Law Council
OF AUSTRALIA

Response to Discussion Paper: Priorities for federal discrimination law reform

Australian Human Rights Commission

20 December 2019

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.
The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

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

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors. Members of the 2019 Executive as at 14 September 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, President-elect
- Dr Jacoba Brasch QC, Treasurer
- Mr Tass Liveris, Executive Member
- Mr Ross Drinnan, Executive Member
- Executive Member, Vacant

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

Acknowledgement

The Law Council of Australia acknowledges the assistance of its National Human Rights Committee, its Equal Opportunity Committee, Indigenous Legal Issues Committee, the Law Society of South Australia and the Law Society of New South Wales in the preparation of this submission.

Executive Summary

1. The Law Council is grateful for the opportunity to provide a submission to the Australian Human Rights Commission (**AHRC**) in response to the *Discussion Paper: Priorities for federal discrimination law reform* (**Discussion Paper**).

2. On 14 December 2018, the AHRC announced a major project, *Free and Equal: An Australian conversation on human rights* (**Inquiry**), to identify reform proposals to better protect human rights in Australia. On 13 November 2019, the Law Council provided the AHRC with a comprehensive submission in response to the Inquiry's Issues Paper.

3. As part of the overall consultation, the AHRC is releasing a series of separate technical papers that focus on specific law reform issues. The first of these is the Discussion Paper, which sets out the AHRC's preliminary views on the priorities for federal discrimination law reform. The Law Council welcomes the AHRC's Discussion Paper as an important part of facilitating consultations with civil society to provide advice back to the Australian Government.

4. The Discussion Paper identifies the need for reform, the principles that should guide it, and the 11 major priority areas for reform to ensure effective protection against discrimination at the federal level. Discussion questions attached to each proposal are addressed by the Law Council in this submission.

5. The Law Council supports reforms to Australia's federal anti-discrimination law framework, provided that this process preserves or enhances existing protections against discrimination and removes the regulatory burden on business. It views the current inquiry as an opportunity to address some of the limitations of the current legislation identified as part of the Government's consolidation process initiated in 2012.[1]

6. Its central recommendation in this submission concerns the consolidation of existing federal anti-discrimination laws into a single federal act. However, it stresses that this should not be at the expense of lowering the protections based on Australia's international obligations. Careful consideration should be given to retaining provisions that currently provide protection to specific grounds under the individual Acts.

7. Other key recommendations of this submission relate to:

   - improving the definitions within federal discrimination laws;
   - expanding the coverage of existing protected attributes and addressing gaps in protection through the addition of new protected attributes;
   - achieving greater consistency and clarity regarding the areas of public life in which unlawful discrimination is prohibited;
   - assessing the reasonableness and proportionality of permanent exceptions;
   - improving compliance and community awareness with respect to anti-discrimination laws;
   - enhancing the powers of the AHRC to investigate incidents of discrimination on its own motion;

[1] See for example, the Law Council of Australia (**Law Council)**, Submission to the Attorney-General's Department*, Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper,* 1 February 2012.

- introducing positive duties to eliminate unlawful discrimination and harassment and to advance equality;
- reassessing the complaint handling process to improve access to justice for example, clarifying the standard of proof and adopting a shifting onus of proof; and
- the desirability of achieving consistent, harmonised national legislation, provided that this preserves or enhances existing protections.

A full list of recommendations is provided at the end of this submission.

8. The Law Council would be pleased to discuss its submission further with the AHRC, should it assist.

Introduction

9. The Law Council welcomes the AHRC's Inquiry, which seeks to identify reform proposals to better protect human rights in Australia. It particularly welcomes the Discussion Paper issued under the Inquiry's auspices, and the constructive approach that it adopts to the important area of Commonwealth anti-discrimination law.

10. The Commonwealth anti-discrimination regime is a major component of human rights protection in Australia. It provides an important framework for promoting equality and contains many positive features that operate to protect against certain forms of discrimination in certain circumstances.[2] Despite this, many individuals and groups within the Australian community experience discrimination, and the notion of substantive equality remains, at least for some, still out of reach.[3]

11. The limitations of Australia's anti-discrimination laws were highlighted in recent comments by the United Nations High Commissioner for Human Rights:

> *Australians rely on a patchwork of laws that address different forms of discrimination. But several of these laws need to be updated, protection gaps need to be filled, and broad exemptions and reservations need to be clarified.*[4]

12. The Law Council is committed to promoting substantive equality before the law for all Australians.[5] To this end, it has a long history of engagement on proposals to reform federal anti-discrimination laws. This includes providing a:

- 2012 submission in response to the Attorney General Department's (**AGD's**) Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper;[6]
- 2012 submission on the Senate Constitutional and Legal Affairs Legislation Committee's (**Senate Committee**) Exposure Draft-Human Rights and Anti-Discrimination Bill 2012 (Cth);
- 2013 submission on the Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth);
- 2014 submission on the exposure draft of the AGD's Freedom of Speech (Repeal of section 18C) Bill 2014 (Cth);
- 2015 submission to the Australian Law Reform Commission (**ALRC**) regarding Traditional Rights and Freedoms;
- 2016 submission to the Parliamentary Joint Committee on Human Rights inquiry into Freedom of Speech in Australia;
- 2016 submission to the AHRC regarding its Willing to Work inquiry into employment discrimination against older Australians;
- 2018 submission to the Expert Panel on Religious Freedom in 2018;

---

[2] Law Council, *Policy Statement – Consolidation of Commonwealth Anti-Discrimination Laws* (***Policy***) (March 2011), available at <https://www.lawcouncil.asn.au/docs/79df61dc-cb39-e711-93fb-005056be13b5/1202-Policy-Statement-Consolidation-of-Commonwealth-Anti-Discrimination-Laws.pdf>.
[3] Ibid referring to eg, Professor Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2018* report (Scanlon Foundation and University of Monash, 2018), 67-69.
[4] Michelle Bachelet, UN High Commissioner for Human Rights, 'Free and Equal: An Australian Conversation on Human Rights' (Speech to AHRC conference, Sydney, 8 October 2019).
[5] Law Council, *Policy Statement on Human Rights and the Legal Profession: Key Principles and Commitments* (2017), available at <https://www.lawcouncil.asn.au/resources/policies-and-guidelines>.
[6] See also Law Council, Supplementary Submission to the Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper,* 26 April 2012.

- 2018 submission to the Senate Committee regarding legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff;
- 2019 submission to the AHRC's National Inquiry into Sexual Harassment in Australian Workplaces;[7]
- 2019 submission to the Senate Committee regarding the Discrimination Amendment (Removing Discrimination Against Students) Bill 2018;
- 2019 submission to the AGD regarding its review of Review of the *Australian Human Rights Commission Regulations 1989* and the *Disability Discrimination Regulations 1996*; and
- 2019 submission to the AGD regarding the exposure drafts of the Religious Freedom Bills.

13. This level of engagement has served to illustrate the complexity of the law in this area, and the complicated interactions between 'core' Commonwealth anti-discrimination laws (the *Sex Discrimination Act 1984* (Cth) (**SDA**), *Age Discrimination Act 2005* (Cth) (**ADA**), *Disability Discrimination Act 1992* (Cth) (**DDA**) and *Racial Discrimination Act 1975* (Cth) (**RDA**), and the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**)). The overall complexity is augmented by these laws' further interactions with other important Commonwealth laws prohibiting discrimination, such as the *Fair Work Act 2009* (Cth) (**FWA**),[8] and state and territory anti-discrimination laws.

14. 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 FWA 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 FWA provisions, with a view to avoid multiple proceedings agitating the same subject matter.[9]

15. A more holistic review, which in the long-term may be most effective, would extend to consideration of relevant FWA provisions, as well as state and territory anti-discrimination laws, with a view to achieving consistent, harmonised national legislation. One option to facilitate this could be through referral of state and territory powers to the Federal Government, as occurred with the FWA. However, the Law Council recognises that this is beyond the AHRC's remit. Further, if such an exercise were embarked upon there would inevitably be major debate as to how such an objective would be achieved, focussing on changes that would result in a diminution or increase in existing rights.

16. At the same time, the Law Council is also conscious that each piece of 'core' Commonwealth anti-discrimination legislation carries both symbolic and practical significance for the cohort it seeks to protect, and that moves to simplify or harmonise legislation in this area may have significant implications. A measured approach to reform is required to avoid any unintended consequences.

17. Proposals to significantly reform or expand federal anti-discrimination law may be constrained by the requirement to ensure that any amendments have a sound

[7] See also Law Council, Supplementary Submission to the AHRC, *National Inquiry into Sexual Harassment in Australian Workplaces,* 26 February 2019.
[8] Eg, FWA, ss 351 and 772.
[9] Law Council, *Policy* (2011), 5.

Constitutional basis. The Commonwealth does not have any express power to legislate in respect of discrimination and therefore relies on a number of heads of law-making power. Most significantly, the Commonwealth relies on its power to legislate with respect to 'external affairs' under section 51(xxix) of the Constitution which has been held to include the implementation of Australia's obligations under international instruments.[10] The Commonwealth can validly legislate to implement international treaty obligations, provided that the legislation is 'reasonably capable of being considered appropriate and adapted to implementing the treaty.'[11]

18. In addition to the external affairs power, the Commonwealth has relied on a number of other heads of power to support the application of its anti-discrimination legislation. As highlighted by Rees, Rice and Allen,[12] this includes its powers to make laws of application to Territories;[13] foreign trading and financial corporations;[14] banking;[15] insurance;[16] trade and commerce with other countries and among the States;[17] and incidental matters.[18] Any amendments to Australia's anti-discrimination laws must be closely considered against these powers to ensure their constitutional validity.

19. The Law Council's response on the questions outlined in the Discussion Paper, is underpinned by its Policy Statement on *Consolidation of Commonwealth Anti-Discrimination Laws*[19] (**Policy**), along with several other key Law Council policies cited below.

20. At this stage of the Inquiry, the Law Council provides a high-level response to the questions identified in the Discussion Paper. Moving forward, the Law Council is conscious of the need for more detailed consultation with a range of stakeholders, including complainants and respondents who have practical experience as to the operation of the law in this area.

Response to questions

What principles should guide discrimination law reform?

21. The AHRC proposes that the following principles are important in ensuring that discrimination laws contribute positively to a reduction of discrimination in society and the greater realisation of equality on a continuing basis: that is, laws should be *clear*, *consistent, comprehensive*, *intersectional*, *remedial, accessible* and *preventative*.

