



## **Consolidation of Anti-discrimination Laws**

**Submission to Australian Government Attorney-General's Department**

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## **Contents**

Introduction.....	<b>1</b>
Part I – Definition(s) of Discrimination.....	<b>2</b>
Part II – Burdens on Complainants.....	<b>11</b>
Part III – Exemptions and Exceptions.....	<b>17</b>
Conclusion.....	<b>24</b>
Summary of Recommendations.....	<b>Attachment</b>

## Introduction

1. The Castan Centre thanks the Attorney-General's Department for the opportunity to comment on its project to consolidate the Commonwealth anti-discrimination laws.
2. The Centre welcomes the Government's initiative to harmonise and clarify the existing laws, but we urge the Government to do more than just maintain existing protections, because, as this submission seeks to demonstrate, the current law is not as effective as it could be in promoting equality.
3. Given that others' expertise will allow them to answer more comprehensively the questions in the discussion paper relating to the functioning of the current anti-discrimination legislation, we have chosen to focus our comments on areas in which we believe the law is out of step with international law and/or best practice in other countries. In particular we wish to highlight:
  - i. the definition(s) of discrimination including protected attributes;
  - ii. evidentiary and other burdens on complainants, and
  - iii. the scope of exemptions and exceptions (including special measures).
4. In this context, the submission addresses the issues raised by questions 1-3, 7-10 and 20-27.
5. Broadly speaking, the Centre believes that the Commonwealth anti-discrimination law needs to be strengthened significantly in order to achieve its object of eliminating discrimination.
6. Overly technical definitions of the various types of discrimination, unfair burdens on complainants and broad exemptions/exceptions are all factors which undermine the ability of the anti-discrimination legislation to achieve its goals. As such, we recommend these areas be addressed as a matter of priority in drafting the consolidation Bill.

## Part I – Definition(s) of Discrimination

### Background

7. Under the International Covenant on Civil and Political Rights (ICCPR) of 1966,<sup>1</sup> Australia is obliged to guarantee to all persons within its territory and subject to its jurisdiction 'equal and effective protection against discrimination on any ground.'<sup>2</sup> The ICCPR also provides specifically for the protection of minors from discrimination.<sup>3</sup> In addition, Australia is party to the Convention on the Elimination of All Forms of Racial Discrimination of 1966 (CERD)<sup>4</sup> and the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW).<sup>5</sup> As their titles indicate, these multilateral treaties aim to eliminate discrimination on the basis of race and discrimination against women.
8. If a new definition of discrimination is to be adopted in Australia, it must be consistent with the object of these anti-discrimination provisions in international law – ie to work towards the elimination of discrimination in all its forms. As such, the Centre advocates a broad definition, encompassing not only the concepts of direct and indirect discrimination as they exist in the current legislation, but also a wide range of protected attributes.
9. The Centre notes that the 2008 Parliamentary review of the effectiveness of the *Sex Discrimination Act 1984* (Cth) (SDA)<sup>6</sup> specifically recommended:

...that the Act be amended by inserting an express requirement that the Act be interpreted in accordance with relevant international conventions Australia has ratified including CEDAW, ICCPR, ICESCR and the ILO conventions which create obligations in relation to gender equality.<sup>7</sup>

We echo this recommendation in respect of the proposed consolidated Act to encourage interpretation with Australia's human rights obligations in mind.

### Current Law

10. Under the *Disability Discrimination Act 1992* (Cth) (DDA), the *Age Discrimination Act 2004* (Cth) (ADA) and the SDA, direct discrimination is determined according to the

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<sup>1</sup> 999 UNTS 181, entry into force 23 March 1976 (for Australia 13 November 1980).

<sup>2</sup> Ibid, article 26.

<sup>3</sup> Ibid, article 24(1).

<sup>4</sup> 660 UNTS 195, entry into force 4 January 1969 (for Australia 30 October 1975).

<sup>5</sup> 1249 UNTS 13, entry into force 3 September 1981 (for Australia 27 August 1983).

<sup>6</sup> Effectiveness of the *Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality, December 2008, available at:

[http://www.aph.gov.au/senate/committee/legcon\\_ctte/sex\\_discrim/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/report.pdf).

<sup>7</sup> Ibid, Recommendation 3.

‘comparator test,’ which requires a tribunal to find a person in the same (or ‘not materially different’) circumstances as the complainant, but without his or her protected attribute. When such a person cannot be found, tribunals/courts have had to invent a hypothetical comparator and suppose how such a person might have been treated by the respondent, which, as the Discussion Paper notes,<sup>8</sup> can lead to unpredictable results and has created significant uncertainty for all involved.

11. Any treatment or policy which has a discriminatory effect needs to be covered by the new definition. The effect, rather than the actions of the potential ‘discriminator,’ should be the focus. The test for discrimination used in the *Racial Discrimination Act 1975 (Cth) (RDA)*<sup>9</sup> is preferable to the comparator test from an international law perspective. However, since it refers to acts which have the ‘purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom,’ it is not a self-contained definition and may lead to further uncertainty if adopted in the consolidated Act. The ‘detriment’ test used in the ACT and Victorian jurisdictions is therefore the logical choice for the Commonwealth jurisdiction, as it is simpler and more focussed on effects than the comparator test.
12. Having said that, the Centre recognises that the effectiveness of anti-discrimination legislation relies – at least in part – on respondents’ ability to ascertain their duties under the law and incentives to comply with these duties. Indeed, employer groups have called on the Government to define discrimination more clearly to this end.<sup>10</sup> Thus, while the definition of discrimination in the new legislation should concentrate on detriment to victims of discrimination, it must also provide guidance for those who wish to avoid becoming discriminators.
13. The UK *Equality Act 2010* is an interesting model for a consolidated Australian law in many ways, given that it represents the culmination of a similar consolidation project in that jurisdiction. One aspect which we would encourage the Government to emulate is the Home Office’s guidance for a whole range of users of the legislation, including potential discriminators such as businesses, clubs and public sector organisations.<sup>11</sup>

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<sup>8</sup> Discussion Paper, 10.

<sup>9</sup> See s 9.

<sup>10</sup> See eg Anderson, ‘The Sex Discrimination Act: An Employer Perspective – Twenty Years On,’ 27 *University of NSW Law Journal* 3 (2004) 905, 908.

<sup>11</sup> See: <<http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/equality-act-guidance>>.

