



AN AUSTRALIAN CONVERSATION ON HUMAN RIGHTS



Australian
Human Rights
Commission

Free & Equal

A reform agenda for federal discrimination laws



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Contents Chapter 1

1	Free and Equal – A national conversation on human rights	13
1.1	How has the national conversation project progressed?	14
1.2	The obligations to respect, protect and fulfil human rights	16
2	Reforming federal discrimination laws: the foundation stone of human rights protection in Australia	19
2.1	The case for reforming federal discrimination law is longstanding and known	20
2.2	Why reform to federal discrimination law is needed	21
2.3	What principles should guide reform?	25
3	Context for reform	28
3.1	What discrimination laws exist at the federal level?	28
3.2	A complex mix of laws?	30
3.3	The purpose of discrimination laws?	34
3.4	Previous considerations of reform	35
3.5	Effectiveness – responsive regulation	39
3.6	The ‘Brandy’ misconception	41
4	The Commission’s approach to reform	44

Contents

Chapter 2

1 Focusing on capacity to bring about change	55
2 A positive duty to take measures to eliminate unlawful discrimination	58
2.1 Shifting the focus to prevention	58
2.2 Addressing systemic discrimination	60
2.3 Comparative experience	62
(a) Victoria	62
(b) UK Equality Act 2010: Public Sector Equality Duty	64
(c) Work Health and Safety	68
2.4 A positive duty in federal discrimination laws	70
(a) Alignment with the expectations of the United Nations Guiding Principles on Business and Human Rights	75
(b) Enabling compliance	75
(c) The value of a positive duty	77
2.5 Reform proposals – building a preventative culture	79

Contents Chapter 3

1 Federal discrimination law – an outdated regulatory framework	91
2 Responsive regulation	96
2.1 The concept of responsive regulation	96
2.2 The Commission, federal discrimination law and responsive regulation	99
3 Persuasion and capacity building– level one of the regulatory pyramid	103
3.1 Alternative dispute resolution	103
3.2 Information about outcomes of complaints	105
(a) Secrecy constraints	106
(b) Confidentiality and information about outcomes	107
(c) Non-disclosure agreements	109
(d) Information through court decisions	111
(e) Research partnerships on outcomes of discrimination complaints, at conciliation and through court processes	111
3.3 Guidelines	115
3.4 Summary – improving the effectiveness of regulatory functions at level one of the regulatory pyramid	117
4 Expanded co-regulatory mechanisms – level two	119
4.1 Action plans	120
4.2 Voluntary audits	124
4.3 Codes of practice	125
4.4 Certification of ‘special measures’	127

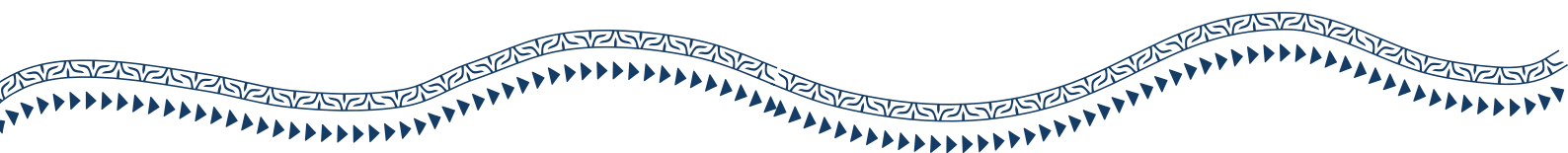
4.5 Cost recovery for co-regulatory options	130
4.6 Summary – expanding co-regulatory functions at level two of the regulatory pyramid	131
5 Measures to address non-compliance – level three	134
5.1 Disability Discrimination Act Standards	134
(a) The role of standards	135
(b) What are the existing DDA standards?	136
(c) Concerns about specific Standards	139
(d) Reporting, review and enforcement processes	141
(e) Expanding standards	141
5.2 Conducting own motion inquiries into systemic issues of discrimination	143
(a) Present inquiry functions	143
(b) Previous recommendations for an own-motion power	146
(c) Conflict of interest?	151
(d) Key elements of an own-motion inquiry power	151
(e) What enforcement powers should accompany an own-motion inquiry function?	154
5.3 Summary – measures to address non-compliance – level 3 of the regulatory pyramid	162
6 Reform proposals – modernising the regulatory framework	165

Contents

Chapter 4

1 Beyond alternative dispute resolution	189
2 Costs	191
2.1 Costs as a deterrent	191
2.2 Alternative approaches	195
(a) Cost-capping	195
(b) Cost neutrality	196
(c) Fair Work Act	197
(d) Respect@Work recommendation	198
(e) Human Rights and Anti-Discrimination Bill 2012	198
2.3 A balanced approach	200
3 Evidentiary issues	203
3.1 Evidentiary burden versus onus of proof	203
3.2 Fair Work Act approach	205
3.3 Human Rights and Anti-Discrimination Bill 2012	206
3.4 Towards a fair balance	208
3.5 Standard of proof	211
4 Standing	213
4.1 Representative complaints	213
4.2 Towards consistency	217

5	Timeframe	219
5.1	Framework for termination of complaints	219
5.2	The need for consistency	222
6	Reintroducing an intermediate adjudicative process?	225
6.1	The case for a middle tier	225
6.2	Pre-Brandy v HREOC	226
6.3	Amending the HREOC structure	228
6.4	Brandy amendments went too far?	229
6.5	Moving to a more effective model	231
6.6	Arbitration	232
7	Reform proposals – Enhancing access to justice	235



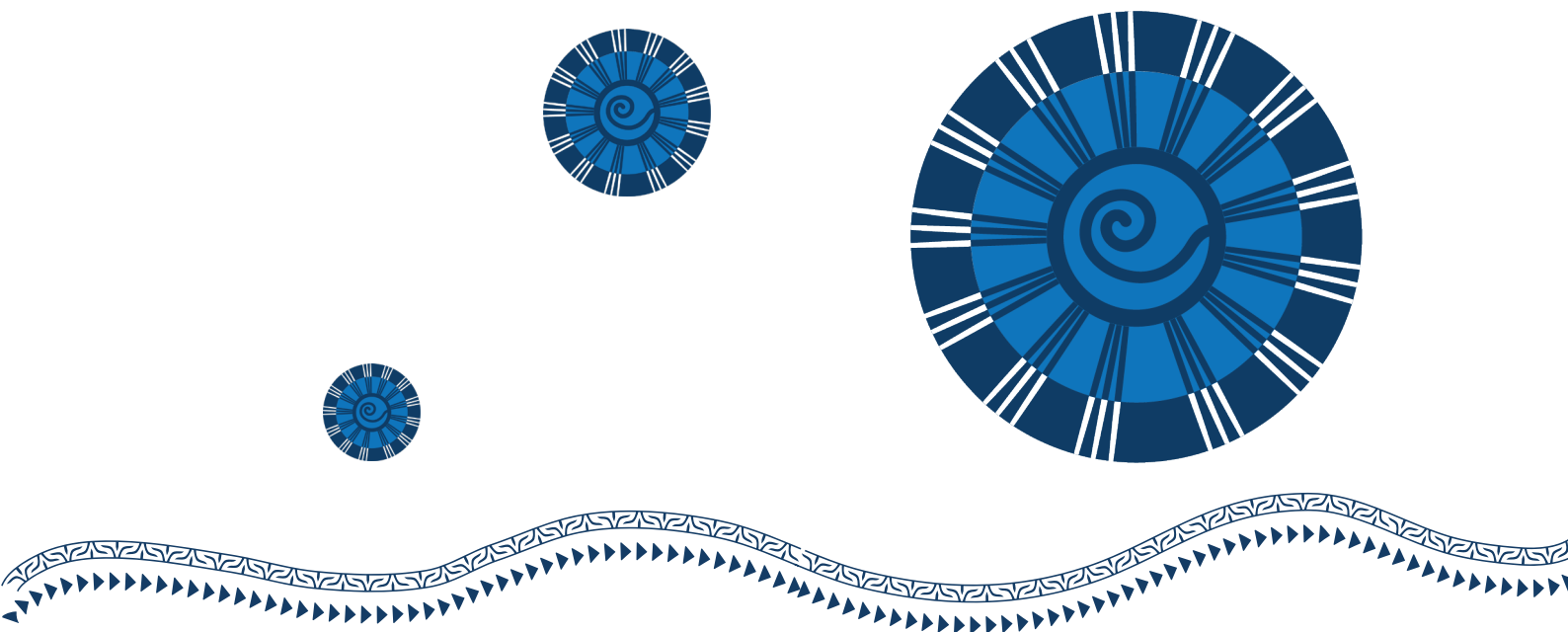
Contents Chapter 5

1 The compelling case for immediate reform	251
2 Coverage of the Acts	252
2.1 Ensuring discrimination law protects everyone in the 21st century 'world of work'	252
(a) Protection for unpaid workers	252
(b) State government employees	255
(c) Carer/family responsibilities	256
2.2 ILO 111 Discrimination as unlawful discrimination	258
(a) Scope	258
(b) Human Rights and Anti-Discrimination Bill 2012	260
(c) The right to freedom of thought, conscience and religion	261
(d) Irrelevant criminal record	262
(e) Existing ILO grounds that are adequately covered	268
2.3 Other suggested protected attributes	270
(a) Subjection to domestic or family violence	270
(b) Open-textured category?	271
3 Review all permanent exemptions under discrimination law	272
3.1 The need for a comprehensive review	272
3.2 Support for a review	273
3.3 General exception?	275
3.4 Particular permanent exceptions warranting particular scrutiny	276
(a) Insurance policies	276
(b) Religious exemptions	277
(c) Domestic work	278

4	Defining discrimination and related concepts	279
4.1	Direct discrimination – comparator test	279
4.2	A unified test for discrimination?	284
4.3	Duty to make reasonable adjustments	286
(a)	An intended positive duty	286
(b)	Impact of the Sklavos decision	288
(c)	Ways forward	291
(d)	Beyond the Disability Discrimination Act	293
(e)	‘Unjustifiable hardship’ defence	294
4.4	Indirect discrimination – Disability Discrimination Act and Racial Discrimination Act ‘inability to comply’	295
4.5	Victimisation	298
4.6	Meaning of ‘special measures’ provisions	299
4.7	Managing intersectionality	301
(a)	Law	301
(b)	Practice	302
(c)	Options for reform	303
5	Other technical issues	304
5.1	Notification obligations	304
6	Amend the AHRC Act to confirm the AHRC’s operation as a Paris Principles compliant institution	305
7	Navigating the complexity of laws	307
8	Reform proposals – Improving practical operation of laws	308

Contents Chapter 6

1 The Commission's approach to reform	331
2 Major reform 1 - building a preventative culture	333
3 Major reform 2 - modernising the regulatory framework	334
4 Major reform 3 - Enhancing access to justice	337
5 Major reform 4 - Improving the practical operation of federal discrimination laws	338
6 Implementing the reform agenda	340





Chapter 1

A reform agenda for federal discrimination laws



Major Reform 1:
Building a
preventative
culture

Major Reform 2:
Modernising the
regulatory
framework

Major Reform 4:
Improving the
practical
operation of laws

Major Reform 3:
Enhancing access
to justice



1 Free and Equal – A national conversation on human rights

This Position Paper sets out the Australian Human Rights Commission's proposals for reforming federal discrimination law in Australia. It forms part of the Commission's Free and Equal project: A National conversation on human rights.

Terms of Reference, National conversation on human rights (extract)¹

The national conversation project seeks to identify what makes an effective system of human rights protection for 21st century Australia, and what steps Australia needs to take to get there. The project is considering possible actions to ensure that:

- a.) the community understands human rights and is able to protect them (for themselves and others)
- b.) communities are resilient and a protective factor against human rights violations
- c.) law and policy makers explicitly consider the impact on human rights of their decisions and are accountable for this impact
- d.) robust institutions exist to promote and protect human rights
- e.) government and the community can work together to fully realise human rights—understanding the respective role of each other
- f.) public servants, and contracted service providers, see the protection of human rights as core business in exercising their functions
- g.) other issues that are identified as priorities for human rights protection by the Australian community are addressed.

The project will also:

- a.) Promote awareness of the importance of human rights to 21st century Australia
- b.) Identify current limitations in the promotion and protection of human rights at the national level
- c.) Identify the key principles and elements of a human rights reform agenda to modernize our system of human rights protection
- d.) Build partnerships and consensus on the future actions required to better protect and promote human rights across the Parliament, government and the community.



1.1 How has the national conversation project progressed?

The national conversation project was announced on 10 December 2018, Human Rights Day, and commenced in early 2019. In 2019 the Commission:

- released an Issues Paper – setting out consultation questions for the national conversation²
- released three Discussion Papers – on federal discrimination law reform; framing of rights; and accountability mechanisms for human rights at the national level³
- conducted the Free and Equal national conference on human rights⁴
- convened a series of roundtables with the United Nations High Commissioner for Human Rights, Dr Michelle Bachelet
- convened a series of roundtables with Professor Manfred Nowak, and hosted the Pacific launch of the United Nations Global Study on Children Deprived of Liberty

In 2019 and into 2020, the Commission opened a public submission process for the Discussion Papers as well as conducting consultations nationally. We received over 160 written submissions, with 190 people participating in national consultations.

The Commission also convened a series of technical workshops on key thematic issues:

- August 2019: Ensuring Effective National Accountability for Human Rights Workshop convened in partnership with the Human Rights Institute at UNSW
- May 2021: Technical workshop on improving parliamentary scrutiny of human rights, convened in partnership with the Castan Centre for Human Rights at Monash University and the University of Adelaide
- October–December 2020: roundtables and industry consultations on federal discrimination law reform with industry, unions, government, community legal centres and legal aid agencies, academics, barristers, and NGOs
- April–June 2021: roundtables on the positive framing of human rights and the key elements of a federal Human Rights Act.

In July 2020, the Commission also provided a report to the United Nations Human Rights Council as part of Australia's 3rd Universal periodic review. The UPR review then occurred in January 2021. In this report, the Commission made a series of recommendations for specific human rights reforms at the law and policy level in Australia across key issues such as gender, Indigenous rights, immigration and asylum seekers, age, race and disability discrimination, and appropriately balancing rights in the time of the COVID-19 pandemic.

In 2020, the Commission focused on the pressing issues that arose as the COVID-19 pandemic unfolded, and extended finalisation of the project until 2021.

Figure 1.1: Consultation processes



**4 Issues and
discussion papers**



**166 submissions
received**



**72 Consultations,
roundtables, and
workshops with over
650 participants**



**1 National
conference with over
400 participants**

1.2 The obligations to respect, protect and fulfil human rights

This Position Paper is the first in a series of papers setting out the Commission's proposed reform agenda for the better protection of human rights at the national level in Australia.

Each of the Position Papers is designed to complement the others, and to address necessary human rights reforms across different areas of law, policy and practice.

Each paper identifies actions necessary for Governments to meet their obligations to respect, protect and fulfil human rights.

- The obligation to **respect** human rights requires that governments, through their own actions, do not breach human rights.
- The obligation to **protect** human rights requires governments to take actions to prevent others from breaching human rights. Where a person's rights have been breached, the obligation to protect also requires governments to ensure accessible and effective remedies are available to that person.
- The obligation to **fulfil** human rights requires governments to take positive actions to fully realise the equal enjoyment of human rights.

These different obligations reflect that there is no one single action that can fully protect human rights or remedy a breach of human rights. It requires a mixture of actions ranging from legal protections, complaint and compensatory processes, educative measures, community-based programs and social services, for example.

Because human rights aim to protect people's essential dignity and ensure fairness of treatment, it is especially important to ensure that there is a strong focus on prevention of breaches of human rights from occurring in the first place.

Federal discrimination law has a key role to play in meeting Australia's obligations across each domain: to respect, protect **and** fulfil human rights.

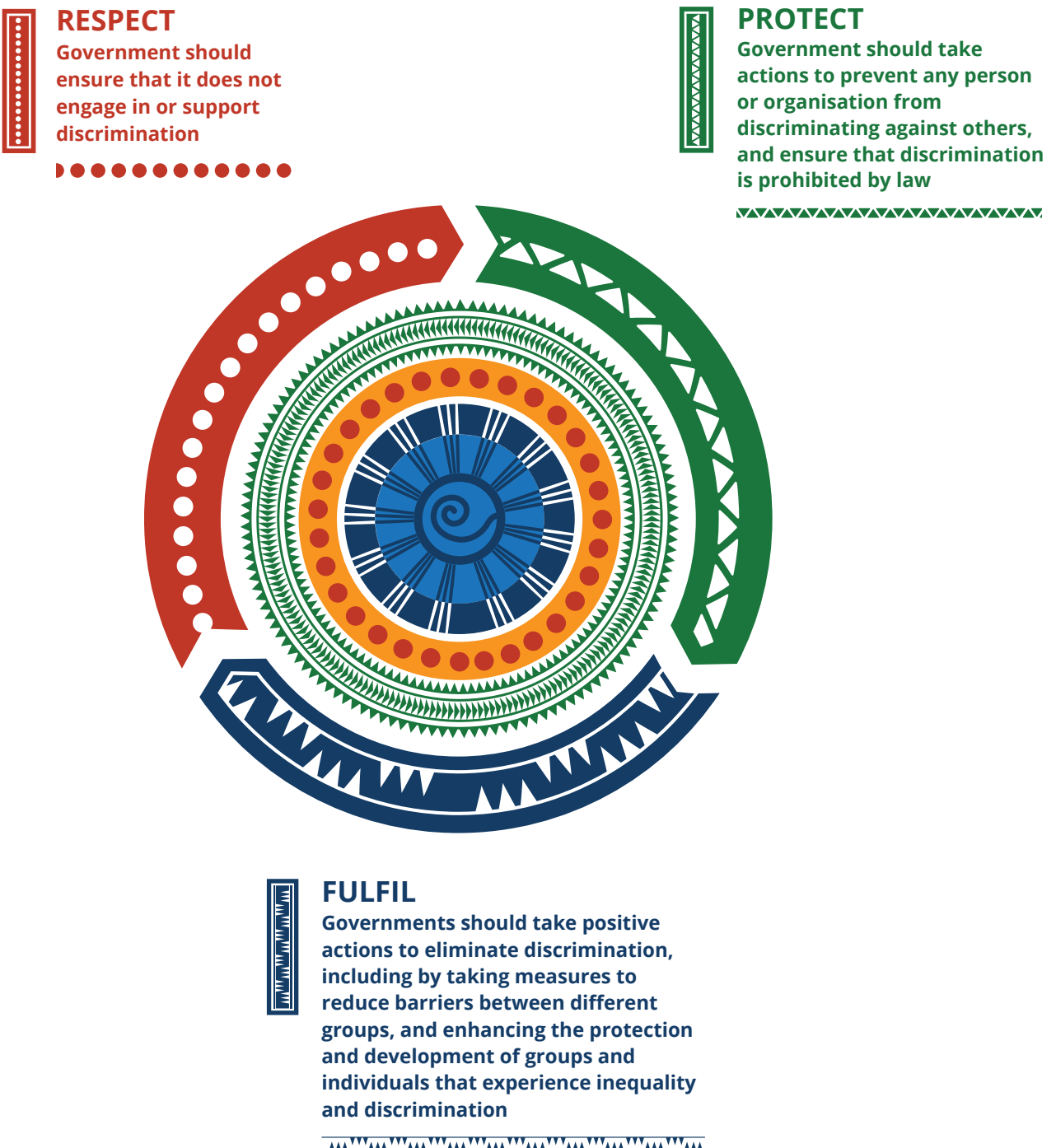
One of the key findings of the Commission's work is that the existing system of federal discrimination law is primarily geared towards the remedial aspects of the obligations to respect and protect, and even with this as its main focus, it falls short of realising effective remediation for discrimination.

There are gaps in the protection offered by these laws, as well as significant questions as to how accessible the discrimination law system is – particularly for marginalised or disadvantaged groups. This suggests that federal discrimination law could be more effective in meeting these obligations to respect and protect rights.

As outlined in this Paper, there is also a pressing need to shift the focus of the federal discrimination law system to a more preventative approach, and towards actions that better support the fulfilment of rights.

Federal discrimination law reform would contribute to each of the 3 main sets of obligations of the federal government to respect, protect and fulfil human rights.

Figure 1.2: Obligations to respect, protect and fulfil human rights





Reforming federal discrimination laws: the foundation stone of human rights protection in Australia



2 Reforming federal discrimination laws: the foundation stone of human rights protection in Australia

The Commission has chosen to focus on federal discrimination law as the first component of our human rights reform agenda as it is the most developed and longstanding component of human rights protection in Australia. These laws promote human rights being available on an equal basis, without discrimination.

Federal discrimination law protections have been the predominant implementation tool for protecting human rights in Australia in giving effect to our international obligations.

This has meant that there are significant gaps in protection that exist due to the lack of more positive and comprehensive rights protection. The need for other, complementary protections of human rights is addressed in the second Position Paper that will be released by the Commission.

Here we focus on the appropriate role of discrimination law, but recognising that discrimination law is not the only means 'by which the disadvantages of the disabled or other minority groups are to be alleviated'.⁵ Other tools are needed.

The proposals for reform here aim to realise the purpose of discrimination law, while recognising the need for parallel measures that alleviate disadvantage and protect other important human rights.

The Commission notes that Australia was a world leader on discrimination protections when the Racial Discrimination Act (Cth) was introduced in 1975 – 'an important trailblazing law'.⁶ The Sex Discrimination Act 1984 (Cth) and Disability Discrimination Act 1992 (Cth) were also considered international best practice at the time they were introduced.⁷

However, what was best practice in the second half of the 20th century is not so in the 21st century. Australia has fallen behind other comparable jurisdictions in the protection against discrimination and the transformation that has occurred in those jurisdictions in advancing equality.

For this reason, the Commission agrees with the observation of Professors Neil Rees and Simon Rice, and Associate Professor Dominique Allen, that Australia's discrimination laws 'are now in urgent need of renewal'.⁸

Reforms that have occurred to federal discrimination law over the past 40 years have tended to occur on an issue-specific basis, by adding in new protected attributes – either within existing legislation or by creating a further Act. Reforms have tended to be discrete and not focused on the operational effectiveness of the overall legislative scheme.

So, while discrimination laws remain the foundation stone of human rights protection in Australia, questions about their overall effectiveness assume great significance.

2.1 The case for reforming federal discrimination law is longstanding and known

A concerning factor that reappears throughout this paper is that numerous reviews have identified the need for reform of federal discrimination laws – and over a long period of time.

This includes parliamentary committee inquiry reports, a major Productivity Commission review and an ambitious attempt to consolidate all discrimination laws into one cohesive framework. These are discussed in section 3.4 below in more detail.

There are unaddressed reforms that have been identified as necessary for federal discrimination laws going back over decades.

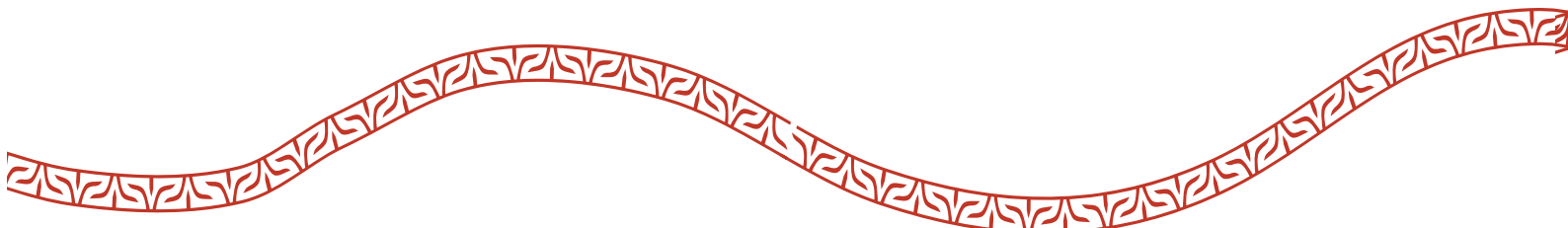
It is also notable that the current Government has embarked on an ambitious and commendable effort to modernise the regulatory powers across a wide variety of areas of federal law since 2014. In doing so, they have sought to standardise the operation of regulatory agencies and provide greater clarity and simplicity for the business community among others.

Federal discrimination law is a notable absence in this modernisation effort.

Model provisions for some of the key reforms that have been proposed for federal discrimination laws exist in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), suggesting that reform is achievable if matched with the political will to undertake it.

The consequence is that federal discrimination laws have remained mostly untouched since they were introduced over 45, 35, 30 and 15 years ago.

They are now in need of a significant overhaul.



2.2 Why reform to federal discrimination law is needed

As we outline in this Paper, the need for reform is pressing. The limitations that exist in the legislative scheme as it stands mean that:

- protections are less accessible than they should be, meaning that people who experience discrimination are not being fully protected
- the business sector is not being supported as well as it should be to take steps to prevent discrimination, or to have confidence that they will be supported when they confront discrimination head on
- addressing discrimination is heavily reliant on individuals bringing complaints, rather than more systemic approaches to building a culture of prevention.

Reform of discrimination law in Australia needs consideration on several levels:

- to address known deficiencies in the operation of existing provisions
- to be simpler, and easier to understand
- to provide better support to the business community, so that businesses have the confidence to take actions to prevent or address discrimination
- to re-balance the legislative scheme so that it is less heavily reliant on individuals needing to take remedial action when discrimination has occurred.

In the Discussion Paper on federal discrimination law reform, the Commission set out the key reasons why reform is necessary. These were broadly endorsed in consultations, with further clarifications added in below.

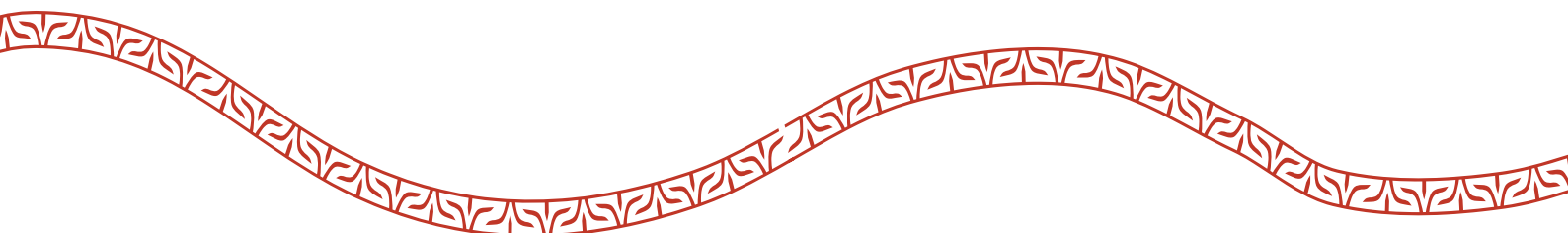
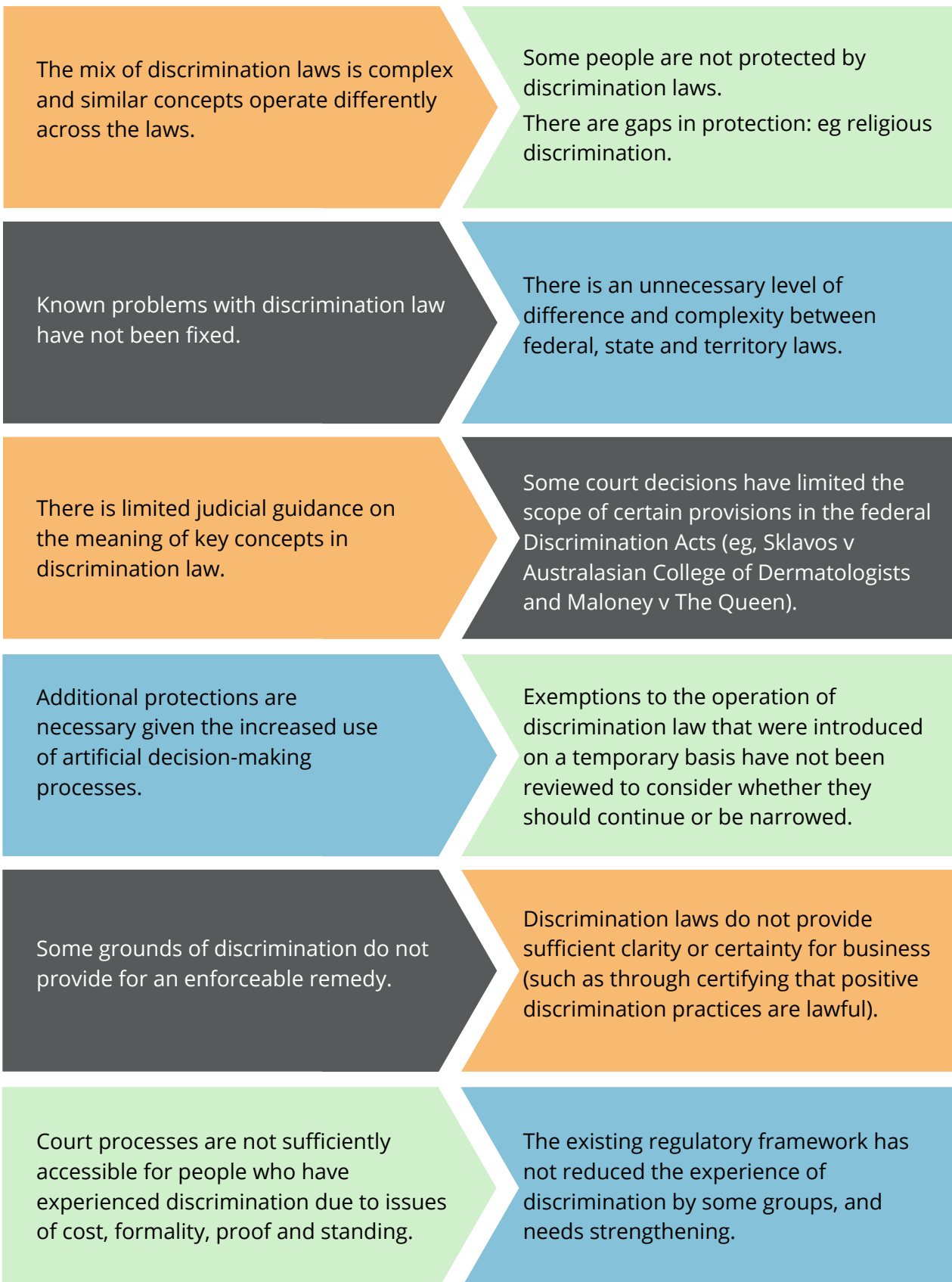


Figure 1.3: Why reform of discrimination laws is necessary

The economic and social imperatives for reforming discrimination law

Successive Australian governments have recognised that there are significant economic and social imperatives that derive from federal discrimination laws.⁹

In its review of the Disability Discrimination Act in 2004, the Productivity Commission identified the main ways that the Disability Discrimination Act has 'the potential to benefit the community in general':

First, reductions in discrimination can lead to an increase in the productive capacity of the economy. For example, reducing discrimination can enhance the participation and employment of people with disabilities in the workforce. In turn, better employment prospects can provide incentives to students with disabilities to improve their educational outcomes, making them more productive members of the community. Second, an effective DDA that improved the acceptance and integration of people with disabilities in society would benefit the community in less tangible but not less significant ways, by promoting greater trust and mutual cooperation.¹⁰

The Commission's submission to the Attorney-General's Department Discussion Paper on consolidation of discrimination laws in 2011 noted, in particular,

In 2009 independent estimates indicated that closing the gender participation gap in employment would increase Australian GDP by 21%. While it is not claimed that the whole difference in participation rates is explained by discrimination, or that discrimination law alone is capable of closing this gap, substantial productivity and participation gains appear likely to be available through improved equity measures, including through reduction in sexual harassment and violence against women. The Commission considers that any regulatory impacts and resourcing issues arising in the context of measures for improved effectiveness of discrimination law should be assessed having regard to the potential for large scale economic and social benefits through such measures.¹¹

In addition to the social and economic benefits from improving equality, there is also the question of the economic impacts of discrimination itself.

In the Respect@Work inquiry, the Commission reported the findings of economic modelling as to the economic impact of workplace sexual harassment. In the report of Deloitte Access Economics, commissioned by the Australian Government Department of the Treasury, it estimated that the total financial cost of workplace sexual harassment to the Australian economy was \$3.8 billion annually, noting that this was likely to be a 'conservative estimate'.¹²

Lost productivity (\$2.6 billion) represented the largest component of the estimated economic cost of workplace sexual harassment, with the largest share of this borne by employers. The Commission urged that, '[t]ogether with the non-financial impacts on victims, the very significant economic costs provide a compelling case for investment by governments and employers in preventing and addressing workplace sexual harassment'.¹³

As set out in the Respect@Work report, the Deloitte report identified that:

- the vast majority of the costs associated with lost productivity (approximately \$1.8 billion or 70%) were borne by Australian businesses¹⁴
- the private sector shouldered the majority of lost productivity costs (approximately \$2.2 billion) in comparison to the public sector (\$393.7 million)¹⁵
- victims of workplace sexual harassment spent an estimated \$103.5 million in accessing the health and justice systems.¹⁶

The Commission concluded that, '[r]ather than costing employers, government and victims an estimated \$3.5 billion annually, by taking action to prevent and address workplace sexual harassment, Australia has the opportunity to invest in better health and economic outcomes for its workers and workplaces'.¹⁷

Research has also been conducted in the health sector, measuring the link between racial discrimination and determinants of health. One meta study summarised the ways in which racism can impact health as follows:

- (1) reduced access to employment, housing and education and/or increased exposure to risk factors (e.g., avoidable contact with police);
- (2) adverse cognitive/emotional processes and associated psychopathology;
- (3) allostatic load [i.e. the cumulative health burden of chronic stress and life events] ;
- (4) diminished participation in healthy behaviors (e.g., sleep and exercise) and/or increased engagement in unhealthy behaviors (e.g., alcohol consumption) either directly as stress coping, or indirectly, via reduced self-regulation; and
- (5) physical injury as a result of racially-motivated violence.¹⁸

2.3 What principles should guide reform?

In the Free and Equal Discussion Paper on federal discrimination law reform, the Commission set out principles to guide any reform to federal discrimination laws. These were broadly endorsed in consultations, with some refinement as included below.

The Commission is of the view that discrimination laws, as a major component of human rights protection in Australia, should positively contribute to a reduction of discrimination in society and the greater realisation of equality on a continual basis. They should be capable of making this contribution by containing the tools to support effective regulation.

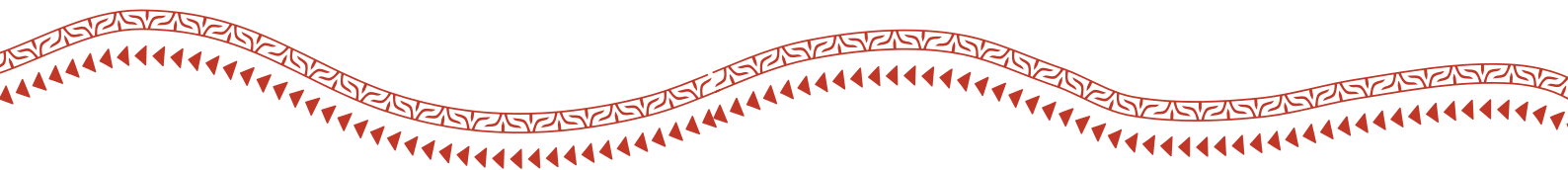
In order to achieve this, federal discrimination law should be:

- **Clear:** any legislation must be readily understandable by the community, and avoid unnecessary complexity.
- **Consistent:** key definitions should be consistent across different grounds of discrimination, unless there is a distinct or unique aspect to one ground that must be accounted for.
- **Comprehensive:** our discrimination laws should be comprehensive in their coverage by protecting all individuals and communities.
- **Intersectional:** protections for different attributes must be able to work together easily – having different tests for different attributes (such that a person has different elements of proof) and having to litigate discrimination in relation to each attribute separately is burdensome and less effective.
- **Remedial:** where someone has experienced unlawful discrimination, there should be effective remedies for breaches of their rights.
- **Accessible:** discrimination laws provide remedial support to people in vulnerable situations – the operation of these laws should aid access to justice rather than creating barriers to such access.
- **Preventative:** while discrimination law is currently largely remedial in focus, requiring a dispute before coming into operation, greater consideration should be given to mechanisms that require law and policy makers to prevent discrimination and promote equality of treatment and equal opportunity as the ultimate goals.

- **Predictable:** there has been a limited number of cases that have made their way to the federal courts over the past twenty years. While this points to the success of the conciliation process to informally resolve matters, it has left a dearth of knowledge about key elements of these laws. A lack of precedent was cited as a major inhibiting factor to the effective operation of federal discrimination laws, and the need for different options to provide non-judicial guidance.
- **Trusted:** The community should have confidence in the law as a reliable means by which discrimination can be prevented and remedied.

Any reform to discrimination law should also improve protection across the community. It should not involve creating new forms of discrimination against any sector of society.

Discrimination law should be accompanied by other protections and mechanisms to promote equality and respect for human rights. The absence of additional measures at present places additional burdens on the operation of discrimination laws, as the primary existing legislative mechanism to resolve human rights issues.



Context for reform



3 Context for reform

3.1 What discrimination laws exist at the federal level?

The first federal discrimination law in Australia was the Racial Discrimination Act, introduced to implement the *International Convention on the Elimination of All Forms of Racial Discrimination*.¹⁹

The Commonwealth Parliament added discrimination law protections in each decade after 1975, on the basis of:

- sex, marital status or pregnancy in the *Sex Discrimination Act 1984* (Cth)
- disability in the *Disability Discrimination Act 1992* (Cth)
- age in the *Age Discrimination Act 2004* (Cth)
- sexual orientation, gender identity and intersex status (SOGII) by amendments to the Sex Discrimination Act in 2013.

The passage of each new Discrimination Act set out new grounds of ‘unlawful discrimination’ and access to the complaints-handling procedure set out in the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). The four Discrimination Acts were accompanied by the appointment of a designated Discrimination Commissioner to the Commission in respect of the relevant subject matter.²⁰

The model that applies to all the federal Discrimination Acts is complaint-based, as civil wrongs, and reliant on a hybrid Alternative Dispute Resolution (ADR) model, based on conciliation of individual complaints.

If a settlement cannot be reached through conciliation, a person aggrieved can institute civil proceedings in the Federal Circuit Court or the Federal Court and seek a range of enforceable remedies, including damages.²¹ For the most part, matters are resolved administratively through conciliation. This has proved to be the hallmark of the Commission’s complaint handling since the establishment of the Commission in 1981.²²

The essential characteristic of the federal Discrimination Acts is a prohibition on discrimination in respect of particular attributes, such as race and disability, in specified areas of public life, such as employment and education. There are also defined exceptions. However, the burden of pursuing a remedy rests on individuals.

The focus of discrimination law has been on incidents that occur in areas of public life, which includes workplaces. Rather than building on existing regulatory frameworks in the area of workplace relations, ‘anti-discrimination laws were developed to stand alone’.²³ Moreover, in contrast to labour law, ‘the focus of anti-discrimination laws has been human rights and status equality’.²⁴

There are two other streams of complaint handling by the Commission at the federal level.

Other grounds of discrimination in the context of employment were introduced in 1986, in the AHRC Act. This includes protected attributes of irrelevant criminal record, religion and union activity, with the protected areas referable to Australia’s obligations under the ILO Convention 111 on discrimination (Employment and occupation).²⁵

These provisions do not operate in the same manner as the above unlawful discrimination grounds. If a complaint is not resolved at conciliation, the complainant has no pathway to proceed to Court.

There is also an ability to lodge complaints for certain human rights grounds in relation to acts or practices of the Commonwealth under the AHRC Act. This also lacks the pathway for resolution to the courts that exists under the unlawful discrimination provisions.

Figure 1.4: The complaints handling jurisdictions

Three complaints jurisdictions of the Australian Human Rights Commission			
‘Unlawful discrimination’		‘Discrimination in employment’ jurisdiction (ILO 111)	
<p>Sex Discrimination Act:</p> <ul style="list-style-type: none"> Sex Pregnancy Marital or relationship status Breastfeeding Gender identity Intersex status Sexual orientation Family responsibilities 	<p>Racial Discrimination Act:</p> <ul style="list-style-type: none"> Race Colour Descent National or ethnic origin Immigrant status 	<ul style="list-style-type: none"> Religion Political opinion Irrelevant criminal record Trade union activity <p><i>Note: no pathway to court</i></p>	
		‘Human rights’ complaints	
<p>Age Discrimination Act:</p> <ul style="list-style-type: none"> Age 	<p>Disability Discrimination Act:</p> <ul style="list-style-type: none"> Disability 	<ul style="list-style-type: none"> International Covenant on Civil and Political Rights (ICCPR) Convention Concerning Discrimination in Respect of Employment and Occupation (ILO 111) Convention on the Rights of Persons with Disabilities Convention on the Rights of the Child Declaration of the Rights of the Child Declaration on the Rights of Disabled Persons Declaration on the Rights of Mentally Retarded Persons Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. <p><i>Note: no pathway to court</i></p>	

When referring to reform of discrimination laws in this Paper, the Commission considers both ‘unlawful discrimination’ under the Discrimination Acts and ‘discrimination in employment’ under the ILO 111 jurisdiction. The ‘human rights complaints’ jurisdiction is considered in a separate Position Paper exploring the potential operation of a federal Human Rights Act.

3.2 A complex mix of laws?

Different protections against discrimination, different definitions and processes for addressing breaches, also exist in the law of every state and territory in Australia.

From the mid-1970s, state and territory laws providing for a civil remedy for discrimination were adopted: in South Australia (1975); New South Wales and Victoria (1977); Western Australia (1984); Queensland and the Australian Capital Territory (1991); the Northern Territory (1998); and Tasmania (1998).²⁶ They followed a similar pattern of introduction and areas of coverage as the Commonwealth.²⁷

At the time of writing, in 2021, there are some differences in coverage between these laws and the federal discrimination laws. There are also different regulatory powers for commissions in each jurisdiction.

In addition to these laws, there are protections against discrimination in the employment context in the *Fair Work Act 2009* (Cth).

The Fair Work system is the national framework governing the relationship between employer and employee in Australia. It provides a separate but overlapping scheme that applies to some forms of discrimination in employment.

The ‘General Protections’ provisions in Part 3-1 of the Fair Work Act, prohibit ‘adverse action’ in employment based on 13 protected attributes,²⁸ including several that are similar to those covered by anti-discrimination laws. However, a key difference of the Fair Work Act regime is that it only applies to the field of work and only to employees and potential employees.²⁹

The Fair Work Act introduced into labour law rights against discrimination in all stages of work, no longer limiting this protection to termination of employment of existing employees.

Individual claims of adverse action can be brought to the Fair Work Commission by employees against their employers, to be resolved through conciliation or adjudication.³⁰

The Fair Work Commission uses some ADR processes, but in a much more limited and truncated way than the Human Rights Commission. The Fair Work Act system operates differently from the anti-discrimination law model through the Human Rights Commission in a number of respects, particularly the enforcement machinery and powers.

Very significantly, the capacity to allege breaches under the Fair Work Act is not limited to victims. Independent of any individual who may seek to invoke the prohibitions in the Fair Work Act, the Fair Work Ombudsman has inspection and enforcement powers.³¹ The Fair Work Ombudsman is able to inquire into possible breaches on the Ombudsman's own motion. The remedies available in the federal courts also extend beyond merely reinstatement or financial compensation, to include penalty orders, which are punitive in nature, and systemic remedies, such as requirements for organisational training.³²

Civil penalty provisions, and compensatory remedies and reinstatement can be awarded to the victim, meaning that the Fair Work Act brings to discrimination claims the host of enforcement machinery that is available for other employment claims, such as underpayment of wages.³³

There are also some crossovers in protection in the federal discrimination laws with the *Work Health and Safety Act 2011* (Cth). Work health and safety laws impose a positive duty to ensure health and safety, which extends to preventing discrimination and harassment.

Australia's work health and safety laws are based on the model Work Health and Safety Act, model Work Health and Safety Regulations and model Codes of Practice (model WHS laws) in all states and territories, except in Victoria and Western Australia, which have their own WHS schemes. Under the model WHS laws, a 'person conducting a business or undertaking' has a primary duty of care to ensure, so far as is reasonably practicable, the physical and psychological health and safety of workers and those affected by the work.³⁴ It has been recognised that sexual harassment is a workplace risk that can endanger the health and safety of workers.

The result of this legislative history at the Commonwealth and state and territory levels is that there are now four different discrimination laws and the AHRC Act at the Commonwealth level; eight discrimination laws at state and territory level; and the *Fair Work Act 2009* (Cth) and work health and safety laws, such as the Work Health and Safety Act.

As Professor Beth Gaze and Associate Professor Belinda Smith observe,

Although the laws have many similarities, they differ significantly in detail. This proliferation of laws creates complexity that is a challenge for any organisation or business that has to comply with the laws in more than one jurisdiction.³⁵

The challenge created by this proliferation of laws has been a repeated theme when reform of discrimination laws has been considered.

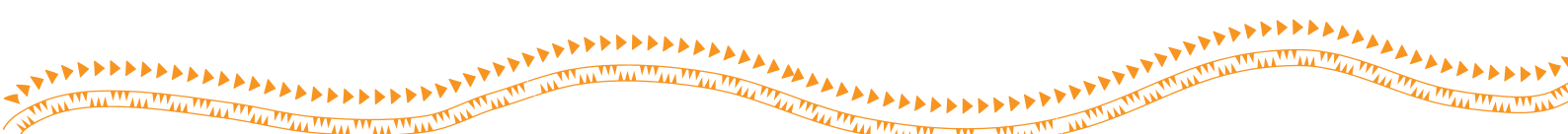
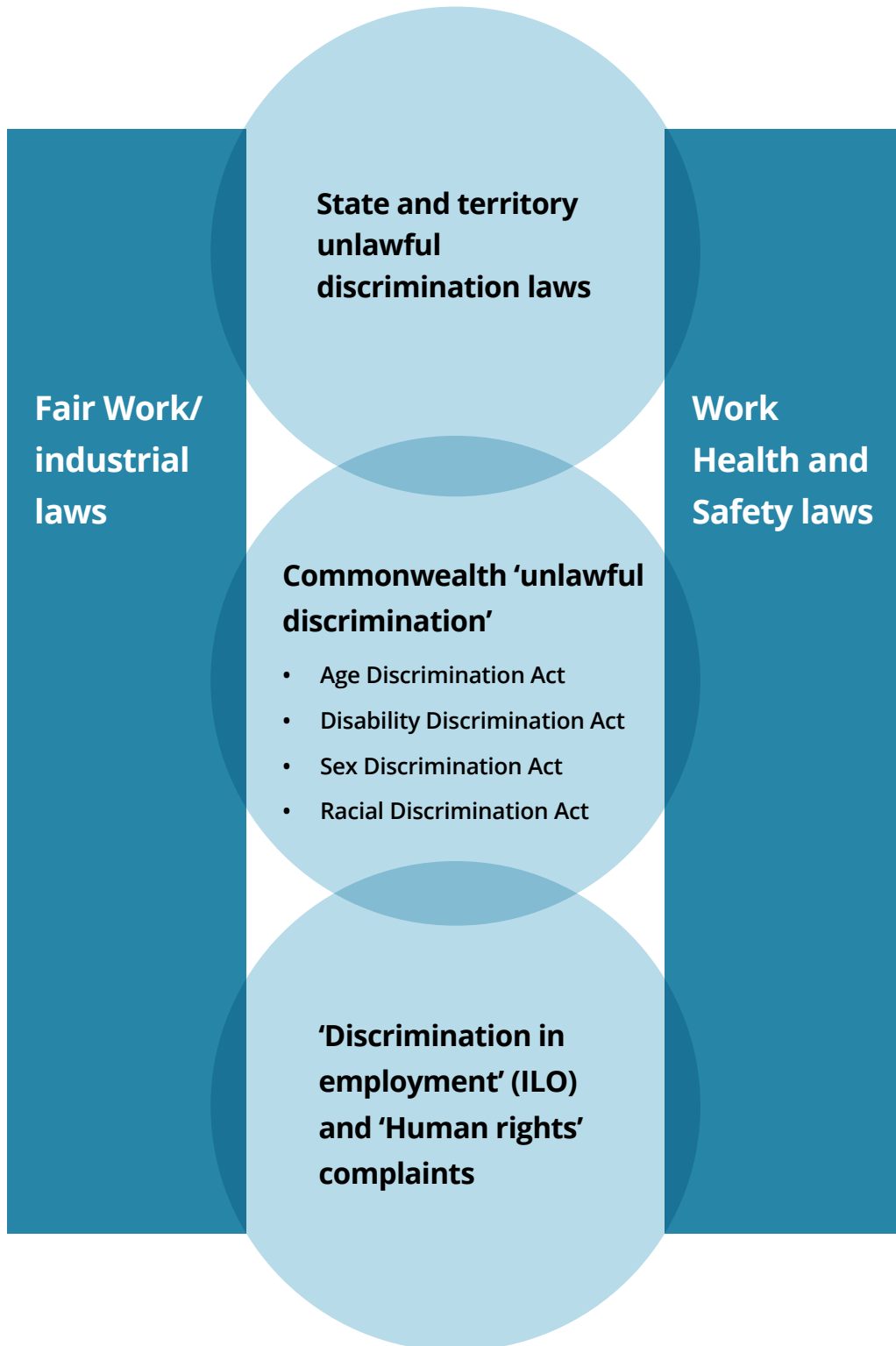


Figure 1.5: Overlapping laws



This presents a mix of sometimes overlapping jurisdictions, particularly in relation to discrimination in the workplace, which can appear complex. Duplication is managed through statutory provisions that prevent people from forum shopping by moving from one jurisdiction to another. So, for example, a person is not entitled to make a complaint to the federal jurisdiction, if they have first made a complaint under a state or territory anti-discrimination law in relation to the same act or practice.³⁶

In the Commission's national inquiry into sexual harassment in Australian workplaces, a consistent theme that emerged was that 'the interaction between the schemes is complex and confusing for both victims and employers to understand and navigate', and that changes were required to provide greater clarity.³⁷ In its response to the *Respect@Work* report recommendations, the Australian Government acknowledged that 'the duplication, conflicting definitions and concepts and unclear pathways for resolution ... create challenges for dealing with these kinds of matters when they arise' and stated that its response 'seeks clear paths to maximise Australians' access to justice'.³⁸ For example, it accepted recommendations designed to encourage joined up responses across different service providers and agencies.³⁹

The subsequent *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* recognised the need for coordination across anti-discrimination, employment and work health and safety laws, introduced a definition of sexual harassment consistent with the Sex Discrimination Act into the Fair Work Act, and allows the Fair Work Commission to issue a 'stop sexual harassment order' in the same way that it can currently issue a 'stop bullying order'. The Fair Work Act has been amended to provide certainty to employers that engaging in sexual harassment is a valid reason for the termination of a person's employment.⁴⁰

However, differences between schemes of themselves are not necessarily a reason for reform. Differences of laws in a federal system, with similar or complementary objectives, may be seen to be an unsurprising aspect of federal systems. The purposes of laws and their framework of operation may also have distinct rationales. Laws that emerged in the industrial framework and with a focus on a workplace developed in a different context from laws that expressed goals of addressing inequality and removing discrimination in public life, including aspects of workplaces.

The purpose of the Fair Work Act is expressed in an objects clause, s 3: 'to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians'. The purpose of discrimination laws is expressed very differently.

The outcomes to be achieved through a reform process need to be sensitive to such rationales and that, while the complexity remains, bodies like the Commission itself and the Fair Work Commission can assist in making the avenues as accessible and straightforward as possible from the perspective of the user.

Accessibility of systems, and a 'no wrong door' approach, are important aspects of effectiveness, even where aspects of the overall framework are structurally complex and multi-layered.

Ensuring systems are as seamless as possible, and retain the confidence of users, may provide greater stability in the short term, while incremental reforms can align these systems more effectively in the long term.

3.3 The purpose of discrimination laws?

The existing federal discrimination laws identify that the legislation is intended to achieve the following purposes:

- to eliminate discrimination as it is experienced by persons with particular attributes and where experienced in certain areas of life
- to ensure equality before the law for everyone in the community
- to promote recognition and acceptance within the community of the principle that all people have the same fundamental rights as the rest of the community
- to reflect Australia's international human rights commitments to prevent discrimination and promote equality.
- to set Australian standards and values around principles and threshold against discrimination.⁴¹

Extensive academic commentary on anti-discrimination law has reflected on the 'larger policy reasons' for anti-discrimination laws, particularly focusing on the idea of the 'equality' goal of such laws in Australia and elsewhere.⁴²

While the laws are framed as 'anti' discrimination, expressing a 'negative duty' – not to do certain things because of protected attributes,⁴³ there are also clear examples of equality measures – provisions conceptualised and framed through the objective of achieving an outcome of substantive equality. Illustrations of a substantive equality approach are the 'special measures' provisions, the positive duty to provide reasonable accommodations in the disability context and indirect discrimination, which requires a sensitivity to the manner in which existing practices may advance some groups over others;⁴⁴ all acknowledge that different treatment is sometimes required to achieve a similar outcome.

Hence the four Discrimination Acts reflect commitments to advance equality both through removing discriminatory barriers – a goal of non-discrimination – and to advance equality through direct measures – particularly in the Sex Discrimination Act and the Disability Discrimination Act.⁴⁵

The Commission considers that both approaches remain appropriate for 21st century Australia, but that the laws can go further. This inquiry is framed through the language and aspirations of the Universal Declaration of Human Rights, that all people are 'free and equal in dignity and rights'.

In response to the Attorney-General's Department's Discussion Paper on the consolidation of discrimination law, the Commission submitted that Australia's obligations on equality as reflected in the international treaties behind the Discrimination Acts should be brought more clearly into focus.⁴⁶ The Commission recommended that a consolidated law should state the objectives of promoting the achievement of equality and the elimination of discrimination, and indicate clearly that it is intended to be interpreted in accordance with Australia's international obligations on human rights. In this Free and Equal report, the Commission reiterates this recommendation in relation to the reform agenda for discrimination laws.

The Commission considers that discrimination laws, as a major component of human rights protection in Australia, should be reformed so that they better contribute to a reduction of discrimination in society and the greater realisation of equality on an ongoing basis.

3.4 Previous considerations of reform

There have been several processes to review and/or reform federal discrimination laws in the past. These reviews have occurred in relation to the operation of specific federal discrimination laws, the Commission's structure and powers, and also to consider consolidation of the federal discrimination laws together and their harmonisation with state and territory laws.

Many of these processes have resulted in findings about the need for reform but have not been accompanied by subsequent legislative reform.

The Sex Discrimination Act was reviewed in 1992 and 2008 by parliamentary committees, and by the Australian Law Reform Commission in 1994.⁴⁷ The Disability Discrimination Act was reviewed by the Productivity Commission in 2004.⁴⁸

The goal of national harmonisation was on the agenda of the Standing Committee of Attorneys-General in 2008: Ministers agreed that interested jurisdictions would examine options for harmonising Commonwealth, State and Territory anti-discrimination laws, and that a working group would be established to develop options for Ministers' consideration.⁴⁹ This was abandoned as too difficult by the Council of Attorneys-General in 2009–10.⁵⁰

In 2011–2013 an attempt to consolidate federal discrimination laws was undertaken as a key action under the Australian Human Rights Framework. This was conducted jointly by the Attorney-General's Department and the Department of Finance and Deregulation.

After a Discussion Paper and lengthy consultation process, an Exposure Draft of a Human Rights and Anti-Discrimination Bill (HRAD Bill) was released in 2012 for comment. The project was undertaken explicitly as a means to reduce complexity and inconsistency in regulation,⁵¹ to produce 'a clearer and simpler anti-discrimination law for consumers, employers and the general public'.⁵²

The aim of the Bill was to constitute a single consolidated Commonwealth anti-discrimination law, replacing the Age Discrimination Act, the Disability Discrimination Act, the Racial Discrimination Act, the Sex Discrimination Act and the AHRC Act. The Bill effected a number of reforms to Commonwealth anti-discrimination law, including implementing many recommendations of the 2008 inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Sex Discrimination Act 1984.⁵³

The Exposure Draft was considered by the Senate Legal and Constitutional Affairs Committee.⁵⁴ The Committee received 3,464 submissions and form letters,⁵⁵ and recommended some changes. The Committee report on the Bill acknowledged that '[a]nti-discrimination law is a key mechanism for promoting equality and protecting vulnerable or marginalised groups in Australia, and the parliament must do its utmost to ensure that the law in this area is fair and balanced'.⁵⁶

One aspect of the proposed reforms was implemented, to amend the Sex Discrimination Act to include sexual orientation, gender identity and intersex status as protected attributes (the SOGII reforms), but the attempt to consolidate the four anti-discrimination laws did not proceed.

While many participated in the processes of consultation conducted by the Attorney-General's Department and the Senate Legal and Constitutional Affairs committee, the failure of the reform exercise demonstrates that another exercise towards consolidation of any kind needs to be conducted with great care. The 'flash points' that emerged in the consolidation process need to be acknowledged – particularly in relation to laws that have been in place for a number of decades.

Professor Beth Gaze and Associate Professor Belinda Smith observed that consolidating the Commonwealth Acts 'proved to be a more difficult task than was probably expected',⁵⁷ and that '[a]s this is a politically charged area of law, proposals for amendment raise strong views, and proposals for broad changes can attract very strong resistance'.⁵⁸

There is much 'unfinished business' in the serious reform agenda undertaken in 2011–2013 and the Commission seeks to address some key aspects of this in this Report.

As Gaze and Smith observe, the HRAD Bill 'was not radical':

it addressed the inconsistencies between the four federal laws, and some weaknesses in Australia's laws, but fundamentally it still defined a series of negative duties not to discriminate, to be enforced by individual victims of discrimination, through a two-stage dispute resolution process of conciliation by an agency followed by a hearing and determination by a federal court.⁵⁹

They also note that there is 'an urgent need for greater depth of understanding of what the law can and cannot do to ensure better informed public debate over proposals'.⁶⁰

The reform proposals in this Position Paper have different horizons. There are some crucial amendments that should be made as a matter of priority. Incremental reforms can, and should be, undertaken. But the bigger project, of achieving some drawing together of other aspects of the four Discrimination Acts, and advancing broad-based reform, also needs to be continued.

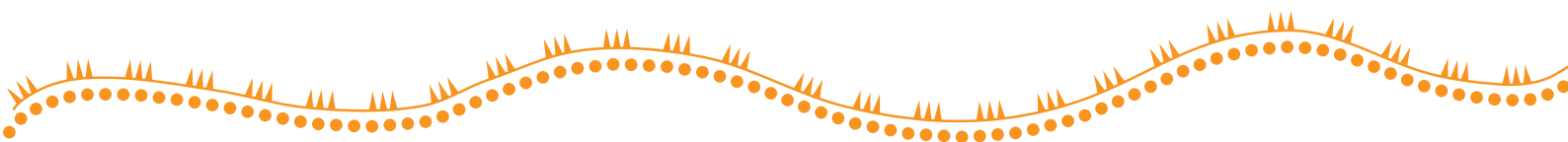
Since the HRAD Bill, there have been further considerations of aspects of the discrimination law framework. An inquiry of the Parliamentary Joint Committee on Human Rights in 2016, concluding in February 2017,⁶¹ led to amendments to the AHRC Act in relation to complaints-handling procedures and reporting.⁶²

2017 amendments to the AHRC Act

The 2017 amendments were designed to improve procedural fairness, and to enable the dismissal of unmeritorious complaints at an earlier stage.⁶³ Key changes included:

- The introduction of a higher threshold for making a valid complaint of unlawful discrimination.⁶⁴
- New obligations for the Commission to notify respondents and the subjects of adverse allegations.⁶⁵
- The introduction of a requirement that the President make a preliminary assessment to consider whether a complaint should be terminated.
- Expansion of the termination grounds, enabling the President to terminate where satisfied that an inquiry, or a continuation of an inquiry, is not warranted;⁶⁶ and the discretionary termination of a complaint where it is lodged more than six months after the alleged conduct, shortened from the previous timeframe of 12 months.⁶⁷
- Requiring a complainant to seek leave to proceed with a claim in court when a complaint is terminated on certain grounds, rather than having an automatic right to do so under the previous law.⁶⁸

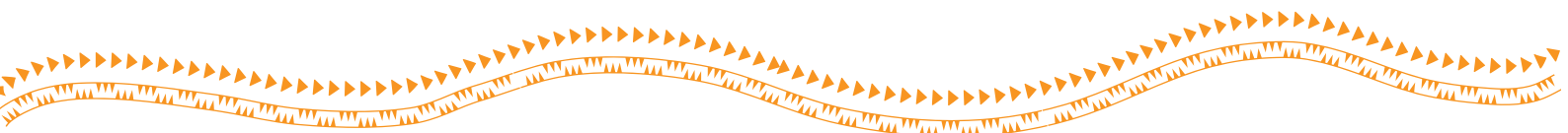
The amendments also implemented a number of recommendations advanced by the Commission itself to improve its operations and reduce its administrative burdens. These changes enabled discretionary rather than mandatory reporting to the Minister, improved governance arrangements, and clarified conciliation processes and confidentiality rules to provide greater certainty to parties.⁶⁹



In 2018, an Expert Panel, led by the Hon Philip Ruddock AO, conducted a review into religious freedom in Australia (Ruddock review).⁷⁰ A key recommendation in that report was that the Commonwealth should amend the Racial Discrimination Act, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.⁷¹

Following upon the Ruddock review, the Government introduced two packages of Exposure Draft laws, including a Religious Discrimination Bill, and other related legislation.⁷² The Exposure Drafts included some provisions that would address some of the limits in existing discrimination laws. For example, they included a definition of employment that includes volunteer workers and unpaid interns. The Commission supported this in both Exposure Drafts and recommended it be extended to all discrimination laws.⁷³ In some other respects the Exposure Drafts went further even than suggested by the Ruddock review.⁷⁴

Then, in March 2020, the Commission concluded its national inquiry into workplace sexual harassment in the report, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. The Government responded, indicating that a number of amendments would be introduced in implementation of aspects of this report, and others to be further considered, and legislation amending the Sex Discrimination Act was subsequently passed. For example, one reform removed a long-standing anomalous exemption that prevented State and Territory public servants from making claims of discrimination or harassment under the Sex Discrimination Act. A number of other matters have also been taken up in proposed reforms discussed throughout this position paper.⁷⁵ However, like other previously recommended reforms, many of the *Respect@Work* recommendations have not been adopted. The recommendations, the Government's response, and legislative amendments are considered in Chapter 5, sections 2.2 and 4.6.



3.5 Effectiveness – responsive regulation

A common theme in submissions and consultations in this Free and Equal Inquiry, and in broader commentary, was that the current model of federal discrimination laws is not 'effective' on a number of levels.

In particular, the model is reliant on an individual to make a complaint; the ADR proceedings, being conducted confidentially do not generate a sense of expectations or benchmarks; access to a remedy through judicial pathways is potentially very costly; the Commission has limited investigation powers and no enforcement powers.

The mix of laws, both federal and state and territory, is also an issue – not just for complainants but also for employers and organisations, as is the limited way that the Commission can assist employers to 'do the right thing'.

Business representatives stressed the importance of 'confidence' in discrimination law and that any reform to discrimination laws should result in a 'net improvement to the regulatory framework, including in the capacity of employers to comply'.⁷⁶

The Australian Industry Group emphasised that what is needed to ensure that human rights legislation is 'practical, fair and complied with', is that it is 'simple to understand, not overly complex and recognises that employers can comply in different ways'.⁷⁷ The Australian Chamber of Commerce and Industry also suggested that reform should be sensitive to business size and capacities – that the 'particular circumstances of smaller and medium-sized businesses need to be taken into account in framing and implementing the law'.⁷⁸

The Commission acknowledges the concerns of employers, particularly in those areas of discrimination law that relate to businesses.

The question of 'confidence' is one that involves issues of clarity: clear expectations of all those who engage with discrimination laws.

This Position Paper addresses the issue of expectations on several levels, for example: what is expected of employers; what complainants can expect; what outcomes are likely; and what support for preventative actions can the Commission give.

In developing the reform agenda in this Position Paper, the Commission has considered the model of responsive regulation initially developed by Professors Ian Ayres and John Braithwaite in 1992⁷⁹ and including their 'enforcement pyramid', that was subsequently developed by UK academics as a specific application of Braithwaite's model in the context of regulating equal opportunity.⁸⁰

When the Commission's powers are viewed through such a lens, they all sit at the bottom: at the level of persuasion, including education and training. The Commission is a 'gatekeeper',⁸¹ most of the Commission's work comprising complaint handling and education and awareness raising about human rights law and the complaint handling pathways.

The Commission does not have enforcement powers. Nor does it have the ability to investigate possible systemic discrimination law abuses. It has an inquiry power, but this is limited, and can only result in a report with non-binding recommendations. While agencies in areas like competition law and occupational health and safety have a broad range of powers to enforce compliance, 'successive governments have chosen not to invest the AHRC with equivalent powers'.⁸²

The Australian Chamber of Commerce and Industry supported the kinds of persuasive powers the Commission has, as important non-regulatory measures, but also supported 'recourse to regulation where these non-regulatory measures have failed to achieve policy objectives'.⁸³

A key question in developing a reform agenda for discrimination law is to ask what improvements are needed to the regulatory framework to build a more effective discrimination law regime, without reducing protections?



3.6 The ‘Brandy’ misconception

This Position Paper also considers fundamental structural issues of the jurisdiction of the Commission itself, and the relationship of the Commission’s conciliation processes to the federal courts.

A key moment in the development of federal discrimination law in Australia was the decision in *Brandy v HREOC (Brandy)*,⁸⁴ and the legislation introduced in consequence.⁸⁵

Between 1986 and 2000, the Commission had an adjudicative function in unlawful discrimination matters, where such matters could not be resolved either at conciliation or by negotiation between the parties. The object of this second stage was to provide a forum other than litigation in court. As Professor Beth Gaze explained:

Because of the public interest in protecting human rights it was thought better to have a less intimidating and expensive avenue for resolving discrimination matters than the normal court system, and the two-part structure of attempted conciliation and then a hearing before an informal, specialist tribunal was chosen.⁸⁶

However, this meant that a complaint pathway could involve three stages: conciliation, a Commission determination after a hearing, and proceedings in the Federal Court to enforce the determination. This multiplication of processes led to criticism that the system was ‘inefficient and prone to exacerbate, rather than ameliorate, the distress of the complainant’.⁸⁷ To address this, a process of registration in the Federal Court of determinations of the Commission under the Racial Discrimination Act, Sex Discrimination Act and Disability Discrimination Act was introduced.⁸⁸ Upon registration, a determination then had effect ‘as if it were an order made by the Federal Court’.⁸⁹

This scheme was challenged in 1995 in *Brandy* and the High Court held that because the amendments purported to vest judicial power in the Commission, contrary to Chapter III, they were invalid.⁹⁰ In terms of legal precedent, the *Brandy* decision has been frequently cited in subsequent cases concerning Chapter III of the *Constitution* and judicial power, particularly when considering issues of enforcement.⁹¹

In 1999, the *Human Rights Legislation Amendment Act (Cth)* was passed, coming into effect the following year, introducing a uniform scheme for complaint handling for unlawful discrimination matters under the Racial Discrimination Act, Sex Discrimination Act and Disability Discrimination Act. The hearing/determination function was removed from the Commission and, if conciliation was unsuccessful and the relevant complaint were ‘terminated’, an affected person could bring an unlawful discrimination case in the Federal Court.⁹² These amendments also marked the shift of the complaint-handling jurisdiction from the individual Commissioners to the President. The Discrimination Commissioners, the Human Rights Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner were also now given an *amicus curiae* function in certain proceedings before the Federal Court.⁹³ This scheme continues to the present day and remains the contemporary basis for the bringing of an action for unlawful discrimination in the Federal Courts, applying to all of the federal Discrimination Acts.⁹⁴

Commentators have observed that the decision in *Brandy* was disrupting, far-reaching and prompted significant public debate about the Court's rejection of a discrimination law scheme that had been considered relatively expeditious and cost-effective.⁹⁵ The removal of the hearing/determination function from the Commission in the subsequent amendments has been described as 'possibly the most contentious change' effected in consequence.⁹⁶

Moreover, the *Brandy* amendments went further than was necessary to address the issue of constitutional invalidity and a key part of the Commission's powers was removed. This has had consequential impacts of a wide kind. Having confidence in discrimination law and its expectations has been a theme in submissions from duty-holders. Under the former model, Commission determinations provided a measure of certainty for complainants and respondents, which then informed the Commission's ability to give guidance and improve community understanding – to generate the certainty that provides the necessary confidence for all involved.

Determinations were made by a body that had clear expertise in human rights, and the public nature of determinations, as distinct from the confidential nature of conciliation, provided an additional source of clarity for the community about the operation of discrimination laws.

Additionally, following the decision in *Brandy*, other agencies were not affected in the same way as the Commission. For example, the registration and enforcement provisions targeted in *Brandy* were mirrored in the Privacy Act at the time. Consequently, following *Brandy*, the Privacy Act also needed to be amended to respond to the High Court's decision. However, the Australian Information Commissioner retains the power to investigate and make determinations on privacy complaints, where conciliation has not resolved the matter, and retains a mechanism to enforce these determinations in the federal courts.⁹⁷

There are many federal agencies such as the Fair Work Commission, the Fair Work Ombudsman and the Office of the Australian Information Commissioner that have been conferred with determinative or regulatory powers. Like the Commission, these agencies are not 'courts' established under Chapter III of the *Constitution*.

The amendments introduced in consequence of the *Brandy* decision have effectively stultified the regulatory role of the Commission – based on a misconception that such broad reform was necessary for constitutional reasons. It is time, in light of the significant expansion of lawful, regulatory powers exercised by comparable regulatory bodies at the federal level, to consider how the Commission could be a more effective agency.

The Commission's approach to reform



4 The Commission's approach to reform

In this Position Paper the Commission sets out four integrated sets of reforms to improve the effectiveness of federal discrimination laws.

The Commission's proposals are practical, building on past reform exercises and lessons learned. We propose that reforms be staged.

Some reforms are urgently needed to address existing, known problems with the operation of federal discrimination laws. These reforms can be implemented immediately and are well overdue.

Some reforms require process responses, such as by embedding a periodic review of exemptions to ensure they remain appropriate at all times.

Other reforms are transformational, moving beyond the limitations of the existing model. These are focused on modernising the regulatory framework:

- turning it into a more proactively focused system that is less disputes-focused and encourages business confidence and innovative business practice.
- by introducing more effective enforcement mechanisms, to address systemic issues or persistent non-compliance with the law.

These reforms should be accompanied by significant outreach to stakeholders, including through educative and engagement measures. As we indicate in this paper, some measures should be given time for familiarity to develop and adaptation of policies to be done before legal consequences flow. This can be achieved by some measures coming into effect 12 months after they are enacted.

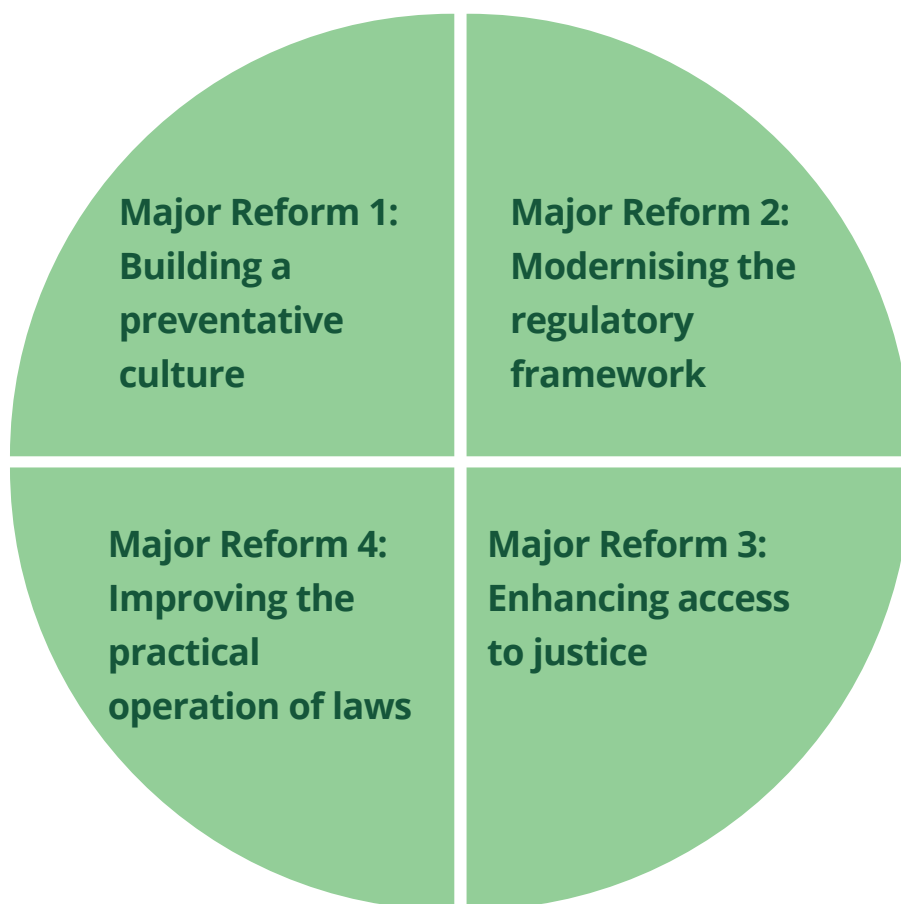
Ultimately, the Commission considers that for our system of anti-discrimination protections to be truly effective, it must shift to focus more on prevention, with measures that will assist duty-holders to prevent discrimination from occurring in the first place.