22. The Law Council supports these principles. Additional principles which could be included are set out below.

- *Maintaining or enhancing current levels of protection* - the Law Council's support for reforms in this area is premised on the basis that this process preserves or enhances existing protections against discrimination and removes the

[10] *Commonwealth v Tasmania* (1983) 158 CLR 1.
[11] *Victoria v Commonwealth* (1996) 187 CLR 416, 487.
[12] *Australian anti-discrimination & equal opportunity law* (The Federation Press, 3rd edition, 2018) 73 [2.14.7].
[13] *Australian Constitution* s 122.
[14] Ibid s 51 (xx).
[15] Ibid s 51 (xiii).
[16] Ibid s 51 (xiv).
[17] Ibid s 51 (i).
[18] Ibid s 51 (xxxiv).
[19] Law Council, *Policy* (2011).

regulatory burden on business.[20] The Discussion Paper's comment that reform 'should not involve creating new forms of discrimination against any sector of society'[21] could be elevated to a guiding principle.

- *Upholding international obligations* – federal anti-discrimination law should be consistent with Australia's obligations under international law.[22]
- *Promoting substantive equality* – particularly in the absence of a federal human rights charter, the symbolic importance of legislation in this area should be informed by a clear commitment to promote substantive equality, and protect against unlawful discrimination.[23]
- *Alleviating complexity* – Australia has a complex system of federal anti-discrimination laws, layered over a similarly complex set of State and Territory laws. Any reforms to Australia's federal anti-discrimination law framework should alleviate this complexity, rather than increase it.
- *Consolidation* – this fourth additional principle is discussed below.

Consolidation

23. Efforts to consolidate Commonwealth anti-discrimination laws in 2012 and 2013 were unsuccessful.[24] However, the Law Council continues to support the consolidation of existing federal anti-discrimination laws into a single federal act.[25] It considers that a consolidated Act should be a fully integrated Act, rather than a mere consolidation of existing laws, which would not of itself be sufficient to increase accessibility. This means that, where possible, a consolidated Act should include general provisions that apply to all grounds and contain one process for making and determining complaints.[26]

24. With respect to consolidation, however, the Law Council is mindful that uniformity and consolidation should not be at the expense of lowering the protections based on particular treaties. Compliance with Australia's international obligations requires that anti-discrimination laws are fit for purpose.

25. In order to ensure that existing protections are not diluted, the Law Council considers that a consolidated Act should also maintain those provisions specific to a particular ground that currently provide protection under individual Acts, such as the reasonable adjustment provisions in the DDA.[27] It has previously pointed towards the *Equality Act 2010* (UK) (**UK Act**) as an appropriate model for consolidation.[28] The UK Act has general provisions, including general limitation provisions and a

[20] Ibid 2.
[21] Discussion paper, 7.
[22] Including the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 23 March 1976) (**ICCPR**); Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (**CEDAW**); Convention on the Rights of Persons with Disabilities**,** opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 30 March 2008) (**CPRD**); Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (**CERD**); Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (**CRC**); (Employment and Occupation) Convention 1958 (No III), opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) (**ILO 111**).
[23] Law Council, *Policy* (2011) 2.
[24] Through the release by the Attorney-General's Department of the *Human Rights and Anti-Discrimination Bill 2012* (Cth) in late 2012. In early 2013, the then Australian Government announced that the Bill would be withdrawn and that instead, anti-discrimination laws would be introduced to cover sexual orientation, gender and intersex status.
[25] Law Council, *Policy* (2011), 2.
[26] Ibid 5.
[27] Ibid.
[28] Ibid, 5.

single complaints process, but also includes specific provisions in relation to each of the particular grounds (or attributes) of discrimination.

26. The Law Council notes that the RDA is unique in that it contains different and much broader prohibitions, as based on the wide provisions of the *Convention on the Elimination of Racial Discrimination* (**CERD**)[29] that prohibit racial discrimination in relation to the equal enjoyment of any human rights.[30] In particular, section 10 of the RDA 'extends beyond dealing with discriminatory actions to dealing with discriminatory laws',[31] operating to ensure that racially discriminatory laws are interpreted in a non-discriminatory way.[32] Section 10 also allows for the invalidation of some laws, and has been a bulwark for upholding native title and First Nations property rights.[33]

27. The level of protection provided by the RDA should not be reduced by making its form resemble less comprehensive statutes, with a greater number of exceptions, such as the SDA. It has received Committee views suggesting that while consolidating some laws, such as the DDA and SDA, may be beneficial, there may be strong arguments for keeping the RDA separate from any consolidation process, as there may be dangers that its relatively strong protections are watered down. Given that any consolidation process will be most effective if it includes all relevant laws, it should be approached on the basis that consolidation does not require total uniformity of treatment of all forms of discrimination, and that the unique elements of the RDA can be retained in consolidated discrimination legislation.

Why is reform needed?

28. The Discussion Paper identifies six key reasons for reform, as listed below. The Law Council considers that all six factors identified by the AHRC are relevant and important considerations.

The mix of discrimination laws is complex and similar concepts operate differently across the laws.

29. The Law Council has previously identified that the current scheme is confused, fragmented, and difficult to use.[34] It supports reforms to the Commonwealth anti-discrimination regime that make it easier to understand and improve its capacity to address all forms of discrimination.[35]

30. The need for laws that are accessible and clear is fundamental. In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Limited,* Justice Lockhart said:

> *Anti-discrimination legislation must be understood, not only by statutory bodies that enforce it, but by all sections of the community because the implications and effects of the legislation could touch us all. It is important that the legislation is not approached and construed*

[29] Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
[30] Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) (**Gaze and Smith**), 55.
[31] Ibid, 170.
[32] Ibid.
[33] *Mabo v Queensland (No 1)* (1988) 166 CLR 186.
[34] Law Council, *Policy* (2011) 2.
[35] Ibid.

> *with fine and nice distinctions which will not be comprehended by any except experts in the field; nor is there any need for them.*[36]

31. For anti-discrimination laws to be effective, they must not only be known and understood by lawyers – they must be incorporated in the practice of everyone in the Australian community. The Law Council has received views that the jurisdiction is becoming mired in technicality, which seems contrary to the ultimate policy goal and social aims of the legislation. For example, the 'direct/indirect' distinction and the vexed issue of the comparator at the federal level, which are discussed further below, are features which have become overly complex with the passage of time and caselaw.

32. Nevertheless, the Law Council reiterates that any synthesising of current anti-discrimination laws should not dilute existing protections that reflect Australia's obligations under a number of international human rights treaties. Any effort to consolidate anti-discrimination laws must recognise the distinctive nature of each of the human rights treaties that underpin these laws.

33. The Law Council agrees with the emphasis in the Discussion Paper on understanding the complexities for people experiencing 'intersectional discrimination', where someone is discriminated against on several different grounds and where different legislative protections apply.[37]

34. A consistent theme of the submissions received during the Law Council's recent Justice Project inquiry was the need for an 'intersectional' analysis of the challenges that disadvantaged groups face in terms of legal need and access to justice.[38] Intersectionality describes how different types of discrimination interact and render individuals that experience compound discrimination invisible in the eyes of the law. For example, there has been a 'tendency to treat race and gender as mutually exclusive categories of experience and analysis'.[39]

35. A limited policy focus which is blind to this issue can lead to the needs of the most disadvantaged members of society being ignored.[40] In Australia, the justice system has traditionally 'identified groups of needs and rights holders such as women and Indigenous people, but fail[ed] to provide for the needs of people who dwell at the intersection of these groups'.[41] With respect to anti-discrimination laws, the retention of separate legislation dealing with different grounds of discrimination creates real challenges for complainants who experience intersectional discrimination.

The discrimination laws have not been updated to reflect best practice approaches or to address identified concerns.

36. Concerns about the operation of existing discrimination laws and options for reform have been highlighted in the previous Law Council submissions listed above.

---

[36] (1993) 46 FCR 301 ('***Mt Isa Mines'***) 326.
[37] Discussion Paper, 7.
[38] See, eg, WrongTrac, *Submission No 39*; Aged and Disability Advocacy Australia, *Submission No 59*; International Commission of Jurists Victoria*, Submission No 103*; National Family Violence Prevention Legal Service, *Submission No 105.*
[39] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 *University of Chicago Legal Forum* 137
[40] Ibid.
[41] Human Rights Law Centre and Change the Record Coalition, *Over-looked and overrepresented: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (May 2017) 11 <https://www.hrlc.org.au/reports/2017/5/18/report-over-represented-and-overlooked-the-crisis-of-aboriginal-and-torres-strait-islander-womens-growing-over-imprisonment>.

Despite this, significant issues identified have yet to be addressed. The current inquiry provides an opportunity to further consider some of the inconsistencies and limitations of current legislation identified in response to the Government's 2012 *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper.* This includes the following issues that were highlighted in the Law Council's submissions:[42]

- inconsistencies in interactions between Commonwealth, State and Territory anti-discrimination laws including the 'direct/indirect' distinction;
- the application of the reasonable adjustments duty in the DDA;
- the protection of voluntary workers;
- the role and functions of the AHRC; and
- gaps in existing attributes.

37. The Law Council's 2011 Policy also pointed towards the consideration of models in other jurisdictions, such as:

- the general prohibition on harassment on any of the grounds protected in the *Equality Act 2010* (UK) (**the UK Act)**;[43]
- a definition which refers to 'unfavourable treatment' because of a protected attribute, such as that contained in the *Discrimination Act 1991* (ACT) (**the ACT Act**);[44]
- the approach towards the onus and standard of proof adopted under the FWA;[45] and
- the structure of the UK Act as an appropriate model for consolidation.[46]

There is an unnecessary level of difference and complexity between federal, state and territory laws.

38. As flagged above, the Law Council has an established position that a process of consolidation should also be accompanied by renewed moves to harmonise anti-discrimination laws across Australia.[47] As noted by Rees, Rice and Allen at the outset of 'Australian anti-discrimination & equal opportunity law'[48]:

> *The single reform… of harmonising provisions, most notably the exceptions, would significantly reduce the size of this book. Throughout the book, we repeatedly observe on the irrational, and always confusing, variations in legislation, from one jurisdiction and even within the same jurisdiction. There can be no policy or practical justification for prohibiting in one Australian jurisdiction discriminatory conduct that is permitted in another.*[49]

---

[42] Law Council, Submission to the Attorney-General's Department*, Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper,* 1 February 2012 and Law Council, Supplementary Submission to the Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper,* 26 April 2012.
[43] Law Council, Policy, 3, citing *UK Act* s 26.
[44] Ibid, 4 citing *ACT Act* s 8(2).
[45] Ibid, 4, citing *FWA* ss 361 and 783.
[46] As discussed above: Ibid, 5.
[47] Ibid, 5.
[48] (The Federation Press, 3rd edition, 2018) (**Rees, Rice and Allen**).
[49] Ibid, xv.

39. However, these authors acknowledge that such reform is 'simply stated but enormously challenging to do'.[50] This process was commenced by the Standing Committee of Attorneys-General in 2009-2010 but not pursued.[51]

40. The Law Council retains the view that there are significant differences in the protections provided across the jurisdictions which often appear to lack a justifiable policy rationale. This results in a confused and fragmented scheme, which is difficult to apply in practice.