### *Defining Discrimination – Important Considerations*

14. The current definitions in the four Commonwealth anti-discrimination Acts have been carefully drafted and amended over the years to reflect case law<sup>12</sup> and other developments, such as evolving international interpretations.<sup>13</sup> However, this has resulted in a complex regime with technical requirements, which makes life difficult for both complainants and respondents.
15. In her authoritative text on Discrimination Law in the UK,<sup>14</sup> Sandra Fredman begins by considering the principle of equality and the social context in which discrimination laws have been created. “Each protected ground,” she notes “has its own history and particular sets of inequalities, all of which are crucial components in the understanding and evaluation of the legal concepts underpinning anti-discrimination law.” Any analysis of the legislation and jurisprudence should not lose sight of “the ways in which anti-discrimination laws interact with the lived experience of the victims....”<sup>15</sup>
16. The Centre urges the Government to consider the appropriateness of various provisions of the current law in the contemporary social context – particularly the restricted scope of protected attributes and difficulties with the ‘comparator’ tests.

### *Protected Attributes*

17. It is now widely (if not universally) acknowledged that discrimination occurs not just on the basis of race, sex, age and disability, but also on the basis of (*inter alia*):
  - i. criminal record;
  - ii. gender identity;
  - iii. medical record (including medical issues not technically amounting to disability);
  - iv. nationality (which may or may not coincide with race or ethnicity);
  - v. political opinion
  - vi. relationship status;

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<sup>12</sup> For example the DDA was amended in 2009 to make explicit the duty to make reasonable adjustments after the High Court cast doubt on this duty in *Purvis v NSW* [2003] HCA 62.

<sup>13</sup> For example, the RDA makes explicit reference to – and even incorporates provisions of – international law, whereas the subsequent SDA and ADA reflect a more domestically-oriented approach.

<sup>14</sup> Fredman, *Discrimination Law*, OUP 2011.

<sup>15</sup> *Ibid*, 108.

- vii. religion;
- viii. sexual orientation;
- ix. socio-economic status (particularly homelessness);
- x. status as a victim of crime (particularly domestic violence), or
- xi. combinations of attributes (known as ‘intersectional discrimination’).

18. A list of protected attributes is arguably necessary in any anti-discrimination law, as it defines the boundary between treatment which is merely unfair and that which constitutes unlawful discrimination. However, the attributes protected by the current legislation do not reflect the real range of discrimination which occurs in Australia today. This was recognised by the UN Human Rights Committee in its Concluding observations on Australia of 2009, in which it recommended that Australia:

...adopt Federal legislation, covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination.<sup>16</sup>

19. During Australia’s Universal Periodic Review in January 2011, several highly relevant recommendations were made by other Member Nations of the Human Rights Council. For example, the UK recommended that the Government...

...[e]nsure that [Australia’s] efforts to harmonise and consolidate Commonwealth anti-discrimination laws address all prohibited grounds of discrimination and promote substantive equality...<sup>17</sup>

The UK *Equality Act 2010* devotes a whole Chapter (Chapter 1) to what it terms ‘protected characteristics.’ This Chapter includes all of the existing attributes protected under Australian law, along with some of the attributes listed above (or variations thereupon – including religion, gender reassignment, marriage & civil partnership, pregnancy & maternity; religion or belief and sexual orientation).

20. Under the Canadian *Human Rights Act 1985*, it is against the law for any employer or provider of a service that falls within federal jurisdiction to discriminate on the basis of race, national or ethnic origin, colour, religion, age, sex (including pregnancy and childbearing), sexual orientation, marital status, family status, physical or mental

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<sup>16</sup> CCPR/C/AUS/CO/5 (2009) [12].

<sup>17</sup> From *List of recommendations contained in Section II of the Report of the Working Group* (UN Doc A/HRC/17/10), Recommendation 42. Recommendations 43-47, 52 and 66-68 are also highly relevant.

disability or pardoned criminal conviction.<sup>18</sup> Intersectional discrimination is also covered.<sup>19</sup>

21. New Zealand's *Human Rights Act 1993* is perhaps the most progressive when it comes to protected attributes, listing sex (including pregnancy and childbirth), marital status, religious belief, ethical belief, colour, race, ethnic/national origin, disability, age, political opinion, employment status, family status and sexual orientation.<sup>20</sup>
22. In drafting the consolidated Act, the Government should include as many of the attributes listed above as possible, not only to bring our law into line with that of comparable jurisdictions and international human rights law, but also to reflect better the reality of discrimination suffered by various groups in our society.

#### *Direct/Indirect Discrimination*

23. The distinction between direct and indirect discrimination in the current legislation is replicated in most other jurisdictions, including all States and Territories and the UK. However, the Canadian *Human Rights Act* of 1985 and associated jurisprudence have largely done away with the distinction.
24. In the 1999 cases of *Meiorin*<sup>21</sup> and *Grismer*,<sup>22</sup> the Canadian Supreme Court considered two respondents' claims that they could not retain someone due to 'bona fide occupational requirements' (known as 'inherent requirements' in Australian jurisprudence) or provide a service with a 'bona fide justification' (roughly corresponding to the Australian defence of 'reasonable in the circumstances'). In *Meiorin*, the Court said of the direct/indirect distinction:

The conventional analysis was helpful in the interpretation of the early human rights statutes, and indeed represented a significant step forward in that it recognized for the first time the harm of adverse effect discrimination. The distinction it drew between the available remedies may also have reflected the apparent differences between direct and adverse effect discrimination. However well this approach may have served us in the past, many commentators have suggested that it ill-serves the purpose of contemporary human rights legislation. I agree. In my view, the complexity and unnecessary artificiality of aspects of the conventional analysis attest to the desirability of now simplifying the guidelines that

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<sup>18</sup> See s 3.

<sup>19</sup> See s 3.1.

<sup>20</sup> See s 21.

<sup>21</sup> *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union* [1999] 3 SCR 3.

<sup>22</sup> *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868.

structure the interpretation of human rights legislation in Canada.<sup>23</sup>

25. The Court went on to list no fewer than seven defects in the ‘old’ divided approach, including most damningly that it allowed systemic discrimination to slip under the radar.<sup>24</sup> As such, it formulated a simpler test for employment-related discrimination which, according to the Canadian Human Rights Commission, can be summarised as:

- Is there a standard, policy or practice that discriminates based on a prohibited ground?
- Did the employer adopt the standard, policy or practice for a purpose rationally connected to the performance of the job?
- Did the employer adopt the particular standard, policy or practice in an honest and good faith belief that it was necessary in order to fulfill that legitimate work-related purpose?
- Is the standard, policy or practice reasonably necessary in order to fulfill that legitimate work-related purpose?<sup>25</sup>

26. The *Grismer* case applied this approach to service provision with a modified test:

- Is the underlying purpose of the standard, policy or practice rationally connected to the service provider’s function?
- Did the service provider adopt the particular standard in an honest and good faith belief that it was necessary in order to fulfill the service provider’s purpose or goal?
- Is the standard, policy or practice reasonably necessary in order to fulfill the service provider’s purpose or goal?<sup>26</sup>

27. It is submitted that these tests might inform the development of a unified test for discrimination in Australia, if such a test were to be adopted.<sup>27</sup>

### *Approach of the Courts to Date*

28. Under the present test(s) for direct discrimination, according to recognised expert Beth Gaze of the University of Melbourne, complainants have great difficulty proving “the less favourable treatment was on the prohibited ground; in indirect discrimination, it is in showing that the requirement or condition which disproportionately affected people with the ‘prohibited’ (sic) attribute was not ‘reasonable.’”<sup>28</sup> Analysing the Victorian case

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<sup>23</sup> Meiorin, above n 21, [25].

