

# Searching for the Aussie “Fair Go”: A Survey of the Legal Landscape and Road to Reform of Australian Anti-Discrimination Law

Anna Brown<sup>1</sup>

Australia’s anti-discrimination laws are a patchwork of overlapping and inconsistent protections which are based on an outdated, reactive, complaint-based legal model which fails to address systemic discrimination or promote substantive equality. This article traces briefly the development of anti-discrimination law in Australia and identifies the limitations of current federal laws and priorities for the reform of federal anti-discrimination laws that is currently underway. The so-called “Consolidation Project” has been pitched to the Australian community as an exercise in addressing inconsistencies and reducing regulation. However, the reform process also provides an opportunity to rethink the framework of Australia’s equality laws and strengthen and modernise them in line with best practice examples from overseas.

## 1. The Current State of the Law

Surprisingly, despite boasting the 13<sup>th</sup> largest economy in the world, the world’s fifth-highest *per capita* income, robust democratic institutions and a highly regarded independent judiciary, Australia is the only liberal democracy without institutional protection of human rights. There is no overarching and comprehensive protection of human rights in Australian national law, such as a bill of rights enshrined in the Australian Constitu-

tion or by legislation. The right to non-discrimination is one of the few human rights with a degree of legislative protection in Australia, however this right is not enshrined in the Australian Constitution and, as a result, anti-discrimination laws may be overridden by subsequent legislation. Moreover, as identified by Belinda Smith and Dominique Allen, Australia’s anti-discrimination laws “have not developed significantly since their inception, leaving Australia lagging behind international consensus on human rights and equality”.<sup>2</sup>

Some of the most pressing human rights issues facing Australia are both causes and consequences of inequality. While the overall level of wellbeing of the Australian population is high when compared to the populations of many other countries, beneath these overall statistics hide substantial differences in the health and wellbeing of specific groups within Australia’s population. Although this is most evident for Aboriginal and Torres Strait Islander peoples,<sup>3</sup> there are also many other communities that experience discrimination and disadvantage in Australia. Women still fair worse than men on key indices such as pay equity, representation at decision-making levels, retirement income and superannuation levels.<sup>4</sup> Members of culturally and linguistically diverse (CALD) communities and Aboriginal and Torres Strait

Islander people experience systemic barriers to full participation in Australian life and suffer the adverse effects of persistent racism and discrimination.<sup>5</sup> For example, it has been found that Australian employers are still more likely to grant interviews to candidates with Anglo-Celtic names, on otherwise identical job applications in a supposedly open field.<sup>6</sup> Identity-motivated crime and harassment against Muslim Australians<sup>7</sup> and international students, particularly Indian nationals,<sup>8</sup> has been recognised as a more recent and growing problem. Recent legislative reforms have reduced inequality before the law for same sex couples,<sup>9</sup> with marriage equality remaining the final sticking point, but nevertheless members of Australia's LG-BTIQ communities continue to experience high levels of prejudice, stigma, exclusion, discrimination, abuse and hate-motivated assault.<sup>10</sup> Ageism acts as a significant barrier to workplace participation for older people and is prevalent in a wide range of policy areas, for example, operating to deny access to health services and accommodation.<sup>11</sup> Despite representing 20% of Australia's population, people with disabilities experience significant disadvantage and exclusion from full and equal participation in the life of the Australian community. Other groups, such as persons experiencing homelessness, refugees and newly arrived migrants, also experience systemic discrimination and significant disadvantage.

Australia is a federal parliamentary democracy and the legal regulation of discrimination is an area of concurrent legislative power for the Commonwealth and the States. The existence of multiple regulatory jurisdictions and the inconsistencies between State and federal legislation create constitutional and practical problems, which are exacerbated by the uneven and *ad hoc* development of various anti-discrimination laws across the

jurisdictions over the past decades. This has led to increasing calls for and, more recently, concerted efforts to bring about the harmonisation and consolidation of existing laws.<sup>12</sup>

Currently, Commonwealth anti-discrimination law is found across four separate pieces of legislation, each dealing with a different ground of discrimination. The Racial Discrimination Act 1975 (Cth) (RDA) was the first federal anti-discrimination law, enacted less than a decade after the Constitution was amended to remove provisions which discriminated against Indigenous Australians and the infamous "White Australia" immigration policy came to an end. As was the case with later generations of discrimination law in Australia, the RDA was influenced by the global political movements of the time, primarily the civil rights movement in the United States. Ground-breaking in its time, the RDA implemented Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>13</sup> and was substantially based on its text. Subsequent federal laws also followed the enactment of international treaties, as well as the spread of feminism and the politicisation of minority groups. The Sex Discrimination Act 1984 (Cth) (SDA) followed the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>14</sup> The Disability Discrimination Act 1992 (Cth) (DDA) was taken as a step in fulfilling Australia's obligations under international human rights instruments,<sup>15</sup> and ratification of the 2007 Convention on the Rights of Persons with Disabilities (CRPD)<sup>16</sup> followed some years later, in 2008.

The most recent of the federal statutes, the Age Discrimination Act 2004 (Cth) (ADA), provides the weakest protections of all the four Acts. The economic imperative of max-

imising workforce participation and utilising the skills and experience of all members of society featured heavily in the rationale behind the introduction of the ADA.<sup>17</sup> Disappointingly, the ADA replicates many of the limitations of the previous laws without adopting any of the potential lessons.

In addition, the Australian Human Rights Commission Act 1986 (Cth) establishes the Australian Human Rights Commission, regulates the processes for making and resolving complaints under the other four statutes and establishes a more limited mechanism in relation to certain attributes protected under the International Labour Organisation Convention No. 111. There are also provisions relating to discrimination in employment in the Fair Work Act 2009 (Cth). Finally, a “light touch” regulator was established by the Equal Opportunity for Women in the Workplace Act 1999 (Cth), to be replaced by the Workplace Gender Equality Act 2011 (Cth), which promotes gender equal opportunity in the workplace through requiring employers to report annually.

The development of these four federal anti-discrimination laws over nearly 40 years is marked by significant differences in drafting and coverage. The differences range from the particular innovations of the DDA, for example, which provides for the development of industry standards and action plans; to inconsistencies in definitions and differences in scope of coverage. Two of the more significant differences of this kind are, respectively, (i) the definitions of indirect discrimination, and (ii) the exclusion of the States and Territories from the operation of the SDA as compared to the other statutes. Another example is that the RDA prohibits offensive behaviour based on race but the other statutes do not deal specifically with vilification or hate speech. The RDA is also unique in enshrining

a general right to equality before the law and applies to all areas of public life without restriction – in contrast with the more limited scope of the other three federal statutes which restrict their coverage to a defined list of spheres of life. At the other end of the scale, the effectiveness of the ADA is hampered by permanent exceptions to a greater degree when compared to the other statutes.

In each case, the drafting of the statutes reflects the impact of political compromise as compared to the international instruments from which they draw their inspiration. For example, much criticism has been directed towards the highly equivocal terms of the “objects” clause of the SDA which states that it will give effect only to “certain provisions” of CEDAW and repeatedly uses the qualification “so far as possible”,<sup>18</sup> reflecting the divisiveness of the public battle around the introduction of the SDA.<sup>19</sup>

In contrast to the more limited coverage at a federal level, the parliaments of every State and Territory have enacted general anti-discrimination statutes which prohibit discrimination on many grounds in addition to those covered by the four federal Acts.<sup>20</sup> As stated above, inconsistency between those laws has been, and remains, a significant constitutional and practical problem.<sup>21</sup> As Simon Rice argued, the “unprincipled diversity” of the various State, Territory and federal laws creates significant legal complexity, confusion and added costs for duty-holders and complainants alike.<sup>22</sup> Due to the number of jurisdictions involved, the diversity of laws and often deeply entrenched ideological positions held by major political parties on the issues involved in this area of law, it is not surprising that commentators have described the task of harmonising all anti-discrimination laws nationally as a “herculean task”,<sup>23</sup> and that a national committee of Attorneys-General

have failed to report any material progress on a project to harmonise State, Territory and federal anti-discrimination laws that was commenced a number of years ago.