The Commission's national reform agenda for discrimination law is set out in the next four chapters, and has the following integrated sets of reforms:

- **Major reform 1:** building a preventative culture
- **Major reform 2:** modernising the regulatory framework
- **Major reform 3:** enhancing access to justice
- **Major reform 4:** improving the practical operation of the laws.

Above all, reform should be seen as a shared endeavour, in which individuals, businesses, organisations and governments each actively contributes to and is assisted in reaching this outcome.

Figure 1.6: Four integrated reforms to federal discrimination laws



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- 16 Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace* (Final Report, February 2019) 38–42. See especially Table 4.3.
- 17 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 81.
- 18 Yin Paradies et al, 'Racism as a Determinant of Health: A Systematic Review and Meta-Analysis' (2015) 10(9) PLoS ONE, 1; <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4580597/pdf/pone.0138511.pdf>>.
- 19 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969). Human Rights Commission, *Annual Report, 1981–82*, vol 1, 7. The first law at state level was the *Prohibition of Discrimination Act 1966* (SA), which outlawed discrimination on the basis of race. For historical background to anti-discrimination law, see eg, Gaze and Smith ch 2.
- 20 Other Commissioners were added in the fields of Children and Aboriginal and Torres Strait Islander Social Justice through, respectively: *Human Rights and Equal Opportunity Legislation Amendment Act (No 2) 1992* (Cth); *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth).
- 21 Eg, *Racial Discrimination Act 1975* (Cth) ss 24, 25.
- 22 It was also the basis of complaint handling under the Commission's predecessor body, the Community Relations Commission established under the *Racial Discrimination Act 1975* (Cth). See, eg, AJ Grassby, *The Future of Community Relations* (Community Relations Paper No 16, August 1981) 4–5. The Hon AJ Grassby was the first Commissioner of Community Relations.
- 23 Belinda Smith, 'What Kind of Equality Can We Expect from the *Fair Work Act*?' (2011) 35(2) *Melbourne University Law Review* 542, 553.
- 24 Belinda Smith, 'What Kind of Equality Can We Expect from the *Fair Work Act*?' (2011) 35(2) *Melbourne University Law Review* 542, 560.
- 25 *Discrimination (Employment and Occupation) Convention 1958* (No 111), opened for signature
- 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).
- 26 *Sex Discrimination Act 1975* (SA); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1977* (Vic); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1991* (QLD); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1998* (Tas).

- 27 See Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 37.
- 28 See discussion in, eg, Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) section 17.2.
- 29 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 59. However, not all employees and employers are covered, due to Constitutional complexities: Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [17.1.6]–[17.1.8]. The Fair Work Act is also limited in other ways. For example, there is no definition of discrimination, and it is therefore not clear that indirect discrimination is covered; there are no definitions of the attributes so they can be interpreted narrowly; the defences are broad - it is not necessary for the employer to establish that the employee is unable to perform the inherent requirements of the position (only that the employer's genuine reason for taking the adverse action was because of the inherent requirements of the position) and it is not necessary to have regard to 'reasonable adjustments' to the position.
- 30 'Protections at Work' *Fair Work Ombudsman* (Web Page, April 2021) <<https://www.fairwork.gov.au/tools-and-resources/fact-sheets/rights-and-obligations/protections-at-work>>
- 31 *Fair Work Act 2009* (Cth) s 539 table item 11 and Part 5-2, Division 3.
- 32 *Fair Work Act 2009* (Cth) ss 539, 545, 546.
- 33 Belinda Smith, 'What Kind of Equality Can We Expect from the *Fair Work Act*?' (2011) 35(2) *Melbourne University Law Review* 542, 572–573.
- 34 See, eg, 'Duties of a PCBU', <[Duties of a PCBU | Safe Work Australia](#)>.
- 35 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 37.
- 36 *Race Discrimination Act 1975* (Cth) s 6A; *Sex Discrimination Act 1984* (Cth) s 11(4); *Disability Discrimination Act 1992* (Cth) s 13(4); *Age Discrimination Act 2004* (Cth) s 12(4).
- 37 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 74.
- 38 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 2.
- 39 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 16, 10. See Sex Discrimination Amendment (Prohibiting All Sexual Harassment) Bill (Cth) 2021.
- 40 *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).

- 41 See further s 3 of the *Age Discrimination Act 2004* (Cth), *Sex Discrimination 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Racial Discrimination Act 1975* (Cth) preamble.
- 42 See, eg, Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [1.4.13]–[1.4.20]; Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) [1.3], [1.4], 14–28.
- 43 See, eg, George Rutherglen, ‘Concrete or Abstract Conceptions of Discrimination’, in D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (2013) 123.
- 44 See discussion at Chapter 5, section 4.4.
- 45 See, eg, Alice Taylor, ‘The Conflicting Purposes of Australian Anti-Discrimination Law’ (2019) 42(1) *UNSW Law Journal* 188, 191.
- 46 Australian Human Rights Commission, Submission to Australian Government Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011), [8]–[9], Rec 1.
- 47 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Half Way to Equal: Report of the inquiry into equal opportunity and equal status for women in Australia* (Report, 1992); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Final Report, December 2008); Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (Report No 69, 1994).
- 48 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004).
- 49 Standing Committee of Attorneys-General, 28 March 2008 Communiqué, 11 <<https://nswbar.asn.au/circulars/scag.pdf>>.
- 50 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 37.
- 51 Australian Government Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) 6.
- 52 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft Human Rights and Anti-Discrimination Bill 2012* (Report, February 2013) [7.2].
- 53 Australian Government Attorney-General’s Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) 1.
- 54 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft Human Rights and Anti-Discrimination Bill 2012* (Report, February 2013).
- 55 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft Human Rights and Anti-Discrimination Bill 2012* (Report, February 2013) [7.6].

- 56 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft Human Rights and Anti-Discrimination Bill 2012* (Report, February 2013) [7.2].
- 57 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 278.
- 58 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 45.
- 59 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 279.
- 60 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 279.
- 61 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (Report, 28 February 2017).
- 62 *Human Rights Legislation Amendment Act 2017* (Cth). The amendments are considered in Chapter 3.
- 63 Explanatory Memorandum, *Human Rights Legislation Amendment Act 2017* (Cth) [8], [10].
- 64 Explanatory Memorandum, *Human Rights Legislation Amendment Act 2017* (Cth) [41]; *Human Rights Legislation Amendment Act 2017* (Cth) s 27.
- 65 *Human Rights Legislation Amendment Act 2017* (Cth) s 36(7).
- 66 *Human Rights Legislation Amendment Act 2017* (Cth) s 31.
- 67 *Human Rights Legislation Amendment Act 2017* (Cth) s 39.
- 68 *Human Rights Legislation Amendment Act 2017* (Cth) s 53.
- 69 Explanatory Memorandum, *Human Rights Legislation Amendment Bill 2017* (Cth) [57], [61], [63], [67], [69].
- 70 Expert Panel, *Religious Freedom Review* (May 2018) (Religious Freedom Review).
- 71 *Religious Freedom Review*, rec 15.
- 72 'Religious Freedom Bills- Second Exposure Drafts', *Attorney-General's Department* (Web Page, January 2020) <<https://www.ag.gov.au/rights-and-protections/consultations/religious-freedom-bills-second-exposure-drafts>>; 'Religious Freedom Bills- First Exposure Drafts', *Attorney-General's Department* (Web Page, October 2019) < <https://www.ag.gov.au/rights-and-protections/consultations/religious-freedom-bills-first-exposure-drafts>>.

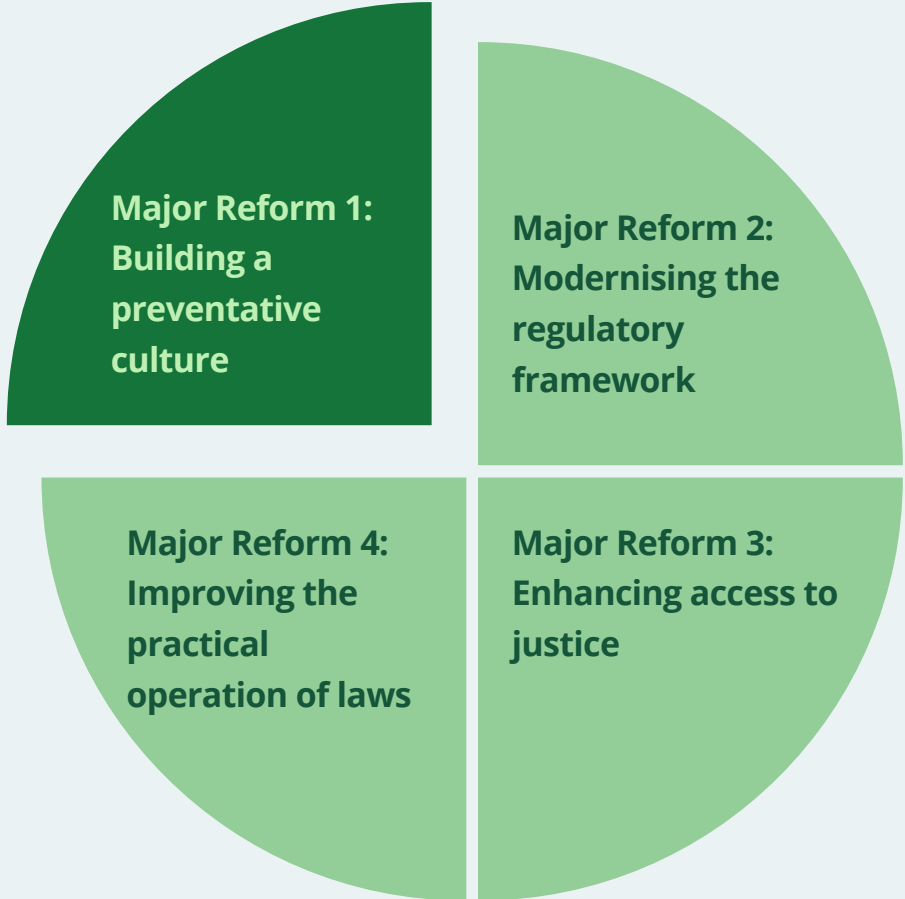
- 73 Australian Government, Attorney-General's Department, Religious Discrimination Bills: Second Exposure Draft, cl 5, definition of 'employment'; Australian Human Rights Commission, Submission to the Attorney-General's Department, *Religious Freedom Bills* (27 September 2019), 14 [46-51]; Australian Human Rights Commission, Submission to the Attorney-General's Department, *Religious Freedom Bills: second exposure draft* (31 January 2020), rec 1.
- 74 Eg, in the recommendation for a Religious Freedom Commissioner, which was not supported: *Religious Freedom Review*, 100–101. See also, Australian Human Rights Commission, Submission to the Attorney-General's Department, *Religious Freedom Bills* (27 September 2019), [172-180]; Australian Human Rights Commission, Submission to the Attorney-General's Department, *Religious Freedom Bills: second exposure draft* (31 January 2020), rec 11.
- 75 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 12–15; *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) and Sex Discrimination Amendment (Prohibiting All Sexual Harassment) Bill (Cth) 2021.
- 76 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 1.
- 77 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 3.
- 78 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 2.
- 79 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 19192). See also, John Braithwaite, 'Essence of Responsive Regulation' (2011) 44 *UBC Law Review* 475. There are other relevant regulatory theories that can inform proposals for discrimination law in Australia. For example, 'reflexive regulation' promotes enforceable self-regulation through a positive duty, consultation, enabling and enforcement: see Belinda Smith, Melanie Shleiger and Liam Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws' (2020) 32(2) *Australian Journal of Labour Law* 219.
- 80 Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework – The Final Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*. (Oxford: Hart Publishing, 2000) ; Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 1.
- 81 Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, 312, 313.
- 82 Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, 312.
- 83 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 2.
- 84 *Brandy v HREOC* (1995) 183 CLR 245.
- 85 *Human Rights Legislation Amendment Act* (No 1) 1999 (Cth).
- 86 Beth Gaze, 'The costs of equal opportunity' (2000) 25(3) *Alternative Law Journal* 125.

- 87 Krysti Guest, *Human Rights Legislation Amendment Bill 1996* (Bills Digest No 75 of 1996–97, Department of the Parliamentary Library, Information and Research Services) 3. Guest referred to academic and judicial comments noted in: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Review of the Determinations of the Human Rights and Equal Opportunity Commission and the Privacy Commissioner* (1992) 8–12.
- 88 The Commission itself suggested to the Committee that determinations should be registered with the Federal Court and take effect as if they were court orders, subject to the ability of the respondent to apply for a review by the Federal Court: HREOC, Submission No 8, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Review of the Determinations of the Human Rights and Equal Opportunity Commission and the Privacy Commissioner* (1992) [3.11]. With support for such a registration procedure, its constitutional validity affirmed by the Chief General Counsel, and favoured by the Attorney-General's Department, the Committee opted for this approach: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Review of the Determinations of the Human Rights and Equal Opportunity Commission and the Privacy Commissioner* (1992) [4.15].
- 89 Eg, *Racial Discrimination Act 1975* (Cth) s 25ZAB. The Bill came into force on 13 January 1993.
- 90 *Brandy v HREOC* (1995) 183 CLR 245, [20].
- 91 See, for example, *Vella v Commissioner of Police (NSW)* [2019] HCA 38; *Deputy Commissioner of Taxation v Buzadzic* [2019] VSCA 221; *GS v Ms* [2019] WASC 225.
- 92 *Australian Human Rights Commission Act 1986* (Cth) s 46PO.
- 93 *Human Rights Legislation Amendment Act (No 1) 1999* (Cth) introducing s 46PV.
- 94 *Australian Human Rights Commission Act 1986* (Cth) s 3(1).
- 95 See Janice Nand, 'Judicial Power and Administrative Tribunals: The decision in *Brandy v HREOC*' (1997) 14 *Australian Institute of Administrative Law Forum* 15, 25.
- 96 Sharon Offenberger and Robin Banks, 'Wind out of the sails: new federal structure for the administration of human rights legislation' (2000) 6(1) *Australian Journal of Human Rights* 239, 241.
- 97 *Privacy Act 1988* (Cth) ss 52, 55A, 62. The role of the Privacy Commissioner sat with the Commission until 2000.



Chapter 2

Building a preventative culture



**Major Reform 1:
Building a
preventative
culture**

**Major Reform 2:
Modernising the
regulatory
framework**

**Major Reform 4:
Improving the
practical
operation of laws**

**Major Reform 3:
Enhancing access to
justice**



Focusing on capacity to bring about change



1 Focusing on capacity to bring about change

Positive duties focus on capacity to bring about change, rather than on fault.

Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 266

The first of four major reforms that the Commission proposes in this Position Paper, seeks to refocus federal discrimination law so that it encourages, and indeed expects, action to prevent discrimination from occurring in the first place.

The Commission proposes that existing protections against discrimination in each of the federal discrimination laws should be complemented by the inclusion of a positive duty to take reasonable and proportionate measures to eliminate unlawful discrimination, along with harassment and victimisation.

This involves a significant cultural shift in the operation of federal discrimination law, albeit a shift that has been occurring in discrimination law in other jurisdictions and in work, health and safety laws.

The current model of federal discrimination law is heavily dependent on individuals bringing forward complaints of discriminatory treatment as the only available method for enforcing the law. We know that many people who have been discriminated against and treated unlawfully will never take such action.

To do so, requires a person to be prepared to relive an incident or pattern of behaviour that may have been deeply hurtful or traumatic for them. It requires them to have enough knowledge of the law, and/or of how to get legal assistance, even to know that their treatment may be unlawful. It involves a significant investment of time and money. And it requires them to exercise bravery and, in some instances, to risk experiencing further adverse consequences from stepping forward.

We also know that those most likely to experience discrimination on a regular basis may be less likely to bring individual actions. They are often the least resourced and least supported in our community to do so, and the cumulative impact of their exposure to such treatment on a regular basis may leave them the most disempowered in the community. The Commission's report, *Wiyi Yanu U Thangani: Women's voices (2020)*,¹ is a vivid illustration of this. It details regular experiences of discrimination faced by Aboriginal and Torres Strait Islander women – most of which goes unaddressed.

Ensuring that there are remedies for those subject to discrimination is fundamental. It is a key component to meeting obligations to respect, protect and fulfil the right to non-discrimination.

Complaints mechanisms are, therefore, of critical importance. But such mechanisms should not be the first or only mechanism for addressing discrimination, because they are focused on redress rather than prevention.

Positive duties are an emerging feature of discrimination laws in Australia and overseas, reflecting a shift to a preventative focus that is proactive in dealing with discrimination and avoiding harm.

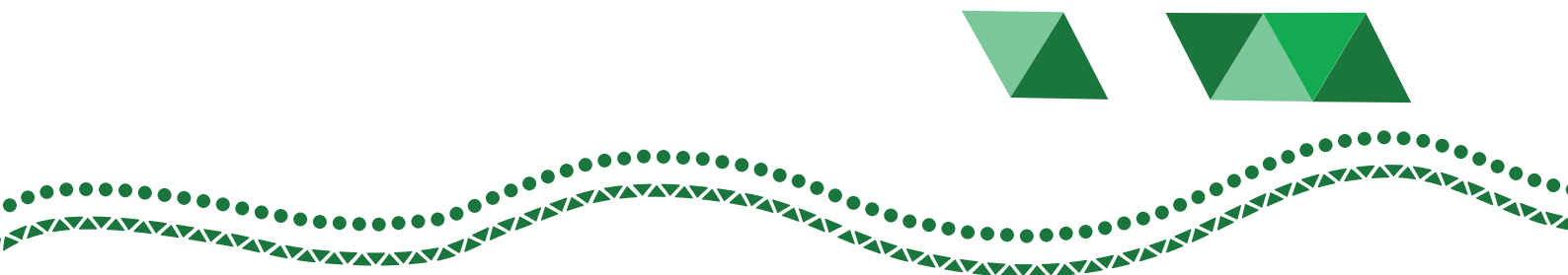
The Commission's report, *Respect@Work: National inquiry into Sexual Harassment in Australian Workplaces* (2020), recommended a positive duty to take measures to eliminate discrimination, sexual harassment and victimisation as far as possible.

That was based on the model in Victoria that has been in place since 2010.² The Commission considered that the positive duty should be part of a new regulatory model in relation to the continuing problem of sexual harassment in the workplace.

However, sexual harassment and discrimination in the workplace are only one aspect of matters covered by federal discrimination law. The Commission considers that a broader positive duty incorporating all discrimination laws is essential if Australia is to achieve the goal of the elimination of discrimination.

This language is clearly reflected in Australia's international obligations. For example, article 2 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) states that the commitment that Australia, and all other governments, have made is to eliminate racial discrimination in all its forms.

The Commission therefore recommends that such a positive duty be a central reform to *all* discrimination laws – to place a new, significant focus on the prevention of discrimination. The duty would extend beyond the workplace, to all areas of public life, and incorporate all protected grounds. All organisations with responsibilities under discrimination laws would be required to comply with the duty, including employers and businesses, government entities, and providers of accommodation, education, or goods and services. This would set out a clear expectation that all these responsible organisations will always act in a non-discriminatory manner and pre-emptively consider and address risks of discrimination. The Commission also recommends that the positive duty be enforceable through several enforcement mechanisms (these are explored further in Chapter 3, sections 4.3 and 6.2).



A positive duty to take measures to eliminate unlawful discrimination



2 A positive duty to take measures to eliminate unlawful discrimination

2.1 Shifting the focus to prevention

The current legislative framework in relation to unlawful discrimination remains largely remedial in nature, because it requires a 'person aggrieved' (the victim) to make a complaint and tends to focus on discrimination that has already happened.

As noted in the *Respect@Work* report, this places significant responsibility on individual complainants and means that employer practices are often only externally scrutinised after an allegation of sexual harassment (or discrimination) has been made,³ and the issue goes to the liability of the employer.

In that inquiry, the Commission heard that, while the Sex Discrimination Act aims to eliminate sexual harassment and promote gender equality, existing laws did not place sufficient obligations on employers to prevent sexual harassment from occurring in the first place.

There are vicarious liability provisions that mean that organisations can be held liable for not acting sufficiently to address discrimination and harassment, but they only come into operation when an incident of discrimination has occurred, and a complaint is made to the Commission. For example, the Sex Discrimination Act provides that if the organisation has failed in its duty to take all reasonable steps to prevent the person from engaging in the discrimination, then it can be held jointly liable for the discrimination or harassment.

In submissions to the *Respect@Work* inquiry, the Commission received significant support for the introduction of a freestanding positive duty that would require employers to take proactive measures to prevent sex discrimination and sexual harassment in the workplace.⁴

To shift the reactive nature of discrimination laws, and to foster cultures that do not wait until an issue arises, change is required, in all the areas of life covered by discrimination law (such as workplaces, education, housing, and services).

It is the dealing with discrimination 'after the fact' that is seen to be a principal reason why anti-discrimination laws have been unable to address ongoing issues of entrenched and systemic discriminatory practices.

Associate Professor Dominique Allen observed that

anti-discrimination laws impose very few obligations on employers and service providers to address inequality or to anticipate the discriminatory consequences of their behaviour; they do not have to do anything until a successful claim has been made against them and even in that instance, they are most likely to be ordered to pay compensation rather than to make wider, structural change.⁵

The Commission considers that there is a place for a positive duty in all federal discrimination laws as a foundation for reshaping the understanding and operation of those laws. It reflects a sharing of the overall burden of discrimination laws.

As Professor Beth Gaze and Associate Professor Belinda Smith explain,

Positive duties are forward-looking, systemic and seek to impel social transformation toward a system that prevents discrimination occurring and promotes substantive equality, in contrast with the backward looking, individualised nature of anti-discrimination law enforcement. Positive duties focus on capacity to bring about change, rather than on fault.⁶

Positive duties across all discrimination laws would require proactive steps to address potential discrimination by organisations with discrimination law obligations, including government entities, businesses, employers and service providers.

The Commission considers that a positive duty, and associated reforms, would be beneficial to the business sector in particular. The introduction of such a positive duty for businesses also aligns with the expectations on both governments and business under the United Nations Guiding Principles on Business and Human Rights.⁷

Such a duty should be accompanied by guidance, industry codes and professional standards to embed it in the culture of organisations.

Currently, federal discrimination law offers limited support for businesses that seek to embed non-discrimination into their operations. As an example, the Commission is unable to certify that actions taken to promote diversity through Indigenous specific recruitment processes or practices to employ persons with a disability amount to a special measure and is not discrimination. This leaves businesses at risk of legal action where they seek to do 'the right thing'.

The focus of a positive duty would be on prevention. The corollary of placing a duty to focus on this is that businesses would have a 'protective shield' from legal actions where they have taken proactive steps to enhance workplace protections against discrimination.

It is highly likely that there would be cost benefits for business from the impact of shifting the focus from having to deal with complaints of unlawful discrimination, both in terms of damage to business reputation but also disruption to business. These costs benefits extend to the unseen financial and productivity implications of discrimination, for organisations and the economy as a whole.

As noted in Chapter 1, section 2.2, the findings of the Deloitte report as to the economic impact of sexual harassment, were stark: that it was costing the Australian economy an estimated \$3.8 billion, annually, including approximately \$2.6 billion in lost productivity and \$249.6 million in individual 'lost wellbeing'.⁸ These are striking figures, even without consideration of the economic impact of any other forms of discrimination.

2.2 Addressing systemic discrimination

Positive duties may also contribute to addressing what is described as ‘systemic discrimination’. Systemic discrimination is a particularly insidious form of discrimination that is serious in nature and relates to a class or group of people. The UN Committee on Social, Economic and Cultural Rights refers to systemic discrimination as the ‘legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups’.⁹ The Council of Europe defines ‘structural discrimination’ as based on the way society is organised and institutions are structured. It operates ‘through norms, routines, patterns of attitudes and behaviour that create obstacles in achieving real equality or equal opportunities’.¹⁰ These patterns and behaviours can be unintended, unconscious or informal in nature.¹¹

Systemic discrimination includes the small but cumulative manifestations of a culture of inequality. These can be so embedded that they are difficult to identify and isolate, and may appear minor in their individual impact, so as not to be practically amenable to a legal claim, despite broader implications for social or organisational culture as a whole.

Examples of conduct that may amount to systemic discrimination include:

- refusal to provide goods or services to people who have a certain protected attribute – for example, an insurance industry wide limitation or complete restriction on income protection insurance for people with a disclosed psychological disability
- financial institutions adopting more restrictive lending practices (and/or denial of certain types of credit cards) for persons with certain income streams connected to their age
- designing a product intended to improve the experience of the majority but which effectively excludes people with a particular attribute, such as vision impairment
- training requirements with timeframes for completion, that do not take account of maternity leave, may have a negative impact on women of a particular age.

Attention may be drawn to such systemic issues through individual complaints, but also through media attention on the issues – and not necessarily with a complaint. Although some complaints may be conciliated on an individual basis, the policy in a particular place may not have changed, indicating a more pervasive and systemic problem.¹²



Similarly, a number of complaints may draw attention to a policy, such as an airline policy that all people with disabilities requiring wheelchair assistance must prove medical fitness to travel. Several complaints may have been lodged by different individuals regarding the policy and settled, without any change to the policy. The systemic issue of discrimination is continuing.¹³

'Systemic' is also used in other ways in the discrimination law context, such as systemic remedies. For example, settlement of an individual complaint may give rise to a resolution for the individual as well as to systemic changes, as where the policy or practice is changed for everyone. Systemic outcomes have been achieved. Systemic remedies can result through conciliation, but courts are unlikely to order them as the Discrimination Acts do not explicitly authorise systemic remedies, and because the focus of a court is on the achievement of justice for the individual, on the basis of the particular case. Courts also only provide remedies after the fact. Ideally, systemic changes can be made early, when problems are first identified, preventing the need for an individual to go to court altogether.

The *Respect@Work* report drew attention to other issues of a systemic nature that may give rise to discrimination. One aspect of the Terms of Reference for that inquiry concerned the 'drivers, including risk factors for particular population groups or in different workplace setting'. This led to a focus in the report on other 'cultural and systemic factors' that contribute to the prevalence of workplace sexual harassment, including

- the culture or 'climate' of a workplace, including the critical role of leadership in setting workplace culture
- a lack of understanding about what constitutes sexual harassment
- use of alcohol in a work context.¹⁴

Other 'systemic drivers' identified included gender inequality and social norms, and power disparities in workplaces.¹⁵

Gaze and Smith argue that positive duties are crucial in tackling systemic discrimination. They point to the work of Professor Sandra Fredman, who urged that positive duties 'should be the future of equality law because of their potential for transforming systems to prevent discrimination arising'.

Designed to address systemic problems that are not easily reached by a prohibition on discrimination, they do not depend on individuals identifying a breach of the law and having the resources to follow through what can be a lengthy enforcement process.¹⁶

Gaze and Smith argue that, rather than simply addressing particular instances of unlawful discrimination, 'within a system that continues to generate them', it would be more effective to prevent discrimination occurring in the first place 'by changing the system and its practices':

This requires positive action to be taken by people and organisations that are in a position to change the way things are done. In this way, positive duties are seen as a more effective response to discrimination.¹⁷

Issues of compliance and enforcement are separate matters, but necessary considerations in the design of a positive duty in federal discrimination laws. The Commission recommends that a positive duty be backed by effective enforcement mechanisms. This is discussed further in Chapter 3.

2.3 Comparative experience

The experience in the UK, under the *Equality Act 2010*, and Victoria since the introduction of the *Equal Opportunity Act 2010 (Vic)* is instructive and was referred to by stakeholders in support of the introduction of a similar positive duty in federal discrimination laws. Most recently, this has been a focus of the Commission in the *Respect@Work* report in relation to sexual harassment.

(a) Victoria

Victoria overhauled its anti-discrimination laws in 2010.¹⁸

The Act 'features a number of dynamic provisions' which were included 'in an attempt to address systemic discrimination and promote substantive, rather than formal, equality'.¹⁹

The 2010 Act followed upon the review of Victoria's anti-discrimination laws after the introduction of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*. It was conducted by former public advocate, Julian Gardner, who recommended that the Act 'take a more proactive approach in tackling discrimination, explicitly articulate its goal of eliminating discrimination, and include measures to address systemic discrimination'.²⁰

The positive duty applies to a person who is potentially liable for discrimination, harassment or vilification under the Act. It provides that 'a person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible'.²¹

In determining whether a measure is reasonable and proportionate, the following factors must be considered:

- the size of the person's business or operations
- the nature and circumstances of the person's business or operations
- the person's resources
- the person's business and operational priorities
- the practicability and the cost of the measures.²²

The positive duty in the 2010 Act applies to all organisations covered by the Act, including government, business, employers and service providers.

The outcome sought was a greater 'upstream' focus of the responsibility of discrimination laws: a focus on *preventing* discrimination, rather than just responding to a complaint in a specific instance.

As stated in the Explanatory Memorandum for the 2010 legislation:

The duty will mean that duty holders will need to think proactively about their compliance obligations rather than waiting for a dispute to be brought to elicit a response. It may involve organisations doing such things as –

- identifying potential areas for non-compliance;
- developing a strategy for meeting and maintaining compliance (such as undertaking training or establishing policies);
- reviewing and improving compliance where appropriate.

It is intended that, by stating the existing obligations in a positive and explicit way that does not rely on an individual dispute being brought, this duty will promote proactive compliance with the Bill and provide [VEOHRC] with a platform to facilitate compliance in the absence of a dispute.²³

Gardner recommended including a specific duty to eliminate discrimination that is expressed in a positive way, rather than as a duty *not* to discriminate, recognising that 'an individual complaints system cannot adequately address systemic discrimination because it relies on the individual to lodge a complaint rather than placing the obligation on the respondent to comply.'²⁴

Gardner also recommended that the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) have the power to enforce the duty by conducting inquiries and issuing compliance notices.

VEOHRC now has some powers to conduct an investigation, which are less than Gardner recommended, into a suspected contravention of the positive duty that is serious in nature, relates to a class or group of persons and cannot reasonably be expected to be resolved by dispute resolution or at the Victorian Civil and Administrative Tribunal (VCAT).²⁵

The Victorian legislation also provides that an employer can be held vicariously liable under the Act when an employee or agent engages in discrimination, victimisation, or sexual harassment during their employment or when acting on the organisation's behalf.²⁶ An employer will not be held liable if they can prove that they took reasonable precautions to prevent the behaviour.

Guidelines produced by VEOHRC explain that the combination of the positive duty and vicarious liability provisions in Victoria mean that employers have to be 'proactive' in addressing the causes of discrimination, sexual harassment or victimisation and provides support to enable them to realise their obligations.²⁷

The question of whether an employer is vicariously liable for the actions of its employees only arises after sexual harassment or discrimination has already taken place and an individual complaint has been made.

The positive duty applies to employers all the time and does not rely on an individual complaint to be made.

The VEOHRC guidelines emphasise that taking proactive steps will help to ensure that organisations can meet the positive duty, prevent and address discrimination, sexual harassment or victimisation in the workplace and defend any future vicarious liability claims.²⁸

Victoria has also recently introduced the *Gender Equality Act 2020 (Vic)* which includes duties on the Victorian public sector, local councils and universities to take positive action towards achieving workplace gender equality and promote gender equality in their policies, programs and services.²⁹ The Act provides for education, monitoring and enforcement by the newly established Commissioner for Gender Equality in the Public Sector. Relevant entities are required to:

- develop and implement a Gender Equality Action Plan, which includes the results of a workplace gender audit and strategies for achieving workplace gender equality
- publicly report on their progress in relation to workplace gender equality
- promote gender equality in policies, programs and services that impact the public
- complete gender impact assessments, and
- consider intersectionality when developing strategies.³⁰

(b) UK Equality Act 2010: Public Sector Equality Duty

The *Equality Act 2010 (UK)* (Equality Act) consolidated and simplified previous discrimination legislation that had evolved and expanded over 45 years. It replaced nine statutes and over 100 other pieces of legislation and expanded the scope of some protected characteristics.³¹ The Act encompasses nine protected characteristics: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.³² A key element of the Act is the public sector equality duty (PSED), which imposes positive obligations on public authorities.

(i) Origin and development of the PSED

When the PSED was created under the Equality Act, it replaced three separate duties under the former discrimination law regime.³³ The first of these duties was the race equality duty. It arose out of the report of a review conducted by Sir William Macpherson, which examined the racially motivated murder of Stephen Lawrence, a black teenager, and the subsequent failings in the police investigation of the crime (Macpherson Report).³⁴ Having found institutional racism in the Metropolitan Police, the Macpherson Report provided the impetus for a proactive approach to combating racism in the UK.³⁵ In addition to police, the report noted racism across other institutions:

It is clear that other agencies including for example those dealing with housing and education also suffer from the disease. If racism is to be eradicated there must be specific and co-ordinated action.³⁶

The *Race Relations Act 1965* (UK) was amended in 2000 to introduce the duty, which was 'designed to shift the onus from individuals to organisations, placing for the first time an obligation on public authorities to positively promote equality, not merely to avoid discrimination'.³⁷

The duty entailed an obligation on public authorities to have 'due regard' to the 'need to promote equality of opportunity and good relations between persons of different racial groups'.³⁸ The duty was regulated via the then Commission for Racial Equality and enforced through judicially enforceable compliance notices and judicial review claims.³⁹

In 2008, the Commission for Racial Equality surveyed the UK race equality duty alongside other positive race-related duties in Canada, the USA and the European Union, noting that

these new types of racial equality duties recognise racial discrimination as a pervasive social problem, rather than an offence which can be attributed to a single individual or group, and place the onus of redressing inequality on those who have the greatest power to achieve social change, rather than on those who are most at fault.⁴⁰

Subsequent to the implementation of the race equality duty in the UK, it was recognised that other areas of discrimination law could benefit from similar duties. The disability equality duty was introduced in 2006, and the gender equality duty in 2007.⁴¹ In 2007, the UK consolidated its various human rights authorities (such as the Commission for Racial Equality) into one national body, the Equality and Human Rights Commission (EHRC). With the introduction of the Equality Act, the public sector equality duty replaced the standalone duties with the overarching PSED across all nine protected grounds.

(ii) Contents of the PSED

The PSED incorporates a general equality duty, alongside specific equality duties set out in regulations, which are intended to aid performance of the general duty.⁴²

The general duty is a legal responsibility that applies to key public authorities and to private bodies carrying out a public function.⁴³ It incorporates three arms – public authorities must show they have paid due regard to the need to

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by the Act
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.⁴⁴

The duty applies to all decisions made in the course of exercising public functions, not just policy and high-level decisions.⁴⁵ Case law has fleshed out the nature of the duty and has emphasised that compliance requires a conscious, substantive, and continuing approach, that is not satisfied by 'box ticking'.⁴⁶ EHRC Guidance explains the purpose of the duty as follows:

The broad purpose of the equality duty is to integrate consideration of equality and good relations into the day-to-day business of public authorities. If you do not consider how a function can affect different groups in different ways, it is unlikely to have the intended effect. This can contribute to greater inequality and poor outcomes. The general equality duty therefore requires organisations to consider how they could positively contribute to the advancement of equality and good relations. It requires equality considerations to be reflected into the design of policies and the delivery of services, including internal policies, and for these issues to be kept under review.⁴⁷

The requirement to consider equality in decision-making is a flexible one. Decision makers must consider whether and to what extent the duty is relevant to their functions; gain enough relevant information to have an evidence base for their decisions (for example, diversity information), which may involve engagement with service users or employees; understand the potential impact of their decisions on people with different protected characteristics and identify potential mitigating steps to reduce or remove adverse impacts. The emphasis is on informed decision-making, not on 'carrying out particular processes or producing particular documents'.⁴⁸

Specific duties in regulations include requirements for listed public authorities to publish annual information to demonstrate compliance with the general duty; and develop specific and measurable objectives to further any of the aims of the general equality duty at least every four years. This information must be accessible to the public.⁴⁹

The EHRC is responsible for regulating the PSED. It develops strategies to promote and enforce compliance with the duty including providing advice and information, building relationships with bodies, monitoring implementation, undertaking compliance assessments, and entering agreements with bodies to implement action plans to address breaches. It has the power to issue a compliance notice which can be enforced through the courts, and to challenge actions via judicial review. An application for judicial review can also be made by a person or group of people with an interest in the matter.⁵⁰

The flexibility of the PSED leads to public authorities utilising a range of different approaches. The case studies, set out in the text box below, illustrate how the PSED has been used in practice.

The UK experience is illustrative of how a positive duty can apply across a range of protected grounds, ensuring that there is 'no hierarchy of equality'.⁵¹ Research has found that, generally, the PSED was thought by public authorities to be simpler and easier to respond to than the previous standalone duties.⁵² Much of the debate and focus on positive duties in Australia has focused on its application to sexual harassment and sex discrimination, which is but one set of protected attributes to which a positive duty should apply.

The following examples are extracted and condensed from the UK Equality and Human Rights Commission's website.

Examples – operation of the positive duty in the UK

- **Newcastle Council** heard through engagement with constituents that there was a lack of public play equipment for children with disabilities and a lack of information about the location and types of play equipment suited to children with disabilities. The Council consulted with children, parents and carers, assessed local play areas and identified suitable sites for redevelopment, such as parks near hospitals. The Council identified benefits of this approach, including that previously, the Council had viewed equipment suitable for children with disabilities as being specialist and separate, but engagement made them re-think. As a result, the new equipment can be used by both disabled and non-disabled children, providing more choice for parents of children with disabilities and increasing interaction between disabled and non-disabled children.⁵³
- **Thames Valley Police** had been found by the EHRC to utilise its powers to stop and search against black people six times more often than white people. In response, Thames Valley Police implemented an 18-month program which revised policy, instituted training and statistical monitoring. This led to a reduction in the disproportionate use of stop and search, with police finding they needed to use these powers less, and that this had no impact on crime levels, which continued to decline. The use of stop and search became better targeted based on intelligence, and police managers were able to identify and challenge officers that misused their powers.⁵⁴
- **Hampshire City Council** was determining whether to adopt the national concession scheme for public transport or maintain arrangements set up by district councils, for those over 60 years old, and people with disabilities. To make an informed decision, the council assessed the equality impact of existing scheme options and consulted service users. Using this information, the council decided to provide the national scheme, with selected enhancements in order to better meet the needs of older people and people with disabilities.⁵⁵

(c) Work Health and Safety

Australia's Work Health and Safety (WHS) regime also provides an instructive model for the use of positive duties. Established in 2011, the model Work Health and Safety (WHS) laws comprise the Model WHS Act, the Model WHS Regulations and 24 Model Codes of Practice issued by SafeWork Australia. The Model WHS Act has been adopted in all jurisdictions except for Victoria and Western Australia. In the *Respect@Work* inquiry, the Commission considered this a useful example of building a preventative practice through positive duties and clear understanding of workplace responsibilities.

The Australian WHS regime reflects the transformation in the approach to work health and safety law in Britain, after the report of the committee chaired by Lord Alfred Robens in 1972.⁵⁶ The core of the WHS legislation that was introduced after the Robens report, 'puts voluntary effort, or "self-regulation" by employers and workers at the heart of accident prevention'.⁵⁷

It is a system that uses codes of practice, voluntary standards and non-statutory forms of guidance in preference to detailed, prescriptive regulation.⁵⁸ The 'Robens philosophy' represented an 'influential shift' in safety and health regulation.⁵⁹ The committee proposed 'a wholesale redistribution of responsibility away from statutory regulation, to those who create the risks and those who work with them'.⁶⁰

As set out in the *Respect@Work* report:⁶¹

The model WHS law framework has a three-tiered model based on the 'Robens model'.⁶² This model recommends that duty holders be required to comply with:

1. General duties of care set out in a broad-based WHS statute. The Model WHS Act aims to provide a balanced and nationally consistent framework to secure the health and safety of workers and workplaces.
2. More detailed standards laid down in regulations. The Model WHS Regulations set out detailed requirements that must be applied to specific work activities and hazards in order to meet WHS duties.
3. Codes of practice, which form the third and final tier of the WHS regulatory architecture. The Model Codes of Practice provide practical information on how the requirements of the model WHS laws may be met.⁶³

The Model WHS framework applies to all organisations, regardless of their size or industry. As it is 'outcomes-based', there is 'flexibility for organisations to tailor their approach to safety to suit their circumstances'.⁶⁴

A key element of the WHS Act is a positive duty of dutyholders requiring the elimination or minimisation of risks arising from work.⁶⁵ The primary duty is to identify, control and address hazards and risks, so far as is reasonably practicable, which may affect the physical and psychological health or safety of workers.

The recommendations of the Robens committee were based on a conviction that legislation 'should seek to promote, as much as to control'.⁶⁶

Robens advised against the use of prosecution for most offences under health and safety law, preferring instead the use of new administrative sanctions, improvement and prohibition notices, to encourage good practice. Indeed, the Robens Committee believed the role of the state was to facilitate good practice, establishing and strengthening the arrangements through which voluntary effort, or 'self-regulation' could thrive.⁶⁷

As noted in an overview of the Australian legislation by the Australian National University School of Regulation and Global Governance, REGNET:

A key development in the legislation in the jurisdictions that have adopted the national model Act and regulations is to establish the 'person conducting a business or undertaking' (the PCBU) as the principal duty holder, rather than the 'employer'. The PCBU concept includes employers but it also includes franchisors, principal contractors, the head parties in supply chains, and others conducting a business or undertaking. Importantly, a PCBU must ensure the health and safety, so far as is reasonably practicable, of all workers engaged or caused to be engaged by the PCBU, or whose activities in carrying out work are influenced or directed by the PCBU. In addition, these seven jurisdictions have the same provisions in relation to the general duties, worker representation and participation, the functions and powers of regulators and inspectors, and sanctions for non-compliance.⁶⁸

Safe Work Australia's guide, *How to determine what is reasonably practicable to meet a health and safety duty*, provides further assistance on the issue:

A duty holder must first consider what can be done – that is, what is possible in the circumstances for ensuring health and safety. They must then consider whether it is *reasonable in the circumstances* to do all that is possible.⁶⁹

Safe Work Australia explains that what is 'reasonably practicable' is an objective test. It takes into account what the person ought reasonably to have known and what was reasonably foreseeable by someone in the position of the duty holder at the particular time.⁷⁰ It also clarifies that 'the standard is intended to be a very high one'.⁷¹

2.4 A positive duty in federal discrimination laws

In consultations in this Free and Equal inquiry, the Business Council of Australia commended the approach in WHS laws for its focus on encouraging prevention as part of the obligations imposed by those provisions.

They identified that the focus on prevention builds a different mindset into all aspects of a business to ensure that your WHS obligations are met.

They used the following example to explain this: a worker in a supermarket will be mindful of the potential for injury to result from a lettuce leaf being left on the shop floor and will automatically pick it up. They will not wait for someone to be injured or for a complaint before doing so.

For discrimination law, a positive duty has the potential to shift mindsets in a similar way.

An obligation to look for the environmental factors in a business that may lead to discrimination or harassment would lead to greater visibility of these factors and support practices that would avoid or address them upfront.

The WHS model is also strongly grounded in consultation. The WHS Act provides for worker consultation, representation and participation relating to WHS matters.⁷² Because of the duty basis of the model, it is one that employers – PBCUs – now understand.

Without such a duty there is a much-reduced imperative to get across the obligations embedded in discrimination laws.

It was suggested in consultations in this inquiry that while employers are fully aware of their WHS obligations, some are not as aware of their obligations under discrimination laws – federally or at state and territory level. This is despite such laws existing for decades.

In consultations, some business leaders also expressed their disquiet about a phenomenon that they have observed relating to high profile matters of harassment and discrimination in large companies. In media commentary about such matters, they observed that often people would comment that they were aware of previous incidents of harassment, or that the behaviour that was exposed publicly had precedents in those companies – another illustration of discrimination of a systemic kind.

This suggests a failure of leadership in those settings: not learning and implementing change when problematic practices are identified; and not getting ‘ahead’ of known problems before they are formalised in complaints or negative publicity.

But it also suggests that relying entirely on complaints-based processes will not be capable of addressing pervasive, entrenched issues where there is a problematic workplace culture.

Many stakeholders referred to the Victorian and UK provisions in support of the introduction of a positive duty in federal discrimination laws.

The Law Council of Australia (Law Council), for example, referring to such provisions, said:

A positive duty would ideally oblige employers to take all reasonable steps to prevent discrimination from occurring, and impose civil penalties for breaches of this positive obligation. One advantage of such a positive duty is that it would help to prevent discrimination before it occurs. At present an organisation may fail to implement policy measures or introduce internal reporting mechanisms in relation to discrimination, but will not face scrutiny unless an individual makes a complaint which then engages vicarious liability provisions.⁷³

The Law Council referred to submissions from Victorian stakeholders in their own Justice Project in 2017–2018,⁷⁴ that the introduction of positive duties on government agencies had had practical and beneficial outcomes in breaking down barriers, instigating agency-wide conversations on how to address discrimination and the introduction of positive measures that would not otherwise have occurred.⁷⁵

Legal Aid NSW supported the introduction of a positive duty on all individuals and organisations that have obligations under discrimination laws, to take positive measures to eliminate discrimination, referring to the Victorian model as a good example.

A positive duty would encourage individuals and organisations to proactively consider the adequacy and impact of their services, policies and procedures and take steps to address shortcomings. It would also reduce the burden on individuals to bring complaints to address discriminatory conduct.⁷⁶

Views opposed to the imposition of a positive duty were expressed by some employer groups – such as the Australian Industry Group (AIG) and the Australian Chamber of Commerce and Industry (ACCI).

The AIG said that the imposition of such a duty would increase the regulatory burden on employers, particularly small to medium enterprises, and would ‘achieve very limited community gain and would lead to further confusion about rights and obligations of duty-holders’.⁷⁷

ACCI considered that existing discrimination laws already imposed a duty on employers because employers ‘who fail to take all reasonable steps may be found to be vicariously liable for the actions of any employees or agent that may be in breach of the relevant discrimination law’.⁷⁸ Such obligations were ‘sufficient’, they said.⁷⁹ Similar views were put to the Commission by ACCI during the *Respect@Work* inquiry.⁸⁰

However, as Victoria Legal Aid pointed out, a principal reason why employers and other duty holders are failing to prevent discrimination and sexual harassment is that ‘our regulatory system does not require them to do so’.⁸¹

In a comparative study of equality laws, Aimee Cooper noted that

An employer is only prompted to consider whether they took all reasonable steps to prevent the discrimination or harassment if they seek to avoid vicarious liability for a legal claim made by an employee who was subjected to discrimination or harassment.

This approach means that employers are only held accountable for the steps they took to reduce the likelihood of discrimination or sexual harassment occurring after an unlawful incident has already occurred and a claim has been made.

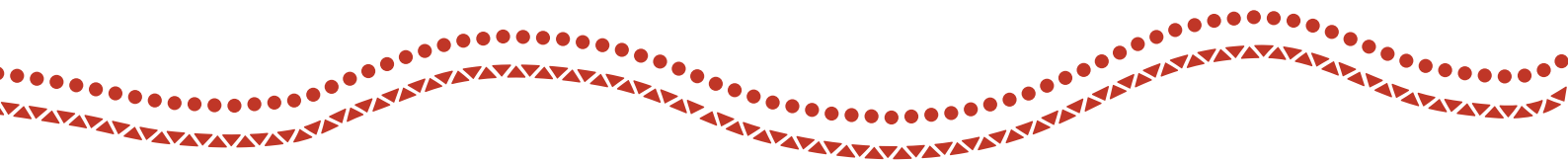
Given the low number of employees who come forward about discrimination and sexual harassment this is not an effective mechanism to ensure preventative steps are taken.⁸²

Cooper pointed out that many employers 'want to do the right thing', and some are 'proactively taking steps to prevent unlawful behaviour in their workforce', but given the likelihood of a claim is low, compliance with equality laws might be given 'a low risk rating' on a risk matrix, 'ensuring it's not something significant time or resources will go into'.⁸³

Moreover, Legal Aid NSW suggested that, because employers can already be held vicariously liable for the discriminatory actions of their employees when they fail to take all reasonable steps to prevent discrimination, the imposition of a positive duty therefore 'would not greatly increase the legislative burden on individuals and organisations'.⁸⁴

In the *Respect@Work* inquiry, the Commission concluded similarly that,

As Australian employers already have responsibilities to ensure they are not held vicariously liable under the Sex Discrimination Act, as well as positive duties under WHS laws, ... this would not create a substantially new or increased burden for employers.⁸⁵



How would a positive duty in discrimination law fit with the positive duty in WHS law?

In April 2021, the Government responded to the recommendations of the *Respect@Work* report.

In relation to the recommendation for a positive duty in relation to sexual harassment in the SDA it expressed concern that it would be complex and confusing for employers and victims to navigate a duty in addition to that set out in WHS law.

While not rejecting the recommendation, the Government said it would assess whether a duty of the kind proposed in the *Respect@Work* report 'would create further complexity, uncertainty or duplication in the overarching legal framework'.⁸⁶ A positive duty was not included in the Government's subsequently passed *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*.⁸⁷ However the Act did simplify and amend the protection from workplace sexual harassment in the Sex Discrimination Act to ensure the provisions closely align with terms used in the model Work Health and Safety law. This ensures that persons not previously covered under the Sex Discrimination Act, such as interns, volunteers and self-employed workers, are protected from harassment.⁸⁸

The Commission considers that the preventative approach to health and safety, the foundation of the Robens model, is a good model. But it is an approach that revolves around work and its concern is on health and safety. Ensuring that within that system 'psychological safety' is appropriately acknowledged is crucial and addresses a gap in the existing regime that is often focused on physical safety risks and hazards.

However, such a regime is not comprehensive enough to address the rationale for a positive duty in discrimination laws, which serve a different purpose and extend far beyond workplaces. Additionally, embedding this more limited reform in WHS will take time and result in some shift in how that system has traditionally operated. As the Commission noted in the *Respect@Work* report,

While it will take time for all WHS regulators to develop a detailed understanding of the dynamics and drivers of sexual harassment, the Commission already has the expertise to oversee a positive duty under the Sex Discrimination Act. This is particularly important given not only the prevalence of sexual harassment, but also the significant under-reporting of sexual harassment, outlined throughout this report.⁸⁹

Perhaps more significantly, in the *Respect@Work* report the Commission expressed its confidence that a positive duty in discrimination law would operate in a mutually reinforcing manner and not lead to duplication:

Ultimately, with these differing but complementary approaches, the two positive duties would work in a mutually reinforcing way.

The Commission would also assist employers to comply with the positive duty by providing information and support, including:

- promoting awareness about the law and issuing guidance materials on the steps required to comply with the positive duty
- providing education and training support to employers on the law and best practice measures to comply with the positive duty.

The Commission considers that an enforceable positive duty would help to ensure employers engage with their legal obligations. It would also provide both a collaborative and enforceable mechanism for employers to work with the Commission and engage in the Commission's processes in a full and meaningful way and to effect change.⁹⁰



(a) Alignment with the expectations of the United Nations Guiding Principles on Business and Human Rights

The introduction of a positive duty to take reasonable and proportionate measures to eliminate discrimination in the workplace also aligns with the expectations of the United Nations Guiding Principles on Business and Human Rights (UNGPs).⁹¹

The UNGPs are the current, authoritative global standard on preventing and addressing business-related human rights harms (including discrimination). They are increasingly reflected in a wide range of regulations, standards and corporate practice globally. Australia co-sponsored the resolution for the introduction of the UNGPs, which were unanimously endorsed by the Human Rights Council in 2011.

The UNGPs reiterate the expectation in international law that all governments have a duty to protect against human rights harms occasioned by business. The UNGPs expect that governments will do this through a 'smart mix' of regulation, policy and facilitating judicial and non-judicial mechanisms for remedy. This duty to protect against business-related harms also extends to the activities of the government as an economic actor.

The UNGPs expect that businesses will take steps to prevent infringing on the human rights of others. Businesses meet this 'responsibility to respect' human rights in accordance with the UNGPs by carrying out 'human rights due diligence' to identify, prevent, mitigate and remediate human rights harms arising in their direct activities or through their business relationships (such as supply chains). Human rights due diligence is a business-risk management framework, but one that focuses primarily on preventing *risks to people*, rather just *risks to the business*.

A prevention-focused positive duty on businesses to avoid discrimination would create an enabling environment for Australian businesses to meet the expectations of the UNGPs by prompting businesses to undertake human rights due diligence to identify and address discrimination risks in their business. The introduction of such reforms arguably creates a 'level playing field' for businesses that are already taking steps to address discrimination in the workplace, and incentivise action from laggards in this space. The expectation that businesses remediate discrimination where it occurs, and provide complaints mechanisms to facilitate pathways to remedy also aligns with the UNGPs' expectations of business.

(b) Enabling compliance

It is critical that duty holders are supported to implement the positive duty if it is to play the kind of forward-looking, systemic role that it should.

In her research, Aimee Cooper learned of the value of positive duties on employers in Sweden and the UK to prevent discrimination and sexual harassment occurring. She also heard about the need for 'detailed meaningful procedural requirements to accompany the general duty because the general duty itself can be so vague that it is not possible to meaningfully enforce it'.⁹² She stated further:

There is an inherent tension between the need for these duties to be broad enough so that implementation can be tailored to each workplace, but specific enough that duty holders know what is actually required of them. ... Stakeholders also spoke about how the procedural duties accompanying a general positive duty provided a tangible step for employers to engage with that duty, and routinely come back to consider their compliance with it.⁹³

Procedural requirements like policies, training and compliance plans, Cooper suggested, would facilitate an auditing approach that many businesses are familiar with. This was an approach that many stakeholders had seen as valuable to support compliance.⁹⁴

Victoria Legal Aid submitted that it is 'not enough to tell duty holders that they must work towards eliminating discrimination and harassment, we must tell them how to do so effectively'.⁹⁵

Victoria Legal Aid gave an example, in a sexual harassment context, that 'specific duties should be imposed on employers to implement policies, practices and training that prevent sexual harassment'.⁹⁶ Victoria Legal Aid, like Cooper, referred to the need for 'specific procedural duties to clarify what is required by the positive duty and facilitate enforcement'.⁹⁷

Such guidance could include model policies and internal complaint and whistleblower processes, training modules, as well as industry-specific tailored guidance materials. A comparison is the wealth of guidance material produced by work health and safety agencies that enable compliance with the relevant law.⁹⁸

In consultations for this project, some industry groups also referred to the importance of their engagement in the development phase of such materials. The Commission considers that funding for industry bodies to assist in the roll out of a positive duty, supporting their engagement with members, providing advisory support and developing tailored resources, would likely yield significant benefits over the longer term.

In the Chapter 3, at section 5.2, the Commission proposes additional powers to enable it to conduct voluntary audits. This was supported by industry and would assist duty holders in complying with a positive duty.

The Commission considers that using an incremental approach to reform, with the participation and cooperation of duty holders, and with the objective of helping duty holders to improve their own practice through voluntary compliance measures, will build confidence and trust in discrimination laws as measures to reduce discrimination and support equality.

However, in consultations there were also concerns expressed that such a co-regulatory approach would not be sufficient of itself. The Commission heard that additional enforcement mechanisms would also need to be attached to a positive duty.

The Disability Discrimination Legal Service Inc urged that any positive duty in the federal discrimination law framework 'must learn from the Victorian experience, particularly ensuring that the duty is enforceable'.⁹⁹ Associate Professor Dominique Allen noted that the Victorian provision, as initially passed, included enforcement powers, but these were removed before the Act came into force following a change of government.¹⁰⁰ VEOHRC itself sees this as a missing, limiting piece in its functions.¹⁰¹

Allen noted that her research on the operation of the positive duty in Victoria has shown that it was being used by VEOHRC 'as an educative tool and to "set the tone" for the Act'.¹⁰² Nonetheless, she submitted, 'it is difficult for [VEOHRC] to do more than that because the duty is not enforceable'. Respondents, therefore, she concluded, 'place no weight on it'.¹⁰³

Professor Beth Gaze and Associate Professor Belinda Smith observe, similarly, that the Victorian provision has been described as having 'valuable educative and normative force', although its legal effect is not clear.¹⁰⁴

The Commission has set out why a positive duty needs to be accompanied by enforcement mechanisms in the *Respect@Work* report as follows:

an enforceable positive duty would help to ensure employers engage with their legal obligations. It would also provide both a collaborative and enforceable mechanism for employers to work with the Commission and engage in the Commission's processes in a full and meaningful way and to effect change.

In determining whether a measure is reasonable and proportionate, the factors that must be considered could draw on the positive duty under the Victorian Equal Opportunity Act, as well as all other relevant facts and circumstances, which may include systemic issues within that industry or workplace. The impact on both employers and workers should be considered when assessing each of these factors.¹⁰⁵

The Commission also recommended that it should be given responsibility for assessing compliance with the positive duty and for enforcement, and the necessary powers to fulfil this role.¹⁰⁶ These issues are considered further in the Chapter 3 in sections 5 and 6.

(c) The value of a positive duty

Ultimately, bearing in mind the differing perspectives referred to above, the Commission concludes as follows:

- The existing system of federal discrimination law often does not address systemic problems – even though outcomes of complaints do often require respondent organisations to reconsider their policy frameworks and conduct internal training, achieving systemic outcomes in the process.
- The reliance on individuals bringing a formal complaint means that many incidents of discrimination and harassment go unaddressed.

- The positive duty in WHS law is revolves around a particular area of public life – work. A positive duty in discrimination law would extend beyond factors associated with ‘work’, applying to all areas of public life, and would complement the approach in WHS.
- A positive duty would require organisations to place greater priority on the prevention of discrimination and harassment.
- A positive duty is likely to have a more significant preventative impact being placed at the front or upstream end, looking at unlawful discrimination on a continuum, than the vicarious liability provisions that already exist at the back end or downstream.
- As the example of the Victorian law shows, a positive duty can, and should, be framed in a manner that is sensitive to issues such as the size and resourcing of organisations – a factor that addresses the concerns of industry groups.
- Businesses that ‘do the right thing’, which is most businesses, have nothing to fear from a positive duty, given that all such a duty requires is the taking of reasonable and proportionate measures.
- Any positive duty should also be accompanied by significant education and other outreach, as well as support for the Commission, legal assistance providers and business peak bodies, to be able to provide clear and accessible guidance about the positive duty.
- In its introductory phase, there should be a significant focus on co-regulatory mechanisms to embed understanding of the positive duty in the community. However, on its own, this is not adequate and there should be enforcement mechanisms that also attach to the positive duty to ensure that it is of sufficient importance to shift culture.
- To ensure that there is broad understanding of the actions required as a result of a positive duty in discrimination law, and to enable organisations time to assess their current business practices, the Commission considers that it would be appropriate to stage the introduction of a positive duty by providing a 12-month grace period before it came into legal effect. Resourcing should be provided in this timeframe to build awareness and to support business. This would also address concerns about any new obligation as set out by business groups.
- There are likely to be significant benefits that would flow to businesses from an approach grounded in a positive duty – particularly in avoiding legal actions and damage to business reputation, and in avoiding unseen costs of discrimination, such as loss of productivity, morale, and the potential that diversity offers business. Support to business should be prioritised and appropriately funded to ensure this benefit flows.
- A positive duty would set the bar for the values and standards for discrimination law compliance.
- A positive duty would rebalance the discrimination law system to focus on prevention rather than redress and is critical to improving the overall effectiveness of federal discrimination law.

2.5 Reform proposals – building a preventative culture

The following reforms are required to federal discrimination law to build a preventative culture.

Introduce a positive duty

1. Existing protections against discrimination in each of the federal discrimination laws should be supplemented by the inclusion of a positive duty on all duty bearers to take reasonable and proportionate measures to eliminate unlawful discrimination.

The positive duty should include a non-exclusive list of factors that should be considered in determining whether a measure is 'reasonable and proportionate', including:

- a. the size of the person's business or operations
- b. the nature and circumstances of the person's business or operations
- c. the person's resources
- d. the person's business and operational priorities
- e. the practicality and the cost of the measures
- f. all other relevant facts and circumstances.

Resource significant community and business sector outreach

2. A positive duty should be accompanied by significant education and other outreach, as well as support for the Commission, legal assistance providers and business peak bodies to be able to provide clear and accessible guidance about the positive duty.

Stagger introduction of the positive duty to support awareness and compliance readiness

3. To ensure that there is broad understanding of the actions required as a result of a positive duty in discrimination law, and to enable organisations time to assess their current business practices, the Commission considers that it would be appropriate to stage the introduction of a positive duty by providing a 12-month grace period before it came into legal effect.

Introduce regulatory mechanisms to enforce the positive duty

4. In its introductory phase, there should be a significant focus on co-regulatory mechanisms to embed understanding of the positive duty with new functions for the Commission such as the ability to conduct voluntary audits.

However, on its own, this is not adequate and there should be enforcement mechanisms that also attach to the positive duty to ensure that it is of sufficient importance to shift culture, such as the ability for the issuance of compliance notices and enforceable undertakings.

Enforcement mechanisms are discussed in Chapter 3, sections 5 and 6.



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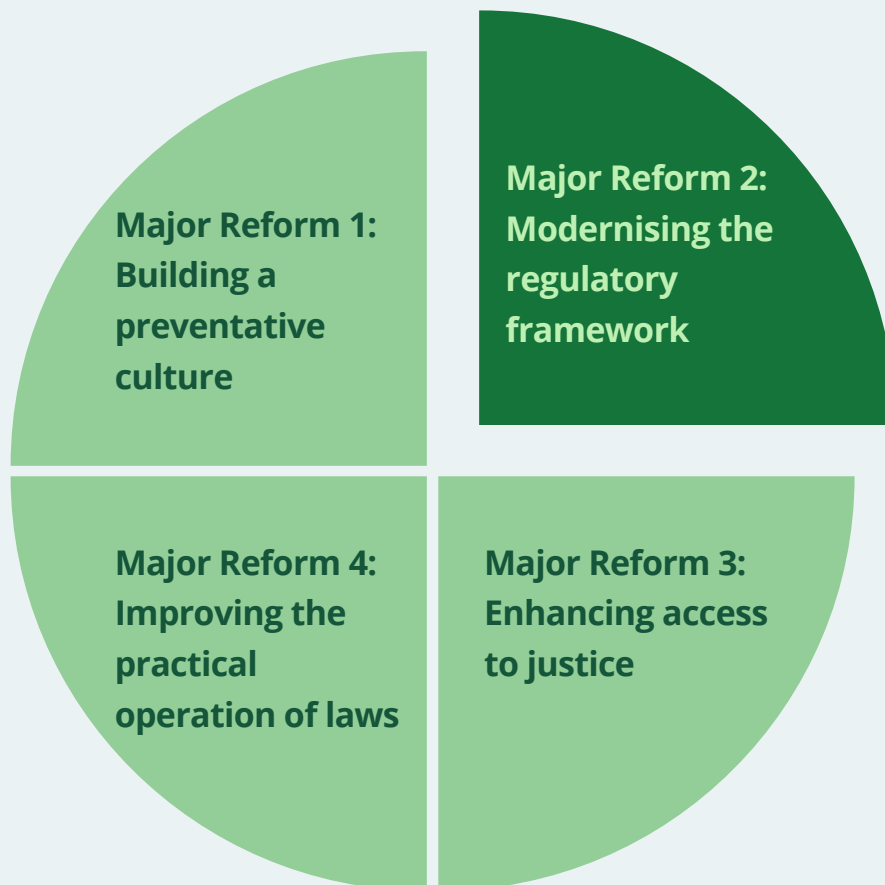
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Chapter 3

Modernising the regulatory framework





Federal discrimination law – an outdated regulatory framework



1 Federal discrimination law – an outdated regulatory framework

What is needed is a truly comprehensive review enabling us to examine our current equality laws against regulatory innovations, allowing us – in assessing and (re)designing equality law – to better account for developments in regulatory thinking as well as evidence emanating from reform efforts overseas.

Belinda Smith, 'It's about Time: For a new Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 144

The powers of the Commission in unlawful discrimination matters are almost entirely based on persuasion, reliant on education and awareness raising and, where disputes arise, alternative dispute resolution.

It is difficult to think of any other area of law in the federal arena where a regulatory agency operates solely on the basis of such limited powers. This is not an effective regulatory model.

The current federal discrimination law regime lacks key elements to build a preventative culture to address discrimination and to ensure accountability.

Alternative dispute resolution (ADR), that sits at the core of Australia's anti-discrimination framework, can be an empowering process for complainants and can be very effective at achieving both individual and systemic outcomes.

However, the compliance framework that operates alongside this is extremely limited. Individual complainants, and the ADR process, should not bear the bulk of responsibility for ensuring compliance with discrimination laws.

As Associate Professor Belinda Smith has observed:

Anti-discrimination legislation is designed to protect disempowered groups – those who traditionally experience marginalisation and exclusion. Expecting members of such groups to have the time, security and resources to pursue legal action in order to gain compensation and possibly bring about wider change represents a fundamental regulatory weakness.¹

The Commission's ADR powers have remained largely as they were at the establishment of the first iteration of the Commission in 1981. However, as noted in Chapter 1, the Commission's additional powers, which revolved around a hearing and determination function were reduced in 2000, in response to the High Court's decision in *Brandy v HREOC*.²

At the same time, other regulatory agencies have had their frameworks modernised with a broader suite of regulatory powers and options to aid compliance and address non-compliance.

In 2014, the Australian Government introduced the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (Regulatory Powers Act) to provide ‘a framework of standard regulatory powers exercised by agencies across the Commonwealth’.

Regulatory powers are the suite of different tools used by government agencies to ensure individuals and industry comply with legislative requirements. The key features of the Regulatory Powers Act include monitoring and investigation powers as well as enforcement provisions, through the use of civil penalty provisions, infringement notices, enforceable undertakings and injunctions.³

The Regulatory Powers Act commenced on 1 October 2014, but only has effect where Commonwealth Acts are drafted or amended to trigger its provisions. As the Attorney-General’s Department explained,

Implementation of the Regulatory Powers Act supports the government’s regulatory reform agenda, as it simplifies and streamlines Commonwealth regulatory powers across the statute book.⁴

The range of powers included in the Act are:

- monitoring powers, which can be used to monitor compliance with provisions of an Act and to monitor whether information given to the Commonwealth is correct (Part 2)
- investigation powers, which can be used to gather material that relates to the contravention of an offence or civil penalty provision (Part 3)
- the power to apply to a court for civil penalty orders and injunctions (Parts 4 and 7)
- the power to issue infringement notices (Part 5)
- the power to accept and seek enforcement of undertakings relating to compliance with legislative provisions (Part 6).⁵

The Explanatory Memorandum for the Bill noted that it was expected that, over time, ‘existing regulatory regimes will be reviewed and, if appropriate, amended to instead trigger the relevant provisions of the Regulatory Powers Bill’.⁶

Provisions in existing legislation would be replaced with references to the standard provisions as appropriate – some legislative schemes would wholly adopt these standard provisions, and some would adopt some of the provisions while maintaining their own unique provisions as appropriate.

In the period since 2014, there has been no consideration as to whether federal discrimination law should be amended by adding new regulatory provisions covered in this legislation.

Accordingly, federal discrimination law relies on the regulatory framework as it was in the 1980s to address the challenges of the 2020s. The modern approach to regulation has bypassed federal discrimination law.

In this section, the Commission considers how the regulatory framework for federal discrimination law should be modernised and which of these standard provisions should be considered for the Commission to bring regulation into line with other areas of federal law.

The Commission's proposed reforms in this area reflect the concept of 'responsive regulation'. This envisages that different tools are required to achieve compliance with the law, depending on the willingness and capacity of individuals and organisations. It envisages capacity building for circumstances where there is an inability to comply, and more coercive powers for circumstances where there is an unwillingness to comply with discrimination legislation.⁷

The Commission concludes that its effectiveness as a regulatory agency can be enhanced by shifting from the current reliance solely on conciliation and persuasion, to a broader suite of regulatory approaches, including co-regulatory powers and inquiry powers.

This mix of powers would assist in building greater predictability and confidence in the operation of federal discrimination law, as well as greater understanding and awareness of rights and duties.

Confidence and certainty are two foundational expectations of business and industry that the Commission has factored into its proposals to modernise the regulatory framework.

The Commission considers that there are several measures that can be introduced to assist people and organisations to better understand their responsibilities under the law and to provide increased certainty to them when seeking to comply.



Case study – modernising the regulation of privacy law in Australia

For many years, the Privacy Commissioner was a member of the Australian Human Rights Commission and powers under the Privacy Act were broadly similar to those in federal discrimination law.

Privacy regulation has undergone significant transformation since 2010, with a significant range of regulatory options now available under the Privacy Act, conferring powers on the Office of the Australian Information Commissioner (OAIC) and the Australian Information Commissioner. This includes application of some standard provisions in the *Regulatory Powers (Standard Provisions) Act*.

The OAIC is both a complaints-handling body with conciliation functions, and a regulator with enforcement options. It is open to the OAIC to use a combination of regulatory powers to address a particular complaint or matter.

Regulatory powers that allow the OAIC to work with an entity to facilitate compliance with privacy obligations, include powers to: request that entities develop a privacy code and apply to the Commissioner for it to be registered;⁸ direct an agency to give the Commissioner a privacy impact assessment;⁹ monitor and conduct assessments of information handling by entities;¹⁰ and direct entities to notify the Commissioner and individuals at risk of serious harm when data breaches occur.¹¹

Regulatory powers that can be used to investigate and deal with alleged interferences with privacy include powers to: investigate a matter following a complaint or on the Commissioner's own initiative;¹² attempt to conciliate a complaint;¹³ conduct preliminary inquiries to determine whether to open an investigation;¹⁴ hold a hearing in response to a request from a complainant or respondent;¹⁵ require information or a document to be produced, or a person to attend before the Commissioner to answer questions under oath or affirmation;¹⁶ direct parties to attend a conference presided over by the Commissioner (failure to comply with the direction is an offence);¹⁷ and refer a complaint to an alternative complaint body.¹⁸

Enforcement powers include powers to: accept an enforceable undertaking relating to compliance with provisions, and initiate proceedings to enforce enforceable undertakings in court;¹⁹ make a determination, and bring proceedings to enforce determinations in court (which entails a hearing de novo, with OAIC documentation in evidence);²⁰ report to the Minister following an investigation, monitoring activity or assessment;²¹ seek an injunction including before, during or after an investigation or in the exercise of another regulatory power;²² and apply to the court for a civil penalty order in response to a breach of a civil penalty provision, which may result in the court ordering a respondent to pay pecuniary penalties.²³

Having started from the same point as federal discrimination law, the growth of regulatory options in relation to privacy is instructive in (a) showing what is possible within a broadly similar complaints model; and (b) how outmoded the regulatory framework for federal discrimination law has become since 2000.



Responsive regulation



2 Responsive regulation

2.1 The concept of responsive regulation

The concept of ‘responsive regulation’ was developed by Professors Ian Ayres and John Braithwaite in 1992.²⁴ It is a theory which involves ‘a dynamic model of enforcement that is premised on an ongoing relationship between the regulator and regulatee’.²⁵

The model is founded on the assumption that regulators can assume and nurture virtue, corporate responsibility and ethical standards on the part of regulatee but it also requires them to be realistic enough to know when these elements are absent or inadequate.²⁶

The model is depicted in the form of a regulatory hierarchy or enforcement pyramid. Regulatory methods of enforcement are arranged along ‘a continuum of coerciveness’.²⁷ ‘Regulatory pyramids’, are ‘an attempt to solve the puzzle of when to punish and when to persuade’.²⁸

Under the ‘enforcement pyramid’ model, breaches of increasing seriousness are dealt with by sanctions of increasing severity, with the ultimate typically held in reserve.

