21 constitutes a significant departure from how the term 'special measures' is understood at international law.[77]

143. At international law, special measures are to 'be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary'.[78] Only some of these concepts are addressed in the current drafting of clause 21.

144. Notably absent from clause 21 is any reference to the need to ensure that ' special measures' should be formulated (i) after appraisal of the need for the measure based on accurate data on the socio-economic and cultural status of the group,[79] and (ii) through prior consultation with the affected group and with their active participation.[80] Under international law, it is also necessary that 'special measures' provide for a continuing system for monitoring the application of the 'special measure' and the results using quantitative and qualitative methods of appraisal.[81]

145. The Law Council is also concerned that paragraph 21(2)(b) appears to introduce a 'reasonable person' assessment that has no foundation in international law. That is, before something is recognised as a 'special measure', 'a reasonable person in the circumstances of the person' would have considered it 'necessary' for that measure to be adopted in order to advance or achieve substantive equality. There is no indication of the criteria or standards by which any such assessment would be made.

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combination of attributes).' Pursuant to subclause 80(5), a special measure determination (or an amendment or revocation of a special measure determination) is a legislative instrument.

[76] Explanatory Notes [320].

[77] RDA s 8(1) specifically refers to special measures to which art 1(4) of the CERD applies.

[77] Committee on the Elimination of Racial Discrimination, *General Recommendation 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, [16] (CERD General Recommendation 32) available at http://www2.ohchr.org/english/bodies/cerd/comments.htm See also Law Council of Australia Submission to the Attorney General's Department, Consolidation of Commonwealth Anti-Discrimination Law Discussion Paper (February 2012), [100(g)], above note 27.

[78] CERD General Recommendation 32, above note 77. See also Brennan J in *Gerhardy v Brown(1985)* 159 CLR 70.

[79] CERD General Recommendation 32, [17].

[80] See Declaration on the Rights of Indigenous Peoples, Article 19, available at http://www.unhcr.org/refworld/docid/471355a82.html. See also CERD General Recommendation 32 [18], above note 77 and CERD *General Recommendation 23 (1997): Indigenous Peoples*, [4(d)], available at http://www2.ohchr.org/english/bodies/cerd/comments.htm

[81] CERD General Recommendation 32, [35].

146. The Law Council also notes that clause 21 uses the phrase 'sole or dominant purpose' of securing substantive equality which varies from Article 1(4) of the CERD which contains the phrase 'sole purpose'.

147. The Law Council also notes that the meaning of 'special measures' under the RDA is currently under consideration by the High Court in *Maloney v The Queen*.[82]

148. The Law Council is of the view that it is imperative that the special measures provisions should be consistent with Australia's international law obligations, relevant case law and other federal provisions designed to promote substantive equality. If this does not occur, business, service providers, employers and others may be deterred from adopting the type of positive measures necessary to promote and achieve equality that are central to the objects of the Draft Bill.

149. As a result, the Law Council recommends that clause 21 be reconsidered to ensure that the definition of 'special measures' is consistent with the meaning of the term at international law, which includes ensuring that 'special measures' are formulated:

- after appraisal of the need for the measure based on accurate data on the socio-economic and cultural status of the group;
- through prior consultation with the affected group and with their active participation.[83]

150. Under international law, it is also necessary that 'special measures' provide for a continuing system for monitoring the application of the 'special measure' to determine if and when it achieves its stated aims.

151. 'Special measures' should also be defined in a manner that provides clear guidance as to the types of measures that are covered, and that seeks to achieve consistency with other federal provisions designed to promote equality.

Recommendation

The Law Council supports a streamlined approach to special measures that applies to all attributes.

The Law Council recommends that clause 21 could be improved by ensuring that the definition of 'special measures' is consistent with the meaning of the term at international law, which includes ensuring that special measures are formulated:

-after appraisal of the need for the measure based on accurate data on the socio-economic and cultural status of the group;

- through prior consultation with the affected group and with their active participation.

When discrimination is unlawful – Clause 22

152. Clause 22 of the Draft Bill deals with the question of when discrimination is unlawful. Subclause 22(1) provides that it is unlawful for a person to discriminate against another person if the discrimination is connected with any area of 'public life'.

[82] *Maloney v. The Queen* B57/2012, Transcript and other documents available at http://www.hcourt.gov.au/cases/case_b57-2012

[83] Above, notes 77, 80.

153. A non exhaustive list of the areas of public life is provided in subclause 22(2), which includes:

- work and work-related areas;
- education or training;
- the provision of goods, services or facilities;
- access to public places;
- provision of accommodation;
- dealings in estates or interests in land (otherwise than by, or to give effect to, a will or a gift);
- membership and activities of clubs or member-based 16 associations;
- participation in sporting activities (including umpiring, coaching and administration of sporting activities);and
- the administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs.

154. The Law Council welcomes the introduction of this provision, which draws upon the protections currently provided in section 9 of the RDA. This section prohibits discrimination in any area of public life rather than the more restrictive specified areas of public life currently referred to in the SDA, DDA and ADA.

155. However, the scope of this provision is qualified by subclause 22(3) which provides that discrimination on the basis of family responsibilities; industrial history; medical history; nationality or citizenship; political opinion; religion; or social origin (or a combination of these attributes) is only unlawful if the discrimination is connected with work and work-related areas. These attributes are drawn from Part II Division 4 of the AHRC Act which permits complaints to be made alleging discrimination in employment only on a limited number of grounds. The attributes of religion, political opinion, industrial activity and social origin are also subject to protections under the *Fair Work Act 2009* (Cth) (the FWA).[84]

156. 'Work and work related areas' is defined in clause 6 and includes: employment; membership of partnerships; membership of industrial associations; the provision of services by employment agencies; and the conferral, renewal, extension, revocation or withdrawal of qualifications by occupational authorities.

157. The Law Council submits that subclause 22(3) requires reconsideration. The Law Council is concerned that by providing narrower coverage for some attributes than others, the Draft Bill may undermine the objectives of the consolidation project. For example, this approach could have implications for complaints of discrimination that include intersecting grounds, such as race and religion or disability and medical record, where one of the grounds is given full coverage under the Draft Bill and the other is limited to work areas. It also gives rise to inconsistency between the federal law and some State and Territory laws which provide more general coverage on a number of these grounds.

158. The Law Council also notes that the attributes that are listed in subclause 22(3) - such as religion, political opinion and medical history - are significant personal attributes, which are closely linked to personal identity. Discrimination based on these

[84] See *Fair Work Act 2009* (Cth) (FWA) Chapter 3, Part 3-1 General Protections, in particular s351.

attributes can have enormously deleterious consequences for individuals and society more broadly. Limiting the coverage in the Bill to in respect of these attributes to discrimination in work and work areas, risks significantly undermining the meaningful coverage of the proposed legislation.

159. The Law Council also notes that the reason stated in the Explanatory Notes for providing more limited protections for the attributes listed in clause 22(3) appears to be based on the fact that these are 'primarily the attributes that were previously only protected by the AHRC Act equal employment opportunity grounds'. These grounds derive from those attributes protected under the ILO Conventions Nos 100, 111, 156 and 158. [85] However, the Law Council notes that some of the attributes listed in subclause 22(3) are also protected under the 'human rights instruments' in subclause 3(2) of the Draft Bill. For example, Article 2 of the ICCPR provides that a State Party undertakes to:

> *…respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

160. The Law Council submits that by limiting the scope of protection for some attributes to work and work related areas, the Draft Bill fails to give full effect to Australia's international human rights obligations. For this reason, the Law Council recommends that further consideration be given to extending coverage for these attributes to all areas of public life.

Recommendation

The Law Council welcomes the scope of protection provided by clause 22 to cover discrimination in all areas of 'public life' in relation to the attributes of age; breastfeeding; disability; gender identity; immigrant status; marital or relationship status; potential pregnancy; pregnancy; race; sex; and sexual orientation.

The Law Council recommends that further consideration be given to extending this coverage to the attributes of family responsibilities, industrial history, medical history, nationality or citizenship, political opinion, religion, social origin.

Justifiable Conduct Exception– clause 23

161. Clause 23 provides a general exception to unlawful conduct under the Draft Bill based on the concept of 'justifiable conduct'. This exception applies in relation to all protected attributes.

162. Subclause 23(2) provides that it is not unlawful for a person to discriminate against another person if the conduct constituting discrimination is 'justifiable'.

163. Pursuant to subclause 23(3), conduct is 'justifiable' if:

- the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim; and
- that aim is a legitimate aim; and
- the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and

[85] Explanatory Notes [135].

- the conduct is a proportionate means of achieving that aim.[86]

164. When determining whether conduct is justifiable, the following matters are to be taken into account:

- the objects of this Act;
- the nature and extent of the discriminatory effect of the conduct;
- whether the first person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect;
- the cost and feasibility of engaging in other conduct; and
- any other matter that it is reasonable to take into account.