<sup>24</sup> Ibid [39-42].

<sup>25</sup> See: <<http://www.chrc-ccdp.ca/discrimination/occupational-eng.aspx>>.

<sup>26</sup> Ibid.

<sup>27</sup> We note that the Discrimination Law Experts’ Group, in its submission dated 13 December 2011, has recommended a divided test be retained “because it has some familiarity to the Australian public and legal profession,” but believe the arguments made in the Group’s earlier (March 2011) Report remain valid.

<sup>28</sup> Gaze, ‘Context and Interpretation in Anti-Discrimination Law,’ 26 *Melbourne University Law Review* 2 (2002) 325, 341.

of *Schou*,<sup>29</sup> which overturned a VCAT finding of indirect discrimination, Gaze notes the Victorian Supreme Court's reluctance to cause employers any inconvenience and its narrow interpretation of the role/purpose of the anti-discrimination legislation in question.

29. Similarly, the High Court case of *Purvis*<sup>30</sup> effectively discounted the effect of the complainant's son's disability by using a comparator who behaved the same way but did not suffer from the same (or any) disability. This overturned the approach of Commissioner Innes, which recognised the behaviour was bound up with the disability, and arguably demonstrated a lack of understanding of, or empathy for, the loss of control experienced by the boy concerned.
30. A refrain which subsists throughout such judgments is that the text of the legislation demands no more than the usual 'objective,' 'neutral' approach to statutory interpretation.<sup>31</sup> This is arguably at odds with the purposive approach of s 15AA of the *Acts Interpretation Act 1901* (Cth), which requires courts to 'prefer statutory constructions which promote the objects of the legislation in question,' and which could give anti-discrimination law real 'teeth.'
31. Despite a direct obligation under the Acts Interpretation Act to prefer statutory constructions which promote the objects of the relevant legislation, the elimination of discrimination from our society has not figured prominently in the jurisprudence.<sup>32</sup> Even High Court exhortations to give the anti-discrimination statutes 'a beneficial construction' have not sufficed to overcome narrow interpretations given to terms in the definitions – 'reasonable' being perhaps the prime example.<sup>33</sup> In the 1997 Federal Court case of *Commonwealth Bank v HREOC*,<sup>34</sup> HREOC (as it then was) submitted that reasonableness, in a discrimination case, should be informed by the objects and purposes of the Act and that 'human rights and discrimination legislation ought to be liberally construed.' Justice Davies (in a concurring judgment) disagreed on both counts.<sup>35</sup>

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<sup>29</sup> *Schou v Victoria* [2001] 3 VR 655. *Schou* was subsequently re-heard in the VCAT, where the finding of indirect discrimination was reaffirmed, but Victoria appealed to the Court of Appeal and the finding was overturned once again – see: *Victoria v Schou* [2004] VSCA 71.

<sup>30</sup> *Purvis v NSW* [2003] HCA 62.

<sup>31</sup> See eg *Purvis* per Gummow, Hayne and Heydon JJ [224] or *Schou* per Harper J at 659, or per Buchanan JA (on appeal) [47].

<sup>32</sup> *Ibid* 331-332.

<sup>33</sup> *Ibid* 332-333. Gaze notes that Kirby J's judgments constitute the honourable exception; discussing as they do power imbalances and stereotypes in Australian society.

<sup>34</sup> [1997] FCA 1311.

<sup>35</sup> *Ibid*, no paragraph numbers are provided in the online version of the judgment, but the relevant statement can also be found at 80 FCR 88.

32. Perhaps the major impediment for complainants in discrimination cases presented by the current definition(s) is the variable approach of the courts to concepts such as 'reasonable,' 'justified,' 'disadvantage' and 'detriment.' While the Federal and High Courts focussed on the former concepts in *Purvis*, the Full Federal Court in *Hurst v Queensland*<sup>36</sup> emphasised the 'serious disadvantage' which could flow from the 'inability [of a child] to achieve his or her full potential, in educational terms,'<sup>37</sup> and concluded in the complainant's favour – overturning a judgment of a single Federal Court judge which said she could 'cope' with the lack of instruction in sign language at her school.<sup>38</sup> Although this ruling came too late to restore the complainant's education in her home State of Queensland, it did lead to 'revamped...policies on the education of students with disabilities' in the State.<sup>39</sup>
33. This submission does not attempt to make a legal assessment of the relative merits of the judgments in these two contrasting cases, but surely the outcome of improved disability policies for Education Queensland suggests that the approach taken in *Hurst*, which focussed on the effects (real and potential) on the complainant, was the one more likely to achieve the goals of the DDA.
34. Beth Gaze's assessment of Australian judicial interpretation of anti-discrimination legislation is that it is influenced by the unrepresentative nature of the bench.<sup>40</sup> Discrimination claims, she notes, are generally brought by disadvantaged or marginalised people – often from non-English speaking backgrounds or living with disabilities. By contrast, judges tend to be drawn from the bar – a group which rarely has any direct experience of disadvantage or discrimination. Gaze notes that "the profile of tribunal members is much less 'elite,' including more women, people of diverse ethnic origins, and people with disabilities." This, she posits, may go some way to explaining why tribunal findings of discrimination are often overturned by the courts, which are simply less alive to the issues involved.<sup>41</sup>
35. The courts' present technical approach gives rise to an important consideration for the consolidation project – whether a differently-drafted definition of discrimination could lead to more positive outcomes for aggrieved persons, for example by insisting on a more purposive approach to interpretation. In our submission, the consolidated definition should be drafted with this in mind.

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<sup>36</sup> *Hurst v Queensland* [2006] FCAFC 100

<sup>37</sup> *Ibid*, [134].

<sup>38</sup> *Hurst and Devlin v Education Queensland* [2005] FCA 405.