41. For example, as discussed further below, the focus on the mutual exclusivity of direct[52] and indirect discrimination,[53] the need to develop a 'comparator' (between a person or persons in similar circumstances without the protected attribute), and the need to demonstrate disadvantage to members of a 'group' sharing the same protected attribute have become problematic.

42. In other jurisdictions, the legislation has been drawn so as to focus (for direct discrimination) on *unfavourable treatment* (rather than less favourable treatment),[54] and (for indirect discrimination) *disadvantage to the individual* (not inability to comply and/or disadvantage to the group with the protected attribute).[55] This assists simplification and avoids fruitless or arcane inquiries into establishing the 'correct' comparator, what a 'group' of people with a protected attribute may or may not be able to meet, or what actually constitutes an 'inability to comply' with a requirement.

Court decisions have limited the scope of certain provisions in the federal discrimination acts.

43. The Discussion Paper identifies a number of court decisions that have limited the scope of Commonwealth anti-discrimination legislation by confining the operation of key provisions. In particular, the decision of the High Court in *Maloney v The Queen*[56] (***Maloney***) has also raised concerns. This concerned a Queensland legislative scheme to restrict the amount of alcohol any person could possess in a community area on Palm Island, on which most persons were First Nations Australians. The Court ultimately reached the view that the scheme was lawful as it was a 'special measure' within the meaning of section 8 of the RDA.

44. The High Court considered the question of whether the RDA should be construed consistently with CERD, including more recent international developments with respect to race discrimination. The High Court was asked to consider a range of international legal materials beyond the text of CERD.[57]

45. In particular, Ms Maloney argued that consultation with the relevant community was essential for a special measure to be valid. Relevant to this argument was General Recommendation 32 of the CERD Committee[58] which was issued in 2009, well after CERD was ratified by Australia in 1975, and the passage of the RDA itself (also 1975). The General Recommendation provides that special measures should be

[50] Ibid.
[51] Standing Committee of Attorneys-General, Communique, 25 July 2008.
[52] See for example, DDA s 5, ADA s 14, RDA s 9(1).
[53] See for example, DDA s 6, ADA s 15, RDA s 9(1A).
[54] See *ACT Act*, s 8(2) and *Equal Opportunity Act 2010* (Vic) s 8(1).
[55] See for example *ACT Act*, s 8(3) and *Equal Opportunity Act 2010* (Vic) s 9 and *Anti-discrimination Act 1998* (Tas) s 15(1).
[56] [2013] HCA 28; 252 CLR 168 (***Maloney***).
[57] See Kate Eastman SC, 'Still Anxious…Using International Law in Australian Courts' (Paper presented at the Scottish Parliament at the World Bar Conference, Edinburgh, March 2016).
[58] CERD/C/GC/32 (2009).

designed and implemented on the basis of prior consultation with affected communities.

46. The issue for the High Court was whether international developments such as General Recommendations issued by treaty bodies after the enactment of the RDA, could be considered as part of the interpretive process. The majority of the High Court took a restrictive approach. In particular, Chief Justice French, Justice Kiefel and Justice Bell, respectively, warned of "interpretations' which rewrite the [treaty] text';[59] the risk that State parties may 'be taken to have agreed that which they have not';[60] and 'the threat of the treaty text being 'supplemented' by additional criteria reflecting the non-binding recommendations of the CERD Committee'.[61]

47. A different approach was taken by Justice Gageler who embraced the 'living' instrument theory and found that regard to subsequent clarification of the CERD rights assisted in the interpretation of the RDA. He specifically noted that subsequent General Recommendations 'have contributed to, and are indicative of, a 'normative development'.[62]

48. The Law Council notes the questions of interpretation prompted by *Maloney*, regarding the extent to which, courts in Australia must take into account the emerging interpretations by treaty bodies or committees which post-date Australia's ratification of a particular treaty and domestic legislation which gives effect to its provisions. These questions transcend matters of anti-discrimination law. The tension is 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.

49. It has been suggested that a deeper engagement with international law is necessary and that international human rights treaties cannot be considered in isolation of the work of the treaty bodies, the Universal Periodic Review mechanisms, the role of expert committees, special rapporteurs and regional courts.[63] The Law Council would be happy to give further consideration to these important questions.

50. With respect to the question of the interpretation of 'special measures' under the RDA, the Law Council considers that, too often, legislative and policy reform is pursued without the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples in Australia, including for 'special measures', contrary to article 19 of the United Nations Declaration on the Rights of Indigenous Peoples.[64] For example, the Law Council recently expressed concern that the Social Services Legislation Amendment (Cashless Debit Card) Bill 2017 (Cth) lacked genuine consultation with the Aboriginal and Torres Strait Islander communities affected by the policy.[65] The definition and scope of special measures in the RDA is discussed further below.

---

[59] *Maloney* [23].
[60] *Maloney* [175].
[61] *Maloney* [235].
[62] *Maloney* [289].
[63] Eastman, 'Still Anxious…Using International Law in Australian Courts' 15.
[64] *61/295. United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex (**UNDRIP**).
[65] Law Council, *Social Services Legislation Amendment (Cashless Debit Card) Bill 2017*, Submission to the Senate Community Affairs Legislation Committee, 4 October 2017.

Discrimination laws are not comprehensive in their protection and gaps in protection have been identified.

51. The Law Council is cognisant of gaps in protection that undermine the effectiveness of the Commonwealth anti-discrimination law regime. For example, it has identified:

    - gaps in the attributes covered (such as volunteers, interns and other categories of unpaid workers);
    - religious belief or activity is another important attribute lacking federal protection (other than through exemptions), and the Law Council has supported this being redressed in its recent submission on the proposed Religious Discrimination Bill 2019 (although it considers that the Bill requires significant amendment);[66] and
    - there is a lack of coverage of state government employees under the SDA.

    Its positions on these issues are discussed below.

52. The Discussion Paper also refers to emerging challenges to protect individuals from algorithmic bias, through the application of intelligence (**AI**) to decision-making processes.[67] The Law Council agrees that it is essential to consider whether existing anti-discrimination law frameworks are fit for purpose, given that the continued rise of AI across many systems in everyday life has the potential to effectively institutionalise discrimination, diminishing accountability in relation to the making of AI-informed decisions.

53. Instances of unjust consequences arising from AI-informed decision-making have already occurred internationally in areas including recruitment, performance management and the issuance of bail.[68] The Law Council considers that all algorithms that are used to make decisions about individuals must be evaluated for discriminatory effect, preferably prior to roll-out and on a periodic basis.[69]

Some grounds of discrimination do not provide for an enforceable remedy.

54. Complaints brought within the AHRC's 'ILO 111 jurisdiction'[70], which is set out in section 3 of the AHRC Act[71] and concerns of discrimination in the area of employment on the basis of a broader range of attributes (including religion, political opinion, criminal record, nationality and trade union activity) are currently treated differently from those brought under the other four 'core' Commonwealth anti-discrimination laws (SDA, DDA, RDA, ADA) which cover 'unlawful discrimination.'[72] Most notably, remedies are not available from the Federal Court and Federal Circuit Court in ILO 111 discrimination matters. This adds to a fragmented approach, in which complaints of discrimination on the basis of certain attributes are enforceable, while others are not.

Other areas of inquiry

55. The Law Council considers that the reasons for reform raised by the AHRC all present legitimate grounds for reform. Other issues which could be explored include

[66] Law Council, *Religious Freedoms Bills – Exposure Drafts*, Submission to the Attorney-General's Department, 4 October 2019.
[67] Discussion paper, 9; see also AHRC, *Human Rights and Technology*, Issues Paper (2018).
[68] Law Council, *Human Rights and Technology*, Submission to the AHRC, 25 October 2018.
[69] Ibid, 24.
[70] *Discrimination (Employment and Occupation) Convention 1958 (No III)*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) art 1.
[71] See also the *Australian Human Rights Commission Regulations 1989* (Cth), reg 4, declaring additional grounds of discrimination.
[72] See definition of 'unlawful discrimination' in section 3 of the *AHRC Act*.

the *areas in which unlawful discrimination is prohibited*. Discrimination only becomes unlawful if it occurs with respect to the specified attributes in anti-discrimination legislation within certain areas of public life. Ideally, there would be consistency across these areas, which currently include public domains of life such as work, education and the provision of goods and services.

56. Legislative prohibitions upon unlawful discrimination have reflected a 'public/private' distinction in which public activities may be regulated while more freedom is afforded to private activities, although it has been noted that this distinction has shifted over time, bringing more activities within the scope of anti-discrimination laws.[73] Questions have also been raised as to whether this classical distinction can or should be preserved into the future, given the influence that traditionally 'private' institutions, such as professions, charitable institutions, sport and religious educational bodies, can wield over individuals' lives.[74]

57. It has also been noted that the four 'core' Commonwealth anti-discrimination laws cover different areas of activity while particular areas are not all covered in similar terms.[75] For example, with respect to discrimination by a person who provides 'goods', the RDA prohibition concerns people who supply goods to the public,[76] while other Commonwealth Acts are not expressly limited to public supply, and the ADA provision goes further in that it concerns 'a person, who whether for payment or not, provides goods to others'.[77] While most of the Commonwealth Acts provide prohibitions regarding discrimination in access to premises,[78] the SDA makes no such provision.

58. A question arises concerning the extent to which a protection from discrimination in various specified areas of public life extends to anything done by a person who operates in that area. Clarification may be required as to whether protection extends to anything done by a person who operates in that area of public life, or only those things done by a person which *relate* to that area of public life. For example, in the area of education, not everything an educational institution does will necessarily be in the sphere of education. Is the institution nonetheless bound to comply with the legislation even in those areas which are not squarely in the area of education, even though the institution itself is an educational institution? Committee members have noted, eg, that in the Victorian context an example that arises from time to time is the obligation of educational authorities in their interaction with parents.

59. The extent to which 'reasonable adjustments' requirements under federal discrimination law should be extended to other protected attributes in addition to disability is another area for possible inquiry. This is discussed further below.

Major reform priorities

Definitions

60. In line with the guiding principles identified above, federal discrimination laws should be clear and consistent. The Discussion Paper notes that under the existing Commonwealth regime, a number of different and complex definitions are currently

[73] Rees, Rice and Allen, 49.
[74] Ibid, 50, citing Margaret Thornton, *The Liberal Promise: Anti-Discrimination Law in Australia*, Oxford University Press, Melbourne, 1990, 102-107.
[75] Ibid, 565.
[76] RDA, s 13.
[77] ADA, s 28.
[78] DDA, s 23; ADA, s 27; RDA, s 11.

employed in the various acts, namely: *discrimination*, *victimisation*, *special measures* and *reasonable adjustments*. These inconsistencies make a difficult area of the law even more difficult to justify, explain and message.