165. Subclause 23(6) clarifies that in relation to discrimination on the ground of disability (or on a combination of grounds of which disability is one), conduct of a person will not be justifiable if there is a reasonable adjustment (as defined in clause 25) that could have been made and if, by making that adjustment, the conduct would have had no or a lesser discriminatory effect.

166. The Law Council supports the adoption of single, streamlined approach to exceptions to discrimination and welcomes the inclusion of a general exception clause in the Draft Bill. However, the Law Council submits that further consideration should be given to the tests employed in clause 23 to:

- ensure that clause 23 operates to provide meaningful protection against liability in circumstances where conduct can be justified on the basis of some other meritorious reason having regard to the objects and purpose of the Draft Bill, and
- to address the difficulties arising from the interaction of clause 23 with other key provisions of the Draft Bill.

<u>The proportionality test in subclause 23(3)</u>

167. The Law Council submits that consideration should be given to amending or removing the proportionality test in subclause 23(3).

168. As noted above, sub-clause 23(3) provides that conduct is 'justifiable' if:

- the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim; and
- that aim is a legitimate aim; and
- the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and
- the conduct is a proportionate means of achieving that aim.[87]

169. The Explanatory Notes indicate that while the idea of a general limitations clause is new, clause 23 builds on the defence of reasonableness in existing indirect discrimination provisions and reflects the policy rationale underpinning existing exceptions and international law requirements.[88]

[86] Draft Bill subclause 23(3).
[87] Draft Bill subclause 23(3)
[88] Explanatory Notes [148].

170. While the Law Council generally supports efforts to ensure that Australia's domestic laws comply with and give effect to Australia's obligations under the international Conventions to which it is a party, it is concerned that as currently drafted, subclause 23(3) is not appropriately expressed.

171. These concerns arise from the fact that when proportionality tests are employed under international human rights law – such as in the context of Article 26 of the ICCPR which protects freedom from discrimination[89] - they are directed at the relationship between the State and the individual. In this context, it is appropriate to identify the aim or purpose of the measure adopted by the State, determine whether this aim is legitimate and consider whether any alternative means are available to achieve that aim which would have a lesser impact on the protected right. It is possible to clearly identify the purpose of a measure adopted by a State (such as a law, policy or budget allocation), to objectively determine whether its aim is legitimate and to identify examples of alternative less restrictive measures to achieve the aim.

172. A proportionality test of this nature may also be appropriate when considering the conduct of a large corporation with significant resources and clearly stated policies and procedures that readily lend themselves to comparison with alternative available means to achieve the same end. For example, it may be appropriate to have regard to the concept of proportionality when evaluating whether an airline's policy to limit the number of passengers with disabilities that can travel on a particular flight amounts to justifiable conduct.

173. However, the application of this type of test is much more difficult in the context of the Draft Bill, which not only applies to conduct undertaken by the State, but also to conduct undertaken by employers, businesses, services and others. The definition of 'public life' and 'work and work related areas' in the Draft Bill also cover interactions beyond that between employer and employee or service provider and service recipient and extend to interactions between co-workers and among service recipients.

174. In this context, it is not always possible to clearly identity an aim and whether the conduct is a proportionate means of achieving the aim. A person may make a comment in a moment of stress or a service provider may fail to adopt a certain policy due to the constraints of their accommodation. It may also be difficult to ascribe a single purpose to a complex corporate entity.

175. The test proposed in subclause 23(3) also requires a court to judge the legitimacy of a purpose or aim, and whether a reasonable person would have considered that engaging in the conduct would achieve that aim. The subclause also introduces a good faith requirement which, combined with these other elements, emphasises the subjective factors particular to the discriminator, rather than focusing on the objective circumstances in which the conduct occurred.

176. The Law Council notes that in proceedings currently before the High Court concerning the meaning to be given to 'special measures', the complexities associated with applying a proportionality test in the context of anti-discrimination law have been identified and explored by both parties. [90]

177. Subclause 23(3) may also have the potential to raise serious practical difficulties for respondents. The amount of evidence that a respondent is likely to be required to bring before the court to demonstrate having acted in good faith and to achieve a

[89] UN Human Rights Committee General Comment No. 18: Non-discrimination: 10/11/1989, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument. Paragraph [13] provides that "13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."

[90] *Maloney v. The Queen*, per Kiefel J, note 82.

particular aim may be so significant that respondents may find it difficult to rely upon this exception. This may deter service providers, employers and others from taking positive action to promote substantive equality.

Interaction with other provisions of the Draft Bill

178. In addition to the concerns raised above, clause 23 requires further consideration in light of its interaction with other key features of the Draft Bill. For example:

- The proportionality test outlined in subclause 23(3), which presupposes an identifiable aim of the conduct undertaken, sits uneasily with the test for discrimination in sub-clauses 19(1) and (2) which currently includes conduct that offends, insults or intimidates within the definition of unfavourable treatment. This gives rise to a scenario where the test for discrimination is based on a subjective inquiry into the reaction of the aggrieved party, and the justifiable conduct exception is based on a subjective inquiry into the legitimacy of the aims of the would be discriminator.
- The rationale for the justifiable conduct exception in clause 23 appears to be at odds with the specific exceptions contained in the Draft Bill. It would appear, for example, that the conduct subject to specific exceptions (such as that relating to clubs and sports) would fit within the scope of the justifiable conduct exception.

179. The great majority of examples provided in the Explanatory Memorandum that illustrate the type of justifiable conduct that would be subject to the exception in clause 23 appear to be the type of conduct that can be readily anticipated and should be subject to a temporary exemption, or be determined to be a 'special measure' pursuant to clause 80 . For example, the Explanatory Notes provide that the following conduct would be covered by the justifiable conduct exception in clause 23:

- not allowing a vision impaired person to obtain a driver's licence,
- setting aside time for women only to access a swimming pool to recognise religious and cultural reasons prohibiting some females from bathing in front of men.[91]

180. In these examples, it would appear to be more consistent with the objects and purpose of the Draft Bill to require that these businesses or service providers seek a temporary exemption for their policy prior to engaging in the otherwise discriminatory conduct. This appears to be acknowledged in the Explanatory Notes which provide that there is 'significant overlap between special measures to achieve equality and justifiable conduct. This means that beneficial measures could be characterised in either of these categories, to ensure that such conduct is not unlawful.'[92]

Options to address these concerns

181. To address these concerns, the Law Council submits that consideration be given to replacing the 'justifiable conduct' exception with an exception based on 'reasonableness'. Under this approach, 'reasonableness' would be required to be objectively determined in light of all the circumstances of the case, and having regard to criteria that could be based upon those outlined in subclause 23(4) of the Draft Bill.[93] This approach would:

[91] Explanatory Notes [149].
[92] Explanatory Notes [153].
[93] Although the Explanatory Notes at [148] suggest that the SDA Report recommended replacing 'reasonableness' with a 'legitimate and proportionate test', the Law Council notes that this recommendation was made in the context of proposing amendments to the test for indirect discrimination under the SDA (see

- avoid the need to identify a legitimate aim behind the conduct in every case;
- reduce the potential for subjective considerations to be determinative; and
- rely upon a concept already familiar within anti-discrimination law jurisprudence.[94]

182. In suggesting that consideration be given to these options, the Law Council emphasises the need to ensure that any general exception clause included in the Draft Bill does not dilute the protection currently offered by the existing Commonwealth anti-discrimination Acts, including the RDA. Outlining certain criteria that need to be considered when determining reasonableness should protect against this outcome.

183. Alternatively, some of the concerns described above could be alleviated by:

- removing subclause 23(3) from the Draft Bill, or
- explicitly providing that the exception in clause 23 does not apply to the definition of discrimination in clause 19(1).

Recommendation

The Law Council supports the adoption of single, streamlined approach to exceptions to discrimination and welcomes the inclusion of a general exception clause in the Draft Bill.

The Law Council recommends that the justifiable conduct exception in clause 23 be replaced with an exception based on 'reasonableness', which would be required to be objectively determined in light of all the circumstances of the case, and having regard to a set of prescribed criteria.

Alternatively, the Law Council recommends:

- **that subclause 23(3) be removed from the Draft Bill, or**
- **that clause 23 be amended to provide that the justifiable conduct exception does not apply to the definition of discrimination in clause 19(1)**.

Duty to make reasonable adjustments to prevent discrimination – Clauses 23 and 24

184. The duty to make 'reasonable adjustments' imposes an obligation on people to take practical steps to address disadvantage experienced by someone with the protected attribute of disability. The Explanatory Notes provide that an example of a 'reasonable adjustment' is 'installing audio announcements in a lift so that people with vision impairment can access a building'.[95] The DDA contains an explicit duty to make 'reasonable adjustments' which appears in the tests for direct and indirect discrimination.

185. Subclauses 23(6) and 24(4) of the Draft Bill provide that, in relation to discrimination on the basis of disability (or on the ground of a combination of disability and one or

Recommendation 6, SDA Report) and cannot be easily translated into the context of the Draft Bill or to the new tests for discrimination proposed in clause 19.