Braithwaite argued that compliance was most likely ‘when the regulatory agency displays an explicit enforcement pyramid’. Most regulatory action occurs at the base of the pyramid, ‘where initially attempts are made to coax compliance by persuasion’. The elements in the pyramid reflect the particular regulatory arena in which it is to apply: ‘[t]he form of the enforcement pyramid is the subject of the theory, not the content of the particular pyramid’.²⁹

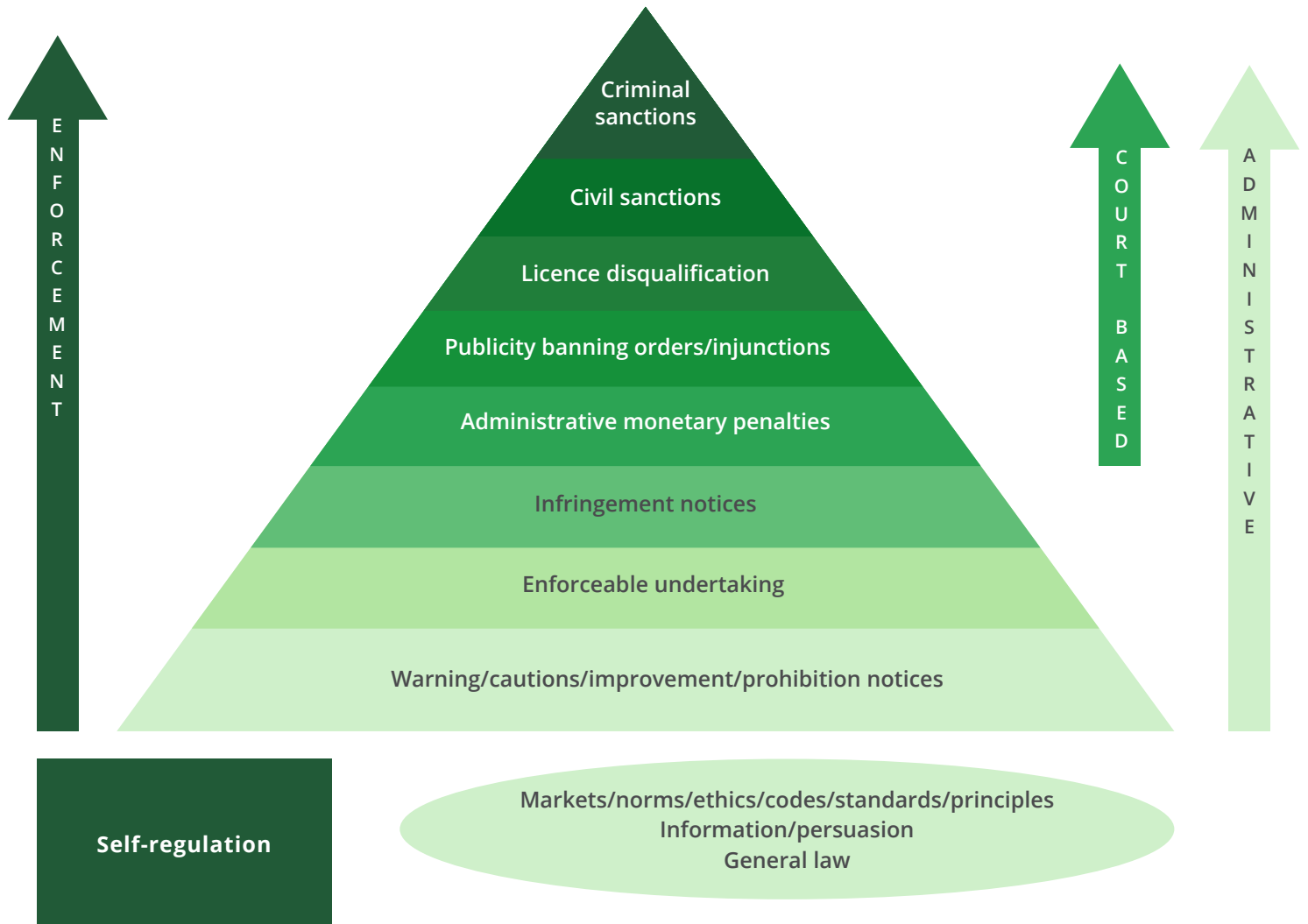
Braithwaite also argued that ‘persuasion will normally only be more effective than punishment in securing compliance when the persuasion is backed by punishment’.³⁰

Voluntary measures are used first but, if necessary, more intense measures are used, with measures escalating in severity to achieve compliance. Persuasive measures are not enough on their own.

The model was used as a conceptual tool in the 2002 Australian Law Reform Commission (ALRC) report, *Principled Regulation*. As the ALRC described, it envisages the regulator as having powers, but not necessarily using them: as a ‘benign big gun’.³¹ The model requires regulators

to behave as though the organisations being regulated wish to cooperate, and ensure that it is economically rational for them to cooperate. Where breaches occur, the initial response should be to persuade and educate them as to the appropriate behaviour. Such an approach promotes self-regulation and the wish to preserve reputation.³²

Figure 3.1: The Braithwaite regulatory pyramid model

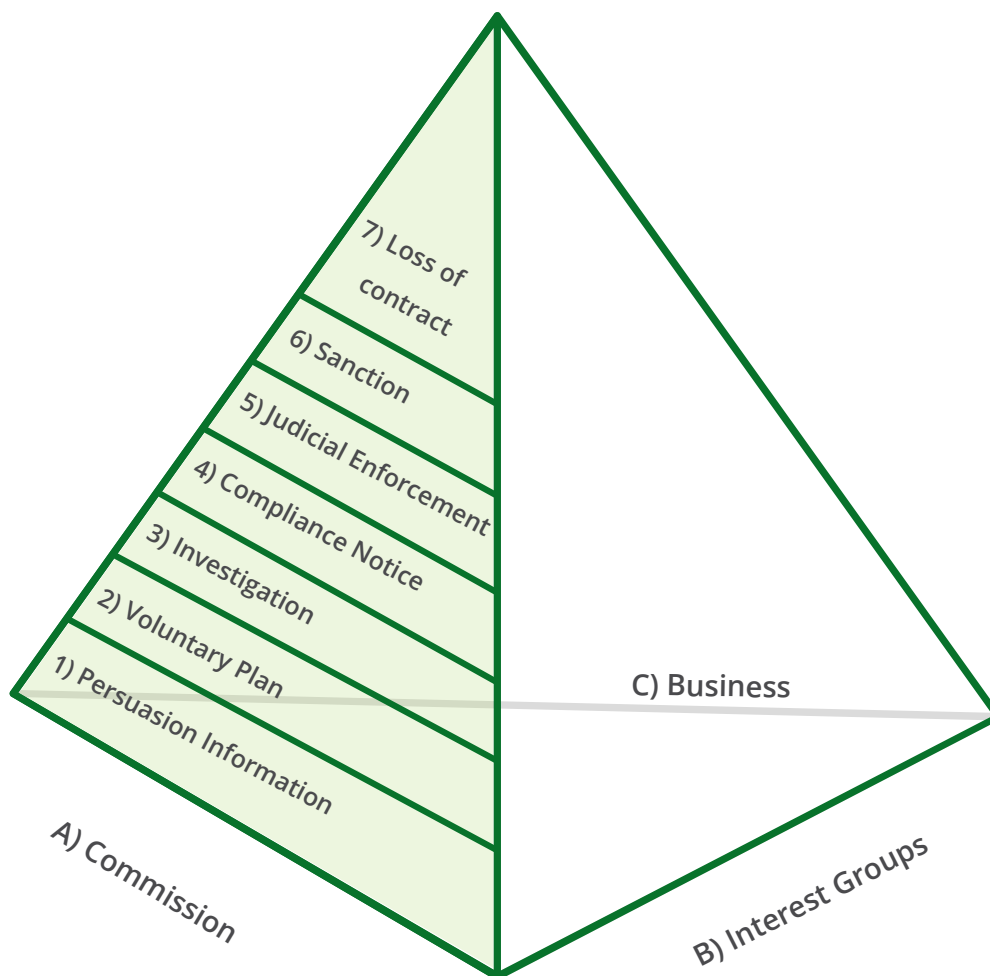


Source: Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 98.

UK academics have applied Braithwaite’s model in the context of regulating equal opportunity.³³

At the pyramid’s base is persuasion, including education, training and monitoring. At the next level is developing a voluntary action plan to promote ‘best practice’. This escalates to equality commission investigation. If the organisation does not comply with the commission’s investigation or it is unwilling to give suitable undertakings, the equality commission can issue a compliance notice. This directs the organisation to refrain from taking certain actions or making changes to ensure compliance, such as preparing an action plan. The organisation can appeal the issue of this notice. At the upper levels are judicial enforcement and then sanctions. Withdrawal of government contracts or licences sits at the pyramid’s apex.³⁴

Figure 3.2: UK Equality law – regulatory pyramid



Source: Bob Hepple, Mary Coussey and Tufyal Choudhury, Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation (Hart Publishing, 2000) 59

In relation to federal discrimination laws, having a mix of powers that sit at different levels of a regulatory pyramid would aid compliance and increase the effectiveness of laws. Professor Beth Gaze and Associate Professor Belinda Smith argue that

Equipping a regulatory agency with a range of powers and allowing courts to order a full range of sanctions would enable the agency to approach the regulatory role responsively, so that compliance could be pursued through the use of lower level powers in a context where more coercive and punitive powers were available if compliance was not forthcoming.³⁵

2.2 The Commission, federal discrimination law and responsive regulation

While regulatory agencies in areas like privacy law, competition law and occupational health and safety have a broad range of powers to enforce compliance, ‘successive governments have chosen not to invest the AHRC with equivalent powers’.³⁶

Most of the Commission’s powers sit at the bottom of a regulatory pyramid: at the level of persuasion, including education and training. The Commission is a ‘gatekeeper’,³⁷ most of the Commission’s work comprising complaint handling and education and awareness raising about human rights law and the complaint handling pathways.

Figure 3.3: Commission’s existing powers

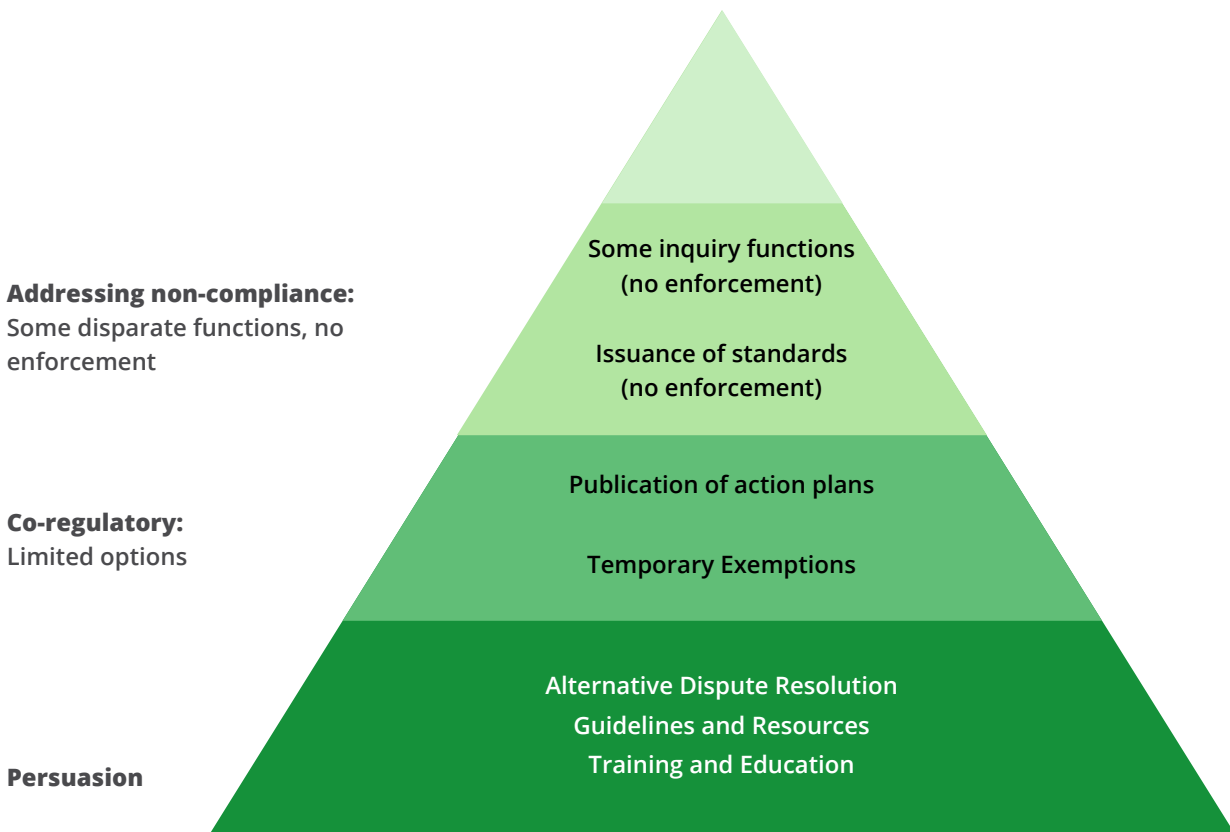
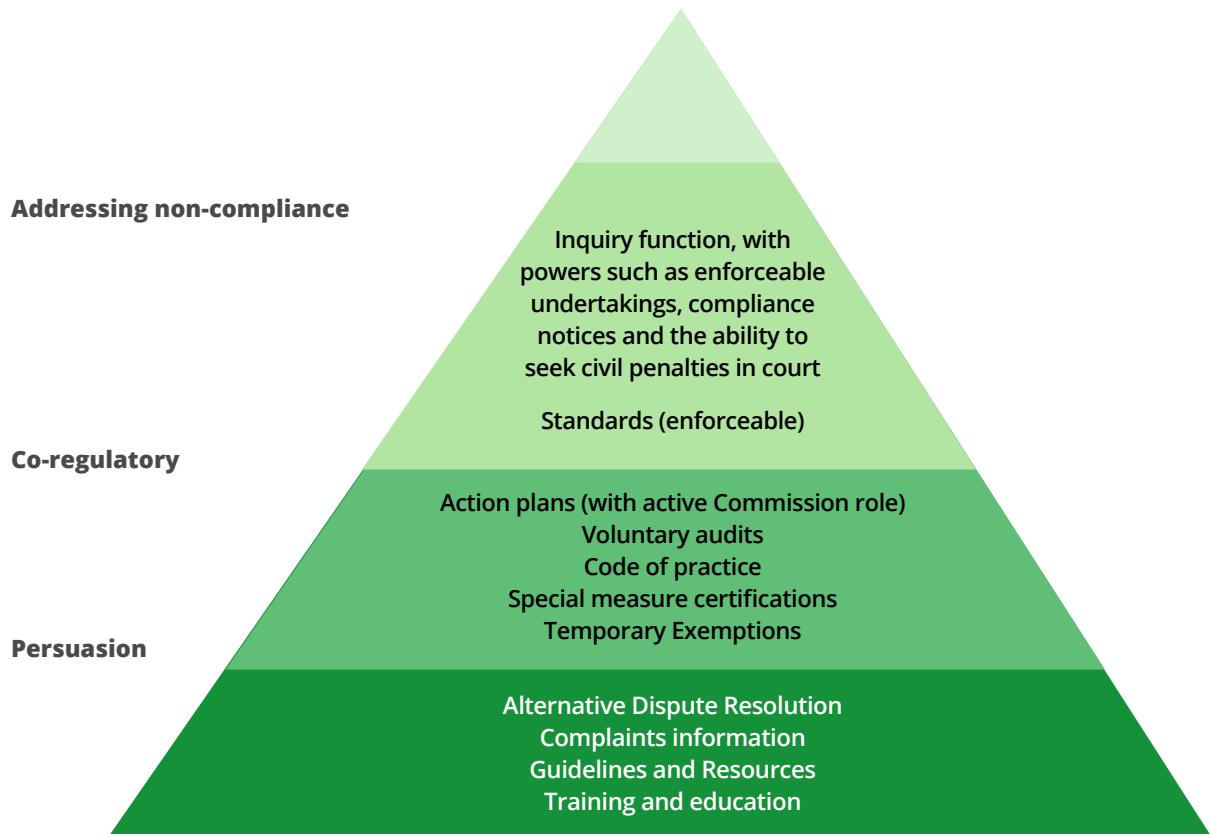


Figure 3.4: Commission’s powers under reform proposals



Gaze and Smith argue in support of an enhanced regulatory approach in relation to discrimination laws:

Even if the legal obligation of anti-discrimination laws remains a negative rule to not discriminate, this alternative approach to regulatory enforcement could lead to a more nuanced and constructive outcome. The rule, combined with the existence and known practices of the agency, would provide the external stimulus to regulated actors, prompting them to develop their own systems and practices to identify and address discrimination. Complaints of unlawful discrimination could still be made, but enforcement of the law would not depend only on the will and capacity of the victim; the matter might not be resolved simply according to the power differential between the parties. The agency could investigate and engage with the respondent, starting at the base of the pyramid and only escalating as required, while engaging in a process of consultation with victims and target groups to ensure outcomes reflect the principles and objectives of the legislation. Of course much of the capacity of the agency to do any of this would depend upon what resources are available, including funding, expertise and some scope to experiment.³⁸

The Commission considers that its effectiveness as a regulatory agency should be enhanced by shifting from the reliance on conciliation and persuasion.

The Commission here identifies a range of mechanisms to broaden the regulatory framework for federal discrimination law so that it operates more effectively across the different levels of a regulatory pyramid.

This includes through enhanced ability to provide de-identified public information about the outcomes of conciliations and dedicated resourcing to develop a wider range of guidance materials to support industry (at level 1 of the regulatory pyramid), as well as new powers:

- at level two of the pyramid – through the introduction of measures that involve the voluntary participation of organisations and duty-holders under the discrimination laws
- at level three – through inquiry and enforcement powers for the Commission.



Persuasion and capacity building- level one of the regulatory pyramid



3 Persuasion and capacity building– level one of the regulatory pyramid

The base level of a regulatory pyramid recognises that, in most instances, people and organisations want ‘to do the right thing’, but may need support to do so. It also recognises that despite this willingness, discriminatory actions may still occur and need to be resolved.

The measures at this level involve education initiatives, engagement and guidance materials to assist people and organisations to understand the law and build practices to comply, as well as alternative dispute resolution services (in this case through the Commission’s Investigation and Conciliation Service and National Information Service) to resolve disputes.

This first level of the regulatory pyramid is described as measures of persuasion and capacity building.

3.1 Alternative dispute resolution

The model that applies to all the federal Discrimination Acts is complaint-based and reliant on conciliation. Since the first federal discrimination law, the Racial Discrimination Act in 1975, alternate dispute resolution (ADR) for individual complaints has been used. It is an administrative means of dealing with complaints, rather than leaving matters to be resolved in court.

It was, as Professor Anne Twomey described, ‘aimed at solving the problems which underlie ... discrimination, rather than exacerbating them with adversarial proceedings’.³⁹

The emphasis was on the resolution of issues for individuals. The choice of conciliation as the primary method of dispute resolution was also ‘in keeping with the predominant “private law” view of human rights’, as Annemarie Devereux explained, which ‘aimed for optimal flexibility in styles and outcomes in such a way as to maximise the parties’ opportunity to reach a satisfactory settlement’.⁴⁰

Court proceedings were available, but they were kept separate from the conciliation process. If a settlement could not be reached through conciliation, a person aggrieved could institute civil proceedings and seek a range of enforceable remedies, including damages.⁴¹ It is also only through court proceedings that case law is developed that interprets the legislation.

It is estimated that fewer than 3% of discrimination matters make it to the court stage, meaning that there is little judicial guidance on the law, and very few precedents setting benchmarks for the type of damages that may flow from such proceedings.⁴² This lack of judicial elaboration is particularly important because the regulatory framework provides no other means of rule elaboration. For example, work health and safety regulatory agencies have the capacity to produce authoritative guidelines.

In her study of equality commissions in the US, Canada, the UK and Sweden, Aimee Cooper began her conclusions by observing what Australia is 'doing well'. 'In particular', she said, she had 'a renewed appreciation for the strong focus that Australia's Human Rights Commissions have on genuine alternative dispute resolution':

Multiple stakeholders in the USA, UK and Sweden spoke about their frustration at the lack of quality accessible alternative dispute resolution for discrimination and harassment claims. While each jurisdiction does have some form of mediation available in certain circumstances, it did not appear to be anywhere near the level of accessibility and reliable quality we have here in Australia.⁴³

In the Discussion Paper prepared by the Attorney-General's Department in 2011 on the consolidation of discrimination laws, the Commission's conciliation process was described as 'a low-cost, informal and flexible alternative dispute resolution process designed to achieve a negotiated resolution between the parties',⁴⁴ saying that ADR processes prior to commencing court proceedings have several advantages, 'including reducing costs and stress for all parties'.⁴⁵

The Commission currently provides a flexible complaint resolution process that extends beyond a single model of ADR. While the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) refers to 'conciliation',⁴⁶ in practice the complaint resolution process is best classified as a hybrid ADR model, which can span the traditional facilitative model of mediation and the more advisory aspects of statutory conciliation. The Commission notes, in this respect, that the majority of the Commission's conciliators are nationally accredited mediators who are also specifically trained to facilitate a more evaluative ADR process that may be appropriate to the particular matter.

The Commission facilitates over 1,000 conciliations each year with notable variety in terms of subject matter, complexity of issues, participant engagement and legal understanding and accessibility requirements. The Commission can and regularly does customise the conciliation process, to the extent possible given the statutory requirements of the Act, to maximise informed participation and prospects of resolution.⁴⁷ In 2020–21 the Commission received 3,113 complaints. One complaint may raise a number of grounds and areas of discrimination and be against one or more respondents. The Commission finalised 2,624 complaints during 2020–21. The Commission conducted approximately 1,517 conciliation processes, of which 70% were successfully resolved.⁴⁸

The format of conciliation can be structured to address issues such as a power imbalance between the parties:

While the majority of [the Commission's] conciliation processes are conducted in the form of a face-to-meeting between the parties, it will not always be necessary or appropriate to bring the parties together and in some cases, this may be inappropriate and will frustrate resolution. For example, where there is a significant power imbalance between the parties, where one of the parties is emotionally vulnerable or where a face-to-face meeting may exacerbate feelings of distress and anxiety, alternative conciliation formats are employed. These alternative formats include in-person shuttle, which involves the parties being at the same location and the conciliator conveying messages between the parties, telephone shuttle negotiations and teleconferences.⁴⁹

The value of conciliation, and ADR as empowering, was acknowledged in many submissions. It has also been described as ‘useful, informal and cost-effective’.⁵⁰

Criticism of the conciliation model in federal discrimination law is not about the processes themselves *per se*. Instead, it is about the over-reliance on this as a regulatory tool – namely, that it is not accompanied by other measures of increasing seriousness where matters are not able to be resolved, and that it does not assist in the development of a body of rules.

This absence of regulatory approaches is seen as undermining the overall *effectiveness* of discrimination law.

As Associate Professor Dominique Allen commented,

relying heavily on addressing discrimination through a confidential dispute resolution procedure, along with an agency that can only encourage voluntary compliance, is inadequate.⁵¹

Associate Professor Belinda Smith similarly observed that

The least intrusive forms of intervention could be used effectively as the primary and usual regulatory tools, *so long as* the regulator had access to more serious sanctions (ie a big stick) to be held mostly in reserve for extreme cases of irrational actors. In essence, the ‘notion of responsiveness is the idea that escalating forms of government intervention will reinforce and help constitute less intrusive and delegated forms of market regulation.’⁵²

The Australian Chamber of Commerce and Industry supported the kinds of persuasive powers the Commission has, as important non-regulatory measures, but also supported ‘recourse to regulation where these non-regulatory measures have failed to achieve policy objectives’.⁵³

3.2 Information about outcomes of complaints

A further matter that is seen to limit the effectiveness of federal discrimination law is the lack of information about the outcomes of conciliation.

Various legal provisions operate to limit public awareness about the typical outcomes from conciliation processes, the remedies that usually result and the types of issues that most commonly arise.

The Commission considers that there is a need for:

- Review or amendment of the secrecy provisions in s 49 of the AHRC Act.
- Guidance on the appropriateness of non-disclosure agreements and confidentiality clauses in settlements across all unlawful discrimination matters.

(a) Secrecy constraints

The Commission, as a government agency, is constrained by strict privacy (or ‘non disclosure’ obligations) set out in s 49 of the AHRC Act.

Staff are prohibited from disclosing ‘any information relating to the affairs of another person’ acquired through the Commission’s operations, and are potentially subject to fines or imprisonment for breach.⁵⁴

The *Privacy Act 1988* (Cth) also imposes obligations in relation to the handling of personal information. Information may be revealed in a de-identified way.

In 2009, the ALRC concluded a report into secrecy provisions in Commonwealth laws, *Secrecy Laws and Open Government in Australia*.⁵⁵ Section 49 of the AHRC Act was identified as one of 358 provisions that imposed criminal sanctions.⁵⁶ The ALRC concluded that specific secrecy offences should only be enacted where necessary to protect a public interest of sufficient importance to justify the imposition of a criminal sanction. The ALRC recommended that specific secrecy offences should be reviewed.⁵⁷

The Commission considers that the conclusions of the ALRC support a review of s 49 of the AHRC Act to determine whether secrecy provisions with criminal sanctions are warranted and, if so, how such provisions may be moderated to ensure that information can be provided for educative purposes.

Associate Professors Dominique Allen and Alysia Blackham identify the strict privacy constraints on the management of information, with criminal penalties ‘for an accidental or well-intentioned breach of an ambiguous provision’, as ‘inevitably [having] a chilling effect on the release of information’.

At a minimum, then, the statutory confidentiality provisions should be reformed, to make it clear that de-identified information can be released, or to facilitate the release of information to researchers if they undertake to maintain confidentiality and only release information in a de-identified form. More generally, though, there is a need for serious review of whether these provisions are actually required, given agencies are already bound by privacy laws.⁵⁸

This ‘chilling effect’ means that the information released may be limited.

In his review of the Victorian legislation in 2008, Julian Gardner identified a ‘perceived reluctance’ on the part of the VEOHRC to use de-identified information because of a similar secrecy provision in its legislation.

Gardner considered that information drawn from complaints, settlements and orders made by the Victorian Civil and Administrative Tribunal (VCAT) could assist ‘in the early settlement of disputes by providing the parties with indicative information that can guide their thinking’.⁵⁹

He recommended that the secrecy provisions in the Act should be amended ‘so that it is clear [VEOHRC] can use de-identified information about cases for educational purposes’.⁶⁰

The Commission currently provides public information in a de-identified form about issues raised in complaints and outcomes obtained through conciliation. The Commission has developed a conciliation register that provides de-identified summaries of selected conciliated complaints and de-identified case studies are published in the Commission's annual reports, on its webpage and in policy documents.

The Commission considers that there is potential to consider how much further information can be provided, while at the same time respecting the obligations of confidentiality of ADR processes (including maintaining fidelity to the practice standards that apply to accredited mediators).

If the secrecy provision were removed, this consideration would operate under privacy principles, rather than the shadow of criminal penalties.

(b) Confidentiality and information about outcomes

Confidentiality is 'an integral part of the individual enforcement model' of discrimination laws.⁶¹ However, a consequence of the confidentiality of complaint handling is that there is limited information about the outcomes of complaints – 'the community at large is left unaware of the extent to which discrimination remains a problem and how it is (or is not) being addressed'.⁶²

Allen and Blackham argue that the adverse impact of confidentiality in the enforcement of discrimination law 'is amplified by the fact that the agencies release very little information about the outcomes obtained at settlement, the nature of discrimination claims, or the prevalence of discrimination in the community, other than statistical complaints data'.⁶³

There are good reasons, argue Allen and Blackham, for embedding confidentiality in the enforcement process:

It allows parties to negotiate in conciliation without fear that what was said could be used in future litigation. It therefore creates a '[safe] haven' for both parties, who can 'express emotions' and communicate their 'true interests' without fear of public judgment. Confidentiality may encourage people to lodge claims and encourage respondents to participate in resolving them. It also protects both parties from potential reputational damage from being involved in a discrimination claim, particularly the risk that media might show an interest in the claim if it proceeds to court. ... Thus, confidentiality has significant benefits in facilitating the efficient resolution of discrimination complaints, and can benefit both claimants and respondents.⁶⁴

However, there are drawbacks.

Allen and Blackham state that '[k]eeping both processes and outcomes confidential means that there is very limited guidance regarding what claimants and respondents can expect from the law, including in relation to remedies (both monetary and systemic).⁶⁵ This is exacerbated by the lack of authoritative guidance materials.

An additional issue is that confidentiality 'masks the extent to which discrimination remains a problem in society', by consigning discrimination complaints to the private sphere.⁶⁶

The limited nature of the information to assist complainants was a matter identified in submissions in this Free and Equal inquiry and in prior reviews.

For example, in the review of the Sex Discrimination Act by the Senate Standing Committee on Legal and Constitutional Affairs in 2008, several submissions recommended publication of more detailed de-identified information concerning complaints received by the Commission and their outcomes. Professor Margaret Thornton explained to the Committee that

conciliation is the main mode of dispute resolution in this jurisdiction. That means that about 98 per cent of complaints never go beyond the conciliation level and there is agreement that conciliation occur behind closed doors. ...

I think having more material available to help other complainants would serve a very important educative function. What is the point of having a jurisdiction that operates almost entirely in private, behind closed doors, and then has very little money to communicate to the general public the outcome of those decisions or settlements that have been ... effected that way?⁶⁷

Professor Sara Charlesworth also submitted to the Senate Committee that there would be benefits in publishing more detailed information on inquiries and complaints:

There needs to be a serious and committed attempt to collect and publish detailed deidentified data on the inquiries and complaints made to [the Commission]. This would enable both the monitoring of the efficacy of the SDA and [Commission] processes and practices. Good data collection and analysis is vital not only for reporting and accountability purposes, but also for monitoring trends in complaints and for the education and research activities undertaken by [the Commission]. Such data can form the basis of feedback to employer associations, unions, government and the broader community so that discrimination issues can be tackled in a proactive way.⁶⁸

The Commission acknowledges the value in more detailed information about the subject matter of discrimination complaints, as well as complaint outcomes achieved through the conciliation process, being publicly available. It also recognises that this is a time-consuming task that the Commission is not resourced sufficiently to undertake.⁶⁹

The Commission considers that dedicated resourcing should be provided to the Commission, as well as to academic partners, to provide detailed information about trends in complaints on a periodic basis. This would be a low-cost mechanism for improving the effectiveness of discrimination laws by enriching the understanding of key trends across the discrimination laws.

(c) Non-disclosure agreements

Transparency is also restricted through non-disclosure agreements (NDAs) between parties.

For example, when discrimination complaints resolve through the Commission's conciliation process, the settlement reached is typically formalised by way of a Deed of Release or Conciliation Agreement. It is very common for these agreements to contain specific terms regarding mutual confidentiality and non-disparagement obligations.

The extent of these terms may be confined to the terms of the settlement agreement reached between the parties or may be considerably broader, encompassing the entirety of the subject matter of the complaint.

Reform of the use of NDAs has been identified as a key issue in balancing confidentiality and appropriate transparency.⁷⁰

The *Respect@Work* report noted that NDAs were often used in the settlement of sexual harassment cases, as well as other workplace matters.⁷¹

While a range of benefits for both parties was identified, the Commission also heard concerns about their use in sexual harassment cases, including that 'they can contribute to a culture of silence, which disempowers victims, covers up unlawful conduct and facilitates repeat offending'.⁷²

Recent consideration of limiting the use of NDAs and confidentiality clauses in the UK

Similarly, in the UK, the EHRC has identified problems associated with NDAs in the context of workplace sexual harassment.⁷³ In a report in 2018, the EHRC observed that NDAs prevented people from speaking about their experiences and reduced the likelihood of systemic problems being tackled. They recommended that such clauses should be more closely regulated.⁷⁴

The EHRC recommended the introduction of a code of practice for organisations, which should set out when confidentiality clauses preventing disclosure of past acts of harassment should be void, and setting out best practice in the use of confidentiality clauses in settlement agreements.⁷⁵

After a consultation process, the UK Government concluded that legislation should be introduced to: ensure that confidentiality clauses have clear limitations and do not prevent reporting to the police, regulated health and care professionals or legal professionals; and improve independent legal advice on settlement agreements.⁷⁶

In the *Respect@Work* inquiry, the Commission concluded that a practice note or guideline should be developed that identified best practice principles for the use of NDAs in workplace sexual harassment matters to inform the development and regulation of NDAs.

The Commission also recommended that the Commission do this, in conjunction with the proposed Workplace Sexual Harassment Council.⁷⁷

The Government agreed with this recommendation, establishing the Respect@Work Council and saying it will ask the Council to develop guidance that identifies best practice principles for the use of NDAs in workplace sexual harassment matters.⁷⁸

Reflecting on the Government's response, Maria Nawaz commented that

This issue is extremely pressing – the majority of sexual harassment matters settle, with many deeds of settlement including confidentiality clauses, which effectively silence victims/survivors from speaking out about their experience. Confidentiality also means systemic sexual harassment remains concealed and perpetrators who are frequent harassers are shielded from accountability.

In the development of this guideline, the wishes of the victim/survivor should remain centred. There are benefits to confidentiality, such as protecting the victim/survivor's privacy and reputation for future employment, particularly in small industries. Guidance could be drawn from reform of NDAs overseas. For example, New York State introduced a prohibition on the use of NDAs in settling sexual harassment and discrimination cases, unless the complainant requests it (Consolidated Laws of New York State, General Obligations Art 5, s 5-336).⁷⁹

Allen and Blackham advocate that a review of confidentiality clauses should scrutinise the use of NDAs in all discrimination settlements.

There are strong reasons for publicising the outcomes of discrimination complaints, particularly where employers are repeat offenders. It may be desirable to negotiate that employers make a public statement relating to any claims that are settled, acknowledging the discriminatory conduct in a public way. This has the potential to act as a significant deterrent, and a prompt for systemic change.⁸⁰

The Commission agrees that such guidance should be developed on the appropriate usage of non-disclosure agreements and confidentiality provisions in all discrimination matters. The guidance materials that will be prepared in relation to sexual harassment complaints should be utilised as a pilot for further guidance across all other protected attributes in federal discrimination law.



(d) Information through court decisions

Since amendments to the Commission's jurisdiction in 2000, the information about complaint outcomes is provided in a generalised way by the Commission and through the few matters that are determined in court.

But, as Associate Professors Dominique Allen and Alysia Blackham observe, court decisions do not provide 'a complete picture'.

Strong cases frequently settle, possibly even more often in equality law than other areas of law because respondents fear the reputational damage they might incur if they defend a claim.

Conversely, weak, spurious and vexatious claims often reach a hearing, which paints a distorted picture of the prevalence of discrimination and how it is affecting people.

The orders made by courts are often not in keeping with what the parties are able to negotiate at settlement, both in terms of quantum and the prevalence of systemic remedies. Thus, it is difficult to state with any certainty that the claims before courts reflect what is happening in the community, and that the remedies awarded by courts are the most suitable ways of addressing discrimination or adequately measuring the harm caused.⁸¹

Allen and Blackham therefore conclude that court decisions are not a suitable source of information if seeking to assess the prevalence of discrimination or how discrimination complaints are resolved.⁸² A better source is conciliation and settlement data, 'as this more accurately depicts the actual claims that are made and resolved'.⁸³

In Chapter 4, Section 6, the Commission recommends that serious consideration be given to reintroducing an intermediate adjudicative process into the federal discrimination law system. If accepted, this might provide an additional avenue for public information about complaints.

(e) Research partnerships on outcomes of discrimination complaints, at conciliation and through court processes

The Commission considers that there is a need for better information about the outcome of discrimination complaints at both the conciliation and court stages of the process. This should be addressed through the conduct of research, such as through Australian Research Council linkage grants and / or formal reviews.

(i) Remedies at the court stage of the process

The Commission recommends that a review be conducted into the awards of monetary compensation and other remedies in discrimination matters as part of the assessment of the effectiveness of discrimination law to meet international obligations. The Commission welcomes the Government's agreement to commission this research.⁸⁴ The review should consider how to classify and calculate compensation and how such compensation intersects or interacts with awards of damages in common law personal injury or workers compensation matters.⁸⁵

Once this review has occurred, consideration should be given as to the need for additional clarity being provided in the AHRC Act on the example list of orders that a court can make – as suggested in 2008 by the Senate Standing Committee on Legal and Constitutional Affairs Committee in relation to the Sex Discrimination Act; as well as other mechanisms such as inclusion in judicial training and other guidance materials.

The Law Council said that the ‘effectiveness of both monetary compensation remedies and non-monetary remedies should be considered as part of the reform process’, noting that the level of monetary compensation awarded in anti-discrimination matters is ‘relatively modest compared to other areas of the law where personal harm has been done’:

Committee members observe that since the inception of anti-discrimination legislation, awards of damages have been consistently disproportionately low compared to damages for other causes of action. At the same time, the experience of discrimination amongst many groups is frequently insidious, harming their dignity and precluding their active participation in public life. While the current system relies on complaints being made, the incentive to do so is often small.⁸⁶

The remedies that may be obtained for individuals is an aspect of the effectiveness of discrimination law as an equality measure and also as a measure in discharge of international obligations: to provide an ‘effective remedy’ for discrimination.⁸⁷

The courts can make any order they see fit if they determine that unlawful discrimination has occurred. The AHRC Act lists examples of orders the court may make, including requiring the respondent to re-employ the complainant, to perform any reasonable act to redress the loss or damage suffered by the complainant, including payment of damages, and requiring the respondent to vary the terms of a contract or agreement.⁸⁸

Gaze and Smith observed that while the federal courts are empowered to grant any remedy they think appropriate for unlawful discrimination, ‘the courts have repeatedly interpreted this power narrowly to grant only compensatory remedies’:

Compensation could redress some of the harm suffered by individual complainants, but is often inadequate and does little to address the wider and public harms that discrimination can cause. By limiting remedies to compensation, discrimination is characterised as merely a private, interpersonal tort-like dispute, not a public issue. Its public character could instead be served by other remedies such as punitive damages or civil penalties for actions or respondents that warrant some punishment and deterrence from future contraventions. To address entrenched and systemic discrimination, systemic preventative remedies could also be considered, such as ordering changes to policies, the implementation of training, and even improvements in processes or representation.⁸⁹

Gaze and Smith advocate ‘twin reforms’: of an enforcement agency and a full range of remedies, to allow for ‘a constructive and efficient approach to regulating’, in the form of responsive regulation as developed by John Braithwaite.

In a review of the Sex Discrimination Act conducted by the Senate Standing Committee on Legal and Constitutional Affairs Committee in 2008, the Committee recommended that the AHRC Act be amended to extend the example list of orders available to the courts to include corrective and preventative orders.⁹⁰

This would enable courts to order the respondent to perform any reasonable act or acts aimed at ensuring future compliance with the Sex Discrimination Act.⁹¹ When the consolidation of federal discrimination laws was under consideration, the Attorney-General's Department's Discussion Paper suggested that, while not strictly necessary, such an amendment could provide better guidance to courts on the range of possible orders it may wish to make, and 'highlight to duty holders the possible consequences of noncompliance with the Act'.⁹²

The Human Rights and Anti-Discrimination Bill 2012 included some specific amendments which, while 'not intended to significantly change existing policy',⁹³ sought to address some of the concerns raised in previous reports. One clause provided for an order focusing on systemic orders to attempt to stop such conduct from happening again in the future.

Implementing a recommendation of the 2008 Senate committee review of the Sex Discrimination Act, the clause provided that the court may make an order requiring the respondent to perform any reasonable act or course of conduct aimed at ensuring future compliance with the Bill.⁹⁴ An order of this nature could, for example, include changing policies, directing specific staff training or reviewing internal practices. An additional provision was to clarify that an order of damages (and other orders) did not have to be limited to compensation.⁹⁵ Ideally, orders should reflect the kinds of steps expected through a positive duty.

In the national inquiry into sexual harassment in the workplace, the powers of the court to award certain types of damages was raised as a specific matter for reform, particularly in light of the decision of the Full Court of the Federal Court in *Richardson v Oracle Corporation Australia Pty Ltd (Oracle)*,⁹⁶ which set a new benchmark for compensation awarded to victims of sexual harassment, holding that the previous range of general damages awards in sex discrimination and sexual harassment cases was out of step with community standards, and that harm (and therefore compensation) should be assessed more consistently with harm from other types of conduct.⁹⁷

As noted in the *Respect@Work* report, the decision in Oracle 'has given greater guidance to courts, suggesting that courts should have regard to the prevailing community standards of behaviour to determine the appropriate amount of compensation'.⁹⁸

The court can also award aggravated damages. However there has been some uncertainty as to whether exemplary damages may be awarded in discrimination cases, as exemplary damages are more punitive than compensatory in character.⁹⁹

In *Wotton and Others v Queensland and Another (No 5)*,¹⁰⁰ Mortimer J concluded that the Federal Court had no power to award exemplary damages under the AHRC Act. While acknowledging the list of remedies in s 46PO(4) is not exhaustive, Mortimer J considered that Parliament's intention when enacting this clause was for a compensatory and remedial regime and 'not a regime designed to punish, or confer any deterrent or punitive functions on a court by its orders'.¹⁰¹

In the *Respect@Work* report, the Commission said that it would ensure that the court's existing powers are better explained in education and guidance materials.

The Commission also pointed to a need to monitor whether the development of the law, as it relates to damages in anti-discrimination and harassment matters, continues to reflect community perceptions and the evolving understanding of the harm caused by sexual harassment. The Commission recommended that further research be conducted on damages in sexual harassment matters and whether this reflects contemporary understandings of the nature, drivers, harms and impacts of sexual harassment, and this research should inform judicial education and training.¹⁰² Subsequently, the Government agreed to this recommendation and is commissioning the research.¹⁰³

The Commission considers that because there are so few unlawful discrimination matters that are litigated, and even fewer that are appellate decisions, the development of case law and precedent is somewhat sporadic. As considered in Chapter 4, section 6, this issue may be assisted by the reintroduction of an intermediate adjudicative process into the federal discrimination law system. Additionally, as suggested above, proposed research could also be used to inform judicial training. Further guidance materials developed by the Commission could also assist courts in their decision-making.

(ii) Remedies at the conciliation stage of the process

Information about the outcomes of conciliation is extremely restricted. This in part reflects the obligations on agencies such as the AHRC to ensure confidentiality of the process and its outcomes (see discussion of secrecy provisions in section 3.2 above).

The Commission publishes de-identified information about complaints through its conciliation register to provide guidance on the types of outcomes that have been mutually agreed between parties in conciliations. The scope of this information is constrained to ensure that a respondent or matter cannot be identified from published information being able to be matched with information already in the public domain (for example, where a matter has been high profile or the identity of a respondent or complainant would become apparent by referring to the factual situation in the complaint).

In section 3.2 above the Commission has proposed reform to the secrecy provisions of the AHRC Act to ensure that information can be disclosed for educational and awareness purposes.

This should be accompanied by further research examining the range of outcomes mutually agreed through the conciliation process. Such research should be able to identify a range of matters that would be of public interest, including:

- The suite of outcomes commonly agreed in conciliations
- The quantum of financial outcomes agreed
- Outcomes commonly agreed that can result in systemic changes in respondent organisations (which may be beneficial for other organisations, who have not been subject to complaints, to build into their business operations proactively)
- Trends identifiable from the complaint process: such as timeframes, the level of legal representation in matters for both complainants and respondents, the impact of representation on timeframes and outcomes.

(iii) Research on the effectiveness of different complaint resolution mechanisms

There are now a range of different complaint mechanisms that operate in relation to discrimination and human rights matters across Australia. Queensland, the ACT and Victoria have Human Rights Acts, and operate parallel discrimination and human rights complaint processes. States such as Victoria also utilise an administrative tribunal model for hearing complaints, in addition to the conciliation role of the state Commission. Some of these processes rely on litigation whilst others include conciliation.

The Commission has recently supported an ARC Linkage grant proposal that would evaluate the effectiveness of these different processes, in partnership with a range of industry partners from the legal sector and other human rights commissions. The outcome of that proposal is not known at this stage. It is proposed it would analyse qualitative and quantitative data to investigate what kinds of human rights complaints are mediated, conciliated and litigated, and develop an evidence-based model for human rights dispute resolution in an Australian context. This would provide valuable guidance on best practice mechanisms for dispute resolution nationally.

3.3 Guidelines

One of the Commission's functions is to produce guidelines for employers and resources to assist organisations to comply with their obligations under federal discrimination laws. The power to do so is set out in the AHRC Act and in the four Discrimination Acts.¹⁰⁴

The Commission develops resources – such as toolkits, factsheets, guides – to assist employers understand their workplace obligations with respect to federal discrimination law and to assist organisations and the community.¹⁰⁵

Guidelines are practical tools to assist decision making and compliance. These are non-binding and do not provide a defence in any subsequent legal action, although they do have an educative value and are able to reflect best practice approaches to various issues. Courts have, on occasion, referred to guidelines issued by the Commission when considering an employer's compliance with federal discrimination laws.¹⁰⁶

The policy rationale for the Commission preparing guidelines was set out by the Attorney-General's Department in 2012 as follows:

Guidelines provide greater guidance to organisations on what is and is not unlawful conduct. [They] assist ... users ... to understand their rights and obligations, and therefore increase compliance.¹⁰⁷

The Commission considers that such guidelines and resources provide important tools to assist duty-holders understand what amounts to unlawful discrimination and how they might prevent it. This is a key function of the Commission in building a preventative culture.

It is also a key function in the element of 'persuasion' at the base of the regulatory pyramid.

Guidelines are appropriate 'when an issue is developing, and a degree of flexibility is still required'. They can also be adapted and respond to emerging trends and issues quicker than more formalised tools such as Codes of Practice or Standards.¹⁰⁸

Associate Professor Belinda Smith has identified the different roles guidelines can play, depending on how they are drafted. These include explaining or translating the law; illustrating rules by providing examples of wrongful practice and correct practice; and providing best practice guidance to aid duty-bearers in their own proactive efforts.¹⁰⁹

The utility of guidelines in assisting employers and organisations to understand their obligations under federal discrimination laws was acknowledged by stakeholders – and the Commission was encouraged to do more.

The Australian Chamber of Commerce and Industry, for example, suggested that the Commission itself could do more to promote an understanding of anti-discrimination laws among small to medium sized enterprises and that the impact be monitored.¹¹⁰

Maurice Blackburn Lawyers said that guidelines are ‘a valuable compliance mechanism as they are another form of information developed by the AHRC to encourage organisations to improve behaviour by providing best practice and comprehensive information’.¹¹¹

The Australian Industry Group said that the importance of guidelines and educative materials to assist employers ‘should not be underestimated’: ‘small to medium enterprises, in particular, that typically have no internal HR staff are greatly assisted by free, quality online resources’.¹¹² A similar view was expressed by the Council of Small Business Organisations Australia in consultations.

In its review of the Disability Discrimination Act in 2004, the Productivity Commission considered that guidelines were a useful and positive measure, with the advantage of flexibility: ‘they can be easily updated to reflect changes in best practice and precedents set in case law’. However, there are also weaknesses, because they are not legally binding.

Service providers are not obliged to comply with the requirements and responsibilities set out in guidelines; even if they do, compliance with guidelines is not necessarily a defence if a complaint is lodged.¹¹³

However, compliance with guidance could still be relevant to a case, and provisions in legislation could enable compliance to be considered by courts, without prescribing a particular outcome. The Commission acknowledges the importance of its guidance materials and seeks to ensure that they are regularly updated, easily accessible and cover major topics under the Discrimination Acts.

The Commission is limited in the guidance that it can prepare by its resourcing. It was noted in consultations, for example, that it would be valuable for the Commission to expand the range of guidance materials it has on emerging issues such as the applicability of the Disability Discrimination Act to psycho-social conditions, supporting inclusive education in the context of particular types of disability, and supporting reasonable adjustments in the workplace. While the Commission agrees that guidance is valuable, and resourcing is a key constraint, a further limitation is the lack of judicial interpretation of key provisions in federal discrimination laws. Guidance, without such interpretation, can only be generalised or estimated, and not precise, which may make guidance in such circumstances somewhat limited.

The Commission will further consider methods for engaging with key stakeholders on a periodic basis to identify emerging issues on which guidance materials would be most valued.

Dedicated funding for undertaking this function should be built into the budget of the Commission on an ongoing basis.

The Commission also notes that guidance materials are a foundation upon which other regulatory functions would rely.

In particular, the next section of this chapter discusses demand from the business sector for targeted engagement through voluntary audits and other advisory support. Guidance materials provide generalised materials that can clarify the general application of the law. Other regulatory functions such as voluntary audits then provide a tool through which the Commission can provide more specific and tailored analysis on steps that particular businesses or sectors could take to ensure compliance with federal discrimination laws.

Guidelines will also be of particular importance in supporting implementation of the proposed positive duty to take measures to eliminate discrimination (as set out in Chapter 2, section 2.1).

3.4 Summary – improving the effectiveness of regulatory functions at level one of the regulatory pyramid

To improve the effectiveness of regulation:

- Consideration be given to review of s 49 of the AHRC Act to determine whether secrecy provisions with criminal sanctions are warranted, or whether s 49 should be amended to clarify that disclosing information of a de-identified nature for educative purposes does not breach the secrecy obligations in discrimination law.
- Dedicated resourcing be provided to the Commission, as well as to academic partners, to provide publicly available information and analysis on a periodic basis about trends in complaints.
- Guidance be developed on the appropriate usage of non-disclosure agreements and confidentiality provisions in discrimination matters. The preparation of such guidance has been committed to by the government in relation to sexual harassment complaints. This guidance should be the pilot for further guidance across all other protected attributes in federal discrimination law.

The Commission will further consider methods for engaging with key stakeholders on a periodic basis to identify emerging issues on which guidance materials would be most valued.

Dedicated funding for undertaking this preparation of guidelines function should be built into the budget of the Commission on an ongoing basis, particularly given that it is foundational in supporting the successful rollout of other regulatory options identified in this paper.

Expanded co-regulatory mechanisms - level two



4 Expanded co-regulatory mechanisms – level two

The Commission recommends the introduction of new, as well as the refinement of existing, co-regulatory mechanisms in federal discrimination law. This includes through such measures as the ability to certify special measures and the expanded operation of action plans.

Co-regulation typically refers to the situation where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced.¹¹⁴

In the context of federal discrimination law, existing co-regulatory measures have tended to set out that actions taken by industry are lawful and do not breach the legislation. They have lacked enforcement mechanisms to also ensure that industry complies with the measures – a fundamental element of a co-regulatory approach.

At present, the Commission also has a function under the Disability Discrimination Act that it may publish action plans developed by organisations outlining how they intend to comply with disability discrimination laws.

While such mechanisms are valuable, they are limited in their effectiveness as regulatory tools. Queensland Advocacy Incorporated, for example, said that the current mechanisms administered by the Commission are ‘necessary and helpful’ and supported their continuation, but that the introduction of things like voluntary audits and positive duties would be of significant value.¹¹⁵

The Discussion Paper produced by the Attorney-General’s Department on the consolidation of discrimination laws in 2011, included suggestions for measures that could assist businesses to understand and fulfil their obligations under anti-discrimination laws.¹¹⁶

The Human Rights and Anti-Discrimination Bill 2012 (HRAD Bill) that followed included a number of voluntary measures, with the object of assisting compliance with anti-discrimination obligations, without affecting potential liability. They were aimed at assisting business to understand their obligations under anti-discrimination law and ‘provide them with an opportunity to promote their efforts towards compliance to interested members of the community’.¹¹⁷

The Commission acknowledges the importance of clarity in obligations for employers, and especially for small businesses.¹¹⁸ The Commission considers that any new compliance mechanisms should be considered alongside existing mechanisms to ensure that they work together to provide a spectrum of options that are effective and efficient.

The Commission considers that a broader set of co-regulatory tools will provide more focused support for the business sector to build confidence to initiate positive measures to prevent discrimination.

Systems of co-regulation can be found in a number of Commonwealth laws, such as the Privacy Act 1988 (Cth), the *Taxation Administration Act 1953* (Cth) and the *Broadcasting Services Act 1992* (Cth). As explained by the Attorney-General's Department,

A typical co-regulatory framework will involve a law that sets minimum standards, while permitting industry codes or other mechanisms developed by industry bodies which supplement the law. These codes and mechanisms may be monitored or validated by a government regulator.¹¹⁹

The need for a mix of mechanisms within an overall compliance framework is not uncommon to ensure that diverse circumstances covered by the legislation are appropriately addressed. For example, the *Competition and Consumer Act 2010* (Cth) and work health and safety laws provide models of varied mechanisms situated within a broader compliance framework.

In its review of the Disability Discrimination Act in 2004, the Productivity Commission recommended that the Commission be empowered to certify such coregulation arrangements.¹²⁰

It concluded that 'the benefits of co-regulation, particularly its flexibility to deal with a variety of different circumstances and changes over time, are compelling'.¹²¹ The Productivity Commission concluded that co-regulatory arrangements between organisations and government, could increase awareness of, and willingness to comply with, the Disability Discrimination Act.

4.1 Action plans

Action plans are currently provided for in the Disability Discrimination Act. Provisions in Part 3 permit public authorities, employers, educational institutions, and providers of goods, services and facilities to develop action plans concerning ways in which they will act to achieve the objects of the legislation.¹²²

The Commission considers that action plans should be a measure available across all discrimination laws as part of a suite of voluntary measures and a constructive strategy in addressing issues of intersectionality, where inequalities may raise issues across more than one of the Discrimination Acts.

As Neil Rees, Simon Rice and Dominique Allen explain in relation to action plans under the Disability Discrimination Act,

The intention of the action plan provisions in Part 3 of the DDA is to encourage organisations – particularly those that offer goods or services in a way which may be difficult to access by some people with limited mobility – to plan for ways of improving the delivery of goods or services over time, especially when it was likely to be costly to make changes. If a complaint was made against the organisation before it had fully implemented the action plan, the existence of the plan could be an important part of an unjustifiable hardship 'defence'.¹²³

Section 61 of the Disability Discrimination Act provides that the action plan must include provisions relating to:

- the devising of policies and programs to achieve the objects of the Act
- the communication of these policies and programs to persons covered by the plan

- the review and identification of any discriminatory practices within the plan
- the setting of goals and targets, where these may reasonably be determined against the success of the plan in achieving the objects of the Act
- the appointment of persons within the organisation to implement the plan.

Action plans have primarily been adopted by employers and service providers, including banks, public transport services and government departments.

While the benefit of such plans is that they act as a public statement to the community of the commitments and actions to be taken by an organisation, the Commission's role is currently a passive one: it can *receive* action plans and *publish* them. While the Commission has produced a range of guides to preparing action plans, available on the Commission's website,¹²⁴ the Commission is not required to assess their rigour or to consider whether they are being implemented.

Further, the provisions relating to action plans do not require them to be of a specified duration or to be updated on a periodic basis. This leads to action plans being out of date, and therefore less effective tools to encourage compliance.

As the Productivity Commission noted in its review of the Disability Discrimination Act in 2004, the success of an action plan, in terms of eliminating disability discrimination and as a defence against complaints, 'will largely depend on the effectiveness of the actions taken'.¹²⁵

In its Discussion Paper on the consolidation of discrimination laws, the Attorney-General's Department observed that

Action plans are voluntary, nonbinding and have limited effect on the action planner's legal obligations. Action plans provide a collaborative mechanism for addressing the needs of people with a particular protected attribute. They are developed through consultation between the employer or service provider and the Commission and the community. This educative process can help businesses to avoid behaviour and practices which are likely to give rise to complaints of unlawful discrimination. Action plans may also be relevant to the assessment of unjustifiable hardship where a claim of discrimination has been made [under the DDA s 11(1)(e)].¹²⁶

The development of an action plan is recognised by Hepple et al as a step in the regulatory pyramid after persuasion.¹²⁷

The Attorney-General's Department suggested that a power to register action plans may allow businesses to market their commitment to equality and assist them to analyse and improve their policies and procedures.¹²⁸

The HRAD Bill proposed expanding the action plan provisions to all protected attributes, not just under the Disability Discrimination Act, to assist persons or bodies to avoid engaging in unlawful conduct.¹²⁹ In this way, the development of action plans can be seen to reflect commitment to building a preventative culture. The Commission supports this approach.

This is now the case in Victoria, under s 152 of the *Equal Opportunity Act 2010*.

Under the HRAD Bill, action plans were to remain voluntary and intended 'to provide greater guidance to organisations and encourage proactive steps to comply with the Bill'.¹³⁰ Action plans were also not to be binding, but the Commission or a court could have regard to an action plan, if considered appropriate.¹³¹ Compliance with a voluntary action plan would not be a complete defence to a complaint of unlawful conduct, but could be evidence of compliance.¹³²

While clauses 67 and 68 of the HRAD Bill spelled out what was required in an action plan, and that action plans may be given to the Commission,¹³³ it continued the existing approach under the Disability Discrimination Act – namely, the role of the Commission was to continue to lack an active, quality control element.

In comparison, the 2010 Victorian provision states that VEOHRC may provide advice about preparing and implementing action plans and may set minimum requirements for action plans.

Maurice Blackburn submitted that it should be mandatory for organisations to prepare and implement an action plan and supported a provision for action plans in all federal discrimination laws. Maurice Blackburn said it would be an aspect of taking positive steps 'to try and prevent discrimination in the workplace while ensuring organisations understand the current statutory framework and their obligations at law'.¹³⁴

The Australian Industry Group disagreed that the action plan mechanism should be extended to other attributes. However, it said that if this proposal were pursued, the action plans 'need to remain voluntary and non-binding on the duty-holder'.¹³⁵

The Disability Discrimination Legal Service said that action plans should be encouraged, but noted that 'their use as a tool of compliance is limited and their role in establishing the defence of unjustifiable hardship is concerning'.

Action plans under the Disability Discrimination Act are voluntary in the sense that any organisation that implements a plan is only bound to fulfil it to the extent that they choose to and there is no consequence for not doing so. Thus, while they are useful from a public information point of view, as they allow organisations to show an intention to the public that they are committed to equality, they should not play any role in establishing the defence of unjustifiable hardship as they currently do. An intention to improve, which is not binding, is irrelevant to whether an individual has suffered harm through discrimination contemporaneously. As such ... organisations should not be allowed to use this to assist in their own defence.¹³⁶

The Commission considers that action plans should be updated to introduce further quality checks into the process. In particular, the Commission considers the following reforms to the action plan process should be instituted:

- clarify that the Commission may provide advice on the development and implementation of action plans
- clarify that the Commission may set minimum requirements for action plans (such as through guidelines) and not accept action plans that fail to meet these requirements
- introduce a set timeframe within which action plans will lapse, and require that outcomes of the evaluation of previous action plans be provided to the Commission when submitting a subsequent action plan.

The Commission acknowledges, however, that additional involvement of the Commission and an expansion of this function across all Discrimination Acts will have resource implications and would need to be addressed in a suite of reforms to enhance the Commission's role as a modern regulatory agency.

Examples of action plans

The Commission maintains a database of action plans on its website. The database records action plans across banking and legal industries; businesses; public transport; telecommunications; utilities; arts and entertainment, healthcare; Commonwealth, state, territory and local government bodies; education; employment and training; and sport.¹³⁷

One example is ANZ's 2019 action plan. This plan outlines ANZ's vision for improvement, and includes a range of 'action areas' for implementation. One action area is focused on improving accessibility. Actions under this umbrella include commitments to 'continually improve our communications to ensure they are accessible and inclusive' and 'attract, engage, retain, and develop people with disability'. These actions are themselves broken down into a range of specific outputs, and responsibility is assigned to relevant ANZ executives. Other action areas include commitments to: improve financial inclusion and resilience for people at risk of financial exclusion; improve organisational culture and internal capabilities; improve awareness and understanding of financial vulnerability; and take steps to encourage meaningful economic participation.¹³⁸

4.2 Voluntary audits

The Commission recommends that it be given a power to conduct reviews of policies or programs of a person or body, on a request to the Commission, in order to assess compliance with federal discrimination laws and measures to eliminate unlawful discrimination.

The Commission considers that voluntary audits could be a useful co-regulatory compliance measure, by assisting in the promotion of greater compliance and understanding of federal discrimination law. A mechanism for a voluntary audit could play an important role in assisting duty-holders to incorporate an approach based on a positive duty to take measures to eliminate discrimination.

The HRAD Bill included provisions to enable the Commission to review a person's or a body's policies or programs, on application, to determine whether they constitute, or may give rise to, unlawful conduct.¹³⁹ The proposed power also extended to a review of Commonwealth conduct that may be contrary to human rights.¹⁴⁰ These are not matters that sit within the unlawful discrimination jurisdiction covered by the four Discrimination Acts. It is an aspect that is considered in the positive human rights framing aspect of the Commission's Free and Equal work.

Under the proposed provisions, the Commission could decline to conduct the review, but if it did a review the Commission had to provide a written report on the outcomes, which would not be published unless the person or body consented to the publication. It was also made clear that a review report was not binding, but that a court or the Commission dealing with proceedings could have regard to a review report if they considered it appropriate to do so.

The HRAD Bill's proposed voluntary review mechanism was intended to provide greater guidance to organisations, and to encourage proactive steps to comply with the Bill.¹⁴¹ Compliance with any Commission recommendations from a review could then be evidence of compliance with the Bill, although it would not operate as a complete defence.

The review mechanism was seen as helping to foster a preventative culture as it would assist organisations to understand and meet their legal obligations under the Bill, and to prevent discrimination from occurring.¹⁴²

It was also provided that the Commission could charge the person or body that made the application a fee for dealing with the application to enable the Commission to recover its costs.¹⁴³

Business stakeholders were supportive of this co-regulatory approach.

The Business Council of Australia, for example, welcomed the measures to assist and promote voluntary compliance with the Bill, including the voluntary audit function proposed for the Commission, seeing this 'as a way to contain compliance costs while still achieving the stated policy objectives'.¹⁴⁴

The Commission considers that the ability to conduct a voluntary audit would assist towards the goal of encouraging and supporting compliance. It would also be a valuable tool in assisting business to comply with a positive duty, by obtaining guidance on measures to embed prevention in workplace and service culture.

4.3 Codes of practice

The proposal for the Commission to have a role in certifying 'compliance codes' has been raised before. While they are an example of a co-regulatory measure that may carry merit in perhaps providing greater certainty to industry about the measures to prevent discrimination, at this stage, however, the Commission is not proposing that it have a role in relation to such codes. It may be considered at a later stage, in light of past proposals and in light of the experience in the implementation of the other measures included in this Position Paper.

The HRAD Bill included provisions to allow the Commission to certify 'compliance codes' to allow duty-holders to gain 'greater certainty about their obligations', on a voluntary basis.¹⁴⁵ Failure to comply with a code would not, in and of itself, be unlawful, but compliance with a code would be 'a complete defence against discrimination'.¹⁴⁶

The Productivity Commission had also recommended a similar voluntary measure in its review of the Disability Discrimination Act in 2004. It recommended that the Commission

should be able to approve and register codes of conduct, including dispute resolution mechanisms, subject to criteria such as consistency with the objects of the DDA and adherence to good regulatory practice. Consultation is fundamental to developing good regulation, including codes of conduct. Codes of conduct should be certified only after organisations have consulted with stakeholders, including people with disabilities and relevant government departments and agencies. Compliance with a registered code could be linked to exempt or deemed to comply status.¹⁴⁷

The Attorney-General's Department emphasised that the advantage of co-regulation is that it can improve certainty for businesses: 'a business which is compliant with its industry's co-regulation plan (which has been certified by the Commission) would not be liable for unlawful discrimination claims with respect to the matters covered by the plan'.¹⁴⁸

Preparing a co-regulatory code or standard in consultation with the community and the Commission could assist in educating businesses on the broader requirements of Commonwealth anti-discrimination law. Quality of co-regulatory standards and legislative compliance could be enforced by a requirement that standards be approved by the Commission under certain conditions (including appropriate community consultation), and sunset provisions requiring the plan to be recertified on a regular basis (for example, every five years). These measures would also resolve concerns that co-regulation codes and standards may not be compliant with the DDA.¹⁴⁹

An example given in the Explanatory Notes to the HRAD Bill was that the Commission could use this power to develop and certify a code of general application, such as a Small Business Code, which could provide certainty about what actions would not constitute discrimination or would not give rise to an action.¹⁵⁰

The Explanatory Notes also signalled the importance of this measure to assist voluntary compliance:

The introduction of compliance codes will for the first time allow industry to develop voluntary codes specific to their industry. In industries with unusual or technically complex requirements, such as the railway industry, this mechanism will allow development of clear guidance on compliance with anti-discrimination obligations taking into account the peculiar requirements of the industry. Compliance with a code will provide a defence to a claim of unlawful discrimination. ...

Codes could also be used to provide a more general understanding for business of some of the more technical aspects of the Bill, such as vicarious liability. That is, it could be desirable to provide greater guidance on what constitutes reasonable steps and due diligence to ensure, if followed, an employer is not liable for the actions of a rogue employee.¹⁵¹

Maurice Blackburn suggested how codes of practice could work constructively:

by setting out how similar, if not the same, standards might apply in different circumstances. The codes of practice should also be used to inform what is reasonable and proportionate in any given situation. The codes of practice should continue to anticipate how unlawful conduct may arise so that organisations can address problems that may arise, rather than reactively dealing with a complaint after discriminatory practice has already occurred.¹⁵²

The Australian Industry Group, however, said that they did not support additional codes of practice. They suggested they would 'add to the existing complexity of anti-discrimination legislation for duty-holders and unfairly constrain the varying capacities and ways in which employers can comply with their obligations'.¹⁵³

The HRAD Bill proposed that compliance codes, if made by the Commission, would be legislative instruments. This would invoke the consultation requirements of the *Legislation Act 2003* (Cth).¹⁵⁴ It was also provided that compliance with a Code certified by the Commission would not constitute unlawful discrimination.

The Commission considers that a power to work with duty-holders in a model of co-regulation would improve the effectiveness of the Commission as a regulatory body, with the aim of fostering a culture of compliance and prevention, and to provide certainty for duty-holders. However, the Commission considers the other measures of co-regulation advanced in this Paper are a preferable mix of mechanisms and should be implemented first. The Commission considers that the certification of compliance codes for industry may in some circumstances amount to a quasi-legislative function that more appropriately sits with the responsible Minister. In the case of the Disability Discrimination Act, the certification process could be done using the disability standards process.

4.4 Certification of ‘special measures’

The AHRC Act should be amended to provide the Commission with a power to issue special measures certifications. Such certifications should be judicially reviewable, to ensure appropriate oversight, particularly for complex applications.

A ‘special measure’ is an equality promoting measure whereby an action is proposed that confers a benefit on a group of people to redress their experience of inequality. Examples of special measures are provided in guidance on the Commission’s website, as included in the below text box.¹⁵⁵ The Commission also provides specific guidance on the targeted recruitment of Aboriginal and Torres Strait Islander people.¹⁵⁶

Special measures

Special measures aim to foster greater equality by supporting groups of people who face, or have faced, entrenched discrimination so they can have similar access to opportunities as others in the community.

Special measures are sometimes described as acts of ‘positive discrimination’ or ‘affirmative action’. They are allowed under federal anti-discrimination laws.

The Sex Discrimination Act allows special measures that improve equality of opportunity for people based on their sex, sexual orientation, gender identity, intersex status, relationship status, pregnancy or potential pregnancy status or family responsibilities.

Example: A gym offers a women’s only exercise class as a special measure after it receives feedback that women are less likely to participate in exercise classes with men because they feel uncomfortable.

The Disability Discrimination Act allows for special measures that improve equality of opportunity for people with disabilities.

Example: A housing provider makes modifications to accommodation for a person with a disability.

The Racial Discrimination Act permits special measures that foster greater racial equality in the Australian community.

Example: Rental assistance given to Aboriginal and Torres Strait Islander students is a special measure. The purpose of the assistance is to increase participation rates of Aboriginal and Torres Strait Islander students in tertiary education to a level equivalent to the non-Indigenous community.

The Age Discrimination Act allows for positive measures to be taken. The Act says that it is “not against the law to provide a genuine benefit to people of a particular age group; to do something that helps meet an identified need for people of a certain age group or reduce a disadvantage experienced by people of a particular age”.

Example: A hairdresser gives discounts to customers with a Seniors Card.

All Australian anti-discrimination statutes permit special measures to be taken for the benefit of people with a protected attribute, to overcome disadvantage that they have experienced because of their shared attribute, although the wording is quite different.¹⁵⁷ Neil Rees, Simon Rice and Dominique Allen explain that

Conduct which falls within the scope of special measures is an exception to the legislative prohibitions against discrimination, although the provisions are not always worded in that negative way. Conduct that is a special measure is, at the same time as being an exception, a positive step towards achieving equality for an historically disadvantaged group of people, and some legislation expresses a special measure not as an exception to unlawful discrimination, but as a positive measure in its own right in pursuit of equality.¹⁵⁸

Special measures are not unlawful discrimination.

Special measures are different from ‘temporary exemptions’. The Commission has the power to grant ‘temporary exemptions’ from some parts of the Sex Discrimination Act, the Disability Discrimination Act and the Age Discrimination Act. If a temporary exemption is granted the activities covered by it cannot be the subject of a successful complaint under the Discrimination Act. Such exemptions involve serious consideration by the Commission, may be subject to conditions, and are provided for a term of no more than five years.¹⁵⁹

The Commission regularly receives requests to issue a temporary exemption in circumstances where a business or organisation is taking actions that may qualify as a ‘special measure’.

However, because a special measure does not amount to discrimination, the Commission cannot ‘exempt’ such activities from the operation of federal discrimination law.

The Commission considers that having the ability to certify special measures would provide certainty and confidence for business and other duty-holders and recommends the introduction of such a power. It would be an additional constructive co-regulatory measure.

This perverse situation – where organisations taking positive steps to promote equality seek to be exempted from discrimination law – arises because there is no process whereby the Commission can certify that the activity amounts to a special measure and therefore may be conducted lawfully under discrimination law.

Only the NSW Anti-Discrimination Act contains a process which requires a person wishing to engage in conduct that is a special measure to seek formal clearance before the measure is put into operation.¹⁶⁰

The ability to certify special measures was one proposal considered at the time of the HRAD Bill in 2012. The object was to ‘provide certainty to organisations that are implementing special measures, and to encourage the taking of special measures to achieve equality’.¹⁶¹

The explanatory notes to the HRAD Bill provided this example:

An example of a temporary exemption that has been sought from the Commission which might more appropriately be considered for a special measure determination under this Bill relates to a business seeking an exemption to pay its female employees a slightly higher superannuation percentage than male employees to take into account the time a female employee is likely to be out of the workforce following childbirth and its associated responsibilities.¹⁶²

The inclusion of provisions in the Bill to facilitate special measure certification recognised that temporary exemptions worked differently from special measures: 'special measures are not discrimination as they are positive measures to achieve equality, so a temporary exemption is not required'.¹⁶³

Despite all federal discrimination laws providing for special measures, no process for such certification currently exists.

The Commission has consistently heard from the business sector that the absence of a compliance function for the Commission to issue special measures certifications contributes to greater uncertainty about the operation of the law, and potentially affects the willingness of organisations to take positive measures to promote equality and eliminate discrimination due to concerns that they may have discrimination actions brought against them.

The advantage of such a power would be to provide greater certainty to businesses and other duty-holders, and encourage the taking of special measures.

In the Discussion Paper on the consolidation of discrimination laws, the Attorney-General's Department suggested that,

While not affecting the substantive obligations imposed on business, certification would allow businesses to adopt equal opportunity measures with more certainty. Enabling businesses to pursue special measures with more guidance and certainty could help to overcome areas of disadvantage.¹⁶⁴

The Australian Industry Group considered that 'there is merit in this approach'.¹⁶⁵ As noted by the Law Council of Australia, the lack of such a function 'potentially affects the willingness of organisations to take positive measures to promote equality and eliminate discrimination'.¹⁶⁶

The Australian Industry Group considered that the certification process should be voluntary and that organisations should be able to rely on the current provisions.¹⁶⁷

This position was also reflected in the HRAD Bill which affirmed that certification was not *required* for conduct to be considered a special measure. The Australian Chamber of Commerce and Industry said that providing certainty would be useful, as long as there was no disadvantage if there was no certification.

The Commission agrees with this approach.

In terms of the mechanism of special measures certification, the HRAD Bill provided that certification could be made for a period of five years. The Commission agrees with this time limitation.

The Bill also proposed that a special measures determination would take effect as a legislative instrument, disallowable by Parliament, which would invoke the consultation requirements of the Legislation Act prior to a determination being made.¹⁶⁸

In the Commission's experience, requests for special measures certifications are likely to be made by individual businesses or organisations in relation to discrete issues – for example, specific business decisions such as Indigenous-only recruitment processes, incentives to attract and retain female employees, or a scholarship program to attract women to an engineering course. In these circumstances, and considering the technical requirements associated with drafting legislative instruments, the Commission considers it more appropriate for a special measures certification to be an administrative decision of the Commission, subject to review by the Administrative Appeals Tribunal.

The HRAD Bill made clear that the Commission could not determine whether a Commonwealth, State or Territory law was a special measure – such a question is one for Parliament and the courts to determine.¹⁶⁹ The Commission agrees with this limitation.

In summary, the Commission recommends that:

- The Commission should be given the power to certify special measures.
- The certification should be limited to a period up to five years
- Certification should be voluntary, with organisations able to rely on existing provisions
- Certifications should be administrative decisions, subject to administrative review.
- The certification power would not extend to the certification of legislative provisions as special measures.

4.5 Cost recovery for co-regulatory options

An issue that arises with all of the co-regulatory options proposed in this Position Paper is how to resource their operation.

The Commission considers that a mixture of the following approaches should be considered:

A base funding model that adequately resources the Commission to administer the co-regulatory functions that it is charged with performing.

Specific resourcing for the development of guidance materials and for community outreach – this will be particularly crucial in ensuring that the Commission has readily available and accessible support materials of a general nature, that can address the majority of inquiries and requests for support.

Specific resourcing for outreach to the business community and small to medium business enterprises in particular – this may require the development of more tailored materials in conjunction with industry bodies.