61. Nevertheless, while the Law Council supports a more uniform approach to anti-discrimination laws to alleviate complexity, this reform process should not be oversimplified. The various definitions used in federal discrimination laws do not stand in isolation and must be carefully construed in the context of the operative provisions of each relevant act. A uniform approach to any of the definitions must be applicable across all areas of anti-discrimination law.

62. The Law Council again notes the significance of Australia's international law obligations. As noted above, the constitutional validity of federal anti-discrimination legislation strongly relies upon the Commonwealth's power to legislate with respect to 'external affairs' under section 51(xxix) of the Constitution which, in *Commonwealth v Tasmania*,[79] was held to include the implementation of Australia's international law instruments. To this end, any changes to the various definitions must be closely considered in light of Australia's commitments under relevant international treaties.

Discrimination

63. Across federal discrimination laws, there are significant differences in the way in which unlawful discrimination is described. The Law Council supports a comprehensive review of each of the provisions of the existing Commonwealth discrimination laws that contain definitions of, or tests for 'discrimination' to determine whether these:

- definitions and tests give rise to difficulties for complainants, respondents and/or the courts; and
- key definitions comply with the relevant international law definitions contained in Conventions to which Australia is a party.[80]

64. In general, the definition of direct discrimination is distinguished by its focus on 'less favourable treatment' in circumstances that are the same or not materially different.[81] This requires the identification of a 'comparator'; that is, the person or persons to whom an applicant is to be compared in determining whether or not there has been discrimination. It has resulted in complex arguments concerning the identification of comparators.[82]

65. The Law Council considers that a focus on *unfavourable* treatment (compared with less favourable treatment) would remove the inquiry into an appropriate comparator and avoid this added layer of complexity. This approach has been adopted in the ACT[83] and Victoria[84] and is generally simpler to apply.

66. In terms of indirect discrimination, the current definitions in the DDA and RDA incorporate a focus on the inability to comply with a requirement or condition, as well as whether there is a disadvantageous impact on persons with the attribute.[85] The Law Council considers that a test of *effect of disadvantaging persons with the*

[79] *Commonwealth v Tasmania* (1983) 158 CLR 1, 259.
[80] Law Council, Policy, 3.
[81] See, eg, SDA, s 5(1); DDA, s 5; ADA, s 14.
[82] See, eg, *Purvis v New South Wales* [2003] HCA 62; 217 CLR 92; and Rees, Rice and Allen, 95.
[83] *ACT Act*, s 8(2).
[84] *Equal Opportunity Act 2010* (Vic) s 8(1).
[85] DDA, s 6; RDA, s 9(1)(A).

protected attribute (compared with an inability to comply) would avoid an inquiry into what constitutes an 'inability to comply'.[86] This approach is taken in Tasmania,[87] Victoria,[88] and under the ADA[89] and SDA,[90] and again is simpler and more accessible.

67. The definitions of direct discrimination and indirect discrimination have been held to be mutually exclusive[91] and must be alleged in the alternative. According to the ACT Law Reform Advisory Council, this 'can be conceptually difficult for people who want to complain about discrimination, and for people who are trying to comply with the Act and avoid discriminating'.[92] It has been characterised as a costly, time-consuming technical barrier.[93]

68. The Law Council has previously expressed in-principle support for a unified definition which removes the distinction between direct and indirect discrimination and defines 'discrimination' as including any 'distinction, exclusion, preference, restriction or condition made on the basis of a protected attribute, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment'.[94] This approach is taken in Canada, the United States and New Zealand[95] and the Law Council has continued to receive some support for a unified definition.

69. However, it also notes that 'direct' and indirect' discrimination are recognised concepts in Australian law and may have an important educative function,[96] particularly with respect to indirect discrimination. An alternative recommendation, put forward by the Discrimination Law Experts Group in 2011, would involve a definition of discrimination which retains the two concepts of direct and indirect discrimination, but states expressly that the concepts are not mutually exclusive.[97] This has been adopted in the ACT, which defines discrimination as occurring 'when a person discriminates either directly or indirectly, or both, against someone else', and then defines both direct and indirect discrimination.[98]

70. While outside the scope of the Discussion Paper, the Law Council notes concerns with the inconsistency of the definition of discrimination in the FWA. The recent decision of *The Hon. Christian Porter v MFB*,[99] handed down by a Full Bench of the Fair Work Commission has confined the construction of 'discriminatory terms' of enterprise agreements prohibited in section 195 of the FWA, to terms that are directly discriminatory. This has significant implications for the regulation of work by enterprise agreements, as well as modern awards and may mean that indirect

[86] See for example, *Travers v New South Wales* [2000] FCA 1565, [17].
[87] ADA (Tas) s 151.
[88] EOA (Vic) s 9(1)(a).
[89] ADA (Cth) s 15(1)(c).
[90] SDA (Cth) ss 5(2), 5A(2), 5B(2), 5C(2), 6(2), 7(2), 7AA(2).
[91] *Australian Medical Council v Wilson* (1995) 68 FCR 46; 55; *Waters v Public Transport Corporation* (1991) 173 CLR 349, 393; *Bropho v Western Australia* [2007 FCA 519, [489]; *Sklavos*,[16].
[92] Rees, Rice and Allen, 91, citing ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991* (ACT) Final Report (2015), LRAC 3 FP,
[93] Ibid.
[94] Law Council, Policy, 4 citing the Discrimination Experts' Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia* (2010), 7.
[95] Rees, Rice and Allen, 91 quoting Discrimination Law Experts Group, *Consolidation of Discrimination Laws*, Submission to the Attorney-General's Department, 13 December 2011.
[96] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991* (ACT) Final Report (2015), LRAC 3 FP, 29-31.
[97] Discrimination Law Experts Group, *Consolidation of Discrimination Laws*, Submission to the Attorney-General's Department, 13 December 2011, 10.
[98] ACT Act, ss 8(1) – 8(3).
[99] *Re Metropolitan Fire and Emergency Services Board* [2019] FWC 1023.

discriminatory conduct under these agreements or awards will not be prohibited by Federal anti-discrimination legislation.[100] It underlines the need, long-term, to consider the consistent operation of the FWA alongside the 'core' anti-discrimination acts.

Special Measures

71. All Australian anti-discrimination statutes permit special measures to be taken for the benefit of people with a protected attribute. Despite this, there are significant differences amongst the various acts, including on whether 'special measures' are considered exemptions from prohibitions upon discrimination,[101] or positive measures to achieve substantive equality.[102] In general, the Law Council supports a 'special measures' provision that aligns with how that term is understood at international law.[103] It recognises, however, that different treaties which underpin respective Commonwealth laws may approach this subject slightly differently.

72. In particular, the Law Council supports a recommendation of the Committee on the Elimination of Racial Discrimination that the definition and scope of special measures in the RDA be brought in line with article 2(2) of the International Convention on the Elimination of Racial Discrimination (**ICERD**) and the Committee's general recommendation[104] on the meaning and scope of special measures in the ICERD.[105] This would respond to the issues raised by *Maloney*, discussed above.

Reasonable Adjustments

73. The DDA embeds into its definitions of discrimination the duty to make 'reasonable adjustments' for a person with disability. For example, subsection 5(2) of the DDA provides that a person is discriminating against another person if he or she fails to make, or proposes not to make, reasonable adjustments for the person with disability, where the failure to make such adjustments has, or would have, the effect that the person with disability is treated less favourably than a person without disability in circumstances that are not materially different.[106]

74. The Law Council submits that consideration should be given to whether such reasonable adjustments provisions under federal discrimination law should be extended beyond disability to other protected attributes such as age or pregnancy. One relevant example that may be considered is section 24(1) of the *Anti-discrimination Act 1992* (NT), which provides that 'a person shall not fail or refuse to accommodate a special need that another person has because of an attribute'. Section 24 applies to all attributes identified under section 19 of the Northern Territory Act.

---

[100] See eg, SDA s 40(1)(g).
[101] Eg, RDA, s 8.
[102] Eg, SDA, s 7D.
[103] Law Council, Policy, 4.
[104] See Committee on the Elimination of Racial Discrimination, *General recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination,* 76th Sess, UN Doc. CERD/C/GC/32 (24 September 2009).
[105] Committee on the Elimination of Racial Discrimination, *Concluding observations - on the eighteenth to twentieth periodic reports of Australia* UN Doc CERD/C/AUS/CO/18-20 (8 December 2017).
[106] See also DDA s 6(2) concerning indirect discrimination.

Exceptions and exemptions

75. The Law Council notes that confusion can exist regarding the meaning of 'exceptions' compared to 'exemptions'. Consideration should be given to defining an exception as conduct which, but for the operation of the excepting provision, would be unlawful discrimination.[107] Consideration should also be given to defining an exemption as a permissive authorisation for conduct which, but for the operation of the exemption, would be unlawful.[108]

Protected attributes

What, if any, changes to existing protected attributes are required?

76. The Discussion Paper has identified a number of limitations concerning the coverage of existing protected attributes including gaps in coverage for carer's responsibilities, employees of state governments and volunteers and interns.

77. The Law Council agrees with these concerns. It supports the Discussion Paper's proposal that the SDA's protections should be expanded to cover *family responsibilities/carer responsibilities* both in terms of direct and indirect discrimination and applying to all areas of public life. As noted, currently, discrimination in terms of family responsibilities is limited to direct discrimination in work related areas only.[109]

78. It supports current protections being expanded to include *volunteers, interns and other categories of unpaid workers*.[110] With respect to the current Religious Discrimination Bill 2019 exposure draft, the Law Council recently noted that its definition of 'employment' includes unpaid work,[111] while the definition under other anti-discrimination laws does not include volunteers.[112] It noted that the inclusion of unpaid work reflects modern work practices and ensures that workers who are particularly vulnerable to exploitation, such as unpaid interns, cannot be subject to discrimination merely because they are working in an unpaid capacity. However, to avoid confusion amongst employers, consideration should be given to adopting a similar approach with respect to other anti-discrimination laws and employment.[113]

79. In terms of coverage of *state government employees*, the Law Council agrees with the Discussion Paper's proposition that the SDA should be amended to provide coverage to an employee of a State or a State instrumentality, subject to any constitutional limitations.[114] Subsection 13(1) of the SDA provides that section 14, prohibiting discrimination in employment, does not apply to employment by an instrumentality of a State. Similarly, the SDA's prohibitions on sexual harassment in employment or partnerships do not apply to acts done by employees of a State or an instrumentality of a State.[115] This means, for example, that state-based public servants are not able to make a complaint of workplace sexual harassment under section 28B of the SDA and are ultimately left to rely on the coverage provided in

[107] Law Council Policy, 4 quoting Discrimination Law Experts' Roundtable, 'Report on recommendations for a consolidated federal anti-discrimination law in Australia', (29 November 2010).
[108] Ibid.
[109] Discussion Paper, 10.
[110] International Labour Office Employment Policy Department, *The regulation of internships: A comparative study* (Working paper No 240, 2018).
[111] Religious Discrimination Bill 2019 (Exposure Draft), cl 5(1).
[112] Law Council, *Religious Freedoms Bills*, Submission to the Attorney-General's Department, 3 October 2019, 14, citing eg, SDA, s 4(1).
[113] Ibid.
[114] Discussion Paper, 10.
[115] SDA, s 13(2).

their home state or territory jurisdiction. Other federal discrimination laws do not exclude state government employees. The Law Council recalls that an amendment of this nature was recommended by the Senate Standing Committee on Legal and Constitutional Affairs in its 2008 inquiry into the effectiveness of the SDA.[116]

80. The Law Council's views on *irrelevant criminal record* as an attribute which could attract additional coverage are set out below.