Australia's industrial relations laws also include anti-discrimination provisions, adding to the complexity for users of the legal system as well as those tasked with reforming the law. The Fair Work Act 2009 (Cth) "general protection" provisions create a parallel avenue for pursuing discrimination complaints in an employment setting but provide more limited redress to complainants.<sup>24</sup> A detailed analysis of Australia's labour laws is outside the scope of this article. It should, however, be noted that they have acted as the site of many significant test cases on equality issues, such as a recent historic decision on equal pay for women in the community sector and significant decisions on maternity and parental leave and accommodation of family responsibilities.<sup>25</sup> In contrast, Sara Charlesworth has highlighted the significant failure of anti-discrimination law to protect women in casualised part-time employment in her recent discussion of the case of *New South Wales v Amery*.<sup>26</sup> Any attempt to modernise Australia's anti-discrimination laws would ideally confront the problems associated with the separation of labour law from anti-discrimination laws of general application and improve the intersections between these two frameworks.

## 2. Problems with Federal Laws

Australia's current anti-discrimination laws have made an important contribution to addressing discrimination in Australian society. However, no matter how ground-breaking (or otherwise) they may have been in their time, the laws are outdated and limited in their effectiveness. While Australia's anti-discrimination laws were generally based

on the so called "fault-based" model of anti-discrimination law established in the UK in the 1970s, they have failed to keep pace with reform in the UK and other jurisdictions.<sup>27</sup> Australia's legal framework has been summarised as representing the "fault-based" model by Belinda Smith and Dominique Allen in these terms:

"Australia's laws prohibit discrimination on specific grounds in particular fields. The law characterises discrimination perpetrated by individuals as a wrong and provides victims with a tort like right of complaint. Orders can be made compelling the employer or service provider to compensate a victim but only after the harm has been done and the victim has proven that the employer or service provider caused the harm. The law imposes a negative duty on employers and service providers *not* to discriminate but no other obligations. Duty-holders are not required to do anything unless a finding of fault is made."<sup>28</sup>

This "fault-based" model is generally said to fall within the so called "third generation" of anti-discrimination legislation, modelled on negative duties and an individualistic, adversarial style approach rather than "fourth generation" positive duties and affirmative action.<sup>29</sup> This model is reactive and complaints-based, effectively placing the burden of enforcement against wrongdoers on individuals suffering from discrimination. A number of factors mean that the burden of proving a discrimination case in Australia is simply too heavy for many, already vulnerable, individuals. These factors include, for example, the complexity of the law, particularly the difficulty of applying the tests for discrimination. Smith and Allen use the example of a woman demoted as a result of having taken maternity leave. To claim discrimination, she will be required to identify whether

the detriment (loss of pay or seniority) was a result of different treatment of pregnant workers (direct discrimination) or the different impact of an apparently neutral rule about taking leave (indirect discrimination). The two alternatives would require different kinds of evidence in order to prove them and there remain different defences available to respondents. As Smith and Allen highlight, the scope of protection from direct discrimination has been severely limited, so as to apply only to consistency of treatment without any obligation to accommodate difference; and the ability to seek recourse for indirect discrimination has been stymied due to its interpretation and extraordinary difficulties relating to proof.<sup>30</sup>

After overcoming the definitional complexity, complainants must also meet the heavy burden of proof and the costs of pursuing a matter through the courts, including potential liability for legal costs.<sup>31</sup> Access to free or low cost legal services for complainants is limited, hampered by inadequate funding of legal services and advocacy organisations. Significantly, awards of compensatory damages in discrimination cases are traditionally very low and the potential costs liability for an unsuccessful complainant may represent up to three or four times the potential compensation available for a successful case.<sup>32</sup>

In addition, as Beth Gaze and Simon Rice have observed, the Australian courts have demonstrated a disappointing tendency to give literal, narrow and overly technical readings of the law which are out of touch with the aims and intent of the legislation,<sup>33</sup> although Belinda Smith suggests that a beneficial interpretation may be more likely with a redrafted set of laws.<sup>34</sup> This approach compares unfavourably with more flexible and progressive judicial interpretation in foreign jurisdictions, such as the Court of Justice of

the European Union jurisprudence on sex and pregnancy discrimination. As the Hon Michael Kirby AC CMG has observed:

“[T]he field of anti-discrimination law is littered with the wounded who appear to present the problem of discrimination which the law was designed to prevent and redress but who, following closer judicial analysis of the legislation, fail to hold on to the relief ordinarily granted to them.”<sup>35</sup>

Under this system, there is little pressure on duty-holders to address discrimination proactively, which highlights the second limitation of the Australian model. Federal anti-discrimination law in Australia, with one or two minor exceptions, fails actively to promote equality or address systemic discrimination.<sup>36</sup> Australia’s fault-based approach merely deals with the “symptoms” of systemic problems rather than attempting to create an operating environment in which discrimination is less likely to occur and attempts are made to overcome structural barriers that entrench inequality. Regulation could and should, for example, (i) equip regulators with powers to tackle proactively instances of systemic discrimination and deal with the policies, procedures and practices which cause or perpetuate discrimination (rather than merely resolving single complaints); and (ii) introduce positive duties to promote equality and provide for other positive actions such as special measures and action plans to incentivise and guide duty-holders to eliminate discrimination and promote equality.

A third key failing is the lack of comprehensiveness of federal anti-discrimination law. Currently, federal anti-discrimination law only addresses a small number of grounds of discrimination and does not adequately account for multiple, particularly intersectional, discrimination.<sup>37</sup> Finally, the effective-

ness of federal anti-discrimination laws is compromised by the number and scope of permanent exceptions available to certain entities and individuals in relation to a number of areas of public life and/or activities or conduct.<sup>38</sup> The broad permanent exceptions for religious organisations in the SDA and ADA, ostensibly designed to protect religious freedom, are examples of exceptions which are out of step with international human rights law standards as well as the views of the broader Australian community.<sup>39</sup>

### 3. Recent State-Based Developments

The general equal opportunity legislation found in the States and Territories covers a greater number of protected attributes when compared to the four federal statutes. For example, most States and Territories prohibit discrimination on the grounds of sexual orientation, gender identity, political belief, religious belief and industrial activity.<sup>40</sup> Some more unusual examples are the inclusion of physical features as a protected attribute in Victoria and explicit protection against vilification on the grounds of HIV/AIDS infection in New South Wales.<sup>41</sup>

Nonetheless, these statutes were influenced by federal laws and share many of the flaws described above. However, recent developments in Victoria, Australia's second most populous State and second largest economy after New South Wales, signal the beginnings of a more integrated and comprehensive human rights-based approach to the protection and promotion of equality in Australia. Notably, Victoria is one of two jurisdictions within Australia which boasts some form of statutory human rights protection which includes guarantees of the right to equality before the law and the right to effective protection from discrimination.<sup>42</sup>

The recent Equal Opportunity Act 2010 (Vic) (the 2010 Act) followed a year-long process of independent review and public consultation and was aimed at tackling systemic discrimination and promoting proactive compliance with less reliance on individual complaints.<sup>43</sup> While the 2010 Act falls short of international best practice in many respects, for example, by failing to provide for a shifting onus of proof and retaining broad exceptions for religious organisations,<sup>44</sup> its new features create a framework directed at proactive compliance and positive action. For example, the 2010 Act equipped the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) with a suite of compliance and enforcement powers, including the power to investigate instances of discrimination without the need for an individual complaint, the power to issue compliance notices and the power to enter into enforceable undertakings.<sup>45</sup> The 2010 Act also takes the step of introducing a positive duty on both public and private bodies. The content of the duty is to "eliminate discrimination as far as possible", which is somewhat unusual, however, when compared to the positive duties in other jurisdictions such as the United Kingdom, which apply only to public bodies but require the advancement of equality of opportunity as well as the elimination of discrimination.<sup>46</sup> The "objects" clause of the 2010 Act refers to the promotion of the human right to equality and explicitly acknowledges the link between discrimination and disadvantage.<sup>47</sup> The 2010 Act also explicitly provides for the implementation of special measures where the purpose is to promote or realise substantive equality, reflecting the intention that special measures should be viewed as a means of progressively realising substantive equality.<sup>48</sup> The 2010 Act also introduces a new duty to make reasonable adjustments, but this duty applies only in re-

lation to people with a disability, rather than all protected attributes, and its operation is limited to employment, education and goods and services.<sup>49</sup> It should be noted, however, that a requirement for employers not to refuse unreasonably to accommodate employees' parental or carer responsibilities in relation to their work arrangements was introduced in 2008 and remains in the 2010 Act. The 2010 Act maintains an exhaustive list of protected attributes<sup>50</sup> and the scope of application remains limited to certain spheres of activity.<sup>51</sup> A number of permanent exceptions in the previous legislation were narrowed in, or removed altogether from the 2010 Act. A significant number of permanent exceptions do, however, remain including a potentially broad exception for "things done with statutory authority".<sup>52</sup>

