

PILCH Submission to the Attorney- General's Department on the Consolidation of Commonwealth Anti- Discrimination Laws

1 February 2012



17/461 Bourke St Melbourne VIC 3000
Tel: (03) 8636 4400 | Fax: (03) 8636 4455
www.pilch.org.au



Lucy McKernan
Director
Legal Services



Juanita Pope
Senior Lawyer
PilchConnect



Charlotte Ahearne
Manager, Public Interest Referrals
Referral Scheme



Lauren Adamson
Manager
Seniors Rights Legal Clinic



Lucy Adams
Senior Lawyer
Homeless Persons' Legal Clinic

Contents

1	Introduction and Summary of Recommendations	1
1.1	About PILCH	3
1.2	Summary of Recommendations	3
2	Objects	8
2.1	Objects of the Act	8
3	Meaning of Discrimination	9
3.1	Definition of Discrimination – Question 1	9
3.2	Special measures- Question 3	10
3.3	Burden of proof - Question 2	10
3.4	Equality before the law	11
3.5	Positive duties - Question 5	12
4	Protected Attributes	14
4.1	Protected Attributes - Question 9	14
4.1.1	Homelessness and Discrimination	14
4.1.2	Social Status	14
4.1.3	Irrelevant Criminal Record	19
4.2	Associates- Question 8	22
4.3	Intersectional discrimination- Question 10	22
5	Protected Areas of Public Life	24
5.1	Voluntary workers - Question 13	24
5.1.1	Voluntary workers should be protected from discrimination and harassment	24
5.1.2	How to protect volunteers	24
5.1.3	Volunteers should be separately covered	25
5.1.4	How to define a volunteer	26
5.1.5	Exceptions	28
5.2	Clubs and member-based associations - Question 15	29
5.2.1	Broad coverage	29
5.2.2	Exceptions	30
5.3	Vicarious liability provisions - Question 19	30
5.3.1	Specified relationships for vicarious liability	30
5.3.2	Defences to vicarious liability	31
5.3.3	Support and education for the community sector	32
6	Exceptions and Exemptions	34
6.1	General limitations clause - Question 20	34
6.2	Exemptions for religious organisations - Question 22	34
7	Complaints and Compliance Framework	36
7.1	Conciliation Process - Question 25	36
7.1.1	Conciliation and other forms of ADR	36

7.1.2	Direct access to Court	36
7.1.3	Need for timely resolution	37
7.1.4	Disclosure of de-identified conciliation agreements.....	37
7.2	<i>Court Processes - Question 26</i>	38
7.2.1	Litigation costs	38
7.2.2	Representative actions.....	38
7.2.3	Remedies	40
8	Interaction with Other Laws and Application to State and Territory Governments	41
8.1	<i>Interactions with State and Territory Laws- Q29</i>	41

1 Introduction and Summary of Recommendations

The Public Interest Law Clearing House (Vic) Inc. (**PILCH**) welcomes the opportunity to make a submission to the Commonwealth Government in relation to its project of consolidation of all federal anti-discrimination laws (**Consolidation Project**) as part of Australia's Human Rights Framework. The Consolidation Project is an important development in the evolution of equality laws in Australia. It provides a significant opportunity for reforming the law by clarifying and strengthening anti-discrimination protections, simplifying obligations and improving the administration and compliance strategies.

Equality is one of the foundations of a democratic and free society and there is a growing body of empirical evidence that demonstrates that societies with greater equality are more harmonious, healthier and more successful.¹ Discrimination is one of the causes and effects of inequality which results in serious harms to the individual, the community and the nation. For instance discrimination can have negative impacts on health and wellbeing, educational performance, workplace productivity, social mobility and economic prosperity.

For PILCH clients, and particularly clients of the Homeless Persons' Legal Clinic (**HPLC**), discrimination can have extremely negative consequences. These can include:

- ▶ hindering access to accommodation, employment, goods and services;
- ▶ exacerbating social exclusion and stigmatisation;
- ▶ entrenching homelessness; and
- ▶ harmful mental and psychological effects.