<sup>39</sup> See Dickson, 'Coping, Complying and Indirect Discrimination: *Hurst v State of Queensland*,' 11 *Australia & NZ Journal of Law & Education* 1 (2006) 103, 106.

<sup>40</sup> Gaze, above n 28, 338-354.

<sup>41</sup> *Ibid*, 338-340.

36. Whatever form the definition of discrimination takes in the new legislation, the key elements we recommend are:

- i. emphasis on the purpose of eliminating discrimination rather than establishing directness, 'less favourable' treatment etc.
- ii. inclusion of a broad range of protected attributes to provide better coverage for discrimination suffered on grounds which are currently recognised but not protected, and
- iii. a single defence of reasonableness or justification requiring the court to conduct a proportionality assessment informed by international human rights law<sup>42</sup> (and with the burden of proof on the respondent once a *prima facie* case for unreasonableness has been made).

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<sup>42</sup> For example, the Committee on the Elimination of Racial Discrimination, in its General Comment 30 of 1 October 2004, requires States Parties to interpret different treatment as discriminatory "if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim." [4]

## Part II – Burdens on Complainants

### *A Burden-shifting Model is Preferable*

37. Mounting a successful discrimination challenge in Australian courts (and tribunals) has been described by experts as an arduous task.<sup>43</sup> As the discussion paper acknowledges, in complaints of direct discrimination the burden is entirely on the complainant in every Australian jurisdiction. In some instances, such as under the RDA, indirect discrimination complaints also place the full onus on the complainant.<sup>44</sup>

38. This is in contrast to:

- i. indirect discrimination claims under the ADA, SDA, DDA and some State and Territory legislation;<sup>45</sup>
- ii. employment-related discrimination claims under the Fair Work Act, and
- iii. discrimination claims in comparable jurisdictions including the UK, US, Canada and the EU.

Under these regimes, complainants must make out a *prima facie* case of discrimination and then it is up to the respondent to explain or defend its apparently discriminatory behaviour. This ‘burden-shifting’ model has existed in jurisdictions such as the UK since before Australia even had anti-discrimination legislation,<sup>46</sup> and is clearly the fairer approach given the power imbalance which often exists between complainants and respondents. As such, expert reviews have consistently recommended Australian law be amended to adopt a similar approach.

39. One example is the Senate Standing Committee on Legal and Constitutional Affairs’ report on the effectiveness of the SDA in 2008, which recommended:

...that a provision be inserted in the Act in similar terms to section 63A of the *Sex Discrimination Act 1975 (UK)* so that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate.<sup>47</sup>

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<sup>43</sup> See Allen, ‘Reducing the Burden of Proving Discrimination in Australia,’ 31 *Sydney Law Review* (2009) 579, 580

<sup>44</sup> Allen, 587.

<sup>45</sup> See eg *Anti-Discrimination Act 1991* (Qld) ss 204-205 or *Discrimination Act 1991* (ACT) s 8(3)(c).

<sup>46</sup> *Ibid.*

<sup>47</sup> Senate Committee Report, above n 6, Recommendation 22.

40. The NSW Law Reform Commission,<sup>48</sup> the Western Australia Equal Opportunity Commission<sup>49</sup> and the Victorian Department of Justice<sup>50</sup> have also made corresponding recommendations for the Equal Opportunities legislation in their respective jurisdictions.

41. In addition, the European Parliament and Council of the EU issued a Directive on this issue to its member States in 1997<sup>51</sup> and again in 2006<sup>52</sup> which provides relevantly:

The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a *prima facie* case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.<sup>53</sup>

42. Australian experts in the field of discrimination law – including Beth Gaze, Dominique Allen of Deakin University and Jonathan Hunyor of the North Australian Aboriginal Justice Agency (formerly of HREOC) – have also been calling for a shifting burden for many years.<sup>54</sup>

43. There are, of course, practicalities which we need to bear in mind in advocating a change of approach. One is that the majority of Australian anti-discrimination cases are settled or conciliated out of court or withdrawn prior to hearing.<sup>55</sup> The difficulty of proving a case under the current approach almost certainly plays a role in this. The Centre supports resolution of discrimination cases through negotiation and Alternative Dispute Resolution generally, but people should not be compelled into unsatisfactory settlements due to the unduly high burden they face if the matter goes to court.

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<sup>48</sup> See: NSWLRC, *Review of the Anti-Discrimination Act 1977*, Report 92, 1999.

<sup>49</sup> See: WAEOC, *Review of the Equal Opportunity Act 1984* (2007) (Several recommendations of this report recommend shifting the relevant burden – see eg p 40).

<sup>50</sup> See: DOJ *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008) 88-89.

<sup>51</sup> Directive 1997/80/EC.

<sup>52</sup> Directive 2006/54/EC. See also EC Racial Equality Directive 2000/43/EC, article 8 and Employment Equality Directive 2000/78/EC, article 10.

<sup>53</sup> *Ibid*, paragraph 30.

<sup>54</sup> See Allen, above n 43; Gaze, 'Problems of Proof in Equal Opportunity Cases,' 63 *Law Institute Journal* (1989) 731, and Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment,' 25 *Sydney Law Review* 4 (December 2003) 535.

<sup>55</sup> See Allen, above n 43.

44. Another practical matter, which has been raised by Shadow Attorney-General Brandis,<sup>56</sup> is whether there should be a 'presumption of innocence' for respondents in discrimination cases, just as there is for defendants in criminal cases. With respect, this analogy fails on several counts. First, the presumption of innocence is a right (at both common and international law) devised for the protection of accused individuals in the face of the power of the State,<sup>57</sup> whereas most potential respondents in discrimination cases are corporations/partnerships or Government Departments, and are invariably in the more powerful position of the parties to the dispute.
45. Secondly, the considerable resources of the State (embodied in the police and prosecutors) are mobilised to gather evidence for a criminal prosecution and present it to the court. In contrast, complainants in discrimination cases tend to be left alone to fight their battles, rarely receiving assistance from the relevant Commission or even Legal Aid,<sup>58</sup> and as such cannot reasonably be expected to 'prove the guilt' of those who have discriminated against them. No matter the strength of the circumstantial case, any concrete evidence which does exist is likely to remain the sole property of the respondent.<sup>59</sup> Compounding this difficulty is the reluctance of the courts to infer responsibility<sup>60</sup> and jurisprudence which sometimes requires a standard of proof above the usual civil law 'balance of probabilities' standard to 'convict' respondents of discrimination.<sup>61</sup> This also raises the issue of the enforcement and investigative powers of the AHRC, which are discussed below.