What, if any, new protected attributes should be prioritised?

81. The Discussion Paper further proposes to address gaps in protections through introducing new protected attributes, namely:

- a new protected attribute for religion or belief;
- transitioning other grounds under the Commission's ILO111 jurisdiction, in particular irrelevant criminal record, as well as trade union activity/industrial activity, and political opinion; and
- considering the need for other new protected attributes, including by reference to attributes that are covered under state and territory laws, such as accommodation status and subjection to domestic or family violence.

82. In line with the guiding principles discussed above, the Law Council supports reforms to the current Commonwealth anti-discrimination regime in order to improve the capacity to address all forms of discrimination. To this end, the Law Council Policy, as agreed in 2011, supports consideration of the addition of grounds relating to (inter alia):

a) religious conviction;

b) political opinion;

c) association with, or relation to, a person identified on the basis of any protected grounds or attributes;

d) irrelevant criminal record; and

e) 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.[117]

83. In response to the AHRC's proposal for a new protected attribute on the basis of '*thought, conscience or religion*,' the Law Council has recently supported the inclusion of a protected attribute of religious belief or activity in the federal anti-discrimination law framework, in the context of the first Religious Discrimination Bill 2019 exposure draft issued by the AGD.[118] It notes, however, that the AHRC's proposed attribute of 'thought, conscience or religion', which was proposed before the Bill was introduced, is broader in scope than that proposed by the original exposure draft Bill. A second exposure draft has recently been released for public feedback and will be the subject of a further Law Council submission.

---

[116] Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Report, December 2008), xiv.
[117] Law Council, Policy, 2. With respect to (e), a similar approach is taken under the *South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000* s1(1)(xxii).
[118] Law Council, *Religious Freedoms Bills*, Submission to the Attorney-General's Department, 3 October 2019.

84. Article 1 of the International Labour Organisation Convention concerning Discrimination in respect of Employment and Occupation (**ILO 111**)[119] includes 'religion' as a ground upon which discrimination is prohibited. With respect to *transitioning other grounds under the Commission's ILO111 jurisdiction,* the Law Council submits that the protected attributes within the AHRC's 'ILO 111' jurisdiction should be enforceable and applicable to all areas of public life, unless there is a strong rationale to the contrary.

85. As noted by the AHRC, the following attributes receive only limited protection: political opinion, criminal record and trade union activity. They relate only to 'employment or occupation', whereas unlawful discrimination is prohibited in a broader range of public areas. Importantly, there is also no pathway to enforce complaints of ILO discrimination, as discussed above.

86. The Law Council particularly agrees that *irrelevant criminal record* should be a fully protected attribute under federal discrimination law. This would enable discrimination complaints concerning this attribute to be enforced through courts, should a complaint not resolve through conciliation.

87. The ALRC has previously recommended that Commonwealth legislation should be introduced making it unlawful to discriminate unreasonably on the ground of criminal record, stating that if discrimination on this ground is to be taken seriously, effective and enforceable remedies are needed. [120] It has noted that discrimination on the ground of criminal conviction, while not expressly referred to in the International Covenant on Civil and Political Rights (**ICCPR**),[121] would fall within its 'other status' category in article 2(1).[122] International jurisprudence supports this position.[123]

88. The Law Council's Justice Project highlights the common discrimination faced by those with irrelevant criminal records despite the fact that they have served their time.[124] The AHRC regularly receives complaints on the basis of criminal record discrimination (95 in 2017-2018, a significant increase from the 71 complaints received in 2016-2017).[125] It reports that the number of complaints received is similar to the numbers alleging age discrimination in employment.[126]

89. Further, Graffam et al have reported that the prospects of employment for those with criminal histories are lower than for those of other disadvantaged groups such as people experiencing chronic illness or disability.[127] There are established links between employment and reduced rates of re-offending. For example, a United Kingdom review found that employment can reduce re-offending by between a third

[119] Opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).
[120] ALRC, *Spent Convictions*, Report No 37 (1987), xvi, 53-54.
[121] Opened for signature 19 December 1966, 993 UNTS 3 (entered into force 23 March 1976).
[122] ALRC, *Spent Convictions*, Report No 37 (1987), xvi, 51.
[123] See AHRC, *Discrimination in Employment on the Basis of Criminal Record* (Discussion Paper, 2004) citing the *Thlimmenos v Greece*, 6 April 2000, European Court of Human Rights, Application No 34369/97.
[124] Law Council, *Justice Project – Final Report*, (August 2018), Prisoners and Detainees Chapter, 25. The Law Council acknowledges that not all prisoners should have access to all jobs. For example, legislation implementing requirements for working with children is in place in all jurisdictions to prevent certain offenders working with children: see, eg, *Child Protection (Working with Children) Act 2012* (NSW).
[125] Rosalind Croucher, 'Righting the relic: towards effective protections for criminal record discrimination' (September 2018) 48 Law Society Journal 73, 75.
[126] Ibid.
[127] Ibid citing Joe Graffam, Criminology Research Council, Attitudes of employers, corrective services workers, employment support workers, and prisoners and offenders towards employing ex-prisoners and ex-offenders (2004).

and a half.[128] It also found that a criminal record can seriously diminish employment opportunities.[129] This has a flow-on effect to the broader community's safety and underlines an important rationale for ensuring that individuals who have served their criminal justice punishment are able to work again. For groups who are subject to over-incarceration, such as Aboriginal and Torres Strait Islander peoples, rehabilitative 'exit' pathways from prison to reintegration in the community are particularly important.

90. With respect to *trade union activity*, the Law Council notes that there are existing protections in Division 4 of the FWA which prohibit adverse action being taken against a person based on their membership of an industrial association or industrial activity.[130] The necessity and desirability of transitioning this attribute to a fully protected attribute in Commonwealth anti-discrimination laws should be considered with regard to these existing provisions, including the possibility of increased complexity. However, the merits of protecting this attribute in the 'core' anti-discrimination legislation, not only the FWA, should also be further explored. Members have also noted that, unless the term 'discrimination' in the FWA is construed consistently with federal anti-discrimination legislation, the protections found in the FWA for discrimination based on industrial association or industrial activity will not necessarily protect against indirect discrimination.[131]

91. In relation to the AHRC's proposal that other new protected attributes, including by reference to *attributes that are covered under state and territory laws*, such as accommodation status, the Law Council Policy supports consideration of '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'.[132] Particular regard should be had to those attributes already forming part of the state or territory regimes, noting that this may be consistent with promoting harmonisation at a federal and state level over time. However, the Law Council again highlights that the constitutional validity of any new protected attributes must be closely considered.

92. With respect to *subjection to family violence and homelessness*, the Law Council continues to support the consideration of these as protected attributes, while noting that they should be subject to detailed consideration and public debate.[133] Discrimination against people who were or are subject to domestic violence or homelessness 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.

---

[128] Victorian Government Department of Justice, An Equality Act for a Fairer Victoria, Equal Opportunity Review Final Report, June 2008,99, citing United Kingdom Home Office 2002, Breaking the Circle –a report of the review of the Rehabilitation of Offenders Act, United Kingdom Home Office, Sentencing and Offences Unit, London.

[129] Ibid.

[130] See also FWA s 772 concerning termination based on reasons including trade union membership or activity.

[131] see, eg, the definition of 'adverse action' in the FWA, s 342.

[132] Law Council, Policy (2011) 3.

[133] See previous positions adopted in eg, Law Council, Supplementary Submission to the Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper,* 26 April 2012; and Law Council, Submission to the Senate Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012*, 24 December 2012.

93. The AHRC has previously recommended that domestic violence be recognised as a protected attribute in federal discrimination laws[134] as well as in the FWA,[135] while the Senate Legal and Constitutional Affairs Legislation Committee made a similar recommendation in 2013.[136] Since 2016, the ACT has protected the attribute of 'subjection to domestic or family violence'.[137] The ALRC also considered the implications of including family and domestic attribute under federal discrimination law in a 2011 report, noting that:

> *.. several overseas jurisdictions have enacted legislation that prohibits employers from terminating an employee's employment or otherwise discriminating against them where the employee is, or is perceived to be, a victim of family violence, or where they take time off work, for example, to testify in a criminal proceeding, seek a protection order or seek medical attention related to experiences of family violence.*[138]

94. 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,[139] 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.[140]

95. The Justice Project also described how people who are homeless, or at risk of homelessness, experience cumulative and multifaceted disadvantage and are amongst the most marginalised people in society.[141] It recorded findings that due to their lack of security and safety, people experiencing homelessness are particularly vulnerable to human rights violations, such as acts of violence and sexual abuse, discrimination and negative stigma, and lack of access to basic services.[142] In Australia, experiences of intersectional discrimination amongst homeless groups were raised as particularly common, such as racial discrimination undermining Aboriginal and Torres Strait Islander peoples' access to affordable accommodation and housing.[143] Ex-prisoners were also more vulnerable to homelessness than the

---

[134] AHRC, *Consolidation of Commonwealth Discrimination Law – Domestic and Family Violence* (2012). At http://www.humanrights.gov.au/consolidationcommonwealth-discrimination-law-domestic-and-family-violence

[135]AHRC, Australian Law Reform Commission: Family Violence and Commonwealth Laws: Employment and Superannuation (2011).

[136] Senate Legal and Constitutional Affairs Legislation Committee, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013), Rec 3.

[137] ACT, s 7(1)(x).

[138] ALRC, *Family Violence and Commonwealth Laws – Improving Legal Frameworks Final Report* (2011), ALRC 117, 410.

[139] Law Council, *Justice Project – Final Report*, (August 2018), People Who Experience Family Violence Chapter, 20 citing Emma Smallwood, Women's Legal Service Victoria, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* (2015), 21 < http://www.womenslegal.org.au/files/file/Stepping%20Stones%20Report(1).pdf> ('*Stepping Stone*').

[140] Ibid, citing AHRC, *Fact Sheet: Australian Domestic Family Violence – a Workplace Issue, a Discrimination Issue*, 3 <https://www.humanrights.gov.au/sites/default/files/13_10_31_DV_as_a_workplace_issue_factsheet_FINAL6.p>; Consultation, 29/08/2017 Townsville (Queensland Legal Aid).