Discrimination can exacerbate social exclusion and stigmatisation of such individuals. An inability to access services, or the experience of unequal treatment when attempting to access services further marginalises and creates barriers to reintegrating into the community. People facing discrimination on the basis of their homelessness report feeling: 'persecuted, sad, distressful, resentful, outraged, 'small', humiliated, confused, stressed out and lost.'²

Discrimination can entrench homelessness. For example, discrimination in the private rental market can prevent a person from breaking a cycle of homelessness. An inability to secure private rental increases the need to rely on transitional and crisis housing, which makes it more difficult to secure private rental accommodation in the future where a person's recent housing history is disjointed and "welfarised". Not having secure or permanent housing can impact an individual's ability to access other goods and services, or to gain employment, which will also make escaping homelessness harder. The HPLC has found that almost half of respondents to the Discrimination Consultation reported that discrimination on the grounds of

¹ See Pickett, K.E. and Wilkinson, R.G. 'The Spirit Level: Why Equality is Better for Everyone', Penguin 2009; The Equality Trust <http://www.equalitytrust.org.uk/>; VicHealth Research Summary 'Ethnic and race-based discrimination as a determinant of mental health and wellbeing' August 2008 found at www.vichealth.vic.gov.au/research/ethnicity; Victorian Equal Opportunity and Human Rights Commission, *Economics of equality: An investigation into the economics benefits of equality and a framework for linking the work of the Commission with its impact on the wellbeing of Victorians*, June 2010, available at http://www.humanrightscscommission.vic.gov.au/index.php?option=com_k2&view=item&id=570:economics-of-equality&Itemid=690

² PILCH HPLC, *Submission to the Victorian Attorney-General's Independent Review of the Equal Opportunity Act 1995 (Vic) (2008) (HPLC Submission 2008)*, p22, available at <http://www.pilch.org.au/socialstatusdiscrimination/equalservice/>.

homelessness or social status had prolonged their homelessness and had made it difficult to find a sustainable pathway out of homelessness.³

Experiencing discrimination can also have health consequences. Research undertaken by VicHealth⁴ clearly illustrates that people who suffer from discrimination are also more likely to develop problems such as depression and anxiety. The report notes that there is a strong link between poor mental health and poor physical health, so the impact of mental distress from discrimination may bring a further burden of ill-health. The report discusses a range of responses that people can have to discrimination, including suffering from depression, anxiety and anger, or engaging in self-destructive behaviour such as smoking, drinking, substance abuse or violence.

The economic implications of discrimination are also significant. By entrenching homelessness, unemployment and recidivism, discrimination can also put strain on public spending. For example, a recent City of Sydney study showed that the public cost of someone remaining homeless is as much as \$34,000 per person every year.⁵

Discrimination also exacerbates social inequality by further disadvantaging those who are already disadvantaged. The links between equality and social cohesion are well documented. Violence, conflict, insecurity and political instability are all more likely to occur in more unequal societies. In the poorest areas of unequal societies, the quality of social relations and the social fabric are stretched to breaking point. A UK report, *Fairness and Freedom: The Final Report of the Equalities Review* notes:

*There are substantial benefits to be gained from living in a more equal society. Gaps in educational attainment, employment rates or other opportunities impoverish us all. Research shows that not only does absolute poverty in itself reduce our productivity; so does the size of the gap between those at the top of society and those at the bottom. On several measures, that gap creates a drag on economic performance. This does not mean that the answer is to hold back those at the top or to sacrifice prosperity; but it does require focused effort on those who seem rooted at the bottom of the pile.*⁶

Despite what we know about the damaging effect of unequal societies, there remain in Australia significant inequalities for particular groups and those groups continue to face discrimination in many areas of public and private life. PILCH receives complaints about discrimination on the grounds of sexual orientation, sexual identity, sex, race, religion, disability, social status and criminal record and in areas of life such as education, prisons, medical care, housing, employment, policing, provision of Government welfare services and transport. Importantly, many of the complaints we receive are the result of structural or systemic discrimination, such as negative gender stereotyping or the lack of spent convictions legislation in Victoria.