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<sup>56</sup> In Senate Estimates hearings on 19 October 2011, Liberal Party Senator George Brandis suggested of the proposal to shift the burden of proof that there should be "strong reasons to depart from the traditional position in our law that the burden of proof should not be reversed except in unusual circumstances." He went on to state that it is "a basic human rights principle that people should not be found to have breached a statute unless the complainant or the person making the allegation against them discharges the relevant burden of proof...." See *Official Hansard of the Senate Legal and Constitutional Affairs Legislation Committee*, 18 October 2011, available at: <<http://www.aph.gov.au/hansard/senate/commtee/s377.pdf>> 19.

<sup>57</sup> Cf Gans, 'Denial of Non-human Rights Protection in Australia,' 2 *New Zealand Law Review* (2011) 229.

<sup>58</sup> See Gaze, 'Context and Interpretation in Anti-Discrimination Law,' above n 28, 337; also Gaze, 'Twenty years of the Sex Discrimination Act: assessing its achievements,' 30 *Alternative Law Journal* 1 (February 2005) 3, 6 and Gaze/Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation,' 32 *University of NSW Law Journal* 3 (2009) 699.

<sup>59</sup> See Allen, 581-592 and eg *Massinde Ntoko v Citibank* [2004] 15 ELR 116.

<sup>60</sup> See Allen, 583-584 & 593-596 and Gaze, above n 28, 353.

<sup>61</sup> De Plevitz, 'The *Briginshaw* 'Standard of Proof' in Anti-discrimination Law: Pointing with a Wavering Finger,' 27 *Melbourne University Law Review* 2 (August 2003) 308, 331. See also *Department of Health v Arumugam* [1988] VR 319, in which the Victorian Supreme Court overturned a finding of discrimination by the Equal Opportunity Board on the basis that the convincing circumstantial evidence and lack of explanation on the part of the respondent could not amount to 'proof' of discrimination. This was affirmed, along with the need for the high standard of proof formulated in *Briginshaw*, by the Full Federal Court in *Sharma v Legal Aid (Qld)* [2002] FCAFC 196. Cf *Qantas Airways v Gama* [2008] FCAFC 69, which takes a more liberal approach in line with the object of the legislation.

46. Thirdly, the adoption of criminal law-style approaches to discrimination cases in Australia (and the US) has made it too difficult for complainants to succeed. It is an established principle of statutory interpretation that beneficial laws should be read broadly, and punitive laws narrowly, but courts seem to have miscategorised anti-discrimination laws. Gaze identifies a ‘victim/perpetrator’ approach which assesses a finding of discrimination against a respondent to be almost as serious/stigmatising as a criminal conviction – hence the high evidentiary requirements and reluctance to infer responsibility.<sup>62</sup>
47. This approach fails to recognise that discrimination is more likely to be a symptom of entrenched inequalities in society than a result of individual ill-intent – and may well even be the consequence of unconscious prejudice.<sup>63</sup> As such, the legislation needs to guide courts away from this approach if it is to become more effective in eliminating discrimination. Gaze suggests negligence cases – in which redress for those harmed is the focus rather than the “moral fault of those who have breached their standard of care” – may constitute a better model.<sup>64</sup>
48. We acknowledge that there is no mention of ‘guilt’ or ‘innocence’ in the current legislation, and that it does not explicitly dictate the strict approach taken by the courts to date, but thought should be given to how a consolidated Act might encourage a new approach. For example, the DDA dispenses with the element of intention and places equal emphasis on direct and indirect discrimination, which recognises that “the achievement of social justice does not depend on the attribution or finding of blame or fault on, in this case, the part of the alleged discriminator. [F]inding actors liable for discriminating is not to classify them as ‘bad’ or ‘evil’ people, nor as people who are exploitative of others. The law is not concerned to pass moral judgement. Rather, it is concerned to rectify improper actions.”<sup>65</sup> As such, it is submitted that the DDA would constitute a better model for the consolidated Act than the older Anti-discrimination Acts.
49. Finally, under the proposed burden-shifting approach, respondents would not be asked to ‘prove their innocence’ – instead they would have to show, on the balance of probabilities, that their behaviour towards the complainant (which seems discriminatory on its face) was in fact legitimately motivated and reasonable in the circumstances. To assist them in this endeavour, the UK has developed a questionnaire system which could be adopted in Australia.

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<sup>62</sup> Gaze, above n 28, 335-336.

<sup>63</sup> *Ibid*, 333-337.

<sup>64</sup> *Ibid*, 338.

<sup>65</sup> Basser and Jones, ‘The Disability Discrimination Act 1992 (Cth): A Three-dimensional Approach to Operationalising Human Rights,’ 26 *Melbourne University Law Review* 2 (2002) 254, 263-265.

### *The Questionnaire System*

50. The questionnaires sent to respondents in the UK (and Ireland) are aimed at helping the complainant (and advisors, if any) to decide whether the case has sufficient merit and, if so, how best to formulate and present it to the conciliator or tribunal. In the UK and Ireland, the relevant Equal Opportunity Commission generally assists in the preparation of the questionnaire to ensure its questions are focussed and relevant. This may not be appropriate in Australia due to the AHRC's role as conciliator, but guidelines and/or model questionnaires could be prepared.<sup>66</sup>
51. Of course, respondents are likely to be reluctant to 'incriminate' themselves by answering such a questionnaire in a full and forthcoming manner. As such, conciliators and tribunals need to be empowered (or even required) to draw an adverse inference from a failure to provide an adequate explanation for behaviour which is *prima facie* discriminatory. Allen and Hunyor have noted this would be analogous to the well known common law rule in *Jones v Dunkel*,<sup>67</sup> which says an inference may be drawn against parties who fail to adduce evidence in circumstances where they might reasonably be expected to do so, since the omission suggests the evidence would be unhelpful to their cause. Since discrimination complaints take place in civil, rather than criminal jurisdiction, no 'right to silence' is applicable.<sup>68</sup>
52. We emphasise that such questionnaires are designed to assist the complainant to make out a *prima facie* case, and that the respondent should still bear the burden of proof (if further evidence is required) once such a case has been put to the court or tribunal.

### *Powers of the AHRC*

53. Clearly, after the *Brandy* case,<sup>69</sup> the AHRC cannot be given the power to make determinations in discrimination cases. However, the Centre believes there is scope to improve the compliance framework in the anti-discrimination regime by giving the AHRC further non-complaint-based investigative powers (comparable to those granted to other 'protective' agencies such as ASIC and the ACCC). In addition, it would be advantageous for the AHRC to be able to initiate proceedings in its own name against anyone who has been the subject of multiple discrimination complaints, or is otherwise suspected of engaging in systematic discrimination. Such a power might help to alleviate patterns of discrimination identified in, for example, the 2008 review of the

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<sup>66</sup> See Allen, above n 43, 602.