In 2011, a newly elected conservative Victorian Government passed amending legislation which weakened many of the new proposed powers of the VEOHRC and reinstated broad permanent exceptions for religious organisations and schools.<sup>53</sup> Despite this disappointing development, many positive features of the new legislation remain, representing the "high watermark" in Australian anti-discrimination law.<sup>54</sup>

## 4. The Road to Reform

### 4.1 Inquiries into the Reform of Federal Anti-Discrimination Law

#### *Australian Law Reform Commission Inquiry*

A number of inquiries have been undertaken in recent years which have considered aspects of federal anti-discrimination law and options for future reform. In 1993, the Australian Law Reform Commission (ALRC) was tasked with investigating steps that should

be taken "so as to remove any discriminatory effects of laws on or of their application to women with a view to ensuring their full equality before the law".<sup>55</sup> The reference was limited to equality before the law and focused on the SDA. The ALRC identified a number of limitations of the SDA:

- It addresses only individual acts of discrimination within specified fields of activity for which a person may make a complaint;
- It has a limited understanding of equality and it does not take account of the historical and contextual framework of disadvantage;
- It is unable to address the issue of violence against women as discrimination other than within the framework of sexual harassment;
- It is unable to challenge directly gender bias or systemic discrimination in the content of the law;
- It concentrates on the treatment of individuals rather than the effects of laws;
- It cannot strike down rules or laws;
- It exempts areas from its operation; and
- Its protection is activated only by making a complaint.<sup>56</sup>

To respond to these shortcomings, the ALRC recommended the introduction of a legislative guarantee to "equality in law", which would extend to (i) equality before the law, (ii) equality under the law, (iii) equal protection of the law, (iv) equal benefit of the law and (v) the full and equal enjoyment of human rights and fundamental freedoms.<sup>57</sup> Largely modelled on Canada, this guarantee would apply to acts of government and the performance of public functions, powers and duties. It would also override inconsistent laws and enable challenges to be made, in a similar way to the operation of European Union law in relation to the United Kingdom.<sup>58</sup> However, given that the ALRC model otherwise remained premised on individual

complaints as the means of identifying and remedying offending conduct, the “combined Equality Act” ultimately proposed by the ALRC would have only been “more of the same approach”.<sup>59</sup>

Amendments to the SDA introduced in 1995 addressed, to some extent, concerns raised earlier by the ALRC. The amendments included new preambular recognition of equality before the law and the rights to equal protection and equal benefit of the law.<sup>60</sup> The grounds of prohibited discrimination were also expanded to incorporate “potential pregnancy”.<sup>61</sup> The 1995 amendments also sought to clarify the tests for indirect discrimination and special measures.<sup>62</sup>

#### *Senate Inquiry into the Sex Discrimination Act*

In 2008, a parliamentary committee was charged with reviewing the effectiveness of the SDA in eliminating discrimination and promoting gender equality (the 2008 SDA Review). The Senate Standing Committee on Legal and Constitutional Affairs (SSCLCA) further developed the findings of the ALRC review and, in its report (the 2008 SDA Report) made a number of recommendations to improve the effectiveness of the SDA, for example:

- Extending its application to all areas of public life and including a general “equality before the law” clause;
- Removing the qualifying words “as far as possible” from the “objects” clause;
- Extending coverage to men as well as women and expanding the definition of marital status to include same sex couples;
- Reforming the tests for direct and indirect discrimination, including removing the need for a comparator;
- The inclusion of the additional protected attribute of “breastfeeding status” and the

extension of coverage in the area of family responsibilities to include a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements in order to accommodate family or carer responsibilities;

- A number of changes to the complaints and dispute resolution procedures;
- Expanding the litigation intervention, educative and other functions of the federal anti-discrimination regulator; and
- Suggesting amendments to some exceptions and exemptions to the SDA.<sup>63</sup>

In the course of the review, the SSCLCA heard extensive evidence on the deficiencies of the current legal framework from equal opportunity regulators, academics, discrimination lawyers, NGO experts, trade unions and other interest groups. A number of submissions recommended the consolidation and harmonisation of existing laws by developing one consolidated act to deal with all the protected attributes in a single instrument.

The SDA was recently amended in response to some of the recommendations made by the SSCLCA in the SDA 2008 Report. The amendments included the introduction of an express prohibition against direct discrimination (but not indirect) on the basis of family responsibilities in the area of work.<sup>64</sup> Breastfeeding was also established as a separate ground of discrimination.<sup>65</sup> Protections against sexual harassment were also moderately strengthened, for example, by clarifying that sexual harassment via technologies, like mobile telephones and social networking sites, and in schools is unlawful. The federal government, however, deferred most of the SSCLCA’s recommendations to be considered in the context of developing Australia’s Human Rights Framework and consolidating federal anti-discrimination laws.<sup>66</sup>

### *National Human Rights Consultation*

In 2008, the Australian Government commissioned a panel of experts to conduct the most extensive community consultation on human rights ever conducted in Australia. In its 2009 report, the National Human Rights Consultation Committee (NHRC Committee) found that federal anti-discrimination laws go only “part of the way” towards fulfilling Australia’s obligation under international human rights law to prohibit discrimination. The NHRC Committee also noted that a large number of submissions, as well as participants at community roundtables, expressed concern about the inadequacies of the federal anti-discrimination laws.<sup>67</sup> These concerns prompted the NHRC Committee to recommend an audit of all federal legislation, policies and practices to determine compliance with Australia’s international human rights obligations, with priority given to the issue of discrimination.<sup>68</sup> This was one of a series of recommendations designed to strengthen the promotion and protection of human rights in Australia, including the establishment of a national human rights instrument that would provide legally enforceable protection for, among other rights, the right to equality and freedom from discrimination.

### **5. United Nations Commentary**

Australia’s anti-discrimination laws have been widely criticised as falling short of obligations under the international human rights system in a number of areas. For example, in 2009, the United Nations Human Rights Committee, the treaty body responsible for monitoring state parties’ compliance with the International Covenant on Civil and Political Rights, noted that “the rights to equality and non-discrimination are not comprehensively protected in Australia in Federal law”.<sup>69</sup>

The Human Rights Committee recommended that Australia should “adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection for the right to equality and non-discrimination”.<sup>70</sup> Similarly, the UN Committee on Economic, Social and Cultural Rights has recommended that Australia “enact Federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds”.<sup>71</sup> This Committee has also commented that “the State party’s anti-discrimination legislation does not provide comprehensive protection against all forms of discrimination in all areas related to the Covenant rights”.<sup>72</sup> More recently, throughout its Universal Periodic Review before the Human Rights Council, Australia received a number of recommendations regarding the adequacy of its anti-discrimination laws.<sup>73</sup>

Such commentary through United Nations mechanisms serves to underline the importance of enacting laws that effectively address discrimination and promote equality in order to fulfil Australia’s international human rights obligations. These scrutiny mechanisms are particularly important for a country such as Australia which is not engaged in the European or any other regional system.