[94] For example, 'reasonableness' is a key feature of the obligation to make reasonable adjustments under the DDA, it is also a key feature of the vicarious liability provisions under the SDA.

[95] Explanatory Notes [167].

more other protected attributes), the justifiable conduct and 'inherent requirements' exceptions do not apply if the person could have made a 'reasonable adjustment'.

186. Clause 25 provides that a person could have made a 'reasonable adjustment' if the person could have made the adjustment without 'unjustifiable hardship' being caused to the person.

187. When considering whether making an adjustment would result in 'unjustifiable hardship', all relevant matters must be taken into account, including:
- the nature of any benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- the effect of any disability of any person concerned;
- the financial circumstances of the first person, and the estimated amount of expenditure that the first person would have to incur in order to make the adjustment;
- the availability of financial and other assistance to the person;
- any relevant guidelines prepared by the AHRC under clause 62; and
- relevant action plans given to the AHRC under clause 68.

188. The Law Council supports the retention of the duty to make 'reasonable adjustments' in relation to disability discrimination, but is disappointed that this duty has not been extended to other forms of discrimination, particularly as the existing age, race and sex discrimination legislation contains an implicit duty to make reasonable adjustments in the tests for indirect discrimination.[96]

189. The Law Council is of the view that the duty to make 'reasonable adjustments' should apply at least to discrimination by the imposition of policies (clause 19(3)) to maintain the protections currently appearing in the existing age, race and sex discrimination legislation. The Law Council has also previously submitted that further guidance regarding the scope of the duty to make 'reasonable adjustments' could be provided by including a provision that outlines the type of factors to be taken into account, such as a provision based on section 17 of the Victorian EO Act.

190. The Law Council also notes that unlike the DDA, which includes an explicit duty to make 'reasonable adjustments' within the tests for direct and indirect discrimination, the Draft Bill includes the 'reasonable adjustment' provisions in the tests for determining whether conduct is justifiable or whether the 'inherent requirements' exception applies. The Explanatory Notes state that this approach is necessary to avoid the complexities that would arise from incorporating the concept of 'reasonable adjustments' within the definitional provisions whilst at the same time restricting its application to discrimination on the grounds of disability.

191. While the Law Council acknowledges the need to avoid the appearance of adding an extra regulatory burden, it also holds concerns that this approach undervalues the significance of the concept of 'reasonable adjustments' for discrimination on the basis of other protected attributes, particularly in relation to unlawful conduct that would currently be covered by the 'indirect discrimination' provisions of the existing Commonwealth anti-discrimination laws.[97]

[96] Discussion Paper, [58], note 3. Although not mentioned specifically in the Discussion Paper, the relevant provisions are: ADA s 15(1)(b); RDA, s 9(1A)(a); and SDA, s 7B(1).
[97] For example see SDA s7B.

192. The AHRC has recommended that a clarifying statement accompany the introduction of the Bill that would confirm that, in addition to clause 25, 'adjustments in policies and practices may also be necessary to avoid what has previously been referred to as 'indirect' discrimination on the basis of other attributes.[98] The Law Council supports this recommendation.

193. As will be discussed further below in relation to victimisation, the Law Council also supports the inclusion of a general positive duty provision in the consolidated Act that would apply to all attributes, and has suggested that section 15 of the Victorian EO Act may provide a possible model. However, the Law Council is aware that the Government has rejected past recommendations for positive duties, such as those made in the SDA Report.[99]

Recommendation

The Law Council supports the retention of the duty to make 'reasonable adjustments' in relation to disability discrimination, but is disappointed that this duty has not been extended to other forms of discrimination.

The Law Council recommends that the duty to make 'reasonable adjustments' should apply – at least – to discrimination by the imposition of policies (clause 19(3)) to maintain the protections currently appearing in the existing age, race and sex discrimination legislation.

Exceptions to unlawful discrimination – Chapter 2 Part 2-2 Division 4

194. Chapter 2, Part 2.2, Division 4 of the Draft Bill outlines a range of exceptions to unlawful conduct, which includes the general exception for justifiable conduct and a number of additional specific exceptions.

195. There are a number of positive features of the provisions in Division 4 which offer a simpler more consistent approach to exceptions than that which currently exists under the separate Commonwealth anti-discrimination laws. For example, the same test for the inherent requirements of work is applied to all protected attributes. Similarly, the exception in clause 35 in relation to clubs or member-based associations applies in relation to all protected attributes rather than only to some attributes.

196. Despite these positive features, the Law Council is of the view that a number of the exceptions in the Draft Bill require further consideration to ensure that they meet the objectives of easing the regulatory burden on businesses and employers and enhancing the existing protections against unlawful discrimination.

Exceptions for Religious Organisations – Chapter 2 Part 2-2 Division 4 Subdivision C

197. Chapter 2, Part 2-2, Division 4, Subdivision C of the Draft Bill maintains the existing exceptions for discriminatory conduct by religious bodies and religious educational institutions, and the exceptions for specific activities such as the ordination or appointment of priests.

198. Under the Draft Bill, these exceptions also apply to the new protected attributes of gender identity, sexual orientation and religion.

[98] AHRC Submission on the Draft Bill Recommendation 7, above note 46.
[99] SDA Report Recommendation 14, above note 10. See also Government's Response to the SDA Report available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/sex_discrim/index.htm

199. Subclause 33(3) introduces a limitation on these exceptions if the discrimination is connected with the provision of Commonwealth-funded aged care services.

200. The Explanatory Notes state that '[g]iven the importance of freedom of religion, it is important to maintain explicit religious exemptions, particularly for matters fundamental to the practice of the religion.'[100]

201. The Discussion Paper preceding the introduction of the Draft Bill also made it clear that the Government was not considering making any significant changes to the exceptions for religious bodies (beyond the extension of these exceptions to the new attributes).

202. In light of these views, the Law Council has not previously commented in detail on the existing exceptions for religious bodies, but has expressed the general view that any religious based exceptions operate as a constraint to the degree of protection afforded under the Act. If religious exceptions are maintained, the Law Council has submitted that they should be precise and subject to regular review.

203. For this reason, the Law Council welcomes the review of exceptions within three years provided for in clause 47 and hopes that it provides the opportunity for more detailed consideration of these exceptions.

204. To ensure that this occurs, the Law Council recommends that the review contemplated under clause 47 include specific reference to the following considerations:

- Whether there is evidence that justifies including each of the particular attributes within each of the exceptions contained in this subdivision. For example, the Law Council queries whether it is appropriate or necessary to provide an exception to discrimination on the basis of family responsibilities, potential pregnancy or pregnancy in relation to the appointment of priests or ministers or in respect of religious-based education institutions;

- Whether it is appropriate to include the provision of all Commonwealth funded services from the exception in clause 33 rather than just aged care services. The Law Council queries the rationale behind isolating aged care services in this way and notes that children and young people are particularly vulnerable to the harmful effects of homophobic discrimination and harassment;[101]

- Whether the prescription process contained in subclause 33(3) is subject to sufficient legislative scrutiny;

- Whether an alternative approach to religious bodies exceptions should be adopted, such as that considered in Option 3 of the RIS to the Draft Bill and described as the 'licence to discriminate approach'.[102] Under this approach:

- The religious body must issue a notice of intention to discriminate that includes information such as the attribute in issue, the area of public life and the basis for asserting the exception in the doctrines, tenets or beliefs of the religion.

[100] Explanatory Notes [183].
[101] For example see Gay and Lesbian Health Victoria *Private Lives 2, the second national survey of the health and wellbeing of GLBT Australians* (April 2012) available at http://glhv.org.au/report/private-lives-2-report
[102] RIS p. 70, above note 15.

- This notice would be made public and provided to the AHRC and would expire after a certain period of time, such as five years, and may be renewed or varied.

- Members of the public could ascertain whether and to what extent a particular religious body or organisation may be seeking to rely upon an exception to the protection contained in the relevant anti-discrimination law.[103]

205. The Law Council submits that a comprehensive review of the exceptions for religious bodies is critical to ensure that these provisions do not unnecessarily or unjustifiably undermine the objects and purpose of the Draft Bill.

Exceptions relating to other laws and regulations

206. The Law Council submits that the review of exceptions provided for in clause 47 of the Draft Bill should also include consideration of the appropriateness of those exceptions that exclude or limit the operation of the Draft Bill in relation to other laws or regulations. For example:

- clause 30 provides an exception for unlawful conduct in accordance with laws prescribed by the regulations. The Law Council queries whether it is appropriate to exclude laws prescribed by regulation from the ambit of the Draft Bill. This approach has the potential to significantly limit the coverage of anti-discrimination protections without appropriate levels of parliamentary scrutiny.

- clause 14 provides that the Draft Bill is not intended to exclude or limit the operation of State or Territory anti-discrimination laws, which can also be prescribed by regulation. The Law Council is also concerned about the appropriate level of parliamentary scrutiny in relation to this clause.