[141] Ibid, citing Suzie Forell, Emily MacCarron and Louis Shetzer, Law and Justice Foundation of New South Wales, *No Home, No Justice? The Legal needs of homeless people in NSW: Access to Justice and Legal Needs, Volume 2* (2005) iv.

[142] Ibid, 11 citing Office of the High Commissioner for Human Rights, *Housing Metadata* (2008) <http://www.ohchr.org/Documents/Issues/Housing/homelessness.pdf>.

[143] Ibid, 21, citing Consultations, 03/08/2017, Darwin (NT Shelter); and Homelessness Australia, *Homelessness and Aboriginal and Torres Strait Islanders* (January 2016) <https://www.homelessnessaustralia.org.au/sites/homelessnessaus/files/2017-07/Homelessness_and_ATSIv3.pdf> ('*Homelessness and Aboriginal and Torres Strait Islanders factsheet*').

general population because of discrimination when attempting to secure accommodation.[144]

96. In past submissions, the Law Council has supported consideration of an additional attribute of homelessness.[145] It has previously noted that this has been recommended by a range of organisations that regularly provide support and advice for this vulnerable sector of the community.[146] Careful consideration would need to be given to how this attribute would be defined and what exceptions might apply. Guidance may be obtained from a submission prepared by the AHRC in response to an inquiry into National Homelessness legislation.[147]

97. At the same time, the Law Council has also received cautionary views that in addressing gaps in existing protection, it is important to recall the underlying role, and limitations of, anti-discrimination laws. This is highlighted by Justice Brennan's comments in *Waters v Public Transport Corporation, '*anti-discrimination legislation cannot carry a traffic it was not designed to bear'.[148] This view cautions against a too broad approach which construes anti-discrimination laws as if they were the 'only means by which the disadvantages of the disabled or of other minority groups are to be alleviated'.[149] Other policy levers are also essential in norm-setting. For example, these include the recently announced changes to ensure that all employees can take unpaid leave to deal with family and domestic violence, following the passage of the *Fair Work Amendment (Family and Domestic Violence Leave*) *Act 2018* (Cth).

98. As per its Policy above, the Law Council also submits that consideration should be given to whether coverage under federal discrimination law should be extended to *associates* of people with a protected attribute to a greater degree than is already the case.[150] This is a recognised concept in the DDA and the RDA,[151] but not in the ADA and SDA. With respect to the DDA, Rees, Rice and Allan note that its extension to 'associates' is problematic in that the definition of disability discrimination does not include associations, even though the prohibition does.[152] Further, there are limitations with respect to the constitutional heads of power for the DDA which in turn limits a person's ability to rely on its protections against discrimination on the basis of association.[153]

---

[144] Ibid, 37-38, citing Olav B Nielssen et al, 'Characteristics of people attending psychiatric clinics in inner Sydney homeless hostels' (2018) 208(4) *Medical Journal of Australia* 169, 172.
[145] See Law Council, Supplementary Submission to the Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper,* 26 April 2012; and Law Council, Submission to the Senate Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012*, 24 December 2012.
[146] Law Council, Submission to the Senate Committee, *Exposure Draft of Human Rights and Anti-Discrimination Bill 2012*, 24 December 2012, 23.
[147] AHRC, Submission to the House of Representatives Standing Committee on Family, Community, Housing and Youth, 1 September 2009, Recommendation 8, paras 82-83, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=fchy/homelessness/subs.htm
[148] (1991) 173 CLR 349, 372.
[149] Ibid.
[150] Law Council, Policy, 3.
[151] See, eg, DDA, s 7; RDA, s 12.
[152] Rees, Rice and Allan, 370.
[153] Ibid.

Exceptions

99. The Law Council supports a careful review being conducted of both the exceptions to, and exemptions from, unlawful discrimination in the existing Commonwealth regime.[154] It further supports the AHRC's view that all permanent 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
- be regularly reviewed to ensure that they reflect community standards and appropriately balance competing rights.[155]

100. As noted in the Discussion Paper, permanent, unreviewed exceptions have the effect of 'freezing in time' community standards in relation to sex, age, disability, sexual orientation and gender identity at the moment at which relevant legislation was passed.[156] The Law Council agrees that it is important to consider all permanent exceptions in light of the overall purpose in discrimination law to promote equality and fair treatment, having regard to whether they remain necessary, reasonable and proportionate. This is particularly the case with legislation which was passed several decades ago and may not accord with current community standards.

101. The Law Council also recognises that the complexity of the federal discrimination law framework is due, in no small part, to the many exceptions available under the SDA, DDA and ADA. If the Religious Discrimination Bill 2019 is passed in its current form, this complexity will be heightened.

102. Where possible, the Law Council supports streamlining the exceptions and exemptions in the four key Commonwealth Acts.[157] However, it is acknowledged that in some cases, an exception may be specific to the particular ground (for example, inherent requirements and disability[158]).

What are your views about the AHRC's proposed process for reviewing all permanent exceptions under federal discrimination law?

103. The Discussion Paper proposes that the Federal Government should review all existing exceptions to consider whether individual clauses should:

- remain;
- be time limited and regularly reviewed on an ongoing basis to assess the ongoing relevance and necessity of the exception; or
- be sunsetted as they no longer reflect community standards or balance rights appropriately.

This seems a sensible approach which may help to ensure that existing permanent exceptions remain appropriate into the 21st century.

104. The Discussion Paper also flags that consideration also be given to remove all permanent exceptions in federal discrimination law, replacing them with a 'justifiable conduct' clause. The AHRC notes that:

---

[154] Law Council, Policy, 4.
[155] Discussion Paper, 12. Refer to the above discussion concerning the distinction between exemptions and exceptions.
[156] Discussion Paper, 11.
[157] Law Council, Policy, 4 which cites the example of the SDAs40 which provides a 'statutory authority' exception, compared to the RDA, which does not.
[158] Ibid citing *Disability Discrimination Act 1992* s21A.

This would provide flexibility into the future to ensure that the legal definition of unlawful discrimination is able to adapt so that legitimate actions do not constitute discrimination. It would however, be dependent on judicial interpretation over time.[159]

105. In a similar vein, the Law Society of NSW (**NSW LS**) recommends removing all permanent exceptions in federal anti-discrimination law and replacing them with a general limitations clause. This could potentially operate as follows:

- the clause would deem discriminatory actions or conduct to be lawful when it is a reasonable, necessary and proportionate means of achieving a legitimate aim; and
- the court would be required to consider the objects of the relevant federal discrimination law when determining the application of the general limitations clause.

106. The NSW LS identifies that an advantage of such a clause is that it would help address a weakness of the current regime of exceptions which 'freeze in time community standards'.

107. On the other hand, Law Council advisory committee members have raised concerns regarding the lack of clear guidance offered by such provisions. A general limitation clause relies on a case by case assessment and may lack certainty, undermining the objective of clear and consistent law reform. 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. Committee members have also raised that, in practice, well-funded bodies may be better able to argue their position under general limitations clauses and to secure broad-based exceptions which may not serve the interests of vulnerable, less-well off community members.

108. This view suggests that the AHRC's position that permanent exceptions should 'only exist in permanent form in circumstances that are strictly necessary and which result in the minimum intrusion on people's rights' may be preferable.

109. The option to review all existing exceptions through sunset clauses also means 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) (**the Victorian Charter**) which imposes a five-year sunset clause on legislative overrides to the Victorian Charter.[160]

Are there particular permanent exceptions that warrant particular scrutiny?

110. The Law Council has previously raised concerns that certain existing permanent exceptions which are available to religious organisations under Commonwealth anti-discrimination laws are overly broad and do not require analysis of reasonableness and proportionality.[161]

---

[159] Discussion Paper, 12.
[160] Victorian Charter, s 31.
[161] See, eg, Law Council, *Religious Freedom* Review, Submission to the Expert Panel into Religious Freedom, 27 February 2018; Law Council, *Legislative exemptions that allow faith-based educational institutions to*

111. These include exceptions under the SDA which allow faith-based educational institutions to discriminate against students, teachers and staff.[162] The Law Council has previously recommended that subsection 38(3) of the SDA should be abolished, and that section 37 should be amended to clarify that paragraph 37(1)(d) does not apply to the treatment of students by religious schools.[163] These recommendations concern the ability of religious educational institutions to discriminate against students on the basis of attributes such as their sex, sexual orientation or gender identity. The Law Council considers that children should not be discriminated against. It does not support laws which add to children's trauma or which stigmatise them.

112. The Law Council has further raised concerns about existing SDA exceptions enabling discrimination against people who are employed or contracted by religious educational institutions.[164] Its position is that careful review is required as to whether the scope of existing provisions is justified, necessary and proportionate to what educational institutions are trying to protect. However, it also considers that this review of amendments to SDA exceptions for employees and contractors should be taken in line with broader consideration of their interaction with other relevant federal provisions, including under the FWA and the AHRC Act,[165] given the possible need for broader amendments.[166]

113. The Law Council has also previously received input from a number of constituent bodies and advisory groups raising concerns with respect to other broad and permanent exceptions in the SDA and ADA that permit religious organisations to discriminate against individuals where it is necessary to avoid injury to the sensitivities or susceptibilities of the adherents of a religion.[167] It has highlighted that this is particularly relevant for religious organisations in receipt of public funding to conduct essential services in education, aged care, child welfare, adoption and employment services. While the SDA prohibits religious organisations in receipt of Commonwealth funding for aged care from discriminating against individuals eg, on the basis of their sex or sexual orientation,[168] this is not the case for the other services listed above.

114. The Law Council further notes that the framework of religious exceptions in anti-discrimination legislation is the subject of a current ALRC inquiry,[169] which is due to report by December 2020. It looks forward to engaging with this inquiry in due course. However, it has raised its concerns that certain problematic elements of the

---

discriminate against students, teachers and staff, Submission to the Senate Legal and Constitutional Affairs References Committee, 21 November 2018; Law Council, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 23 January 2019;

[162] SDA ss 37(1)(d) and 38(3).

[163] Law Council, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff*, Submission to the Senate Legal and Constitutional Affairs References Committee, 21 November 2018; Law Council, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 23 January 2019

[164] SDA, ss 38(1) and (2). Paragraph 37(1)(d) is also relevant.

[165] FWA, ss 351(1) and 772(1); AHRC Act, s 32(1).

[166] Law Council, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff*, Submission to the Senate Legal and Constitutional Affairs References Committee, 21 November 2018, 23-28.

[167] Eg ADA, s 35; SDA, s 37. See Law Council, *Religious Freedom* Review, Submission to the Expert Panel into Religious Freedom, 27 February 2018.

[168] SDA, s 37(2).