In relation to the consideration of particularly complex matters, such as voluntary audits, and some special measures certifications, an ability to cost recover.

In relation to cost recovery, this must not render the services of the Commission inaccessible to those who are vulnerable or who cannot afford it.

When the certification of special measures was proposed in the context of the HRAD Bill 2012, it was provided that the Commission 'will be able to recover costs associated with the certification process'.¹⁷⁰ The Bill stipulated that the fee could be prescribed in regulations or otherwise by the Commission.¹⁷¹

The HRAD Bill provided that the Commission could charge the person or body that made the application a fee for dealing with the application, which will enable the Commission to recover costs. Alternatively, it was suggested in the context of considering compliance codes, that the Government might choose to fund the Commission to develop a code of general application across the business sector (such as a Small Business Code), rather than requiring any particular organisation or body to bear those costs on behalf of all small businesses.¹⁷²

In its submission to this Free and Equal project, the Law Council submitted that the proposal for a 'fee for service' certification for special measures could potentially threaten 'the neutrality of the regime' and that it might inadvertently defer special measures where funding was not available.¹⁷³

Ultimately, the method for resourcing the regulatory functions discussed here is a matter for government and involves policy choices that have to balance competing considerations.

Accordingly, the Commission flags this as an important issue to be addressed in order to ensure regulatory processes are efficient and effective.

4.6 Summary – expanding co-regulatory functions at level two of the regulatory pyramid

The Commission recommends the introduction of new, as well as the refinement of existing, co-regulatory mechanisms in federal discrimination law as follows.

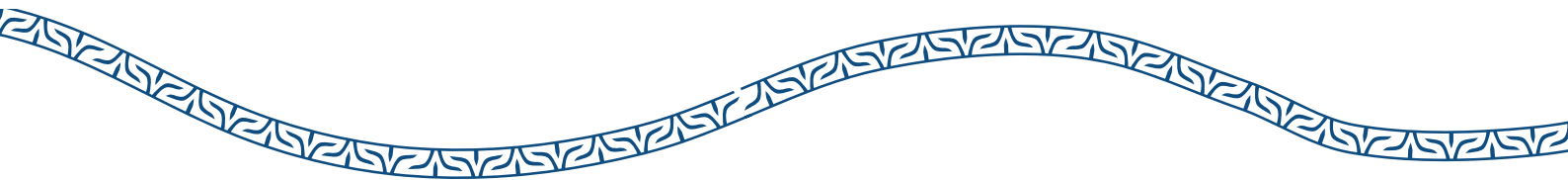
The Commission considers that action plans, currently available under the Disability Discrimination Act, should be a measure available across all discrimination laws as part of a suite of voluntary measures. The provisions relating to action plans should be updated to introduce further quality checks into the process. In particular, the Commission considers the following reforms to the action plan process should be instituted:

- clarify that the Commission may provide advice on the development and implementation of action plans.
- clarify that the Commission may set minimum requirements for action plans (such as through guidelines) and not accept action plans that fail to meet these requirements.
- introduce a set timeframe within which action plans will lapse, and require that outcomes of the evaluation of previous action plans be provided to the Commission when submitting a subsequent action plan.

The Commission recommends that it be given a power to conduct voluntary audits, or reviews of policies or programs of a person or body, on a request to the Commission in order to assess compliance with federal discrimination laws and measures to eliminate unlawful discrimination.

The AHRC Act should be amended to provide the Commission with a power to issue special measures certifications. Such certifications should be judicially reviewable, to ensure appropriate oversight, particularly for complex applications.

The Commission acknowledges, however, that additional involvement of the Commission and an expansion of these functions will have resource implications and would need to be addressed in a suite of reforms to enhance the Commission's role as a modern regulatory agency.



Measures to address non-compliance - level three



5 Measures to address non-compliance – level three

At present, measures to assure compliance with federal discrimination law operate at the lower levels of the regulatory pyramid. The above sections have identified how to make these measures more effective and appropriate in scope.

Measures at levels one and two of the regulatory pyramid can be effective where organisations and individuals wish to comply with the law and are trying to do so. Those measures make it easier for them to comply and offer assistance that clarifies obligations, often through cooperative and voluntary approaches.

However, these measures are less effective where an organisation, government or individual does not want to comply with the law, or in the circumstance where the likelihood of a lack of legal consequence from not complying means that they have no motivation to address non-compliance.

Pursuing issues of non-compliance is currently solely the responsibility of an affected individual, through pursuing complaints and possibly legal action. This also limits the likelihood that breaches of the law will be remedied.

For these circumstances, regulators should have available to them a stronger set of compliance measures that can address non-compliance and penalise persistent or serious breaches of the law as part of their 'toolbox'.

Such measures sit at the apex of a regulatory pyramid, which reflects that they would be utilised less commonly and in relation to a smaller, but extremely serious, set of issues.

The Commission proposes that federal discrimination laws be amended to include a function for the Commission to conduct own motion inquiries in relation to systemic unlawful discrimination, with enforcement mechanisms attached.

The Commission also proposes that the standards under the Disability Discrimination Act be reviewed to consider their overall effectiveness, and to consider clearer accountability and enforcement mechanisms.

5.1 Disability Discrimination Act Standards

Disability standards are legislative instruments, created by the Attorney-General, with a five-year review period. They are part of the regulatory framework of the Disability Discrimination Act and can help to provide clarity to businesses and organisations about their obligations. Where they apply, the disability standards provide accessible and detailed technical advice on necessary steps for compliance.

Standards have been introduced for Accessible Public Transport, Access to Premises and Education. The Commission has developed a range of guidance material in relation to the Standards.¹⁷⁴

In 2021, processes were underway in relation to each of the Disability Standards to consider reform options, following the conduct of statutory reviews of each standard. These reviews have identified some challenges with the operation of the standards.

The Commission supports the continued operation of the Disability Standards, as well as consideration of whether further standards should be introduced. The Commission considers that, at this stage, standards should remain a regulatory tool only available under the Disability Discrimination Act, reserved for particularly technical, systemic issues.

At this stage, the Commission considers that the other regulatory tools proposed in this Position Paper provide appropriate co-regulatory options for issues under other federal discrimination laws, as well as for some issues under the Disability Discrimination Act, and should be preferred in the first instance due to the intensive processes required in the making of Disability Standards.

The Commission is concerned at the current operation of the Disability Standards due to the lack of appropriate accountability mechanisms for their implementation. Non-compliance is an issue, and is not easy to enforce.

The Commission considers that there is a need for an independent review of the existing Disability Standards to consider their effectiveness in addressing unlawful discrimination, as well as the effectiveness of the current legislative, governance, policy and practice arrangements in place to implement and achieve compliance with the Disability Standards. Additional enforcement mechanisms should be considered as part of this review.

(a) The role of standards

As a regulatory tool, standards can operate to provide clear benchmarks for compliance with duties under legislation. As Julian Gardner explained,

Standards are distinguished by the fact that they are made by regulation and provide a complete statement of the law, rather than merely providing guidance or directions on compliance with an Act. Compliance with a standard is prima facie evidence of compliance. Non-compliance leads to liability under the relevant legislation.¹⁷⁵

Standards are designed, as Associate Professor Dominique Allen observed, to 'increase access for people with disability systematically, rather than on a case-by-case basis'.¹⁷⁶

In its 2004 review of the Disability Discrimination Act, the Productivity Commission supported the use of standards because they had the potential to ensure the needs of more people with disabilities would be met than under an individual complaints system alone.¹⁷⁷

However, the process of introducing standards into Parliament 'can be lengthy and riddled with obstacles'.¹⁷⁸ It requires complex consultation processes and regulatory impact processes, including consulting with all Australian governments.

As a result, binding standards can be resource- and time-intensive to create.¹⁷⁹ Standards may also 'freeze the nature of compliance to a minimum standard and may not encourage best practice'.¹⁸⁰

The HRAD Bill maintained provisions for Disability Standards in largely unchanged form.¹⁸¹ However, in areas aside from disability, the Explanatory Notes to the HRAD Bill suggested that the introduction of other proposed compliance mechanisms, such as compliance codes, may be more appropriate mechanisms for achieving greater certainty of obligations.¹⁸²

Stakeholders supported the use of standards to transform general legal principles into measurable, outcome-focused requirements.¹⁸³ Legal Aid NSW said, for example, that standards are ‘a useful way to clarify requirements under the DDA and support compliance’.¹⁸⁴

However, while there is demonstrated in-principle support for legislated standards under the DDA, the statutory reviews and the submissions received in this Free and Equal inquiry have raised concerns about the operation and effectiveness of standards.

These include concerns about the unevenness of compliance with the standards across different industries,¹⁸⁵ the (in)effectiveness of current review processes,¹⁸⁶ the lack of enforceability,¹⁸⁷ and the need for standards in other areas.¹⁸⁸ A further issue is the relationship between standards and state provisions.

(b) What are the existing DDA standards?

Section 31(1) of the Disability Discrimination Act provides that the Minister (the Attorney-General) may ‘formulate standards’ in relation to any area of life in which it is unlawful for a person to be discriminated against under the Disability Discrimination Act. Thus far, the standards that have been formulated include:

- Disability Standards for Accessible Public Transport 2002 (Cth) (Transport Standards)
- Disability Standards for Education 2005 (Cth) (Education Standards)
- Disability (Access to Premises – Buildings) Standards 2010 (Cth) (Premises Standards).

The Disability Standards are legally binding regulations set by the Attorney-General under the Disability Discrimination Act that provide more detail on rights and responsibilities about equal access and opportunity for people with a disability.

It is unlawful for a person (or organisation) to contravene a Disability Standard. Conversely, demonstrated compliance with a Disability Standard means that the relevant unlawful discrimination provisions of the Disability Discrimination Act do not apply to the same conduct.

A statutory review of each of the Disability Standards is conducted every five years. There is no obligation on the Commonwealth Government to amend any Disability Standard in response to any review.

Current status of the Disability Standards

Education Standards

The Education Standards are presently being reviewed by the Australian Department of Education, Skills and Employment, following a 2015 review of the standards.

Through this review, the consultation confirms that the Education Standards remain important and relevant in a wider policy landscape seeking to ensure that students with disability are able to access and participate in education on the same basis as other students. It is important to note that the report indicates that awareness among educators and education providers is relatively high, and that the Education Standards continue to be a tool to advocate for the rights of students with disability.

While there has been significant improvement in the accessibility and use of the Education Standards since 2010, it is evident that further effort and resources are still required in order to support the use, application and interpretation of the Education Standards in practice. The recommendations from the 2015 Review outline key areas for improvement across all levels of education to better improve knowledge and implementation of the Education Standards.

Transport Standards

The third five-year review of the Transport Standards is being undertaken by the Department of Infrastructure, Regional Development and Communications (Department of Infrastructure) in consultation with the Attorney-General's Department and the National Accessible Public Transport Advisory Committee and the Aviation Access Forum. The Department of Infrastructure will provide a final written report for consideration by the Minister for Infrastructure, Transport and Regional Development in consultation with the Attorney-General. This process is due to report in 2021. This review has been delayed almost five years; it was initially intended to report in 2017.¹⁸⁹

The 2012 Review found that progress against the Transport Standards was occurring at an uneven rate depending on the location, population and demand for accessible public transport. While acknowledging that progress had been made, most submissions from the disability sector, local governments and other bodies advised of continuing deficiencies in the physical accessibility of public transport conveyances and infrastructure, the quality of public transport information and engagement of public transport staff, and a lack of effective planning for whole-of-journey accessibility. There was also widespread criticism of the absence of a national system of reporting on compliance.

The 2012 Review also found that although the Transport Standards had overall been effective in removing discrimination, they were not optimal in their present form. This review discovered that a number of parts of the legislation, as well as the legislative guidelines, may need to be amended to provide a more flexible response to cover the different modes of public transport and the different environments in which public transport networks operate across jurisdictions.

The National Accessible Transport Taskforce, jointly led by the Australian Government and Queensland Government, is driving the reform and modernisation of the Transport Standards with an emphasis on co-design meeting the needs of all stakeholders and transport providers not just seeking to comply with the Transport Standards but providing additional accessibility. A critical issue is whether the Transport Standards can achieve these goals without lessening the investment in accessible transport infrastructure and how compliance should be reported on by transport providers across Australia.

Premises Standards

In April 2016, the five-yearly review of the Premises Standards was completed following significant input from government, the building and construction industry and the disability sector.

The review found the Premises Standards, National Construction Code and Transport Standards could be better aligned in places and that there is an inadequate understanding and awareness of the Premises Standards. There was also a lack of a coordinated approach to performance-related data collection and a lack of coherent governance structure for progressing reform of the Premises Standards.



(c) Concerns about specific Standards

While the concept of standards was seen as beneficial, the Commission heard concerns from stakeholders about the operation of specific standards. In particular, about the operation of the Education and Transport Standards.

(i) Disability Standards for Education

The Disability Discrimination Legal Service and Children and Young People with Disability Australia raised concerns about the contrast between the clear technical standards laid out under the standard for physical access to premises and the, 'vague', 'fluid' and 'interpretable language'¹⁹⁰ of the Education Standards.

The Disability Discrimination Legal Service stated that the use of concepts such as 'consultation' or 'strategies and programs' within the Education Standards has meant that, 'when required to be interpreted, courts have tended to respect the discretion of the education provider and thus show a disregard to the human rights of persons with disabilities'.¹⁹¹

The Disability Discrimination Legal Service illustrated the problems about the interpretation of the Education Standards via the case of *Walker v State of Victoria* [2011] 279 ALR 284, identifying the meaning of 'consultation' as the key problem:

The standard does not provide clear guidance on what consultation requires. The consultation requirement was interpreted by the court to allow the school to determine how consultation takes place and what level of significance to give to the opinion of the student, their representative, or their medical professional. Fundamentally, this decision allows schools to ask students or their representatives for their opinion, and then for staff to make their own decision as to whether the adjustment is needed or whether there is an alternative that is just as appropriate. This is a dangerous interpretation considering schools cannot be considered experts in disability and are certainly not in a position to be a better judge on the appropriateness of adjustments than the student or their representative. Furthermore, it raises a range of clear conflict of interest issues, most obviously, any subjective financial priorities.¹⁹²

The Disability Discrimination Legal Service also pointed out that the Education Standards 'provide no meaningful route for redress', in relation to issues like bullying of children with disability, as they require only that a general strategy or program is in place, which is satisfied by a school's 'general bullying policies' and 'fails to recognise the unique susceptibility of students with disabilities'.¹⁹³

Hence, they suggested the Education Standards are inconsistent; too broad; poorly drafted; and incomprehensible. Compliance with the Education Standards results in individuals being prevented from bringing disability claims under the Disability Discrimination Act, so any vagueness is particularly problematic.

Children and Young People with Disability Australia noted that neither the Disability Discrimination Act nor the Education Standards expressly mention a right to inclusive education as recognised under the Convention on the Rights of Persons with Disabilities (CRPD), or seek to provide for positive steps to implement inclusive education at a systemic level as required by article 24 of the CRPD, ‘beyond the limited prohibition of specific forms of discrimination and the provision of individual rather than systemic remedies’.¹⁹⁴ Moreover, the concept of ‘reasonable adjustments’ is a limited enactment of article 24 obligations that

tends to encourage individualised, case-based and deficit ‘retrofit thinking’ only and overlooks broader systemic architecture and design issues in the delivery of education services, including the implementation of Universal Design for Learning as expressly mentioned in paragraph 25 of General Comment No 4.¹⁹⁵

Children and Young People with Disability Australia urged that both the Education Standard and the Disability Discrimination Act should be reviewed, replaced or supplemented with new laws ‘to ensure that Australia’s regulatory framework for education of students with disability fully aligns with the rights and concepts in the CRPD, including the approach to equality and non-discrimination applicable pursuant to the CRPD’.¹⁹⁶

People with Disability (Australia) said that there are long-term implications in the area of education, as it affects the economic trajectory for people with disability.¹⁹⁷

(ii) Disability Standards for Accessible Public Transport

The Public Interest Advocacy Centre (PIAC) raised specific concerns about the Transport Standards, which were developed to provide guidance on the minimum access requirements for public transport operators and providers.¹⁹⁸ PIAC stated that ‘shortcomings’ in the way the standards were drafted, and the lack of sufficient enforcement mechanisms, have meant that there continue to be ‘low levels of industry compliance’. Though compliance targets were set within the standards, individual legal action has been the only way that compliance has been enforced.

PIAC recommended structural reforms to strengthen enforcement of the Transport Standards, including:

- a new national reporting and monitoring framework
- resourcing an independent monitoring body, such as the Commission, to oversee enforcement
- amending the standards to certify that it is unlawful to breach them
- creating a ‘stand-alone complaint process’ for individuals and organisations to allege breaches of the Transport Standards, without requiring the breach to amount to unlawful disability discrimination, and
- allowing organisations to bring complaints in relation to the Standards.¹⁹⁹

(d) Reporting, review and enforcement processes

Many of the concerns raised by stakeholders about the Education and Public Transport Standards align with the Commission's analysis that the current review and enforcement processes are not sufficient to ensure standards are effective and contributing towards full compliance with the Disability Discrimination Act.

They also highlight the ongoing uneven compliance with the Disability Discrimination Act across sectors and the limited capacity for the Commission to enforce compliance.

Enhanced monitoring and review processes, combined with greater engagement and awareness raising, are required to ensure standards can have a positive systemic impact. Stakeholders agreed that robust review processes should be in place to ascertain the effectiveness of the standards and assess the level of compliance.²⁰⁰

As under the Disability Discrimination Act, compliance with the Disability Standards can only be enforced if a 'person aggrieved' brings an action for a breach.²⁰¹ It is difficult for representative groups to bring action on behalf of their members. The lack of stronger regulatory tools to ensure full and timely compliance with standards and the Disability Discrimination Act will continue to hamper the capacity of standards to create systemic change.

Consideration should also be given to the Commission having an oversight role with regulatory powers to enforce compliance. This is particularly important in light of Australia's obligations under the Convention on the Rights of Persons with Disabilities, which obliges member states to take measures to ensure access to justice for people with disability.²⁰²

(e) Expanding standards

Despite concerns about the monitoring and review mechanisms operating under the existing standards, a number of stakeholders expressed support for standards to be developed for other areas.²⁰³

The Productivity Commission review highlighted the potential benefits of allowing standards to be introduced in any area covered by the Disability Discrimination Act. It recommended expressing the power to create standards in a general sense to allow greater flexibility in determining priorities for future standards development.

Several stakeholders highlighted the need for increased awareness and action to improve communication accessibility and ensure community inclusion is afforded to everyone, including those with communication support needs.²⁰⁴ Both Scope and Speech Pathology Australia encouraged consideration of Disability Standards for communication access to improve inclusive practices across the country.²⁰⁵

In the *Human Rights and Technology Final Report*, the Commission recommended the creation of a new Digital Communication Technology Standard under s 31 of the Disability Discrimination Act. A broad range of stakeholders – including people with disability, community and advocacy groups, and academic experts – advocated strengthening disability discrimination law in respect of Digital Communication Technology and many specifically endorsed the creation of a new Standard under the Disability Discrimination Act.²⁰⁶

The Commission noted that the UN Committee on the Rights of Persons with Disabilities has recommended that Australia take the necessary legislative and policy measures, including through the use of public procurement policies, to implement the full range of accessibility obligations under the CRPD and ensure effective sanctions or remedies for non-compliance.

The development of a new Digital Communication Technology Standard would have a number of potential benefits. It is likely to increase availability of accessible Digital Communication Technology for people with disability, reducing the likelihood of unlawful discrimination. A binding standard would clarify, for government and the private sector, the Disability Discrimination Act's minimum requirements regarding goods, services and facilities that use Digital Communication Technologies. It would send a clear message that people with disability use Digital Communication Technology and so it needs to be accessible.

Such a Standard would help guide the design and development of those goods, services and facilities, thereby spurring innovation that promotes accessibility for people with disability. It would also provide legal recourse for anyone negatively affected by a good (such as a product), service or facility that fails to comply with the Standard.

There may also be broader commercial and community benefits. Accessible design and development can give businesses a competitive advantage, increased market share and enhanced reputation, and greater adaptability to external forces such as market changes and regulatory reform.

The Commission agrees that Standards should be considered for other areas and industries covered by the Disability Discrimination Act but that different regulatory mechanisms may be more effective for other protected attributes, including those recommended in this Report.²⁰⁷

Legal Aid NSW considered that additional disability standards would be helpful in employment.

Standards could outline what is an inherent requirement of a job and how to assess whether a person can perform the inherent requirements. Standards could also provide guidance on the making of a reasonable adjustment in an employment context, in a similar way to the guidance provided in the Education Standards to the education sector.²⁰⁸

Legal Aid NSW said that they see issues arising from the application of the legal principles 'on an almost daily basis', and considered that 'employers would welcome greater certainty around these concepts, and employees would also benefit from greater clarity regarding rights'.²⁰⁹

Legal Aid NSW encouraged consideration of how similar standards or codes of practice could apply to the other anti-discrimination laws, 'to provide greater certainty and to improve compliance with obligations under those Acts'.²¹⁰ The HRAD Bill however, maintained the provisions for Disability Standards in largely unchanged form and did not allow for standards to be created in any area other than disability.²¹¹

In this Position Paper the Commission proposes a range of mechanisms for supporting compliance and building a preventative culture. Standards are one mechanism that can be expanded to other discrimination laws; and suited best to areas of technical specificity.

5.2 Conducting own motion inquiries into systemic issues of discrimination

The Commission proposes that federal discrimination laws be amended to include a function to enable the Commission to conduct own motion inquiries into serious matters that involve systemic unlawful discrimination, as illustrated in Chapter 1, sections 2.2 and 3.5, with enforcement mechanisms attached.

The Commission currently has some inquiry powers, but they are very limited with respect to coverage, ability to consider issues of systemic unlawful discrimination and enforcement mechanisms.

The Commission emphasises that a broadly-based inquiry function would be one avenue to deal with systemic discrimination issues, although if other preventative measures are working effectively, it should not be needed, other than in exceptional cases.

(a) Present inquiry functions

Under s 11(1)(f) of the AHRC Act, the Commission can inquire into matters relating to ‘acts or practices’ which may infringe human rights and may report to the Attorney-General on its inquiry.²¹² There are several functions included in this provision.

‘Act’ or ‘practice’ is defined as meaning an act or practice:

- (a) by or on behalf of the Commonwealth or an authority of the Commonwealth;
- (b) under an enactment;
- (c) wholly within a Territory; or
- (d) partly within a Territory, to the extent to which the act or practice was done within a Territory.²¹³

The inquiry function may be exercised when requested by the Minister, when a written complaint is received, or when ‘it appears to the Commission desirable to do so’.²¹⁴ The function also includes the complaint function in relation to ‘human rights’ complaints, but also broader human rights inquiries, as a complaint is not required to enliven this function.

As the Commission submitted to the 2008 Senate Committee review of the Sex Discrimination Act, ‘[o]n a first reading, this appears to be a broad and flexible statutory function which would enable [the Commission] to initiate inquiries into human rights, including systemic discrimination’.²¹⁵

However, inquiries under this function are limited to acts of the *Commonwealth or under a Commonwealth law* and do not extend to employers, or other bodies which may be acting in breach of the Discrimination Acts.

The Commission has a similar inquiry function under s 31(b) of the AHRC Act to conduct inquiries into discrimination in employment, including systemic discrimination, which applies also to acts or practices within a state, or under state laws. However, the definition of 'discrimination' is taken from the Discrimination (Employment and Occupation) Convention 1958 (ILO 111 Convention) and is therefore limited to discrimination in employment or occupation. The grounds of discrimination are also expressed in language that, in many respects, has been overtaken by the generations of unlawful discrimination law reform since 1986.

In relation to these functions, the Commission can make recommendations, and report to the Minister on the matter. A report may be publicly released by the Commission.

Prior to 2017 there was a tabling requirement for such reports. This requirement was part of the original design of the Commission, in 1981, in relation to human rights complaints. The then Attorney-General, Senator the Hon Peter Durack, considered that, through tabling, the reports would ensure that governments and parliaments were 'aware of situations in which there needs to be a redefinition of the rights of different individuals and will stimulate them to take appropriate action'.²¹⁶ As the Commission similarly observed, the effect of the reports was

to bring a matter to public notice, through its tabling in Parliament, and, perhaps, discussion there. This publicity itself may result in changes in the attitudes, not only of the parties concerned, but also of the community at large.²¹⁷

However, in 2017, the tabling requirement was dropped. The awareness and attendant publicity of the human rights breaches considered in the reports no longer comes through tabling, but through the Commission publishing the reports itself.

There are no other mechanisms to achieve compliance or to remedy any breach of human rights identified by the Commission. In addition to these formal inquiry functions, the Commission has a number of 'inquiry-like' functions which are available to address systemic discrimination. The Commission can:

- conduct research to promote the objects of the Discrimination Acts or human rights obligations
- examine federal laws or proposed laws and report to the Minister as to whether those laws are against the objects of the Discrimination Acts or human rights
- report to the Minister on laws required or action which should be taken by the Commonwealth or to comply with Australia's discrimination and human rights obligations.

National inquiry reports

The Commission uses a mixture of the functions referred to above to conduct thematic inquiries into issues. Over the past three years, the Commission has conducted the following inquiries:

- *Respect@Work*: National Inquiry into Sexual Harassment in Australian workplaces (Report, March 2020)
- *Human Rights and Technology* (Report, June 2021)
- Free and Equal: A national conversation on human rights
- *Sharing the Stories of Australian Muslims* (Report, July 2021)
- *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future* (Report, December 2020)

These inquiries, and the resultant reports, involve a mix of prevalence research, surveys, national consultations, submissions and focus groups, supplemented with research and analysis.

They identify limitations in law, policy and practice, mostly at the federal level, and make recommendations to address these or to build on existing best practice.

These inquiries do not discuss or investigate individual situations. Sometimes, for example the *Respect@Work* prevalence data, they will focus at the industry-level to identify the pervasiveness of a problem in a particular sector or industry.



In its submission to the 2008 Senate Standing Committee on Legal and Constitutional Affairs review of the Sex Discrimination Act, the Commission stated:

The existing inquiry functions ... are important in efforts to bring about cultural changes and action through education and awareness-raising. [Commission] inquiries have been influential in fostering public debate and public action, for example, in the area of paid maternity leave, the right to request flexible work arrangements, and amendments to the SDA to increase legal protection from discrimination, for example, in the areas of potential pregnancy, family responsibilities and breastfeeding.

However, the current inquiry functions are limited, due to the confined nature of the formal inquiry functions under the [AHRC] Act.²¹⁸

(b) Previous recommendations for an own-motion power

Empowering the Commission to conduct own-motion inquiries into systemic discrimination is not a new proposal.²¹⁹

In 2008, in a review of the Sex Discrimination Act, the Senate Standing Committee on Legal and Constitutional Affairs recommended that the Commission be empowered to conduct formal inquiries into issues relevant to eliminating sex discrimination and promoting gender equality.²²⁰ The Committee observed, of the limitation on the Commission's inquiry powers under s 11(1)(f) to Commonwealth laws or actions done by the Commonwealth or its territories,

This limitation seems both unnecessary and artificial. More importantly, it hamstring the capacity of [the Commission] to examine the more intractable or systemic areas of sex discrimination which generally cross the boundaries between the Commonwealth and the states. The committee believes that Australia's national human rights institution should have broad ranging formal inquiry powers that enable it to identify and suggest solutions to these remaining areas of gender inequality.²²¹

The Committee recommended that the Commission's inquiry powers should be expanded.²²²

In response to the Attorney-General's Discussion Paper on the consolidation of discrimination laws in 2011, the Commission referred to a power that had been included in the Disability Discrimination Act as passed, namely a capacity to act in the absence of a complaint, but as if a complaint had been received:

There was provision made for the Commissioner to pursue discrimination issues as if a complaint had been lodged. This power was seen as highly important by disability community organisations, partly because of their own limited resources and concerns about the ability of disadvantaged and vulnerable people to use the legislation sufficiently effectively in driving large scale social change.²²³

This power, as originally framed, was problematic and was removed when the machinery provisions of the Disability Discrimination Act and other Commonwealth discrimination laws were revised in 1999 with effect from 2000.²²⁴ The Commission considers that a systemic inquiry power, of the Commission's own motion, and not limited to individual complaints, is a more appropriate approach.

In the *Respect@Work* report, the Commission recommended a monitoring and investigation role and an inquiry function in relation to systemic issues of unlawful discrimination. This was not reflected in the subsequent *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).

The Commission recommended that it be given the function of assessing compliance with the recommended positive duty to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation.²²⁵ It was recommended that the Commission have the power to:

- a. undertake assessments of the extent to which an organisation has complied with the duty, and issue compliance notices if it considers that an organisation has failed to comply
- b. enter into agreements/enforceable undertakings with the organisation
- c. apply to the Court for an order requiring compliance with the duty.²²⁶

The *Respect@Work* report also recommended that the Commission be given a broad inquiry function to inquire into issues of systemic unlawful discrimination, with powers similar to the Commission's existing inquiry powers, but moving beyond the existing limitations of coverage.²²⁷

In consultations in this Free and Equal inquiry, many stakeholders pointed to the Commission's inability to tackle systemic or routine discrimination. Victoria Legal Aid, for example, urged that

Reform is needed to address the fact that our laws and agencies currently place the burden on the individual who has experienced discrimination or sexual harassment to bring a legal claim to enforce their rights and change their workplace. As the 2018 AHRC's Fourth National Survey on Sexual Harassment in Australian Workplaces confirmed, less than 1 in 5 people who experience sexual harassment take action, and only 1 in 100 make a legal complaint to the AHRC or equivalent State or Territory agency.

This reliance on individual complaints means that employers are rarely made aware that discrimination or sexual harassment is occurring and there are rarely consequences for perpetrators and workplaces in which it occurs. Even when people do make a complaint or come forward and seek advice we often see complainants decide not to proceed with their claim for fear of the consequences to their career and reputation.²²⁸

A further limitation of the reliance on individual complaints is that when an outcome is obtained as a result of a complaint of unlawful discrimination, 'it rarely requires the employer to take preventative systemic action (such as conducting proper training or staff consultation about preventing sexual harassment, or implementing a policy to prevent harassment occurring again in the future)'.²²⁹ VLA said that, even though they push for such outcomes in settlements, they are only able to obtain them in approximately 25% of cases.²³⁰

An additional problem identified was that, because claims resolve in confidential settlement agreements, ‘any consequences are rarely visible’, hence discrimination claims and their outcomes ‘rarely act as a visible warning or example to others and rarely result in steps taken to reduce the risk of this conduct occurring again in future’.²³¹

Aimee Cooper’s study revealed that ‘the inability of individual complaints to ensure compliance with equality laws was universal’ across each jurisdiction included in her study. Her conclusion was that

We cannot expect people who have lost their livelihood and experienced trauma to put their immediate needs aside in order to fix the problems in their previous workplace in the public interest.²³²

Cooper pointed to the ability of equality bodies to ‘prompt compliance’, without having to wait on individual complaints, through systemic investigations or compliance monitoring. Cooper referred to the impact of monitoring in the jurisdictions she studied:

In every jurisdiction I heard from stakeholders about the positive impact regulators can have simply by asking about compliance when employers know the equality body has the power to take action if they are in breach.²³³

In his review of Victoria’s anti-discrimination law and the role of VEOHRC, Julian Gardner identified the weakness of the complaint-based system as it existed at that time:

The requirement that a complaint must be lodged before [VEOHRC] can act as a significant restriction. Many instances of discrimination never result in complaints to [VEOHRC] for a wide range of reasons. These include the perceived difficulties in making a complaint, which may be financial, emotional, legal or practical. Making a complaint can be particularly difficult where the person experiencing discrimination is vulnerable or disadvantaged.

It may be even more difficult for an individual to make a complaint about systemic discrimination because systemic issues can be difficult to identify. The complaints system is focussed on specific acts of discrimination rather than ‘systems’ which are discriminatory. It imposes a considerable burden on an individual, even if a representative is prepared to lodge a complaint on their behalf.²³⁴

Gardner considered it ‘central’ to any reform of the Victorian legislation to introduce ‘some degree of enforcement role’ for VEOHRC that: empowered VEOHRC to take action in relation to breaches of the Act without reliance on individual complaints; and provided sanctions for breaches of the Act that can reach beyond individual redress to achieving broader change.

He recommended giving the Commission the power to initiate an inquiry without the need for an individual complaint.²³⁵ Gardner envisaged that the power:

could allow [VEOHRC] to initiate and determine whether to conduct an inquiry into any matter arising under the Act. Inquiries could be thematic (inquiring into the causes of unequal outcomes) or sectoral (inquiring into the employment of people in particular sectors). Inquiries could also occur in relation to one or more named parties (for example, the persistent sexual harassment of staff within a particular corporation).²³⁶

He saw the reform as critical 'to overcome the current deficiencies that leave law enforcement almost entirely to the individual and which do not adequately address systemic discrimination'.²³⁷

The Law Council of Australia supported the expansion of the Commission's role and powers to allow the Commission to inquire into incidents of unlawful discrimination of its own motion, without needing to rely on a formal individual complaint or a reference from government.²³⁸

Associate Professor Dominique Allen conducted research in 2017–2019 on discrimination law practice, involving 27 solicitors and eight barristers. To address discrimination effectively, she concluded, 'the burden should not be borne by individual complainants alone', but rather a statutory agency such as the Commission should be invested 'with the power to enforce the law'.

As one of the solicitors [Dr Allen] interviewed put it, 'In an arena like this where the individual has to do all the heavy lifting ... systemic discrimination is not going to be addressed unless you have a body like the Commission or an equivalent of the Fair Work Ombudsman in the anti-discrimination sphere.' Giving the AHRC a role in enforcing the law would complement its current role in providing education and training about discrimination, conducting inquiries and intervening in relevant court proceedings.²³⁹

In his 2008 review, Gardner made a number of recommendations concerning the role of VEOHRC in relation to an inquiry power, including:

- enabling VEOHRC to conduct own motion investigations into serious matters that concern a possible contravention in relation to a class or group of persons (without the need for a dispute)
- enabling VEOHRC to undertake own motion public inquiries into serious matters of public interest relating to discrimination, sexual harassment and victimisation that are not appropriate to be dealt with by an individual complaint
- strengthening powers to compel attendance, information and documents for the purposes of an investigation or public inquiry (without an order from VCAT)
- introducing enforcement tools to seek enforceable undertakings and issue compliance notices, as part of a range of investigation and inquiry outcomes.²⁴⁰

An investigation was intended to permit 'a graduated, flexible response to issues arising from disputes, which may become the subject of a broader inquiry'.

Gardner considered the inquiry power as linked to the positive duty to eliminate discrimination, that he also advocated. Indeed, he saw the inclusion of an express duty to eliminate discrimination as 'crucial to giving the Commission the capacity to act without a complaint being made'.²⁴¹

Gardner recommended the introduction of a broad and flexible inquiry power, which could be used 'for general issues as well as patterns or repeated incidents of discrimination'.²⁴²

In its submission to the *Respect@Work* inquiry, VEOHRC said that the positive legal duty in the Equal Opportunity Act 'could – if accompanied by appropriate compulsion and enforcement powers – deliver systemic change and help alleviate the burden on individuals'.²⁴³

VEOHRC identified as critical having broad and flexible powers to investigate and inquire into breaches of the duty. Effective consequences for non-compliance with the duty are also key when education and encouragement fail to bring change.²⁴⁴

VEOHRC envisaged that a positive duty to eliminate sexual harassment (as well as discrimination and victimisation), combined with an own-motion public inquiry and a broadened investigation function, 'would provide the Commission with more effective tools to assess compliance with the positive duty, even when there is no complaint'.²⁴⁵

VEOHRC advocated that the threshold for an investigation would be if the matter is:

- (a) serious in nature
- (b) indicates a possible contravention of the Act
- (c) [VEOHRC] has a reasonable expectation that the matter relates to a class or group of people.

The threshold for a public inquiry would be if the matter is:

- (a) serious in nature
- (b) relates to a class or group of persons
- (c) is in the public interest.²⁴⁶

Powers of this nature would, among other things, enable a Commission to require organisations who have breached their positive duty to take corrective action, which would ultimately be enforceable. VEOHRC noted that '[i]t is reasonable to imagine that while enforcement tools would on occasion be necessary to enforce the Act, their mere existence, rather than use, may facilitate cooperation from organisations'.²⁴⁷

VEOHRC recommended that a positive duty should be included in all Commonwealth, state and territory anti-discrimination laws, and that it should be accompanied by a full suite of regulatory powers, including investigations and inquiries with compulsion and compliance tools to enable anti-discrimination commissions to act to enforce the duty effectively.²⁴⁸

(c) Conflict of interest?

The Australian Industry Group was strongly opposed to an expansion of the Commission's role to include initiating own motion inquiries, saying that such expansion 'would clearly conflict with the Commission's function as an impartial conciliator and would cause duty-holders defending an anti-discrimination claim to lose faith in the system'.²⁴⁹

The Commission considers that there are a number of ways that any perceived conflict of interest could be addressed. Other agencies, such as OAIC, have both a complaints-handling and an inquiry function and are able to manage both administratively.

In the pre-*Brandy* period, the Commission had both complaints-handling and hearing powers and operated both to ensure clear separation of functions. Similarly in relation to the post-*Brandy* era, perceived conflict situations are managed legislatively and administratively. Post-*Brandy*, the President has been responsible for complaint handling, and the Special Purpose Commissioners have had a separate function of appearing as *amicus curiae* in proceedings that proceed to Court. No conflict of interest concerns have been expressed in relation to these different roles, exercised by different people within the one organisation, in relation to different parts of a single complaint.²⁵⁰

(d) Key elements of an own-motion inquiry power

The Commission agrees with the characterisation by the Senate Standing Committee on Legal and Constitutional Affairs in 2008, that the existing inquiry function is unnecessarily and artificially limited, and with the criticism of others that this constrains the ability of the Commission to address systemic instances of discrimination.

New mechanisms are needed to shift the burden away from individuals to address serious systemic problems.

An inquiry function should sit as one of the more significant regulatory options available in circumstances that warrant it.

The Commission proposes two, mutually reinforcing, elements to an inquiry power:

- the capacity to undertake systemic inquiries – such as in circumstances where there is a pattern of discrimination or suspected compliance issues becomes known to the Commission
- compliance monitoring – to ensure that industries, organisations, sectors or others are complying with the provisions of a positive duty.

The Commission should be empowered to take action where it suspects there are significant breaches of federal discrimination law that affect a class of people, without the need for an individual complaint; and in relation to serious matters of public interest relating to discrimination, harassment and victimisation.

The Commission agrees with the proposal in the Gardner review in Victoria that inquiries could be thematic, sectoral or take place in relation to one or more named parties (where there is a pattern of discrimination or harassment, for example).

However, in conducting such inquiries, the Commission agrees with the analysis of VEOHRC that they should focus on systemic issues.

It is expected that such an inquiry function would require equivalent powers to compel attendance, information and documents for the purposes of an investigation or public inquiry as currently exist in relation to other functions of the Commission.

Existing Commission powers in the conduct of inquiries

In relation to its current inquiry function into 'acts' or 'practices' of the Commonwealth, the Commission has powers to require the giving of information, the production of documents, and the examination of witnesses under oath or affirmation, with penalties applying for non-compliance, when conducting an inquiry under s 11(1)(f) of the AHRC Act.

However, these powers are not available to the Commission when conducting an inquiry into conduct done by or on behalf of a State, within a State, or under State laws that may amount to discrimination under s 31(b) of the AHRC Act.

The Commission also has the power to require the production of information and documents relating to an inquiry into an unlawful discrimination complaint (s 46PI). The combined effect of ss 46PJ(1)–(3) and 46PK of the AHRC Act is that the President may decide to hold a private conference for the purpose of attempting to conciliate a complaint of unlawful discrimination and may either invite or require certain people to attend the conference.

There are penalty provisions that apply for non-compliance with these powers.

These provisions could form the basis of powers associated with an expanded inquiry function.

A broader inquiry function should also be accompanied by enforcement mechanisms, such as enforceable undertakings and compliance notices, with a focus on systemic outcomes that can achieve structural change. Enforcement mechanisms are discussed in detail in the next section below.

The Commission considers that a systemic inquiry function should be independently exercised by the Commission.

In its response to the *Respect@Work* report, the Government stated a preference for an investigative function of the Commission to be limited to matters referred to it by the Government:

There is a risk to the effectiveness of the cooperative model were the AHRC to adopt as a general practice the role of investigator. That said, the Government observes that in referred cases, there are advantages to the AHRC having a broader suite of powers to be exercised upon the referral of a matter for investigation by the Government. It would, for example, avoid the need for special purpose legislation to be enacted in circumstances where it is desirable to confer upon the AHRC such a function.²⁵¹

The Government's response therefore limited support for the recommendation in the *Respect@Work* report for an own motion inquiry power to 'circumstances *where the matter for inquiry is referred by Government*'.

The Commission considers that a systemic inquiry function limited to matters referred by Government is inadequate. As noted above, the roles of the Commission in relation to complaints handling and also being able to seek leave to appear as amicus curiae has not compromised the effectiveness of the Commission in any way.

It is narrower in operation than the existing Commission inquiry function for discrimination matters arising from ILO 111. Placing such limitations on the exercise of this function would also undermine public confidence in the operation of discrimination laws, and discourage people from raising issues of systemic discrimination and harassment if they fear that the Government will not support further inquiry into these.

It also fundamentally misconstrues the Commission's role as a regulator, and also as an independent national human rights institution.

Autonomous decision making by the Commission

The Commission is an 'A status' national human rights institution under the 'Principles Relating to the Status of National Human Rights Institutions', endorsed by the United Nations General Assembly in 1993. These principles, known as the 'Paris Principles', set out the minimum standards required by national human rights institutions, such as the Commission, to be considered credible and to operate effectively domestically.²⁵² One key criterion of six that NHRIs should meet under the Principles, is that of 'autonomy'.

The issue of autonomy is intrinsically linked to independence and is perhaps the most important of the criteria elaborated in the Paris Principles.

Because an NHRI is funded by the State, it is accountable to the Government in terms of reporting on its performance. However, its decision making and its operational structure need to be autonomous and independent – as is the position, for example, in relation to federal courts.

The Commission may self-initiate inquiries under the current provisions of the Act. The Attorney-General may also *request* the Commission to undertake certain inquiries.²⁵³

Given the significance of autonomy in the context of the Paris Principles, the Commission's ability to exercise its role as the NHRI should drive consideration of an expansion of the Commission's inquiry functions.

In this Position Paper, the Commission recommends a stronger co-regulatory approach that is capable of building a more preventative culture and modernising the regulatory framework of the Commission itself.

But the Commission needs a suite of different tools among its range of functions, including at the highest level of a regulatory pyramid, for it to be effective.

(e) What enforcement powers should accompany an own-motion inquiry function?

A separate question concerns any enforcement powers that may accompany an own-motion inquiry function.

If the Commission is empowered to conduct systemic inquiries and to investigate compliance with a positive duty, the Regulatory Powers Act has a number of relevant powers that should be considered.

(i) Enforceable undertakings

An effective cooperative tool is the ability of a regulator to accept enforceable undertakings from duty bearers in breach of the law. Part 6 of the Regulatory Powers Act creates a framework for accepting and enforcing undertakings relating to compliance with statutory provisions.

An authorised person may accept an undertaking relating to compliance with a specific provision that is enforceable under Part 6. The undertaking may then be enforced by a relevant court if not complied with. Under s 114, an authorised person may accept any of the following undertakings:

- a) a written undertaking given by a person that the person will, in order to comply with a provision enforceable under Part 6, take specified action
- b) a written undertaking given by a person that the person will, in order to comply with a provision enforceable under Part 6, refrain from taking specified action
- c) a written undertaking given by a person that the person will take specified action directed towards ensuring that the person does not contravene a provision enforceable under Part 6, or is unlikely to contravene such a provision, in the future.

For example, an undertaking could include that a respondent takes a specified action to address a situation that indicates a possible contravention of discrimination law. Undertakings are enforceable in their own right and they may be entered into instead of, or in addition to, an authorised person taking other disciplinary action.

Enforceable undertakings are used by regulators in many areas of law, including in employment, workplace health and safety, information and privacy and financial services, as an alternative to civil action where there has been an actual or suspected contravention of legislation.²⁵⁴

As enforceable undertakings require discussion and agreement between the regulator and the person suspected of breaching the law, they are often a very good mechanism for achieving organisational change and systemic reform.

For example, respondents can make undertakings to create, update or review policies or have them audited by an appropriate third-party, as well as committing to paying compensation to named individuals or classes of people for past contraventions of the law.

Enforceable undertakings can require a person to make significant and ongoing commitments to remedy past breaches of the law, as well as to prevent future contraventions. As enforceable undertakings are made public by the regulator, for example on a register on the regulator's website, they are also a good way of communicating to industry, and to the community, the consequences of breaching the law. Enforceable undertakings also provide greater clarity and certainty for the entities entering into them, about the specific and appropriate steps required to be in compliance with the law.

Using the Fair Work Ombudsman as an example, Professor Beth Gaze and Associate Professor Belinda Smith suggest that such undertakings can be the outcome of negotiation and settlement with a respondent, 'by which the respondent publicly acknowledges contravention and undertakes to pay compensation or provide training as appropriate, rather than have the matter progress to a hearing in which the agency could seek civil penalties'.²⁵⁵

They also note that while some similar outcomes are achievable through conciliated settlements, 'their confidentiality deprives them of the value of publicly setting out the limits of and remedies for breach of the law in an educative fashion'.²⁵⁶

In Victoria, Julian Gardner commended the use of undertakings in the context of his consideration of reforms to the Equality Act. He noted that such a mechanism was used between authorities and persons or organisations in Victoria. It was also used in relation to similar Commissions overseas:

The EHRC in the United Kingdom may make an agreement with a person not to commit an unlawful act and to take positive steps to avoid an unlawful act. Agreements are enforceable through the County Court. The agreement requires that the person not commit the unlawful act and in return, the EHRC does not issue an unlawful act notice or proceed with an investigation. The EHRC can also enter into an agreement with a public authority in respect of a breach of a public sector duty.

The Canadian Human Rights Commission has a variation of this power in relation to employers. Where an officer under the Canadian Employment Equity Act 1995 believes an employer is not complying, they can negotiate a written undertaking to remedy non-compliance. Where the undertaking is breached, the commission can issue a compliance direction.²⁵⁷

Gardner also recommended that undertakings should be enforceable through VCAT. He made the following observations:

If the Commission were empowered to enforce undertakings, concerns about transparency and accountability could be addressed in several ways. Enforceable undertakings should be optional rather than mandatory. It is recommended that the Commission develop guidelines on how it will implement the power to enter into enforceable undertakings. The guidelines and a register of enforceable undertakings should be publicly available and published on the Commission's website.²⁵⁸

In 2010, the *Equal Opportunity Act 2010* (Vic) implemented many of the reforms recommended by Gardner, including introducing a positive duty requiring duty-holders to proactively eliminate discrimination, sexual harassment and victimisation, and a power to issue compliance notices and accept enforceable undertakings. However, the Act was amended again in 2011, before it commenced.²⁵⁹

Among other things, the amendments removed the ability of VEOHRC to enter into enforceable undertakings and issue compliance notices as potential outcomes of investigations.²⁶⁰

While VEOHRC can investigate a breach of the positive duty and take any action it thinks fit after the investigation, VEOHRC cannot seek enforceable undertakings or issue compliance notices, as Gardner recommended. In consequence, VEOHRC is limited to entering into an agreement, referring a matter to VCAT or making a report to the Attorney-General of Victoria or the Victorian Parliament.²⁶¹

The Commission considers that, while the making of a report is of importance, the Commission's experience in relation to its function of making reports, particularly in relation to human rights complaints and ILO 111 complaints suggests more effective regulatory tools are required. Enforceable undertakings would be a significant step in that direction.

In a study of the use of enforceable undertakings by the Fair Work Ombudsman (FWO), and contrasting the position under discrimination laws, Associate Professor Beth Gaze remarked that

What is significant about enforceable undertakings under the *Fair Work Act* is that because the complete terms are published by the FWO, the extent of the actions agreed to by the employer is clear. This is very different from anti-discrimination law enforcement, which rests entirely on the persons affected, with possible assistance of their union. Because Australian anti-discrimination laws do not contain any provisions for agency enforcement of any kind, all settlements are reached through conciliation, mediation or private agreement, and they are usually completely confidential, so it is not possible to determine any 'ball park' settlement conditions or compensation level.

The FWO's use of enforceable undertakings is providing an insight into the nature of settlements that is not available under anti-discrimination laws. Although they are not directly comparable because *Fair Work Act* enforceable undertaking cases involve avoiding a potential prosecution and anti-discrimination matters involve settling a private claim, they do throw some light on the ability to obtain systemic as well as individual remedies.²⁶²

Senior staff at the Office of the Australian Information Commissioner (OAIC) have also advised that the OAIC's ability to accept enforceable undertakings is an effective and powerful regulatory tool and that it has resulted in many favourable outcomes.

(ii) Compliance Notices

Compliance notices enable effective inquiry powers, by providing a process through which remedial action can be undertaken, in the absence of agreement.²⁶³ The ability to issue compliance notices is a powerful option in the toolbox of a regulator.

In a proposed amendment to the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, the Opposition and the Greens jointly proposed that the Commission be granted the power to issue compliance notices.²⁶⁴

The amendment provided an indicative model for the operation of compliance notice powers, with the following features:

- If the Commission is satisfied as a result of an inquiry that an employer or person conducting a business or undertaking is not complying with its duties, the Commission may issue a compliance notice.
- The compliance notice should only be issued once a 'show cause' notice has been given. A 'show cause' notice states the grounds under which the Commission initiated an inquiry, and invites a response setting out measures the employer or person has undertaken to comply with its duties. A compliance notice can be issued if the employer or person has given a statement in response to the 'show cause' notice, or has not responded within a 28-day time period.
- The compliance notice must outline:
 - the name of the employer or person;
 - the details of the employer's or person's non-compliance;

- action that the employer must take in order to address the non-compliance;
 - a reasonable period within which the employer or person must take the specified action; and
 - a reasonable period within which the employer or person must provide the Commission with evidence that the action has been taken.
- If the Commission considers that the employer or person has failed to comply with the notice, the Commission may apply to the Federal Court or Federal Circuit Court for an order.
 - If the Court is satisfied that the employer or person has failed to comply with the notice, the Court may make any or all of the following orders:
 - an order directing the employer or person to comply with the notice;
 - any order that the court considers appropriate directing the employer or person to comply with the notice;
 - any order that the court considers appropriate directing the employer or person to compensate any other person who has suffered loss or damage as a result of the non-compliance;
 - any other order that the court considers appropriate.²⁶⁵

As noted above, compliance notices were recommended by Julian Gardner in his Victorian review, alongside enforceable undertakings.²⁶⁶ Gardner considered that these notices should be issued directly by VEOHRC. He elaborated that:

This proposed measure would provide the Commission with the power to issue a notice where it has conducted an investigation or an inquiry and found a breach of the duty to eliminate discrimination. The notice would set out the details of the offending behaviour and the steps to be taken to prevent the unlawful conduct. A notice could also require the production of an action plan and the monitoring of the plan.²⁶⁷

Compliance notice powers are available to the Fair Work Ombudsman. Under the Fair Work Act, failure to comply with a compliance notice means that the Fair Work Ombudsman can initiate legal proceedings which may result in a fine.²⁶⁸

(iii) Civil penalties

Part 4 of the Regulatory Powers Act creates a framework for the use of civil penalties to enforce civil penalty provisions. Civil penalties add to the flexibility of regulatory law by allowing for the punishment of misconduct without the need to impose criminal liability.

The ability to seek a civil penalty order through the courts is a powerful option in the toolbox of a regulator. In addition to the punitive and deterrent effect that civil penalty orders may have on individual respondents, the threat of taking respondents to court can also encourage compliance with alternatives that sit at the lower levels of the regulatory pyramid, such as enforceable undertakings.

Civil penalty provisions, the violation of which can result in an order for pecuniary penalties, are generally reserved for the most serious contraventions of the law. For example, under s 13G of the Privacy Act, it is only 'serious' or 'repeated' interferences with the privacy of an individual that can attract a civil penalty of up to 2,000 penalty units or \$444,000. Under the *Work Health and Safety Act 2011* (Cth) there is a range of civil penalties applying to contraventions of 'right of entry' provisions. For example, refusing or unduly delaying entry into a workplace by Work Health and Safety officials entitled to enter under the Act, without reasonable excuse, may result in a civil penalty of \$10,000 for individuals, and \$50 000 for a body corporate.²⁶⁹

Under Part 4 of the Regulatory Powers Act, a court will only make a civil penalty order if it is satisfied that a person has contravened a civil penalty provision. Applied to federal discrimination law, this means that a court would decide if a relevant contravention of the law had occurred and if the payment of a pecuniary penalty was appropriate.

While new civil penalty provisions would require public consultation on a number of aspects of their design, the Commission considers that the ability to seek such orders in the courts would enhance its role as an effective regulator.

Civil penalty provisions could also be considered in the context of the recommendation for own-motion inquiries above.

Case Study: OAIC action against Facebook Inc. and Facebook Ireland

The following case study is extracted and edited from the OAIC's 2019–20 Annual Report:

In March 2020, the Privacy Commissioner lodged proceedings against US-based Facebook Inc. and Facebook Ireland in the Federal Court of Australia, alleging the social media platform had committed serious and/or repeated interferences with privacy under s 13G of the Privacy Act, and applying for a civil penalty.

The Commissioner alleged that in, the period 12 March 2014 to 1 May 2015, Facebook Inc. and Facebook Ireland disclosed the personal information of Australian Facebook users to a third-party app, the 'This Is Your Digital Life' (TIYDL) app, in breach of Australian Privacy Principle 6. The Commissioner also alleged that both Facebook entities did not take reasonable steps during this period to protect their users' personal information from unauthorised disclosure, in breach of Australian Privacy Principle 11. The proceedings followed a Commissioner-initiated investigation, commenced in April 2018, after media reports that the developer of the TIYDL app had sold Facebook user data to Cambridge Analytica, a data analytics firm, for political campaigning purposes. These reports generated significant, sustained public interest.

Shortly after these reports, Facebook publicly confirmed that the Facebook information of up to 87 million people, including up to 311,127 Australians, may have been improperly shared.

The Federal Court can impose a civil penalty of up to \$1,700,000 for each serious and/or repeated interference with privacy. The proceedings are ongoing.²⁷⁰

(iv) Injunctions

The Commission currently has some power to seek an injunction in court. The Regulatory Powers Act provision is broader and the Commission recommends that this power be considered for the Commission.

Part 7 of the Regulatory Powers Act creates a framework for the use of injunctions to enforce provisions. Injunctions may be used to restrain a person from contravening a provision enforceable under Part 7 or to compel compliance with such a provision. Interim injunctions are also available under Part 7.

Section 121 of the Regulatory Powers Act empowers the court to grant injunctions on application by an authorised person. A court can issue injunctions to prevent a person from engaging in particular conduct or issue injunctions to compel a person to engage in particular conduct if the court is satisfied that an injunction is necessary or desirable to respond to, or prevent, a contravention of an enforceable provision.

Section 46PP of the AHRC Act provides that at any time after a valid complaint is lodged with the Commission, a federal court may grant an interim injunction to maintain the status quo, as it existed immediately before the complaint was lodged, or to maintain the rights of any complainant, respondent or affected person. It is also empowered to discharge or vary an interim injunction that has already been granted.

The application for an interim injunction may be made by the Commission, a complainant, a respondent or an affected person. A court cannot, as a condition of granting the interim injunction, require a person to give an undertaking as to damages.

An interim injunction under s 46PP cannot be granted by the court after a complaint has been withdrawn by the complainant or terminated by the Commission. However, in the case of a complaint that has been terminated, any person who was an affected person in relation to the complaint may make an application to the Federal Court or the Federal Circuit Court alleging unlawful discrimination (subject to certain leave requirements).

Pursuant to s 46PO(6) of the AHRC Act, once an application has been made to a federal court, the relevant court may, if it thinks fit, grant an interim injunction pending the determination of the court proceedings or discharge or vary any injunction already granted. The court cannot, as a condition of granting the interim injunction, require a person to give an undertaking as to damages.

Unlike with interim injunctions under s 46PP, there is no express statutory authority for the Commission to make an application for an interim injunction after it has terminated a matter and once the matter is before the courts.

The injunction powers under Part 7 of the Regulatory Powers Act are broader than the interim injunction powers available to the Commission under the AHRC Act. This is because the injunction powers under Part 7 are intended to enforce provisions of an Act, whereas the injunctions that the Commission can seek under s 46PP of the AHRC Act are limited to maintaining the status quo as it existed immediately before a complaint was lodged with the Commission or maintaining the rights of any complainant, respondent or affected person while the matter is before the Commission.

Injunctions under Part 7 of the Regulatory Powers Act can be used to restrain a person from engaging in particular conduct or to compel a person to engage in particular conduct if the court is satisfied that an injunction is necessary or desirable to respond to, or prevent, a contravention of an enforceable provision.

Part 7 does not limit how long injunctions can be granted for and they can be made on an interim or final basis.

In its public guidance material, the OAIC identifies injunctions as an important enforcement tool for compelling a person to modify their behaviour to prevent them from contravening, or from continuing to contravene, the Privacy Act or the My Health Records Act.²⁷¹

The OAIC may seek an injunction on its own or with civil penalty proceedings, or other enforcement action. In terms of the OAIC context, an injunction may be appropriate if the conduct

- is serious or has had, or is likely to have, serious or extensive adverse consequences
- is systemic or poses ongoing compliance or enforcement issues
- is deliberate or reckless or where the entity involved is not being cooperative, or
- raises significant concerns of public interest.²⁷²

The Commission considers that broader injunction powers could be useful to the Commission to enhance its effectiveness in a more regulatory role. Additionally, as all injunction applications are heard and decided upon by a court, the model would involve significant judicial oversight.

(v) Other powers

There are other powers in the Regulatory Powers Act that the Commission considers are not appropriate for consideration for the Commission to be effective under its statutory human rights framework.

For example, the monitoring and investigation powers set out in Parts 2 and 3 of the Act confer broad powers on an agency to search premises and seize evidential material. The Commission considers that the nature of inquiries into breaches of discrimination law does not require these kinds of powers to be exercised.

While some enhancement of the Commission's position to make it more effective as a regulatory agency is merited, moving this far up the regulatory pyramid is neither desirable nor necessary in this context.

5.3 Summary – measures to address non-compliance – level 3 of the regulatory pyramid

The Commission proposes that the standards under the Disability Discrimination Act be reviewed to consider their overall effectiveness, and to consider clearer accountability and enforcement mechanisms.

The Commission supports the continued operation of the Disability Standards, as well as consideration of whether further standards should be introduced. Some suggestions for further standards include those in relation to employment and digital communication technology.

At this stage, the Commission considers that the other regulatory tools proposed in this paper provide appropriate co-regulatory options for issues under other federal discrimination laws, as well as for some issues under the Disability Discrimination Act, and should be preferred in the first instance due to the intensive processes required in the making of Disability Standards.

The Commission also considers that there is a need for an independent review of the existing Disability Standards to consider their effectiveness in addressing unlawful discrimination, as well as the effectiveness of the current legislative, governance, policy and practice arrangements in place to implement and achieve compliance with the Disability Standards. This review would include consideration of appropriate monitoring, regulatory and complaint processes.

The Commission proposes that federal discrimination laws be amended to include a function to enable the Commission to conduct own motion inquiries into serious matters that involve systemic unlawful discrimination, with enforcement mechanisms attached.

The Commission proposes two, mutually reinforcing, elements to an inquiry power:

- the capacity to undertake systemic inquiries – such as in circumstances where there a pattern of discrimination or suspected compliance issues becomes known to the Commission
- compliance monitoring – to ensure that industries, organisations, sectors or others are complying with the provisions of a positive duty.

The Commission should be empowered to take action where it suspects there are significant breaches of federal discrimination law that affect a class of people, without the need for an individual complaint; and in relation to serious matters of public interest relating to discrimination, harassment and victimisation.

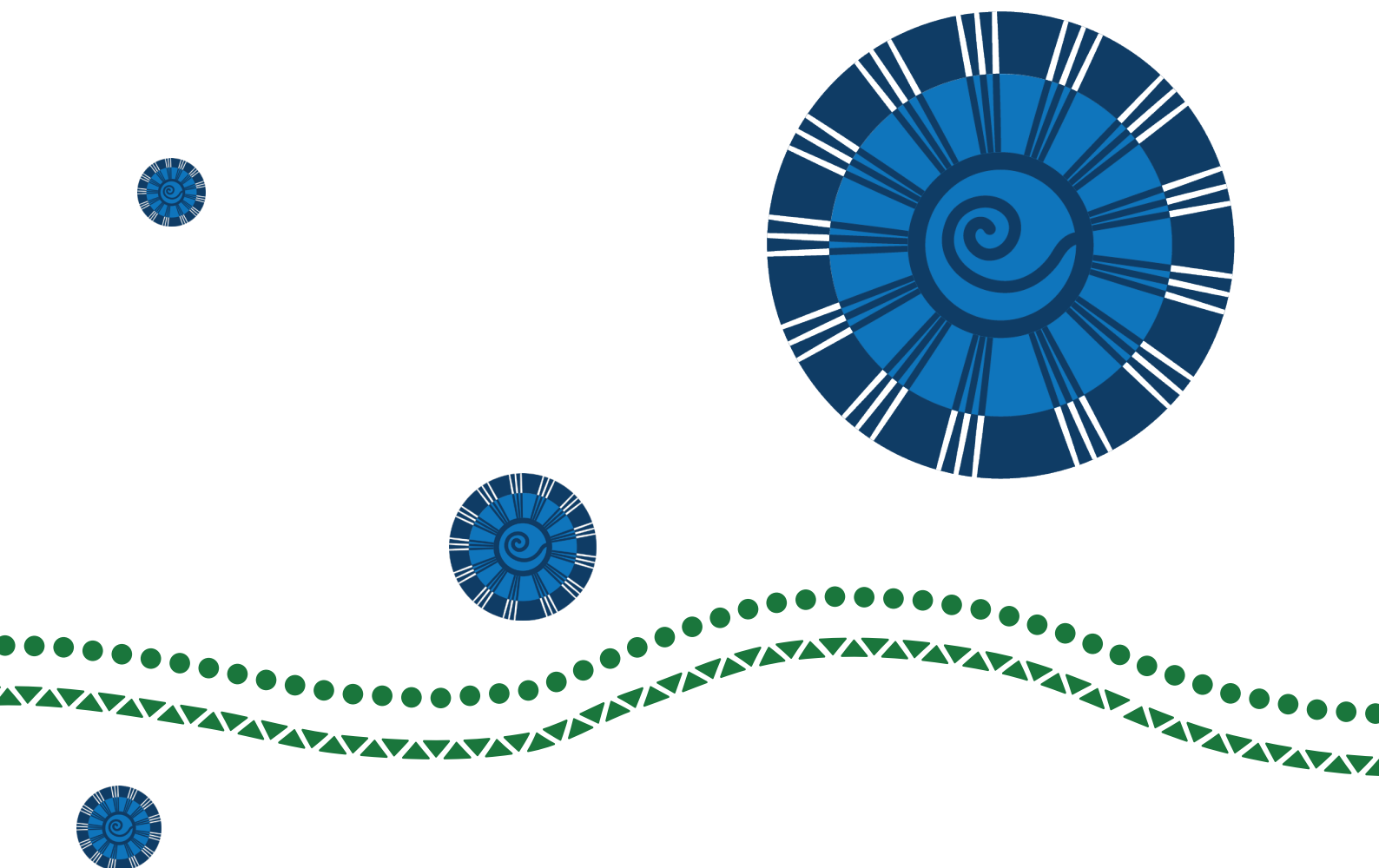
Such inquiries should focus on systemic issues.

Such an inquiry function would require powers to compel attendance, information and documents for the purposes of an investigation or public inquiry.

The Commission also considers that a systemic inquiry function should be independently exercised by the Commission.

A broader inquiry function should also be accompanied by enforcement mechanisms, such as enforceable undertakings and compliance notices, with a focus on systemic outcomes that can achieve structural change. Consideration should be given to attaching the following model provisions of the Regulatory Powers (Standard Provisions) Act to the proposed inquiry function:

- enforceable undertakings under Part 6 of the Act
- the ability to seek civil penalty orders under Part 4 of the Act
- a broader suite of injunctive powers than the existing AHRC Act provisions, as set out in Part 7 of the Act.





Reform proposals
- modernising the
regulatory framework



6 Reform proposals – modernising the regulatory framework

The following reforms are required to modernise the regulatory framework and, as a consequence, to improve the effectiveness of federal discrimination law.

Alternative dispute resolution – data

5. Consideration be given to review of s 49 of the AHRC Act to determine whether secrecy provisions with criminal sanctions are warranted, or whether s 49 should be amended to clarify that disclosing information of a de-identified nature for educative purposes does not breach the secrecy obligations in discrimination law.
6. Dedicated resourcing be provided to the Commission, as well as to academic partners, to provide publicly available information and analysis about trends in complaints on a periodic basis.

Use of non-disclosure agreements and confidentiality clauses

7. Guidance be developed on the appropriate usage of non-disclosure agreements and confidentiality provisions in discrimination matters. The preparation of such guidance has been committed to by the Government in relation to sexual harassment complaints. This guidance should be the pilot for further guidance across all other protected attributes in federal discrimination law.

Broader range of guidance materials to be prepared

8. Dedicated funding for undertaking the preparation of guidelines function should be built into the budget of the Commission on an ongoing basis, particularly given that it is foundational in supporting all regulatory options in federal discrimination law.

The Commission should also adopt methods for engaging with key stakeholders on a periodic basis to identify emerging issues on which guidance materials would be most valued.

Action plans

9. The capacity to develop and lodge action plans under the Disability Discrimination Act should be expanded as a measure available across all federal discrimination laws. The following reforms to the action plan process should also be introduced:
 - Clarify that the Commission may provide advice on the development and implementation of action plans.
 - Clarify that the Commission may set minimum requirements for action plans (such as through guidelines) and not accept action plans that fail to meet these requirements.
 - Introduce a set timeframe within which action plans will lapse, and require that outcomes of the evaluation of previous action plans be provided to the Commission when submitting a subsequent action plan.

Voluntary audits

10. New powers should be introduced enabling the Commission to conduct reviews of policies or programs of a person or body, upon request to the Commission, in order to assess compliance with federal discrimination laws and measures to eliminate unlawful discrimination.

Special measures certifications

11. The Australian Human Rights Commission Act should be amended to provide the Commission with a power to issue special measures certifications. Such certifications should be judicially reviewable, to ensure appropriate oversight, and time limited. The Commission should be empowered to consult relevant stakeholders when deliberating on whether to certify a special measure.

Disability Standards

12. An independent review of the existing Disability Standards should be conducted to consider their effectiveness in addressing unlawful discrimination, as well as the effectiveness of the current legislative, governance, policy and practice arrangements in place to implement and achieve compliance with the Disability Standards.
13. Consideration be given to introducing new Disability Standards in relation to employment and digital communication technology.

Own-motion inquiries into systemic instances of discrimination

14. The Commission should be empowered to conduct own motion inquiries in relation to all areas of unlawful discrimination, of a systemic nature, with enforcement mechanisms attached.

This inquiry power should include:

- The capacity to undertake systemic inquiries – such as in circumstances where there a pattern of discrimination or suspected compliance issues becomes known to the Commission.
- Compliance monitoring – to ensure that industries, organisations, sectors or others are complying with the provisions of a positive duty.

The Commission should be empowered to inquire where it suspects there are significant breaches of federal discrimination law that affect a class of people, without the need for an individual complaint; and in relation to serious matters of public interest relating to discrimination, harassment and victimisation.

This function should be independently exercised by the Commission.

15. Consideration should be given to the introduction of compliance notices and attaching the following model provisions of the Regulatory Powers (Standard Provisions) Act to the proposed inquiry function as enforcement tools:

- enforceable undertakings under Part 6 of the Act
- the ability to seek civil penalty orders in the courts under Part 4 of the Act
- a broader suite of injunctive powers, than the existing AHRC Act provisions, as set out in Part 7 of the Act.



Endnotes

- 1 Belinda Smith, 'It's about Time: For a new Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 132.
- 2 *Brandy v HREOC* (1995) 183 CLR 245.
- 3 Explanatory Memorandum, Regulatory Powers (Standard Provisions) Bill 2014 (Cth).
- 4 Australian Government Attorney-General's Department, *Regulatory powers*, <<https://www.ag.gov.au/legal-system/administrative-law/regulatory-powers>>
- 5 See Australian Government Attorney-General's Department, *Regulatory powers*, and linked fact sheets and other material: <https://www.ag.gov.au/legal-system/administrative-law/regulatory-powers>.
- 6 Replacement Explanatory Memorandum, Regulatory powers (Standard Provisions) Bill 2014 (Cth) 2.
- 7 See Belinda Smith, 'How might information bolster anti-discrimination laws' (2014) 56(4) *Journal of Industrial Relations*, 547-565.
- 8 *Privacy Act 1988* (Cth) ss 26E(2), 26G, 26P(1) and 26R.
- 9 *Privacy Act 1988* (Cth) s 33D.
- 10 *Privacy Act 1988* (Cth) ss 28A and 33C.
- 11 This applies to certain 'eligible' data breaches under s26WR of the *Privacy Act 1988* (Cth).
- 12 *Privacy Act 1988* (Cth) ss 40(1) and 40(2).
- 13 *Privacy Act 1988* (Cth) s 40A.
- 14 *Privacy Act 1988* (Cth) s 42.
- 15 *Privacy Act 1988* (Cth) s 43A.
- 16 *Privacy Act 1988* (Cth) ss 44 and 45.
- 17 *Privacy Act 1988* (Cth) s 46.
- 18 *Privacy Act 1988* (Cth) s 50.
- 19 *Privacy Act 1988* (Cth) ss 33E and 33F. The Act triggers Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (Regulatory Powers Act), which creates a framework for accepting and enforcing undertakings relating to compliance with provisions.
- 20 *Privacy Act 1988* (Cth) ss 52, 55A and 62.

- 21 *Privacy Act 1988* (Cth) ss 30 and 32.
- 22 *Privacy Act 1988* (Cth) s 80W. The Act triggers Part 7 of the Regulatory Powers Act which creates a framework for using injunctions to enforce provisions.
- 23 *Privacy Act 1988* (Cth) s 80U. The Act triggers Part 4 of the Regulatory Powers Act which creates a framework for the use of civil penalties to enforce civil penalty provisions.
- 24 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992). See John Braithwaite's website for developments and examples: <<http://johnbraithwaite.com/responsive-regulation/>>.
- 25 Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 97.
- 26 Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 97.
- 27 Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 97.
- 28 John Braithwaite, 'Rewards and Regulation' (2002) 29 *Journal of Law and Society* 12, 20.
- 29 John Braithwaite, 'Convergence in Models of Regulatory Strategy' (1990) 2(1) *Current Issues in Criminal Justice* 59, 62–63.
- 30 John Braithwaite, 'Rewards and Regulation' (2002) 29 *Journal of Law and Society* 12, 19.
- 31 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, December 2002) [3.34].
- 32 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, December 2002) [3.34].
- 33 Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing, 2000). The application of this model in the Australian context is discussed by Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311.
- 34 Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, 315.
- 35 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 291, [59].
- 36 Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, 312.

- 37 Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, 313.
- 38 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 294. See also: Belinda Smith, "Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict" (2006) 28(4) *Sydney Law Review* 689; Belinda Smith, "It's About Time: For a New Regulatory Approach to Equality" (2008) 36(2) *Federal Law Review*, 117.
- 39 Anne Twomey, 'Trimming the Tribunals: Brandy v Human Rights and Equal Opportunity Commission' (Library Publications CJ820, 30 March 1995).
- 40 Annemarie Devereux, 'Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation' (1996) 7(4) *Australian Dispute Resolution Journal* 280, 282. It was based on the reported experience of countries such as Canada, the United Kingdom and New Zealand.
- 41 Eg, *Racial Discrimination Act* 1975 (Cth) ss 24, 25.
- 42 In 2019–20 and 2018-19, 2% of finalised complaints regarding unlawful discrimination proceeded to court, in 2017-18, fewer than 3% proceeded to court and in 2016–17, fewer than 2%. Australian Human Rights Commission, *Annual Review 2019–20: 2019–20 Complaints Statistics* (2020) <https://humanrights.gov.au/sites/default/files/2020-10/AHRC_AR_2019-20_Complaint_Stats_FINAL.pdf>; Australian Human Rights Commission, *Annual Review 2018–19: 2018–19 Complaints Statistics* (2019) <https://humanrights.gov.au/sites/default/files/2019-10/AHRC_AR_2018-19_Stats_Tables_%28Final%29.pdf>; Australian Human Rights Commission, *Annual Review 2017–18: 2017-18 Complaints Statistics* (2018) <https://humanrights.gov.au/sites/default/files/AHRC_Complaints_AR_Stats_Tables_2017-18.pdf>; Australian Human Rights Commission, *Annual Review 2016-17: 2016-17 Complaints Statistics* (2017) <https://humanrights.gov.au/sites/default/files/AHRC_Complaints_AR_Stats_Tables%202016-2017.pdf>.
- 43 Aimee Cooper, Submission 133, Free & Equal Inquiry, 60. See also Aimee Cooper, *Bringing Equality Laws to Life* (Winston Churchill Memorial Trust, Final Report, 2019)
- 44 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [188].
- 45 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [189].
- 46 Eg, s 11(1)(f)(ii); s 20(2)(c)(iib); s 31(b)(ii); Pt IIB, Div 1.
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- 48 Australian Human Rights Commission, *Annual Report 2020–21* (2021).