- clause 27 provides an exception in relation to the provisions of the *Migration Act 1985* (Cth) (the Migration Act). While the Law Council acknowledges that some form of discrimination in relation to the Migration Act may be necessary (for example in relation to the issue of specific visas), this exception is currently drafted so broadly as to cover a wide range of migration decisions without adequate justification as to why they should be included in the exception.

Recommendation

The Law Council recommends that the review of exceptions provided in clause 47 specifically address concerns relating to the scope of the exceptions relating to unlawful conduct in accordance with laws prescribed by regulations and in relation to the provisions of the *Migration Act 1985* (Cth).

Review of Exceptions – Clause 47

207. As noted above, the Law Council supports the inclusion of clause 47 of the Draft Bill which provides that the Minister must arrange for a review of the exceptions in Chapter 2, Part 2-2, Division 4 within three years, and that a copy of this review must be provided to Parliament.

[103] The *Equal Opportunity Act 1984* (SA) provides a limited example of this type of approach in s34(3)

208. The Law Council is of the view that a number of these exceptions, including the exception for justifiable conduct, require further consideration to ensure that they meet the objectives of the Draft Bill and provide certainty for all members of the community seeking to exercise their rights or to understand their compliance obligations.

209. The Law Council also supports an expansion of the review provided in clause 47 to include a range of other matters raised by the Draft Bill it has identified as requiring further consideration. These are outlined in summary form at the beginning of this submission.

Sexual harassment - Clause 49

210. Chapter 2, Part 2-3, Division 2 of the Draft Bill deals with sexual harassment. Subclause 49(1) provides that a person 'sexually harasses' another person if he or she:

- makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person; or
- engages in other unwelcome conduct of a sexual nature (including making a statement of a sexual nature to, or in the presence of, the other person) in relation to the other person; and
- a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the other person would be offended, insulted, humiliated or intimidated by the first person's conduct.

211. Subclause 49(2) provides that the circumstances to be taken into account by the reasonable person in the test above include, but are not limited to:

- the other person's sex, age, marital or relationship status, sexual orientation, religion or race;
- any disability of the other person;
- any other relevant protected attribute of the other person; and
- the relationship between the first person and the other person.

212. The Explanatory Notes provide that the 'definition of sexual harassment in clause 49 preserves the policy of section 28A of the SDA'.[104]

213. Clause 50 provides that sexual harassment will be unlawful if 'the harassment is connected with any area of public life'.

[104] Explanatory Notes [224]. Section 28A of the SDA currently provides that:
"(1) For the purposes of this Division, a person sexually harasses another person (the *person harassed*) if:
(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.
(1A) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:
(a) the sex, age, marital status, sexual preference, religious belief, race, colour, or national or ethnic origin, of the person harassed;
(b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
(c) any disability of the person harassed;
(d) any other relevant circumstance. "

214. This means that sexual harassment need not actually occur in a public place provided that there is a clear connection to an area of public life. The Explanatory Notes provide the following example of what conduct this may cover:

> *For example, if an office Christmas party were held in the CEO's private home, sexual harassment that occurred at that party would be connected to public life because it occurred in the course of a work function that was directly related to an employment relationship.*
>
> *Similarly, if sexual harassment occurred in dormitories provided by the employer to its employees at the work site, the conduct may be sufficiently connected to public life because of the relationship to the people residing on the premises and the employment relationship.*[105]

215. The Law Council supports the inclusion of clause 50 which provides broader coverage than section 28A of the SDA. Under section 28A of the SDA, sexual harassment is only unlawful in relation to specified areas of public life. Clause 49 of the Draft Bill also implements recommendation 8 of the SDA Report[106] and recognises that 'there is no public interaction in which sexual harassment is acceptable'.[107]

216. The approach adopted in clause 49 also reflects the approach taken in section 118 of the *Anti-Discrimination Act 1991* (Qld) which simply provides that 'a person must not sexually harass another person.' [108] In its past submissions on the Discussion Paper, the Law Council has also advocated for harassment on other grounds to be prohibited under the consolidated law. For this reason it welcomes the protection against harassment offered by subclauses 19(1) and (2) which applies to all protected attributes listed in clause 17 but is limited in respect of some of those attributes to conduct occurring in work or work related areas.[109]

217. Further consideration may need to be given to removing clause 49, if it is shown to be unnecessary in light of the protection against harassment provided by subclauses 19(1) and (2).

Recommendation

The Law Council supports the protections against harassment relating to all attributes contained in subclauses 19(1) and (2) and submits that clause 49 relating to sexual harassment only should be reconsidered.

Vilification - Clause 51

218. Chapter 2, Part 2-3, Division 3 of the Draft Bill provides that racial vilification is unlawful.

219. Clause 51 prohibits racial vilification subject to exceptions intended to preserve artistic performances; genuine academic, artistic or scientific debate; and fair reporting of matters in the public interest.

220. It provides that racial vilification occurs where:

- a person engages in conduct;

[105] Explanatory Notes [226]-[227].
[106] Recommendation 8 of the SDA Report provides "The committee recommends that the Act be amended to include a general prohibition against sex discrimination and sexual harassment in any area of public life equivalent to section 9 of the *Racial Discrimination Act 1975",* above note 15.
[107] Explanatory Notes [229]
[108] Explanatory Notes [229]
[109] See Draft Bill clause 22(3).

- that conduct is reasonably likely to offend, insult, humiliate or intimidate another person or persons;
- the conduct is engaged in because the person, or an associate of the person, is of a particular race; and
- the conduct is engaged in otherwise than in private.

221. Subclause 51(4) provides that exceptions apply to anything done or said, reasonably and in good faith, in:
    - artistic performances;
    - genuine academic, artistic or scientific debates, or for other genuine purposes;
    - making a fair or accurate report on a matter of public interest; or
    - making a fair comment on a matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

222. The Law Council notes that this clause replicates sections 18C and 18D of the RDA.[110]

223. The Law Council also notes that there is evidence that vilification occurs in relation to other protected attributes, such as disability.[111] The Victorian Disability Discrimination Legal Service Inc ('DDLS') has recently undertaken research[112] into disability discrimination which suggests that people with a disability experience a spectrum of negative behaviours that are generally perceived to be examples of vilification, but may be unlikely to be found by a court or tribunal to reach the required threshold of seriousness necessary to constitute *unlawful* vilification under existing legislation. [113] The DDLS also concludes that existing Victorian and federal legislation is inadequate to protect people with a disability from the harmful effects of disability vilification and strongly recommends law reform in this area.

[110] Section 18C of the RDA provides that: "(1) It is unlawful for a person to do an act, otherwise than in private, if: (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group. (2) For the purposes of subsection (1), an act is taken not to be done in private if it: (a) causes words, sounds, images or writing to be communicated to the public; or (b) is done in a public place; or (c) is done in the sight or hearing of people who are in a public place. (3). In this section: *"public place"* includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.' Section 18D of the RDA provides that: "Section 18C does not render unlawful anything said or done reasonably and in good faith: (a) in the performance, exhibition or distribution of an artistic work; or (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or (c) in making or publishing: (i) a fair and accurate report of any event or matter of public interest; or (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment."

[111] Disability vilification generally refers to public conduct by one person or group towards another person or group of persons with a disability that would be considered by a general observer likely to either:
Incite in another person serious contempt for, or revulsion or severe ridicule of the person with a disability (s 7, 8 *Racial and Religious Tolerance Act 2001* (Vic)); or cause a person with the disability to be offended, humiliated or intimidated (s 18C *Racial Discrimination Act 1975* (Cth) ('RDA').)

[112] See Disability Discrimination Legal Service 'Law Reform Submission to the Victorian Law Reform Commission: Disability Vilification' (April 2012) available at http://www.communitylaw.org.au/ddls/cb_pages/files/Disability%20Vilification%20Report%20FINAL%2030041 2(1).pdf

[113] Existing Commonwealth, State and Territory legal protection from discrimination, vilification and harassment is inconsistent, and other than in Tasmania, unable to protect a person at risk of disability vilification.

224. In light of this, it may be appropriate for the Commonwealth Government to consider broadening the application of Chapter 2, Part 2-3, Division 3 to other attributes in the future.

Victimisation and Positive Duties – Clause 54

225. Chapter 2, Part 2-3, Division 6 of the Draft Bill provides protection against victimisation.

226. Clause 54 defines victimisation and details when victimisation is unlawful. In general, victimisation is unlawful where a person is untreated unfavourably because either that person or his or her associate proposes to or has:

- made a complaint to the AHRC;
- brought proceedings in a court under the Draft Bill;
- participated in such proceedings or processes;
- asserted any right that he or she has under the Draft Bill; or
- made an allegation that a person has engaged in unlawful conduct.