<sup>67</sup> (1959) 101 CLR 298.

<sup>68</sup> Even in criminal proceedings, protection of the right to silence in Australia is reflected only in the common law and in limited circumstances.

<sup>69</sup> *Brandy v HREOC* [1995] HCA 10.

SDA.<sup>70</sup> It could also assist in reducing the burden on individual complainants to combat systemic discrimination, which is made particularly difficult by, for example, the unavailability of Legal Aid and the risks of adverse costs orders.<sup>71</sup>

54. In the Discrimination Law Experts' Group Report of March 2011, the Group notes that discrimination does public as well as private harm, and that individuals should not have to shoulder the entire burden of seeking redress for both kinds of harm.<sup>72</sup> One way of fixing this, they note, is to ensure that the administering body (AHRC) has sufficient power to address the public aspect of the harm.<sup>73</sup>
55. Of course, such extra powers would entail extra responsibility on the AHRC's part, and a concomitant increase in funding would need to be made available for any major investigations or litigation. Gaze assessed changes made to the HREOC Act (as it then was) in 2000 and determined that inadequate funding for the Commission, along with the poor risk/benefit equation of Federal Court litigation, were significant barriers to the overall success of the Commonwealth anti-discrimination regime.<sup>74</sup> The latter problem has arguably been addressed to some extent by the creation of the Federal Magistrates Court, but the former persists.

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<sup>70</sup> See House Standing Committee on Employment & Workplace Relations, *Inquiry into pay equity and associated issues related to increasing female participation in the workforce*, 23 November 2009, available at: <<http://www.aph.gov.au/house/committee/ewr/payequity/report.htm>> [6.1-6.7].

<sup>71</sup> Gaze, 'The Costs of Equal Opportunity: Will changes to HREOC solve the problem of anti-discrimination law enforcement,' 25 *Alternative Law Journal* 3 (2000) 125, 126-127.

<sup>72</sup> See *Report on recommendations for a consolidated Federal anti-discrimination law in Australia* (31 March 2011), 24.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, 128-130.

### Part III – Exemptions and Exceptions

#### *Exceptions Should not be Automatic or Blanket*

56. This consolidation project presents an opportunity to review existing exemptions and exceptions to the anti-discrimination legislation, some of which are, in the Centre's view, overly broad or otherwise unjustified.
57. In particular, we are concerned about sweeping, permanent exceptions for organisations such as religious and voluntary bodies.<sup>75</sup> Temporary exemptions granted after a rigorous assessment by the AHRC are in a different category, as are special measures or 'positive discrimination' (discussed below). These temporary kinds of exemptions must be applied for and justified by the organisation in question, and in granting them regard must be had to the purposes (and other relevant provisions) of the legislation.<sup>76</sup> In our view, such requirements should apply to all exemptions/exceptions.
58. Nearly 20 years ago the Commonwealth Sex Discrimination Commissioner undertook a review of permanent exemptions/exceptions to the SDA which 'identified the significant number of permanent exemptions to the SDA as a major obstacle to the SDA's effectiveness.'<sup>77</sup> Since that time, there have been shifts in relation to, for example, superannuation, workplace relations and combat duties,<sup>78</sup> but it is submitted that remaining exceptions still constitute an obstacle to the achievement of the Act's objects. Below are some examples to illustrate the point.
59. The UK Home Office provides the following compelling answer to a Frequently Asked Question about the *Equality Act 2010*:

**Do I have to employ a gay person if homosexuality is against my religion or belief?**

Generally, the Equality Act prohibits discrimination in employment against people because of their sexual orientation. In certain circumstances, churches and other organised religions can choose not to appoint a person because of their sexual orientation where the job being filled is, for example, a Minister of the religion and the appointment of a gay person would conflict with the religion's doctrine or would offend a significant number of its followers. But this only applies where the job in question is

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<sup>75</sup> See eg ss 37 and 39 of the SDA.

<sup>76</sup> See <[http://www.hreoc.gov.au/legal/exemptions/sda\\_exemption/sda\\_exemption\\_guidelines.html](http://www.hreoc.gov.au/legal/exemptions/sda_exemption/sda_exemption_guidelines.html)>.

<sup>77</sup> Sex Discrimination Commissioner, *Report on Review of Permanent Exemptions under the Sex Discrimination Act 1984*, AGPS, Canberra, 1992. Commentary: <<http://www.aph.gov.au/library/pubs/rp/1998-99/99rp16.htm>>.

<sup>78</sup> See Gaze, 'Twenty Years of the Sex Discrimination Act,' 30 *Alternative Law Journal* 1 (February 2005) 3, 6.

closely connected to the core purpose of the organised religion. So it would not apply to the appointment of a cleaner or accountant, for example.<sup>79</sup>

60. This approach strikes a reasonable balance between the rights at stake, and is in accordance with ILO Convention 111, which only allows exceptions for jobs for which a characteristic such as religion is an ‘inherent requirement.’<sup>80</sup> Yet church groups such as the Australian Christian Lobby are fighting to maintain a blanket employment exception from the SDA which allows them to refuse to employ people such as cleaners and gardeners on the basis of their sexual orientation in the name of ‘maintaining a Christian environment.’<sup>81</sup>
61. Anglican Bishop Robert Forsyth confirmed to *The Age* newspaper last year that the list of people who are not to be hired also includes (unrepentant) single mothers, de factos and adulterers.<sup>82</sup> This shows the Church to be out of step with the contemporary values of the broader Australian public, yet we cannot afford to ignore this anachronism because religious groups still employ a huge number of people – in fact the Catholic Church is one of the largest private employers in the country.<sup>83</sup>
62. There are other examples in the field of education. One, which recently highlighted exemptions to NSW anti-discrimination legislation, is the Catholic school in Broken Hill which was reported to have refused enrolment to a child of a same-sex couple. Australian National University discrimination expert Wayne Morgan was quoted on the ABC as saying:
- We often find in anti-discrimination laws that there are a lot of exemptions and they really make a nonsense of the whole basis for the Act. There are so many exemptions that they make a mockery of us actually saying that discrimination on the basis of homosexuality is illegal.<sup>84</sup>
63. Church groups’ large-scale provision of social welfare and education services raises another issue – their receipt of public funding and generous tax exemptions. Putting aside the issue of whether it would be better for these services to be provided by secular institutions or the State itself, we must ask whether religious organisations

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<sup>79</sup> See: <<http://www.homeoffice.gov.uk/equalities/equality-act/faq>>.

<sup>80</sup> ILO 111 article 1(2) – available at: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111>>.