A strong and effective Commonwealth anti-discrimination law is a critical and effective element of a national strategy to eliminate discrimination and promote substantive equality in Australian society.

³ PILCH HPLC, *Report to the Department of Justice, Discrimination on the Grounds of Homelessness or Social Status* (2007) (**HPLC Report 2007**) p17, available at <http://www.pilch.org.au/socialstatusdiscrimination/equalsservice/>.

⁴ See VicHealth, *More than Tolerance: Embracing Diversity for Health* (2007) available at: <http://www.vichealth.vic.gov.au/discrimattitudes/>. Although the VicHealth research focuses on discrimination on the basis of race and cultural heritage, the negative effects of discrimination on individuals' health are likely to extend to all forms of discrimination.

⁵ See City of Sydney and St Vincent's Hospital Emergency Department, *Help the Homeless: Spend Less – Spend Wisely* available at: <http://www.mhcc.org.au/images/uploaded/CitySydney-HelpHomeless.ppt#257,2,Overview>. See also, Sacred Heart Mission, *An Overview: A Journey to Social Inclusion* available at: http://www.sacredheartmission.org/Assets/Files/Microsoft%20Word%20-%20J2SI%20Summary%205%20pgs_.pdf.

⁶ Equalities Review Panel, United Kingdom, *Fairness and Freedom: The Final Report of the Equalities Review* (February 2007) 19 available at: http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/equality_review.pdf.

1.1 About PILCH

PILCH is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice;
- ▶ foster a strong pro bono culture in Victoria; and
- ▶ increase the pro bono capacity of the legal profession.

PILCH operates a number of different Programs which have contributed to this submission.

The **Referral Services Program** provides a pro bono referral service to persons seeking free legal assistance where they cannot afford to pay for such assistance. Clients who are eligible for assistance, are referred to a solicitor at a member firm or a barrister who will advise them and/or represent them on a pro bono basis. The Referral Services Program also undertakes law reform and delivers legal education to further the public interest, improve access to justice and protect human rights.

The **Homeless Persons' Legal Clinic (HPLC)** provides free legal assistance and advocacy to people who are homeless or at risk of homelessness within a human rights framework. Legal assistance is provided by pro bono lawyers at homelessness assistance services to facilitate direct access by clients. The HPLC also undertakes significant law reform, public policy, legal education and community development activities to promote and protect the fundamental human rights of people experiencing homelessness.

The **Seniors Rights Legal Clinic (SRLC)** provides free legal services to older persons at pro bono clinics located at hospitals and health centres. The SRLC undertakes law reform and advocacy in relation to laws that adversely impact the interests of older people and their access to justice and to advocate for the reform of those laws. The SRLC also undertakes a range of community and legal education to raise awareness of elder abuse and legal issues associated with aging. The SRLC is administered by PILCH as part of Seniors Rights Victoria.

PilchConnect provides legal help to Victorian, not-for-profit (**NFP**) community organisations. It has a range of legal services, including a legal information webportal, a low-cost legal seminar series for NFPs and it refers eligible organisations for pro bono legal assistance. It also does law reform and advocacy work in relation to the regulation of NFPs.

1.2 Summary of Recommendations

The casework and advocacy work of each of these Programs of PILCH involves regular interaction with the Commonwealth anti-discrimination laws and this makes PILCH well placed to contribute valuable insights to the Government's Consolidation Project. In particular, since each year PILCH and its network of pro bono lawyers provide thousands of advice, casework and referral services to disadvantaged and marginalised individuals who have experienced discrimination, and to NFPs seeking assistance to comply with anti-discrimination laws, we are able to provide important feedback to Government about the impact and effectiveness of those laws.

Therefore this submission makes recommendations for reform based on our work with clients and focuses on providing Government with examples and case studies arising from our work. We aim to give voice to our clients who have experienced discrimination and who have attempted to negotiate the anti-discrimination regulatory system. Our submission responds only to those questions raised in the Government's Discussion Paper about which we consider we have expertise and experience. In addition we have commented on issues not raised in the Discussion Paper, but which we consider are important and should be given attention as part of the Consolidation Project.