227. Victimisation is also unlawful if someone treats another person unfavourably because he or she believes that the person has or proposes to act in the above ways. The prohibited reasons above need be the only reason for the unfavourable treatment and do not need to be the dominant reason.[114]

228. Subclause 54(2) provides a new exception allowing unfavourable treatment of complainants where their conduct was not in good faith. The exception does not apply where a person is merely proposing, or is believed to be proposing, to do any of the above actions.

229. Clause 54 replaces the current provisions of the Commonwealth anti-discrimination Acts which provide that victimisation of complainants is a criminal offence.[115] Under these laws, it is also possible to bring a civil complaint about victimisation through the AHRC.[116]

230. The Explanatory Notes indicate that criminal liability for victimisation has been removed from clause 54 and replaced with civil liability so as to 'enable enforcement through complaints to the AHRC while removing the complexity associated with simultaneous civil and criminal liability.'[117] The Explanatory Notes further indicate that the new exception in sub-clause 54(2) 'ensures that protection from victimisation does not extend to situations where a person has made a false allegation or complaint, or seeks to use the AHRC Act other than for legitimate purposes.'[118]

231. The Law Council supports strong protections against victimisation and welcomes the inclusion of these provisions.

232. The Law Council is of the view that future consideration should be given to incorporating within the Bill a provision that would require a person or a body to take positive steps to eliminate discrimination, harassment and victimisation. This type of positive duty would encourage employers, service providers and others to take steps to prevent victimisation - such as by implementing appropriate training programs and

[114] Draft Bill clause 8.
[115] See ADA s51; DDA s42, RDA s27(2); SDA s94; AHRC Act s26(2).
[116] Explanatory Notes [249].
[117] Explanatory Notes [249].
[118] Explanatory Notes [250].

complaint handling policies - and would enhance the protection offered by clause 54 of the Draft Bill.

233. In past submissions in response to the Discussion Paper, the Law Council has suggested that section 15 of the Victorian EO Act could provide a possible model for including a positive duty in the consolidated Act. This section provides that a person or body 'take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible' and applies to duty holders in the private sector, as well as public organisations.

Recommendation

The Law Council supports protections against victimisation and recommends that consideration be given to:

- **Whether these protections should be supported by a general positive duty provision that would include the duty to take reasonable measures to eliminate victimisation.**

Extensions of liability for unlawful conduct – Chapter 2, Part 2-4

234. Chapter 2, Part 2-4 of the Draft Bill deals with extensions of liability for unlawful conduct.

235. The existing Commonwealth anti-discrimination Acts contain differing provisions in relation to vicarious liability:
- the RDA and SDA provide that an employee or agent's act must have taken place in connection with their employment or their duties as an agent, and provide an exception where a person took 'all reasonable steps' to prevent their employees or agents from acting unlawfully.

- the ADA and DDA require that a director, employee or agent act within their actual or apparent authority, and provide an exception where the company, employer or principal took reasonable precautions and exercised due diligence.

236. Chapter 2, Part 2-4 of the Draft Bill attempts to streamline the vicarious liability provisions and apply them equally to all attributes.

237. Clause 56 provides that:

> *A person who causes, instructs, induces, aids or permits another person to engage in conduct is, for the purposes of the provisions of this Act relating to unlawful conduct, taken also to have engaged in the conduct, and to have engaged in it for the same reasons, or for the same purposes, as it was engaged in by the other person.*

238. Clause 57 provides that:

- if a person (the first person) who is a director, officer, employee or agent of another person (the principal) engages in conduct connected with the first person's duties as a director, officer or agent, or connected with the first person's employment;

- the principal is, for the purposes of the provisions relating to unlawful conduct, taken to also have engaged in the conduct, and to have engaged in it for the same reasons, or for the same purposes, as it was engaged in by the first person.

239. However, the principal is taken not to have engaged in the conduct if the principal took reasonable precautions, and exercised due diligence, to avoid the conduct.

240. The Law Council generally supports this approach which seeks to reconcile the varying approaches in the current Acts by using a 'connection' based test for the 'imposition of liability' and 'reasonable precautions and due diligence' considerations.[119] The Explanatory Notes provide that 'this approach is intended to balance incentives for businesses to take reasonable measures to avoid unlawful behaviour by directors, employees and agents with reasonable recourse for persons who have suffered discrimination.'[120]

241. The Law Council notes that the connection test adopted in clause 57 is broader in scope than the approach currently adopted in the ADA and DDA and therefore enhances existing protections and may encourage the development of broader preventative policies for unlawful discrimination by employers and principals.

242. While generally supporting this approach, the Law Council notes that as this clause departs from the language of the existing vicarious liability provisions in the Commonwealth anti-discrimination Acts, measures will need to be taken to ensure that it is clearly understood.

243. This may mean providing specific guidance, either in the provisions themselves or in the Explanatory Memorandum, regarding the meaning of 'reasonable precautions, and exercised due diligence' in subclause 57(3). The Law Council has previously suggested that this should include reference to appropriate policies, training and complaints processes and the use of industry best practice guidelines as examples of 'the reasonable precautions' that could be taken by the employer or principal.

244. The Law Council is also pleased to note that there is no longer an exception for small partnerships, which is in line with the Law Council's previous recommendations.

Limited protections for equality before the law – Clause 60

245. Chapter 2, Part 2-5, Division 1 of the Draft Bill preserves the equality before the law provisions that were previously contained in section 10 of the RDA[121] although in a slightly different form.

246. Subclause 60 provides that:

> *(1) If, because of a law, persons of a particular race:*
>
> *(a) do not enjoy a right (whether a human right or some other right) that is enjoyed by persons of another race; or*
>
> *(b) enjoy a right (whether a human right or some other right) to a more limited extent than persons of another race;*
>
> *then, by force of this section (and despite anything in that law), persons of the first-mentioned race enjoy that right to the same extent as persons of that other race.*

[119] Explanatory Notes [262].
[120] Explanatory Notes [261].
[121] Subsection 10(1) of the RDA provides that: " If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin."

247. Subclause 60(2) provides that sub-clause 60(1) does not apply to a law that is a special measure to achieve equality.[122]

248. Clause 60 is designed to have the same effect as section 10 of the RDA, and will operate to modify Commonwealth, State and Territory laws which deny or limit the rights of people of a particular race, to ensure that laws are applied equally to all people.[123]

249. While the Law Council strongly supports the retention of these protections in respect of racial discrimination, it is disappointed that an equality before the law provision with broader application has not been included in the Draft Bill.

250. In submissions on the Discussion Paper, the Law Council has expressed the view that a broader right to equality provision would complement the other protections proposed in the consolidated Act and speak directly to governments and public organisations by guaranteeing equal enjoyment of rights by all persons under law rather than focusing solely on prohibiting discriminatory acts.[124] Such a provision would also enhance Australia's compliance with its obligations under a range of international human rights treaties that require state parties to promote and protect the right to equality, including Article 26 of the ICCPR, Article 15 of the CEDAW and Article 15 of the CRPD. [125]

Recommendation

The Law Council supports the retention of the equality before the law provision in relation to the attribute of race.

It recommends that consideration be given to extending this provision to other protected attributes.

Measures to assist compliance – Chapter 3, Part 3-1

251. Chapter 3, Part 3-1 of the Draft Bill empowers the AHRC to assist people to comply with their obligations under the Draft Bill by providing for the AHRC to:

- make guidelines to assist people to avoid engaging in unlawful conduct, or in Commonwealth conduct that is contrary to human rights;
- review policies or programs (on application) to determine whether they constitute, or may give rise to, unlawful conduct, or Commonwealth conduct that is contrary to human rights;
- make compliance codes;
- make special measures determinations (on application); and

[122] Explanatory Notes [272].
[123] Explanatory Notes [276].
[124] Noting the potential difficulties identified by the Productivity Commission regarding the extension of these provisions to discrimination on the basis of disability, the Law Council has recommended that consideration should be given to framing a right to equality provision based on section 8 of the *Charter of Human Rights and Responsibilities Act 20*06 (Vic) (the Victorian Charter). See the Law Council's April 2012 Submission on the Discussion Paper, above note 28. The New South Wales Bar Association has also suggested that to the extent there are concerns about the impact of an equality before the law provision of general application to special legal regimes (such as mental health and guardianship legislation), such concerns could be readily addressed by an exemption in relation to measures taken to assist persons with a protected attribute, particularly given the principal effect of such a provision is on governments rather than individuals or businesses.
[125] See the Law Council's April 2012 Submission on the Discussion Paper, above note 28.

- grant temporary exemptions.

252. Clause 207 of the Draft Bill also allows the AHRC to charge fees for reviewing policies and programs, developing compliance codes and making special measures determinations.

253. Chapter 3, Part 3-1 also contains provisions that provide for the development of action plans by persons or bodies to assist them to avoid engaging in unlawful conduct. Action plans may be lodged with the AHRC and may be referred to by the AHRC when dealing with a complaint or by a court in hearing proceedings.