### **6. The Consolidation Project**

In response to the National Human Rights Consultation, the Australian Government announced a Human Rights Framework in April 2010 (the Framework).<sup>74</sup> Described by one commentator as “icing without the cake”, the Framework failed to deliver a comprehensive human rights act for Australians. It delivered instead a number of measures, such as scrutiny of legislation and investment in human rights education, designed to enhance the protection of human rights

in Australia. Among these was a commitment to consolidate the four federal anti-discrimination laws into a single act (the Consolidated Act). This so-called “Consolidation Project” was also intended to be a vehicle for responding to the remaining recommendations of the 2008 SDA Report and to deliver on an election commitment to introduce new prohibitions on discrimination on the basis of sexual orientation and gender identity.<sup>75</sup>

Despite its grounding in a human rights agenda, the Consolidation Project has been promoted by Australia’s Attorney-General and Minister for Finance as a “better regulation partnership”, designed to reduce regulatory burden for business through simplified and consistent lawmaking.<sup>76</sup> The stated purpose of the project is not to enhance or strengthen protections, or to promote substantive equality, but to “reduce the regulatory burden and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and businesses, particularly small business”.<sup>77</sup> Both the tenor of the initial announcement and the absence of any kind of public consultation process attracted criticism and concern among civil society.<sup>78</sup> The announcement foreshadowed the release of draft legislation without any opportunity for prior public discussion or debate, in contrast with, for example, the 14-year long process of consultation and expert consideration that took place in the United Kingdom. As Simon Rice notes, concern that the approach will “result in different provisions being resolved at the level of the lowest common denominator is heightened by the ominous ‘deregulatory’ rationale for the exercise”.<sup>79</sup> This concern has been alleviated to an extent by an undertaking by the government that the changes would not result in any diminution of existing protections.<sup>80</sup> However, such limited parameters fall disappointingly short

for many that have long campaigned for reform to Australia’s anti-discrimination laws. In the months following the announcement, a number of NGOs authored a joint letter to the responsible minister calling for the terms of the Consolidation Project to be broadened to encompass modernising and strengthening Australia’s anti-discrimination laws and promoting equality rather than pursuing the more limited exercise of consolidating existing laws in the name of deregulation.<sup>81</sup>

More recent developments, both in regard to language and process, have given civil society cause for greater optimism. Public statements have been made by the Australian government in international forums endorsing the object of promoting substantive equality.<sup>82</sup> Most significantly, a discussion paper was released by the Attorney-General’s Department in September 2011 (the Government Discussion Paper) which represented the long awaited commencement of a formal consultation process.<sup>83</sup> The language of the Government Discussion Paper improves upon the more limited wording in previous public statements, stating that the reform process “provides an opportunity to (...) explore opportunities to improve the effectiveness of the legislation to address discrimination and provide equality of opportunity to participate and contribute to the social, economic and cultural life of our community”.<sup>84</sup> The paper offers a welcome discussion of many of the limitations of the current system and options for reform, drawing on international examples and posing a number of questions to guide public comment.

## **7. Priorities for Reform**

This section identifies a number of key priorities relevant to the current consolidation of anti-discrimination laws but does not represent a comprehensive or in-depth analysis

of all the issues and options for reform. For such an analysis, readers are directed to submissions made in relation to the Government Discussion Paper.<sup>85</sup>

## 7.1 Changes to Better Address Individual Instances of Discrimination

### *Definitions*

The definitions of discrimination currently used in federal anti-discrimination laws have been criticised extensively as inconsistent, complex and uncertain.<sup>86</sup> The statutes currently define both “direct” and “indirect” discrimination. As noted in a submission made by a group of Australian discrimination experts, this has “made analysis of complaints cumbersome and distorted as the definition of direct discrimination, and considering the impact of indirect discrimination has always been complex”.<sup>87</sup> The interpretation of the comparator test by the courts in cases of direct discrimination has raised the bar, some would say insurmountably, for complainants, and has led to unpredictable and, at times, absurd and unjust results.<sup>88</sup>

While there are some variations between the definitions of indirect discrimination across the four federal statutes, they generally require an unreasonable condition, requirement or practice which disadvantages members of a group with a protected attribute. Somewhat unusually, compared to other jurisdictions, the DDA and RDA also require an additional element of the complainant not being able to comply with the condition, requirement or practice. Due to the barriers to proving an indirect discrimination claim in practice, protection against indirect discrimination has not actually operated to promote substantive equality. For example, the 2008 SDA Report found that complainants face difficulties in identifying a condition, require-

ment or practice and also in relation to the reasonableness test.<sup>89</sup>

There has been some consideration given to the adoption of a unified definition of discrimination on the basis that the two categories of direct and indirect discrimination are artificial and unnecessarily complicated.<sup>90</sup> However, such a step would be unprecedented among Australian jurisdictions. Currently, the test favoured by discrimination experts is a simplified test which has been drafted to incorporate the concepts of both direct and indirect discrimination. It utilises some wording from existing legislation, but also expressly states that the two forms of discrimination are not mutually exclusive and provides for the general defence of justification to apply to both.<sup>91</sup> The group of discrimination experts referred to above noted in a joint report that whilst direct discrimination was not previously subject to a general exception, and therefore this change could be considered a diminution in protection on its face, in practice the defence of justification should be narrowly construed such that the exceptions from discrimination are no wider than the current enumerated exceptions that it will replace.<sup>92</sup> The drafters will also need to be mindful of the conservatism demonstrated by the Australian courts in past anti-discrimination decisions when considering the likelihood that the defence will be construed more broadly. Perhaps clear explanatory material to future legislation is one way in which the Attorney-General’s Department could seek to mitigate risk. Whatever definition of discrimination is adopted in the Consolidated Act, it is hoped that it will strike the delicate balance of improving on the burdensome complexity of the current models without diminishing the strength of existing protections.

### *Burden of Proof*

Changes to the burden of proof are also a priority for reform and a necessary corollary to changes which simplify the tests for discrimination. Under the tests for direct discrimination contained in all Australian anti-discrimination laws, the burden of proving that the respondent treated the complainant less favourably because of their protected attribute falls entirely on the complainant.<sup>93</sup> This leads to the well-documented difficulty of requiring a complainant to prove the reason for the respondent's conduct where the knowledge is in the hands of the other side and all the evidence is likewise in their possession.<sup>94</sup> A much fairer model would be to shift the burden of proof to the respondent once the complainant has established a *prima facie* case, in line with practice in many other jurisdictions.<sup>95</sup> This would have the added advantage of enabling the law better to deal with discrimination on the ground of multiple attributes. Whilst such reform will remedy a significant deficiency in the current laws, it will be politically challenging to achieve, given the project's focus on reducing regulation and the likelihood for strong resistance by duty-holder lobby groups. The potential for consistency with the shifting burden contained in the discrimination provisions of Australia's industrial laws, however, provides a strong argument in favour of more progressive reform.<sup>96</sup> Such a reform would also align Australian law more closely with the approach taken in the United Kingdom.

### *Intersectional Discrimination*

Whilst there is some capacity under existing laws to deal with claims of discrimination on the ground of multiple attributes, there is a need better to address multiple discrimina-

tion, particularly intersectional discrimination, in the new Consolidated Act. While it may be possible to discuss cases involving intersectional discrimination informally at the initial conciliation stage of a discrimination dispute, complainants experiencing intersectional discrimination face extreme challenges when it comes to particularising and proving the discrimination before a court. Complainants may be deterred from initiating and pursuing their claims at the outset because their experiences of discrimination do not fall neatly within the established categories.<sup>97</sup> For these reasons, discrimination experts and NGOs representing affected communities are advocating for explicit coverage of intersectional discrimination in the Consolidated Act.