- 49 Human Rights and Equal Opportunity Commission, Submission 69 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Final Report, December 2008) [996]. Cited at [6.71].
- 50 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, 40.
- 51 Dominique Allen, 'Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311, 318.
- 52 Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28(4) *Sydney Law Review* 689, 706, emphasis in original, citing Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992) 3.
- 53 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 2.
- 54 Australian Human Rights Commission Act 1986 (Cth) s 49(1), Crimes Act 1914 (Cth) s 4AA.
- 55 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No 112, December 2009).
- 56 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No 112, December 2009) 22, 614.
- 57 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No 112, December 2009) rec 11-1.
- 58 Dominique Allen and Alysia Blackham 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384, 417.
- 59 Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review* (Final Report, June 2008) [233]-[234].
- 60 Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review* (Final Report, June 2008) rec 14.
- 61 Dominique Allen and Alysia Blackham 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384, 385.
- 62 Dominique Allen and Alysia Blackham 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384, 385.
- 63 Dominique Allen and Alysia Blackham 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384, 400.

- 64 Dominique Allen and Alysia Blackham 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384, 412. Also referring to Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778.
- 65 Dominique Allen and Alysia Blackham 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384, 412. See also Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31 *Australian Journal of Labour Law* 253.
- 66 Dominique Allen and Alysia Blackham 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384, 413. The authors refer to the work of Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) in relation to the public-private divide in liberal societies, with discrimination being seen as something that is private and which should be addressed behind closed doors: Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18(4) *Journal of Law and Society* 448, 450. See also Annemarie Devereux, 'Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation' 7(4) *Alternative Dispute Resolution Journal* 280; Belinda Smith, 'It's about Time: For a new Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117. The benefits and limitations of ADR are also explored by the authors in Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31 *Australian Journal of Labour Law* 253, 267–269.
- 67 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Final Report, December 2008) [6.78], citing Committee Hansard, 11 September 2008, p. 43.
- 68 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Final Report, December 2008) [6.79], citing Submission No 39, p. 6.
- 69 Dominique Allen and Alysia Blackham 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384, 419.
- 70 Dominique Allen and Alysia Blackham 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384, 417.
- 71 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 556.
- 72 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 557.

- 73 Equality and Human Rights Commission, *Turning the Tables: Ending Sexual harassment at Work* (Report, March 2018) 16–18. Discussed in Dominique Allen and Alysia Blackham ‘Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom’ (2019) 43(2) *Melbourne University Law Review* 384, 419–420.
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- 76 Department for Business, Energy & Industrial Strategy (UK), *Confidentiality Clauses: Response to the Government Consultation on Proposals to Prevent Misuse in Situations of Workplace Harassment or Discrimination* (Report, July 2019) 4–5. Discussed in Dominique Allen and Alysia Blackham ‘Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom’ (2019) 43(2) *Melbourne University Law Review* 384, 420.
- 77 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) rec 38.
- 78 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 8–9.
- 79 Maria Nawaz, ‘Respect@Work: What’s it Going to Take?’ (2021) 77 (May) *Law Society Journal* 68, 69.
- 80 Dominique Allen and Alysia Blackham ‘Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom’ (2019) 43(2) *Melbourne University Law Review* 384, 421.
- 81 Dominique Allen and Alysia Blackham ‘Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom’ (2019) 43(2) *Melbourne University Law Review* 384, 399–400.
- 82 Dominique Allen and Alysia Blackham ‘Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom’ (2019) 43(2) *Melbourne University Law Review* 384, 400.
- 83 Dominique Allen and Alysia Blackham ‘Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom’ (2019) 43(2) *Melbourne University Law Review* 384, 400.
- 84 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 7.
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- 86 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 143.
- 87 See, eg, art 6 of CERD and art 2 of CEDAW.
- 88 *Australian Human Rights Commission Act 1986* (Cth) s 46PO(4).
- 89 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 290–291, [56]–[57].
- 90 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Final Report, December 2008) rec 23.
- 91 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Final Report, December 2008) 156.
- 92 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [206]. The AGD also cited rec 21 of the House of Representatives Standing Committee on Employment and Workplace Relations, *Making it fair: Pay equity and associated issues related to increasing female participation in the workforce* (2009): that 'the SDA be amended to make it mandatory for employers who are repeat offenders discriminating on the basis of pregnancy or family responsibilities to be required to attend counselling or an approved training course'.
- 93 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012*, Exposure Draft Explanatory Notes (November 2012) [466].
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- 95 Human Rights and Anti-Discrimination Bill 2012 Exposure Draft Legislation cl 125(2)(e).
- 96 *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCA 82.
- 97 *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCA 82, [118].
- 98 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 505.
- 99 *Mulligan v Virgin Australia Airlines Pty Ltd* (2015) 326 ALR 677, [167]; *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389, [340].

- 100 *Wotton and Others v Queensland and Another* (No 5) [2016] FCA 1457.
- 101 *Wotton and Others v Queensland and Another* (No 5) [2016] FCA 1457, 1788.
- 102 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) rec 24.
- 103 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 7.
- 104 *Racial Discrimination Act 1975* (Cth) s 20(d); *Sex Discrimination Act 1984* (Cth) s 48(1)(ga); *Disability Discrimination Act 1992* (Cth) s 67(1)(k); *Age Discrimination Act 2004* (Cth) s 53(1)(f). In relation to human rights and ILO 111 matters: *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(n); s 31(h).
- 105 See <https://humanrights.gov.au/education/employers>.
- 106 *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102 (20 February 2013).
- 107 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [281].
- 108 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 549.
- 109 Belinda Smith 'How might information bolster anti-discrimination laws' (2014) 56(4) *Journal of Industrial Relations* 547–565,
- 110 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 5.
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- 112 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 9.
- 113 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) 427.
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- 115 Queensland Advocacy Incorporated, Submission 63, *Free & Equal Inquiry*, 11.
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- 117 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) 6.

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- 120 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) rec 14.5.
- 121 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) 426.
- 122 *Disability Discrimination Act 1992* (Cth) pt 3.
- 123 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [4.4.2].
- 124 'Action plans and action plan guides' *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/disability-rights/action-plans-and-action-plan-guides>>.
- 125 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) 428.
- 126 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [175].
- 127 See Hepple et al model: Figure 3.2. Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing, 2000).
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- 129 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [296].
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- 133 *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl 67 and 68.

- 134 Maurice Blackburn Lawyers, Submission 132, *Free & Equal Inquiry*, 17.
- 135 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 9.
- 136 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, 39.
- 137 'Register of Disability Discrimination Act Action Plans' *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/disability-rights/register-disability-discrimination-act-action-plans>>.
- 138 ANZ, *Our approach to accessibility and financial inclusion* (2019) <<https://www.anz.com/resources/e/6/e6575c5a-ef5a-4413-8d9b-4ff04239e4ea/our-approach-accessibility-inclusion-2019.pdf>>.
- 139 *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl 64–66. The provision also included the Commonwealth and compliance with human rights.
- 140 *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl 64.
- 141 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [288].
- 142 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [289].
- 143 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [290].
- 144 Business Council of Australia Submission no 319 to the Senate Standing Committee on Legal and Constitutional Affairs, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (December 2012) 3.
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- 146 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [314].
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- 149 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [180], referring to Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) 424–426.
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- 151 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) 7.
- 152 Maurice Blackburn Lawyers, Submission 132, *Free & Equal Inquiry*, 16.
- 153 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 10.
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- 162 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [327].
- 163 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [326].

- 164 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [186].
- 165 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 10.
- 166 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 120.
- 167 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 10.
- 168 *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl 80(2).
- 169 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [329].
- 170 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [328].
- 171 *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl 207.
- 172 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) 64.
- 173 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 121–122.
- 174 <<https://humanrights.gov.au/our-work/disability-rights/disability-standards>>.
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- 176 Dominique Allen, 'Wielding the big stick: lessons for enforcing anti-discrimination law from the Fair Work Ombudsman' (2015) 21 (1) *Australian Journal of Human Rights* 119, 124.
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- 179 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [306].
- 180 Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review* (Final Report, June 2008) [6.81]. He recommended against them for Victoria: rec 63.
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- 182 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [306].
- 183 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 19; Queensland Advocacy Incorporated, Submission 109, *Free & Equal Inquiry*, 11; Scope, Submission 126, *Free & Equal Inquiry*, 4.
- 184 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 18.
- 185 Public Interest Advocacy Centre, Submission 90, *Free & Equal Inquiry*, 8.
- 186 Children and Young People with Disability Australia, Submission 151, *Free & Equal Inquiry*, 8.
- 187 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, 24; Dominique Allen, 'Wielding the big stick: lessons for enforcing anti-discrimination law from the Fair Work Ombudsman' (2015) 21 (1) *Australian Journal of Human Rights* 119, 124.
- 188 Scope, Submission 126, *Free & Equal Inquiry*, 4; Speech Pathology Australia, Submission 93, *Free & Equal Inquiry*, 10.
- 189 'Reviews of the Disability Standards for Accessible Public Transport 2002 (Transport Standards)' *Department of Infrastructure, Transport, Regional Development and Communications* (Web Page) < <https://www.infrastructure.gov.au/infrastructure-transport-vehicles/transport-accessibility/reviews-disability-standards-accessible-public-transport-2002>>.
- 190 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, 20.
- 191 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, 20. Referring to pts 3.5, 8.3 of the Standard.
- 192 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, 21. The Walker case was followed in later cases, including *Siewwright v State of Victoria* [2012] FCA 118.
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Chapter 4

Enhancing access to justice




**Major Reform 1:
Building a
preventative
culture**

**Major Reform 2:
Modernising the
regulatory
framework**

**Major Reform 4:
Improving the
practical
operation of laws**

**Major Reform 3:
Enhancing access
to justice**



Beyond alternative dispute resolution



1 Beyond alternative dispute resolution

While the enforceability of decisions in this area is important, so too is the accessibility of the complaints procedure. A human rights system which relies on the risks of litigation and court process in order to redress and eliminate discrimination is an inadequate response to the discrimination and disadvantage created by and perpetuated by our governments and our society.

Sharon Offenberger and Robin Banks, 'Wind out of the sails—new federal structure for the administration of human rights legislation' (2000) 6(1) *Australian Journal of Human Rights* 239, 251.

Alternative dispute resolution is often an effective tool for generating positive outcomes for rights-holders in unlawful discrimination matters. However, not all complaints resolve at conciliation.

If a matter does not resolve at conciliation, then a complainant may bring an action to the Federal Circuit Court or the Federal Court. Proceeding to court can be extremely resource- and time-intensive. A number of meritorious complainants may decide not to pursue their claims because of this.

This section considers how to improve access to justice for complainants who fail to reach a suitable outcome at the conciliation phase, yet who have a meritorious case.

Key recommendations relate to costs; onus of proof; standing provisions and timeframes.

The Commission also recommends that serious consideration be given to reintroducing an intermediate adjudicative process into the federal discrimination law system to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts. This could take the form of a tribunal-like body, the restoration of hearing and determination functions to the Commission, the creation of an arbitral process or a different mechanism. The consideration of such mechanisms would benefit greatly from public consultation and expert advice about the best options available in today's legal landscape.

This would address the concerns of business and other respondents about the cost of federal litigation by providing a quicker and cheaper alternative to court proceedings in circumstances where parties are unable to reach agreement themselves in a conciliation process.

Cost



2 Costs

There are presently no specific provisions relating to costs in unlawful discrimination proceedings before the Federal Circuit Court and the Federal Court. These courts have a general discretion to order costs under the provisions of their establishing acts¹ and generally exercise these powers according to the guiding principle that 'costs follow the event'. Under this principle, an unsuccessful party to litigation is ordinarily ordered to pay the costs of the successful party.

While the courts have the discretion to depart from this approach in certain circumstances – and also the power to make cost-capping orders – concerns have been raised that the threat of an adverse costs order discourages the pursuit of legitimate discrimination claims in the courts. The time and cost of litigation are also reasons identified for settling prior to court.²

After considering the various competing arguments, the Commission considers that the default position should be that parties bear their own costs, as contained in the Human Rights and Anti-Discrimination Bill 2012 (HRAD Bill), with the court retaining a discretion to award costs in the interests of justice. The Commission considers, however, that clarity should be provided by amendment to the Australian Human Rights Commission Act 1986 (Cth) (AHRC Act) to include mandatory criteria to be considered by the courts in determining whether to award costs in the interests of justice. The list included in the HRAD Bill, which was based on the Family Law Act 1975 (Cth) (Family Law Act), is an instructive one.

2.1 Costs as a deterrent

The costs that may be incurred in unlawful discrimination proceedings in the Federal courts have been identified as a significant deterrent to bringing such proceedings. This is not a new issue.³ The issue of costs is also linked to certain structural limitations in the jurisdiction of the Commission and the complaints pathways.

Complainants are mandated under federal discrimination law to utilise the Commission's conciliation processes, to seek to resolve the dispute early. Where this does not occur, a complainant may bring their matter to the Federal courts. In reality, very few matters continue to this stage. Costs can be prohibitive, with Federal Court guidance acknowledging that:

In most matters in the Federal Court, the unsuccessful party is ordered to pay part of the legal costs of the successful party. The amounts involved can be many thousands of dollars, sometimes tens of thousands.⁴

The lack of cases that go to court results in limited jurisprudence in many areas of discrimination law, which makes advising potential litigants on the merits of their claim difficult. This means that people with meritorious claims may be dissuaded from commencing action, because it is difficult readily to ascertain the strength of their case and the chance of having costs awarded against them.

One reason may be that the conciliation process itself has proved to be successful and that participants are satisfied with the outcomes.⁵ But the deterrence of the existing general rule applied in the federal courts, that 'costs follow the event', has been consistently identified as another.

Amendments to the AHRC Act in 2017 introduced provisions to the Commission's complaint-handling processes that require leave of the court for those matters that are considered to be lacking in merit. This has provided a safeguard to deter unmeritorious claims from proceeding to court.

The Commission considers that further disincentives for people to bring complaints which are unmeritorious are not required. The Commission is of the view that the rules on costs in the federal courts have a more profound deterrence effect on meritorious complaints.

The deterrent nature of a possible adverse costs order and indemnity orders has been raised repeatedly in previous inquiries: in 1997, in the Senate Legal and Constitutional Affairs Committee inquiry into the Human Rights Legislation Amendment Bill Report;⁶ in the 2008 Senate inquiry into the Sex Discrimination Act (Sex Discrimination Act), which acknowledged there were concerns that complainants may be deterred from pursuing legitimate claims in the courts because of the risk that they will be liable for the costs of the respondent;⁷ the Productivity Commission review of Disability Discrimination Act (Disability Discrimination Act) in 2004;⁸ and in consultations on the Human Rights and Anti-Discrimination Bill in 2011–2012 – the risk of an adverse costs order presented a significant barrier to commencing litigation.⁹

As the Attorney-General's Department observed in the Discussion Paper on the consolidation of discrimination laws in 2011:

The costs of litigation, and the risk of adverse costs orders, create a significant barrier to the pursuit of unlawful discrimination actions. Under the current system, the unsuccessful party in a litigation matter must pay the costs of the successful party (although the courts have discretion in how they award costs).¹⁰

The same concerns were expressed again in this inquiry. Queensland Advocacy Incorporated, for example, submitted that

Litigation is very expensive – the cost places it well out of the reach of many people (particularly disempowered people) – and discrimination complaints can be complex and lengthy to resolve. Awareness of this is enough to deter many people from making a complaint in the first place.¹¹

The Disability Discrimination Legal Service described the risk of an adverse cost finding as a 'dramatic disincentive' to bringing court action.¹²

Similarly, the National Federation of Blind Citizens of Australia submitted to the Senate Committee considering the amending legislation in 1996 that

There is little chance that people with disabilities, primarily on pensions, will take cases to the Federal Court, largely regardless of the merits of the case, because no legal representation can or will guarantee the outcome of a case and there is no way the costs could be paid.¹³

The Disability Discrimination Legal Service said that the costs of pursuing legal action are a significant problem and given 'the well accepted socio-economic disadvantages prevalent amongst Australians with disabilities, it is unreasonable to expect them to carry this burden unassisted'.¹⁴ The 'best approach', they said was this:

The starting point should be that costs are born by each party. There are two exceptions to this. Firstly, if the complainant's legal action is successful then the respondent should bear the complainant's legal costs.

This would allow an element of punitive action against wrongful organisations and thus an incentive to not discriminate. It would also be an important reflection of the idea that the complainant is asking for not more than what they are entitled to and should have been granted. Secondly, the court should have the power to, in exceptional circumstances where the complainant has acted vexatiously, frivolously, or in bad faith, award costs against the complainant. This would act as an important deterrent against disingenuous claims.¹⁵

The Disability Discrimination Legal Service also noted that introducing more complainant-friendly costs procedures of itself would not be enough. While the proposed approach above would reduce the financial risk of bringing a claim, 'it does not necessarily make the system more financially accessible for the vast majority of complainants'. They urged more financial support – beyond legal aid.¹⁶

Key stakeholders submitted that the prospect of a costs burden in the event of a failure by a complainant to prove a claim may deter complainants from seeking relief under the federal legislation.¹⁷

Bringing the approach to costs in line with the approach in states and territories 'would significantly improve access to justice outcomes for complainants at the court stage of the complaints process'.¹⁸

Associate Professor Dominique Allen identified cost as the primary reason that complainants do not pursue claims in the federal jurisdiction and that this comprised three aspects:

The first is the cost of litigation, which is always a factor when considering whether or not to settle. The second aspect is that this is not a jurisdiction known for substantial damages awards ... Finally, there is the risk of an adverse costs order if they lose. This is driving people away from the federal jurisdiction to the state and territory systems and (for employment claims) to the Fair Work system because none of the alternatives have the same costs risk.¹⁹

Moreover, the deterrent effect of the costs of litigation is not only an issue for complainants. In a submission to the Senate Committee review of the Sex Discrimination Act in 2008, for example, the Australian Chamber of Commerce and Industry (ACCI) suggested that

many employers simply settle claims, regardless of the strength of the applicant's case, in order to avoid the costs of litigation: It is well known that many employers simply settle claims (in cases where either party is unsure whether they have legal grounds to initiate or defend proceedings) to make them 'go away' (similar to what occurs in unfair dismissal jurisdictions). In most cases, legal advisors will recommend this as the most prudent approach to avoid the costs of litigation.²⁰

Employers may feel compelled to 'make a payment on commercial grounds',²¹ even for speculative claims, 'because of the possible damage to the company's reputation'. In evidence to the committee, ACCI said:

A lot of very major companies make very significant efforts and investments in this area. ... They take their reputational efforts in this area very seriously. When claims emerge, often speculatively, as we have said, as part of a dismissal or performance management-type processes, there is an extra effort to settle. They are not necessarily ... making solely a financial calculation. There is a reputational calculation involved. Even if the company believes its processes were entirely compliant and would navigate the litigation successfully there is an extra incentive to settle.²²

In 2017, the deterrent effect of the costs of litigation and the possibility of an adverse costs order in proceedings in the federal courts was identified as a way to discourage ‘unmeritorious complaints’, in the explanatory memorandum,²³ and the Parliamentary Joint Committee on Human Rights (PJCHR) in its inquiry into Freedom of Speech.²⁴ The PJCHR recommended that the AHRC Act be amended

to make explicit that, subject to the court’s discretion, an applicant pay a respondent’s costs of future proceedings if they are unsuccessful or if the respondent has, at any earlier point, offered a remedy which is at least equivalent to the remedy which is ultimately ordered.²⁵

In consequence of an amendment to give effect to this recommendation, the Commission is now obliged to include a statement in its termination notices explaining that the Federal Court and the Federal Circuit Court can award costs in unlawful discrimination proceedings.²⁶

As another strategy following the PJCHR inquiry ‘to discourage clearly unmeritorious complaints from progressing to court’, an amendment to the AHRC Act was made in 2017 to clarify that the court may, in exercising its discretion to award costs in an unlawful discrimination proceeding, consider previous rejected offers to settle the matter.

The object of the amendment was ‘to deter recourse to the court where earlier settlement offers have been made that may reasonably be regarded as equivalent to the remedy that the court has ultimately offered’.²⁷

The Explanatory Memorandum for the amending Act, which introduced s 46PSA, illustrated the potential application of this new provision:

For example, if in the course of conciliation, the respondent offered a monetary settlement and the court ultimately upheld the application and ordered the respondent to pay damages, the court could consider that offer in determining whether to award costs in the proceedings against the applicant. Alternatively, if the court dismissed the case, the court could consider the respondent’s previous offers to settle.²⁸

One issue with this approach is that the parties in discrimination cases are generally not in a position to predict what the court may award, as there has been minimal court discussion of the valuation of claims and the assessment of damages. This places the burden of uncertainty on the applicant. The approach is therefore highly punitive and deterrent, and can be used by better resourced respondents (such as companies and government departments) against individual claimants and place them under pressure to settle. A better approach may be to have a preliminary review of the matter, for example a directions hearing, to evaluate merits at an early stage.

The key problem identified by stakeholders, however, is that the deterrence effect is not limited to potentially ‘unmeritorious’ complaints.

Victoria Legal Aid, for example, drawing on their practice experience, said that ‘the fear of incurring an adverse costs order deters people from pursuing meritorious claims’.²⁹

This was also one of the findings of the Productivity Commission in its review of the Disability Discrimination Act in 2004, that uncertainty about costs orders affects incentives and outcomes at the conciliation stage and it is ‘likely that some cases of unlawful disability discrimination are not being adequately addressed’.³⁰

2.2 Alternative approaches

Alternative approaches to the rule that 'costs follow the event' have been suggested.

The following list of examples was suggested to the Senate Standing Committee on Legal and Constitutional Affairs in 1997, when examining proposed amendments to the Commission's constituting legislation:

- each party should bear their own costs in contested discrimination matters
- costs should only be awarded against a party if their application or defence is unreasonable, having regard also to the means of the party
- each party generally pay their own costs, but the Federal Court have discretion to award costs in exceptional circumstances, as is the case under s 117 of the Family Court Act
- ordinarily costs follow the event but, before the hearing, the applicant would be able to seek a direction that each party bear their own costs, which the Court would normally agree to, except in the case of a frivolous or vexatious complaint
- ordinarily each party pay its own costs, but before the hearing the applicant would be able to seek a direction that costs follow the event
- the entitlement of an applicant to damages could be expanded so that damages include legal costs.³¹

The Committee at that time concluded that it remained appropriate that costs follow the event in unlawful discrimination matters heard in the Federal Court.³²

The Attorney-General's Department has the ability to fund cases in the public interest, which is an important function.³³ In addition to substantive cost reforms, better publicisation and resourcing of this function would be another means of increasing access to justice. This would enable more strategic litigation by complainants, address resource imbalances between the parties and ensure stronger cases go to court.

(a) Cost-capping

'Cost-capping' or 'protective cost' orders are orders made by a court at the beginning of a proceeding, capping the parties' potential liability to pay their opponent's costs in the event they are unsuccessful. They appear to be limited to cases where the court must determine an important public interest issue, with an impact extending well beyond the dispute between the parties in question.

The federal courts have the power to specify the maximum costs that may be recovered against a party. These cost-capping orders can be made on application by a party or on the court's own motion, and are usually made at the beginning of proceedings. The policy reason behind the introduction of these provisions was the concern that the cost of litigation, for a person of ordinary means, places access to the courts beyond reach.³⁴ This policy applies to the majority of discrimination claims, often undertaken by vulnerable and disadvantaged people.

Maria Nawaz noted, however, that cost-capping orders or a no-cost order are rarely made, 'providing prospective plaintiffs with little certainty that they will be successful in a maximum costs order or no-cost order application'. Nawaz cited estimates by the Public Interest Law Clearing House (now Justice Connect) that 'nine out of 10 meritorious cases aren't reaching the courts, simply due to the financial barriers caused by the risk of adverse costs orders'.³⁵

(b) Cost neutrality

An alternative approach is to make the starting point in the federal courts one of cost neutrality – that each party will bear their own costs. This is the case in the various state and territory tribunals that hear discrimination cases under state and territory laws.³⁶ The Family Court of Australia was also directed to be cost neutral, 'to encourage persons to settle their differences'.³⁷

The Productivity Commission recommended this approach in relation to disability discrimination matters:³⁸

Under the cost neutral principle, complainants can be fairly confident that although they will pay their own costs, they will not have to pay the respondent's costs, regardless of which party is successful. As complainants have a degree of knowledge and control over their own costs, this gives them some certainty about the costs of proceeding to court. With greater certainty, complainants may be more willing to proceed to the courts, which in turn might affect the incentives and outcomes at the conciliation stage.³⁹

However, the Productivity Commission also acknowledged that the cost neutral principle was 'not without its own shortcomings':

Although the principle that each party bears his or her own costs protects complainants from paying the respondent's costs, it does not address the complainant having to pay their own costs even if they win. The relatively poor resources available to many people with disabilities could prevent some from taking action. The burden of paying one's own costs is the tradeoff for greater certainty about costs. On balance, the Productivity Commission considers that cost neutrality achieves an appropriate balance between placing a burden on complainants to pay their own costs, even if they win, and giving complainants a sufficient degree of certainty about costs to overcome their aversion to proceeding to court. Nonetheless, the Commission emphasises the importance of access to legal assistance to maintain the accessibility of the courts.⁴⁰

Nonetheless, there was a balance that needed to be made between reducing barriers to complainants' participation in the courts, against 'the burden on respondents and the court system'.

It is important that courts retain discretion to award costs under some circumstances. Frivolous or vexatious complaints, or some defence strategies, for example, impose unnecessary costs on other parties and the court system, and might need to be discouraged by the prospect of costs being awarded in such cases.⁴¹

Since the Productivity Commission's consideration of the issue, the passage of the Fair Work Act in 2009 provided another example of an approach to costs and, in 2012, the consolidation exercise led to a revised approach in the HRAD Bill.

(c) Fair Work Act

The Fair Work Act 2009 (Cth) continued an approach to the award of costs in workplace relations matters that had been established in 1904, in the Conciliation and Arbitration Act 1904 (Cth), as ‘part of the policy of discouraging legalism in proceedings before industrial courts’.⁴²

There are provisions about costs in matters before the Fair Work Commission, and provisions for costs in the federal courts.

Section 611 of the Fair Work Act sets out the general provision as to when the Fair Work Commission may order costs. The Fair Work Commission may order a person to pay the other party’s costs if it is satisfied

- that the person’s application or response to an application was made vexatiously or without reasonable cause, or
- it should have been reasonably apparent that the person’s application or response to an application had no reasonable prospect of success.

Section 375B of the Fair Work Act sets out the circumstances in which the Fair Work Commission can make costs orders against parties in general protections matters, which involve unlawful discrimination of some kind.

When it comes to matters that proceed to the federal courts under the Fair Work Act s 570(2) provides costs may only be awarded if:

- (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
- (b) the court is satisfied that the party’s unreasonable act or omission caused the other party to incur the costs; or
- (c) the court is satisfied of both of the following:
 - (i) the party unreasonably refused to participate in a matter before the FWC;
 - (ii) the matter arose from the same facts as the proceedings.

In its submission to the Productivity Commission inquiry into the Disability Discrimination Act, the Australian Industry Group supported the approach applying to unfair dismissal applications under the predecessor to the Fair Work Act, the Workplace Relations Act 1996 (Cth), where each party paid their own costs, except where

- The applicant pursues an application in circumstances where it should have been reasonably apparent that he or she had no reasonable prospect of success; or
- The applicant has acted unreasonably in failing to discontinue a proceeding or in failing to agree to terms of settlement that could lead to discontinuance of the application. (Workplace Relations Act 1996, s170CJ).⁴³

The Productivity Commission considered that, while this proposal provided protection for respondents, it was 'of little assistance to complainants facing a respondent who acts unreasonably in the proceedings'. Hence it was recommended that guidance be drawn from the cost order guidelines in the Family Law Act to provide '[m]ore balance between the requirements on complainants and respondents'.⁴⁴

The 2008 Senate Inquiry into the Sex Discrimination Act also acknowledged that there was existing provision for the Federal Court and the Federal Magistrates Court (as it then was) to make orders capping costs, and that a rule that each party would generally bear their own costs would have both advantages and disadvantages for complainants, in that those who are successful would generally be left to pay their own legal fees.

Ultimately, the 2008 Senate Inquiry recommended that the issues of legal costs would be better addressed through changes to allow for better enforcement of the Sex Discrimination Act.⁴⁵

(d) *Respect@Work* recommendation

In the national inquiry into sexual harassment in the workplace, *Respect@Work*, the Commission received several submissions arguing that the risk of potentially having to bear the costs of litigation in sexual harassment matters under the Sex Discrimination Act was a deterrent to meritorious claims being pursued.

Submissions argued that a costs protection provision like s 570 of the Fair Work Act should be introduced to provide that applicants and respondents should bear their own costs unless an exception applies.⁴⁶ The Commission recommended that a cost protection provision, consistent with s 570 of the Fair Work Act, be introduced.⁴⁷

The Commission urged that such a provision 'should ensure costs may only be ordered against a party by the court if satisfied that the party instituted the proceedings vexatiously or without reasonable cause, or if the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs'.⁴⁸

In April 2021, the Government responded to the *Respect@Work* recommendation for a cost protection provision consistent with s 570 of the Fair Work Act, by agreeing in principle, but noting that

the determination of costs orders is already at the discretion of the court, but will review cost procedures in sexual harassment matters to ensure they are fit for purpose, taking into account the issues raised by the Report.

The amending legislation introduced as part of the Government's implementation of the *Respect@Work* report recommendations, the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*, did not address the issue of costs.

(e) Human Rights and Anti-Discrimination Bill 2012

The HRAD Bill included a set of provisions that were considered as improving access to justice, providing that parties should bear their own costs for litigation as a default position, with the court retaining a discretion to award costs in the interests of justice.

In exercising the discretion, the court was to have regard to a range of factors.⁴⁹ If the relevant court considers that there were circumstances justifying departing from this approach, it could make such orders as to costs and security for costs that it considered 'just'.

In considering whether there are circumstances that justify departing from the default position that each party is to bear their own costs, the court was to have regard to the following matters, which are similar to those in s 117(2A) of the Family Law Act:

- (a) the financial circumstances of each of the parties to the proceedings
- (b) whether any party to the proceedings is receiving assistance under clause 130 of the HRAD Bill (which provides for assistance by the Attorney-General's Departments), or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance)
- (c) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission)
- (d) whether any party to the proceedings has been wholly unsuccessful in the proceedings
- (e) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings and the terms of any such offer
- (f) any other matters that the court considers relevant.

The Explanatory Notes to the HRAD Bill justified the change in policy with respect to costs in unlawful discrimination matters as follows:

The risk of an adverse cost order is a significant barrier to commencing litigation, even for cases with relative merit. This provision should be considered in conjunction with clauses 117 and 121, which outline the Commission's ability to dismiss unmeritorious complaints at an early stage.⁵⁰

The need to discourage unmeritorious complaints was acknowledged but considered best dealt with through early termination processes and the new requirement to seek leave to proceed to Court if the Commission terminated a complaint on a substance ground.

Clause 117 of the Bill set out the powers of the Commission to terminate or 'close' complaints, including for being frivolous, vexatious, misconceived or lacking in substance. Clause 121 provided that an application to the Federal Court or the Federal Circuit Court could not be made without leave of the relevant court if the Commission 'closed' an unlawful discrimination complaint for a reason other than it being an issue of public importance or there being no reasonable prospects of conciliation. The combined effect of these provisions was to reduce the chance that respondents would be drawn into unmeritorious proceedings in the federal courts that may require them to bear the cost of their own legal representation unfairly.

In the Senate Legal and Constitutional Affairs Committee inquiry into the HRAD Bill, the Commission made recommendations in regard to both concerns: the deterrent effect of costs on complainants and the impact of unmeritorious complaints on respondents.

The Commission welcomed features of the Bill that were consistent with the Commission's previous recommendations, including:

- improved capacity to terminate unmeritorious complaints, and protection for respondents against having to defend such complaints in court, with complaints terminated by the Commission as being unmeritorious only being able to proceed to court with the leave of the court
- for the small proportion of matters which proceed to court, an approach to costs which is more consistent with that in other Australian discrimination law jurisdictions, and which facilitates access to justice while providing continuing capacity for courts to make costs orders appropriate to the conduct of the parties and the merits of the matter.⁵¹

In consultations in this Free and Equal inquiry, Victoria Legal Aid noted that

The deterrent effect of the current costs rule could be ameliorated by allowing costs orders against an unsuccessful defendant, but limiting costs orders against unsuccessful applicants to instances where the application is frivolous, vexatious or without foundation.⁵²

2.3 A balanced approach

The discouragement of unmeritorious complaints was seen as an important propelling motivation of aspects of the 2017 amendments to the AHRC Act, achieved through a combination of early termination, provision for leave and warnings about potential adverse costs orders.

The issue of litigation costs potentially affects directly only a very small number of complaints. However, the costs rules frame the whole approach for complainants, affecting for example whether lawyers may take on matters, even in the first instance.

Maurice Blackburn Lawyers, for example, opposed a 'no-costs' jurisdiction in discrimination matters, because it would

reduce access to justice for complainants with meritorious cases, who would risk being left out-of-pocket despite making a successful claim;

increase the incidence of complainants with meritorious cases representing themselves, to attempt to avoid the risk being left out-of-pocket despite making a successful claim, which increased incidence would cause delay and inconvenience in the courts.⁵³

These observations were also reiterated in some consultations: that it was hard to get lawyers involved if there were no prospect of payment. In its submission to the Senate Legal and Constitutional Affairs Committee in the inquiry into the Human Rights Legislation Amendment Bill 1996, the Commission said that

Despite reservations, [the Commission] ... did not oppose the rule that costs follow the event. [The Commission] maintained that if, in the Federal Court, each party pays its own legal costs, lawyers will be reluctant to take on speculative actions on behalf of clients who are unable to pay legal costs.⁵⁴

At the same time, the Attorney-General's Department advised that the question of costs was 'a difficult one', but said that the rule that costs ordinarily follow the event 'will encourage solicitors to undertake cases on the basis of a speculative action', which may not be the case otherwise. The power to award costs might also 'mitigate against frivolous and vexatious claims by applicants and deliberate delay or obstruction by respondents'.⁵⁵

Conversely, it was also suggested that there should be greater support for meritorious complainants to gain legal representation.

The employer group, ACCI, referred to the relative newness of the costs approach in the Fair Work jurisdiction and recommended that the current non-exhaustive list of applicability factors for determining the making of protective cost orders by the courts should be retained.⁵⁶

Professor Beth Gaze and Associate Professor Belinda Smith observe that '[a]llowing costs to remain as a barrier to the law's enforcement is especially problematic if the burden of enforcing the law is primarily on the person affected by discrimination':

The need for agency assistance with enforcement is clear, as is the need to address the costs of litigation and to ensure that individuals harmed by discrimination are properly compensated, above reimbursing the cost of pursuing their claim. Failing to address these issues indicates there is no real commitment to ensuring that all individuals subjected to discrimination can enforce their rights.⁵⁷

On balance, the Commission concludes that the default position should be that parties bear their own costs, as contained in the HRAD Bill, but with the court retaining a discretion to award costs in the interests of justice. However, the Commission also considers that the AHRC Act should be amended to include mandatory criteria to be considered by the courts in determining whether to award costs in the interests of justice. The list included in the HRAD Bill, which was based on the Family Law Act, is an instructive one:

- (a) the financial circumstances of each of the parties to the proceedings
- (b) whether any party to the proceedings is receiving assistance provided by the Attorney-General's Department, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance)
- (c) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission)
- (d) whether any party to the proceedings has been wholly unsuccessful in the proceedings
- (e) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings and the terms of any such offer
- (f) any other matters that the court considers relevant.

The Commission's position remains that for the small proportion of matters which proceed to court, this approach to costs is more consistent with that in other Australian discrimination law jurisdictions, and better facilitates access to justice while providing continuing capacity for courts to make costs orders appropriate to the conduct of the parties and the merits of the matter.⁵⁸

Evidentiary issues



3 Evidentiary issues

The Commission recommends that the overall onus of proof for direct discrimination remain with the complainant, but that a shifting evidentiary burden be introduced, once an application has established a prima facie case.

This would reflect the practice in the Fair Work jurisdiction, however the Commission prefers the model proposed in the HRAD Bill 2012. This would ensure that the person best positioned to produce evidence is expected to do so, consistent with procedure in other areas of civil law.

3.1 Evidentiary burden versus onus of proof

The question of the legal burden of proof only arises in the small proportion of matters under federal discrimination laws which cannot be resolved by conciliation at the Commission and proceed to the federal courts. Based on statistics in the Annual reports of the Commission, less than 3% of discrimination matters finalised by the Commission proceed to court.⁵⁹

Conciliation is conducted in a different framework from court proceedings as the function is administrative, not judicial, and the Commission is not bound by the rules of evidence.⁶⁰ The Commission can require appropriate evidence if needed.

Under the current direct discrimination tests, the burden of proving unlawful discrimination – that the respondent treated the complainant less favourably because of their protected attribute – falls entirely on the complainant.

However, with respect to indirect discrimination, once an applicant has established the discriminatory impact of a condition, requirement or practice, the Age Discrimination Act, Disability Discrimination Act and Sex Discrimination Act shift the evidentiary burden of proving that the discriminatory condition was reasonable to the respondent.⁶¹

Taking the Age Discrimination Act as an example, s 14 provides, in relation to direct discrimination:

For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the age of the aggrieved person if:

- (a) the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different age; and
- (b) the discriminator does so because of:
 - (i) the age of the aggrieved person; or
 - (ii) a characteristic that appertains generally to persons of the age of the aggrieved person; or
 - (iii) a characteristic that is generally imputed to persons of the age of the aggrieved person.

But then s 15 then provides, in relation to indirect discrimination:

- (1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the age of the aggrieved person if:
 - (a) the discriminator imposes, or proposes to impose, a condition, requirement or practice; and
 - (b) the condition, requirement or practice is not reasonable in the circumstances; and
 - (c) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same age as the aggrieved person.
- (2) For the purposes of paragraph (1)(b), the burden of proving that the condition, requirement or practice is reasonable in the circumstances lies on the discriminator.

As the Attorney-General's Department explained,⁶² under the 'direct discrimination' tests in existing Commonwealth discrimination laws, the complainant is required to prove matters relating to the state of mind of the respondent.

A provision for a shifting evidentiary burden is contained in the Fair Work Act, noted below, and is familiar in civil law matters.

One example is the 'doctrine of suspicious circumstances' in the context of wills.

Onus of proof in relation to wills

The onus of proving that a will is a valid one, that it is the last will of a free and capable testator lies on the person propounding the will: the propounder bears the onus of proof. This onus is in general discharged by proof of capacity, and the fact of execution; from which the knowledge of and assent to its contents by the Testator will be assumed.

But if a person who played a part in the preparation of a will takes a substantial benefit under the will the propounder must then demonstrate 'the righteousness of the transaction' – by actively proving that the testator knew the contents of the will and appreciated the effect of what they were doing so that it can be said that the will contains the real intention and reflects the true will of the testator.⁶³

Once that has been done, then if those who challenge a will wish to go further, to allege that the will was the result of undue influence or fraud, the onus of proving such matters is on those who allege it. The propounder of the will is not required to demonstrate that the testator executed the will in the absence of coercion and fraud. This is described as an example of a shifting evidentiary burden.

3.2 Fair Work Act approach

Section 361 of the Fair Work Act takes a different approach to the issue of burden of proof from the approach under the federal Discrimination Acts. This includes general protections claims that a person took adverse action against an employee because of a protected attribute such as race, sex, sexual orientation, age and disability.

Once a complainant establishes the basic facts (for example, the circumstances of a dismissal) and alleges that a person took an action for a particular reason, this is presumed to be the reason for the action unless the respondent proves otherwise.⁶⁴ A presumption of this kind has operated in industrial relations law since its inception in 1904.⁶⁵

The Fair Work Commission's General Protections Benchbook explains that s 361 'makes it easier than it otherwise would be to establish that a person took adverse action because the reason for taking adverse action usually lies entirely within the knowledge of the person who took the adverse action'.⁶⁶

For example, if an application is made alleging that an employer dismissed an employee because the employee exercised a workplace right, once it is established that the dismissal took place and that the employee exercised a workplace right, it is presumed that the employer dismissed the employee because the employee exercised a workplace right unless the employer proves otherwise.⁶⁷

In the Discussion Paper on the consolidation of discrimination laws, the Attorney-General's Department suggested that the Fair Work Act model is of particular significance because, for all protected attributes, employment is either the first or second most common area of antidiscrimination complaints.⁶⁸

The Attorney-General's Department noted that few overseas jurisdictions took the Australian approach of imposing the full burden of proof on the complainant in discrimination law matters, giving the following examples:

- United Kingdom, European Union and Canada: the burden of proof shifts to the respondent once the complainant has established a prima facie case of discrimination.⁶⁹
- United States: case law has established a framework of shifting burdens of proof.⁷⁰ The three steps of this scheme are:
 - the plaintiff has the burden of establishing a prima facie case of discrimination
 - if the plaintiff establishes a prima facie case, the defendant must provide evidence which could support a finding that it had a legitimate and nondiscriminatory reason for its action, and
 - if the respondent produces such evidence, the plaintiff must prove the reasons provided by the defendant were mere pretexts for discrimination.⁷¹

In the Discussion Paper on the consolidation of discrimination laws in 2011, the Attorney-General's Department also noted the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs in its 2008 report on the Sex Discrimination Act, that an equivalent approach should be taken to that in the UK.⁷²

A related issue in relation to complaints of direct discrimination is the requirement of being treated 'less favourably' and the difficulties that have arisen through judicial interpretation of this as requiring a 'comparator'. This is considered in Chapter 5, section 2.

3.3 Human Rights and Anti-Discrimination Bill 2012

The HRAD Bill included a provision with respect to proof. It was designed to improve access to justice by shifting the evidentiary burden to the respondent, but only once the applicant had established a prima facie case:

Under clause 124 the shifting burden rule only applies in relation to the reason or purpose why a person engaged in conduct when unlawful conduct is alleged. The rest of the core elements of each form of unlawful conduct will have to be proved by the applicant.⁷³

As explained in notes accompanying the Exposure Draft Bill, in practice the complainant would first have to establish a prima facie case that the unlawful discrimination occurred. Namely, an applicant was required to adduce evidence 'from which a court could decide, in the absence of any other explanation, that the alleged reason or purpose is the reason or purpose' that the respondent engaged in the conduct.

Only then would the evidentiary burden shift to the respondent to show a non-discriminatory reason for the action, that the conduct was justifiable or that another exception applied. The policy reason for the amendment was 'that the respondent is in the best position to know the reason for the discriminatory action and to have access to the relevant evidence'.⁷⁴

For example, a person claiming discrimination on the basis of their sexual orientation at work would need to show they are of the particular sexual orientation ... that they were treated unfavourably and that it was connected with an area of public life. They would also need to show evidence from which it could be concluded that the unfavourable treatment was because of their sexual orientation (eg disparaging or offensive remarks by the respondent). The burden would then shift to the respondent to explain the real reasons for the treatment or otherwise justify the conduct.⁷⁵

Clause 124 of the HRAD Bill provided that an applicant must:

- establish a number of preliminary matters including the fact of the alleged conduct
- allege a reason for that conduct, and
- adduce evidence from which a court could decide, in the absence of any other explanation, that the reason for the conduct is as alleged.

The Attorney-General's Department noted in its submission to the Senate inquiry in relation to the HRAD Bill, that the 'reason for the conduct' is only one of five elements required to be proved in order for discrimination to be established. Those elements are:

1. The complainant has the attribute or attributes.
2. The complainant was treated unfavourably.
3. The unfavourable treatment occurred in connection with a relevant area of public life.
4. The attribute (or attributes) was the reason for the unfavourable treatment.
5. No defences, exemptions or exceptions apply to the respondent's conduct.

Clauses 124(2)–(4) of the HRAD Bill provided that a person seeking to rely on a statutory exception to unlawful conduct would bear the burden of establishing that exception. This is the ordinary way in which statutory defences operate and does not amount to a change from the way that exceptions operate under the current discrimination laws.

Under the HRAD Bill, the applicant was therefore required to establish a prima facie case – not just to allege that a person took an action for a particular reason.

The threshold in the Fair Work Act is a lower one: once a complainant alleges that a person took an action for a particular reason, this is presumed to be the reason for the action unless the respondent proves otherwise.

The Commission considers that if the applicant is required to establish a prima facie case, as is the model in the HRAD Bill and comparative international examples, it addresses some of the concerns by stakeholders raised, referencing the Fair Work Act provisions.

The proposed shifting evidentiary burden amounts to a change in only one element of unlawful discrimination claims under the current regime: the reason or purpose why a person engaged in the conduct.

In its submission to the Senate inquiry in relation to the HRAD Bill, the Attorney-General's Department prepared the following table setting out the changes that would be effected by cl 124 of the HRAD Bill:⁷⁶

Table 4.1: Which party has the burden of proof?

Elements of discrimination	Current position in anti-discrimination law	Proposed position in exposure draft
Has the attribute or attributes	Complainant	Complainant
Unfavourable treatment	Complainant	Complainant
Area of public life	Complainant	Complainant
Attribute was reason for unfavourable treatment	Complainant	Complainant establishes prima facie case, then burden shifts to the respondent
Defences, exemptions and exceptions	Respondent	Respondent

The Department also pointed out that the proposed shifting evidentiary burden would not affect sexual harassment claims, as the reason for the unlawful conduct is not relevant. Sexual harassment is established on the basis of an objective test – that is, that a reasonable person would have anticipated the possibility that the other person would be offended, insulted, humiliated or intimidated by the conduct.⁷⁷

3.4 Towards a fair balance

A consistent view among many stakeholders was that the current burden, resting totally on the complainant, was too onerous.⁷⁸ A favoured model was that of the Fair Work Act, with a shifting onus.

The Law Council of Australia, for example, supported this approach:

Under this approach, a complainant must establish an arguable case, and then the respondent has the evidentiary burden of establishing the reasons for the impugned conduct or conditions. The rationale for such provision would be that the reason behind any purportedly less favourable treatment usually lies entirely within the knowledge of the person who took the action and is not available to the complainant.⁷⁹

This approach is also consistent with the one applying to questions of indirect discrimination in the Age Discrimination Act, Disability Discrimination Act and Sex Discrimination Act, where the respondent bears the onus of proving ‘reasonableness’ – as noted in section 3.1, above.

It is also like the approach in the UK:

the onus in discrimination matters shifts to the respondent once the applicant has made out a prima facie case that there is a relationship between their attribute and the treatment they received. The effect of this is that the court or tribunal must find that unlawful discrimination has occurred, unless the respondent presents an adequate explanation for their behaviour.⁸⁰

The Australian Council of Trade Unions noted that this type of 'shifting onus' has been a longstanding feature of the freedom of association and unlawful termination protections in Australia's workplace laws.⁸¹

A contrary view was expressed by the Australian Chamber of Commerce and Industry (ACCI). ACCI stated its opposition to the 'unbalanced discrimination provisions' in the Fair Work Act which reverses the onus of proof on an employer in adverse action cases and are 'manifestly unfair to employers'.⁸²

Since the introduction of the reverse burden into the Fair Work Act, there has been a coinciding increase in the number of claims being made. In large part ACCI suggests this has been caused by the reversal of the burden of proof.⁸³

In the discrimination law context, ACCI noted that there is already a burden on employers in the context of indirect discrimination tests, namely that 'once an applicant has established the discriminatory impact of a condition, requirement or practice, anti-discrimination legislation shifts the burden of proving that the discriminatory condition was reasonable to the respondent'.⁸⁴

The consequence of a shifting onus, in ACCI's view, would be that employers 'will be saddled with additional costs of compiling evidence to defend a claim, or even perhaps settling an unmeritorious claim out of court if it proves to be the more cost-effective option'.⁸⁵

Conversely, Associate Professor Dominique Allen pointed to the 'growing consensus' among the international community that 'victims of discrimination should not be subject to an undue burden in attempting to establish their complaint'.⁸⁶ Allen also reiterated that the shift in burden does not assist the complainant to reach the prima facie threshold.⁸⁷

The Commission acknowledges that any provision allocating part of the burden of proof to the respondent would be a departure from existing Commonwealth antidiscrimination law. The respondent would be required to demonstrate that there was no discriminatory reason for their actions once the complainant has made out the other elements of direct or indirect discrimination. As the Attorney-General's Department noted in its Discussion Paper, this shift in onus would be 'likely to make it easier in some circumstances for complainants to successfully argue cases of unlawful discrimination'.⁸⁸

However, as the Attorney-General's Department also pointed out, both the UK and Fair Work Act models have now been in operation in their respective jurisdictions for some time and do not appear to have created significant problems in practice.

Modelling a provision on the Fair Work Act approach would harmonise the burden of proof for employment discrimination at the Federal level and would enable case law about both provisions to develop together.⁸⁹

The shifting burden provision in the HRAD Bill was different from the Fair Work Act rebuttable presumption, which only requires adverse action and an attribute to be proven.

The HRAD Bill proposed a burden more like that used in the UK, which requires the complainant to establish at least a prima facie case of discrimination.⁹⁰ It would have required the complainant to adduce evidence 'from which the court could decide' that the respondent acted for an impermissible reason or purpose, before the respondent was called upon to prove the contrary.

The HRAD Bill provision was, however, criticised at the time. The Dissenting Report to the Senate Legal and Constitutional Affairs report on the HRAD Bill, by the Coalition Senators, exemplifies this concern:

The reversal of the burden of proof provided for by cl 124 of the Bill, which casts the burden of proof upon a person against whom a complaint is made to establish that they did not act for an unlawful reason or purpose, is arguably inconsistent with the presumption of innocence provided for by Article 11 of the Universal Declaration and Article 14 (2) of the [International Covenant on Civil and Political Rights].⁹¹

The Commission acknowledges the fundamental importance of the presumption of innocence in matters of criminal law. The majority report of the Senate Committee suggested that the public debate surrounding this provision was 'misinformed', given that the draft Bill only imposed a civil liability, not a criminal liability, so 'the suggestion that the Draft Bill removes the presumption of innocence is inaccurate and misleading'.⁹²

The Committee took the view that the shifting burden of proof was appropriate and would reduce costs for respondents 'as they will only be required to produce evidence explaining that their conduct was justifiable after an applicant has established, through evidence, that unlawful treatment actually occurred'. The Committee also considered that imposing this requirement on applicants 'will act as a deterrent against vexatious litigation'.⁹³

The Committee noted comments from the Parliamentary Joint Committee on Human Rights that it was a 'well-established practice in international and comparative human rights jurisprudence for the burden of proof to shift in discrimination cases once a prima facie case is made'.⁹⁴

The Commission recommends that a shifting evidentiary burden be introduced in relation to unlawful discrimination matters, while also affirming that the overall onus of proof rests with the complainant in matters that are considered in the federal courts. The Commission supports the approach taken in the HRAD Bill as setting the appropriate threshold, rather than that in s 361 of the Fair Work Act.

What of arguments that the proposed shifting burden of proof might allow a flood of unmeritorious claims? Gaze and Smith observe that

Good regulatory design does usually provide a means of identifying and discouraging unmeritorious and vexatious claims, and an onerous burden of proof can certainly perform this role, but arguably operates like a sledgehammer where the complainant cannot access the evidence, and other, better, mechanisms operate to screen out such complaints.⁹⁵

The Commission considers that concerns of respondents about the impact of unmeritorious claims are met to some extent by amendments to the Commission's legislation that took effect in April 2017.

The 2017 amendments both increased the threshold for a valid complaint and provided greater ability for the Commission to terminate unmeritorious complaints. The 2017 amendments also introduced leave seeking provisions in order for complaints terminated on certain grounds – including substance – to proceed to the Federal Courts.

There are other concerns about the capacity of organisations, especially small businesses, to respond to the expectations embedded in the shifting burden:

[Small businesses] may not have the requisite capacity to act, to know how to improve their decision making or have the resources to develop processes for identifying and eliminating bias. This places extra importance on drafting clear, consistent rules that can be followed and on providing effective guidance on what the law requires to enable compliance.⁹⁶

The Commission can assist through the development of guidance material about the kinds of matters relevant to discharging the shifting burden, to guide both complainants and respondents in relation to proof of relevant issues.

Gaze and Smith also suggest that as businesses become accustomed to documenting their legitimate reasons for actions that could be challenged, 'this promotes good practice in many contexts'.⁹⁷

3.5 Standard of proof

The Commission recommends that the standard of proof be clarified as the usual standard of proof as set out in the Evidence Act 1995 (Cth) s 140.

The application of the standard of proof in discrimination cases has been the subject of recurring discussion in case law, largely stemming from the test utilised in the case of *Briginshaw v Briginshaw*.⁹⁸ *Briginshaw* indicated that in cases involving serious allegations, evidence of a higher probative value is required to substantiate the claim. There were varying approaches undertaken in discrimination cases following *Briginshaw*, and some uncertainty around the nature of the test.⁹⁹ In 2008, the case of *Qantas Airways Ltd v Gama* appeared to settle the issue, with the Full Federal Court confirming that discrimination complaints should be approached in the same way as other civil matters, with a civil standard of proof as set out in s 140 of the Evidence Act 1995.¹⁰⁰

The Law Council of Australia suggested that consideration be given to clarifying that a civil standard of proof applies in discrimination cases.¹⁰¹ It has also been identified as a problem for applicants and which, in combination with the onus resting on the applicant, makes it difficult for the complainant to discharge their burden.¹⁰² The Commission agrees with this approach.

Standing



4 Standing

The Commission recommends that unions and other representative groups should be permitted to bring representative claims to court, consistent with the existing provisions in the AHRC Act that allow unions and other representative groups to bring a representative complaint to the Commission.

To facilitate this, representative organisations require adequate resourcing to bring these claims, and to support claimants through the process.

4.1 Representative complaints

At present, there is an inconsistency between the ability to bring a representative action as a complaint to the Commission and to bring the same complaint as a representative action at the court stage.

A complaint may be lodged with the Commission by a person aggrieved by the alleged unlawful discrimination or on that person's behalf by another person or trade union.¹⁰³ A 'representative complaint' is a complaint lodged on behalf of at least one person who is not a complainant.

The AHRC Act allows a representative complaint to be made to the Commission in the following circumstances:

- the class members have complaints against the same person, and
- all the complaints are in respect of, or arise out of, the same, similar or related circumstances, and
- all the complaints give rise to a substantial common issue of law or fact.¹⁰⁴

However, if the matter does not resolve at conciliation, these bodies cannot then commence an action in the federal courts on behalf of the aggrieved person.¹⁰⁵

Under the *Federal Court of Australia Act 1976* (Cth) s 33D, 'representative proceedings' are allowed, but to bring a representative action, a person must have 'a sufficient interest to commence a proceeding on his or her own behalf'. Section 33C requires that, to commence representative proceedings:

- (a) 7 or more persons have claims against the same person; and
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) the claims of all those persons give rise to a substantial common issue of law or fact

Professor Therese MacDermott notes that, in the Australian context, the use of representative proceedings 'to achieve efficient economies of scale in litigation' is relatively common in certain fields, such as shareholder actions, banking practices and negligent financial advice, and tort claims involving defective medical devices or trials.¹⁰⁶

However, in the anti-discrimination context, representative complaints have been rarely used, 'both because of their complexity and because of the limited remedies they may provide'.¹⁰⁷

MacDermott refers to the risk of an adverse costs order that weighs against individually initiated discrimination claims – discussed above in section 2.2, above – as applying equally to representative proceedings.¹⁰⁸ She also notes the complexity of drafting pleadings which satisfy the statutory requirements in terms of group proceedings.

Additionally, the low level of damages traditionally awarded in discrimination matters means that ‘the same incentives to settle that exist in other, more commercially-based, class actions do not necessarily exist in the context of representative proceedings under federal anti-discrimination legislation’.¹⁰⁹

The ability to take court proceedings under federal discrimination law is currently more constrained than the ability to bring complaints to the Commission.

It prevents public-interest-based organisations from bringing an action in the courts – even if they have pursued the complaint in the Commission first.

Case study: *Scott v Telstra: The value of representative actions*¹¹⁰

In 1995, the first representative action was brought under the Disability Discrimination Act: *Scott & Disabled People International (Australia) Ltd v Telstra* (1995) EOC 92–717. These proceedings occurred at a time when the Commission itself adjudicated complaints; therefore, the rules for establishing the representative nature of the proceedings in the Federal Court were not applicable. Professor Therese McDermott summarised and analysed the case as follows:

The complaint was lodged on behalf of all Australians who are deaf, or had a total hearing loss, concerning access to the telecommunication network. Although Telstra had settled Mr Scott’s individual complaint by buying him the necessary adaptive technology ... the representative proceedings were regarded as a necessary step by the organisation, Disabled People International (Australia) Ltd in order to address the broader systemic issues in the telecommunication network.

... If the current requirements for instituting such proceedings need to be satisfied in these cases, it is questionable whether these claims – for example, as being on behalf of all Australians who are deaf or had a total hearing loss – would be a sufficiently well-defined class to qualify as complaints ‘against the same person’, that are ‘in respect of or arise out of same, similar or related circumstances’, and ‘give rise to a substantial common issue of law or fact’.¹¹¹



As the Commission pointed out in the *Respect@Work* report, although there are provisions to bring a representative complaint to the Federal Court (not the Federal Circuit Court), these provisions are technical and complex, and different from the requirements under the AHRC Act.¹¹²

The rules of standing therefore reinforce the burden on individuals in the complaint-handling framework.

The Public Interest Advocacy Centre (PIAC), for example, submitted that organisations may in many cases be 'better placed than individuals to make complaints regarding discrimination, particularly in the case of systemic discrimination' – and 'better resourced to absorb the costs risks that are associated with pursuing discrimination complaints in court', particularly where 'the discriminator is a large corporation, and there is a significant difference between the resources of the complainant and alleged discriminator'.

Extending the rules of standing would assist to place greater focus on systemic discrimination issues and limit the risks and burden that litigation, and in particular discrimination litigation, places on individuals. Addressing the inconsistency in the rules of standing would help to streamline the complaint-handling process and improve access to justice by enabling organisations that make complaints on behalf of individuals to the AHRC to then pursue those complaints in court.¹¹³

Previous inquiries have also recommended that representative bodies – such as advocacy groups, human rights organisations and trade unions – should be able to bring actions in the federal courts.¹¹⁴ Like PIAC's submission, it was suggested that this may assist in cases of systemic discrimination, which are more difficult to raise through an individual complaint.¹¹⁵ In the Discussion Paper on the consolidation of discrimination laws in 2011, the Attorney-General's Department said that

Engaging with the complexities of the court system can be difficult and costly for complainants and representative actions would allow genuine cases which previously would not have proceeded past conciliation (particularly those with a public interest element) to be heard in the courts. It may also lead to more judicial consideration of important provisions, which could provide greater certainty as to obligations over time.¹¹⁶

As set out in the *Respect@Work* report, the Commission considers that there are sound public policy reasons to enable appropriate organisations with a legitimate interest in a particular subject-matter to commence and pursue discrimination proceedings, particularly where the claim involves a systemic problem that affects a wide class of persons.

The Commission also considers that attention should be given to simplifying standing requirements and providing for consistent standing rules in Commonwealth discrimination law matters in bringing complaints to the Commission and to the courts.¹¹⁷

The Commission recommended in the *Respect@Work* report that the AHRC Act be amended to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the AHRC Act that allow unions and other representative groups to bring representative complaints to the Commission.¹¹⁸

The Commission notes that the recommended own motion inquiry function into systemic discrimination, set out in chapter 3, section 6.2, would provide an alternate albeit complementary pathway to address issues that might otherwise be the subject of representative complaints.

The Commission also acknowledges concerns like those expressed by ACCI, 'to ensure that strong oversight and effective regulation is put in place to ensure that discrimination class action participants are not taken advantage of by lawyers and litigation funders, including ensuring protections against being enticed into joining actions through misleading and deceptive conduct'.¹¹⁹

ACCI's observations were informed by the Australian Law Reform Commission's litigation funding report that was released in 2019.¹²⁰ Similarly, in *Respect@Work*, the Commission noted concerns about the impact of litigation funding on representative claims.¹²¹

The Government responded to the recommendation in the *Respect@Work* report by stating that, while the approach to representative actions may be appropriate for conciliation in the AHRC, 'different considerations apply in the context of proceedings before a court' and that there was an existing mechanism to enable representative proceedings under Pt IVA of the Federal Court of Australia Act 1976.¹²²

In the 2011 Discussion Paper, the Attorney-General's Department commented that, noting that the federal courts 'already have the power to dismiss an action which is frivolous or has no reasonable prospects of success',

to ensure that such a reform would not lead to an increase in unmeritorious complaints in the federal courts, limitations could be placed on a representative body's ability to commence actions, such as a requirement that representative bodies be required to establish a demonstrated connection with the subject matter of the dispute before commencing an action or that there must be a justiciable issue identified before an action can be brought.¹²³

Reflecting on the Government's response to the *Respect@Work* recommendation, Maria Nawaz argued that

While the Federal Court rules do provide for representative proceedings to be brought, these rules are complex, and differ from the rules for bringing a representative complaint to the Commission. Standing rules are difficult to satisfy when the person wishing to bring the action is not an 'affected' person. In order to shift the burden from individual complainants and address systemic discrimination, human rights organisations and unions which can demonstrate a sufficient interest in the matter should have the power to bring a representative action in the Federal Court.¹²⁴

4.2 Towards consistency

Concerns of inconsistency and uncertainty have been regularly expressed in relation to discrimination laws. The Commission recommends making the position consistent in relation to representative actions before the Commission and before the federal courts.

In its submission to the Senate committee inquiring into the Exposure Draft of the HRAD Bill in 2012, the Commission recommended such reform to provide consistency, between

- who may bring complaints to the Commission and who may commence court proceedings
- standing in federal discrimination law matters (in brief, only persons affected by discrimination) and in general law matters (in brief, any person or body with a sufficient interest in the matter).¹²⁵

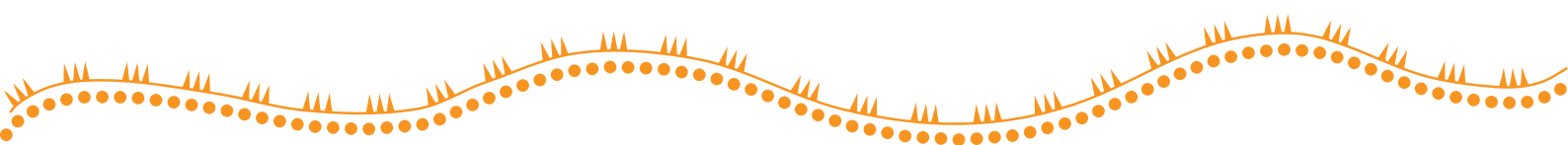
The Commission acknowledged the need to ensure that procedural as well as substantive provisions avoided imposition of undue regulatory burden.

The Commission recommended that there should be further consideration of approaches to standing in federal discrimination law matters which met this objective while also enhancing access to justice and effective compliance with the legislation. The Commission recommended:

further consideration of approaches to standing in federal discrimination law matters which might promote compliance with the legislation without imposition of undue regulatory burden. In particular the Commission suggests consideration of provision for initiation of matters by representative organisations and other bodies with a sufficient interest, but only by leave of the court with regard to appropriate criteria.¹²⁶

The Commission considers that the existing approach to standing in the courts is not adequate to address the concerns raised in this section.

A combination of other measures may address some of the issues concerning litigation in court – accessibility, costs, evidentiary burdens, restoration of an intermediate adjudicative process – but the standing in federal courts also needs to be amended.



Timeframe



5 Timeframe

There is no specific timeframe in which a complaint must be lodged with the Commission. However, since 13 April 2017, the President could terminate a complaint if the complaint was lodged more than six months after the alleged act, omission or practice takes place.

In the *Respect@Work* report, the Commission recommended a period of 24 months for complaints under the Sex Discrimination Act. The Government accepted this recommendation and included a provision to this effect in the subsequent *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth). The Commission recommended in its submission on the then-Bill that, if this amendment were adopted for complaints under the Sex Discrimination Act, a consistent approach should be taken across the four Discrimination Acts, however a 24-month termination period has been only adopted in relation to complaints under the Sex Discrimination Act.¹²⁷

A consistent approach is needed across federal discrimination laws.

5.1 Framework for termination of complaints

Since the amendment to the discretionary termination period in 2017, concern has been expressed that six months is too short a period for complex disputes to be lodged and creates a disincentive for people who have experienced sexual harassment and persons with a disability to raise concern or make complaints.

Before 13 April 2017, the President had the discretion to terminate a complaint that was lodged more than 12 months after the alleged unlawful discrimination occurred.

The reduction of the timeframe was justified in the Explanatory Memorandum for the 2017 amendment as providing 'a strong incentive for complainants to lodge complaints in a timely manner following the occurrence of conduct alleged to be unlawful discrimination'. It was stated that

The reduction will also give the President additional flexibility to terminate complaints that are lodged a significant time after alleged conduct took place for a potentially vexatious or other unmeritorious purpose. This will also reduce the burden on potential respondents.¹²⁸

The Commission considers that other measures introduced with the 2017 amendments already address the concerns about potentially vexatious or unmeritorious complaints and that the reduction in the timeframe was unnecessary.

Before the *Respect@Work* recommendation, the Discussion Paper in this Free and Equal inquiry had proposed an extension of the six-month timeframe.¹²⁹ This proposal received strong support in submissions advocating for a return to the previous 12-month timeframe.¹³⁰ The reduction of the previous and longstanding timeframe was criticised. Legal Aid NSW, for example, said:

In our practice experience, victims of discrimination (including sexual harassment) are often significantly impacted by the discrimination. It can take them some time to overcome the shock, distress or embarrassment, and to make a complaint. Victims of discrimination also often fear the consequences that making a complaint can have on them. In the context of employment, this often involves concern about the impact on their continued employment.¹³¹

The Australian Chamber of Commerce and Industry (ACCI), however, submitted that the six-month timeframe in s 46PH(1)(b) should be retained. They suggested that it provided 'sufficient flexibility to deal with vexatious applicants and provides a strong incentive for complainants to lodge complaints in a timely manner following alleged unlawful conduct'.¹³²

ACCI also recommended that all federal discrimination laws should include an absolute limitation period for the lodgement of claims.¹³³ From the perspective of employers, they may face 'significant problems' when an aggrieved person makes a claim long after the alleged conduct occurred: 'key evidence often may be in the sole domain of certain employees (or ex-employees) or contained in documents such as email, both of which may not be available after a prolonged time'.¹³⁴ A consequence, they argued, was a 'distinct advantage for applicants', meanwhile it 'put pressure on employers to settle early in conciliation proceedings', with respondents 'being forced into paying "go away" money'.¹³⁵

The HRAD Bill included provisions concerning the timeframe for complaints. First, it proposed changing the terminology from 'terminating' a complaint to 'closing' a complaint. While 'closing' is a more neutral word than 'terminating', and may be preferred for that reason, the use of the phrase 'terminating a complaint' does provide an important 'signifier' that the relevant complainant, whose complaint has been 'terminated' (and issued with a termination notice) has a right to make an application to court.

This contrasts with matters that are currently 'closed' by the Commission administratively, (for example if a complaint is withdrawn or resolved).¹³⁶ The word 'terminate' could be replaced, but a distinction between the different types of 'closure' is one worth maintaining and assists in explaining to complainants and respondents the different rights and obligations that may accrue in the event that a complaint does, or does not, resolve through conciliation.

The HRAD Bill also included a provision with respect to requiring leave of the court in relation to the closure of complaints on certain grounds. A provision of this kind was introduced in amending legislation in 2017 and was supported by the Commission.

With respect to the timeframe, the HRAD Bill proposed that the Commission could close a complaint on the ground of time if it was made more than 12 months after the alleged conduct occurred.¹³⁷ An analogous provision that applies with respect to the OAIC, which may decide not to investigate, or not to investigate further, an act or practice about which a complaint has been made if the OAIC Commissioner is satisfied that the complaint was made more than 12 months after the complainant became aware of the act or practice.¹³⁸

In the *Respect@Work* report, the Commission referred to the large number of submissions that supported extending the time period before a complaint could be terminated under the Sex Discrimination Act on the ground of time:

Support for the extended timeframes ranged from 12 months to six years, with some submissions supporting abolishing the timeframe altogether. These submissions argued that the current six-month timeframe fails to recognise the complex reasons for an applicant's delay in making a complaint immediately after an alleged incident of sexual harassment, which can include the impact of the harassment on their mental state, fear of victimisation, lack of awareness of their legal rights, or where they are awaiting the outcome of an internal workplace investigation.

The Commission also heard that complainants are often reluctant to report an incident of sexual harassment while they are still employed. For some complainants, the knowledge that their claim may be rejected because it is outside the time limit is enough to prevent them from making a claim at all.¹³⁹

The Commission concluded that the six-month timeframe was inadequate, but also expressed concern that significantly increasing the timeframe was 'likely to have a negative impact on the Commission's ability to undertake a fair inquiry into the matter and conduct an effective conciliation'.¹⁴⁰

The Commission recommended that, at a minimum, the President's discretion to terminate a complaint should be restored to the prior 12-month timeframe.¹⁴¹

In that report, the Commission also suggested that the timeframe for bringing a sexual harassment complaint should be two years before the President's discretion to terminate on the ground of time is enlivened.¹⁴²

The Government accepted the recommendation in the *Respect@Work* report for a timeframe of 24 months:

Given the importance of ensuring potential complainants understand and have confidence in accessing the complaints process under the AHRC Act, the Government will also amend the AHRC Act so that the President's discretion to terminate a complaint under the Sex Discrimination Act on the grounds of time does not arise until it has been 24 months since the alleged unlawful discrimination occurred.¹⁴³

Timeframe in the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

This *Respect@Work* recommendation has been reflected in s 3 of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*. That section provides that:

- if a complaint relates to the Sex Discrimination Act, the President's discretion to terminate the complaint arises if it has been more than 24 months since the alleged conduct took place; but
- in any other case, the President's discretion to terminate the complaint arises if it has been more than 6 months since the alleged conduct took place.

With the passage of this Act, this is the only termination ground in the AHRC Act that has a different effect depending on the Act under which the complaint was made.

5.2 The need for consistency

The Commission considers that the differential timeframe for terminating complaints has the potential to create confusion and is undesirable and that a consistent approach is needed across federal discrimination laws. This is particularly the case in relation to complaints that straddle a number of forms of discrimination across the Discrimination Acts.

The *Respect@Work* report emphasised that framing an appropriate regulatory response to sexual harassment required examining the problem through an intersectional lens.¹⁴⁴ The concept of 'intersectional' discrimination refers to the fact that people often experience multiple overlapping forms of discrimination and harassment, for example on the basis of gender, race, disability or sexuality.¹⁴⁵

The experience of the Commission is that many people who make complaints under the Sex Discrimination Act also make related complaints under the Disability Discrimination Act or Racial Discrimination Act in relation to the same conduct. If the conduct occurred between 6 months and 24 months previously, the President would not have the discretion to terminate the complaint on the ground of time in so far as it related to the Sex Discrimination Act, but would be able to terminate the complaint in such a manner so far as it related to the Disability Discrimination Act, Age Discrimination Act or Racial Discrimination Act. This is an undesirable result.

Further, the differences in timeframes may also give rise to arguments that complaints under the Disability Discrimination Act, Racial Discrimination Act or Age Discrimination Act should be terminated if the conduct fell within this intermediate period because the legislation draws a distinction between different kinds of complaints.

The factors referred to in the *Respect@Work* report, which explained why there may be a delay in an applicant bringing a complaint of sexual harassment, also apply to a range of other complaints – including discrimination on the grounds of disability or race. In these cases, too, an applicant's delay in making a complaint immediately after an alleged incident can be affected by the impact of the conduct on their mental state, fear of victimisation, lack of awareness of their legal rights, or in the case of a complaint arising out of issues in a workplace, where they are awaiting the outcome of an internal workplace investigation.

The Commission considers that the period of time in s 46PH(1)(b) should apply consistently, regardless of the Act that the complaint relates to.

The Commission therefore recommended to the Senate Education and Employment Legislation Committee inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 that s 46PH(1)(b) of the AHRC Act be amended to provide that the President may terminate any complaint that was lodged more than 24 months after the alleged acts, omissions or practices took place.¹⁴⁶ This recommendation was not adopted by the Committee or reflected in the subsequent Act.