254. Chapter 3, Part 3-1 also provides for the relevant Minister to make disability standards. These standards specify requirements to be complied with in relation to disability in areas of public life. Disability standards are legislative instruments and compliance with a standard is effectively a defence to a claim of discrimination relating to conduct covered by the standard.

255. The Law Council supports the inclusion of these mechanisms in the Draft Bill. A number of these mechanisms reflect existing features of the Commonwealth anti-discrimination Acts or generally align with the recommendations made by the Law Council in past submissions. However, further consideration may need to be given to the implications of these mechanisms, such as the impact (if any) of these changes on the workload and resourcing of the AHRC.

Temporary Exemptions – Chapter 3, Part 3-1, Division 8

256. Chapter 3, Part 3-1, Division 8 of the Draft Bill deals with the process to obtain a temporary exemption. Such an exemption is defined in subclause 83(1) as 'an exemption, granted by the AHRC in accordance with this Division, that exempts particular conduct of one or more persons or bodies (or classes of persons or bodies) from being unlawful discrimination.'

257. Clause 84 provides that the AHRC may grant such exemptions following an application in writing in relation to particular conduct of particular persons or bodies (or classes of persons or bodies).

258. Clause 85 provides that a temporary exemption ceases to have effect at the end of the period specified in the exemption, which cannot exceed five years.

259. Clause 86 provides that while a temporary exemption has effect, the conduct of a person or body covered by that exemption is taken not to be unlawful discrimination.

260. Under subclause 84(4), a temporary exemption granted by the AHRC will be a legislative instrument rather than an administrative instrument, which means that it will be subject to legislative scrutiny. As a result, an exemption made by the AHRC will be subject to disallowance by Parliament, but will no longer be subject to Administrative Appeals Tribunal (AAT) review.

261. The power for the AHRC to grant temporary exemptions currently exists under the SDA, DDA and ADA but not the RDA.[126] Under this Division of the Draft Bill, the AHRC will be able to grant temporary exemptions for race, to ensure consistency across the Bill. However, the Explanatory Notes state that:

> *As the Commission uses the power to grant temporary exemptions to provide protection for organisations while they transition towards full compliance with Commonwealth anti-discrimination law, rather than to permit discriminatory*

[126] For example see SDA ss44-47, DDA ss55-58, ADA Part 4 Division 5

conduct, there is little scope for such an exemption in practice [in relation to race].[127]

262. The Law Council generally welcomes the introduction of these provisions which provide a unified, streamlined approach to the granting of temporary exemptions and contain improved substantive criteria and procedural requirements for such exemptions.[128]

263. The Law Council has previously submitted that care would need to be taken if a unified approach to exemptions were adopted in the Draft Bill to ensure that the protections contained in the RDA are not diluted as a result.

264. The Law Council continues to urge caution in this area, and notes that although the provisions for temporary exemptions do not of themselves reduce the level of rights and protections currently provided for by the RDA, there may be concerns that they provide a mechanism by which rights and protections can be reduced in the future.

265. The Law Council suggests that the provisions for temporary exemptions could be further enhanced by requiring the AHRC to ensure that exemptions are readily accessible to the public by publishing such exemptions on its website.

Recommendation

The Law Council supports the inclusion of a streamlined approach to temporary exemptions in Chapter 3 Part 3-1 Division 8.

Making and determining complaints - Chapter 4

266. Chapter 4 of the Draft Bill deals with the making of complaints.

267. The Law Council considers that this Chapter of the Draft Bill contains a range of positive features, including:

- a single streamlined process for all complaints (clause 88);
- the requirement for the AHRC to provide assistance to a person to put his or her complaint in writing (clauses 95-96);
- the power of the AHRC to refer complaints to other specialist bodies such as industrial bodies, the Inspector-General of Intelligence and Security, and the Information Commissioner (clauses 102-104);
- the discretion provided to the AHRC to deal with complaints as it considers appropriate, as well as the power to investigate and /or attempt to conciliate complaints (clauses 105 to 106);
- the power of the AHRC to request information, inspect documents, and hold conferences (clauses 107 -111);
- the powers of the AHRC to make findings and report to the Minister about complaints about Commonwealth conduct contrary to human rights that cannot be settled by the AHRC (clause 112-115);
- the power for the AHRC to 'close' certain complaints (clause 117); and

[127] Explanatory Notes [335].
[128] For example see SDA ss44-47, DDA ss55-58, ADA Part 4 Division 5.

- the requirement for leave for any application to a court if a complaint was 'closed' by the AHRC on certain grounds(clause121).

268. Despite these positive features, the Law Council considers that the provisions in Chapter 4 could be enhanced in a number of areas to ensure that the AHRC and court process is simplified and fair to both complainants and respondents. These areas include:

- ICESCR based complaints;
- better access to appropriate legal and other assistance in the preparation of complaints and throughout the complaints process;
- investigation by the AHRC of incidents of discrimination on its own volition without needing to rely upon a formal individual complaint or a reference from Government;
- practical measures to support the conciliation services provided by the AHRC such as the conduct of conciliation by teleconference or videoconference;
- provision for appropriate pathways for access to relevant ADR processes available under the jurisdiction of the Federal Court if an application is being made to that court or the Federal Magistrates Court (soon to be known as the Federal Circuit Court);
- guidance as to the level of monetary and types of non-monetary remedies that can be obtained; and
- an optional mechanism for complainants to proceed directly to court, such as the current practice in relation to the decision making tribunal under the Victorian EO Act.

<u>Shifting burden of proof – clause 124</u>

269. Clause 124 of the Draft Bill deals with the burden of proof in court proceedings.

270. Subclause 124(1) provides that in proceedings against a person under clause 120 where the application alleges that another person engaged, or proposed to engage, in conduct for a particular reason or purpose and the applicant:

> *adduces evidence from which the court could decide, in the absence of any other explanation, that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct;*
>
> *it is to be presumed in the proceedings that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct, unless the contrary is proved.*

271. This provision introduces a shifting burden of proof in court proceedings so that if the applicant establishes a prima facie case of unlawful discrimination, the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action.

272. The clause also outlines the burden of proof in relation to exceptions to unlawful conduct.

273. The Law Council generally supports the inclusion of subclause 124(1) of the Draft Bill which shares the burden of proof more equally between complaints and respondents than the approach adopted in the existing Commonwealth Acts.

274. Under the existing Commonwealth Acts, an applicant alleging direct discrimination bears the burden of proving the basis for their less favourable treatment by the respondent, which requires the complainant to prove matters relating to the state of mind of the respondent. In contrast, a shifting burden requires respondents to prove why they took the particular action that has been challenged, so that the court can make an assessment of whether it was on an unlawful basis.

275. The approach in subclause 124(1) is also supported on the basis that it promotes uniformity and consistency between the Commonwealth anti-discrimination regime and the FWA. Sub-clause 124 (1) also reflects international approaches, such as that in the *Equality Act 2010* (UK) (the UK Act).

276. Both the UK Act and the FWA shift the burden of proof from the complainant to the respondent to some degree and provide a greater balance between the interests of complaints and respondents than the approach currently adopted in Commonwealth anti-discrimination Acts.

277. Section 136 of the UK Act provides that 'if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred', unless the respondent shows that it did not contravene the provision. The UK approach was also recommended by the SDA report as an appropriate model to consider.[129]

278. Under the adverse action provisions of the FWA, once a complainant alleges that a person took an action for a particular reason, this is presumed to be the reason for the action unless the respondent proves otherwise.[130]

279. The Law Council notes that while subclause 124(1) addresses the current imbalance in terms of the burden of proof, it does not exactly replicate section 361 of the FWA, but instead demands that the applicant provide evidence upon which the court could find discrimination. The Law Council considers this to be an appropriate means of balancing the competing interests of complainants and respondents under the Draft Bill.

280. The Law Council also suggested in it submissions in response to the Discussion Paper that consideration be given to clarifying the confusion surrounding the *Briginshaw* test[131] and making it clear that the test to be applied under the consolidated Act is the usual civil standard of proof as set out in section 140 of the *Evidence Act 1995* (Cth).[132]

281. While it appears that the civil standard of proof is the standard that applies under the Draft Bill, this is not specifically addressed in the Explanatory Notes. The Law Council suggests that the Explanatory Memorandum to the legislation to be introduced in Parliament should refer to the civil standard of the balance of probabilities as the relevant standard of proof.

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[129] SDA Report Recommendation 22, above note 10.
[130] FWA s 361
[131] *Briginshaw v Briginshaw* (1938) 60 CLR 336. In *Briginshaw*, the High Court held that where a civil case involves allegations of criminal conduct, fraud or moral wrongdoing which may lead to grave consequences for the defendant, the judicial approach should be a closer scrutiny of the evidence. For further discussion in the anti-discrimination context see Loretta De Plevitz 'The *Briginshaw* 'Standard Of Proof' in Anti-Discrimination Law: 'Pointing With A Wavering Finger' (2003) Melbourne University Law Review 13.
[132] See *Qantas Airways Ltd v Gama* [2008] FCAFC 69.