### *Broadening the Coverage of Anti-Discrimination Law*

Presently, federal anti-discrimination laws prohibit discrimination on the basis of race, sex (including pregnancy, marital status and family responsibilities), disability and age.<sup>98</sup> State and Territory laws provide for coverage of a greater number of protected attributes, albeit not yet compliant with international human rights law.<sup>99</sup> The Australian Government has committed to extending protections to the grounds of sexual orientation and gender identity, but the reform process also presents the opportunity to broaden coverage to a greater number of attributes. In its submission to the Government Discussion Paper, the Human Rights Law Centre (HRLC) recommended a non-exhaustive list of attributes including specific protection for certain attributes afforded protection under international law, such as holding a criminal record, social status, status as a victim of family violence, religious activity or belief, political activity or belief, trade union membership or industrial activity and other

status.<sup>100</sup> Advocates representing intersex individuals are also concerned to ensure that intersex status is afforded protection under the new Consolidated Act and not merely inappropriately subsumed under the category of gender identity.

### *Litigation Costs*

The federal laws currently provide no special protection from the risk of adverse costs orders in discrimination matters, beyond the general discretion of judges with regards to costs. This presents a significant barrier to access to justice, especially for victims of discrimination who, due to their vulnerability and financial situation, tend to be risk-adverse.<sup>101</sup> When faced with the risk of an adverse costs order, many complainants shy away from litigation and choose, instead, to settle their complaints at the conciliation stage. Settlements reached at conciliation often fail to reflect the seriousness of the discriminatory conduct in dispute.

In a 2004 report on the efficacy of the DDA, Australia's Productivity Commission recommended that parties should be required to bear their own costs, subject to discretion to award costs in accordance with statutory guidelines that had been developed for the family law jurisdiction.<sup>102</sup> A number of NGOs representing affected communities have renewed these calls for a no-costs federal jurisdiction for discrimination complaints during this consultation phase of the Consolidation Project. However, a no-costs jurisdiction does not remove the difficulties faced by complainants unable to fund litigation in the face of the prospect of a very low award of damages which is likely to be significantly less than their legal fees. A more generous scheme providing for (i) higher and more appropriate awards of compensatory damages, (ii) reforms to the rules around protective costs orders, and (iii) increased funding for

legal services for discrimination complainants needs to accompany any reform to the rules around costs in the federal anti-discrimination jurisdiction.

## **7.2 Tackling Systemic Discrimination and Promoting Equality**

### *Positive Duty*

As discussed above, Australia's federal anti-discrimination laws are currently reactive and complaint-based. Enforcement relies on individual victims bringing their discrimination complaints before the Australian Human Rights Commission (AHRC) and the courts. Hence, the laws act as a deterrent to discriminatory conduct, rather than actively promoting equality.

Bringing Australia into line with "fourth generation" equality laws requires the imposition of a positive duty to tackle discrimination and promote equality, consistent with South Africa, United Kingdom, Canada and the United States,<sup>103</sup> although Australia should aspire to learn from the limitations of these reforms rather than simply emulate foreign jurisdictions.<sup>104</sup> The attraction of a positive duty is that it is proactive rather than reactive. It shifts some of the burden from complainants to duty-holders, who must take positive steps to ensure that their conduct and practices contribute to equality and inclusiveness.

While the imposition of a positive duty on the public sector is currently under consideration as part of the Consolidation Project, there appears to be a reluctance to impose positive duties on the private sector. NGOs, and civil society more broadly, are likely to continue to argue for a broad positive duty applicable to both private and public bodies, particularly as the positive duty to eliminate

discrimination as far as possible contained in the 2010 Act in Victoria<sup>105</sup> has come into effect without any evidence of adverse effects or unintended consequences to date. It remains to be seen whether there will be political appetite for such a step in light of the concern expressed by business groups.<sup>106</sup>

### *Special Measures*

Special measures are “positive measures intended to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing group members into the mainstream of political, economic, social, cultural and civil life.”<sup>107</sup>

At present, federal anti-discrimination laws suffer from a number of deficiencies with respect to special measures. First, they adopt inconsistent approaches to the nomenclature and scope of permissible special measures. Further, aside from the SDA, each of the federal anti-discrimination acts currently treats a special measure as a special kind of “exception” to unlawful discrimination, rather than conceiving of special measures as positive measures for the promotion of equality. The laws also fail to take account of the international legal requirement to engage in consultation and obtain the consent of the affected group.<sup>108</sup> Reform is needed to simplify and harmonise the different approaches to special measures and to ensure consistency with the international legal principles.

### *Powers of the Commission*

At present the AHRC has limited functions and powers to effect compliance and enforcement of federal anti-discrimination law. The AHRC’s current inquiry functions are limited to government activities, but should be expanded so that it may investi-

gate human rights concerns across all States and Territories, including in the private sector. The AHRC should be able to initiate and pursue such investigations on its own motion, rather than merely on the basis of a particular complaint. This would enable the AHRC to address more effectively systemic discrimination and relieve the burden that is currently placed on individual complainants. To ensure that such investigations lead to a real change, investigative powers would need to be accompanied by additional enforcement options, such as the options contained in the 2010 Act introduced in Victoria discussed above. The current reform process should consider the range of options available, drawing on best practice and experience in other jurisdictions, to ensure that the AHRC is equipped with a suite of compliance and enforcement powers that enable it to undertake activities which effectively tackle systemic discrimination. Any concerns regarding conflicts or perceptions of conflict – as between the roles of the AHRC as conciliator and/or mediator and its enforcement role – could be adequately addressed through confidentiality protocols.

### *Representative Proceedings*

Broadening the scope for parties to bring representative complaints is another proposal that would help to alleviate the burden currently placed on individual complainants. Although the Australian Human Rights Commission Act 1986 (Cth) permits representative complaints, a representative will not have standing before a federal court unless it is independently “aggrieved” by the alleged discriminatory conduct – the precondition necessary in order to meet the relevant definition of an “affected person”.<sup>109</sup> The situation is further complicated by legislation governing the Federal Court of Australia,<sup>110</sup> which provides that only a person

who has a “sufficient interest” to commence a proceeding against the respondent on his or her own behalf has standing to bring a representative proceeding.

Reform is therefore needed in order to enable public interest organisations to commence and pursue discrimination proceedings on behalf of aggrieved persons, particularly where the claim involves a systemic problem and the organisation has a demonstrated legitimate interest in the subject matter of the complaint.

## 8. The Importance of Process

As discussed above, the absence of a formal process for nearly 18 months following the announcement of the Consolidation Project was a source of concern for many within civil society. HRLC convened a number of roundtables in partnership with the Australian Human Rights Commission which took place in 2010. A gender specific roundtable was also held by the Equality Rights Alliance, an organisation that had been active in co-ordinating NGO engagement in relation to the 2008 SDA Review. These events enabled NGOs to develop their thinking and positions on specific issues and to co-ordinate lobbying and campaigning activities in the absence of a formal process.

A dedicated website, established by HRLC in May 2011, has also facilitated NGO engagement, discussion and debate around the reforms taking place in Australia<sup>111</sup>. The “online hub” provides a repository of resources and background information for NGOs, as well as a means of disseminating submissions and news about developments in the reform process, hopefully raising the profile of the reforms and levels of public scrutiny regarding their development. The website also features “guest blogs” from discrimi-

nation experts, advocates and users of the anti-discrimination law system to encourage debate and discussion on specific issues raised by the reforms. An email distribution list, twitter feed and discussion board provide interactive elements to further facilitate information-sharing between NGO’s.

HRLC convened a significant agenda-setting national conference in July 2011 to discuss the reform of Australia’s equality laws and best practice models and frameworks for promoting equality.<sup>112</sup> The conference attracted 100 advocates, lawyers, academics, community leaders and policy-makers, including the government officers responsible for developing the new Consolidated Act. Speakers included international expert Dr Dimitrina Petrova of The Equal Rights Trust, leading UK experts Kate Pickett and Richard Wilkinson, as well as domestic legal and other experts, a Government Minister, tribunal members, leaders and advocates from affected communities and representatives from equal opportunity regulators. Importantly, representatives from leading corporations were able to pitch the “business case” for equality and speak of the value of diversity to their workforce and business practices. The conference was useful in building (i) support for more ambitious reforms to enhance, rather than merely consolidate, existing laws, and (ii) consensus around some of the key issues. NGO meetings were held around the time of the conference to provide opportunities for more detailed discussion among civil society and attendees were able to draw on the expertise of international guest Dimitrina Petrova to enable NGO input on domestic equality law reform to be informed by comparative experience, evidence and best practice.