Should different timeframes be applied to complaints brought under the grounds in different discrimination laws, the Commission will monitor the impact of this – including the response of

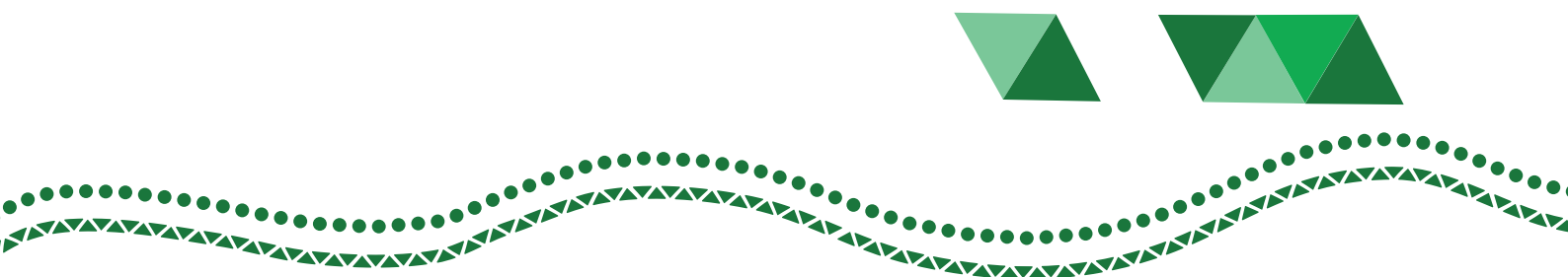
respondents to complaints, the willingness of complainants to pursue the elements of their complaints that are sourced in discrimination laws other than the Sex Discrimination Act, and in terms of complexity of its outreach to stakeholders in explaining the different provisions across the discrimination laws.

In the *Respect@Work* report, the Commission committed to ensuring that education and guidance materials be developed for employers and employees, in consultation with the recommended Workplace Sexual Harassment Council, including information that the termination ground is discretionary and explaining the factors that are taken into account in making this decision.¹⁴⁷

The report also pointed to the kinds of factors that the President has regard to in deciding whether to exercise the discretion regarding out of time termination, including:

- length of delay
- reasons for the delay
- prejudice to respondent or complainant
- whether other remedies have been sought and/or achieved in relation to the subject matter of the claim
- whether steps were taken to try to resolve the matter internally or through criminal proceedings
- the arguable merits of the claim
- whether the complainant was and/or is legally represented
- adverse health and family circumstances
- any other specific factors relevant in an individual case.¹⁴⁸

The Commission supports the provision of guidance in relation to the exercise of the discretion generally in relation to complaints of unlawful discrimination, recognising however that such matters are determined on a case-by-case basis.





Reintroducing an intermediate adjudicative process?



6 Reintroducing an intermediate adjudicative process?

The Commission recommends that serious consideration be given to reintroducing an intermediate adjudicative process into the federal discrimination law system to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts. This could take the form of a tribunal-like body, the restoration of hearing and determination functions of the Commission, the creation of an arbitral process or a different mechanism. The consideration of such mechanisms would benefit greatly from public consultation and expert advice about the best options available in today's legal landscape.

6.1 The case for a middle tier

For nearly 15 years, from 1986–2000, a middle tier existed in the resolution of federal unlawful discrimination matters between voluntary conciliation at the Commission and litigation in court. As discussed below, this took the form of adjudicative hearing and determination functions at the Commission, which were removed in 2000 in the wake of the decision of the High Court of Australia in *Brandy v HREOC (Brandy)*.¹⁴⁹ While the former model was unsatisfactory in some respects, and certain changes were needed for constitutional reasons, the wholesale removal of the Commission's hearing and determination functions went further than necessary to achieve this – the 'misconception' discussed in Chapter 1, section 3.6. For the past 20 years, the burden of discrimination law has largely rested on complainants, with their only further recourse to the federal courts if their complaints cannot be resolved through voluntary conciliation.

From a constitutional law perspective, courts are efficient decision-making bodies because they can exercise 'judicial power' and enforce their own decisions and orders. However, if access to the courts is limited to people with the means and social capital to engage in formal litigation, this restricts the ability of many people to enforce their statutory rights under federal discrimination laws beyond voluntary conciliation.

As outlined above, relatively few unlawful discrimination cases proceed to court, and concerns have been raised repeatedly over the years about the formality, cost, delay, and inaccessibility inherent in court processes, particularly for people from disadvantaged groups. Some of these issues may be alleviated or resolved if certain recommendations from this report are implemented. This notwithstanding, the Commission considers that there remains a compelling case for considering the reintroduction of an intermediate adjudicative process into the federal discrimination law system.

The federal courts will, of course, continue to provide the final say on matters of federal discrimination law. However, with the removal of its hearing and determination functions, the Commission considers that the Australian community lost a low-cost, more informal, accessible middle forum for the adjudication of many discrimination law matters. It also removed a valuable source of public guidance about the operation of federal discrimination laws.

The Commission was, and is, well placed to perform these functions because discrimination law is a specialist area of practice, and the Commission has a wealth of expertise that may not be shared by other forums. Discrimination complainants are often vulnerable or disadvantaged, and will not necessarily have legal representation, so there is greater need for a decision-maker familiar with the law, how it operates, and how best to communicate with vulnerable individuals.

As discussed below, following the decision in *Brandy*, several alternative options were canvassed, including retaining the Commission's hearing and determination functions or conferring arbitral powers on the Commission. However, the decision was ultimately made to confine the Commission's role in unlawful discrimination matters to conciliation and, if conciliation failed, for proceedings to be initiated in court. After two decades, the limitations of this model have become evident.

Since the decision in *Brandy*, there has been a significant increase in the number of tribunals, commissions, administrative bodies and federal statutory agencies that have adjudicative functions, as well as different mechanisms to encourage compliance with the determinations and orders of these statutory bodies – and within constitutional limits. There has also been increased judicial authority on these issues and, potentially, additional options that were not considered or available at the time immediately following the decision in *Brandy*. The consideration of such mechanisms would benefit greatly from public consultation and expert advice.

During this process, the Commission considers that thought should be given to the following:

- whether an intermediate adjudicative process would facilitate more effective access to justice for a larger number of people in federal discrimination law matters
- where an intermediate adjudicative process would best sit, and what form it could take
- whether, within constitutional limits, the system could be designed to reduce the duplication inherent in the former regime involving the Commission's hearing and determination functions and the court
- whether any existing Commonwealth tribunals, commissions or statutory agencies offer a good model of intermediate adjudication, particularly regarding the issue of enforceability and the appropriate pathway to court.

6.2 Pre-*Brandy v HREOC*

Between 1986 and 2000, the Commission had an adjudicative function in unlawful discrimination matters, where such matters could not be resolved either at conciliation or by negotiation between the parties. The object of this second stage was to provide a forum other than litigation in court. As Professor Beth Gaze explained:

Because of the public interest in protecting human rights it was thought better to have a less intimidating and expensive avenue for resolving discrimination matters than the normal court system, and the two-part structure of attempted conciliation and then a hearing before an informal, specialist tribunal was chosen.¹⁵⁰

With respect to the percentage of matters that were taken to the hearing and determination stage, an estimate of the period 1998–1999 showed that approximately 12% of complaints were referred for hearing and, of the hearing matters finalised in that period, only 33% proceeded to hearing and formal decision. A significant proportion of complaints during that period were finalised by conciliation.¹⁵¹

The Commission's hearing function was able to be exercised by one or more Commissioners, but not the Commissioner who conciliated the matter. During these hearings, parties bore their own costs. At the conclusion of the inquiry, the matter was either dismissed or, if the complaint was upheld, a determination was made in favour of the complainant – usually that certain conduct was unlawful and that certain remedial action should be taken.

If a respondent failed to comply with a determination of the Commission, the complainant or the Commission could take the matter to the Federal Court for enforcement. This was not an appeal, as the Federal Court undertook a *de novo* hearing of the matter and determined the original complaint according to its own views.¹⁵²

In this manner, the determinations made by the Commission were not binding or enforceable. The separation of powers principle under the Australian Constitution prevents a non-judicial body, like the Commission, exercising 'judicial power', which includes the making of immediately enforceable decisions.¹⁵³

A complaint pathway could therefore involve three stages: conciliation at the Commission, a Commission determination after a hearing, and then *de novo* proceedings in the Federal Court. This multiplication of processes led to criticism that the system was 'inefficient and prone to exacerbate, rather than ameliorate, the distress of the complainant'.¹⁵⁴ It also prompted an inquiry by the Senate Standing Committee on Legal and Constitutional Affairs in 1992.¹⁵⁵

The Committee sought to find a 'simple and more workable procedure',¹⁵⁶ which acknowledged concerns that anti-discrimination laws were 'designed for the weak, but only the strongest survive ordeal by court' and the 'financial and emotional costs' involved with court action to enforce their rights had a tendency 'to make a mockery of the very legislation which was enacted to alleviate subordinate social positions'.¹⁵⁷

Following the Committee's report in 1992, a process was introduced that provided for the registration of Commission determinations under the federal discrimination acts (Racial Discrimination Act, Sex Discrimination Act and Disability Discrimination Act) with the Federal Court.¹⁵⁸ Upon registration, a Commission determination took effect 'as if it were an order made by the Federal Court'.¹⁵⁹ However, no action to enforce the determination could be taken before the end of a review period, during which the respondent could apply to the Federal Court for review of the determination. The policy intent behind this amendment was to enhance Commission determinations and provide for their easier enforcement.

However, when this scheme was challenged in 1995, in *Brandy*, the High Court held that the registration amendments were invalid because they purported to vest judicial power in the Commission, contrary to Chapter III of the Australian Constitution.¹⁶⁰ This was because the registration provisions amounted to a system of enforcement, which drew on the powers of the Federal Court, without requiring consideration and determination by the Federal Court. In terms of legal precedent, *Brandy* has frequently been cited in subsequent cases concerning Chapter III of the Australian Constitution and judicial power, particularly when considering issues of enforcement.¹⁶¹

6.3 Amending the HREOC structure

In 1995, immediately following the decision in *Brandy*, Chris Sidoti, then Human Rights Commissioner, outlined objectives for an effective model of resolving complaints of racial discrimination:

It must provide a low cost, accessible jurisdiction with as little duplication as possible, that is user friendly, emphasises informality, provides justice as speedily as possible while still being fair to each party's position, enables the award of damages that reflect the true harm to the complainant and allows remedies that challenge systemic discrimination and not only individual suffering.¹⁶²

These objectives are apt to describe an effective system of resolving complaints viewed across all forms of unlawful discrimination.

In 1993, consideration had been underway to review the functions and management of HREOC (as the Commission was then called), with a tripartite review team comprising officers from the Attorney-General's Department, the Department of Finance and HREOC. Following *Brandy*, the review's scope was widened to include consideration of the enforcement of determinations of HREOC.¹⁶³ The report was finalised in 1995. It recommended that unconciliated discrimination matters should be referred to the Federal Court, to a Human Rights Division, with some functions being delegated to registrars.¹⁶⁴

In 1995, Anne Twomey set out four possible ways the Australian Government could respond to *Brandy*:

- to return to the scheme that existed before the 1992 amendments. That is, the Commission would hear and determine matters but, if the Commission made a determination, and a party did not comply with it, the other party or the Commission would need to commence proceedings in the Federal Court. The Federal Court would hear the matter all over again, so that it could independently exercise its judicial power.
- to confine the Commission's role in unlawful discrimination matters to conciliation and, if conciliation failed, for proceedings to be initiated in the Federal Court.
- to vest federal jurisdiction in State courts, noting that State discrimination tribunals had been deemed to be courts because the separation of powers does not apply to the States. Accordingly, it was the view at the time, that these State bodies could validly exercise federal jurisdiction under Commonwealth discrimination legislation, as long as they were considered to be State courts for the purposes of Chapter III of the Commonwealth Constitution.
- to confer upon the Commission powers which were arbitral in nature, rather than judicial.¹⁶⁵

The Australian Government chose to proceed with the second option, with amending legislation in 1999, which 'significantly [reshaped] the enforcement procedure in federal anti-discrimination law and the organisation and functions' of the Commission.¹⁶⁶

A uniform scheme for complaint-handling was introduced for unlawful discrimination matters under the Racial Discrimination Act, Sex Discrimination Act and Disability Discrimination Act. The hearing and determination functions were removed from the Commission and, if a relevant complaint were 'terminated', an affected person could bring an unlawful discrimination case in the federal courts.¹⁶⁷

These amendments also marked the shift of the complaint-handling jurisdiction from the individual Commissioners to the President. The Discrimination Commissioners, the Human Rights Commissioner and the Aboriginal and Torres Strait Islander Social Justice Commissioner were given an *amicus curiae* function in certain proceedings before the Federal Court.¹⁶⁸

This scheme continues to the present day and remains the contemporary basis for the bringing of an action for unlawful discrimination in the federal courts, applying to all the federal discrimination acts.¹⁶⁹

6.4 Brandy amendments went too far?

The legislative response to *Brandy*, including the wholesale removal of the Commission's hearing and determination functions, was not required to remedy the constitutional issues concerning the registration of Commission determinations. In removing this intermediate adjudicative process, the Commission considers that there are genuine questions about whether the *Brandy* amendments went too far, particularly by creating a significant gap between voluntary conciliation and the courts.

There was considerable debate before the Senate Committee inquiring into the amendment Bill about the merits of transferring the Commission's hearing and determination functions to the Federal Court.¹⁷⁰

A great deal of this focused on issues of access and equity. Submissions indicated a concern with practice and procedure in the Federal Court. In particular, concerns were expressed that excessive formality would prove a disincentive to persons exercising their rights under discrimination legislation

The proposed application of Federal Court costs rules also caused alarm and was met with 'vehement opposition and disappointment in the disability sector'¹⁷¹. Professor Beth Gaze said at the time that

there is concern that forcing all adjudication into a system where costs are awarded against the loser, where the law is both unclear and unfavourable to the complainant, will worsen the situation and that fewer people who believe they have experienced unlawful discrimination will be able to pursue their claims.¹⁷²

Removing the Commission's hearing and determination functions had consequential impacts of a wide kind. During the Free and Equal consultation process, duty-holders emphasised the importance of having confidence in discrimination law and its expectations. Under the former model, Commission determinations provided a measure of certainty for complainants and respondents, which then informed the Commission's ability to give guidance and improve community understanding – to generate the certainty that provides the necessary confidence for all involved. Determinations were made by a body

that had clear expertise in human rights and the public nature of determinations, as distinct from the confidential nature of conciliation, provided an additional source of clarity for the community about the operation of discrimination laws.

In its submission, Queensland Advocacy Incorporated (QAI) acknowledged the merits of confidential conciliation, but said that it means that 'its impact is limited':

it is unhelpful as a deterrent, as a driver for altering social behavioural norms, as an impetus for the development or reform of laws or as a means by which policies and practices that create healthier, more productive, communities can be developed.¹⁷³

With the removal of the hearing and determination functions from the Commission, and the concomitant loss of this expertise in the form of published determinations, the only articulation of conclusions is through judicial decisions. In this context, as Associate Professor Belinda Smith observed,

Apart from a few initial progressive judgments, the courts have struggled to give anti-discrimination laws the wide and generous interpretation supposedly given to beneficial legislation. In 2006 Kirby J, having noted the courts originally gave anti-discrimination laws 'meaning that rendered them effective', went on to lament

The wheel has turned. In no decision of this Court in the past decade concerned with anti-discrimination laws, federal or State, has a party claiming relief on a ground of discrimination succeeded. If the decision in the courts below was unfavourable to the claimants, it was affirmed. If it was favourable, it was reversed.

Arguably this is because the Australian judiciary is constrained by a very narrow public mandate in respect of economic and social rights (in contrast to the industrial commission). The courts have also been constrained by highly prescriptive and complicated drafting of anti-discrimination laws. The drafting arguably both reflects and reinforces a limited judicial role in promoting real change.¹⁷⁴

One consequence of the 'remarkably small body of discrimination case law',¹⁷⁵ is that important sections of the federal Discrimination Acts have not received sufficient judicial attention. Consequently, 'there is little guidance on the prospects of taking a successful claim to court'¹⁷⁶ which makes it difficult for legal practitioners to advise clients about the strength of their case and the associated risk of an adverse costs order.

Additionally, following the decision in *Brandy*, other agencies were not affected in the same way as the Commission. For example, the registration and enforcement provisions targeted in *Brandy* were mirrored in the *Privacy Act 1988* (Cth) (Privacy Act) at the time. Consequently, following *Brandy*, the Privacy Act also needed to be amended to respond to the High Court's decision. However, the Australian Information Commissioner retains the power to investigate and make determinations on privacy complaints, where conciliation has not resolved the matter, and retains a mechanism to enforce these determinations in the federal courts.¹⁷⁷

6.5 Moving to a more effective model

Submissions received during the Free and Equal consultations, as well as academic analysis, suggest that the legislative response to *Brandy* created a system that does not wholly meet the objectives of an effective system of dispute resolution for matters raising unlawful discrimination.

An intermediate adjudicative process may offer a more effective mechanism for resolving these complaints. The Commission's former hearing and determination model, while undoubtedly more accessible, had its own limitations – in particular, the need for some complainants to participate in multiple and different proceedings before the Commission and the federal courts to achieve an enforceable outcome.

Avoiding duplication and providing immediately enforceable outcomes is presently being achieved by the judicial resolution of unlawful discrimination matters. However, as discussed above, there are considerable barriers to initiating action in the federal courts, raising questions about the actual ability of people to assert their statutory rights. The advantages and disadvantages of each of these models needs to be considered and weighed.

Tribunals, commissions, and other statutory agencies are critical to the functioning of modern government in Australia. They provide an efficient and inexpensive way of regulating the civil law of Australia and scrutinising government decision-making. In the years leading up to *Brandy*, the High Court had shown a willingness to accommodate the needs of modern government by upholding the validity of powers conferred on federal tribunals and statutory bodies.¹⁷⁸

The reintroduction of an intermediate adjudicative process into the federal discrimination law system would also better align federal discrimination law with state and territory discrimination law, where matters are frequently resolved by state tribunals or boards. While acknowledging the legal and constitutional differences, the Commission considers that comparative discrimination law models should be assessed, both in Australian states and territories and internationally. For example, during the 2008 Senate inquiry into the Sex Discrimination Act, Dr Sara Charlesworth suggested that Australia consider adopting a process similar to that used by the New Zealand Human Rights Commission where matters that are unresolved by mediation are referred to the Human Rights Review Tribunal.¹⁷⁹

There are also many federal agencies, such as the Fair Work Commission, the Fair Work Ombudsman, the eSafety Commissioner and the Office of the Australian Information Commissioner (OAIC) that have been conferred with determinative, arbitral or regulatory powers. Like the Commission, these agencies are not 'courts' established under Chapter III of the Constitution. However, across many areas of law, they provide an accessible intermediate layer of adjudication before litigation in court. The experience of these bodies may be instructive.

On 12 December 2019, the Attorney-General announced that the Australian Government would conduct a review of the Privacy Act.¹⁸⁰ In October 2020, an Issues Paper was released.¹⁸¹ In considering an intermediate adjudicative process, the outcomes of this review, and any subsequent legislative change in relation to the OAI's hearing and determination powers, and its corollary enforcement processes, may be useful and relevant.

Consideration should also be given to whether there are ways to address or minimise the concerns associated with the intermediate tier in the past. These include how best to enforce or encourage compliance with decisions and determinations of a statutory body, and how best to reduce duplication with the functions of the federal courts to the greatest extent possible within constitutional limits.

It is now over two decades since the *Brandy* amendments were passed and the Commission considers that it is appropriate to re-evaluate Australia's federal discrimination law system as a whole and revisit the question of an intermediate adjudicative process, with the benefit of contemporary legal understandings and insights drawn from newer tribunals, regulatory commissions, offices, and agencies.

6.6 Arbitration

In 1995, in the range of possible responses to the decision in *Brandy*, consideration was given to conferring on the Commission 'powers which were arbitral in nature, rather than judicial'.¹⁸²

In 2011, the Attorney-General's Department traversed options in its Discussion Paper on discrimination laws that included consent-based arbitration, describing it as 'a more structured process usually involving formal presentation of evidence and legal argument to the arbitrator, who then makes a determination in order to resolve the dispute'. As the determination of the arbitrator is binding, it was suggested that it may have 'a beneficial deregulatory effect in providing a second, relatively low-cost avenue for the binding resolution of disputes'.¹⁸³ The Fair Work Act was cited as an example of a dispute resolution system that includes both conciliation and consent-based arbitration.¹⁸⁴

In 2013, a new s 369 was introduced into the Fair Work Act, under which an employee can have a general protections dismissal dispute arbitrated by the Fair Work Commission, with the consent of both parties, instead of proceeding to court.¹⁸⁵ The general protections provisions provide that an employer must not take adverse action against an employee because of an attribute of that person such as race, sex, sexual orientation, pregnancy, age, or physical or mental disability. Many of these grounds are the same as the protected attributes under federal discrimination laws, although discrimination laws extend protection beyond employment into many areas of public life.

The Attorney-General's Department noted, however, that arbitration can be more costly than conciliation, both for the parties involved and for Government (if it provides the arbitration services).

The Department cited observations that ‘the more formal and structured process involved in arbitration may leave the parties with fewer opportunities to speak or to suggest and consider options that match their needs and interests’.¹⁸⁶

When this matter was raised in the Attorney-General’s Department Discussion Paper, the Commission said that,

while there are possible benefits in providing for a voluntary arbitration process as referred to in the Discussion Paper, such processes traditionally require significant resourcing arising from the more detailed and through investigation associated with determinative processes.¹⁸⁷

The Commission considers that a consent-based arbitration option may have some advantages in terms of strengthening the complaint-handling structure of the Commission and suggests that it be properly assessed as an option for intermediate adjudication.



Reform proposals – Enhancing access to justice



7 Reform proposals – Enhancing access to justice

The following reforms are proposed to enhance access to justice, and as a consequence to improve the effectiveness of federal discrimination law.

Costs

16. The Commission considers that the default position should be that parties bear their own costs. The AHRC Act should include mandatory criteria to be considered by the courts in determining whether costs should be varied. The list included in the Human Rights and Anti-Discrimination Bill 2012, which was based on the Family Law Act, is an instructive one, which is as follows:

- (a) the financial circumstances of each of the parties to the proceedings
- (b) whether any party to the proceedings is receiving assistance provided by the Attorney-General's Department, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance)
- (c) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission)
- (d) whether any party to the proceedings has been wholly unsuccessful in the proceedings
- (e) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings and the terms of any such offer
- (f) any other matters that the court considers relevant.

Evidentiary issues

17. The Commission recommends that a shifting evidentiary burden be introduced in relation to unlawful discrimination matters, while also affirming that the overall onus of proof rests with the complainant in matters that are considered in the federal courts. The Commission supports the approach taken in the Human Rights and Anti-Discrimination Bill 2012 as setting the appropriate threshold, rather than that in s 361 of the Fair Work Act.

18. The Commission develop guidance material about the kinds of matters relevant to discharging the shifting burden, to guide both complainants and respondents in relation to proof of relevant issues.
19. The Commission proposes that the standard of proof be clarified as the usual standard of proof as set out in the *Evidence Act 1995* (Cth) s140.

Representative actions

20. The Commission recommends that unions and other representative groups should be permitted to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.

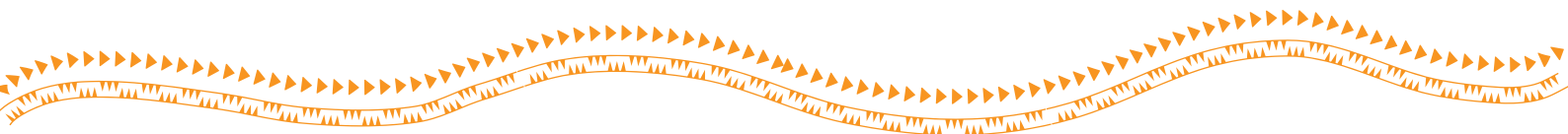
Timeframe for termination of complaints

21. The Commission recommends that a consistent approach should be taken across the four Discrimination Acts in relation to the timeframe for the President's discretion to terminate a complaint. With the amendment to the AHRC Act in August 2021 to introduce a 24-month discretionary termination period for complaints made under the Sex Discrimination Act the Commission recommends that this apply across the four Discrimination Acts.

The Commission supports the provision of guidance in relation to the kinds of factors relevant to the exercise of the President's discretion.

Intermediate adjudicative process

22. The Commission recommends that the Government give serious consideration to reintroducing an intermediate adjudicative process into the federal discrimination system to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts.
23. The Commission suggests that this could take the form of
 - a tribunal-like body
 - the restoration of hearing and determination functions of the Commission
 - the creation of an arbitral process.



Endnotes

- 1 *Federal Court Act 1976* (Cth), s 43; *Federal Circuit Court Act 1999* (Cth), s 79.
- 2 Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31 *Australian Journal of Labour Law* 253, 266. The authors refer to: Tracey Raymond and Sofie Georgalis, *Dispute Resolution in the Changing Shadow of the Law: A Study of Parties' Views on the Conciliation process in Federal Anti-Discrimination Law*, Human Rights and Equal Opportunity Commission, Sydney 2002; Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime*, Sydney 2010, ch 4.
- 3 See, eg, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Final Report, December 2008) ch 6; Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Human Rights Legislation Amendment Bill 1996* (June 1997) ch 4.
- 4 'Legal Costs', *Federal Court of Australia* (Web Page) <<https://www.fedcourt.gov.au/going-to-court/i-am-a-party/court-processes/legal-costs>>.
- 5 See Australian Human Rights Commission, *Annual Report 2019-20* (2020) 56; Australian Human Rights Commission, *Annual Report 2018-19* (2019) 36.
- 6 Legal and Constitutional Legislation Committee, *Human Rights Legislation Amendment Bill 1996* (Report, June 1997) [4.40]–[4.42].
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- 8 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004).
- 9 Australian Government Attorney-General's Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes*, November 2012, 94.
- 10 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [203].
- 11 Queensland Advocacy Incorporated, Submission 109, *Free & Equal Inquiry*, 12.
- 12 See also, eg, Australian Centre for Disability Law, Submission 145, *Free & Equal Inquiry*, 10.
- 13 Senate Legal and Constitutional Committee, Parliament of Australia, *Inquiry into Human Rights Legislation Amendment Bill 1996* (Report, June 1997) [4.41].
- 14 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, [51].
- 15 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, [52].

- 16 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, [53]–[55]. See also Australian Centre for Disability Law, Submission 145, *Free & Equal Inquiry*, 12.
- 17 Eg, Law Council of Australia, Submission 156, *Free & Equal Inquiry*; Public Interest Advocacy Centre, Submission 90, *Free & Equal Inquiry*; Legal Aid NSW, Submission 112, *Free & Equal Inquiry*; Aimee Cooper, Submission 133, *Free & Equal Inquiry*. This is also the case in the UK: UK report 2019 [193].
- 18 Public Interest Advocacy Centre, Submission 90, *Free & Equal Inquiry*, 18.
- 19 Dominique Allen, Submission 66, *Free & Equal Inquiry*.
- 20 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (Final Report, December 2008) [6.24], referring to Submission 25. Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) 143, re small business and burden of litigation costs.
- 21 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (Final Report, December 2008) [6.23], evidence of the Victorian Automobile Chamber of Commerce.
- 22 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (Final Report, December 2008) [6.25], evidence of Mr Scott Barklamb of ACCI cited.
- 23 Explanatory Memorandum, Human Rights Amendment Bill 2017 (Cth) [55].
- 24 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (Report, 28 February 2017) 86, 90.
- 25 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (Report, 28 February 2017) rec 19.
- 26 *Australian Human Rights Commission Act 1986 (Cth)* s 46PH(2A).
- 27 Explanatory Memorandum, Human Rights Amendment Bill 2017 (Cth) [178].
- 28 Explanatory Memorandum, Human Rights Amendment Bill 2017 (Cth) [177].
- 29 Victoria Legal Aid, Submission 131, *Free & Equal Inquiry*, 4.
- 30 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) 393, Finding 13.12.
- 31 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Human Rights Legislation Amendment Bill 1996* (June 1997) [4.42].

- 32 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Human Rights Legislation Amendment Bill 1996* (June 1997) [4.48].
- 33 'Commonwealth public interest and test cases' *Attorney-General's Department* (Web Page) < <https://www.ag.gov.au/legal-system/legal-assistance-services/commonwealth-legal-financial-assistance/commonwealth-public-interest-and-test-cases>>.
- 34 See *Federal Discrimination Law* on the power of the Federal Courts to set and limit costs, 432–438.
- 35 Maria Nawaz, 'Respect@Work: What's it Going to Take?' (2021) 77 (May) *Law Society Journal* 68, 69.
- 36 See, eg, *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 109; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100.
- 37 Explanatory Memorandum, Family Law Bill 1974 (Cth), 11 [50].
- 38 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) rec 13.4.
- 39 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) 394.
- 40 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) 394.
- 41 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) 395.
- 42 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [2228].
- 43 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) 396.
- 44 Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004) 396.
- 45 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (Final Report, December 2008) 156.
- 46 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020), 2020.
- 47 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020), rec 25.
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- 49 Human Rights and Anti-Discrimination Bill 2012 (Cth), Exposure Draft Legislation, cl 133.
- 50 Explanatory Notes, HRAD Bill 2012, 95.
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- 52 Victoria Legal Aid, Submission 131, *Free & Equal Inquiry*, 4.
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- 54 Senate Legal and Constitutional Legislation Committee, *Human Rights Legislation Amendment Bill 1996* (June 1997) [4.45], paraphrasing Human Rights and Equal Opportunity Commission submission no 10 and 10A.
- 55 Senate Legal and Constitutional Legislation Committee, *Human Rights Legislation Amendment Bill 1996* (June 1997) [4.47].
- 56 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, [7.5], rec 13.
- 57 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 289, [53].
- 58 See Human Rights and Anti-Discrimination Bill 2012 (Cth), Exposure Draft Legislation, cl 22(3). Australian Human Rights Commission submission to the Senate Legal and Constitutional Affairs Committee, *Exposure draft Human Rights and Anti-Discrimination Bill 2012* (December 2012), 6.
- 59 In 2019-20 and 2018-19, 2% of finalised complaints regarding unlawful discrimination proceeded to court, in 2017-18, less than 3% proceeded to court and in 2016-17, less than 2%. Australian Human Rights Commission, *Annual Review 2019-20: 2019-20 Complaints Statistics* (2020) <https://humanrights.gov.au/sites/default/files/2020-10/AHRC_AR_2019-20_Complaint_Stats_FINAL.pdf>; *Australian Human Rights Commission, Annual Review 2018-19: 2018-19 Complaints Statistics* (2019) <https://humanrights.gov.au/sites/default/files/2019-10/AHRC_AR_2018-19_Stats_Tables_%28Final%29.pdf>; Australian Human Rights Commission, *Annual Review 2017-18: 2017-18 Complaints Statistics* (2018) <https://humanrights.gov.au/sites/default/files/AHRC_Complaints_AR_Stats_Tables_2017-18.pdf>; Australian Human Rights Commission, *Annual Review 2016-17: 2016-17 Complaints Statistics* (2017) <https://humanrights.gov.au/sites/default/files/AHRC_Complaints_AR_Stats_Tables%202016-2017.pdf>.
- 60 *Australian Human Rights Commission Act 1986* (Cth) s 14(1).
- 61 *Age Discrimination Act 2004* (Cth) s 15(2); *Sex Discrimination Act 1984* (Cth) s 7C; *Disability Discrimination Act 1992* (Cth) s 6(4). See also: *Discrimination Act 1991* (ACT) s 70; *Anti-Discrimination Act 1991* (QLD) s 205; *Equal Opportunity Act 2010* (VIC) s 9(2).
- 62 Australian Government Attorney-General's Department, Submission No 130 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Report, 21 February 2013) 1.
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- 64 *Fair Work Act 2009* (Cth) s 361.

- 65 *Commonwealth Conciliation and Arbitration Act 1904* (Cth) s 9(3). For the operation of the presumption, see, eg, Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [17.3.1]–[17.3.12].
- 66 Fair Work Commission, *General Protections Benchbook*, 'Rebuttable presumption as to reason or intent' (Online, 15 June 2018) <<https://www.fwc.gov.au/general-protections-benchbook/how-do-the-general-protections-work/rebuttable-presumption>>.
- 67 Fair Work Commission, *General Protections Benchbook*, 'Rebuttable presumption as to reason or intent' (Online, 15 June 2018) <<https://www.fwc.gov.au/general-protections-benchbook/how-do-the-general-protections-work/rebuttable-presumption>>.
- 68 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [49]. Australian Human Rights Commission, Annual Review 2019–20: 2019–20 Complaints Statistics (2020) <https://humanrights.gov.au/sites/default/files/2020-10/AHRC_AR_2019-20_Complaint_Stats_FINAL.pdf>; Australian Human Rights Commission, *Annual Review 2018–19: 2018–19 Complaints Statistics* (2019) <https://humanrights.gov.au/sites/default/files/2019-10/AHRC_AR_2018-19_Stats_Tables_%28Final%29.pdf>.
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- 70 *McDonnell Douglas Corp v Green* (1973) 411 US 792.
- 71 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [50], citing as examples: *Marcantel v State of Louisiana Department of Transport and Development* 37 F.3d 197 (5th Cir, 1994).
- 72 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [51]: *The effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) rec 22.
- 73 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [462].
- 74 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [463].
- 75 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [464].

- 76 Australian Government Attorney-General's Department, Submission 130 to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012, 2.
- 77 Australian Government Attorney-General's Department, Submission 130 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Report, 21 February 2013) 3.
- 78 It was also expressed during the National Human Rights Consultation: National Human Rights Consultation (Report, September 2009) 116.
- 79 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, [133]–[134]. Also: Victoria Legal Aid, Submission 131, *Free & Equal Inquiry*; Legal Aid NSW, Submission 112, *Free & Equal Inquiry*; Maurice Blackburn Lawyers, Submission 132, *Free & Equal Inquiry*.
- 80 Australian Council of Trade Unions, Submission 159, *Free & Equal Inquiry*, 19.
- 81 Australian Council of Trade Unions, Submission 159, *Free & Equal Inquiry*, 20. However, it also said that s 361 of the Fair Work Act has been implemented in a 'narrow, overly technical way', which needs to be taken into account in ensuring the introduction of such an approach in discrimination laws is effective: citing *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32.
- 82 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 29–30.
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- 85 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 30.
- 86 Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 580.
- 87 Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 604.
- 88 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [53].
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- 96 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 287, [45].
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- 98 *Briginshaw v Briginshaw* (1938) 60 CLR 336; Australian Human Rights Commission, *Federal Discrimination Law* (2016) 347.
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- 100 *Qantas Airways Ltd v Gama* [2008] FCAFC 69; Australian Human Rights Commission, *Federal Discrimination Law* (2016) 348.
- 101 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, [135].
- 102 Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 581, 584–586.
- 103 *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c).
- 104 *Australian Human Rights Commission Act 1986* (Cth) s 46PB(1).
- 105 Section 46PO(1) only permits an 'affected person' to commence action in the federal courts. 'Affected person' is defined to mean a person on whose behalf the complaint was lodged. See also *Access for All Alliance (Hervey Bay) v Hervey Bay City Council* [2007] FCA 615.
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Chapter 5

Improving the practical operation of laws



Major Reform 1:
Building a
preventative
culture

Major Reform 2:
Modernising the
regulatory
framework

Major Reform 4:
Improving the
practical
operation of laws

Major Reform 3:
Enhancing access
to justice



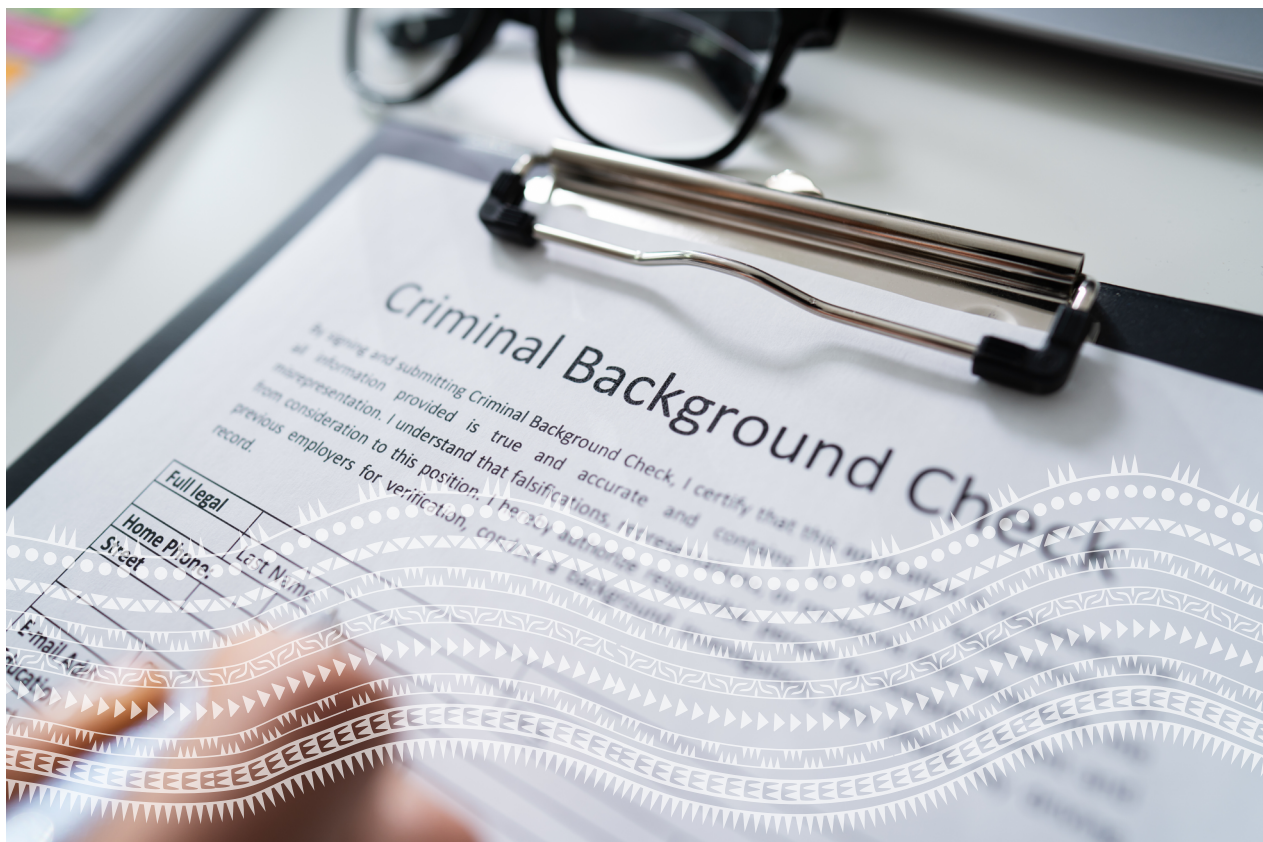
1 The compelling case for immediate reform

Australia's discrimination laws are complex and include some operational quirks; have gaps in their coverage; and, in some cases, have been limited or further complicated by judicial decisions.

Recommendations put forward in this chapter seek to enhance the operation of discrimination laws as they currently are, but also pave the way for further consideration of long term and substantial reforms.

The Commission makes a number of specific recommendations in relation to

- Ensuring discrimination law protects everyone in the world of work
- Reforming ILO 111 discrimination as unlawful discrimination
- Reviewing all permanent exemptions
- Defining discrimination and related concepts
- Managing intersectionality
- Some technical issues



2 Coverage of the Acts

This section focuses on specific areas of coverage of the Discrimination Acts where the case for reform is compelling. Some recommendations made in the *Respect@Work* report have been accepted by the Government and enacted in 2021 in relation to the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act), such as the extension of the Sex Discrimination Act to state employees.

The Commission considers that other recommendations of the *Respect@Work* report made in relation to the Sex Discrimination Act should extend to all Discrimination Acts, for example to broaden coverage in all federal Discrimination Acts with respect to the public area of employment so that the protections cover all persons in the world of work, including paid and unpaid workers, and those who are self-employed.¹

The Commission also considers that the discrimination in employment (ILO 111) complaints process should be reformed by converting some existing grounds into unlawful discrimination complaints or by ensuring exclusive coverage in the Fair Work Act. The current ILO 111 complaints process should cease to exist in its current form due to this scheme being so deficient and incapable of producing appropriate outcomes in many cases.

Other specific issues of coverage are also considered, including protections for discrimination on the basis of thought, conscience or religion.

2.1 Ensuring discrimination law protects everyone in the 21st century ‘world of work’

(a) Protection for unpaid workers

The Commission recommends that discrimination laws be amended to protect volunteers and interns.

Federal discrimination laws currently do not apply to volunteers and interns, as they are not covered within the definition of ‘employment’.

As modern work practices have changed, these exclusions have become less justifiable.

For example, internships are commonly part of higher education courses and can be critically important for young people seeking to enter the workforce. Leaving such a vulnerable cohort of people excluded from protections against unlawful discrimination is unacceptable.

As noted in the Attorney-General’s Department Discussion Paper on the consolidation of discrimination laws, voluntary workers make a significant contribution to the Australian economy and society.² Yet voluntary workers are not protected from discrimination in the workplace by the Age Discrimination Act and Disability Discrimination Act, as they do not fall within the statutory definition of ‘employment’. Similarly, relevant protections under the Fair Work Act do not cover voluntary workers as they do not fall within the ordinary meaning of ‘employee’.³ Coverage under state and territory laws is inconsistent.⁴

In Australia, the definition of worker under the model Work Health and Safety laws is deliberately broad and intended to capture any person who carries out work in any capacity for a person conducting a business or undertaking.⁵ This is now the approach adopted in the Sex Discrimination Act, following the passage of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*.

The Exposure Draft religious freedom bills 2019 also considered how 'employment' should be defined in federal discrimination legislation. They proposed extending protection to volunteers. The Commission supported this in both Exposure Drafts and recommended it be extended to all discrimination laws.⁶

In the *Respect@Work* report, the Commission recommended that every worker, whether paid, unpaid or self-employed, should have access to legal protections from workplace sexual harassment, no matter who sexually harasses them in the course of their work, as well as access to adequate remedies.⁷

The Commission said that the definition of 'workplace participant' in the Sex Discrimination Act should be amended to ensure that all workers were adequately protected from sexual harassment. Such a change, as subsequently implemented through the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*, addresses the previously existing gaps in coverage for volunteers, unpaid workers, self-employed persons and persons working in shared workspaces, as well as ensuring protections for those workers that are engaged in non-traditional work arrangements and relationships, consistent with the international framework.

This should continue to be understood in conjunction with the protections relating to goods and services, which in practice provide protections to workers who are sexually harassed by customers in the course of providing goods and services. The Commission will develop guidance material to accompany legislative change to increase public awareness of the new law.

Recommendations for explicitly protecting voluntary workers have been made as far back as the 2008 Senate report on the Sex Discrimination Act, and in state and territory reviews.⁸ The Law Council of Australia recommended similarly.⁹

Legal Aid NSW identified the omission of unpaid interns as a significant gap, which 'leaves a substantial number of people vulnerable to discrimination without recourse'.¹⁰

Unpaid interns can be particularly vulnerable to mistreatment in the workplace. Many are young people with limited workplace experience. Interns, regardless of their age, may feel that they must tolerate mistreatment in order to get experience, paid work or positive references. The lack of legal protection for this group can reinforce this perception.¹¹

In response to the Attorney-General's Department's Discussion Paper on the consolidation of discrimination laws in 2011, concerns were expressed that the protection of volunteer workers would place an unreasonable burden on organisations with a significant voluntary workforce. Conversely, it was noted, providing protection may encourage volunteerism, which would have significant economic benefits.¹²

While acknowledging the gap in coverage, the Australian Chamber of Commerce and Industry (ACCI) submitted in this Free and Equal inquiry, that employees and volunteers were still different:

Defining a 'volunteer' as a type of 'employee' fails to recognise important distinctions between these two different types of workers, and would be very confusing for small business employers in particular, and volunteers.¹³

ACCI encouraged the Commission to reach out to organisations representing volunteers to engage in this discussion and to retain the current coverage of discrimination laws in relation to volunteers and interns in the meantime.

In the *Respect@Work* report, the Commission pointed to international labour standards and that ILO Convention 190 encourages States to adopt a broad definition of 'worker' and a broad scope through the concept of the 'world of work':

including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer.¹⁴

In its response to the *Respect@Work* report, the Government did not specifically address this point, but 'agreed in principle' with the set of recommendations in Recommendation 16 – which include the definition of 'workplace participant' and 'workplace' – saying that the Government will amend the Sex Discrimination Act 'to ensure greater alignment with model WHS laws and to make the system for addressing sexual harassment in the workplace easier for employers and workers to understand and navigate'.¹⁵ The subsequent *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (the Act) includes new definitions of 'worker' and 'person conducting a business or undertaking' which are taken from the *Work Health and Safety Act 2011* (Cth).

The Act includes these definitions in 28Bs of the Sex Discrimination Act to expand the range of work-related environments in which sexual harassment and sex-based harassment will be prohibited. Crucially, for the first time, the law will expressly protect unpaid workers like volunteers, interns and students, as well as people who are self-employed, from harassment.

The Commission welcomed these amendments. The amendments also fit neatly into the model proposed by the Sex Discrimination Commissioner of improving the coordination, consistency and clarity between anti-discrimination, employment and work health and safety legislative schemes.

While the Act provides volunteers and interns with protection against sexual harassment and sex-based harassment, such people will not be able to make a claim of sex discrimination. This is problematic because many claims of sexual harassment also include a claim of sex discrimination.

The Commission therefore recommended to the Senate Education and Employment Legislation Committee inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 that the provisions against harassment that the Bill provides to volunteers and interns should be extended to protection against discrimination under the Sex Discrimination Act and discrimination under the other three federal discrimination laws.¹⁶ The Committee's Report considered the Commission's recommendation but did not recommend that these provisions extend beyond the Sex Discrimination Act.¹⁷

(b) State government employees

The Commission has previously recommended that the Sex Discrimination Act be amended to apply to employees of state governments. This has now been achieved through the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*.¹⁸

The exclusion of state government employees from the coverage of the Sex Discrimination Act was an anomaly among federal discrimination law protections. It reflected the state of thinking in 1984 about the application of the Act. Times have changed.

No other federal discrimination law includes this exception. The Exposure Draft religious freedom bills in 2019 were also drafted to cover state government employees.

Legal Aid NSW saw the issue as straightforward: all workers in NSW, and other states, should have the same rights in relation to sex discrimination and sexual harassment, and strongly supported the amendment of the Sex Discrimination Act. Maurice Blackburn urged the reform as a matter of 'absolute priority'.¹⁹

In their submission to this Free and Equal inquiry, Legal Aid NSW referred to the impact of the limitation in the Sex Discrimination Act in NSW:

almost 400,000 employees of state and local government are not protected by the Sex Discrimination Act, and must bring sex discrimination claims, including sexual harassment claims, under the Anti-Discrimination Act 1977 (NSW),²⁰

While protection under the NSW law is 'broadly similar', there is a 'significant difference in the powers of adjudicators':

Where the NSW Civil and Administrative Tribunal finds a complaint of sex discrimination substantiated, it may award damages not exceeding \$100,000. Conversely, there is no limit on the sum of damages that the Federal Court or Federal Circuit Court can award if it finds a breach of the Sex Discrimination Act.²¹

Ensuring this coverage was also recommended by the Senate Standing Committee on Legal and Constitutional Affairs in its 2008 inquiry into the effectiveness of the Sex Discrimination Act.²² It is a reform issue that was long overdue.

The *Respect@Work* report recommended that the exemption of state public servants be removed.²³ The Government response to that report in April 2021 was that it would ‘work with states and territories to remove the current exemption of state public servants’.²⁴ Subsequently the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* was passed, which removes the exemption that prevented State public servants from making claims of discrimination or harassment under the Sex Discrimination Act. The Commission welcomed this reform. The Act also provides additional clarity that the provisions of the Sex Discrimination Act extend to Members of Parliament, their staff and judges in all jurisdictions.²⁵

(c) Carer/family responsibilities

The Commission proposes that the Sex Discrimination Act be amended to cover family responsibilities/ carer responsibilities both in terms of direct and indirect discrimination and applying to all areas of public life. This would be consistent with the coverage of other grounds in the Sex Discrimination Act.

There are current gaps in coverage for carer responsibilities in the discrimination laws. The Commission recommends filling them.

The definition of discrimination on the ground of family responsibilities appears in s 7A of the Sex Discrimination Act. Unlike the other grounds in the Sex Discrimination Act, the definition is restricted to direct discrimination and discrimination in specified areas of work (including employees, contract workers, partners, commission agents, qualifying bodies, registered organisations and employment agencies).²⁶

Unlike the other grounds of discrimination in the Sex Discrimination Act, there is no provision in s 7A for indirect discrimination based on the imposition of a ‘condition, requirement or practice’ that disadvantages people with family responsibilities.

The Human Rights and Anti-Discrimination Bill 2012 (Cth) (HRAD Bill) did not seek to change the scope of the prohibition of family responsibilities discrimination in the Sex Discrimination Act. The Commission submitted to the Senate committee inquiry on the HRAD Bill that consideration be given to covering discrimination on the basis of carer responsibilities expressly, ‘in the interests of improved clarity, and consistency with the *Fair Work Act 2009* (Cth) and with state and territory discrimination laws’.²⁷

In practical terms, the limitation in relation to carer/family responsibilities increases the level of complexity in providing protection for people with such responsibilities and provides limited coverage for men with family responsibilities.

Some coverage is also provided in the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act) for people who are associates of a person with a disability.

There are differences in discrimination law with the coverage of carers in the Fair Work Act and in state and territory legislation. Section 97 of the Fair Work Act covers employees who have caring responsibilities for immediate family members or household members. The *Discrimination Act 1991* (ACT) also covers discrimination based on parent, family, carer or kinship responsibilities. The Commission recommends that a consistent definition of carers in the Fair Work Act and federal discrimination laws be adopted.

Legal Aid NSW pointed to the fact that a significant number of working Australians have caring responsibilities, 'including for children, elderly parents or family members with disability'.²⁸ It supported amending the Sex Discrimination Act to provide expressly for protection from both direct and indirect discrimination on the basis of family responsibilities in work and agreed that consideration should be given to this protection applying in all areas of public life.

Family responsibility claims are often difficult to run because they take the form of indirect discrimination. An example where a person may be disadvantaged by a lack of an indirect ground is a requirement to work full-time. This disadvantages women because they disproportionately bear caring responsibilities (in respect of children), but not men. So a woman could run an indirect sex discrimination claim, while a man could not. If indirect family responsibility discrimination was prohibited, the requirement to work full-time would disadvantage those with family responsibilities (regardless of their sex). This would allow any sex to challenge requirements and conditions that disadvantage those with family responsibilities.

Family Responsibilities Case Study: *Burns v Media Options Group and Ors* [2013] FCCA 79.

Mr Burns' partner Ms Mezzomo became ill with cancer which required intensive medical treatment over a relatively short period of time. Mr Burns claimed that his employer provided no flexibility to him in meeting Ms Mezzomo's care needs. Mr Burns claimed discrimination in employment as an 'associate' of a person with a disability under section 15 of the Disability Discrimination Act, and also discrimination in employment on the ground of family responsibilities under sections 7A and 14 of the Sex Discrimination Act.

Nicholls J found that the respondents engaged in a range of discriminatory conduct including telling him not to stay home to care for Ms Mezzomo, pressuring him to come to work and not to leave until he had finished the tasks allocated to him, and imposing a requirement that he could only take leave at times determined by his employer. His Honour concluded that Mr Burns was dismissed from his employment at least in part because of his family responsibilities.²⁹

Women’s Legal Service NSW submitted that

Family and carer responsibilities should be fully protected both from direct and indirect discrimination across all areas of public life. Discrimination in this area should also include a failure to make reasonable adjustments. The definition should be broadened to include domestic relationships and cultural understandings.³⁰

The Australian Council of Trade Unions (ACTU) supported the extension of protection to include family responsibilities and to include indirect discrimination in all areas of public life. They also recommended stronger positive rights to secure quality, flexible working arrangements for parents and carers in the Fair Work Act, including a specific positive duty on employers to reasonably accommodate requests by employees for such arrangements.³¹

ACCI pointed out that the provisions the Commission noted were in addition to ‘the extensive range of rights that parents and carers currently enjoy under the Fair Work Act’. It considered the current rights and protections are ‘comprehensive’ and already ‘balance the needs of those with family and carer responsibilities with those who seek to run an effective business to ensure employment opportunities are not only retained, but grow’.³² ACCI supported consistent definitions in line with the Fair Work Act.

The Australian Industry Group were opposed to caring and family responsibilities in the Sex Discrimination Act, ‘as a provision aligned with sex discrimination’:

Caring and family responsibilities are, and should be, gender neutral responsibilities and relevant protections are more appropriately provided for in the FW Act. The apparent gap identified in the Discussion Paper in the Sex Discrimination Act’s coverage has in many ways been covered by the General Protections in the FW Act. As such Ai Group is not convinced that additional indirect discrimination provisions in the Sex Discrimination Act for persons with family and caring responsibilities are appropriate or necessary.³³

2.2 ILO 111 Discrimination as unlawful discrimination

The Commission proposes that irrelevant criminal record in employment and the right to freedom of thought, conscience and religion should be included as protected attributes in the ‘unlawful discrimination’ jurisdiction of the Commission. In consequence, the ILO complaints jurisdiction of the Commission should be repealed.

(a) Scope

The Commission currently administers three separate complaint jurisdictions: unlawful discrimination, human rights and ILO 111 discrimination in employment complaints. Each has separate pathways for resolution of disputes.

Discrimination in employment on the basis of grounds referable to ILO 111 were included in legislation via the AHRC Act in 1986 under the rubric of ‘equal opportunity in employment’. The objective of ILO 111 is to enhance equal opportunity in the workplace. ILO 111 also underpins aspects of the Fair Work Act.

The ILO grounds are included in the definition of ‘discrimination’ in s 3 of the AHRC Act or prescribed in reg 4 of the Australian Human Rights Commission Regulations 1989 (AHRC Regulations). ‘Discrimination’ is defined as

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (b) any other distinction, exclusion or preference that:
 - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;
 but does not include any distinction, exclusion or preference:
 - (c) in respect of a particular job based on the inherent requirements of the job; or
 - (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

The complaints received by the Commission on the basis of discrimination in employment relate primarily to complaints on the grounds of

- religion
- irrelevant criminal record
- trade union activity
- political opinion.

Table 5.1: Number of ILO Complaints³⁴

Ground	2017–18	2018–19	2019–20
Religion	8	15	19
Political opinion	1	1	3
Social origin			
Medical record	1		
Criminal record	95	90	97
Trade union activity	1	3	2

Complaints brought under the AHRC Act in relation to discrimination in employment are treated differently from complaints brought under the four federal discrimination laws.

The principal difference is that, while ‘unlawful discrimination’ complaints have possible access to judicial consideration, ‘discrimination in employment’ complaints do not.

Not only does the Commission consider that there is no legal rationale that would justify such a difference, particularly that would justify the circumscribed rights in the ILO 111 jurisdiction, but it is also confusing to have different ‘unlawful discrimination’ and ‘discrimination in employment’ processes in the same Act.

(b) Human Rights and Anti-Discrimination Bill 2012

The Human Rights and Anti-Discrimination Bill 2012 (Cth) (HRAD Bill) proposed bringing the grounds covered under the ‘equal opportunity in employment’ complaints scheme within the ‘protected attributes’ of unlawful discrimination and not maintaining a separate regime for these complaints.

The Explanatory Notes to the Bill set out the reasons for the proposed amendments:

The separate equal opportunity in employment complaints regime creates confusion and leads to significant regulatory overlap. Permitting complaints in relation to conduct which is not unlawful represents poorly designed regulation. Providing clear remedies will also benefit individuals, who will be able to take binding action if they consider they have been discriminated against.³⁵

However, the Bill maintained the limitation in relation to areas of work. It also adopted a different approach in relation to criminal record discrimination.

While welcoming the enhancement of federal discrimination law protection by bringing the ILO grounds within the scheme of ‘unlawful discrimination’, the Commission expressed concern that providing *narrower* coverage for some attributes than others could result in some complexity and confusion. The Commission pointed in particular to the implications for:

- intersectional matters (for example where a matter which is not work related raises issues both of race and religion; or of disability and medical record)
- consistency between federal law and state and territory discrimination laws (which provide more general coverage on a number of these grounds).³⁶

The Commission therefore recommended that further consideration be given to cover discrimination on the basis of all protected attributes *in all areas of public life*, ‘in the interests of simplicity and improved consistency with state and territory discrimination laws’.

While the practical application of these amendments would arise mainly in employment situations, the Commission recommends that the distinction between employment and public life should not be retained in future treatment of the ILO 111 grounds.

The Committee report noted that a number of other stakeholders agreed with the Commission's position, referring in particular to the submission by academics from the University of Adelaide Law School, who argued that limiting the application of some attributes will undermine the effect of the legislation as a whole:

Enacting prohibitions of discrimination only in the context of work will inevitably inspire questions as to why the prohibitions are not extended into other areas of public life. Not only does this have the potential to undermine public confidence in the scope and operation of protections against discrimination offered at federal level, it will also limit the utility of the federal legislation to effect real change in discriminatory attitudes and beliefs in society. Limiting the prohibitions to the context of work effectively states that discrimination on the basis of religion in education (for example) is not serious because it is not prohibited. Such limitations on the regulation of discrimination also have the potential to undermine perceptions of the government's commitment to principles of equality and a broad human rights agenda.³⁷

The Committee also referred to the Discrimination Law Experts Group, who agreed that all attributes should be covered in all areas of public life, stating that limiting protection for these attributes to work-related areas 'creates an irrational disparity between the status accorded to these attributes and that accorded to other attributes protected by the [Draft Bill]'.³⁸

The Commission noted that this approach did not appear to raise significant issues of regulatory burden, having regard to the extent of existing coverage in state and territory discrimination laws; or of constitutionally valid application, having regard to the breadth of the non-discrimination provisions of the ICCPR and the ICESCR.³⁹

The Commission considers that this approach should be taken in relation to the future consideration of ILO 111 grounds. The Law Council of Australia, for example, agreed that the ILO grounds should be applicable to all areas of public life, 'unless there is a strong rationale to the contrary'.⁴⁰

The following sections consider how the matters currently covered in the Commission's ILO 111 jurisdiction should be treated in future.

(c) The right to freedom of thought, conscience and religion

The Commission recommends that the right to freedom of thought, conscience and religion be included as a new protected attribute in federal unlawful discrimination law; not be limited to employment; and have full access to judicial remedies.

The Commission has long been on record supporting protections, within the unlawful discrimination law framework, for freedom of thought, conscience and religion. Most recently this was expressed in relation to the Exposure Drafts of the Religious Freedom Bill on 27 September 2019 and 31 January 2020.⁴¹

The Commission strongly supports the addition of protection on the basis of thought, conscience and religion as a new protected attribute in all aspects of public life.

The Commission considers that there is a clear case for providing proper protection for this attribute on the same basis as the existing unlawful discrimination provisions.

The current protection, under the Commission's discrimination in employment jurisdiction, is inadequate. It does not provide remedies through access to the courts. It is also limited to employment or occupation, rather than a broad focus on public life, as is the case for unlawful discrimination.

The Commission also disagreed with the HRAD Bill's proposed limitation of religion as a new protected attribute only in relation to areas of work.⁴²

Currently, there may be some limited protection of religion under the Racial Discrimination Act where the courts of other jurisdictions have found that members of particular groups or faiths, such as Sikhs and Jews, are covered on the ground of 'ethnic origin'.⁴³ Other religious groups, such as Muslims and Christians, have been found not to constitute a group with a common 'ethnic origin' in other jurisdictions.⁴⁴

The lack of comprehensive coverage of all people based on their religion or belief, and the lack of coverage in significant areas of public life, is a clear shortcoming of existing federal discrimination law.

Stakeholders agreed that protections from religious discrimination are currently inadequate and had provided submissions in relation to the Exposure Draft Bills.

The Australian Industry Group, for example, supported the right both to be religious and non-religious, saying that, '[b]usinesses, of course, manage a combination of multi-faith and non-religious workforces while striving to ensure that their operations are viable, productive, competitive and harmonious'.⁴⁵

The Law Council of Australia noted that the Commission's proposed attribute of a right to freedom of thought, conscience or religion was 'broader in scope than that proposed' in the first Exposure Draft Bill, which would have made discrimination unlawful on the ground of 'religious belief or activity'.⁴⁶

For the purpose of this Position Paper, the Commission reiterates its view that the current provision in the AHRC Act, framed through the limited lens of ILO 111 and not as 'unlawful discrimination', is inadequate and that that protection should be elevated to the same level as other protected attributes.

The Commission also notes that legislating for new protected attributes relating to the right to freedom of thought, conscience and religion should be carefully framed and reinforced by principles of non-discrimination and equality. Attempts to do this in the Draft exposure bills on religious freedom in 2019 did not get the balance right.⁴⁷

(d) Irrelevant criminal record

The Commission recommends that discrimination on the basis of irrelevant criminal record should be brought under the 'unlawful discrimination' framework.

The Commission proposes that complaints of discrimination in employment on the basis of irrelevant criminal record should be a fully protected attribute under federal discrimination law, meaning that they have the same pathway for resolution as discrimination complaints made under the four federal discrimination laws.⁴⁸

(i) Inclusion as a specific ground in the AHRC Act

Discrimination on the basis of criminal records was included as a specific ground of discrimination in employment to implement a recommendation of the Australian Law Reform Commission (ALRC) in the 1987 report, *Spent Convictions*.⁴⁹ The ALRC identified the difficulties faced by former offenders resulting from the mere fact of having criminal records, and concluded that ‘there is a strong case for doing something about the problems faced by former offenders’⁵⁰, balancing

the offender’s need to return to full citizenship against the public interest in the prevention and detection of crime, and in appropriate decision making in judicial and other contexts.⁵¹

The ALRC concluded that the difficulties faced by former offenders ‘may be appropriately reduced, if not avoided’, by:

- minimising the negative consequences that attach to old (spent) convictions
- making it unlawful to discriminate unreasonably against a person on the basis of his or her criminal record.⁵²

The ALRC noted that former offenders received little legal protection against unreasonable treatment on the basis of their criminal records at the time and were not expressly protected under the existing legislation that dealt directly with discrimination, either at state or federal level.⁵³ It concluded that, ‘[i]f discrimination on the ground of criminal record is to be taken seriously, effective remedies are needed. Complainants need enforceable rights and formal enforcement mechanisms.’⁵⁴

The ALRC concluded that legislative reform was necessary to protect former offenders from ‘unjustified discrimination’ and recommended the enactment of a ‘spent conviction’ scheme in Commonwealth legislation.⁵⁵ The ALRC recommended amendment by regulation to provide that discrimination on the ground of criminal record, or of facts relating to a conviction, would be covered by the equal opportunity provisions of the Commission’s legislation.⁵⁶ In addition, noting that the most that the Commission could do in the area of ILO 111 discrimination was to make unenforceable recommendations, the ALRC recommended the enactment of Commonwealth legislation providing for unlawful discrimination on the ground of criminal record, modelled on the provisions of the Sex Discrimination Act.¹⁸

The Government implemented part of the ALRC’s recommendation in relation to criminal records: by including ‘criminal record’ in the definition of ‘discrimination’ in the *Human Rights and Equal Opportunity Commission Regulations 1989* – now the Australian Human Rights Commission Regulations. However, the way that complaints in relation to such a ground was left untouched: they were left to be dealt with under the approach to ILO discrimination and not like the regimes under the Discrimination Acts.

'Irrelevant criminal record' encompasses circumstances when someone does not experience equality of opportunity in employment because of their criminal record. Under the AHRC Act, there is no definition of what constitutes 'criminal record'. However, it has been interpreted broadly to include not only what actually exists on a police record, but also the circumstances of the conviction.⁵⁷ Section 3(1)(c) of the AHRC Act additionally provides that, in relation to irrelevant criminal record complaints, 'discrimination' 'does not include any distinction, exclusion or preference, in respect of a particular job, that is based on the inherent requirements of the job'. This means, for example, that an employer can legitimately refuse to employ a person for a particular role if, given their specific criminal record, they are unable to fulfil the inherent requirements of that role.

Spent convictions are old convictions determined to be 'spent' under spent conviction and offender rehabilitation laws and schemes.⁵⁸ Under spent convictions laws, employees or job applicants are not required to disclose information about their spent convictions to anyone, even if asked about it, unless there is a special exemption or requirement under another law. Disclosure of spent convictions can also result in claims of discrimination.⁵⁹

To provide further clarification to the scope of the ground, the Regulations were amended in 2019 to include the word 'irrelevant', before 'criminal record'.

In 2005 the Commission produced *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal Record*. The guidelines were the result of an extensive research and consultation process undertaken by the Commission in 2004 and 2005. The Guidelines were revised in 2007 and in 2012.⁶⁰

On the Record provides information and practical guidance on how to prevent criminal record discrimination in the workplace. It covers existing anti-discrimination and related laws, as well as best practice principles when recruiting or employing someone who may have a criminal record.

(ii) Impact of criminal records discrimination

In 2020–21 there were 105 complaints on the ground of irrelevant criminal record, and it is the largest ground of complaint under the ILO 111 grounds of discrimination in employment under the AHRC Act.⁶¹

An illustration is seen in the following case study.⁶²

Case study: *Ms Jessica Smith v Redflex Traffic Systems Pty Ltd* [2018 AusHRC 125]

Ms Smith applied for the role of Mobile Speed Camera Operator and was offered a position at Redflex. Redflex required that she undergo a criminal history check. Ms Smith responded indicating that the check would likely return a record of disclosable offences. She was subsequently advised that her application would not be processed further because of her criminal history. Ms Smith requested a copy of the information Redflex was relying upon and an opportunity to explain her past offences. However, she received no response from Redflex.⁶³

Redflex made submissions that due to Ms Smith's criminal history she could not perform the inherent requirements of the role. Redflex's client, Roads and Maritime Services NSW, had a contractual stipulation that employees undergo criminal history checks.⁶⁴

The President found that inherent requirements of the role were: that the person be trustworthy and of good character; that the person be able to 'respond calmly and professionally' in hostile environments; that the person be able to properly handle proprietary information; and that the person has a driving record that demonstrated a commitment to road safety.⁶⁵

The President found that the act of not progressing Ms Smith's offer of employment constituted discrimination under s3(1) of the AHRC Act. The nature of the record, the context of the record and personal circumstances should all be considered when determining questions of character.⁶⁶ The President considered Ms Smith's criminal record, which included two offences without custodial sentences that were 9 and 12 years old, and Ms Smith's subsequent efforts in pursuing her education and career.⁶⁷ The President was not persuaded that there was a tight correlation between the inherent requirements of the role and Ms Smith's criminal record.

The President recommended that Redflex:

- pay Ms Smith an amount of \$2500 in compensation
- revise its policies with regards to the recruitment of people with criminal records and
- conduct training for staff involved in employment decisions, informing them of fair and non-discriminatory methods of assessing a prospective employee's criminal record against the inherent requirements of the role.⁶⁸

Redflex implemented all of these recommendations. It also commented that 'overall, this has been a positive experience for the Company with important learnings not only in legal compliance but also in humanity, empathy and compassion.'⁶⁹

Discrimination on the basis of criminal record affects a particularly disadvantaged group of the population. It can also disproportionately affect particular groups of people, such as Aboriginal and Torres Strait Islander people, due to their continuing over-representation in the criminal justice system.⁷⁰

Legal Aid NSW agreed that there is a need for ‘an enforceable remedy on the basis of irrelevant criminal record in employment’, noting that clients seek assistance on this issue, ‘which affects some of the most marginalised people in society’.

Discrimination on the basis of irrelevant criminal record is a major impediment to many people’s participation in the workforce, ability to support themselves and their families, and reintegration into the community after release from prison or the youth justice system. In our experience, the existing protections from discrimination on the basis of irrelevant criminal record in employment under the AHRC Act, spent convictions, and privacy legislation, are inadequate to address this problem.⁷¹

Legal Aid NSW referred especially to problems young people with a juvenile criminal record can face in obtaining employment.⁷²

Legal Aid NSW: Case Study

Our client was a young single mother who was working as a supervisor in an aged care facility. Our client’s employment was terminated when a criminal record check revealed that five years earlier our client had been convicted of a theft related offence for failing to correctly report her income whilst she was receiving Centrelink benefits.

At the time our client was working part time, studying and was also living in a violent relationship. Our client explained the circumstances of the offending to her manager, but our client was dismissed because the employer maintained that she may have to make minor budgetary decisions in her role, and her criminal record was therefore relevant.⁷³

The Law Council of Australia 'particularly agree[d]' that irrelevant criminal record should be a fully protected attribute under federal discrimination law, noting that its Justice Project highlighted the discrimination faced by those with irrelevant criminal records, despite the fact that 'they had served their time'.⁷⁴

NSW Legal Aid said that it is an issue that is raised by the Children's legal service, in terms of whether to disclose criminal records. Kingsford Legal Centre pointed out that there is a proliferation of criminal records checks and they had matters where people had lost their jobs in consequence.

Legal Aid NSW also noted that the existing 'inherent requirement defence' provides the balance in considering the issue discrimination.⁷⁵

(iii) HRAD Bill proposal

The HRAD Bill proposed *removing* criminal record as a ground of discrimination.⁷⁶ This drew much attention in the consideration of the Bill by the Senate Legal and Constitutional Affairs Legislation Committee. The Committee noted that 'the strongest concerns' were expressed by disability groups and community legal centres, 'both of whom represent some of the most marginalised and vulnerable people within society'.⁷⁷

The Committee acknowledged these concerns and agreed that discrimination in employment on the basis of criminal record 'should not be tolerated'.⁷⁸ The Committee recommended that 'irrelevant criminal record' should be included as a protected attribute.⁷⁹

Conversely, the Australian Industry Group did not support the expansion of anti-discrimination obligations on duty-holders to include the ILO 111 grounds, including irrelevant criminal record.⁸⁰ It considered that the amendment to the Australian Human Rights Commission Regulations 2019 struck 'the right balance', by providing clarity to employers.⁸¹ The amendment to the Regulations was to include the adjective 'irrelevant' to 'criminal record'.

At the time of the HRAD Bill proposal to remove the existing criminal record complaint jurisdiction, the Commission expressed concern that, 'as a practical matter the absence of this avenue of recourse will clearly have adverse impact on people affected by discrimination who presently are able to bring and seek resolution of complaints and in some cases negotiate a remedy'.⁸²

Certainly the proposed *removal* of the jurisdiction would leave unclear how Australia would comply with the obligation assumed in the declaration by the Australian Government of criminal record as an additional ground for the purposes of the ILO Convention (1958).

While spent convictions schemes, both at Commonwealth and at state and territory level, provide some protection against discrimination for people who have a criminal record, this protection is incomplete. For example, spent convictions schemes differ between jurisdictions, convictions only become spent after a certain period of time, and some convictions are exempt from spent convictions schemes. In some situations and for some purposes it may be unfair to base discrimination on a conviction that is not spent.⁸³

(iv) The need for proper protection

Given the volume of matters that come to the Commission raising this ground of discrimination, the Commission considers that it should be put on the same foundation as other unlawful discrimination grounds.

Enabling people the opportunity to return to full citizenship through employment and not to be discriminated against unreasonably in seeking that opportunity is a matter that deserves protection. That protection should be supported by a strong conciliation-based process and access to enforceable remedies through judicial consideration – as is the case with the other anti-discrimination legislative regimes in implementation of Australia’s treaty commitments.⁸⁴

Clarity for employers is needed, but those affected also need a proper pathway for resolution that is equivalent to that available under the Discrimination Acts, with the possibility of judicial consideration and remedies.

(e) Existing ILO grounds that are adequately covered

The Commission considers that some ILO ‘discrimination in employment’ grounds are best situated within the Fair Work Act and should not be converted to new grounds of ‘unlawful discrimination’ under federal discrimination law. These include discrimination on the basis of trade union activity, industrial activity, political opinion and social origin. The Commission suggests that consideration should be given to amending s 351(2)(a) of the Fair Work Act to the extent that it may prevent ‘adverse action’ claims from being considered under the Fair Work jurisdiction where the grounds are not covered in state and territory discrimination laws.

The Commission also notes that the Disability Discrimination Act adequately reflects the ILO ground of ‘medical history’ and therefore it need not be included as a new unlawful discrimination ground.

Issues concerning discrimination in employment on the basis of trade union and industrial activity are covered under the Fair Work Act. Section 346 of the Fair Work Act provides that a person must not take adverse action against another person on the basis of ‘industrial activity’, which includes becoming a member of an ‘industrial association’ and participating in lawful activity for or on behalf of an industrial association.