Recommendation

The Law Council supports the introduction of a shifting burden of proof in clause 124.

Costs – clause 133

282. Clause 133 of the Bill deals with the awarding of costs following court proceedings.

283. It provides that each party is to bear their own costs,[133] but also provides that if the court considers that there are circumstances that justify it in doing so, it may make such orders as to costs as it considers just.[134]

284. Subclause 133(3) provides that when considering whether there are circumstances justifying the making of an order for costs, the court must have regard to the following matters:

- the financial circumstances of each of the parties to the proceedings;
- whether any party to the proceedings is receiving assistance under section 130, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance);
- the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the AHRC);
- whether any party to the proceedings has been wholly unsuccessful in the proceedings;
- whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings and the terms of any such offer;
- any other matters that the court considers relevant.

285. Clause 130 provides that a person who has commenced proceedings in the Federal Court or the Federal Magistrates Court under Chapter 4, Part 4-3 or is a respondent to such proceedings may apply to the Attorney-General for the provision of assistance. The Attorney-General may authorise the provision of legal or financial assistance if he or she is satisfied that it will involve hardship to the person to refuse to do so and it is reasonable to do so.

286. The Law Council generally welcomes the inclusion of the costs provisions in the Draft Bill.

287. The Law Council notes that under the current Commonwealth anti-discrimination Acts, costs tend to follow the event and to be awarded in favour of the successful party,[135] although this was not always the case.[136]

288. In its Policy Statement and past submissions, the Law Council has expressed the view that the prospect of a costs burden in the event of a failure by a complainant to prove a claim may deter potential complainants from seeking relief under the legislation. The prospect of a costs burden may also place pressure on parties to settle rather than pursue claims in court, preventing the development of judicial precedent.

[133] Draft Bill subclause 133(1).
[134] Draft Bill subclause 133(2).
[135] For example *Fetherston v Peninsula Health (No 2)* [2004] FCA 594
[136] For example *Ryan v Albutt t/as Albutt Exprss Holdings Pty Ltd (No.2)* [2005] FMCA 9

289. For this reason, the Law Council has supported consideration of the approach to costs taken under the FWA as a suitable model for the consolidated Act.[137] Under the FWA, a party may be ordered to pay the other party's costs in certain circumstances, such as where the first party instituted proceedings vexatiously or without reasonable cause.

290. While clause 133 of the Draft Bill builds on the features of the analogous FWA provisions it includes additional considerations such as the financial circumstances of each of the parties to the proceedings and whether any party to the proceedings is receiving assistance under section 130, or is receiving assistance by way of legal aid.

291. The Law Council supports the inclusion of these considerations which retain an important degree of flexibility within the costs regime proposed in the Draft Bill by continuing to provide capacity for the courts to make costs orders appropriate to the conduct of the parties and the merits of the matter.

292. The Law Council notes that many parties to anti-discrimination matters receive legal aid funding or are represented by community legal centres or legal practitioners on a pro bono or deferred costs basis. It is important that the costs provisions do not operate to deter parties from seeking and obtaining legal representation on this basis, and do not result in modest awards of compensation for unlawful discrimination being significantly depleted to cover the costs of legal representation. The considerations listed in subclause 133(3) of the Draft Bill appear to offer some protection in this regard.

293. The Law Council also supports consideration of whether additional matters should be included in subclause 133(3) as part of a broader statutory review, as recommended by the Law Council above. For example, subclause 133(3) could include subparagraphs that require the court to consider:

- whether any damages awarded are sufficient, in the absence of an order for costs, to put a wholly or partly successful complainant in a position no worse than the complainant would have been in had the complainant not sustained the wrong concerned or not instituted the proceedings; and
- the public interest in ensuring access to justice.

294. The Law Council has previously noted that the level of monetary compensation awarded in anti-discrimination matters by the courts is relatively modest compared to other areas of law where personal harm has been done.

295. It is imperative that this issue, along with the need to ensure adequate funding for legal aid and community legal centres, also be addressed in any statutory review to ensure that the costs provisions of the Draft Bill operate to remove (rather than create) barriers to parties pursuing meritorious claims.

Recommendation

The Law Council supports the costs approach contained in clause 113, which also retains the court's power to award costs in certain circumstances.

The Law Council supports further consideration being given to the range of considerations to which the court is to have regard when determining whether to award costs.

[137] FWA s570

Further enhancement of the complaints process

296. While the Law Council supports many of the provisions that provide for a streamlined complaints process within the Draft Bill, it submits that this process could be further enhanced by:

- empowering the AHRC to hear complaints in relation to the full range of human rights Conventions to which Australia is a party, including the ICESCR. The Law Council notes that clause 88 provides that complaints can be made to the AHRC about conduct that is either unlawful conduct or Commonwealth conduct contrary to human rights or both but not about Commonwealth conduct contrary to ICESCR rights. Although this is consistent with the approach adopted under the AHRC Act, the Law Council suggests that the consolidation process provides the opportunity to ensure that the Draft Bill provides full coverage for these rights;
- enabling representative bodies to lodge complaints with the courts if conciliation by the AHRC is unsuccessful. The Law Council notes that this was recommended by Senate the Committee following its inquiry into the Sex Discrimination Act;[138]
- undertaking a review of the effectiveness of monetary and non-monetary remedies for discrimination matters remedies awarded by the courts;
- including within the provisions relating to the orders available to the court, legislative guidance that the common law principles relevant to the termination of employment should be applied where the discrimination involves such termination.

297. The Law Council has also received feedback from its ADR Committee that suggests that the conciliation process contained in the Draft Bill could be enhanced by having regard to the following matters:

- provision for appropriate pathways for access to relevant ADR processes available under the jurisdiction of the Federal Court (conciliation, mediation and fast track arbitration) if an application is being made to that court or the Federal Magistrates Court as such processes have now been incorporated into the practices of the federal courts, including in the case management and resolution of disputes;
- the potential tension that arises between the dual roles of the AHRC as mediator and advocate.[139] The conciliator in the AHRC remains impartial as between the parties. This can be a difficult role for staff or contractors associated with an anti-discrimination agency that also has a range of education and social change functions and powers;[140] and
- whether lessons can be applied from the Federal Court's experience in the native title area, in relation to preparing for negotiations, scoping the complaint, applying the negotiating strategy, and structuring the compensation and settlement agreement.

Access to assistance in the preparation of complaints and in court proceedings

298. The Draft Bill contains a number of provisions that outline what assistance is to be made available to parties to complaints or proceedings under the Draft Bill.

[138] SDA Report Recommendation 20, above note 10.
[139] D. Bryson, 'Mediator and Advocate: Conciliating Human Rights Complaints', (1990) 1(3) *Australian Dispute Resolution Journal*, 136–42.
[140] Ibid.

299. Clause 96 provides that if the AHRC is aware that a person wishes to make a complaint and the person needs assistance to put that complaint in writing, the AHRC must take reasonable steps to provide appropriate assistance to the person.

300. Clause 97 provides that certain assistance must be provided to a person who is seeking to make a complaint if the person is in custody.

301. Clause 129 provides that parties to court proceedings are entitled to represent themselves or be represented by a lawyer, or by some other person (with certain limitations).

302. Clause 130 provides that a person involved in proceedings before the court can apply to the Attorney-General for the provision of financial assistance for legal representation. The Attorney-General may grant assistance if satisfied that it will involve hardship to refuse the application and that it is reasonable to grant the application in all the circumstances.

303. While the inclusion of these provisions is welcome, they generally replicate existing provisions and do not fully address the Law Council's concerns that parties to complaints under the Draft Bill have appropriate access to legal representation and advice when preparing and presenting their claims. The Law Council has previously noted that while a complaint need not be a technical legal document, a poorly drafted complaint can undermine a complainant's case, not only at a hearing but also during negotiations.

304. The Law Council notes that the Draft Bill has not been accompanied by any commitments to additional resourcing to the legal assistance sector. In the Explanatory Notes, the Government rejects recommendations for increased funding for community legal centres, which were made by the Senate Committee in its inquiry into the SDA. This is likely to result in additional pressure being placed on already stretched legal aid resources, community legal centres and legal practitioners who offer their services on a pro bono basis.

305. The Law Council is of the view that a lack of access to appropriate assistance in the preparation of complaints, and a lack of access to legal representation during conciliation and court proceedings undermines the aims of the Draft Bill. The Law Council suggests that unless appropriate support is provided to people to effectively and competently formulate and present their claims, the rights protected in the Draft Bill will remain theoretical, and the goal of substantive equality will remain equally unfulfilled.

Recommendation

The Law Council recommends that greater emphasis be placed in the Draft Bill on the need to provide appropriate access to assistance in the preparation of complaints.

The Law Council recommends that the Draft Bill be accompanied by additional resources to the legal assistance sector to ensure that all parties seeking to exercise their rights under the Draft Bill have access to adequate legal advice.