Following the release of the Government Discussion Paper in September 2011, the

Attorney-General's Department also held a number of multi-stakeholder forums and NGO meetings to consult with interested parties and receive feedback on the Government Discussion Paper. The meetings provided a useful opportunity to speak directly to government representatives regarding concerns or queries raised by the Government Discussion Paper and express views on the questions posed within.

## 9. Where To From Here?

At the time of writing, submissions were due on the Government Discussion Paper in a matter of weeks. Exposure legislation is expected to be released in early 2012 and introduced into Parliament in the second

half of the year. The new bill may face an uncertain political environment due to the Labour Government's status as a minority government. This means the passage of the bill will be dependent on the support of a small number of independent and minority party representatives. Given the growing consensus on both the social and economic benefits of equality and the need to tackle systemic discrimination, however, it can only be hoped that principled leadership on this issue will prevail and that the Australian government can achieve a well-resourced, comprehensive system of prevention, regulation, enforcement and monitoring of discrimination and equality – just as they have achieved in many other areas of public policy.

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1 Anna Brown is the Director of Advocacy and Strategic Litigation at the Human Rights Law Centre (HRLC), an independent, not-for-profit, non-governmental organisation which seeks to protect and promote human rights in Australia. The author is grateful to Rachel Brown and Emma Purdue for their valuable input into this article and to the anonymous peer reviewers for their helpful comments.

2 Smith, B. and Allen, D., "Whose Fault Is It? Asking the Right Question When Trying To Address Discrimination", *Alternative Law Journal*, Vol. 37(1), 2012, pp. 30-34.

3 By all social indicators, Aboriginal and Torres Strait Islander peoples rate as among the most disadvantaged peoples in Australia, rating far worse than any others in education, employment, health, standard of living and incidence of family violence. They are also grossly over-represented in the child protection and criminal justice systems. The disparity in life expectancy is very significant: Aboriginal and Torres Strait Islander peoples' life expectancy is 12 years less for males and 10 years less for females than that of their non-Aboriginal and Torres Strait Islander counterparts.

4 For a more detailed analysis of key gender issues in Australia, see Australian Human Rights Commission, *2010 Gender Equality Blueprint*, June 2010, available at: [http://www.hreoc.gov.au/sex\\_discrimination/publication/blueprint/Gender\\_Equality\\_Blueprint.pdf](http://www.hreoc.gov.au/sex_discrimination/publication/blueprint/Gender_Equality_Blueprint.pdf).

5 The negative health and social consequences of race discrimination have been documented by social research conducted in the Australian State of Victoria. See, for example, VicHealth et al, *Building on our strengths: A framework to reduce race based discrimination and support diversity in Victoria: Addressing the social and economic determinants of mental health and well-being*, November 2009, available at: <http://www.vichealth.vic.gov.au/Publications/Free-from-discrimination/Building-on-our-strengths.aspx>.

6 Leigh, A. and Booth, A., *Does Racial and Ethnic Discrimination Vary Across Minority Groups? Evidence from Three Experiments*, Australian National University, 2010, available at: <http://andrewleigh.org/pdf/AuditGender.pdf>.

7 See, for example, Poynting, S., *Living with Racism: The Experience and Reporting by Arab and Muslim Australians of Discrimination, Abuse and Violence Since 11 September 2011: Report to the Human Rights and Equal Opportunity Commission*, 2004, available at: [http://www.hreoc.gov.au/racial\\_discrimination/isma/research/UWSReport.pdf](http://www.hreoc.gov.au/racial_discrimination/isma/research/UWSReport.pdf); and Islamic Women's Welfare Council of Victoria Inc, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria: The Ongoing Impact of September 11, 2001*, 2008, available at: [http://www.islamicwomenswelfare.org.au/files/iwwcv\\_race\\_faith\\_report.pdf](http://www.islamicwomenswelfare.org.au/files/iwwcv_race_faith_report.pdf).

8 During Australia's Universal Periodic Review before the United Nations Human Rights Council, India expressed its concern over the safety and well-being of Indian students in the country, and expressed the hope that the Australian Government would ensure the safety of all in the country. Australia accepted a recommendation to implement additional measures to combat discrimination against "foreign students (essentially coming from India)". See UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/17/10, 2011, Para 44 and Recommendation 65.

9 The Australian Government recently enacted reforms which amended 85 Commonwealth laws to eliminate discrimination against same-sex couples and their children in a wide range of areas, including social security, taxation, Medicare, veteran's affairs, workers' compensation, educational assistance, superannuation, family law and child support. Significant issues affecting transgender and intersex Australians remain unaddressed.

10 See, for example, Joint Working Group of the Attorney-General's and Health Minister's Advisory Committees on Gay, Lesbian, Bi-sexual, Transgender and Intersex Issues, *With Respect: A Strategy for Reducing Homophobic Harassment in Victoria*, November 2011, available at: [http://www.also.org.au/about/what\\_we\\_do\\_1/projects/wrap/with\\_respect](http://www.also.org.au/about/what_we_do_1/projects/wrap/with_respect).

11 Ryan, S. (Age Discrimination Commissioner), *Tackling Age Discrimination in the Labour Market: The Role of the Australian Human Rights Commission*, 13 December 2011, Speech presented at Older Workers and Workability Conference, available at: [http://www.hreoc.gov.au/about/media/speeches/age/2011/20111213\\_workability.html](http://www.hreoc.gov.au/about/media/speeches/age/2011/20111213_workability.html).

12 Although efforts to harmonise the multiple and varying State and Territory equal opportunity laws have been sitting with a national committee of Attorneys-General for a number of years without report of any progress.

13 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX) (1965).

14 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (1979) (CEDAW).

15 These include the International Labour Organisation Convention No. 111 concerning Discrimination in Respect of Employment and Occupation; the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI) (1966); the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (1966); and a number of related declarations (see Second Reading Speech, Disability Discrimination Act (Cth), Commonwealth Parliament, House of Representatives, Official Hansard, 26 May 1992, delivered by the Hon Brian Howe, Minister for Health, Housing and Community Services).

16 Convention on the Rights of Persons with Disabilities, G.A. Res. A/RES/61/106 (2007).

17 Second Reading Speech, Age Discrimination Act 2004 (Cth), Commonwealth Parliament, House of Representatives, Official Hansard, 26 June 2003, 17623 (Attorney-General, the Hon Daryl Williams).

18 Sex Discrimination Act 1984, section 3.

19 See, for example, a submission which noted that the qualification is not consistent with CEDAW and the words result in a "qualified commitment to international obligations, which is inappropriate in respect to an Act of such importance": Australian Human Rights Commission, *Submission to Senate Legal and Constitutional Affairs Committee, Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act*, 2008, p. 102.

20 Anti-Discrimination Act 1977 (New South Wales); Equal Opportunity Act 1984 (South Australia); Equal Opportunity Act 1984 (Western Australia); Anti-Discrimination Act 1991 (Queensland); Discrimination Act 1991 (Australian Capital Territory); Anti-Discrimination Act 1996 (Northern Territory); Anti-Discrimination Act 1998 (Tasmania); Equal Opportunity Act 2010 (Victoria).

21 Rees, N., Lindsay, K. and Rice, S., *Australian Anti-Discrimination Law: Texts, Cases and Materials*, The Federation Press, 2008, p. 3.

22 Rice, S., "And Which 'Equality Act' Would that Be?", in Thornton, M. (ed.), *Sex Discrimination in Uncertain Times*, ANU E Press, 2010, p. 210.

23 *Ibid.*

24 Fair Work Act 2009, Part 3-1.

25 See, for example, *Australian Municipal, Administrative, Clerical and Services Union and others (C2010/3131) v Australian Business Industrial (AM2011/50)* [2012] FWA 1000.

26 [2006] HCA 14; and Charlesworth, S., "Law's Response to the Reconciliation of Work and Care: the Australian Case", in Busby, N. and Grace, J. (eds.), *Families, Care-giving and Paid Work: Challenging Labour Law in the 21<sup>st</sup> Century*, Edward Elgar Publishers, 2011, p. 94.