Social origin and political opinion are also protected characteristics under the Fair Work Act. Section 351(1) the Fair Work Act provides that a person cannot take ‘adverse action’ against an employee on these grounds.⁸⁵

However, s 351(2)(a) of the Fair Work Act provides that the adverse action prohibition on these grounds does not apply to adverse action that is not unlawful under anti-discrimination law in the place where the action is taken. If a broad reading is given to this provision, it would mean that unless the ground of discrimination in s 351 is also a prohibited ground of discrimination either in a federal anti-discrimination law or in the relevant state or territory anti-discrimination law, then the prohibition in s 351(1) does not apply.⁸⁶ On a narrower reading, the prohibition in s 351(1) would not apply only if there was a general or specific exception or exemption that applied under a relevant anti-discrimination law.⁸⁷ This issue was raised, but not answered, in relation to the 'political opinion' ground in *Quirk v Construction, Forestry, Mining and Energy Union* [2017] FCA 1576 at [32].

States and territories do not have full or consistent protections of trade union activity, political opinion or social origin grounds in their own discrimination legislation.⁸⁸ As a result, if the broader interpretation of s 351(2)(a) is correct, then there would not be national protection against adverse action on these grounds. To provide clarity and to ensure full coverage of these grounds under the Fair Work Act, the Commission suggests that consideration should be given to clarifying that s 351(2)(a) is limited to situations where there is a general or specific exception or exemption under relevant anti-discrimination law that would authorise the relevant conduct (including where the conduct is a 'special measure' to achieve equality).

The HRAD Bill included 'social origin' in relation to work and work-related areas. Homelessness, which may be a consequence of 'social origin' was a matter of concern raised by a number of Free & Equal stakeholders.⁸⁹

While 'social origin' is covered in the ILO grounds (and by Article 2 of the ICCPR and Article 2(2) of the ICESCR), it has generated very few complaints in the history of the Commission.

The Commission also notes that it receives very few complaints under the existing discrimination in employment jurisdiction on the grounds of trade union and industrial activity and political opinion grounds – see Table 5.1 above. This may suggest that the Fair Work Act is a preferred avenue for addressing complaints on these grounds, although this may also reflect the inability to take matters to court under the AHRC Act.

The Commission heard both support and opposition to the inclusion of these grounds in federal discrimination law. However, no arguments were made to suggest that there was a pressing need for protections greater than those that already exist in the Fair Work Act.

The Disability Discrimination Act covers discrimination on the basis of a disability, defined as including disability that presently exists or previously existed but no longer exists.⁹⁰ This broad definition of 'disability' is likely to cover discrimination in employment on the ground of 'medical history'.

In its submission to the Senate committee inquiry into the HRAD Bill, the Attorney-General's Department noted that many instances of such discrimination would be protected under the Disability Discrimination Act, while medical history 'could also cover matters that do not constitute a disability, such as relationship counselling, [and] discrimination on this basis would largely be covered by existing privacy laws'.⁹¹

2.3 Other suggested protected attributes

Other potential protected attributes have been raised in the past or are covered under different state and territory laws.⁹² For example, the *Discrimination Act 1991* (ACT) includes accommodation status and subsection to domestic or family violence as protected attributes.

Both of these potential protected attributes have been raised in the past in federal consultation processes regarding reform of discrimination laws.

(a) Subjection to domestic or family violence

The Law Council supported consideration of inclusion of this protected attribute, noting that discrimination against people who were or are subject to domestic violence has been identified as ‘a serious concern within the community’ and discrimination in these areas is ‘often associated with, or a precursor to, discrimination on the grounds of other protected attributes, such as sex or disability’.

As recognised in the Justice Project, victims of family violence may face discrimination in areas such as housing or the workplace. For example, they may face tenancy penalties due to property damage by a partner, they may be denied leave or flexible work arrangements to attend court, or their employment may be terminated for reasons relating to the violence they are experiencing.⁹³

Legal Aid NSW said that, in their experience, ‘discrimination against victims and survivors is prevalent in employment and accessing housing, and compounds the harm that they have experienced’. They observed this in the workplace and in the housing context and consider that providing additional protection from discrimination ‘would result in better outcomes for the victim’.⁹⁴

Legal Aid NSW noted that the National Employment Standards in the Fair Work Act provide some protections, but consider that gaps remain. They also submitted that providing protection from discrimination based on experience of domestic and family violence would be consistent with CEDAW and with ILO 190, which Australia has not yet ratified.⁹⁵

The ACTU referred to the family and domestic violence leave included in all modern awards since March 2018, but identified the need for specific protection in anti-discrimination laws. They pointed to the economic cost of violence against women as a rationale.⁹⁶

ACCI emphasised that domestic violence is ‘an important community issue, on which governments, the police and justice system, community service organisations, the media, and employers all have an important role to play in addressing the problem’. It also pointed to the range of protections under the Fair Work Act that deal with family violence issues. Hence ACCI did not support an ‘additional, overlapping ground of discrimination’.⁹⁷

Anti-discrimination law may not be the best mechanism to address challenges posed by domestic violence. ACCI welcomes the Fair Work Ombudsman’s ‘Employer Guide to Family and Domestic Violence’ [July 2019] and supports similar education/promotion initiatives.⁹⁸

ACCI recommended, instead, that the status quo should be retained, 'in recognition of the current up-to-date protections, and more scope for appropriate initiatives in other areas to address this serious and important community issue'.⁹⁹

The question then is the place for the protection, not that there is no need for it.

Women's Legal Service NSW recommended that federal, state and territory governments should prioritise introducing protection against discrimination on the basis of being a victim or survivor of family and domestic violence.¹⁰⁰

The HRAD Bill did not include status as a victim of domestic and family violence in its list of protected attributes, although a number of stakeholders urged that it should be. The Attorney-General's Department responded that this matter had been considered in detail during the consultation process it led, concluding that:

- there is no specific protection of domestic violence as a ground of discrimination under Commonwealth or state or territory law, although certain aspects of this form of violence may be currently covered
- anti-discrimination law may not be the best mechanism to address challenges faced by victims of domestic violence, and
- introducing an additional regulatory burden on employers potentially risks undermining positive action currently being undertaken by employers in relation to protecting workers experiencing domestic violence.¹⁰¹

The Commission considers that there remains a need for significant thought as to how a protected attribute around domestic violence would be appropriately framed before it could proceed.¹⁰²

(b) Open-textured category?

The Law Council also proposed an open-textured category based on the approach in South Africa:

any other ground that causes or perpetuates systemic disadvantage, undermines human freedom, or adversely affects the equal enjoyment of a person's rights or freedoms in a serious manner comparable to discrimination on one of the listed grounds.¹⁰³

The protection of equality before the law in article 26 of the ICCPR includes an open-textured category of 'other status'. However, whether this would be sufficient to ensure the constitutionality of such a protection is untested.

An approach of this kind could be justified in terms of the objectives of discrimination laws, but may raise issues of complexity in its application.

The Commission does not consider there is a compelling reason for inclusion of such a ground at this stage. The introduction of many other significant reforms proposed in this Position Paper should be embedded before considering the inclusion of such a general and conceptual provision.

3 Review all permanent exemptions under discrimination law

3.1 The need for a comprehensive review

The Commission recommends that all permanent exemptions under federal discrimination laws be reviewed on a `periodic basis to ensure they remain appropriate. This will provide certainty for duty-holders and ensure that the Discrimination Acts are in line with community standards.

An exemption from the operation of discrimination laws has the effect that conduct that might otherwise amount to unlawful conduct is 'exempted'. Permanent exemptions, or 'exceptions', remove from the rights and obligations of discrimination law, conduct that would otherwise be unlawful under such law, and the exception can be relied on as a defence to a complaint.

Permanent exemptions, which are part of the framework of the Discrimination Acts are different from temporary exemptions, which are described in Chapter 3, section 4.4. The Commission has the power to grant 'temporary exemptions' from some parts of the Sex Discrimination Act, the Disability Discrimination Act and the Age Discrimination Act. Such exemptions may be subject to conditions set out by the Commission and are provided for a term of no more than five years.

Both the terms 'exception' and 'exemption' are used in the federal discrimination laws. They have different meanings and this should be clarified in the legislation. As a starting point, the Commission recommends that an 'exception' should be defined as conduct which, but for the operation of the excepting provision, would be unlawful discrimination, but is permanently excepted from being considered such in the relevant Act. An 'exemption' should be defined as a temporary permissive authorisation for conduct which, but for the operation of the exemption, would be unlawful.¹⁰⁴

The HRAD Bill 2012 included a provision which defined a temporary exemption as one that 'exempts particular conduct of one or more persons or bodies (or classes of persons or bodies) from being unlawful discrimination'.¹⁰⁵ The Commission supports adding this definition to clarify the meaning of the term.

Permanent exceptions reflect the circumstances and exigencies of the time of their introduction. Commentators have observed that all Australian discrimination legislation has 'involved a degree of compromise';¹⁰⁶ and it may sometimes be 'difficult to identify the public policy considerations which may lie behind a particular exception, or to argue that those considerations still justify its existence'.¹⁰⁷

Moreover, once legislated, these exemptions operate as a defence, 'admitting of no debate or circumstantial application'.¹⁰⁸ A respondent is 'cleansed of fault' by the operation of the exemption.¹⁰⁹

Permanent exemptions may have enduring reasons to support them, but all permanent exemptions should not be left indefinitely without testing their ongoing need or justification in discrimination law.

Uncertainty for duty-holders is also exacerbated by differences across jurisdictions. Neil Rees, Simon Rice and Dominique Allen point to the lack of uniformity of exceptions across Australia, ‘from one statute to the next, or even within the Commonwealth statutes’, which ‘renders it very difficult to give clear and practical advice about the operation of anti-discrimination law in Australia, causing confusion, cost and delay, and increasing the potential for constitutional inconsistency under s 109 of the Constitution’.¹¹⁰

In her study of exceptions to age discrimination legislation in Australia and the UK, Alysia Blackham concluded that,

While these exceptions sometimes represent a negotiated compromise, others risk undermining the equality principle to a substantial extent. Rather than copying boilerplate provisions from other equality statutes, or merely applying other exceptions to age, serious thought needs to be given to whether these exceptions are appropriate in the context of age equality, or whether they just serve to undermine legal protection as a concession to vested interests. While often neglected as a topic of study, exceptions to equality law reveal significant insights about governmental priorities and national sentiment. In both Australia and the UK, it is timely to review and reconsider exceptions to age equality law.¹¹¹

The Commission agrees with Blackham’s broad conclusion and considers that it can be applied across all discrimination laws. The Commission recommends that the legislation should require that permanent exemptions should be reviewed periodically as a matter of practice, and to promote movement towards compliance with the laws where possible.

As a priority, the Australian Government should review all existing exemptions to consider whether individual exemption provisions should:

- Continue or be removed
- be time limited and regularly reviewed on an ongoing basis to assess the ongoing relevance and necessity of the exemption
- be sunsetted as they no longer reflect community standards or balance rights appropriately.

The Commission recommends that the Terms of Reference given to the ALRC to consider the framework of religious exemptions in the Discrimination Acts, noted below, should be expanded to include a review of all existing permanent exemptions under federal discrimination laws.

3.2 Support for a review

This approach received support from a range of stakeholders, as well as support for the principle that exceptions should only exist in a permanent form in circumstances that are strictly necessary and which result in the minimum intrusion on people’s rights that are required; and that they should be regularly reviewed to ensure that they remain necessary, reasonable and proportionate in the circumstances.

Stakeholders were generally supportive of the idea of a review of exceptions,¹¹² but provided a range of specific observations.

The Australian Council of Trade Unions (ACTU), for example, supported a new mechanism, other than exemptions, for striking ‘an appropriate balance between human rights when they come into conflict’.

Currently, the primary way in which these conflicts are managed is through a system of permanent and temporary exemptions, which carve out categories of people from the protection of discrimination laws. A number of the permanent exemptions in anti-discrimination laws are outdated and unfair ... A new mechanism for fairly and consistently managing conflicting human rights is needed.¹¹³

The Australian Chamber of Commerce and Industry (ACCI) emphasised, however, that exemptions ‘are not included in legislation lightly, and exist for very good reason’.¹¹⁴ The Australian Industry Group (AIG) said that exceptions are ‘an important aspect of anti-discrimination laws as they permit businesses to lawfully discriminate for legitimate purposes’. They provided ‘immediate certainty to duty-holders about the nature and limit of the exceptions available to them’.¹¹⁵

ACCI did not support the proposal that exemptions be ‘time limited’:

Those who hold duties under the law should legitimately expect that their obligations will not change frequently, in particular if they have relied on these exemptions in good faith.¹¹⁶

AIG urged that any review ‘should consider the impact on duty-holders that rely on them’.¹¹⁷ With respect to the process of the review, ACCI suggested that a first step should be to identify exemptions that may not meet community standards, with input from interested stakeholders, and then feedback invited ‘through a well-publicised, transparent, visible consultation/engagement process’.¹¹⁸ The importance of consultation with people with disability and mental ill health was stressed by the ACT Disability Aged and Carer Advocacy Service.¹¹⁹

The Law Council of Australia supported ‘streamlining’ the exemptions in the four federal Acts, but acknowledged that, in some cases, an exemption may be specific to the particular ground – for example inherent requirements and disability.¹²⁰

With respect to the proposed review process, and the option of using sunset clauses, the Law Council noted that this would mean that ‘a decision to re-enact a permanent exception would be subject to review and public scrutiny’:

The advantage of this process is that it would allow for exceptions to be considered at a higher policy level rather than on an individual case by case basis. A comparable approach is adopted in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which imposes a five-year sunset clause on legislative overrides to the Victorian Charter.¹²¹

3.3 General exception?

The suggestion that consideration be given to removing all permanent exemptions in federal discrimination law and replacing them with a 'justifiable conduct' or 'general limitations' clause was not strongly supported. The common concern among stakeholders was a need for certainty.

From an industry perspective, the proposal did not provide certainty for duty-holders. While a 'general limitations' clause has the advantage of flexibility, and applies on a case-by-case basis, the proposal was criticised for introducing uncertainty and that it may have 'unintended negative consequences'.¹²²

Victoria Legal Aid, for example, suggested it would lead to more litigation and place a greater burden on individuals. Victoria Legal Aid also remarked that, while the current list was outdated, it was at least clear.¹²³

The Law Council of Australia commented:

While existing exceptions may currently be too numerous and broad, these do provide some predictability and certainty to the law, including for people and bodies who must implement them. Removing all permanent exceptions may undermine the AHRC's objective of clear and consistent law reform.¹²⁴

The Public Interest Advocacy Centre said that the lack of certainty would have the biggest impact on complainants and could, in turn, 'entrench a power imbalance between complainants and respondents, with respondents able to seek general justification for their actions, requiring complainants to take significant risks in pursuing a claim in court'.¹²⁵ Legal Aid NSW was concerned about how such a clause would operate and wanted further detail before providing feedback. Generally, Legal Aid NSW was concerned 'by a very broad defence to discrimination claims with unclear parameters'.¹²⁶

The idea of adopting a general exception or limitations clause was raised in the 2008 Senate Standing Committee on Legal and Constitutional Affairs review of the Sex Discrimination Act.¹²⁷ The approach for a general exemption for 'justifiable conduct' was then included in the HRAD Bill. It was advanced as a simpler measure to replace many of the existing exceptions.¹²⁸ The approach has also been considered in state and territory reviews.¹²⁹

As explained in the notes accompanying the Exposure Draft Bill, it was a move to 'a more general approach', without changing existing policy in relation to the exceptions. It was proposed that the existing exceptions would be reviewed after three years, to consider whether they were still necessary in light of the operation of the new general exception.¹³⁰

It was recognised that this was a new concept for Commonwealth anti-discrimination law and that a 'general limitations clause'

will allow for a more flexible, case-specific approach giving people and organisations more assistance in determining whether a practice or action was the most appropriate method of achieving an objective. The clause will also be able to adapt to changing standards and community expectations over time.¹³¹

The Explanatory Notes said that while this approach was new, it built on the defence of reasonableness in existing indirect discrimination provisions and reflected 'the policy rationale underpinning existing exceptions and international law'.¹³²

The Commission considers that, while there are arguments to support the approach of a general limitations clause conceptually, from a practical perspective the arguments against such an approach are more persuasive. The Commission therefore does not include a recommendation of this kind in this Position Paper.

3.4 Particular permanent exceptions warranting particular scrutiny

Stakeholders drew attention to a number of specific exemptions warranting attention in any review. These are included here as a contribution to the kinds of issues that will require consideration in the recommended review.

(a) Insurance policies

One example is the partial exemption in s 46 of the Disability Discrimination Act in relation to insurance policies and superannuation, which provides that it is not unlawful for insurers to refuse cover to a person with disability or to modify the person's insurance policy if the decision is (a) based on actuarial or statistical data on which it is reasonable for the insurer to rely, and (b) where no such actuarial or statistical data is available and cannot reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors. If no reliable data is available or reasonably obtainable, the decision to refuse to insure or to modify the policy is not unlawful discrimination, if the discrimination is reasonable, having regard to any other relevant factors.

Legal Aid NSW referred to its experience and research report, 'What's the Risk? Access to insurance for people living with health conditions', to suggest that 'some insurance companies may be inappropriately using this exemption to deny cover, provide cover only with exclusions, or premium load' and that there were 'instances of insurance companies refusing to disclose the information on which those decisions were based'.

Legal Aid NSW suggested that the Commission 'consider ways to encourage insurance companies to comply with their obligations under the Disability Discrimination Act, and this exemption'.¹³³

The exemption in relation to insurance was also considered by the ALRC in its 2013 report, *Access All Ages: Older Workers and Commonwealth Laws*, in relation to an exception in the Age Discrimination Act, in similar terms to s 46 of the Disability Discrimination Act.¹³⁴ The use of actuarial and statistical data was similarly the focus of stakeholder concern.

In response, the ALRC recommended that the Australian Government and insurers negotiate an agreement requiring the publication of data upon which insurance offerings based on age rely; and, secondly, a review of insurance exceptions under Commonwealth, state and territory anti-discrimination legislation as they apply to age. A related recommendation was the development of guidance material about the application of any insurance exception under Commonwealth anti-discrimination legislation.¹³⁵ Ideally, insurers should have an obligation to disclose the data on which they are relying at an early stage of proceedings, before it reaches court.

(b) Religious exemptions

Exemptions that respect religious beliefs are based on the right to freedom of religion. At the federal level, the Sex Discrimination Act and Age Discrimination Act contain such exemptions. As Professor Beth Gaze and Associate Professor Belinda Smith explain,

The human rights conventions protect freedom of religion alongside freedom of thought, opinion and expression, and religion has distinctive claims based on its non-rational, faith based foundation and fundamental cultural significance. Historically, it has also been a powerful form of social organisation.¹³⁶

Another fundamental right is to non-discrimination. Where they intersect, or conflict, some form of reconciliation is needed, which in discrimination law includes exceptions for certain religion-related activities and for some bodies, such as schools.

Generally, the exception for activities relates to core internal aspects of the religion, such as the selection, training and ordination of officials (priests, ministers or members of religious orders) and people performing duties or functions in connection with religious observance. More controversial are exceptions for activities further away from the core. These fall into two main categories: provision of religious schools, hospitals and other welfare services; and more commercially oriented services, such as the running of businesses which may be intended to raise funds for the religion. The first category includes services initiated and run by the religion as well as outsourced government services, where organisations tender for the work, and services are provided under contract with public funding. Both types of services may rely partly or wholly on public funding.¹³⁷

A number of stakeholders identified varying concerns in relation to the exception on the ground of religion in the Sex Discrimination Act and Age Discrimination Act. Legal Aid NSW, for example, was concerned about the breadth of the current exceptions.¹³⁸ The ACTU recommended removal of all the permanent religious exceptions in the Sex Discrimination Act, Fair Work Act and all state and territory laws 'which allow discrimination against employees and students on religious grounds'.¹³⁹

Others wrote strongly in support of them.¹⁴⁰

The religious exceptions have attracted attention and discussion in the context of the amendments to the Marriage Act in 2017, the review into religious freedom chaired by the Hon Philip Ruddock AO, which reported in May 2018,¹⁴¹ and the proposal for protections for religion in the form of another Discrimination Act and comment on the two Exposure Draft Religious Freedom Bills, released by the Attorney General's Department in August and December 2019.¹⁴²

On 10 April 2019, the Attorney-General issued Terms of Reference requesting the ALRC to conduct an Inquiry into the Framework of Religious Exemptions in Anti discrimination Legislation. The Terms of Reference were altered by the Attorney-General on 29 August 2019. On 2 March 2020 the Attorney-General amended the ALRC's reporting deadline to be 12 months from the date the proposed Religious Discrimination Bill is passed by Parliament.¹⁴³

The ALRC has been asked to consider whether those exceptions could be limited or removed altogether, while still allowing religious institutions to conduct their affairs in accordance with their religious ethos. The Government has also asked the ALRC to consider whether any laws prevent a person from expressing a view of marriage as being between a man and a woman.

As noted above, the Commission considers that the ALRC review should be expanded to include a review of all existing permanent exemptions under federal discrimination law.

(c) Domestic work

The Sex Discrimination Act provides an exception in relation to employment in performance of 'domestic duties' in premises in which a person resides (s 14(3)). ACCI submitted that this exception and the one in s 15(5) of the Racial Discrimination Act should be retained and 'be properly informed by transparent open consultations'.¹⁴⁴

The ACTU, in contrast, submitted that the permanent exceptions for people performing domestic work need reconsideration:

An increasing number of workers perform work in private residences, including home-based care under programs such as the National Disability Insurance Scheme. This rise of the gig economy is only exacerbating this trend. In recognition of the growing number of domestic workers around the world (the majority of whom are women) and their particular vulnerability to exploitation, discrimination, harassment and violence, a new ILO Convention was developed in 2011 to protect their rights on the same basis as other workers.¹⁴⁵

The Commission considers that there have been significant changes in the type of work that is performed in the home, with the advent of the National Disability Insurance Scheme as well as the many, varied 'gig economy' jobs through platforms such as Airtasker.

The impact of these developments warrants consideration as to whether the existing exceptions remain appropriate, for example the exception could be limited to selection of a worker, rather than treatment during the course of employment (excepting, for example, the selection of a carer for a person with complex needs within a private home).

4 Defining discrimination and related concepts

In this section, the Commission makes recommendations that relate to the definition of discrimination. Many of these proposals have long been identified to improve the operation of federal discrimination law.

As the Commonwealth discrimination laws have been drafted over a period of over 40 years, there are significant differences in the drafting and coverage of protections under each Act. This ranges from definitional inconsistencies to more significant issues, such as different approaches to the tests for discrimination.

The scope of the protection offered by federal discrimination laws has also been impacted by some judicial decisions, such as in the cases of *Sklavos v Australian College of Dermatologists (Sklavos)* and *Purvis v State of NSW (Department of Education and Training) (Purvis)* under the Disability Discrimination Act.¹⁴⁶

This section identifies reforms to simplify the test of discrimination by removing the requirement for a comparator, as well as to clarify the obligation to provide reasonable adjustments under the Disability Discrimination Act and the interpretation of special measures under the Racial Discrimination Act.

The Commission notes previous consideration of adopting a unified test for discrimination – one not based on the concepts of ‘direct’ and ‘indirect’ discrimination. While there is some merit in this proposal, and there is strong support for this from some stakeholders,¹⁴⁷ the Commission does not propose its adoption at this time, in part due to some uncertainties as to how it would operate and as it would also require some reconsideration of other reform proposals identified across this paper.

4.1 Direct discrimination – comparator test

The Commission recommends that the test for direct discrimination be simplified by removing the existing ‘comparator test’.

The application of the ‘comparator’ test, used in the Sex Discrimination Act, Disability Discrimination Act and Age Discrimination Act, has presented significant difficulties, including complexity in interpretation and uncertainty of outcome.

The Commission has consistently recommended that the express comparator requirement be removed from the definition of direct discrimination and replaced with a ‘detriment test’ provision on the lines of that in the ACT legislation. This approach was also recommended by the NSW Law Reform Commission in 1999 in its review of the *NSW Anti-Discrimination Act 1977* and was the approach followed in the Victorian *Equal Opportunity Act 2010*.

As at June 2021, there are three major Australian models for defining direct discrimination. These are:

- the ‘comparator’ test – used in the Age Discrimination Act, Disability Discrimination Act and Sex Discrimination Act, and (in various forms) in the majority of the States
- the ‘detriment’ test – used in the ACT and Victoria, and
- the test used in subsection 9(1) of the Racial Discrimination Act (the Racial Discrimination Act test).¹⁴⁸

The Attorney-General’s Department summarised each in the Discussion Paper on the consolidation of discrimination laws in 2011:¹⁴⁹

Comparator test: The comparator test focuses on establishing discrimination by comparing the treatment of the complainant to the treatment of others who lack their protected attribute. Under this test, a complainant must prove:

- there has been differential treatment (by reference to a person in comparable circumstances without the attribute)
- the complainant has experienced detriment or disadvantage because of the differential treatment, and
- the differential treatment was caused by their protected attribute.

...

Detriment test: The detriment test that is used in the ACT and Victoria more simply provides that discrimination occurs where a person is treated unfavourably on the ground of their protected attribute. The elements of this test are:

- the unfavourable treatment must cause the complainant to experience detriment or disadvantage, and
- the treatment must have been caused by the complainant’s protected attribute.

...

Racial Discrimination Act test: Subsection 9(1) of the Racial Discrimination Act takes a considerably different approach, largely adopting the definition of discrimination in Article 1(1) of CERD and combining the test for discrimination with substantive coverage. In encapsulating a test for discrimination recognised under international law, it is arguable that this test would also apply to indirect discrimination. However, subsection 9(1A) was enacted in 1990 to expressly cover indirect discrimination. Unique features of the Racial Discrimination Act test are the requirement that the discrimination nullify or impair the enjoyment of a human right, and specification that discrimination is prohibited in any field of public life.

...

All three tests require the complainant to have experienced detriment and this detriment to be because of or caused by their protected attribute. The principal differences arise in relation to:

- **Comparator test – establishing differential treatment:** although the comparator test is intended to have the same policy outcome as the detriment or Racial Discrimination Act tests, it is significantly more complex and there is often difficulty and divergent views between parties as to identifying and constructing a relevant comparator, and
- **Racial Discrimination Act test – nullification or limitation of enjoyment of a human right:** the Racial Discrimination Act includes an additional element requiring the complainant to demonstrate that the treatment they suffered has nullified or limited their enjoyment of a human right.

The ‘comparator’ test requires courts to make a comparison between the treatment of the complainant and the treatment of others. For example, s 5(1) of the Disability Discrimination Act requires a comparison to be made between the way in which the discriminator treats (or proposes to treat) a person with a disability and the way in which a person ‘without the disability’ would be treated in circumstances that are not materially different. That other person, whether actual or hypothetical, is often referred to as the ‘comparator’.¹⁵⁰

The ACTU noted in their submission that

Complainants must prove three things: firstly that there has been differential treatment (compared to a person in similar circumstances without the attribute); secondly that the complainant has experienced detriment or disadvantage because of the differential treatment; and thirdly that the differential treatment was ‘because’ of their protected attribute.¹⁵¹

The issue of how an appropriate comparator is chosen in a particular case has proven complicated and vexed. While the interpretation of the law appears to have been settled by the decision of the High Court in *Purvis v State of NSW (Department of Education and Training)*,¹⁵² the issue has remained a contentious one. The Commission recommends that it be resolved by amendment of the test.

Purvis concerned the expulsion of a student with a visual impairment and diagnosed intellectual disability. In applying the test in s 5(1) of the Disability Discrimination Act, the High Court held that the appropriate ‘comparator’, taking account of all the objective features surrounding the intended treatment, was a student without disability displaying the same behaviours.¹⁵³ As the Court decided the school would have expelled a student without a disability if the student displayed the same violent behaviours, it held that the school had not acted in a discriminatory fashion.

In the Discussion Paper on the consolidation of discrimination laws in 2011, the Attorney-General’s Department pointed out that significant difficulties have arisen in applying the comparator test:

In many cases, there will not be a suitable comparator for the complainant, and courts have therefore relied on identifying a hypothetical comparator, and reconstructing how the discriminator might have treated them. Cases regularly turn on a particular judge’s view as to what the material circumstances were, and how the discriminator might have treated a hypothetical person without the protected attribute in those circumstances. Results are unpredictable and have created significant uncertainty.¹⁵⁴

The ACTU said that reliance on a 'hypothetical comparator' had led to 'technically complex, abstract and time-consuming legal arguments about the suitability of the comparator', distracting courts and tribunals 'from the merits of the complaint in question'.¹⁵⁵

In *Purvis*, the High Court allowed manifestations or characteristics of the protected attribute to be treated as part of the comparator. Specifically, the manifestations of the student's disability were attributed to the comparator and the Court asked whether a student without disability who behaved in the same manner would be treated in the same unfavourable way.

As a result of this approach, the comparison becomes between two people who on the surface appear to be similar: both are exhibiting what outwardly appears to be the same behaviour, but only in one case is this because of a disability. This mode of reasoning allows a respondent to claim that they are not engaging in discrimination. That is, they are treating a person unfavourably because of their behaviour, but not because of their disability, in circumstances where the two may be inextricably linked.

Such reasoning effectively obscures or ignores the basis or cause of the behaviour for the person with disability, and treats manifestations of their disability as though they were something discretionary that could be removed or taken off. The result is a very narrow test for direct discrimination that prohibits discrimination on the basis of disability itself, but not on the basis of outward manifestations of it that may be perceived as socially undesirable. Unless there is specific evidence that the existence of a person's disability was a ground or reason for an act of discrimination, it can be very difficult to make out a case of direct discrimination.

The decision in *Purvis* has been criticised by commentators¹⁵⁶ for setting a precedent that undermines substantive equality.¹⁵⁷ Associate Professor Dominique Allen observed, for example, that the comparator test involves a conceptual problem:

there must be a difference in treatment because equal treatment, even if it is poor treatment, is not discrimination. Courts devised the comparator as a tool to determine whether there was a difference in treatment but since the High Court's decision in *Purvis*, it has been construed restrictively and complainants have found it increasingly difficult to establish. The second problem was proving that the less favourable treatment was because of the attribute (causation). While the complainant did not have to prove the respondent's motive, they had to prove that the reason for the respondent's behaviour was the protected attribute.¹⁵⁸

The Disability Discrimination Legal Service submitted that

alleged discriminators defending their actions on the basis they would treat anyone similarly misses the point as they don't treat anyone else in a similar fashion. This understanding of the comparator test undermines the value of the protection provided by the Disability Discrimination Act. Secondly, by disconnecting the behaviour from the disability, the nature of the disability is misunderstood. Although the majority in *Purvis* expressly noted that detaching the manifestations of a disability from the underlying disability was dangerous and undermined the protections provided by the Disability Discrimination Act, the ultimate decision has in effect done just that.¹⁵⁹

Stakeholders urged that the comparator test be removed from all anti-discrimination laws.¹⁶⁰

The Attorney-General's Department said that the 'detriment' test that is used in the ACT and Victoria provides more simply that discrimination occurs where a person is treated *unfavourably* on the ground of their protected attribute.¹⁶¹

The elements of this test are: the unfavourable treatment must cause the complainant to experience detriment or disadvantage; and the treatment must have been caused by the complainant's protected attribute. The Attorney-General's Department said that the provision was 'more concise than the usual formulations of the comparator test', and did not require the identification of a comparator,¹⁶² but under such a test it would still be necessary to prove that the alleged detrimental treatment was caused by the protected attribute.

Hence the Attorney-General's Department suggested that the 'identification of a comparator may still be useful in proving causation'¹⁶³ and, therefore, even with a detriment test there was 'some risk that courts might interpret the test in substantially the same way as the comparator test'.¹⁶⁴

The HRAD Bill included a detriment test in terms of unfavourable treatment.¹⁶⁵ The Commission supported this approach. It was also recommended by the Senate Standing Committee on Legal and Constitutional Affairs in its 2008 review of the Sex Discrimination Act, on the basis that the test was 'both simpler and more in keeping with the purpose of the Act'.¹⁶⁶

The Law Council recommended that a focus be placed on 'unfavourable' treatment, compared with less favourable treatment, an approach adopted in the ACT and Victoria and 'is generally simpler to apply'.¹⁶⁷

The 2010 Act in Victoria removed this issue by defining direct discrimination as 'unfavourable', rather than 'less favourable'.¹⁶⁸ Allen says that '[t]his has been seen as a significant and purposeful change';¹⁶⁹ and that VCAT has said consistently that a comparator was not required.¹⁷⁰

Allen conducted a study of the impact of the 2010 Victorian legislation. With respect to the 'detriment' test, interview participants said they considered the test to be 'simpler, cleaner and more accessible'. It was also identified as a reason for preferring the Victorian jurisdiction over the federal one: because it was 'almost impossible to be successful when there's a comparator'; and had made it easier to prove direct discrimination.¹⁷¹

Allen noted that some of the lawyers she spoke to said that a consequence of the test being simpler was that there was 'now more time to focus on the issues in the claim because they do not have to spend as much time on technicalities and debating who the comparator is'.¹⁷²

There were other views. Echoing some of the concerns noted in the Attorney-General's Department's Discussion Paper, one barrister commented that 'there's some flavours of the comparator kind of still lurking there ... in looking at whether the treatment is favourable or unfavourable and those things, there's still a bit of how does it differ from another group'.¹⁷³

Allen observed that, while ‘the concept of a comparator still lingers and may well be part of the baggage that accompanies assessing whether someone has been treated unfavourably’, the strength of the *Equal Opportunity Act 2010* (Vic) is that the complainant is not *required* to identify a comparator but can choose to use the concept to bolster their claim if it is applicable.¹⁷⁴

The Commission recommends that the comparator test should be removed.

4.2 A unified test for discrimination?

As the Commonwealth antidiscrimination laws have been drafted over the decades since the 1970s, there are significant differences in the drafting and coverage of protections under each Act. This ranges from definitional inconsistencies to more significant issues, such as different approaches to the tests for discrimination.

In the Discussion Paper for the consolidation of discrimination laws in 2011, the Attorney-General’s Department stated that many of these differences were ‘unnecessary’:

The definitions of direct and indirect discrimination currently used in Commonwealth anti-discrimination laws have been criticised as being inconsistent, complex and uncertain. These inconsistencies make the legislation unnecessarily complex. Laws should be clear and simple so that businesses, governments and other people with obligations under the legislation understand their obligations and implement systems to prevent discrimination. Likewise, clearer laws make it easier for individuals to know their rights and for complaints of discrimination to be resolved fairly and consistently.¹⁷⁵

Under current federal discrimination laws, unlawful discrimination is either direct or indirect discrimination. Broadly, ‘direct discrimination’ relates to actions which are on their face discriminatory – for example, where an employer decides not to hire a person because of their gender, or because of a disability. ‘Indirect discrimination’ arises where an apparently neutral condition has the effect of disadvantaging a group of people with a particular attribute, such as family responsibilities.

A unified test of discrimination was considered in the Attorney-General’s Department’s Discussion Paper on the consolidation of discrimination laws in 2011, which explained that while the international human rights instruments did not explicitly distinguish between ‘direct’ and ‘indirect’ discrimination, the concepts ‘have evolved in the courts and been incorporated into Australian law to describe the different ways in which unlawful discrimination arises’.¹⁷⁶

Adoption of a unified test would avoid the confusing and difficult distinction between direct and indirect discrimination, make obligations under the consolidation bill clearer and more closely align Commonwealth antidiscrimination law with international law.¹⁷⁷

The Attorney-General’s Department said, however, that proposing a unified, ‘fundamentally revised’, test carried risks: of uncertainty as to its scope, in the absence of Australian jurisprudence on such a test; and of diminution of protections, although it was suggested this could be minimised through ‘avoidance of doubt provisions, legislative examples, or appropriate statements of intention in extrinsic materials such as the Second Reading Speech and the Explanatory Memorandum’.¹⁷⁸

At the time, the Commission expressed a preference for a unified test of discrimination incorporating best practice versions, based on a combination of the approaches taken in the *Discrimination Act 1991* (ACT) and the Racial Discrimination Act or the *Anti-Discrimination Act 1992* (NT).¹⁷⁹

The Commission pointed out that the separate provision for direct and indirect discrimination has led to the conclusion in most judicial interpretations that the concepts are separate and do not overlap.¹⁸⁰

Gaze and Smith describe the line between direct and indirect discrimination as ‘chimerical’ and, while that they are not mutually exclusive,

Australian courts ... have held that the definitions are to be treated as mutually exclusive. Much litigation time and energy has been spent on drawing such lines and trying to articulate whether the disadvantage a person has suffered should be characterised as different treatment or different impact. ... An alternative would be to remove the artificial line between direct and indirect discrimination in our statutes, and declare them not to be mutually exclusive. Such an approach would require the courts to focus on whether there was disadvantage, by design *or effect*. Such a unified definition of discrimination is used in Canadian anti-discrimination law. This was proposed in the HRAD Bill.¹⁸¹

A need to choose which category of discrimination a particular situation falls within also introduces an unnecessary layer of complexity for the Commission in seeking to explain rights and responsibilities, and for people and organisations seeking to understand, use, or comply with the legislation:

Presenting direct and indirect discrimination as separate concepts raises particular difficulties in relation to disability. For example, discrimination because a person who is blind cannot read print on paper would appear to meet any current definition for indirect discrimination (there is clearly a condition or requirement imposed which disadvantages people with the disability). But it would be artificial to state that there is not here also direct discrimination because the person is blind: the inability to see is what being blind is, or at the least is a characteristic appertaining to people who are blind. Other examples could be identified by reference to other forms of disability, and other attributes such as family responsibilities or pregnancy.¹⁸²

By identifying instructive examples from existing legislation to inform a unified definition of discrimination, the Commission suggested that clarity and consistency with the objects of the legislation could be achieved, without risking ‘the uncertainties of a wholly new legislative approach’.¹⁸³

The distinction between direct and indirect discrimination was also identified as problematic by stakeholders in this Free and Equal inquiry.

The Law Council of Australia, for example, proposed a unified definition which removed the distinction between direct and indirect discrimination – an approach taken in Canada, the United States and New Zealand. However, the Council also acknowledged that the concepts – of direct and indirect discrimination – were known in Australian law and ‘may have an important educative function’ and pointed to the alternative recommendation of the Discrimination Law Experts Group in 2011, which amended the definition but retained the concepts.¹⁸⁴

Maurice Blackburn, while supportive of a simplification of the definition of discrimination, warned that moving to a single definition ‘may have unintended consequences and said that ‘there should continue to be a basis to complain about conduct that does not appear prima facie discriminatory, but that has a discriminatory effect’.¹⁸⁵ If a unified definition were to be adopted, defences would need to be reconsidered. As Gaze and Smith observed, ‘it would not be plausible to allow different defences’.¹⁸⁶

The Law Council of Australia also pointed to inconsistency of the definition of discrimination in the Fair Work Act with that under the Discrimination Acts, with its focus on direct discrimination. The Council said that this ‘underlines the need, long-term, to consider the consistent operation of the [Fair Work Act] alongside the “core” anti-discrimination acts’.¹⁸⁷

The Commission considers that the suite of other measures proposed in this Paper – including to clarify the definition of discrimination by removing the comparator test – provide a more balanced and appropriate way forward.

Accordingly, while the Commission sees merit in a unified test of discrimination, it is not advanced as a reform proposal at this time. The Commission will continue to update its guidance material to explain the concepts of direct and indirect discrimination. It is also noted that in practice, most of the complaints alleging unlawful discrimination received by the Commission are assessed and progressed as claiming both direct and/or indirect discrimination.

4.3 Duty to make reasonable adjustments

The Commission recommends that the reasonable adjustment assessment currently in the Disability Discrimination Act be amended to establish that the obligation is a standalone one.

The rationale of the reasonable adjustment provision is based on advancing substantive equality. The Commission considers that there should be a duty to make reasonable adjustments, up to the point of the adjustments involving unjustifiable hardship. This was also recommended by the Productivity Commission in its review of the Disability Discrimination Act in 2004.¹⁸⁸

This recommendation is to counteract the impact of the *Skavos* decision in 2017, which held that an aggrieved person must prove a causal connection between the refusal to provide reasonable adjustments and their disability.

(a) An intended positive duty

From 5 August 2009, the Disability Discrimination Act creates a positive obligation on duty holders to make reasonable adjustments for people with disability. In introducing the amendment bill, then Attorney-General, the Hon Robert McClelland MP, said that the purpose was ‘to introduce an explicit and positive duty to make reasonable adjustments for people with disability’.¹⁸⁹ The necessity for an explicit duty was to rectify the doubt introduced by one aspect of the High Court decision in *Purvis*. This was one of the key recommendations of the Productivity Commission’s review of the Disability Discrimination Act in 2004.¹⁹⁰ Alice Taylor observed:

The requirement to make reasonable adjustments recognises and acknowledges that equal treatment can and will lead to inequitable outcomes and so positive duties to 'level the playing field' are required. The purpose of the provisions is to provide for a more substantive form of equality for persons with disabilities.¹⁹¹

The duty is embedded into the definitions of both direct (s 5(2)) and indirect (s 6(2)) discrimination. Examples of reasonable adjustments include installing audio announcements in a lift so that people with vision impairment can access a building.¹⁹²

Reasonable adjustment provisions in the Disability Discrimination Act: s 5(2) and s 6(2)

Section 5

(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.

(2) For the purposes of this Act, a person (the *discriminator*) also discriminates against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:

- (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
- (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

(3) For the purposes of this section, circumstances are not materially different because of the fact that, because of the disability, the aggrieved person requires adjustments.

Section 6

(2) For the purposes of this Act, a person (the *discriminator*) also discriminates against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if:

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
- (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
- (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.

(3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

The Explanatory Memorandum to the amending legislation stated:

Until relatively recently, the general view, including in the case law, was that the Disability Discrimination Act impliedly imposes such a duty if such adjustments are necessary to avoid unlawful discrimination – subject to the defence of unjustifiable hardship. This view was supported by the Explanatory Memorandum of the Disability Discrimination Act and Second Reading Speech delivered when the Disability Discrimination Act was first enacted.¹⁹³

The introduction of a duty to make reasonable adjustment is also consistent with the requirement to make ‘reasonable accommodation’ in the CRPD.¹⁹⁴ ‘Reasonable adjustment’ is defined in s 4(1) as follows:

[a]n adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.

Accordingly, ‘reasonable adjustments’ are all adjustments that do not impose an unjustifiable hardship on the person making the adjustments.¹⁹⁵

In the educational context, the *Disability Standards for Education 2005* (Education Standards) also impose a positive obligation on education providers to make ‘reasonable adjustments’ to accommodate the needs of students with disabilities (See Chapter 3, section 6.1 for discussion of Standards).

(b) Impact of the Sklavos decision

The decision of the Full Federal Court in *Sklavos* ‘requires a rethink as to the extent of the positive obligation placed on duty-holders’.¹⁹⁶

In *Sklavos v Australian College of Dermatologists* [2017] FCAFC 128, the applicant was a doctor who was training to become a dermatologist. To become a fully qualified dermatologist, it was necessary to become a fellow of the Australasian College of Dermatologists). Fellowship was granted following the successful completion of the College’s final examinations. The applicant had developed a disability which prevented him from completing those examinations.

The applicant claimed that the College discriminated against him for the purposes of both ss 5(2) and 6(2) of the Disability Discrimination Act by failing to make reasonable adjustments.

Dr Sklavos put forward three alternative adjustments in order to qualify as a dermatologist that he claimed were reasonable, with one being ‘assessment by a method that did not involve the use of examinations conducted by the College’.

In making an assessment about this option (‘Adjustment One’), Jagot J referred to the ‘causation’ requirement in s 5(2):

[T]he direct discrimination case put for Dr Sklavos has not grappled with the causation requirement in s 5(2). The evidence on causation is all to the same effect. The only reason that caused the College not to make Adjustment One was that it was not satisfied that Dr Sklavos was competent to practice as a dermatologist ... the College never accepted that Dr Sklavos was suffering from any disability. In these circumstances, the reliance placed on direct discrimination in Dr Sklavos's case seems misplaced altogether. Nothing the College did or did not do was caused by Dr Sklavos's disability in the sense required by s 5(2)¹⁹⁷

This passage suggested that in order to succeed under s 5(2) it was necessary for Dr Sklavos to show that his disability was a 'reason' for the refusal by the College to assess Dr Sklavos without the use of any examinations conducted by the college. This finding formed the basis for one of Dr Sklavos' grounds of appeal.

On appeal, Bromberg J considered that there was no error in this approach. His Honour found that:

[I]t was necessary for the primary judge to have posed and answered the causation inquiry required by s 5(2) as to why the aggrieved person was treated as he or she was and if the aggrieved person was treated less favourably was it 'because of' the person's disability. Further, 'where the disability is a reason for any of that conduct [ie, the failure to make a reasonable adjustment] the causation element of s 5(2) will be established'.¹⁹⁸

Justice Bromberg came to the conclusion that s 5(2) included a purposive element based on a review of the context of s 5, including its relationship with s 6, and based on the use of the words 'because of the disability' in s 5(2)(b).

The primary reason was that of context. It took as its starting point that 'the structure adopted by the Disability Discrimination Act must be respected in construing its operation'¹⁹⁹ and that this structure requires a strict dichotomy between direct and indirect discrimination.

Justice Bromberg said that 'disparate treatment' is a hallmark of direct discrimination. Section 5 deals with direct discrimination.²⁰⁰ Therefore, under s 5 'the disability must be a basis or reason for the conduct of the discriminator'.²⁰¹

Because he had already determined that s 5(2) required a purposive element, his Honour held that the phrase 'because of the disability' in s 5 (2) referred to 'the reason for the discriminator's failure to make a reasonable adjustment'.

Justices Griffiths and Bromwich relevantly concurred.

Stakeholders were strongly critical of the effect of the *Sklavos* decision in requiring the complainant to show that their disability was the reason for the failure to make a reasonable adjustment, for the conduct to be unlawful discrimination.

The outcome of the *Sklavos* decision has significantly narrowed the scope of the duty to make reasonable adjustments under s 5(2) of the Disability Discrimination Act and ‘dramatically reduced [its] effectiveness’.²⁰² As the complainant was treated in the same way as any other applicant for Fellowship, there could be no direct discrimination and no utilisation of s 5(2).

What this approach does, as explained by Alice Taylor, is to turn a positive obligation into a negative one:

This approach turns what was described in the second reading speech as a positive obligation: to make changes to existing structures and practices to accommodate difference, into a negative obligation. It becomes a negative obligation because a duty-bearer is only required by the Act to make a reasonable adjustment where the reason for the refusal is the disability itself. If a duty-bearer’s reason for refusal is based on the cost of the adjustment or the inconvenience of making the adjustment, there is no obligation on the duty-bearer to make an adjustment to existing practice. ... This approach to section 5(2) of the Disability Discrimination Act is one which adopts an understanding of anti-discrimination law’s purpose as one of only formal equality; that persons in similar circumstances should be treated the same.²⁰³

The Public Interest Advocacy Centre (PIAC), for example, argued that,

As a consequence of this decision, it is now more difficult for applicants to establish discrimination claims. For example, a blind person who requires software to assist them to undertake a task at work must show that the *failure to provide* that software is *because they are blind*. PIAC submits that while disability will be the reason a person needs a reasonable adjustment, it is not likely to be the reason for refusing to provide adjustments.

It is also important to recognise the practical hurdle that such an approach places in the way of an aggrieved person. Causation will be nearly impossible to prove unless a respondent makes a clear statement such as ‘I refuse to make adjustments for you, because you are blind’. Because a reasonable adjustment will never be provided to people without a disability, it is not possible for an individual to point to the fact that the reasonable adjustment was provided to other (sighted) people that requested it but not to them.²⁰⁴

The practical impact of the *Sklavos* decision is that a person with disability will be unable to enforce the duty to make reasonable adjustments under s 5(2) unless they can show that the discriminator was motivated not to make reasonable adjustments because the person had a disability.

Where a person would be able to comply with a requirement or condition, if reasonable adjustments were made, there is currently no duty to make reasonable adjustments if the requirement or condition is reasonable in the circumstances.²⁰⁵ Therefore, even if the adjustment is minor (and reasonable), it does not need to be provided if the requirement itself is reasonable. The Commission agrees with the recommendation of the Productivity Commission in its review of the Disability Discrimination Act in 2004, that there should be a duty to make reasonable adjustments unless this would involve unjustifiable hardship.²⁰⁶

The rationale of the reasonable adjustment provision is to advance substantive equality. It is different from a rationale that is focused on formal equality. As Alice Taylor explains:

Formal equality necessarily has a place in anti-discrimination law as it confirms that irrelevant characteristics should not be used in making determinations as to whom is alike from whom, and prohibits blatant discriminatory practices. In doing so, it conceives the harm caused by discriminatory treatment as irrelevant distinctions made on the basis of attributes, but is singularly focused on the similarity between persons and their capacity to conform to existing standards of practice. Conceived in this way, anti-discrimination law is designed to protect individuals from obvious forms of discriminatory treatment but does not require any broader change to practices or policy which continue to exclude those who are different. But it is an ineffective framework to utilise when considering provisions designed to provide a more positive and substantive form of equality.²⁰⁷

The Productivity Commission noted that making adjustments to create substantive equality involved important efficiency and equity issues and recommended that the Disability Discrimination Act be amended to include a general duty to make reasonable adjustments. It also recommended that reasonable adjustments be defined to exclude adjustments that would cause unjustifiable hardship.

Neil Rees, Simon Rice and Dominique Allen conclude that an amendment is desirable 'to clearly state a new type of positive non-discrimination duty and abandon the approach of relying on a further negative prohibition such as in s 5(2)'.²⁰⁸

(c) Ways forward

The Productivity Commission considered two ways of achieving the intended goal of the reasonable adjustments provision: one by amendment to the definition of direct discrimination, the other by the creation of a standalone duty.

The latter was preferred, to make it easier to understand, particularly for people who were not experts in discrimination law:

This would not only clarify the Disability Discrimination Act but also subtly reposition it as more positive force for change. The duty would reinforce the roles played by prohibitions on direct and indirect discrimination. Thus, failure to provide a reasonable adjustment could itself be unlawful discrimination and the subject of a complaint. This would put the Act on a more proactive basis, but focusing on what needs to be done to avoid charges of direct or indirect discrimination.²⁰⁹

Amendments to this effect were included in the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, which were enacted in 2009.²¹⁰ The intention of parliament, as set out in the Explanatory Memorandum, appears to have been that the only limitation on the requirement to make reasonable adjustments was to be unjustifiable hardship.²¹¹

The HRAD Bill returned to the issue. In its Discussion Paper on the consolidation of discrimination laws in 2011, the Attorney-General's Department said that '[t]he consolidation bill provides an opportunity to review the expression of the reasonable adjustments duty and to consider whether it is clearly and consistently expressed for both people with protected attributes and for duty holders'.²¹²

The Commission suggests that there are two ways in which amendments could be made to restore the duty to make reasonable adjustments to the Disability Discrimination Act in the way intended by the 2009 amendments: a standalone provision or an amendment to the existing provisions.

The first option would be to take ss 5(2) and 6(2) and put them in a standalone section dealing with the duty to make reasonable adjustments. This approach has the following advantages:

- It would ensure that the duty to make reasonable adjustments is not read down by reference to preconceptions of what constitutes ‘direct’ and ‘indirect’ discrimination.
- It would provide greater clarity by separating out this positive duty from obligations to refrain from (negative) discriminatory conduct.
- As noted by the Productivity Commission, it would make it easier for a lay person to understand their obligations and provide a useful educative function.

The consequence of a standalone reasonable adjustment duty, as explained by the Attorney-General’s Department, is that ‘a failure to make reasonable adjustments would be a separate type of discrimination or action to direct and indirect discrimination and a complainant would not have to prove the other elements of those tests. The duty would still, however, be balanced by the concept of “reasonableness” and the defence of “unjustifiable hardship”.’²¹³ The Victorian provision was given as an example:

An example of a standalone reasonable adjustment duty is in the Victorian Act, in relation to employment, education, the provision of goods and services and access to buildings. These duties are not linked to direct and indirect discrimination. However, a contravention of one of these duties enables a complaint of discrimination to be made.²¹⁴

The second option is to amend the existing ss 5 and 6. However, the Commission prefers the clarity for lawyers and lay persons alike in having a standalone provision. This approach also aligns better with the commitments expressed in the *Convention on the Rights of Persons with Disabilities*.

The Victorian standalone duty to make reasonable adjustments has been described by lawyers, particularly those specialising in disability discrimination claims, as ‘one of the Act’s strengths’.²¹⁵ It is ‘not passive’: the duty-holder is ‘required to do something proactive, rather than waiting until a person with a disability has been discriminated against’.²¹⁶ In a study of the 2010 legislation in practice, Allen identified the strength of the Victorian provision, and the problems in the interpretation of the Disability Discrimination Act provision, as the primary reason that complainant lawyers decided to lodge a claim in Victoria, rather than under the Disability Discrimination Act.²¹⁷ She concluded that that was ‘unfortunate because those claims have national application’.²¹⁸

The United Kingdom provision is also illustrative of a drafting approach that might make the positive obligation clearer. The duty to make adjustments is not a subsection of the provisions prohibiting direct and indirect discrimination, but is a separate and distinct obligation.

Alice Taylor points out that the *Equality Act* is very detailed in its elaboration of what the duty requires, with s 20 including 13 subsections identifying the kinds of actions, aids and changes that need to be made as a part of the duty to make adjustments. She suggests that '[i]t is possible that this different drafting approach has influenced the way in which the courts have understood and applied the duty'.²¹⁹

(d) Beyond the Disability Discrimination Act

The Commission also recommends that the extension of the concept of reasonable adjustments beyond the Disability Discrimination Act be considered in the integration of the legislation.

As a reasonable adjustments provision is a manifestation of an approach based on achieving substantive equality, whether to apply it in other areas of discrimination law depends on the question of the rationale for advancing substantive equality *in those other areas*. The Commission considers that the extension of the reasonable adjustments duty to all discrimination laws be considered in the integration project, see recommendation 40 at the conclusion of this Chapter.

Professor Beth Gaze and Associate Professor Belinda Smith note a 'tendency to think that the need for reasonable adjustments is only relevant to the attribute of disability – that other attributes are different, and equality will be achieved by simply ignoring the attributes'. This, they say, 'is open to challenge'.²²⁰ They point to the example of the *Equal Opportunity Act 2010* (Vic), which

brought in some very significant advances in relation to reasonable adjustments that make it clear that parliament's aim is to ensure as far as possible that the individual needs of workers, students and other people with any of the protected attributes are considered and accommodated where possible. This signals an intention that norms that favour only mainstream individuals are required to adjust to a wider range of circumstances, and marks a step towards a more transformative anti-discrimination law in Australia.²²¹

A key aspect is the adoption of an explicit standalone right to reasonable adjustments for people with disabilities in the context of work, education and provision of services.²²² There is also an equivalent stand-alone right in relation to workers who are parents or carers.²²³ Unreasonable failure to provide adjustments or accommodation is classified as discrimination – independently of the need to establish direct or indirect discrimination.²²⁴

The Law Council of Australia suggested that the NT example could be followed, which extends the concept of accommodation to all attributes identified in the NT legislation.²²⁵ Canadian anti-discrimination law imposes the obligation to make reasonable adjustments in respect of all attributes and all areas.²²⁶

In its Discussion Paper on the consolidation of discrimination laws in 2011, the Attorney-General's Department noted the Canadian example, and the availability of an unjustifiable hardship defence, in relation to all individuals protected under the Act. The Paper also noted that anti-discrimination legislation in the United Kingdom, European Union and the United States only require reasonable adjustments or accommodations to be made for people with disabilities.²²⁷

(e) 'Unjustifiable hardship' defence

What is a 'reasonable adjustment' is affected by the carve-out in the definition: 'unless making the adjustment would impose an unjustifiable hardship on the person'. Gaze and Smith explain that

duty bearers like employers and education providers are expected to bear some cost or 'undergo some hardship' to ensure that they do not discriminate, and the question is 'whether any hardship is of such a nature or degree in the circumstances' to be unjustifiable.²²⁸

It is also a defence to a claim of discrimination in almost all areas specified in Divisions 1 and 2 of Part 2 of the Disability Discrimination Act, that 'unjustifiable hardship' would be imposed upon a respondent in order for them to avoid discriminating against an aggrieved person.²²⁹ The burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.²³⁰ Deciding what is 'unjustifiable hardship' involves a weighing up of several factors.

Section 11(1) provides that 'unjustifiable hardship' must take into account 'all relevant circumstances of the particular case', including:

- (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- (b) the effect of the disability of any person concerned;
- (c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;
- (d) the availability of financial and other assistance to the first person;
- (e) any relevant action plans given to the Commission under section 64.

The factor of the 'availability of financial and other assistance' in paragraph (d) was inserted by amendment in 2009.²³¹ The Explanatory Memorandum stated that this was

designed to allow for a more balanced assessment of the costs of making adjustments. For example, funding to assist in responding to the particular needs of people with disability is available in some circumstances.²³²

Stakeholders raised concerns about the 'unjustifiable hardship' provision in s 11 of the Disability Discrimination Act during the Free and Equal consultation process. Disability Advocacy, for example, argued that the 'social model of disability' on which the NDIS is based, should affect the way that 'unjustifiable hardship' is interpreted, particularly 'the misconceptions of costs associated with removing relevant barriers':

Hence, as suggested by a submission to the [National Disability Strategy consultation], there should be a legislative framework akin to the NDIS that allows for businesses to receive low interest loans to purchase the necessary equipment, limiting the risk of claiming the 'unjustifiable hardship' defence in providing 'reasonable adjustments'.²³³

Gaze and Smith refer to a number of aspects of the assessment of unjustifiable hardship:

Firstly, the test calls for an assessment of the costs of compliance, and the court is to assess the net costs rather than merely the gross estimated expenditure, as any *benefits* of compliance accruing to the respondent or others are to be taken into account in weighing up whether it imposes an unjustifiable hardship. For instance, installing a ramp to allow one employee wheelchair access would cost money but might provide workplace health and safety benefits for other employees with mobility difficulties, suppliers using trolleys and clients with strollers. Training public transport staff to assist customers who have mental health conditions could have significant benefits not only for those customers but also other travellers and the company's public reputation. Such benefits might be difficult to quantify but are an important part of assessing the nature and degree of hardship borne by the respondent. Government or other subsidies for adjustments also need to be considered in offsetting expenditure.²³⁴

A second issue, they noted, is whether there are limits on the duty holder's ability to define their business in a narrow way, for example by seeking to serve only persons without disability. The case used to illustrate is *King v Jetstar*.²³⁵ Jetstar only permitted two wheelchairs per flight, which meant the complainant, Ms King, had reduced options for flying with that airline. The airline argued that it was a 'low cost carrier', with a business model of providing minimal service and fast turnaround at each terminal, hence it limited wheelchair assistance to two per flight. The limitation was imposed to reflect the business model.

Gaze and Smith observe that the case 'raises the issue of establishing a baseline or starting point for assessing the costs of compliance':

If a business is designed in an exclusionary way, are its operating principles and costs of establishment to be accepted as given, as the baseline from which we then measure how much it would cost the business to change in order to bring about compliance? To what extent is anti-discrimination law able to regulate the design and establishment of businesses, work practices or procurement choices in the way that building codes provide rules about the construction of new buildings? For example, could Uber defend a refusal or limited capacity to transport people with disability because its business is designed only to transport people without disability? The unjustifiable hardship defence legitimately allows for consideration of whether compliance with discrimination laws would impose too much cost on an individual respondent. However, as Martha Minow argues, we should not assume that the status quo is natural and neutral rather than chosen and reflecting existing, often exclusionary, norms. If the status quo is not challenged, the norms will not change.²³⁶

4.4 Indirect discrimination – Disability Discrimination Act and Racial Discrimination Act 'inability to comply'

The Commission recommends that the definition of indirect discrimination be amended to require only that a condition, requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected, without the further requirement that the person does not comply or is not able to comply. The Commission also recommends that further consideration be given to replacing the 'reasonableness' test with a 'legitimate and proportionate' test.

Following changes to the Disability Discrimination Act in 2009, the definition of indirect discrimination in s 6(1)(b) requires an aggrieved person to show that 'because of the disability, the aggrieved person does not or would not comply, or is not able to or would not be able to comply' with the relevant requirement or condition.

In its Discussion Paper on the consolidation of discrimination laws in 2011, the Attorney-General's Department pointed out that, by comparison to the Age Discrimination Act and Sex Discrimination Act definitions of indirect discrimination, the Disability Discrimination Act and Racial Discrimination Act definitions add a further requirement that the aggrieved person must not comply, or must be unable to comply, with the condition, requirement or practice. Of this extra requirement, the Attorney-General's Department said:

There is no clear policy reason for the inclusion of this requirement in the Disability Discrimination Act and Racial Discrimination Act but not the ADA and Sex Discrimination Act. Case law has indicated that this requirement may be satisfied not only where the complainant is incapable of complying, but also where compliance would inflict 'serious disadvantage' on the complainant²³⁷ or where the complainant is not 'practically able' to comply.²³⁸ In practice, this version of the test imposes a condition which is more stringent on its face than is supported by the case law and is likely to mislead users of the legislation who are not familiar with the case law.²³⁹

Comparing international and Australian approaches, the Attorney-General's Department concluded that it was 'rare to include the requirement that people with the protected attribute be unable to comply with the condition'.²⁴⁰

The Commission submitted at the time that this further requirement 'should not be applied in that part of the definition of discrimination for the purposes of a consolidated Act which deals with disparate impact discrimination'.

To do so could reduce protection in practice compared to the current provisions of the Sex Discrimination Act and ADA. Inclusion of this additional element would also appear unnecessarily confusing, overly technical, and potentially misleading, in view of case law which, as noted by the Discussion Paper, has generally (although not uniformly) adopted tests of disadvantage and practical compliance, rather than the strict view suggested by the terms of this element as written.²⁴¹

The Attorney-General's Department raised the possibility of replacing the present reference in definitions of indirect discrimination – to whether the condition requirement or practice was reasonable – with reference instead to whether the condition requirement or practice was for a legitimate purpose and proportional to that purpose.

The reasonableness test is vague, and leads to disparate judicial interpretations, as it is difficult to identify the limits of indirect discrimination claims using this approach. A 'legitimate and proportionate' test would enable more rigour and specificity. This test has been adopted in Europe and the UK. For example section 19(d) of the *Equality Act 2010* (UK) provides that an apparently neutral practice or criterion that has a disadvantaging impact on a protected group will be discriminatory if the respondent 'cannot show it to be a proportionate means of achieving a legitimate aim'.

In the UK, the respondent must show that the practice is necessary to achieve a legitimate aim and that there are no other less discriminatory alternatives, which itself includes possible ways of accommodating the complainant.²⁴² The importance of the goal of the practice is assessed, and a 'means-ends' test is applied to determine the closeness of the 'fit' between the means and the ends.²⁴³ Professor Sandra Fredman observes that proportionality 'requires close scrutiny of the stated aims, and the means to achieve those aims. It thus structures judicial decisions in important ways'.²⁴⁴ The test utilised in the UK provides more guidance for a court than 'reasonableness' about what criteria is relevant to the inquiry.

In Victoria, a similar test is used in the Charter of Human Rights to assess appropriate limitations on human rights.²⁴⁵ The Victorian *Equal Opportunity Act 2010* does not explicitly include a proportionality test, but comes close to it in practice through an extended list of factors for the 'reasonableness' test in section 9(3):

- (3) Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including the following—
- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice;
 - (b) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice;
 - (c) the cost of any alternative requirement, condition or practice;
 - (d) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice;
 - (e) whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing, or proposing to impose, the requirement, condition or practice but would result in less disadvantage.

The Commission recommended consideration of the 'legitimate and proportionate' test in its submission to the Senate committee review of the Sex Discrimination Act in 2008, together with recommending provision of guidance, which could include provisions of examples in the Act, on what would, and would not be, considered legitimate and proportionate.

The Commission recommended that the definition of indirect discrimination be amended in the proposed consolidated law, 'to require only that a condition, requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected, without the further requirement that the person does not comply or is not able to comply'.²⁴⁶ The Commission also recommended that further consideration be given to replacing the 'reasonableness' test with a 'legitimate and proportionate' test.²⁴⁷

In this Free and Equal inquiry, the Law Council recommended amending the ‘inability to comply’ requirement in the Disability Discrimination Act and Racial Discrimination Act and to use the test of ‘effect of disadvantaging persons with the protected attribute’, which is the approach taken in Tasmania, Victoria and under the Age Discrimination Act and Sex Discrimination Act. Such an approach, the Council said, was ‘simpler and more accessible’.²⁴⁸

Gaze and Smith note that this requirement has ‘not generally posed a problem for complainants because it has been interpreted practically rather than theoretically’.²⁴⁹ They illustrate by reference to the UK case of *Mandla v Dowell Lee*,²⁵⁰ involving a Sikh boy who argued that he could not comply with a ‘no hat’ school rule, because he wore a turban. In considering the ‘can comply’ requirement, the House of Lords held that, while he could theoretically remove his turban to attend school consistent with this rule (‘can comply’), it should take a practical approach. The ‘no turban’ rule was not a requirement with which the applicant boy could, consistently with the customs of being a Sikh, comply and therefore the application of that rule to him by the headmaster was unlawful discrimination.

Gaze and Smith observe that this approach ‘reflects a substantive rather than merely formal conception of equality’. They note that a similar approach is evident in respect of carers’ responsibilities and the issue of whether a person could comply with a particular requirement:

While someone with such responsibilities might theoretically be able to comply with a requirement to work full-time by arranging alternative care, they are not expected to; the attribute of having carer’s responsibilities manifests in personally performing them.²⁵¹

An interpretation of the requirement that is consistent with a substantive equality approach is evident in decisions of the Full Federal Court of Australia, asking whether the complainant would suffer ‘serious disadvantage’ even if they could, theoretically, comply.²⁵²

So a deaf student who could ‘cope’ with instruction in English was still able to prove that she could not comply with a requirement to be taught without Auslan assistance because she suffered serious disadvantage in educational terms of not being able to achieve her full potential. Matters of practicality and dignity are also to be considered.²⁵³

4.5 Victimization

Victimization of complainants is a criminal offence under each of the federal anti-discrimination laws.²⁵⁴ Broadly victimisation means subjecting someone to a detriment because they have made a complaint, or sought to enforce rights, under these laws.

Doubt has arisen in cases since 2011, as to whether the federal courts have jurisdiction to hear an application under s 46PO of the AHRC Act as a civil claim.²⁵⁵ There is a need for clarity about the operation of victimisation provisions in proceedings before the Federal Court and Federal Circuit Court to ensure that civil proceedings can be brought.

The Disability Discrimination Legal Service urged that, 'in the interests of access to justice victimisation claims should be able to be made as a civil proceeding'.²⁵⁶

In the *Respect@Work* report, the Commission recommended that the AHRC Act be amended to make explicit that any conduct that is an offence under s 94 of the Sex Discrimination Act can form the basis of a civil action for unlawful discrimination.²⁵⁷ The Government accepted this recommendation, and relevant changes to both the AHRC Act and the Sex Discrimination Act were subsequently incorporated into the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (the Act).²⁵⁸

In its submission to the Senate Education and Employment Legislation Committee inquiry into the Bill, the Commission noted that while these amendments will create certainty in relation to victimisation under the Sex Discrimination Act, without equivalent amendments being made in relation to the Disability Discrimination Act, Racial Discrimination Act and the Age Discrimination Act, they have the potential to create further uncertainty in relation to victimisation under those other Acts.²⁵⁹ The Committee subsequently made the same recommendation in its Report.²⁶⁰

The Explanatory Memorandum says that it is not the Government's intention to create uncertainty by amending only one of the four victimisation provisions,²⁶¹ but this may well be the outcome. This is because the Explanatory Memorandum for this Act is likely to carry little interpretive weight when seeking to construe the meaning of provisions in other Acts that are already on the statute books.

The Commission recommends that necessary legislative amendments be made to clarify that victimisation is a civil matter under all four federal Discrimination Acts and can form the basis of a civil action for unlawful discrimination.²⁶²

4.6 Meaning of 'special measures' provisions

The Commission recommends that the provisions concerning 'special measures' for people with a protected attribute should be clarified so that the interpretation of what amounts to a 'special measure' be aligned with the understanding of this term under international law and, in particular, that special measures be construed as positive measures to address the protected attribute.

The federal Discrimination Acts include exceptions for special measures, which are designed as measures to promote substantive equality. For example, special measures in the Sex Discrimination Act are defined as measures 'for the purpose of achieving substantive equality'.²⁶³ The Racial Discrimination Act expresses 'special measures' as an 'exception' to discrimination.²⁶⁴

Gaze and Smith observe that,

Without such exceptions, initiatives designed to help people from disadvantaged groups would be at risk of being found to fall within the prohibitions of discrimination. For example, policies that allow for consideration to be given to Indigenous status for university entry, to ameliorate under-representation in tertiary education, might otherwise be regarded as direct discrimination against others.²⁶⁵

The exclusion of special measures from the concept of discrimination, they argue, is ‘a very important recognition that the laws aim for substantive equality and do take account of the realities and history of discrimination and disadvantage’.²⁶⁶

The HRAD Bill provided that special measures ‘to achieve equality’ were not discrimination. Such special measures included ‘a law, policy or program made, developed or adopted, or other conduct engaged in by a person or body’ if for the sole or dominant purpose ‘of advancing or achieving substantive equality for people, or a class of people, who have a particular protected attribute or a particular combination of 2 or more protected attributes’.²⁶⁷ The Commission agrees with this approach.²⁶⁸

The Law Council of Australia also noted that different treaties underpinning each of the federal Discrimination Acts may approach the subject differently.²⁶⁹

The Commission recommends that s 8 of the Racial Discrimination Act be amended to ensure that the definition and scope of special measures in the Racial Discrimination Act be brought in line with art 2(2) of the ICERD and the Committee’s general recommendation on the meaning and scope of special measures.²⁷⁰ This clarification was supported by stakeholders.²⁷¹

The decision of the High Court in 2013 in *Maloney v The Queen* [2013] 298 ALR 308 generated significant discussion about the interpretation of ‘special measures’ under the Racial Discrimination Act.

A scheme under a state law to restrict the amount of alcohol any person could possess in a community area on Palm Island, a largely Indigenous community, was held to be lawful as a ‘special measure’ – notwithstanding that it imposed criminal penalties on the group it claimed to be advancing.

There were a number of aspects to this decision:

- interpretation of legislation introduced to give effect to international treaties
- purpose of special measures
- process of consideration of special measures

A particular issue in the case concerned whether international developments, such as General Recommendations issued by treaty bodies after the enactment of laws such as the Racial Discrimination Act, could be considered as part of the interpretive process. Such questions, as the Law Council submitted, ‘transcend matters of anti-discrimination law’, involving ‘whether the Court’s approach to interpretation, in line with the requirements of the *Acts Interpretation Act 1901* (Cth) and the general principles of statutory construction, is consistent with the evolving understanding of a treaty under international law’.²⁷²

The Law Council supported a recommendation of the CERD Committee that the definition and scope of special measures in the Racial Discrimination Act be brought in line with art 2(2) of the ICERD and the Committee’s general recommendation on the meaning and scope of special measures in the ICERD.²⁷³ The Law Council said that this would respond to the issues raised by *Maloney*.

ICERD art 2(2) states that

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

A consequence of aligning a consideration of special measures with international consideration of such concepts would be to bring in certain consultation requirements. Since the enactment of the Racial Discrimination Act, a consensus has developed in international law interpretations of the ICERD that genuine consultation with intended beneficiaries and affected communities is required for the development of a special measure.²⁷⁴ In *Maloney*, the High Court concluded to the contrary. Gaze and Smith observe that

Remarkably, despite the Racial Discrimination Act drawing its constitutional validity from being an implementation of CERD, the Court refused to look to this international jurisprudence to interpret the meaning of art 1(4), asserting that its meaning was frozen in time as it was in 1975.²⁷⁵

The Commission recommends that this should be addressed.

4.7 Managing intersectionality

The Commission proposes a new provision be included in the AHRC Act and federal discrimination laws to identify that discrimination may occur on the basis of a particular protected attribute 'or a particular combination of 2 or more protected attributes', including attributes across the four Discrimination Acts.

(a) Law

The four separate federal Discrimination Acts focus on specific protected attributes, reflecting the context of their introduction and their relationship to Australia's adoption of international treaties since the 1970s. As Julia Mansour observed,

The segmented and piecemeal nature of the legislation is rooted in historical circumstance: legislative change has typically been effected to reflect changing public consciousness of the different identity groups affected by discrimination, as well as to implement Australia's obligations with new treaties and agreements coming into force at the international level.²⁷⁶

Framed in this way, however, discrimination law may not adequately capture the experience of claimants affected by discrimination on multiple fronts, as 'intersectional discrimination':

Multiple disadvantage occurs where more than one category of disadvantage affects a person in an additive way, whereas intersectional disadvantage occurs where the two or more attributes of disadvantage compound one another, for example the fact that Indigenous women are more disadvantaged than either white women or Indigenous men. ... Many people may possess more than one attribute of disadvantage; many are identified by multiple attributes; for example, minority racial or ethnic groups include women, people with disability and/or minority sexualities.²⁷⁷

Professor Beth Gaze and Associate Professor Belinda Smith comment that

The single-attribute model used in Australian law has served its purpose in raising awareness and pioneering protection against discrimination, but as the sole model of discrimination it is clearly conceptually lacking and overlooks the experience of those who are most disadvantaged.²⁷⁸

An example was given during consultation with a community legal centre of an Aboriginal female client with a health condition and caring responsibilities, asking ‘why are you slicing and dicing my identity?’