[169] See The Hon Christian Porter MP, the Attorney- General for Australia, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation -Terms of Reference* 10 April 2019, and *Altered Terms of Reference 29 August 2019.*

proposed Religious Discrimination Bill 2019 may interfere with the ALRC's ability to conduct this inquiry effectively.[170]

115. As discussed, the Law Council agrees that section 13 of the SDA, which provides that the legislation does not apply to state instrumentalities in employment, is concerning and should be reviewed.

116. The Discussion Paper also raises that protections against discrimination in employment do not apply to employment in a personal residence under the SDA and RDA.[171] Similar 'domestic duties' exceptions also exist in the DDA and ADA.[172] It may be timely to seek public views on whether it remains reasonable, necessary and proportionate to enable discrimination on the basis of a person's race, sex, disability or age, with respect to domestic employment. As the Discussion Paper notes, the rise of the 'gig economy' and in-home, task-based employment services, as well as the expansion of home based aged care and disability services, provide important context for these exceptions.[173] They underline that traditional distinctions between 'public' and 'private' areas of life, underpinning a key premise of anti-discrimination laws, continue to blur. With respect to the growing Australian 'gig economy', it has been reported that the most common digital platform workers – including on platforms such as Airtasker, which enables many home-based tasks to be contracted out - include students, temporary residents, people with a disability, and those who do not speak English at home.[174] This suggests that many individuals who provide these tasks could benefit from anti-discrimination law protections.

Compliance measures

How can existing compliance measures under federal discrimination law be improved?

117. The Law Council supports a review of how standards under the DDA can be most effectively developed and implemented. It considers that some standards have made a strong and beneficial difference in practice, such as those concerning accessible public transport, while others have been less effective. Critical to the practical implementation of these standards is the input of both people with disability and relevant industry groups. Standards should also be subject to a review of their efficiency and effectiveness.[175]

118. Disability standards are an important preventative tool. More could be done to develop such practical (but flexible) guidance across the board. The development of 'best practice' guides would also be a worthwhile development on the preventative front.

119. In response to the Discussion Paper's proposal to consider industry support packages, the Law Council considers that it would be preferable to provide resources to the AHRC to support whole-of-community education and training to build awareness and compliance, including for the beneficiaries of such standards. This is consistent with the objective of laws that are clear and accessibility not only

---

[170] Law Council of Australia, *Religious Freedoms Bills – Exposure Drafts*, Submission to the Attorney-General's Department, 4 October 2019.
[171] Discussion Paper, 12, citing SDA, 14(3) and RDA, 15(5).
[172] DDA, s 15(3); ADA, s 18(3).
[173] Discussion Paper, 12.
[174] Kaitlyn Offer, 'Australians flock to gig economy for work', *Canberra Times* (online), 18 June 2019, <https://www.canberratimes.com.au/story/6222601/australians-flock-to-gig-economy-for-work/?cs=14231>.
[175] See Part 34.

to those who bear obligations, but also to people who rely on the law to protect their human rights.

What additional compliance measures would assist in providing greater certainty and compliance with federal discrimination law?

120. The Discussion Paper notes 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. This potentially affects the willingness of organisations to take positive measures to promote equality and eliminate discrimination.

121. Although the Law Council supports mechanisms to assist duty holders to comply with their obligations such as special measure certifications, it is concerned with the AHRC's fee for service proposal. The Law Council submits that the collection of a fee in return for a statutory compliance assessment would threaten the neutrality of the regime.

122. There is also a concern that a fee may inadvertently deter special measures to redress discrimination where funding is not available for certification.

123. The Discussion Paper considers that the following compliance measures would assist in promoting greater compliance and understanding of federal discrimination law:

- voluntary audits; and
- a general AHRC inquiry function.

124. In particular, the Law Council supports the expansion of the AHRC's role and powers to expressly allow the AHRC to investigate incidents of discrimination under federal discrimination law on its own volition without needing to rely upon a formal individual complaint or a reference from Government.[176]

125. However, it is important that the circumstances in which the AHRC may conduct investigations on its own motion are clearly outlined. Regard should be had to the Victorian Equal Opportunity and Human Rights Commissions' power to conduct its own investigations under section 127 of the *Equal Opportunity Act 2010* (Vic).

126. While the experience of the Victorian model has been generally positive, it illustrates that the expansion of powers is not without difficulty in application. The absence of clearly defined parameters of statutory powers may leave reviews conducted by the AHRC open to legal challenge.[177]

Positive duties

What form should a positive duty take under federal discrimination law and to whom should it apply?

127. In addition to the above compliance measures, the Discussion Paper considers the introduction of positive duties, either on all organisations or specifically focused on public officials and organisations exercising public functions. This would require

[176] The Law Council, Policy, 3.
[177] See eg, *United Firefighters' Union of Australia v VEOHRC and Anor* [2018] VSCA 252.

people exercising such functions to proactively take measures to eliminate unlawful discrimination and harassment and advance equality.

128. The Law Council supports this approach to the enhancement of current protections to prevent or remove discrimination in relation to each ground protected.[178]

129. 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.

130. In this regard, consideration should be given to the Victorian[179] and UK[180] models, as highlighted in the Discussion Paper, in particular key lessons from their operation. During the Law Council's Justice Project, a number of Victorian-based stakeholders highlighted 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 which would not otherwise have occurred.[181]

Complaint handling processes

What, if any, reforms should be introduced to the complaint handling process to ensure access to justice?

131. The Law Council agrees with the AHRC that processes for making complaints to the AHRC and subsequently going to court should operate in a manner that ensures the availability and accessibility of the process. It notes that a number of provisions guiding the process require further consideration.

Timeframes

132. The Discussion Paper highlights that there is no specific timeframe in which a complaint must be lodged with the AHRC. However, the discretion of the AHRC President to terminate a complaint if it is not brought within six months of an alleged act or practice taking place may – even if infrequently exercised in practice - act as a barrier or disincentive for individuals who wish to seek redress for discrimination. A key Justice Project finding was that many individuals experiencing significant disadvantage – such as recent arrivals, children at risk, people with disability or homeless people - require additional time in order to access justice effectively.[182] The Law Council therefore recommends that, at a minimum, paragraph 46PH(1)(b) of the AHRC Act be amended to reinstate the 12 month period that was in place prior to passage of the *Human Rights Legislation Amendment Act 2017* (Cth).

Onus of Proof

133. In terms of onus of proof, the Law Council supports consideration of the approach adopted under the FWA[183] and in the United Kingdom.[184] Under this approach, a complainant must establish an arguable case, and then the respondent has the

[178] Law Council, Policy, 3.
[179] *The Equality Act 2010* (Vic).
[180] *The Equality Act 2010* (UK).
[181] Law Council, *Justice Project – Final Report* (2018), LGBTI+ Peoples Chapter, 45.
[182] Law Council, *Justice Project – Final Report* (August 2018), Legal Services Chapter, 31-33.
[183] Rebuttable presumption under s 361 of the *Fair Work Act 2009* (Cth).
[184] A shifting burden of proof applies under the *Equality Act 2010* (UK).

evidentiary burden of establishing the reasons for the impugned conduct or conditions.

134. 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.

Standard of evidence

135. In addition to consideration of the onus of proof, a further question relates to the standard of evidence. The Law Council suggests that consideration be given to clarifying the confusion surrounding the *Briginshaw* test[185] and making it clear that the test to be applied to discrimination complaints is the usual civil standard of proof as set out in section 140 of the *Evidence Act 1995* (Cth).[186] Courts should not approach discrimination matters with a presumption that they are of such 'seriousness' that a higher standard of evidence is required.

Costs

136. The Law Council has adopted the policy position that the prospect of a costs burden in the event of a failure by a complainant to prove a claim may deter potential complainants from seeking relief under the legislation.[187] It supports consideration of the approach to costs taken under the FWA[188] which establishes a 'no costs' jurisdiction, subject to limited exceptions.[189] Pursuant to section 570 of the FWA, a party to proceedings in the Fair Work jurisdiction may be ordered to pay costs of another party only if:

- proceedings are instituted vexatiously or without reasonable cause;
- the party's unreasonable act or omission caused the other party to incur the costs; or
- the party unreasonably refused to participate in a matter before the FWA.

137. The NSW LS has further suggested that consideration should be given to whether section 46PO of the AHRC Act should be amended to specify that the Federal Court and the Federal Circuit Court are 'no costs' jurisdictions for discrimination complaints.

138. Related to this issue are the difficulties that emerge from the *Federal Court Rules 2011* (Cth)[190] and *Federal Circuit Court Rules 2001* (Cth)[191] allowing discrimination claims to be commenced through an 'informal' application process. Although this process has the appeal of accessibility, the Law Council considers that it can lead to increased costs in the long run as the Court attempts to decipher the information proffered in the application.

139. Consideration of whether to move towards 'no-costs' jurisdictions should however, have regard to the low awards of damages which are frequently made for discrimination claims, as discussed below. It is possible that, given these low awards, some meritorious claims will not be pursued unless a claimant will receive some contribution to costs if successful. Committee members have expressed

---

[185] *Briginshaw v Briginshaw* (1938) 60 CLR 336. In Briginshaw, the High Court held that where a civil case involves allegations of criminal conduct, fraud or moral wrongdoing which may lead to grave consequences for the defendant, the judicial approach should be a closer scrutiny of the evidence.
[186] See *Qantas Airways Ltd v Gama* [2008] FCAFC 69.
[187] Law Council, Policy, 5.
[188] Ibid.
[189] *Bywater v Appco Group Australia Pty Ltd* [2019] FCA 799.
[190] See r 34.163.
[191] See r 41.02A(1).

concerns that movements towards establishing a 'no-costs' jurisdiction in some states and territories may have led to decreased numbers of claims. Evidence should be canvassed on this point. Other members have also suggested that another approach may be a 'no-costs' jurisdiction, but to include the costs and inconvenience of having to pursue the remedy as part of the recoverable compensation.

Conciliation Data and Register

140. The Law Council also highlights that there is a scarcity of data available on AHRC conciliation outcomes. The Law Council recommends that this be rectified to provide guidance to unrepresented litigants who are determining whether – and in what forum – to pursue a claim. This would also assist unrepresented respondents to better prepare for conciliation conferences.

141. Further, the AHRC could consider publishing a conciliation register on its website that contains de-identified data on conciliation outcomes. This would also assist in identifying trends in conciliation and settlement outcomes, and would enable lawyers to give tailored advice to complainants and respondents based on previous outcomes. Additionally, such data could be used to identify areas where the law is not operating as intended, or where reform is required.

Resourcing

142. The Law Council recognises that the AHRC's ability to carry out its investigation, complaint and conciliation functions is reliant on appropriate levels of resourcing. Harnessing additional resources would have the effect of reducing waiting times from lodgement of a complaint to conciliation. Allowing complainants access to alternative dispute resolution mechanisms in a timely manner is integral to promoting access to justice.