<sup>81</sup> See eg ‘Jim Wallace speaks at opening of ACT legal year,’ 3 February 2011:

<<http://www.acl.org.au/2011/02/md-jim-wallace-speaks-at-opening-of-act-legal-year>>.

<sup>82</sup> See Marr, ‘Holy unrest over right to discriminate,’ *The Age*, 13 February 2011, available at:

<<http://www.theage.com.au/national/holy-unrest-over-religious-right-to-discriminate-20110212-1areb.html>>.

<sup>83</sup> Ibid; see also eg Australian Catholic Bishops’ Conference submission to Standing Committee on Employment & Workplace Relations’ *Inquiry into pay equity and associated issues related to increasing female participation in the workforce*, 2008: <<http://www.aph.gov.au/house/committee/ewr/payequity/subs/sub64.pdf>>.

<sup>84</sup> See: <<http://www.abc.net.au/news/2011-12-15/same-sex-enrolment-row-sparks-call-for-law-change/3732522/?site=brokenhill&section=news>>.

ought to be held to ‘community standards’ in any activities linked to their public funding.

64. The Centre believes activities of religious organisations linked to public funding should, as a matter of principle, be subject to anti-discrimination laws. Otherwise, the Commonwealth risks supporting discriminatory behaviour in contravention of its own legislation.
65. There is currently a debate on this issue in the UK, where the Government is increasingly contracting out services to religious groups. The *Equality Act 2010* requires that faith be an ‘occupational requirement’ if it is to form the basis of an employment decision,<sup>85</sup> as reflected in the FAQ advice above. However, this requirement has been interpreted liberally by successive Governments – to the point where the European Commission decided in 2009 to issue an Opinion chiding the UK for failing to implement properly the EU Employment Equality Directive.<sup>86</sup> The Liberal Democrats have proposed that those delivering public services should not be subject to faith-based employment requirements, but so far have been unable to overcome opposition from Church groups and the major parties on this issue.<sup>87</sup> The Centre urges the Australian Government to adopt the Liberal Democrats’ principled stance, which is the default position in most other European nations (including the traditionally Catholic nations of the south).<sup>88</sup>
66. Church groups speak of religious freedom and the more obscure ‘freedom of religious association’ as fundamental rights, which they seem to believe trump other rights. Planned reforms to Victoria’s anti-discrimination law which would have brought the law in that State closer to the UK law in terms of religious exceptions (and investigative powers for the Commission) were scrapped when the Baillieu Government came to office in late 2010.<sup>89</sup> The responsible Minister, Attorney-General Robert Clark, said at the time:

The 2010 legislation is a far-reaching attack on the freedom of faith-based organisations and freedom of religion and belief. The amendments will restore tolerance and a sense of the fair go. Faith-based organisations and political organisations should be free to engage staff that (sic) uphold their values.<sup>90</sup>

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<sup>85</sup> See Schedule 9, Paragraph 3.

<sup>86</sup> See: <<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=639&furtherNews=yes>>.

<sup>87</sup> See: <<http://www.guardian.co.uk/commentisfree/belief/2011/may/31/religious-groups-public-service-providers-equality-law>>.

<sup>88</sup> Ibid.

<sup>89</sup> See Fyfe, ‘Religious groups to retain bias rights,’ *The Age*, 13 February 2011, available at: <<http://www.theage.com.au/victoria/religious-groups-to-regain-bias-rights-20110212-1ardw.html>>.

<sup>90</sup> Ibid.

67. When advocates of religious exceptions speak of freedom of religion and belief, they are apparently referring to the human right to freedom of thought, conscience and religion provided for in article 18 of the Universal Declaration of Human Rights. This right is reproduced in article 18 of the ICCPR, which has been binding on Australia at international law since 1980.

68. Article 18(3) of the ICCPR provides:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

As such, a limitation on religious freedom prescribed by national anti-discrimination law and necessary to protect the fundamental rights and freedoms of others is permissible under international law.

69. There are few rights more fundamental than the right to freedom from discrimination. This right is reflected in several articles of the ICCPR, including articles 2, 3 and 24-26.

70. The UN Human Rights Committee has specifically stated that “the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as, inter alia, the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools....”<sup>91</sup> It is understandable that churches wish to have full control over their appointment of individuals whose task it is to provide spiritual guidance and maintain faith, and the Human Rights Committee recognises this. However, the General Comment goes on to provide:

In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26.<sup>92</sup>

In other words, restrictions on the right to freedom of religion based on principles of non-discrimination are legitimate.

71. The Human Rights Committee has, to date, received only a limited number of Communications from individuals involving employment and religious belief (or disbelief). In *Delgado-Páez v Colombia*,<sup>93</sup> the Author was a teacher of religion and ethics at a secondary school in Bogotá. His political and theological views differed from those of the Apostolic Prefect (head priest) in his area, who had him reassigned to teaching an

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<sup>91</sup> HRC General Comment 22 of 20 July 2003, [4].

<sup>92</sup> *Ibid*, [8].

<sup>93</sup> CCPR/C/39/D/195/1985.

unrelated subject (handicraft) for which he had no training or relevant experience. Eventually, after a series of difficulties with the area's administration leading to a term of suspension and salary freeze, the Author complained to Colombian Office of the Attorney-General that the Apostolic Prefect had exercised improper influence with the Secretary of Education to place pressure on him to leave his post due to his unorthodox 'liberation theology' views.<sup>94</sup> After refusing to resign and lodging further complaints with the authorities, the Author faced threats of prosecution and even death, and was forced to flee to France after being attacked.<sup>95</sup> Amongst other violations, the Author claimed to be a victim of a breach on Colombia's part of article 18 in conjunction with article 2 of the ICCPR.<sup>96</sup>

72. The Committee was of the view that, while Colombia had failed to protect Delgado-Páez (the Author) and thereby breached article 9(1) of the ICCPR, it had not breached article 18 because "Colombia may, without violating the provision of the Covenant, allow the Church authorities to decide who may teach religion and in what manner it should be taught."<sup>97</sup>

73. *Delgado-Páez* confirms that religious organisations are free to determine whom they wish to hire as teachers, but extension of this principle to the creation of a 'Christian environment' which involves excluding sinners or non-believers from *all* positions in church-run organisations (including schools and charities as well as churches) exceeds the scope of the right to freedom of religion under international law.