27 For discussion of the fault-based model, see Fredman, S., "Changing the Norm: Positive Duties in Equal Treatment Legislation", *Maastricht Journal of European and Comparative Law*, Vol. 12, 2005, pp. 369-398.

28 See above, note 2, p. 35.

29 See, for example, McLaughlin, E., "From Negative to Positive Equality Duties: The Development and Constitutionalisation of Equality Provisions in the UK", *Social Policy and Society*, Vol. 6(1), 2007, p. 112.

30 See above, note 2, p. 34.

31 See above, note 22, pp. 201-202.

32 See above, note 21, p. 8; and Schulman, J., "David and Goliath Battle over Disability Discrimination", *ABC The Drum*, 2 November 2011, available at: <http://www.abc.net.au/unleashed/3625988.html>.

33 Gaze, B., "Context and Interpretation in Anti-Discrimination Law", *Melbourne University Law Review*, Vol. 26, 2002, pp. 332-333; and see above, note 22, pp. 203-204.

34 Smith, B., "Rethinking the Sex Discrimination Act: Does Canada's Experience Suggest We Should Give Judges a Greater Role?", in Thornton, M. (ed.), above note 22, p. 214.

35 *X v Commonwealth (1999)* 200 CLR 177 at 213.

36 See, for example, Senate Legal and Constitutional Affairs Committee, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, December 2008.

37 Multiple (or compounded) discrimination occurs when a person or group is discriminated against on more than one ground; for example, where an Indigenous woman is discriminated against on the basis of her sex and her race, her experience of discrimination is different from both Indigenous men and non-Indigenous women so may not be redressed by either sex or race discrimination law.

38 For example, under the Sex Discrimination Act 1984 (Cth), any clubs without a liquor licence (by virtue of the definition of club in section 4), religious bodies (sections 23, 27 and 38) and charities (section 36) are permanently exempt from the operation of the legislation.

39 Age Discrimination Act 2004, section 35; and Sex Discrimination Act 1984, section 37. Both provisions exempt any acts or practices of a body established for religious purposes that conforms to the doctrines, tenants or beliefs of the relevant religions or are necessary to avoid injury to the religious sensitivities of adherents of that religion.

40 These attributes are drawn in differing terms in different jurisdictions. For example, some jurisdictions use terms such as "homosexuality" and "transgender" (see, for example, Anti-Discrimination Act 1977 (NSW), Part 3A and Part 4C) whereas others have adopted broader terms such as "sexual orientation" and "gender identity" (see, for example, Equal Opportunity Act 2010 (Vic), section 6).

41 See Equal Opportunity Act 2010 (Vic), section 6; and Anti-Discrimination Act 1977 (NSW), sections 49ZXB and 49ZXC.

42 See Charter of Human Rights and Responsibilities Act 2006 (Vic), section 8. The other (and first) statute was the Human Rights Act 2004 (Australian Capital Territory), enacted in a much smaller jurisdiction and not a full State.

43 According to the website of the Department of Justice, Victoria, Australia (available at: <http://www.justice.vic.gov.au/home/your+rights/equal+opportunity/justice++equal+opportunity+review++documents>), the stated aims of the Equal Opportunity Act 2010 (the 2010 Act) were as follows:

- changing the Commission from a complaints handling body to one that educates and facilitates dispute resolution, best practice and compliance;
- giving the Commission more effective options to respond to systemic discrimination;
- encouraging best practice and proactive compliance by duty holders without reliance on individual complaints;
- providing a more effective and efficient system for resolving disputes;
- removing legal and technical barriers to the elimination of discrimination; and
- clarifying, updating and amending certain exceptions to unlawful discrimination.

44 See Equal Opportunity Act 2010 (Vic), sections 82 and 83 (religious exceptions). This Act is silent on the issue of the burden of proof but the laws relating to evidence and civil procedure provide for the onus to fall on the complainant except where otherwise stated.

45 These powers were, however, altered and/or removed by later amendments discussed below.

46 Compare with Part 11, Chapter 1 (Public sector equality duty) of the British Equality Act 2010.

47 2010 Act, section 3.

48 2010 Act, section 12; see also Victorian Parliament, *Equal Opportunity Bill 2010: Explanatory Memorandum*, p. 14, available at: [http://www.austlii.edu.au/au/legis/vic/bill\\_em/eob2010260/eob2010260.html](http://www.austlii.edu.au/au/legis/vic/bill_em/eob2010260/eob2010260.html). It is worth noting that the previous legislation classified special measures as an exception to discrimination.

49 Under section 7 of the 2010 Act, discrimination means "direct or indirect discrimination on the basis of an attribute". In addition, the meaning of discrimination now includes a contravention of the duty to make reasonable adjustments for people with a disability or reasonable alterations to common property. A breach of such a duty will constitute discrimination without the additional need to prove direct or indirect discrimination under the 2010 Act.

50 2010 Act, section 6. The attributes are age, breastfeeding, disability, employment activity, gender identity, industrial activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, race, religious belief/activity, sex, sexual orientation and personal association with someone who has, or is assumed to have, any of the characteristics.

51 Compared to, for example, Principle 8 of the Declaration of Principles on Equality which provides that “[t]he right to equality applies in all areas of activity regulated by law”. (See *Declaration of Principles on Equality*, published by The Equal Rights Trust, London 2008, p. 8.) Notably, administration of justice remains a significant gap in terms of coverage and, despite recommendations to include the additional attributes of irrelevant criminal record and homelessness, the 2010 Act did not extend protections to these groups.

52 2010 Act, section 75.

53 The Equal Opportunity Amendment Act 2011 (Vic) (EOAA) reinstated broad permanent exceptions for religious bodies and schools (sections 18 and 19 of the EOAA amended section 82 of the 2010 Act), and weakened the powers of the Victorian Equal Opportunity and Human Rights Commission by, *inter alia*, removing the power to conduct public inquiries, altering its power to investigate systemic discrimination and removing the power to issue compliance notices (section 21 of EOAA replaced Part 9 of the 2010 Act).

54 For further discussion of the Victorian reforms, see Forsyth, A., “The Human Right to Equality”, *Law Institute Journal*, Vol. 85(10), 2011, p. 36.

55 Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report No. 69, 1994, Part I, p. xv, available at: [http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC69\\_Pt1.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC69_Pt1.pdf).

56 *Ibid.*, Para 4.5.

57 *Ibid.*, Para 4.20.

58 *Ibid.*, Para 4.21.

59 See above, note 22, p. 200.

60 See preamble of the Sex Discrimination Act 1984 (Cth) (reprint as at 10 April 1996) inserted by section 3 of the Sex Discrimination Amendment Act 1995 (Cth).

61 See section 7 of the Sex Discrimination Act 1984 (Cth) (reprint as at 10 April 1996) amended by section 3 of the Sex Discrimination Amendment Act 1995 (Cth).

62 See section 7B (indirect discrimination: reasonableness test) of the Sex Discrimination Act 1984 (Cth) (reprint as at 10 April 1996) amended by section 3 of the Sex Discrimination Amendment Act 1995 (Cth) and section 7D (special measures intended to achieve equality) of the Sex Discrimination Act 1984 (Cth) (reprint as at 10 April 1996) amended by section 3 of the Sex Discrimination Amendment Act 1995 (Cth).

63 For the complete set of recommendations, see: Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008 SDA Report), 2008, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=legcon\\_ctte/sex\\_discrim/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/sex_discrim/report/index.htm).

64 Sex Discrimination Act 1984 (Cth), section 7A.

65 *Ibid.*, section 7AA, as inserted by Sex and Age Discrimination Legislation Amendment Act 2011 (Cth), section 17.

66 The Parliament of the Commonwealth of Australia, House of Representatives, *Sex and Age Discrimination Legislation Amendment Bill 2010: Explanatory Memorandum*, p. 1, available at: [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4459\\_ems\\_c086303d-5577-4466-8aaf-8f99dccc7685%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4459_ems_c086303d-5577-4466-8aaf-8f99dccc7685%22).