Remedies

143. On the issue of remedies, the Law Council submits that the effectiveness of both monetary compensation remedies and non-monetary remedies should be considered as part of the reform process. As above, the level of monetary compensation awarded in anti-discrimination matters is relatively modest compared to other areas of 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.[192] While the current system relies on complaints being made, the incentive to do so is often small.

144. The provision of effective remedies for unlawful discrimination is one of the international obligations Australia has assumed under the human rights Conventions to which it is a party, including the ICCPR, which provides that State Parties must provide an effective remedy for breaches of rights.[193]

145. Committee members have also identified that greater clarity on the issue of monetary compensation, and how to classify and calculate it would be welcome. There can, they observe, be a tendency to assume that tort principles apply to the calculation of compensation under discrimination law. This begs the question of how

[192] See eg, Law Council, *Justice Project – Final Report* (August 2018), Older Persons Chapter, LGBTI+ Chapter, People with Disability Chapter, Recent Arrivals Chapter, Aboriginal and Torres Strait Islander Peoples Chapter.
[193] ICCPR, art 2(3).

such compensation intersects or interacts with awards of damages made in common law personal injury or workers compensation matters.

What, if any, reforms should be introduced to ensure access to justice at the court stage of the complaints process?

146. A broader consultation should be initiated with participants in the complaint handling process. This will help identify some of the practical challenges faced by both complainants and respondents who access the system.

147. In addition to the reforms canvassed in the Discussion Paper, the Law Council supports consideration of a mechanism for complainants to have the option to proceed directly to the court, such as the current practice in relation to the decision-making tribunal under the *Equal Opportunity Act 2010* (Vic).[194] The Law Council considers that it is important to also include a process that provides for early conciliation in the event that a complainant is given a choice to proceed directly to court.

148. Consideration should be given to provisions whereby complainants are provided with assistance in drafting a complaint. While a complaint need not be a technical legal document, a poorly drafted complaint can undermine a complainant's case, not only at a hearing but also at the point of negotiation.

149. A streamlined method for enforcing conciliation agreements may also assist in promoting access to justice for complainants.

Paris Principles compliance

150. The Discussion Paper proposes amendments to the AHRC Act to ensure the independent operation of the AHRC, confirming its operation as a Paris Principles-compliant national human rights institution.

151. The Law Council would support amendments to the AHRC Act to promote compliance with the Paris Principles relating to the Status of National Human Rights Institutions.[195] Relevant sections of the Paris Principles include:

- *The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights…*; and
- *The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.*[196]

152. In its submission regarding the AHRC's current *Free and Equal Inquiry* issues paper, the Law Council recommended that the Australian Government adopt a number of complementary measures to strengthen its support for the AHRC. These included:

[194] See Division 2.
[195] Principles relating to the Status of National Institutions (**The Paris Principles**), GA Res 48/134, UN Doc E/CN.4/RES/1993/55 (20 December 1993).
[196] Ibid, 'Composition and guarantees of independence and pluralism', [1]-[2].

- ensuring sufficient resourcing for the AHRC to perform its important functions effectively;
- strengthening the independence of AHRC commissioners, including through mandating a transparent, arm's length and merits-based selection process; and
- requiring the Australian Government to table a response to any AHRC report on complaints within six months of receiving the report.[197]

Other suggestions

Prohibited areas of unlawful discrimination

153. As noted above, the Discussion Paper does not raise the prospect of achieving greater consistency and clarity regarding the areas of public life in which unlawful discrimination is prohibited.

154. The Law Council suggested, in the context of sexual harassment under the SDA, that the prohibition against sexual harassment should be expanded to all areas of public life, noting that this recommendation had previously been under active consideration in 2013, but not progressed.[198] This was intended to deal with the inconsistent coverage of the current legislation, and also 'provide an important normative statement on how the nation views sexual harassment today'.[199]

155. A similar question arises as to whether current inconsistencies in the areas of public life can be overcome with respect to unlawful discrimination, and a broader normative statement be made. The RDA provides a broad example of coverage, prohibiting discrimination in 'the political, economic, social, cultural or any other field of public life'.[200]

156. The Inquiry could specifically investigate gaps and inconsistencies regarding the areas of public life in which unlawful discrimination is currently prohibited across Commonwealth Acts and recommend legislative changes in this respect. As a secondary step in the reform process, consideration could also be given to the position adopted by the ACT Law Reform Advisory Council, which recently recommended amendments that would 'prohibit discrimination generally (in all areas of life) with an exception for private conduct'.[201] This would apply a presumption of coverage, but it would not apply if the conduct occurred in a private context.

Sexual harassment

157. The Law Council suggests, in relation to protections regarding harassment and vilification, that the impact and efficacy of State and Territory practice be analysed to inform any changes at the federal level. It agrees that further detailed consideration is needed regarding these areas of Commonwealth anti-

[197] Law Council, *Free and equal: An Australian conversation on human rights*, Submission to the Australian Human Rights Commission, 13 November 2019, 46-47; 61-62.

[198] Following the 2013 election and a change of Federal Government: Law Council, *National Inquiry into Sexual Harassment in Australian Workplaces*, Submission to the AHRC, 26 February 2019, 24.
24.
[199] Ibid.
[200] RDA, s 9(1).
[201] Rice, Rees and Allen, 51, citing ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT) Final Report,* Rec 6.1.

discrimination law, noting that other relevant inquiries touch on these issues and may affect any conclusions drawn regarding broader reform directions.[202]

Recommendations

Consolidation

Comprehensive, consolidated federal anti-discrimination legislation should be adopted which preserves and strengthens existing protections, improves the regime's ability to promote substantive equality and removes regulatory burdens on business.

Careful consideration must be given to retaining the RDA's relatively strong anti-discrimination legislative framework as part of any consolidation process.

Principles

Australia's anti-discrimination laws should be clear, consistent, comprehensive, intersectional, remedial, accessible and preventative. They should also:

- **preserve or enhance existing protections against discrimination;**
- **uphold Australia's international obligations;**
- **promote substantive equality; and**
- **alleviate existing complexity**.

Definitions

A *unified definition of discrimination* which removes the distinction between direct and indirect discrimination should be considered. Alternatively, the concepts of direct and indirect discrimination could be retained, with the definition stating expressly that these concepts are not mutually exclusive.

If direct discrimination is retained as a separate concept, a test of *unfavourable treatment* for direct discrimination should apply, instead of *less favourable treatment*.

If indirect discrimination is retained as a separate concept, a test of *disadvantaging persons with the protected attribute* for indirect discrimination (compared with *inability to comply*) should be adopted.

The definition and scope of 'special measures', in particular with respect to the RDA, should align with how the term in understood at international law.

[202] Eg, The Hon Christian Porter MP, the Attorney- General for Australia, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation - Terms of Reference* 10 April 2019, and Altered Terms of Reference 29 August 2019; AHRC, *National Inquiry into Sexual Harassment in Australian Workplaces* (announced December 2018, ongoing).

Consideration should be given to defining an exception as conduct which, but for the operation of the excepting provision, would be unlawful discrimination. Consideration should also be given to defining an exemption as a permissive authorisation for conduct which, but for the operation of the exemption, would be unlawful.

Reasonable adjustments

Consideration should be given to extending the concept of 'reasonable adjustments' to other protected attributes such as age or pregnancy.

Protected attributes

The Commonwealth anti-discrimination regime should be expanded to protect volunteers, interns and other categories of unpaid workers. The SDA should also be amended to provide coverage to an employee of a State or a State instrumentality.

Consideration should be given to the addition of fully protected grounds relating to (inter alia):

- **religious conviction;**
- **political opinion;**
- **association with, or relation to, a person identified on the basis of any protected grounds or attributes;**
- **irrelevant criminal record;**
- **subjection to family violence and homelessness; and**
- **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.**

Protected attributes within the AHRC's jurisdiction should be enforceable and applicable to all areas of public life, unless there is a strong rationale to the contrary.

Areas in which unlawful discrimination is prohibited

The AHRC should give careful consideration to achieving greater consistency and clarity regarding the areas of public life in which unlawful discrimination is prohibited. This should have regard to the increasingly blurred distinction between 'public' and 'private' life and the aim of achieving substantive equality.

Permanent exceptions

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**
- **be regularly reviewed to ensure that they remain necessary, reasonable and proportionate in the circumstances.**

Consideration should be given to introducing sunset clauses which require such regular review to occur.

Particular consideration should be given to:

- **removing existing exceptions under the SDA which allow faith-based educational institutions to discriminate against students, teachers and staff;**
- **the necessity, reasonableness and proportionality of existing SDA exceptions which enable discrimination against people who are employed or contracted by religious educational institutions, having regard to their interaction with other relevant federal provisions, including under the FWA and the AHRC Act; and**
- **whether it remains reasonable, necessary and proportionate to provide exceptions for discrimination on the basis of a person's race, sex, disability or age, with respect to domestic employment.**

Compliance measures

In lieu of industry support packages, resources should be made available to the AHRC to support whole-of-community education and training to build awareness and compliance with the DDA standards, including for the beneficiaries of such standards.

The AHRC should be given the power to investigate incidents of discrimination under federal anti-discrimination law on its own motion. The parameters of these powers should be clearly defined.

The AHRC's proposal to provide greater certainty for industry by empowering the AHRC to issue special measure certifications on a fee for service basis should not be pursued.

Positive Duties

Positive duties should be introduced upon all organisations, including but not limited to public authorities and organisations exercising public functions, to eliminate unlawful discrimination and harassment and to advance equality.

Complaint handling processes and access to justice

Paragraph 46PH(1)(b) of the AHRC Act should be amended to reinstate the 12 month period that was in place prior to passage of the *Human Rights Legislation Amendment Act 2017* (Cth).

The AHRC Act should be amended to clarify that the standard of proof is the normal civil standard as set out in section 140 of the *Evidence Act 1995* (Cth).

Consideration should be given to adopting a shifting onus of proof, in line with the approaches adopted in the FWA and UK.

The Law Council supports consideration of the approach to costs taken under the FWA, which establishes a 'no costs' jurisdiction, subject to limited exceptions.

More data should be made available and accessible on AHRC conciliation outcomes.

Additional resources should be made available to underpin AHRC's ability to carry out its investigation, complaint and conciliation functions effectively.

Clarity should be provided regarding the classification and calculation of monetary compensation under anti-discrimination law, with a view to ensuring that effective and appropriate remedies are provided.

A mechanism for complainants to have the option to proceed directly to court should be considered, having regard to existing examples such as under the *Equal Opportunity Act 2010* (Vic).

Harmonisation

Longer-term, a more holistic review of anti-discrimination laws should be conducted with a view to achieving consistent, harmonised national legislation, provided that this preserves or enhances existing protections in line with best practice, fulfils Australia's international human rights obligations and reduces existing complexity and regulatory burdens. This review should extend to consideration of relevant FWA provisions, as well as federal, state and territory anti-discrimination laws.