74. In the US, an Evangelical school recently won an appeal to the Supreme Court which turned on its right to terminate the employment of a teacher (Ms Perich) despite the nominal protection of the *Americans With Disabilities Act* and the *Employment Non-Discrimination Act*.<sup>98</sup> Relying on the so-called 'ministerial exception,' the Court ruled 9-0 in favour of the school, holding that Perich performed (at least some of) the functions of a minister in the Church, and her employment was therefore at the absolute discretion of the Church.<sup>99</sup>

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<sup>94</sup> For background on Liberation Theology, see eg:

<<http://www.bbc.co.uk/religion/religions/christianity/beliefs/liberationtheology.shtml>>.

<sup>95</sup> *Ibid*, [2.1-2.10].

<sup>96</sup> *Ibid*, [3.1].

<sup>97</sup> *Ibid*, [5.7].

<sup>98</sup> *Hosanna-Tabor Evangelical Lutheran Church & School v Equal Employment Opportunity Commission*, S Ct (US Jan 11, 2012), not yet published but available at: <<http://www.supremecourt.gov/opinions/11pdf/10-553.pdf>>.

<sup>99</sup> We note that previous US cases had come to different conclusions on comparable facts. One example is *Archdiocese of Washington v Moerson* 399 Md 637, 925 A 2d 659 (2007), in which the Maryland Court of Appeals held that an organist did not come under the ministerial exception because he was not as involved in the religious life of the Church as a teacher or member of the clergy.

75. The US has some of the strongest laws protecting freedom of religious expression in the world, yet it still distinguishes between ministers and other employees in the context of discrimination law. In our submission, Australia should at least do the same. If the new consolidated Act retains a standing exception for religious organisations in respect of employment, it should be confined to 'core' roles such as priests and those providing religious instruction. This would also accord with the Human Rights Committee's jurisprudence.

### *Special Measures*

76. As the Discussion Paper notes, the concept of special measures is recognised under treaties to which Australia is party.<sup>100</sup>

77. Special measures have also been called 'positive discrimination'<sup>101</sup> or affirmative action, and are intended to address systemic inequalities in an active manner, rather than simply wait for more enlightened attitudes to prevail in areas of public life such as education, employment and sport.

78. In our view, these measures remain all too necessary in contemporary Australian society, and we recommend they be maintained in the consolidated legislation – preferably with application to all protected attributes.

79. However, the controversy over the use of special measures provisions to justify the Northern Territory Emergency Reponse (NTER)<sup>102</sup> necessitates reflection on the concept of a benefit or 'advancement.' The Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be

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<sup>100</sup> Discussion Paper, 16.

<sup>101</sup> Although we note that positive discrimination as defined in s 33 of the ADA is a broader concept than special measures under the SDA, RDA and DDA – see AHRC, *Federal Discrimination Law Online*, Chapter 2: <[http://www.humanrights.gov.au/legal/FDL/2011/2\\_Age.pdf](http://www.humanrights.gov.au/legal/FDL/2011/2_Age.pdf)> 15.

<sup>102</sup> See eg *Racial Discrimination Act to be Restored in the Northern Territory*, Government Media Release, 22 June 2010, available at:

<[http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/pages/jm\\_m\\_rda\\_22june2010.aspx](http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/pages/jm_m_rda_22june2010.aspx)>.

continued after the objectives for which they were taken have been achieved.<sup>103</sup>

The RDA also picks up this definition.<sup>104</sup>

80. To address concerns raised in the context of the NTER over whether the measures taken were really 'for the sole purpose of securing adequate advancement' of Indigenous Australians, a requirement in the legislation for any special measures to have been developed in consultation with the intended beneficiaries would be helpful.

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<sup>103</sup> CERD, article 1(4).

<sup>104</sup> See s 8(1).

## Conclusion

81. In 2005, Beth Gaze observed that '[l]ike equality, eliminating discrimination is [an idea] that no-one disagrees with in the abstract. However, actually eliminating discrimination entails transferring resources or power away from some people towards others, and [that] will not occur without a struggle.'<sup>105</sup>

82. No doubt this consultation will attract submissions from employers and other potential respondents in discrimination cases who feel that the anti-discrimination legislation already presents too much of a regulatory burden. In 2004, the Australian Chamber of Commerce and Industry wrote in a commentary on the SDA:

There should be a greater emphasis on education, promotion and problem solving, and less emphasis on sanctions in the implementation of discrimination law in employment.<sup>106</sup>

Although such an approach is superficially appealing (especially the idea of employer education), the bottom line is that potential respondents would prefer it if the new anti-discrimination regime were to have even fewer teeth than the current one. Since the Government has undertaken to ensure that existing protections are not diminished, and to add at least two protected attributes (sexual orientation and gender identity) to those which currently exist in the legislation, we are confident this will not come to pass.

83. Nevertheless, given the importance of the goal of eliminating discrimination in Australia and the slowness of progress towards it highlighted in many of the articles cited above, the Castan Centre calls on the Government to take this rare opportunity to strengthen certain aspects of the law and bring it into line with the best international practice.

84. In particular, other important attributes need to be protected to reflect the modern reality of discrimination.<sup>107</sup> The consolidated Act should also shift some of the burden of implementing and/or enforcing anti-discrimination law from individual complainants to the AHRC and respondents, in recognition of the fact that discrimination affects society as a whole, and its victims should be effectively protected from it by the law.

85. Please find attached a summary of all of our recommendations for the consolidated Act.

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<sup>105</sup> Gaze, 'Twenty Years of the Sex Discrimination Act,' above n 58, 3-4.

<sup>106</sup> Anderson, above n 10, 909.

<sup>107</sup> See paragraph 17 above.

## Summary of Recommendations

### Recommendation 1

A unified definition of discrimination, emphasising a purposive approach to interpretation and covering all of the protected attributes identified in paragraph 16, could increase the clarity and efficacy of the law.

### Recommendation 2

Once a complainant has made out a *prima facie* case (possibly with the assistance of a questionnaire system similar to that used in the UK), the burden of proof (on the balance of probabilities) should shift to the respondent to show its conduct was reasonable and justified in the circumstances. Failure to provide an adequate explanation should result in an adverse inference being drawn.

### Recommendation 3

Comprehensive guidance material should be developed for potential complainants and respondents to assist them in the transition to the new model.

### Recommendation 4

The AHRC should be granted further 'own-motion' powers, including to investigate and litigate discrimination where there is sufficient public interest (eg in systemic cases). These powers should be accompanied by extra funding as appropriate.

### Recommendation 5

Any exceptions/exemptions to the consolidated legislation should be granted on the basis of a transparent, reviewable application process. If, despite this recommendation, a standing exception for religious organisations is maintained, it should be strictly confined to ministers of the religion and like roles.

### Recommendation 6

The consolidated legislation should provide for special measures covering all protected attributes, and a requirement of consultation with the intended beneficiaries of such measures.