67 National Human Rights Consultation Committee, *National Human Rights Consultation Report*, September 2009, pp. 114-115, available at: [http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReportDownloads](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads).

68 *Ibid.*, Recommendation 4, p. xxx.

69 UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc. No. CCPR/C/AUS/CO/5, 2009, Para 12.

70 *Ibid.*

71 Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc. No. E/C.12/AUS/Co, 2009, Para 14.

72 *Ibid.*

73 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc. No. A/HRC/17/10, 2010, Paras 86.23, 86.24, 86.41, 86.42, 86.44, 86.45, 86.46, 86.57, 86.59 and 86.98.

74 Commonwealth of Australia: Attorney-General's Department, *Australia's Human Rights Framework*, 2010, [http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/HumanRightsFramework\[1\]PDF.pdf](http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/HumanRightsFramework[1]PDF.pdf).

75 This election commitment followed a series of reforms undertaken by the Labour Federal Government in its previous electoral term which amended 85 Commonwealth laws to eliminate discrimination against same-sex couples and their children in a wide range of areas, including social security, taxation, Medicare, veteran's affairs, workers' compensation, educational assistance, superannuation, family law and child support. The election commitment was shared by the Coalition opposition.

76 McClelland, R. MP (Attorney-General) and Tanner, L. MP (Minister for Finance and De-Regulation), *Reform of Anti-Discrimination Legislation*, 21 April 2011, available at: [http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/page/MediaReleases\\_2010\\_SecondQuarter\\_21April2010-ReformofAnti-DiscriminationLegislation.html](http://pandora.nla.gov.au/pan/21248/20100723-1500/www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/page/MediaReleases_2010_SecondQuarter_21April2010-ReformofAnti-DiscriminationLegislation.html).

77 *Ibid.*

78 See for example, Ball, R., "Addressing the Equality Deficit", *Human Rights Law Centre E-Bulletin*, 25 February 2011, available at: <http://www.hrlc.org.au/content/topics/equality/opinion-addressing-the-equality-deficit-25-feb-2011/>; see also above note 22, p. 210.

79 See above, note 22, p. 211.

80 Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, 2011, p. 9, available at: <http://www.ag.gov.au/Documents/Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.pdf>.

81 Joint Letter to Attorney-General Robert McClelland, dated 5 August 2010, from Rachel Ball of HRLC and co-signed by 21 NGO representatives, available at: <http://www.equalitylaw.org.au/elrp/about/>.

82 For example, see Australia's response to Recommendation 42 made by the United Kingdom during the Universal Periodic Review in which the Government accepted a recommendation to "ensure that its efforts to harmonise and consolidate Commonwealth anti-discrimination laws address all prohibited grounds of discrimination and promote substantive equality": Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia: Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, UN Doc. No. A/HRC/17/10/Add.1, Para 4.

83 See above, note 80.

84 *Ibid.*, p. 5.

85 Copies of submissions, including the HRLC's submission, *Realising the Right to Equality: the Human Rights Law Centre's Recommendations for the Consolidation and Reform of Commonwealth Anti-Discrimination Law*, are available at: <http://www.equalitylaw.org.au/elrp/submissions/>, and the website of the Attorney-General's Department: <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx>.

86 See above, note 82, p. 9; see also above note 63, Para 11.12.

87 Discrimination Law Experts' Roundtable, *Report on Recommendations for a Consolidated Federal Anti-Discrimination Law in Australia*, 31 March 2011, p. 6.

88 As noted by the discrimination experts, as a result of the decision in *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 (a court's decision on whether a comparator must have the attribute-related features of the complainant), the requirement of a comparator proves both conceptually and practically difficult, for example, in cases where there is no suitable comparator such as those concerning pregnancy, breastfeeding or disability.

89 See above, note 63, Para 3.27.

90 See above, note 80, p. 44; see also evidence given by the New South Wales Bar and Law Council of Australia, cited in the 2008 SDA Report, above note 63, Para 3.13.

91 Discrimination Law Experts' Group, *Consolidation of Commonwealth Anti-Discrimination Laws Submission*, 11 December 2011, pp. 9-10.

92 *Ibid.*, p. 10.

93 In the case of indirect discrimination, a number of laws provide for a shifting of the burden to the respondent (to prove that the condition was reasonable) once a complainant has established that a condition, requirement or practice has a discriminatory impact. Specifically, the Age Discrimination Act 2004 (Cth) and the Anti-Discrimination Act 1991 (Qld) were enacted with a requirement that the respondent bears the onus of proving reasonableness in an indirect discrimination complaint. The Sex Discrimination Act 1984 and the Disability Discrimination Act 1992 have been amended (Sex Discrimination Amendment Act 1995 (Cth), section 3; and Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth), Schedule 2).

- 94 For a comprehensive analysis of the difficulties of proving discrimination complaints in Australia, please see Allen, D., "Reducing the Burden of Proving Discrimination in Australia", *Sydney Law Review*, Vol. 39, 2009, pp. 580-605.
- 95 As is the case in the United Kingdom, the European Union and Canada.
- 96 See above, note 87, p. 9. According to the Discrimination Law Experts, the shifting onus has a "long and unremarkable history in Australian industrial law and continues in ss 361 and 782 of the FWA".
- 97 See Gaze, B., *Submission to the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, Undated, Submission No 50 to 2008 SDA Review, p. 2, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=legcon\\_ctte/sex\\_discrim/submissions/sublist.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/sex_discrim/submissions/sublist.htm).
- 98 In addition, a complaints stream is provided for under the Australian Human Rights Commission Act 1986 (Cth) which is designed to give effect to Australia's obligations under the International Labour Organisation Convention No.111 in which complaints of discrimination in employment under a number of grounds are able to be conciliated by the Australian Human Rights Commission and a report made to the Attorney-General who must table a report in Parliament. However, complainants cannot access a court process to enforce their rights or access any other form of redress.
- 99 For example, neither social status nor homelessness is a protected attribute under any State or Territory anti-discrimination legislation. See Human Rights Law Centre, *Realising the Right to Equality: Submission to the Government Discussion Paper on the Consolidation of Anti-Discrimination Laws*, January 2012, available at: <http://www.equalitylaw.org.au/elrp/submissions/>.
- 100 *Ibid.*, p. 19.
- 101 Productivity Commission, *Review of the Disability Discrimination Act 1992*, 2004, p. 369.
- 102 *Ibid.*, Recommendation 13.4, p. 396.
- 103 See, for example, Equality Act 2010 (UK), Part 11, Chapter 1: Northern Ireland Act 1998 (UK), section 75 and Schedule 9; Fair Employment and Treatment (NI) Order 1998 (UK); Employment Equity Act 1998 (South Africa); Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (South Africa), section 5; Employment Equity Act 1995 (Canada); and Executive Order 11246 – Equal Employment Opportunity 1965 (USA).
- 104 For a detailed discussion of the various UK equality duties including their weaknesses and limitations, see Hepple, B., "The New Single Equality Act in Britain", *The Equal Rights Review*, Vol. 5, 2010, pp. 18-21.
- 105 2010 Act, Part 3.
- 106 For example, the Australian Chamber of Commerce and Industry expressed concern about imposing a positive duty on the private sector to eliminate discrimination and promote equality. See above, note 63, p. 120.
- 107 Cook, R., "Obligation to Adopt Temporary Special Measures under the Convention on the Elimination of all Forms of Discrimination against Women", in Boerefijn I. et al (eds.), *Temporary Special Measures: Accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women*, Transnational Publishers, 2003, p. 119.
- 108 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, UN Doc. No. CERD/C/GC/32, 2009.
- 109 Australian Human Rights Commission Act 1986 (Cth), section 46PO(1).
- 110 Federal Court of Australia Act 1976 (Cth), section 33D(1).
- 111 See [www.equalitylaw.org.au](http://www.equalitylaw.org.au).
- 112 The HRLC was able to convene the conference and establish the dedicated website with financial assistance from the Attorney-General's Department.