Intersectionality as a theoretical tool has been invoked since 1989.²⁷⁹ It revealed that intersectional discrimination does not ‘merely involve adding categories of identity together to produce cumulative subordinations’,²⁸⁰ but rather there are different forms of discrimination that arise at the intersections of traditional grounds of discrimination.²⁸¹ Mansour argues that an intersectional approach

calls for the development of a legal framework with the capacity to recognise the experience of intersectional discrimination, as well as policy measures that ensure individuals who experience intersectional subordination (whose needs may differ significantly from others in their identity sub-group) nonetheless have mechanisms through which they may access justice on an equal basis.²⁸²

(b) Practice

While the framing of the law is problematic in dealing with intersectionality, the *practice* of complaint-handling is not so constrained in relation to discrimination where more than one ground is present. The practice has the ‘capacity to recognise’ to which Mansour referred.²⁸³

When complaints are made to the Commission alleging discrimination on the basis of more than one attribute, or on the basis of a combination of attributes, the complaints can be treated pragmatically by the Commission and handled together.

The majority of complaints are resolved through conciliation and only a very small proportion of them continue to court. This may be for a number of reasons, but at least in part it points to the effectiveness of the ADR process itself. In such a context, the barriers of pleading through the specific attributes of the individual Discrimination Acts, can operate quite differently in relation to complaints of an intersectional kind. Mansour affirms that,

In some respects, it is clear that the Commission’s complaints mechanism has the potential to cater to the needs of intersectional claimants far better than a single-axis framework for discrimination. One reason for this is that the Commission routinely receives complaints based on multiple grounds of discrimination and deals with them as one complaint, rather than splitting complaints into their component parts. ... Compared with court proceedings, complaint mechanisms also represent a less formal and costly mechanism for the resolution of complaints—an important factor when considering the realities of access to justice for individuals facing multiple disadvantages.²⁸⁴

Mansour urges that the Commission should produce more fully disaggregated data to support closer analysis in relation to intersectional claimants. The desirability – and challenges – of providing information about complaints is considered at Chapter 3, section 4.2. At the same time, she states:

To its credit, the Commission does take very seriously its role in educating diverse community groups about each of the anti-discrimination laws, and actively targets culturally diverse communities with education programs and materials. The Commission also encourages complaints in a variety of formats, demands a low level of formality, and accepts complaints in diverse community languages.²⁸⁵

Mansour also urges that the Commission should be properly resourced to ensure the successful provision of a complaint service that considers and caters to claimants facing intersectional discrimination.²⁸⁶ While legislative change may be an important aspect of reform, 'more attention should be given to the efficacy of current institutions dealing with anti-discrimination issues at the federal level, and their current level of resourcing to cater for those facing intersectional discrimination':

One of the most important steps that the federal government can take in this respect is to guarantee the adequate resourcing of the Commission, and to require the Commission to evaluate how best it might use its resources and organise its policy structures to ensure that those who face intersectional discrimination are catered for at the complaints level, and considered in the development of future strategic planning.²⁸⁷

(c) Options for reform

Mansour points to two trends in law reform in other common law countries as useful illustrations of approaches that may affect intersectional claimants. The first is to bring protected grounds into a single piece of legislation, and standardise the definitions of discrimination, harassment and victimisation across actions based on any of the protected attributes. The second is 'to make explicit provision for combined claims ... through terming discrimination as occurring on the basis of "multiple", "intersecting" and a "combination" of discriminatory grounds'.²⁸⁸

The first such measure was a key aspect of the consolidation exercise to deal with discrimination as a unitary whole at the federal level. This has the potential to address at least one problem faced by intersectional complainants, by potentially reducing 'the level of judicial wrangling required to "combine" two (or more) various tests to a complainant alleging intersecting forms of discrimination'.²⁸⁹ It was commented in consultation in this Free and Equal inquiry that the problem comes with pleadings.

The second approach, focuses on process: to expressly acknowledge complaints involving a number of grounds that could be made in one complaint, was included in the HRAD Bill. Clause 88 was designed so that 'all complaints that may be made under the Bill are dealt with under a single streamlined process'.²⁹⁰

Clause 19 referred to discrimination on the basis of a particular protected attribute 'or a particular combination of 2 or more protected attributes'. The Commission supported this approach.²⁹¹

The Commission agrees with the observations of Gaze and Smith that

Taking account of multiple or intersectional attributes has the potential to greatly improve Australian law. Since most individuals can be characterised by multiple or intersectional attributes of disadvantage, the work of anti-discrimination agencies in relation to the multiple attributes would be unified by a focus on a broad range of attributes and their combined effects.²⁹²

The Commission considers that any revised definition of discrimination should ensure that multiple and overlapping grounds of discrimination are recognised. In consultations in this Free and Equal inquiry it was also suggested that guiding principles could be included in each Act, linking them.

5 Other technical issues

5.1 Notification obligations

The obligation to notify individuals who are the subject of adverse allegations but who are not named respondents was introduced as part of a package of amendments to the AHRC Act in April 2017. This provision has therefore been in operation for four years, which provides some opportunity to assess its effectiveness.

The Commission considers that it has not enhanced the effectiveness of the Commission's complaint-handling processes. Rather it has added an unnecessary administrative burden and should be removed. The Commission therefore recommends that s 46PF(7)(c) of the AHRC Act should be amended to remove the obligation to notify individuals who are the subject of adverse allegations but who are not named respondents.

The Commission acts in accordance with the principles of natural justice when making decisions under the AHRC Act and when inquiring into and attempting to conciliate complaints. Once the claims that constitute the subject matter of the complaint are clear, the Commission's usual process is to contact the respondents to the complaint to advise them of the complaint and to provide them with a copy of the complaint and the sections of the law that appear relevant to the complaint. At the start of the complaint process, respondents are provided with:

- a. an information sheet dealing with the Commission's process and responding to complaints;²⁹³
- b. an information sheet dealing with the conciliation process;²⁹⁴
- c. the Commission's Charter of Service which sets out the standards of service that complainants and respondents can expect from the Commission.²⁹⁵

As the Commission explained in its submission to the Parliamentary Joint Committee on Human Rights inquiry into the legislation that led to the 2017 amendments:

The Commission provides information about the role of the Commission and the Commission's complaint handling process, including the option of resolving matters by conciliation and what may happen if the complaint is not resolved. The Commission advises respondents they have the opportunity to put forward their views about the allegations and to provide a written response if they wish to do so. In some matters, the Commission may ask respondents to provide certain information and documents relevant to the inquiry. The complaint process is, however, very flexible and when respondents are advised of complaints either verbally or in writing, they are also provided with the opportunity to proceed to conciliation prior to the provision of any formal written reply.²⁹⁶

Section 46PF(7)(c) introduced a further obligation. If the President has decided to inquire into a complaint, the President:

(c) if any person (other than the respondent) is the subject of an adverse allegation arising from the complaint—must notify the person of the adverse allegation, unless the President is satisfied:

(i) that notification would be likely to prejudice the safety of a person; or

(ii) that it is not practicable to do so

In reflecting on the impact of this additional notification requirement, the Commission advised that this obligation does not appear to improve fairness because it requires the Commission to notify people of claims against them in circumstances where they subsequently have no direct role within the complaint process.

The persons notified of ‘adverse allegations’ are not named as ‘respondents’ to the claim when the Commission issues notices of termination and therefore not included in any subsequent legal proceedings. In addition, the provision has led to complainants naming individuals as respondents when they would not otherwise have done so, which in turn exposes those individuals to the possibility of legal action being commenced against them.

6 Amend the AHRC Act to confirm the AHRC’s operation as a Paris Principles compliant institution

The Australian Human Rights Commission is an ‘A status’ national human rights institution. This means that we meet internationally accepted standards (the Paris Principles) to ensure that the Commission operates in a manner that is robust, independent from government influence, with a breadth of functions and diversity of leadership.²⁹⁷ These Principles identify minimum standards to be met by national human rights institutions (NHRIs).

The Paris Principles are significant for a number of reasons. Most important in the context of this Position Paper, they are about ensuring the operational integrity of NHRIs so that they are able to perform their functions with independence and impartially, and are perceived to do so as well.

This Paper proposes a range of expanded functions for the Commission – particularly in the regulatory and co-regulatory mechanisms that it administers. Trust in the ability of the Commission to administer these mechanisms without favour or politicisation is critical to the ability of the Commission to meet its purposes.

Maintaining an ‘A status’ NHRI is also significant for Australia’s foreign policy on human rights. Australia has been a leading advocate for NHRIs globally since the 1990s and draws significant credit from this support.

The Discussion Paper for discrimination law reform suggested a number of improvements that could be made to the AHRC Act to promote compliance with the Paris Principles, as follows:

- Specifying that all Commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process.²⁹⁸
- Including a reference to the Paris Principles in the objects clause of the legislation acknowledging that the AHRC is intended to be a Paris Principles compliant national human rights institution.
- Including a definition of human rights in the AHRC Act that references all of Australia's international human rights obligations.

Consideration should also be given to whether additional measures are required to ensure that the Commission can meet the Paris Principle that it has 'an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding'. This should be achieved through a periodic review or 're-baselining' of the Commission's funding to ensure it has an appropriate and adequate resourcing level.

Indicators of inadequate funding may include: backlogs in complaints, with an impact on timeframes for resolution of complaints; staffing levels to support statutory Commissioners to undertake their mandates; and funding for Commissioners drawn from across the country.

These suggested amendments and actions were based on the recommendations made in the Commission's most recent accreditation review in 2016.²⁹⁹

The Commission will next appear before the Sub-Committee on Accreditation of the Global Alliance of National Human Rights Institutions in March 2022 to determine whether it continues to meet 'A status' requirements or not.

Several recommendations that were made to the Commission to be addressed prior to its next appearance have not been actioned by the Government. In particular, the insertion of a legislative requirement for merit-based selection processes for Commissioners has not been met and further appointments have been made without a merit-based selection process.

The Commission has constantly advocated for the above reforms to be made to its legislation, to ensure the operational integrity of the Commission.

Accordingly, we recommend that the Government amend the AHRC Act as a matter of priority as follows:

- Specifying that all Commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process.
- Including a reference to the Paris Principles in the objects clause of the legislation acknowledging that the AHRC is intended to be a Paris Principles compliant national human rights institution.
- Including a definition of human rights in the AHRC Act that references all of Australia's international human rights obligations.

The Commission also recommends that the Government periodically conduct a re-baselining review of the Commission to ensure that it has adequate resourcing to conduct its functions.

7 Navigating the complexity of laws

A common theme among stakeholders is the complexity of the laws concerning discrimination. In addition to the four federal discrimination laws, there is the AHRC Act itself, the Fair Work Act, work health and safety laws and state and territory laws.

The procedures for handling discrimination complaints all sit within the AHRC Act, so issues of complexity lie not in the procedural aspects of the law so much as through key aspects of discrimination law remaining in the four separate Acts. Different definitions of some similar concepts have also since been introduced in the Fair Work Act, in a workplace context.

The complexity of federal discrimination law can largely be explained by the sporadic way in which it has evolved over time: with new pieces of legislation and protections added without consideration of how the whole fits together.

Stakeholders in consultations observed that ‘if you started from scratch, you’d have a single system’.

Legal Aid NSW said, for example, that ‘the complexity of discrimination law makes it difficult for people to know and understand their rights and comply with the law’:

This is particularly problematic for our clients seeking discrimination advice on one or more ground, or where there is a choice of forum. Clients are often confused and overwhelmed by the broadly similar but not identical concepts and definitions. In some instances, this can be a deterrent to our clients making complaints. Complexity also adds to the cost, duration and uncertainty of legal claims.³⁰⁰

The impact of this complexity was summed up by the Law Council of Australia:

It is important to consider the practical operation of each piece of legislation and its interaction with a wide range of other laws, from the perspectives of both complainants and respondents, who must determine their position under all applicable laws. In particular the [Fair Work Act] is increasingly being utilised to deal with certain workplace disputes which previously tended to be almost the exclusive province of anti-discrimination law. This demands that particular consideration be given to the interaction between anti-discrimination laws and relevant [Fair Work Act] provisions, with a view to avoid multiple proceedings agitating the same subject matter.³⁰¹

Similar issues were identified in the *Respect@Work* inquiry, leading to the recommendation of a new regulatory model recognising that ‘the right of workers to be free from sexual harassment is a human right, a workplace right and a safety right’.³⁰²

The development of overlapping laws is in some ways a consequence of a federal system and, in the context of discrimination laws, state and federal legislatures seeking to contribute frameworks of protection and proscription in relation to particular conduct. Moreover, federal discrimination laws explicitly preserve the concurrent legislative power of the states and territories and do not purport to cover the field.³⁰³

There is also a legislative evolutionary dimension. The Commonwealth response has been through separate statutes, essentially reflecting adoption of international treaties, while the states and territories have tended to deal with all types of discrimination in general legislation: '[t]he various modes of anti-discrimination law across Australia also reflect various phases of international treaty making and legislative response to different eras of consciousness raising about discrimination'.³⁰⁴

Complexity in this sense provides several different pathways for addressing issues of unlawful behaviour.

An abundance of choices is not necessarily a negative.

Different jurisdictions have also trialled different approaches within their discrimination laws, which has also led to innovative practices across the states and territories being recommended for subsequent inclusion in federal laws.

This has also been a positive result from the differences in statutes across jurisdictions.

This Position Paper proposes a range of reforms to improve the operation of discrimination law at many levels. This includes through a better regulatory system; more engaged outreach to affected stakeholders; a concentrated focus on the needs of the business community, including through co-regulatory tools that provide greater certainty and proactivity in preventing discrimination.

The Commission considers that the reforms identified in this paper should form the priority actions for federal discrimination law reform.

It is envisaged that they would simplify the operation of the laws as they stand, and that the proposed new regulatory practices would ensure better support and clarity for all affected.

A simplification and harmonisation of all discrimination laws, including state and territory laws would be beneficial, but there are more significant challenges that need to be addressed within the federal discrimination laws as a matter of priority.

8 Reform proposals – Improving practical operation of laws

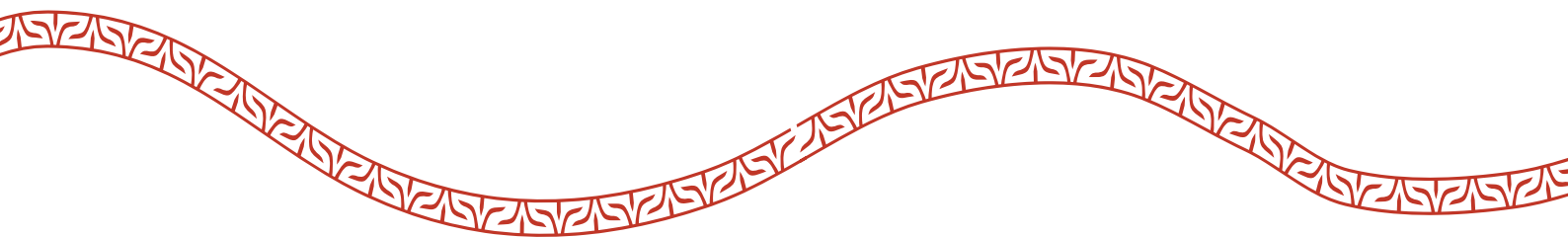
24. The Commission recommends that volunteers and interns be protected across all discrimination laws.
25. The Commission proposes that the Sex Discrimination Act be amended to cover family responsibilities/ carer responsibilities both in terms of direct and indirect discrimination and applying to all areas of public life.
26. The Commission recommends that thought, conscience or religion be included as a new protected attribute; not be limited to employment; and have full access to judicial remedies.

27. The Commission proposes that complaints of discrimination in employment on the basis of irrelevant criminal record should be a fully protected attribute under federal discrimination law, meaning that they have the same pathway for resolution as discrimination complaints made under the four federal discrimination laws.
28. Subject to irrelevant criminal record in employment and the right to freedom of thought, conscience and religion being included as protected attributes in the 'unlawful discrimination' jurisdiction of the Commission, the ILO complaints jurisdiction of the Commission should be repealed.
29. The Commission recommends that all permanent exemptions under federal discrimination law be reviewed on a periodic basis to ensure they remain appropriate. Particular focus should be given to exemptions relating to insurance, religion and domestic workers.
30. The Commission recommends that the test for direct discrimination be simplified by removing the 'comparator test'.
31. The Commission recommends that the reasonable adjustment assessment currently in the Disability Discrimination Act be amended to clarify that the obligation is a standalone one. The Commission also recommends that the extension of the concept of reasonable adjustments beyond the Disability Discrimination Act be considered.
32. The Commission recommends that the definition of indirect discrimination be amended 'to require only that a condition requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected, without the further requirement that the person does not comply or is not able to comply'. The Commission also recommends that further consideration be given to replacing the 'reasonableness' test with a 'legitimate and proportionate' test.
33. The Commission recommends that the AHRC Act be amended to make explicit that any conduct that amounts to victimisation can form the basis of a civil action for unlawful discrimination, across all federal Discrimination Acts.
34. The Commission recommends that the provisions concerning 'special measures' for people with a protected attribute should be clarified so that the interpretation of what amounts to a 'special measure' be aligned with the understanding of this term under international law and, in particular, that special measures be construed as positive measures to address the protected attribute.
35. The Commission proposes a new provision be included across all federal discrimination laws to identify that discrimination may occur on the basis of a particular protected attribute 'or a particular combination of 2 or more protected attributes', including attributes across the four discrimination acts.

36. Amend s 46PF(7)(c) of the AHRC Act to remove the obligation to notify individuals who are the subject of adverse allegations but who are not named respondents.
37. Amend the AHRC Act as a matter of priority to ensure the Paris Principles compliance of the Commission, as follows:
- Specify that all commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process.
 - Including a reference to the Paris Principles in the objects clause of the legislation acknowledging that the AHRC is intended to be a Paris Principles compliant national human rights institution.
 - Including a definition of human rights in the AHRC Act that references all of Australia's international human rights obligations.
 - Specify that all Commission functions may be exercised independently of government authorisation – at present, the Commission's function to intervene in court matters is not completely unfettered.

The Commission also recommends that the Government periodically conduct a re-baselining review of the Commission to ensure that it has adequate resourcing to conduct its functions.

38. The Commission concludes that the major focus at this time should be on embedding the structural reforms that are proposed in this paper. Once these reforms are implemented, they should be reviewed after 5 years to consider their effectiveness and whether a broader integration exercise should be undertaken to further standardise the approach across federal, state and territory discrimination laws, as well as the Fair Work Act and work, health and safety law.



Endnotes

- 1 Australian Human Rights Commission, submission no 19 to the Senate Education and Employment Legislation Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (July 2021) Recommendation 4.
- 2 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [102].
- 3 Section 335 of the Fair Work Act provides that the terms 'employee' and 'employer' have their ordinary meanings for the purpose of Part 3-1 of the Act.
- 4 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [101].
- 5 Model Work Health and Safety Act 2011 s 7.
- 6 Australian Human Rights Commission, Submission to Attorney-General's Department, *Religious Freedom Bills Second Exposure Draft* (31 January 2020) rec 1; Australian Human Rights Commission, Submission to the Attorney-General's Department, *Religious Freedom Bills* (27 September 2019) [46]–[51].
- 7 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 515–516, rec 16.
- 8 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (Final Report, December 2008) rec10; Department of Justice (Victoria), *An Equality Act for a Fairer Victoria, Equal Opportunity Review Final Report* (2008); Equal Opportunity Commission (WA), *Review of Equal Opportunity Act 1984*, Report, May 2007.
- 9 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 22.
- 10 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 5.
- 11 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 5.
- 12 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [104].
- 13 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 19.
- 14 International Labour Organization Convention (No 190) *Concerning the Elimination of Violence and Harassment in the World of Work*, adopted 21 June 2019, 108th sess (not yet in force) art 2.
- 15 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 13.
- 16 Australian Human Rights Commission, submission no 19 to the Senate Education and Employment Legislation Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (July 2021) Recommendation 4.

- 17 Senate Education and Employment Legislation Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (August 2021) [3.19].
- 18 *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* s 37.
- 19 Maurice Blackburn Lawyers, Submission 132, *Free & Equal Inquiry*, 4.
- 20 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 7.
- 21 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 5.
- 22 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (Final Report, December 2008) rec 11. Liberal Senators, however, did not, at that time, support this recommendation, 'given that all states and territories have their own anti-discrimination legislation': [1.32].
- 23 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020), rec 16(e).
- 24 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 11.
- 25 Australian Human Rights Commission, submission no 19 to the Senate Education and Employment Legislation Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (July 2021) [4.5].
- 26 Australian Human Rights Commission, *Federal Discrimination Law* (2016) [4.2.6].
- 27 Australian Human Rights Commission, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (December 2012) rec 5.
- 28 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 5. See also Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 98; Women's Legal Service NSW, Submission 157, *Free & Equal Inquiry*, 40.
- 29 *Burns v Media Options Group and Ors* [2013] FCCA 79. Summary extracted from: Australian Human Rights Commission, *Federal Discrimination Law* (2016) 118 < https://humanrights.gov.au/sites/default/files/document/publication/AHRC_Federal%20Discrimination%20Law_2016.pdf>.
- 30 Women's Legal Service NSW, Submission 157, *Free & Equal Inquiry*, [40.7].
- 31 Australian Council of Trade Unions, Submission 159, *Free & Equal Inquiry*, 27.
- 32 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 18.
- 33 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 8.
- 34 See Australian Human Rights Commission 2017-18 Complaint statistics (2018); Australian Human Rights Commission 2018-19 Complaint statistics (2019); Australian Human Rights Commission 2019-20 Complaint statistics (2020).

- 35 Australian Government Attorney-General's Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes*, November 2012, [72].
- 36 Australian Human Rights Commission, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (December 2012) 9.
- 37 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (February 2013) [4.33]–[4.34]. Referring to Ms Anne Hewitt, Professor Andrew Stewart, Professor Rosemary Owens, Ms Gabrielle Appleby and Ms Beth Nosworthy, University of Adelaide Law School, Submission No 204, 3–4.
- 38 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (February 2013) [4.34]. Referring to Discrimination Law Experts Group, Submission No 207.
- 39 Australian Human Rights Commission, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (December 2012) 9.
- 40 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 84.
- 41 Australian Human Rights Commission, Submission to Attorney-General's Department, *Religious Freedom Bills Second Exposure Draft* (31 January 2020) [4]; Australian Human Rights Commission, Submission to the Attorney-General's Department, *Religious Freedom Bills* (27 September 2019) [3].
- 42 Human Rights and Anti-Discrimination Bill 2012 (Cth), Exposure Draft Legislation, cl 22(3). Australian Human Rights Commission submission to the Senate Legal and Constitutional Affairs Committee, *Exposure draft Human Rights and Anti-Discrimination Bill 2012* (December 2012), 8 <<https://humanrights.gov.au/our-work/legal/submission/exposure-draft-human-rights-and-anti-discrimination-bill-2012>>.
- 43 See, e.g. the New Zealand case of *King-Ansell v Police* [1979] 2 NZLR 531, 543 and the United Kingdom case *Mandla v Dowell Lee* [1983] 2 AC 548. See also Australian case law finding that in the context of complaints of racial hatred under Part IIA of the RDA, that Jews in Australia are a group of people with a common 'ethnic origin' for the purposes of the RDA: *Miller v Wertheim* [2002] FCAFC 156, [14]; *Jones v Scully* (2002) 120 FCR 243, 271-273 [110]–[113]; *Jones v Toben* [2002] FCA 1150, [101]; *Jeremy Jones v Bible Believers Church* [2007] FCA 55, [21]; *Silberberg v Builders Collective of Australia Inc* [2007] FCA 1512, [22].
- 44 See, e.g., the United Kingdom decisions of *Tariq v Young* (Unreported, Employment Appeals Tribunal, 24773/88) and *Nyazi v Rymans Ltd* (Unreported, Employment Appeals Tribunal, 6/88). See also a discussion of the term 'ethno-religious' and the Muslim faith in *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131.
- 45 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 7.
- 46 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 23; Attorney-General's Department, *Religious Discrimination Bill 2019: Exposure Draft* (2019) <<https://www.ag.gov.au/sites/default/files/2020-03/exposure-draft-religious-discrimination-bill.pdf>>.

- 47 See Australian Human Rights Commission, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (February 2013); Australian Human Rights Commission, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (December 2012).
- 48 See further: Rosalind Croucher, 'Righting the relic: towards effective protections for criminal record discrimination' (2018) 48 (September) *Law Society Journal* 73.
- 49 Australian Law Reform Commission, *Spent Convictions* (Report No 37, 1987).
- 50 Australian Law Reform Commission, *Spent Convictions* (Report No 37, 1987) [6].
- 51 Australian Law Reform Commission, *Spent Convictions* (Report No 37, 1987) xi.
- 52 Australian Law Reform Commission, *Spent Convictions* (Report No 37, 1987) xi.
- 53 Australian Law Reform Commission, *Spent Convictions* (Report No 37, 1987) [75].
- 54 Australian Law Reform Commission, *Spent Convictions* (Report No 37, 1987) [79].
- 55 Australian Law Reform Commission, *Spent Convictions* (Report No 37, 1987) [70].
- 56 Australian Law Reform Commission, *Spent Convictions* (Report No 37, 1987) [79].
- 57 Australian Human Rights Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal Record*, 59; *Hall v A & A Sheiban Pty Ltd* [1989] FCA 65.
- 58 Australian Human Rights Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal Record*, 3 < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-record>>.
- 59 Australian Human Rights Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal Record*, 10 < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-record>>.
- 60 Australian Human Rights Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal Record*, < <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-record>>.
- 61 Australian Human Rights Commission, *Annual Report 2020-21* (2021).
- 62 *Ms Jessica Smith v Redflex Traffic Systems Pty Ltd* [2018 AusHRC 125]. See also *AG v Commonwealth* (Department of Foreign Affairs and Trade) 2018. These examples and other published reports can be found at: 'Legal Publications' *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/our-work/legal/publications>>.
- 63 *Ms Jessica Smith v Redflex Traffic Systems Pty Ltd* [2018 AusHRC 125] [6].
- 64 *Ms Jessica Smith v Redflex Traffic Systems Pty Ltd* [2018 AusHRC 125] [34].

- 65 Ms Jessica Smith v Redflex Traffic Systems Pty Ltd [2018 AusHRC 125] [61].
- 66 Ms Jessica Smith v Redflex Traffic Systems Pty Ltd [2018 AusHRC 125] [70].
- 67 Ms Jessica Smith v Redflex Traffic Systems Pty Ltd [2018 AusHRC 125] [79-83].
- 68 Ms Jessica Smith v Redflex Traffic Systems Pty Ltd [2018 AusHRC 125] [4].
- 69 Ms Jessica Smith v Redflex Traffic Systems Pty Ltd [2018 AusHRC 125] [116].
- 70 See, eg, Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017). Woor-Dungin and Centre for Innovative Justice's Criminal Record Discrimination Project, submission to 49th Aboriginal Justice Forum (December 2017) <<https://cij.org.au/cms/wp-content/uploads/2018/08/aboriginal-justice-forum.pdf>>.
- 71 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 9.
- 72 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 10. See also Women's Legal Service NSW, Submission 157, *Free & Equal Inquiry*, 40.
- 73 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 10.
- 74 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 24.
- 75 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 10. See also Women's Legal Service NSW, Submission 157, *Free & Equal Inquiry*, 40.
- 76 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Discrimination Laws: Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Explanatory Notes* (November 2012) [73]–[74], 22.
- 77 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (February 2013) [7.32].
- 78 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (February 2013) [7.32].
- 79 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (February 2013) [7.35], rec 4.
- 80 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 7.
- 81 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 7.
- 82 Australian Human Rights Commission, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (February 2013) 7.
- 83 Australian Human Rights Commission, Submission No 9 to Senate Legal and Constitutional Affairs Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (December 2012) 7–8.

- 84 Rosalind Croucher, 'Righting the relic: towards effective protections for criminal record discrimination' (2018) 48 (September) *Law Society Journal* 73, 75.
- 85 *Fair Work Act 2009* (Cth) s 351(1).
- 86 S Rice and C Roles "'It's a Discrimination Law Julia, But Not As We Know It": Part 3-1 of the Fair Work Act' (2010) 21(1) *Economic and Labour Relations Review* 13 at 28–29.
- 87 *Hodkinson v Commonwealth* (2011) 248 FLR 409 at [142] (Cameron FM) which notes that the operation of s 351(1) 'is limited by reference to *exceptions* derived from anti-discrimination legislation' (emphasis added); see also Explanatory Memorandum, Fair Work Bill 2008 (Cth) at [1427] and [1429] which suggests that s 351(2) was intended to exempt action that was 'authorised' by relevant anti-discrimination law; *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27 at [161] (Mortimer J).
- 88 See table in 'A quick guide to Australian Discrimination laws' *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/sites/default/files/GPGB_quick_guide_to_discrimination_laws_0.pdf>.
- 89 See eg, Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 26; NACLCL, Submission, *Free & Equal Inquiry*, [9.2]; Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 15; Women's Legal Service NSW, Submission 157, *Free & Equal Inquiry*, 9.
- 90 *Disability Discrimination Act 1992* (Cth) s 4.
- 91 Attorney-General's Department, Submission No 130 to Senate Legal and Constitutional Affairs Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012* (February 2013) 5.
- 92 Australian Human Rights Commission, *Discussion Paper: Priorities for federal discrimination law reform* (2019), 11 <<https://humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law>>.
- 93 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 94. See also Public Interest Advocacy Centre, Submission 90, *Free & Equal Inquiry*.
- 94 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 11.
- 95 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 12.
- 96 Australian Council of Trade Unions, Submission 159, *Free & Equal Inquiry*, 24.
- 97 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 22–23.
- 98 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 23.
- 99 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 23.
- 100 Women's Legal Service NSW, Submission 157, *Free & Equal Inquiry*, 41.

- 101 Attorney General's Department, Supplementary Submission no 130 to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the exposure draft of the Human Rights and Anti-Discrimination Bill 2012* (2012) 5.
- 102 For further discussion, see Belinda Smith and Tashina Orchiston, 'Domestic Violence Victims at Work: A Role for Anti-Discrimination Law?' (2012) 25(3) *Australian Journal of Labour Law*, 209–236.
- 103 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 82.
- 104 Using Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 75. based on recs of Discrimination Law Experts Group Roundtable 2010.
- 105 Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Legislation, cl 83(1).
- 106 Alice Taylor, 'Disability Discrimination, the Duty to Make Adjustments and the Problem of Persistent Misreading' (2019) 45(2) *Monash University Law Review* 461, 467.
- 107 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [3.9.6].
- 108 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [3.9.2].
- 109 *Airflite Pty Ltd v Goyal* [2003] WASCA 45 [26], citing *Jamal v Department of Health* (1988) 14 NSWLR 252, 265.
- 110 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [3.9.2].
- 111 Alysia Blackham, 'A Compromised Balance? A Comparative Examination of Exceptions to Age Discrimination Law in Australia and the UK' (2018) 41(3) *Melbourne University Law Review* 1085, 1120.
- 112 See, eg, Queensland Advocacy Incorporated, Submission 109, *Free & Equal Inquiry*; Maurice Blackburn Lawyers, Submission 132, *Free & Equal Inquiry*; Women's Legal Service NSW, Submission 157, *Free & Equal Inquiry*, 45; Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, 14.
- 113 Australian Council of Trade Unions, Submission 159, *Free & Equal Inquiry*, 15.
- 114 A similar view was expressed by the Pharmacy Guild of Australia, Submission 125, *Free & Equal Inquiry*, 25.
- 115 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 9.
- 116 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 6. Similarly, the Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 9; Pharmacy Guild of Australia, Submission 125, *Free & Equal Inquiry*, 26.
- 117 Australian Industry Group, Submission 167, *Free & Equal Inquiry*, 9.
- 118 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 7–8.

- 119 ACT Disability Aged and Carer Advocacy Service, Submission 134, *Free & Equal Inquiry*, 15.
- 120 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 102.
- 121 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 109.
- 122 Public Interest Advocacy Centre, Submission 90, *Free & Equal Inquiry*, 19. See also Victoria Legal Aid, Submission 131, *Free & Equal Inquiry*; Legal Aid NSW, Submission 112, *Free & Equal Inquiry*.
- 123 Victoria Legal Aid, Submission 131, *Free & Equal Inquiry*, 8.
- 124 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 107.
- 125 Public Interest Advocacy Centre, Submission 90, *Free & Equal Inquiry*, 19. This view was also supported by experts from the Discrimination Law Experts Group consulted in Sydney on 16 December 2019. See also Victoria Legal Aid, Submission 131, *Free & Equal Inquiry*, 8; Queensland Advocacy Incorporated, Submission 109, *Free & Equal Inquiry*, 10 who note that all exemptions should be ‘carefully and narrowly drafted’.
- 126 Legal Aid NSW, Submission 112, *Free & Equal Inquiry*, 15–16.
- 127 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (Final Report, December 2008) rec 36.
- 128 Senate Legal and Constitutional Affairs Legislation Committee, *Human Rights and Anti-Discrimination Bill 2012*, February 2013, Report, [7.54], 91.
- 129 See Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018), [3.9.12]–[3.9.15].
- 130 Australian Government Attorney-General’s Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes*, November 2012, 33.
- 131 Australian Government Attorney-General’s Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes*, November 2012, [143].
- 132 Australian Government Attorney-General’s Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes*, November 2012, [148].
- 133 Legal Aid NSW, 16. Similarly, the National Mental Health Commission (sub 51, 5) raised concerns about the exemption in the context of mental illnesses. The Commission reiterated its recommendations from its submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry that the Disability Discrimination Act be amended ‘to limit the exemption of superannuation and insurance products from unlawful discrimination only to the extent that the discrimination is based on credible data and independent expert professional opinion’ and ‘to exclude the exemption by reliance on or regard to ‘other factors’.

- 134 Australian Law Reform Commission, *Access All Ages: Older Workers and Commonwealth Laws* (Report No 120, March 2013).
- 135 Australian Law Reform Commission, *Access All Ages: Older Workers and Commonwealth Laws* (Report No 120, March 2013) ch 6.
- 136 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 157, [56].
- 137 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 158, [58].
- 138 Legal Aid NSW. See also Australian Lawyers Alliance, sub 29; A gender agenda, sub 39; Parents for Transgender Youth Equity NSW, sub 7; Women's Legal Service NSW, sub 157, [43]; Amnesty International Australia, sub 103, 9 which notes that Australia does not have a comprehensive framework for balancing competing rights.
- 139 Australian Council of Trade Unions, Submission 159, *Free & Equal Inquiry*, 16.
- 140 Eg, Australian Catholic Bishops Conference, sub 89; Michael Quinlan, sub 121; Freedom for Faith, sub 136 who note that protecting human rights, such as religious freedom, through exemptions 'is something less than a complete way of implementing Australia's international human rights obligations' but that until more comprehensive protections are afforded through a Religious Freedom Bill, the current exemptions should remain in place.
- 141 See <<https://www.pmc.gov.au/domestic-policy/religious-freedom-review>>.
- 142 Attorney-General's Department, *Religious Discrimination Bill 2019: Exposure Draft* (2019) <<https://www.ag.gov.au/sites/default/files/2020-03/exposure-draft-religious-discrimination-bill.pdf>>; Attorney General's Department, *Religious Discrimination Bill 2019: Second Exposure Draft* (2019) <<https://www.ag.gov.au/sites/default/files/2020-03/second-exposure-draft-religious-discrimination-bill-2019.pdf>>.
- 143 See <<https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/>>. In May 2020 the Prime Minister indicated that the Bill would be placed on hold due to the COVID-19 pandemic: Greg Brown 'Policy brakes applied on religious freedom and anti-corruption body' *The Australian* (28 May 2020) <<https://www.theaustralian.com.au/nation/politics/coronavirus-policy-brakes-applied-on-religious-freedom-and-anticorruption-body/news-story/5c0f21cc337ac727ec077de493165689>>.
- 144 Australian Chamber of Commerce and Industry, Submission 153, *Free & Equal Inquiry*, 10.
- 145 Australian Council of Trade Unions, Submission 159, *Free & Equal Inquiry*, 13.
- 146 *Sklavos v Australasian College of Dermatologists* [2016] FCA 179; *Purvis v State of NSW (Department of Education and Training)* [2002] 190 ALR 588.

- 147 See Australian Discrimination Law Expert's Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia* (31 March 2011) Recommendation 2 <<https://www.adleg.org.au/submissions/consolidation-of-federal-anti-discrimination-laws-mar-2011>>.
- 148 See Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) 9–11.
- 149 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [26], [28], [31], [32].
- 150 Australian Human Rights Commission, *Federal Discrimination Law* (2016) 182 [PDF version].
- 151 Australian Council of Trade Unions, Submission 159, *Free & Equal Inquiry*, 17.
- 152 *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62.
- 153 *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 [225].
- 154 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [27].
- 155 Australian Council of Trade Unions, Submission 159, *Free & Equal Inquiry*, 17.
- 156 See eg, Kate Rattigan, 'A Case for Amending The Disability Discrimination Act 1992 (Cth)' (2004) 28 *Melbourne University Law Review* 532, 545 n 91; Colin Campbell, 'A Hard Case Making Bad Law: Purvis v New South Wales and the Role of the Comparator Under the Disability Discrimination Act 1992 (Cth)', (2007) 35(1) *Federal Law Review* 111. See also, *Federal Discrimination Law*, ch 5.
- 157 Maurice Blackburn Lawyers, Submission 132, *Free & Equal Inquiry*, 6; Belinda Smith, 'From Wardley to Purvis – How far has Australian anti-discrimination law come in 30 years', (2008) 21 *Australian Journal of Labour Law* 3, 27.
- 158 Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 480–481. See also, Belinda Smith, 'from Wardley to Purvis: How far has Australian Anti-Discrimination Law come in 30 Years?' (2008) 21(1) *Australian Journal of Labour Law* 3.
- 159 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, 26.
- 160 Eg, Australian Council of Trade Unions, Submission 159, *Free & Equal Inquiry*, 19. (remove from all workplace laws); Victoria Legal Aid, Submission 131, *Free & Equal Inquiry*, 3; Queensland Advocacy Incorporated, Submission 109, *Free & Equal Inquiry*, 6.
- 161 See subsection 8(1) of the *Discrimination Act 1991* (ACT) . Although the *Equal Opportunity Act 1984* (SA) at first appearances seems to follow this model, 'unfavourable treatment' is defined in section 6 in line with the comparator test.

- 162 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [29], referring to *Edgley v Federal Capital Press of Australia Pty Ltd* [2001] FCA 379 (Full Court of the Federal Court of Australia) [54] per Beaumont ACJ (Higgins and Gyles JJ concurring).
- 163 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [29].
- 164 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [30], citing Productivity Commission, *Review of the Disability Discrimination Act* (Report No 30, 30 April 2004) 307.
- 165 Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Legislation, cl 19(1).
- 166 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *The effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Report, December 2008) 147. See also Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia *Report on the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, rec 1 (that the Government should undertake further consultation on whether the detriment test should be adopted in the Disability Discrimination Act).
- 167 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, [65]. See also Victoria Legal Aid, Submission 131, *Free & Equal Inquiry*.
- 168 This was a change recommended by the Gardner review: Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review* (Final Report, June 2008) rec 41.
- 169 *Slattery v Manningham City Council* [2013] VCAT 1869, [36]–[39], Senior Member Nihill.
- 170 Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 482.
- 171 Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 483.
- 172 Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 484.
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- 174 Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 497.
- 175 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [22].
- 176 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [45].

- 177 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [46].
- 178 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [47].
- 179 Australian Human Rights Commission, Submission to the Attorney-General's Department, *Consolidation of Commonwealth Discrimination Law* (6 December 2011) [4.1].
- 180 But see discussion by *Mason CJ and Gaudron J* in *Waters v Public Transport Corporation* (1992) 173 CLR 349.
- 181 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 281.
- 182 Australian Human Rights Commission, Submission to the Attorney-General's Department, *Consolidation of Commonwealth Discrimination Law* (6 December 2011) [25].
- 183 Australian Human Rights Commission, Submission to the Attorney-General's Department, *Consolidation of Commonwealth Discrimination Law* (6 December 2011) [28].
- 184 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 68–69; Discrimination Law Experts Group, Consolidation of Discrimination Laws, Submission to the Attorney General's Department, 13 December 2011, 10.
- 185 Maurice Blackburn Lawyers, Submission 132, *Free & Equal Inquiry*, 7.
- 186 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 282, [31].
- 187 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 70.
- 188 Productivity Commission, *Review of the Disability Discrimination Act* (Report No 30, 30 April 2004).
- 189 Commonwealth, Parliamentary Debates, House of Representatives, 3 December 2008, 12292 (Robert McClelland, Attorney-General).
- 190 Productivity Commission, *Review of the Disability Discrimination Act* (Report No 30, 30 April 2004); Commonwealth, Parliamentary Debates, House of Representatives, 3 December 2008, 12292.
- 191 Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Law Journal* 188, 200. See also Alice Taylor, 'Disability Discrimination, the Duty to Make Adjustments and the Problem of Persistent Misreading' (2019) 45(2) *Monash University Law Review* 461.
- 192 Australian Government Attorney-General's Department, Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper (September 2011) [57].
- 193 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) 8 [38].

- 194 See Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) 9 [41–7].
- 195 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) 8 [36].
- 196 Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Law Journal* 188, 200.
- 197 *Sklavos v Australasian College of Dermatologists* [2016] FCA 179 at [103]
- 198 *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 at [53] (Bromberg J).
- 199 *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 at [15] (Bromberg J).
- 200 *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 at [20] (Bromberg J).
- 201 *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128 at [23] (Bromberg J).
- 202 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, 17.
- 203 Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Law Journal* 188, 202. See also, Alice Taylor, 'Disability Discrimination, the Duty to Make Adjustments and the Problem of Persistent Misreading' (2019) 45(2) *Monash University Law Review* 461,476.
- 204 Public Interest Advocacy Centre, Submission 90, *Free & Equal Inquiry*, 4.
- 205 *Disability Discrimination Act* 1992 (Cth) s 6(3).
- 206 Productivity Commission, *Review of the Disability Discrimination Act* (Report No 30, 30 April 2004), XLIX Recommendation 8.1.
- 207 Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Law Journal* 188, 202.
- 208 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [7.6.30].
- 209 Productivity Commission, *Review of the Disability Discrimination Act* (Report No 30, 30 April 2004) 194–195.
- 210 *Disability Discrimination and Other Human Rights Legislation Amendment Act* 2009 (Cth).
- 211 Explanatory Memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) [28].
- 212 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [59].

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- 214 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [61].
- 215 Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 488.
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- 219 Alice Taylor, 'Disability Discrimination, the Duty to Make Adjustments and the Problem of Persistent Misreading' (2019) 45(2) *Melbourne University Law Review* 461, 479.
- 220 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 126.
- 221 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 128.
- 222 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017); Equal Opportunity Act 2010 (Vic) ss 20, 33, 40, 45.
- 223 *Equal Opportunity Act 2010* (Vic) ss 17, 19, 22, 32.
- 224 *Equal Opportunity Act 2010* (Vic) s 7(1)(b).
- 225 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 74.
- 226 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) citing Sandra Fredman, *Discrimination Law* (OUP, 2011), 215.
- 227 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [61].
- 228 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017), 160, quoting *Hills Grammar School v HREOC* (2000) 1 `00 FCR 306, [48] (Tamberlin J).
- 229 See ss 21B and 29A of the *Disability Discrimination Act 1992* (Cth).

- 230 *Disability Discrimination Act 1992* (Cth) s 11(2).
- 231 *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) Sch 2, item 18.
- 232 Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Cth) 12 [57].
- 233 Disability Advocacy NSW, Submission 47, *Free & Equal Inquiry*.
- 234 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 160–161, [67].
- 235 *King v Jetstar Airways Pty Ltd (No 2)* [2012] FCA 8; Gaze and Smith, 161, [68].
- 236 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 161, [68]; referring to Martha Minow *Making All the Difference: Inclusion, Exclusion and American Law* (1990).
- 237 *Hurst v Qld* (2006) FCR 562.
- 238 *Mandla v Dowell Lee* [1983] 2 AC 548 (House of Lords).
- 239 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [38].
- 240 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011) [39].
- 241 Australian Human Rights Commission, Submission to the Attorney-General's Department, *Consolidation of Commonwealth Discrimination Law* (6 December 2011) [4.3], citing in particular the Full Federal Court decisions in *Hurst v State of Queensland* [2006] FCAFC 100 (28 July 2006) and *Hinchliffe v University of Sydney* [2004] FMCA 85 (17 August 2004).
- 242 Sandra Fredman *Discrimination Law* (OUP, 2nd ed, 2011) 183.
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- 244 Sandra Fredman *Discrimination Law* (OUP, 2nd ed, 2011) 190.
- 245 *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
- 246 Australian Human Rights Commission, Submission to the Attorney-General's Department, *Consolidation of Commonwealth Discrimination Law* (6 December 2011) rec 11.
- 247 Australian Human Rights Commission, Submission to the Attorney-General's Department, *Consolidation of Commonwealth Discrimination Law* (6 December 2011) rec 12.
- 248 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 66.

- 249 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 121, [58]. They refer to *AMC v Wilson* (1996) 68 FCR 46, 80 (Sackville J); Heerey J, 62, with whom Black CJ agreed, 47.
- 250 [1983] 2 AC 548.
- 251 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 122, [58].
- 252 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 122, [59], referring to *Hurst v Queensland* (2006) 151 FCR 562 [134].
- 253 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 122, [59], referring to *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2004] FMCA 915, [9]; *Travers v New South Wales* (2001) 163 FLR 99.
- 254 ADA s 51; Racial Discrimination Act s 27(2); Sex Discrimination Act s 94; Disability Discrimination Act s 42.
- 255 See *Federal Discrimination Law*, [2.5], referring to: *Walker v Cormack* (2011) 196 FCR 574, [37]-[41]; *Walker v State of Victoria* [2012] FCAFC 38, [98]-[100] (Gray J); *Chen v Monash University* [2016] FCAFC 66, [119]-[124] (Barker, Davies and Markovic JJ). Cf *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118, [71] (Marshall, Rares and Flick JJ) where the Full Court of the Federal Court previously reached a different view.
- 256 Disability Discrimination Legal Service, Submission 73, *Free & Equal Inquiry*, 18.
- 257 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020), rec 21.
- 258 Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 12.
- 259 Australian Human Rights Commission, submission no 19 to the Senate Education and Employment Legislation Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (July 2021) [79-88].
- 260 Senate Education and Employment Legislation Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (August 2021) Recommendation 2.
- 261 Explanatory Memorandum, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021*, at [4] and [197].
- 262 It is already a civil matter within the AHRC Act, as it is covered by the definition of 'unlawful discrimination': *Australian Human Rights Commission Act 1986* s 3; Australian Human Rights Commission, submission no 19 to the Senate Education and Employment Legislation Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (July 2021) Recommendation 10.

- 263 *Sex Discrimination Act 1984* (Cth) s 7D.
- 264 *Racial Discrimination Act 1975* (Cth) s 8.
- 265 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 56, [32].
- 266 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 77, [30].
- 267 Human Rights and Anti-Discrimination Bill 2012, Exposure Draft Legislation, cl 21.
- 268 The Commission urged a similar view in response to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011), section 4.6.
- 269 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 71.
- 270 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 72.
- 271 Eg, Maurice Blackburn Lawyers, Submission 132, *Free & Equal Inquiry*, 17; Legal Aid NSW, Submission 112, *Free & Equal Inquiry*.
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- 273 Law Council of Australia, Submission 156, *Free & Equal Inquiry*, 72: *Concluding observations—on the eighteenth to twentieth periodic reports of Australia*, UN Doc CERD/C/AUS/CO/18–20 (8 December 2017).
- 274 Simon Rice, 'Casenote: *Joan Monica Maloney v The Queen* [2013] HCA 28' (2013) 8(7) *Indigenous Law Bulletin* 28, 31.
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- 298 The Global Alliance of National Human Rights Institutions has a Sub-Committee on Accreditation that sets out requirements for how NHRIs will be assessed as meeting the Paris Principles. For selection processes see section 1.8 of GANHRI Sub-Committee on Accreditation, *General observations of the Sub-Committee on Accreditation*, Adopted 21 February 2018, available online at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf>.
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Chapter 6

Reform proposals and next steps

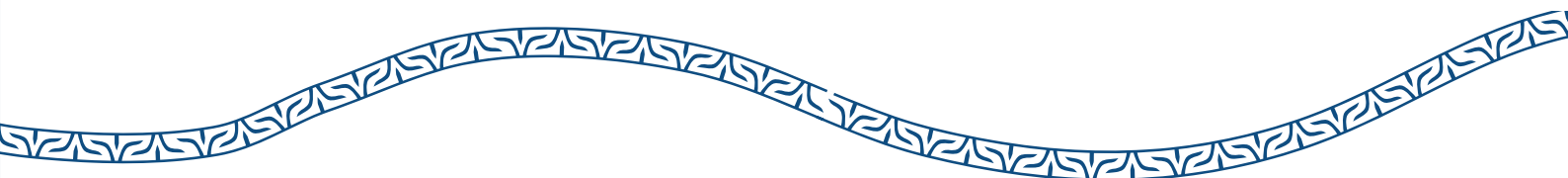


1 The Commission's approach to reform

In this Report the Commission sets out four integrated sets of reforms to improve the effectiveness of federal discrimination laws:

- Major reform 1: shifting towards a culture of prevention (building a preventative culture)
- Major reform 2: shifting to a more effective compliance model (modernising the regulatory framework)
- Major reform 3: enhancing access to justice
- Major reform 4: improving the practical operation of the laws.

There are **38 proposed reforms** to improve the operation of federal discrimination laws across these four areas, as follows.





Level 1: Co-regulatory tools

Level 2: Enforcement mechanism and legislative reform

Level 3: Education and outreach

2 Major reform 1 – building a preventative culture

Positive duty

1. Existing protections against discrimination in each of the federal discrimination laws should be supplemented by the inclusion of a positive duty on all duty bearers to take reasonable and proportionate measures to eliminate unlawful discrimination.

The positive duty should include a non-exclusive list of factors that should be considered in determining whether a measure is 'reasonable and proportionate', including:

- a. the size of the person's business or operations
 - b. the nature and circumstances of the person's business or operations
 - c. the person's resources
 - d. the person's business and operational priorities
 - e. the practicality and the cost of the measures
 - f. all other relevant facts and circumstances.
2. A positive duty should be accompanied by significant education and other outreach, as well as support for the Commission, legal assistance providers and business peak bodies to be able to provide clear and accessible guidance about the positive duty.
 3. To ensure that there is broad understanding of the actions required as a result of a positive duty in discrimination law, and to enable organisations time to assess their current business practices, the Commission considers that it would be appropriate to stage the introduction of a positive duty by providing a 12 month period of time before it came into legal effect.
 4. In its introductory phase, there should be a significant focus on co-regulatory mechanisms to embed understanding of the positive duty with new functions for the Commission such as the ability to conduct voluntary audits.

However, this is not adequate and there should be enforcement mechanisms that also attach to the positive duty to ensure that it is of sufficient importance to shift culture, such as the ability for the issuance of standards, the issuance of compliance notices and enforceable undertakings.

3 Major reform 2 – modernising the regulatory framework

Alternative dispute resolution - data

5. Consideration be given to review of s 49 of the AHRC Act to determine whether secrecy provisions with criminal sanctions are warranted, or whether s 49 should be amended to clarify that disclosing information of a de-identified nature for educative purposes does not breach the secrecy obligations in discrimination law.
6. Dedicated resourcing be provided to the Commission, as well as to academic partners, to provide publicly available information and analysis about trends in complaints on a periodic basis.

Use of non-disclosure agreements and confidentiality clauses

7. Guidance be developed on the appropriate usage of non-disclosure agreements and confidentiality provisions in discrimination matters. The preparation of such guidance has been committed to by the Government in relation to sexual harassment complaints. This guidance should be the pilot for further guidance across all other protected attributes in federal discrimination law.

Broader range of guidance materials to be prepared

8. Dedicated funding for undertaking this preparation of guidelines function should be built into the budget of the Commission on an ongoing basis, particularly given that it is foundational in supporting all regulatory options in federal discrimination law.

The Commission should also adopt methods for engaging with key stakeholders on a periodic basis to identify emerging issues on which guidance materials would be most valued.

Action plans

9. The capacity to develop and lodge action plans under the Disability Discrimination Act should be expanded as a measure available across all federal discrimination laws. The following reforms to the action plan process should also be introduced:
 - Clarify that the Commission may provide advice on the development and implementation of action plans.
 - Clarify that the Commission may set minimum requirements for action plans (such as through guidelines) and not accept action plans that fail to meet these requirements
 - Introduce a set timeframe within which action plans will lapse, and require that outcomes of the evaluation of previous action plans be provided to the Commission when submitting a subsequent action plan.

Voluntary audits

10. New powers should be introduced to enable the Commission to conduct reviews of policies or programs of a person or body, upon request to the Commission, in order to assess compliance with federal discrimination laws and measures to eliminate unlawful discrimination.

Special measures certifications

11. The Australian Human Rights Commission Act should be amended to provide the Commission with a power to issue special measures certifications. Such certifications should be judicially reviewable, to ensure appropriate oversight, and time limited. The Commission should be empowered to consult relevant stakeholders when deliberating on whether to certify a special measure.

Disability Standards

12. An independent review of the existing Disability Standards should be conducted to consider their effectiveness in addressing unlawful discrimination, as well as the effectiveness of the current legislative, governance, policy and practice arrangements in place to implement and achieve compliance with the Disability Standards.
13. Consideration be given to introducing new Disability Standards in relation to employment and digital communication technology.

Own-motion investigations into systemic instances of discrimination

14. The Commission should be empowered to conduct own motion inquiries in relation to all areas of unlawful discrimination, of a systemic nature, with effective enforcement mechanisms attached.

This inquiry power should include:

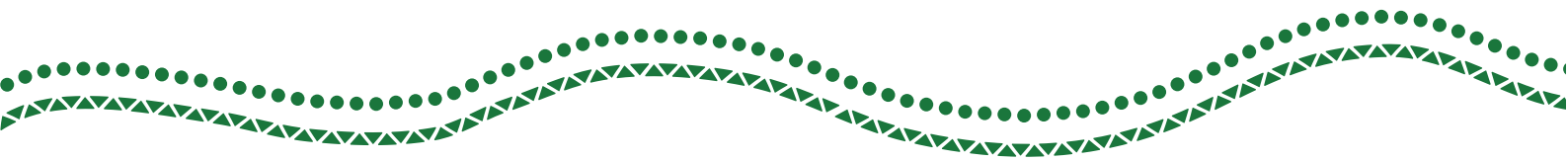
- The capacity to undertake systemic inquiries – such as in circumstances where there a pattern of discrimination or suspected compliance issues becomes known to the Commission.
- Compliance monitoring – to ensure that industries, organisations, sectors or others are complying with the provisions of a positive duty.

The Commission should be empowered to inquire where it suspects there are significant breaches of federal discrimination law that affect a class of people, without the need for an individual complaint; and in relation to serious matters of public interest relating to discrimination, harassment and victimisation.

This function should be independently exercised by the Commission.

15. Consideration be given to the introduction of compliance notices and attaching the following model provisions of the Regulatory Powers (Standard Provisions) Act to the proposed inquiry function as enforcement tools:

- enforceable undertakings under Part 6 of the Act
- the ability to seek civil penalties in court under Part 4 of the Act
- a broader suite of injunctive powers, than the existing Australian Human Rights Commission Act provisions, as set out in Part 7 of the Act.



4 Major reform 3 – Enhancing access to justice

Costs

16. The Commission considers that the default position should be that parties bear their own costs. The AHRC Act should include mandatory criteria to be considered by the courts in determining whether costs should be varied. The list included in the Human Rights and Anti-Discrimination Bill 2012, which was based on the Family Law Act, is an instructive one, which is as follows:
- (a) the financial circumstances of each of the parties to the proceedings
 - (b) whether any party to the proceedings is receiving assistance provided by the Attorney-General's Department, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance)
 - (c) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission)
 - (d) whether any party to the proceedings has been wholly unsuccessful in the proceedings
 - (e) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings and the terms of any such offer
 - (f) any other matters that the court considers relevant.

Evidentiary issues

17. The Commission recommends that a shifting evidentiary burden be introduced in relation to unlawful discrimination matters, while also affirming that the overall onus of proof rests with the complainant in matters that are considered in the federal courts. The Commission supports the approach taken in the Human Rights and Anti-Discrimination Bill 2012 as setting the appropriate threshold, rather than that in s 361 of the Fair Work Act.
18. The Commission develop guidance material about the kinds of matters relevant to discharging the shifting burden, to guide both complainants and respondents in relation to proof of relevant issues.
19. The Commission proposes that the standard of proof be clarified as the usual standard of proof as set out in the *Evidence Act 1995* (Cth) s140.

Representative actions

20. The Commission recommends that unions and other representative groups should be permitted to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.

Timeframe for termination of complaints

21. The Commission recommends that a consistent approach should be taken across the four Discrimination Acts in relation to the timeframe for the President's discretion to terminate a complaint. With the amendment to the AHRC Act in August 2021 to introduce a 24-month discretionary termination period for complaints made under the Sex Discrimination Act the Commission recommends that this apply across the four Discrimination Acts.

The Commission supports the provision of guidance in relation to the kinds of factors relevant to the exercise of the President's discretion.

Reintroducing an intermediate adjudicative process

22. The Commission recommends that the Government give serious consideration to reintroducing an intermediate adjudicative process into the federal discrimination system to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts.

23. The Commission suggests that this could take the form of

- a tribunal-like body
- the restoration of hearing and determination functions of the Commission
- the creation of an arbitral process.

5 Major reform 4 – Improving the practical operation of federal discrimination laws

Coverage of the discrimination laws

24. The Commission recommends that volunteers and interns be protected across all discrimination laws.

25. The Commission proposes that the Sex Discrimination Act be amended to cover family responsibilities/ carer responsibilities both in terms of direct and indirect discrimination and applying to all areas of public life.

New unlawful discrimination protected attributes

26. The Commission recommends that the right to freedom of thought, conscience and religion be included as a new protected attribute; not be limited to employment; and have full access to judicial remedies.

27. The Commission proposes that complaints of discrimination in employment on the basis of irrelevant criminal record should be a fully protected attribute under federal discrimination law, meaning that they have the same pathway for resolution as discrimination complaints made under the four federal discrimination laws

28. Subject to irrelevant criminal record in employment and the right to freedom of thought, conscience and religion being included as protected attributes in the 'unlawful discrimination' jurisdiction of the Commission, the ILO complaints jurisdiction of the Commission should be repealed.

Review of exemptions

29. The Commission recommends that all permanent exemptions under federal discrimination law be reviewed on a periodic basis to ensure they remain appropriate. Particular focus should be given to exemptions relating to insurance, religion and domestic workers.

Definition of discrimination

30. The Commission recommends that the test for direct discrimination be simplified by removing the 'comparator test'.
31. The Commission recommends that the reasonable adjustment assessment currently in the Disability Discrimination Act be amended to clarify that the obligation is a standalone one. The Commission also recommends that the extension of the concept of reasonable adjustments beyond the Disability Discrimination Act be considered.
32. The Commission recommends that the definition of indirect discrimination be amended 'to require only that a condition requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected, without the further requirement that the person does not comply or is not able to comply'. The Commission also recommends that further consideration be given to replacing the 'reasonableness' test with a 'legitimate and proportionate' test.
33. The Commission recommends that the AHRC Act be amended to make explicit that any conduct that amounts to victimisation can form the basis of a civil action for unlawful discrimination, across all federal Discrimination Acts.
34. The Commission recommends that the provisions concerning 'special measures' for people with a protected attribute should be clarified so that the interpretation of what amounts to a 'special measure' be aligned with the understanding of this term under international law and, in particular, that special measures be construed as positive measures to address the protected attribute.
35. The Commission proposes a new provision be included across all federal discrimination laws to identify that discrimination may occur on the basis of a particular protected attribute 'or a particular combination of 2 or more protected attributes', including attributes across the four discrimination acts.

Technical fixes to federal discrimination laws

36. Amend s 46PF(7)(c) of the Australian Human Rights Commission Act to remove the obligation to notify individuals who are the subject of adverse allegations but who are not named respondents.

Harmonisation and standardisation of discrimination law provisions across jurisdictions

37. Amend the AHRC Act as a matter of priority to ensure the Paris Principles compliance of the Commission, as follows:

- Specify that all Commissioner appointments can only be made following a clear, transparent, merit-based and participatory selection and appointment process.
- Including a reference to the Paris Principles in the objects clause of the legislation acknowledging that the Commission is intended to be a Paris Principles compliant national human rights institution.
- Including a definition of human rights in the AHRC Act that references all of Australia's international human rights obligations.

The Commission also recommends that the Government periodically conduct a re-baselining review of the Commission to ensure that it has adequate resourcing to conduct its functions

38. The Commission concludes that the major focus at this time should be on embedding the structural reforms that are proposed in this paper. Once these reforms are implemented, they should be reviewed after 5 years to consider their effectiveness and whether a broader integration exercise should be undertaken to further standardise the approach across federal, state and territory discrimination laws, as well as the Fair Work Act and work, health and safety law.

6 Implementing the reform agenda

The proposed reforms will require:

- Amendments to existing provisions in federal discrimination (and related) laws
- Insertion of new provisions in federal discrimination laws
- New regulatory powers (inserted into the AHRC Act and/or federal Discrimination Acts) and an associated support package
- Educational outreach, community engagement and preparation of guidance materials
- Further review processes into some issues.

The proposed reforms are grouped together in the following table according to these categories. We also identify which legislation would require amendment and identify where the Government has implemented changes or committed to respond to the issues raised in relation to the prohibition of sexual harassment in the Sex Discrimination Act, as a consequence of the *Respect@ Work* report.

Table 6.1: Implementation table

Mechanism / reform	Act requiring amendment or other action
Amendments to existing provisions in federal discrimination (and related) laws	
16. The Commission considers that the default position should be that parties bear their own costs. The AHRC Act should include mandatory criteria to be considered by the courts in determining whether costs should be varied. The list included in the Human Rights and Anti-Discrimination Bill 2012, which was based on the Family Law Act, is an instructive one	AHRC Act
17. The Commission recommends that a shifting evidentiary burden be introduced in relation to unlawful discrimination matters, while also affirming that the overall onus of proof rests with the complainant in matters that are considered in the federal courts.	AHRC Act
19. The Commission proposes that the standard of proof be clarified as the usual standard of proof as set out in the Evidence Act 1995 (Cth) s140.	AHRC Act
20. The Commission recommends that unions and other representative groups should be permitted to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.	AHRC Act

<p>21. The Commission recommends that a consistent approach should be taken across the four Discrimination Acts in relation to the timeframe for the President's discretion to terminate a complaint. With the amendment to the AHRC Act in August 2021 to introduce a 24-month discretionary termination period for complaints made under the Sex Discrimination Act the Commission recommends that this apply across the four Discrimination Acts.</p>	<p>AHRC Act</p>
<p>24. The Commission recommends that volunteers and interns be protected across all discrimination laws.</p>	<p>Relevant Discrimination Acts. Government has implemented this in relation to sex-based harassment.</p>
<p>25. The Commission proposes that the Sex Discrimination Act be amended to cover family responsibilities/carer responsibilities both in terms of direct and indirect discrimination and applying to all areas of public life.</p>	<p>Sex Discrimination Act</p>
<p>30. The Commission recommends that the test for direct discrimination be simplified by removing the 'comparator test'.</p>	<p>Relevant Discrimination Acts</p>
<p>31. The Commission recommends that the reasonable adjustment assessment currently in the Disability Discrimination Act be amended to clarify that the obligation is a standalone one. The Commission also recommends that the extension of the concept of reasonable adjustments beyond the Disability Discrimination Act be considered.'</p>	<p>Disability Discrimination Act, and new provision in relevant Discrimination Acts</p>

<p>32. The Commissions recommends that the definition of indirect discrimination be amended ‘to require only that a condition requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, and of disadvantaging the particular person affected, without the further requirement that the person does not comply or is not able to comply’. The Commission also recommends that further consideration be given to replacing the ‘reasonableness’ test with a ‘legitimate and proportionate’ test.</p>	<p>Relevant Discrimination Acts</p>
<p>33. The Commission recommends that the AHRC Act be amended to make explicit that any conduct that amounts to victimisation can form the basis of a civil action for unlawful discrimination, across all federal Discrimination Acts.</p>	<p>AHRC Act and relevant Discrimination Acts. Implemented in Sex Discrimination Act.</p>
<p>34. The Commission recommends that the provisions concerning ‘special measures’ for people with a protected attribute should be clarified so that the interpretation of what amounts to a ‘special measure’ be aligned with the understanding of this term under international law and, in particular, that special measures be construed as positive measures to address the protected attribute.</p>	<p>Relevant Discrimination Acts, particularly the RDA</p>
<p>36. Amend s 46PF(7)(c) of the AHRC Act to remove the obligation to notify individuals who are the subject of adverse allegations but who are not named respondents.</p>	<p>AHRC Act</p>

Insertion of new provisions in federal discrimination laws	
<p>1. Existing protections against discrimination in each of the federal discrimination laws should be supplemented by the inclusion of a positive duty to take reasonable and proportionate measures to eliminate unlawful discrimination. The positive duty should include a non-exclusive list of factors that should be considered is determining whether a measure was a ‘reasonable and proportionate’</p>	<p>AHRC Act and/or relevant Discrimination Acts</p>
<p>3. To ensure that there is broad understanding of the actions required as a result of a positive duty in discrimination law, and to enable organisations time to assess their current business practices, the Commission considers that it would be appropriate to stage the introduction of a positive duty by providing a 12 month period of time before it came into legal effect.</p>	<p>AHRC Act and/or relevant Discrimination Acts</p>
<p>4. In its introductory phase, there should be a significant focus on co-regulatory mechanisms to embed understanding of the positive duty with new functions for the Commission such as the ability to conduct voluntary audits.</p> <p>However, this is not adequate and there should be enforcement mechanisms that also attach to the positive duty to ensure that it is of sufficient importance to shift culture, such as the ability for the issuance of standards ,the issuance of compliance notices and enforceable undertakings.</p>	<p>AHRC Act and/or relevant Discrimination Acts</p>

<p>26. The Commission recommends that the right to freedom of thought, conscience or religion be included as a new protected attribute; not be limited to employment; and have full access to judicial remedies.</p>	<p>Likely a new Discrimination Act</p>
<p>27. The Commission proposes that complaints of discrimination in employment on the basis of irrelevant criminal record should be a fully protected attribute under federal discrimination law, meaning that they have the same pathway for resolution as discrimination complaints made under the four federal discrimination laws.</p>	<p>AHRC Act</p>
<p>28. Subject to irrelevant criminal record in employment and the right to freedom of thought, conscience and religion being included as protected attributes the 'unlawful discrimination' jurisdiction of the Commission, the ILO complaints jurisdiction of the Commission should be repealed.</p>	<p>AHRC Act</p>
<p>35. The Commission proposes a new provision be included across all federal discrimination laws to identify that discrimination may occur on the basis of a particular protected attribute 'or a particular combination of 2 or more protected attributes', including attributes across the four discrimination acts.</p>	<p>AHRC Act and/or relevant Discrimination Acts</p>

Harmonisation and standardisation of discrimination law provisions across jurisdictions	
37. Amend the Australian Human Rights Commission Act as a matter of priority to ensure the Paris Principles compliance of the Commission.	AHRC Act
New regulatory powers and associated support	
9. The capacity to develop and lodge action plans under the Disability Discrimination Act should be expanded as a measure available across all discrimination laws, with additional requirements.	Relevant Discrimination Acts and/or AHRC Act
10. New powers be introduced enabling the Commission to conduct reviews of policies or programs of a person or body, on a request to the Commission in order to assess compliance with federal discrimination laws and measures to eliminate unlawful discrimination.	AHRC Act and/or relevant Discrimination Acts
11. The Australian Human Rights Commission Act should be amended to provide the Commission with a power to issue special measures certifications. Such certifications should be judicially reviewable, to ensure appropriate oversight, and time limited. The Commission should be empowered to consult relevant stakeholders when deliberating on whether to certify a special measure.	AHRC Act
13. Consideration be given to introducing new Disability Standards in relation to employment and digital communication technology.	No amendments required - resourcing of AHRC and AGD for consultation and development process

<p>14. The Commission should be empowered to conduct own motion inquiries in relation to all areas of unlawful discrimination, of a systemic nature, with effective enforcement mechanisms attached.</p>	<p>AHRC Act and/or relevant Discrimination Acts</p>
<p>15. Consideration be given to the introduction of compliance notices and attaching the following model provisions of the Regulatory Powers (Standard Provisions) Act to the proposed inquiry function as enforcement tools: enforceable undertakings under Part 6 of the Act; civil penalties under Part 4 of the Act; and a broader suite of injunctive powers, than the existing Australian Human Rights Commission Act provisions, as set out in Part 7 of the Act.</p>	<p>AHRC Act and/or relevant Discrimination Acts</p>
<p>Educational outreach, community engagement and preparation of guidance materials</p>	<p>Resourcing required for whom</p>
<p>2. A positive duty should be accompanied by significant education and other outreach, as well as support for the Commission, legal assistance providers and business peak bodies to be able to provide clear and accessible guidance about the positive duty.</p>	<p>AHRC, Community legal centres, business peak bodies</p>
<p>6. Dedicated resourcing be provided to the Commission, as well as to academic partners, to provide publicly available information and analysis about trends in complaints on a periodic basis.</p>	<p>AHRC, with academics through ARC Linkage grants process</p>

<p>7. Guidance be developed on the appropriate usage of non-disclosure agreements and confidentiality provisions in discrimination matters. The preparation of such guidance has been committed to by the government in relation to sexual harassment complaints. This guidance should be the pilot for further guidance across all other protected attributes in federal discrimination law.</p>	<p>AHRC, Government commitment to implement in relation to sexual harassment complaints.</p>
<p>8. Dedicated funding for undertaking this preparation of guidelines function should be built into the budget of the Commission on an ongoing basis, particularly given that it is foundational in supporting all regulatory options in federal discrimination law.</p>	<p>AHRC</p>
<p>18. The Commission develop guidance material about the kinds of matters relevant to discharging the shifting burden, to guide both complainants and respondents in relation to proof of relevant issues.</p>	<p>AHRC</p>
<p>Further review required</p>	<p>Reviewer</p>
<p>5. Consideration be given to removing the existing secrecy provisions and criminal sanctions attached to these. Alternatively, secrecy provisions be amended to clarify that disclosing information of a de-identified nature for educative purposes does not breach the secrecy obligations in discrimination law.</p>	<p>AGD (in considering recommendations of ALRC Secrecy report recommendations)</p>
<p>12. An independent review of the existing Disability Standards should be conducted to consider their effectiveness in addressing unlawful discrimination, as well as the effectiveness of the current legislative, governance, policy and practice arrangements in place to implement and achieve compliance with the Disability Standards.</p>	<p>AHRC (Disability Discrimination Commissioner)</p>

<p>22. The Commission recommends that the Government give serious consideration to reintroducing an intermediate adjudicative process into the federal discrimination system to bridge the gap between voluntary conciliation at the Commission and litigation in the federal courts.</p>	<p>ALRC inquiry or other inquiry process (eg Senate committee, departmental review)</p>
<p>23. The Commission suggests that this could take the form of: a tribunal-like body; the restoration of hearing and determination functions of the Commission; the creation of an arbitral process</p>	<p>ALRC inquiry or other inquiry process (eg Senate committee, departmental review)</p>
<p>29. The Commission recommends that all permanent exemptions under federal discrimination law be reviewed on a periodic basis to ensure they remain appropriate. Particular focus should be given to exemptions relating to insurance, religion and domestic workers.</p>	<p>For initial review, current ALRC inquiry into religious exemptions expanded to cover all exemptions. For periodic review: departmental mechanism.</p>
<p>38. Once these reforms are implemented, they should be reviewed after five years to consider their effectiveness and whether a broader integration exercise should be undertaken to further standardise the approach across federal, state and territory discrimination laws, as well as the Fair Work Act and work, health and safety law.</p>	<p>Independent review mechanism to be built into legislative reforms</p>

In identifying these reform options the Commission reiterates that:

- The need for reform of federal discrimination law is pressing, and consideration should be given to this as a matter of priority
- The proposed reform options are presented as a package of reforms, each which is a necessary component of addressing the current problems with the system of federal discrimination law as a whole
- Effective community and business outreach will be critical to successfully implementing these reforms- implementation should be treated as a shared endeavour, with a focus on shifting the culture to a preventative one that effects a zero-tolerance approach to discrimination.
- To ensure access to justice for complainants and defendants, reforms should be supplemented by sufficient resourcing of Legal Aid, community legal centres and specialist organisations to assist individuals to understand their rights, access advice and appropriate support, and effectively navigate the system.



Further information

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