Inquiries by the AHRC – Chapter 5, Part 5-1

306. Chapter 5, Part 5-1, Division 2 of the Draft Bill provides that the AHRC can conduct inquiries into:
    - whether Commonwealth conduct is unlawful conduct or is contrary to human rights;

- the laws that should be made by the Commonwealth Parliament or any action that should be taken by the Commonwealth or a Territory in relation to a matter covered by the objects of the Act or to better respect or promote human rights;

- any other action that should be taken by Australia to better comply with the human rights instruments or the ILO instruments.

307. Both the AHRC and the Minister can initiate inquiries if they are considered to be necessary to advance the objects of the Act and in the public interest. Clause 137 provides that the main purpose of an inquiry is to make recommendations.

308. While the Law Council supports the inclusion of these provisions in the Draft Bill it is disappointed that a more expansive approach has not been taken to the scope of the AHRC's power to conduct inquires. For example, in the Explanatory Notes to the Draft Bill, the Government rejects recommendations for the AHRC to be able to inquire into matters under State laws as recommended by the SDA Report.[141]

Establishment, functions, powers and liabilities of the AHRC – Chapter 6, Part 6-1

309. Clause 146 of the Draft Bill outlines the functions of the AHRC which are drawn from the existing Commonwealth anti-discrimination Acts.

310. Clause 147 provides that the AHRC may at any time give the Minister a written report on the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders (either generally or in relation to a particular matter or matters). Clause 148 contains a similar provision relating to children's rights.

311. In the Explanatory Notes, the Government rejects a recommendation that the AHRC should be able to commence proceedings for a breach of the Sex Discrimination Act. This recommendation was made by a Senate Committee inquiry into the Sex Discrimination Act.[142]

312. The general powers available to the AHRC are outlined in clause 155 and include all things necessary or convenient to be done for or in connection with the performance of its functions.

313. The membership of the AHRC is outlined in clause 160 as: the President; the Aboriginal and Torres Strait Islander Social Justice Commissioner; the Age Discrimination Commissioner; the Disability Discrimination Commissioner; the National Children's Commissioner; the Race Discrimination Commissioner; and the Sex Discrimination Commissioner. The maximum period a person can serve as a commissioner is 7 years.

314. The powers and functions of each of the specialist Commissioners of the AHRC are outlined in clauses 152 – 154.

315. The Law Council generally supports these provisions, subject to the comments made above in relation to the additional powers and functions of the AHRC regarding measures to assist with compliance and the need to ensure adequate funding is made available to the AHRC to perform these functions and exercise these powers.

316. The Law Council notes that the position of the Human Rights Commissioner has been removed on the basis that it has not been filled since 2000 and that the functions

[141] Explanatory Notes, p 138.
[142] Explanatory Notes, p 142.

have been performed by other Commissioners. The removal of this role has not been opposed by the AHRC in its submission on the Draft Bill.[143]

[143] AHRC Submission, above note 46.

Law Council's Recommendations

Recommendation 1: that the Draft Bill be introduced as a Bill into Parliament subject to the amendments proposed in this submission and having regard to the matters outlined in this submission for further consideration.

Recommendation 2: that the provision regarding the meaning of discrimination in clause 19 should be amended to clarify that an objective standard applies by either:

(a) Removing the terms 'offends, insults or intimidates' from the definition of 'unfavourable treatment'; or

(b) replacing the test for discrimination in subclauses (19)(1) and (2) with a provision based on that contained in section 8 of the ACT Act or section 8 of the Victorian EO Act.

Recommendation 3: that the justifiable conduct exception in clause 23 be replaced with an exception based on 'reasonableness', which would be required to be objectively determined in light of all the circumstances of the case, and having regard to a set of prescribed criteria. Alternatively, the Law Council recommends:

(a) that subclause 23(3) be removed from the Draft Bill, or

(b) that clause 23 be amended to provide that the justifiable conduct exception does not apply to the definition of discrimination on the basis of unfavourable treatment in clause 19(1).

Recommendation 4: That the provision for the review of exceptions in the legislation should be expanded to allow for consideration of matters such as:

(a) including a more explicit reference in the objects clause to the right to equality as a key obligation that Australia has accepted under international law and broadening the definition of 'human rights instruments' in clause 3;

(b) extending the protected attributes to include those relating to irrelevant criminal record, domestic violence and homelessness and ensuring that the definitions of 'gender identity' and 'sexual orientation' are sufficiently comprehensive in scope;

(c) extending coverage so that discrimination in respect of all protected attributes is unlawful in all areas of public life;

(d) ensuring that 'special measures' in clause 21 are formulated in a manner that reflects the full range of Australia's obligations under international law;

(e) extending the duty to make 'reasonable adjustments' and the right to equality before the law to all protected attributes;

(f) including a general positive duty provision encompassing the duty to take reasonable measures to eliminate victimisation;

(g) addressing specific concerns in relation to exceptions relating to religious organisations, migration laws and to unlawful conduct undertaken in accordance with other laws and regulations;

(h) reviewing whether the provision relating to sexual harassment only is necessary in the light of the protections against harassment relating to all attributes;

(i) enhancing the role and powers of the AHRC and strengthening the complaints processes outlined in the Draft Bill, for example through:

-providing the AHRC with the power to investigate incidents of discrimination of its own volition;

-including complaints regarding conduct contrary to the rights contained in the ICESCR in complaints that can be made in relation to Commonwealth conduct contrary to human rights;

-ensuring practical measures to support the conciliation services provided by the AHRC such as the conduct of conciliation by teleconferences or videoconferences;

-ensuring access to appropriate legal and other assistance in the preparation of complaints;

--having regard to the interaction of the AHRC conciliation process and relevant ADR processes available under the jurisdiction of the Federal Court;

-including guidance as to the level of monetary and types of non-monetary remedies that can be provided as outcomes of ADR processes including conciliation;

-providing an optional mechanism for complainants to proceed directly to court; and

-adding to the range of considerations the court is to have regard to when determining whether to award costs under clause 133.

Conclusion

317. The current Commonwealth anti-discrimination regime provides an important legislative framework for promoting equality in Australia. However, gaps in protection remain and many individuals and groups within the Australian community continue to experience discrimination. The notion of substantive equality remains out of reach for some.

318. The current regime also deals with different grounds of discrimination in different ways, with four grounds of discrimination - sex, age, disability and race – dealt with under specific Acts, and other more limited protections are provided under the AHRC Act. This results in a confused and fragmented scheme.

319. For these reasons, the Law Council supports the consolidation of the Commonwealth Acts into a single Act that makes Commonwealth anti-discrimination law easier to access and understand. This consolidation process should also improve the law's capacity to address all forms of discrimination and to promote equality in line with Australia's international obligations in this area.

320. The Law Council considers the Draft Bill to be a significant step towards realising these goals and supports the introduction of legislation based on the Draft Bill into Parliament.

321. However, the Law Council is concerned about a number of issues raised by the test of discrimination in subclauses 19(2) and the justifiable conduct exception in clause 23. Therefore the Law Council recommends that:

- The definition of 'unfavourable conduct' in subclause 19(2) should be amended to clarify that an objective standard applies by either removing the terms 'offends, insults or intimidates' from the definition of 'unfavourable treatment' or by replacing the test for discrimination currently contained in subclauses 19(1) and 19(2) with a provision based on that contained in section 8 of the ACT Act or section 8 of the Victorian EO Act.
- The 'justifiable conduct' exception contained in clause 23 be replaced with an exception based on 'reasonableness', which would be required to be objectively determined in light of all the circumstances of the case, and having regard to a set of prescribed criteria. Alternatively, the Law Council recommends that subclause 23(3), which currently contains a proportionality based test, be removed from the Draft Bill, or that clause 23 be amended to provide that the justifiable conduct exception does not apply to the definition of discrimination on the basis of unfavourable treatment in subclause 19(1).

322. The Law Council welcomes the inclusion in clause 47 of the Draft Bill of a mechanism that requires a review within three years of the exceptions in the legislation. The Law Council recommends that this mechanism should be expanded to allow for further consideration of a range of matters detailed in this submission.

323. Provided that the recommendations outlined in this submission are addressed, the Law Council considers that the Draft Bill can offer broader, more meaningful protections for people experiencing discrimination, while at the same time making it easier for employers, business and service providers to understand and comply with their responsibilities.

324. With its acknowledgement of Australia's international obligations to respect the dignity and rights of all people without distinction, the Draft Bill also serves as a powerful statement of what fairness and equality mean in Australia and has the potential to operate as a preventative mechanism against discrimination.

325. Given that Australia does not currently have a Commonwealth Human Rights Act or any specific constitutional recognition of the right to equality, the symbolic and substantive importance of the Draft Bill should not be underestimated. Legislation based on the Draft Bill would constitute an important statement of Australia's commitment to promoting substantive equality and to preventing and redressing discrimination within our community.

326. The Law Council looks forward to the introduction of legislation based on the Draft Bill.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.