Our submission makes the following recommendations:

Recommendation	Issue / Discussion Paper Question
<p>Recommendation 1</p> <p>The Consolidated Law should include an objects clause that includes the following:</p> <ul style="list-style-type: none"> ▶ The promotion of substantive equality (as opposed to merely formal equality); ▶ The elimination of discrimination, without qualifiers such as ‘so far as is possible’; ▶ A statement empowering Courts to have regard to international instruments and jurisprudence when interpreting the legislation; and ▶ Recognition of the structural and systemic causes of discrimination. 	<p>Objects of the Act</p>
<p>Recommendation 2</p> <p>The Consolidated Law should contain:</p> <ul style="list-style-type: none"> ▶ one definition of discrimination for all protected attributes; and ▶ a unified definition of discrimination (rather than the distinction between direct and indirect discrimination) which does not specify a comparator test and focuses on unfavourable treatment. 	<p>Definition of discrimination – Q1</p>
<p>Recommendation 3</p> <p>The Consolidated Law should include a special measures clause which applies to all protected attributes and is modelled on the concept of special measures under international human rights law.</p>	<p>Special Measures – Q3</p>
<p>Recommendation 4</p> <p>The Consolidated Law should contain a shifting burden of proof, whereby the complainant must establish a prima facie case of unlawful discrimination and then the burden of proof shifts to the respondent to establish the lawful basis for its actions.</p>	<p>Burden of proof - Q2</p>
<p>Recommendation 5</p> <p>The Consolidated Law should include a general ‘equality before the law’ provision applying to all protected attributes.</p>	<p>Equality before the law – Q11</p>
<p>Recommendation 6</p> <p>The Government should include in the Consolidated Law an enforceable positive duty to promote substantive equality and eliminate systemic discrimination.</p>	<p>Positive duties – Q5</p>

<p>Recommendation 7</p> <p>The Consolidated Law should extend protection against discrimination on the basis of a persons' homelessness, unemployment status or receipt of social security.</p>	Protected attributes – Q9
<p>Recommendation 8</p> <p>'Irrelevant criminal record' should be added as a protected attribute in the Consolidated Law.</p>	Protected attributes – Q9
<p>Recommendation 9</p> <p>The Consolidated Law should include a provision extending protection against discrimination to associates of persons with one or more protected attribute.</p>	Associates – Q8
<p>Recommendation 10</p> <p>The Consolidated Law should contain a provision confirming protection against intersectional discrimination and enabling complaints of intersectional discrimination to be made.</p>	Intersectional discrimination – Q10
<p>Recommendation 11</p> <ul style="list-style-type: none"> ▶ Volunteers should be protected against discrimination. ▶ Volunteers should not be included in the definition of an 'employee'. The Consolidated Law should be drafted to include a separate definition of 'volunteer' and to make it clear that all 'workers' (or 'workplace participants'), whether employees or volunteers, are subject to the provisions of the legislation. ▶ The definition of 'volunteer' needs to clearly establish which people constitute a volunteer to whom the NFP will owe anti-discrimination obligations to, and what is required of NFPs to meet their obligations. ▶ Any new obligations should take into account the resource-constrained environment in which many NFPs operate and be reasonable and proportionate in the circumstances. ▶ Exemptions should be available where a volunteer is unable to fulfil the inherent requirements of a particular role (including on the basis of age where an organisation is unable to obtain adequate insurance cover or the cost of such coverage is unreasonable in the circumstances) or lacks a genuine qualification required to carry out the role, subject to the principles of necessity, proportionality and legitimacy. 	Voluntary workers – Q13

<p>Recommendation 12</p> <ul style="list-style-type: none"> ▶ Coverage of clubs and member-based associations should not be limited to licensed clubs only. Consideration of a range of options and further consultation with the NFP sector is required to determine appropriate criteria for defining the scope of coverage of clubs and associations. ▶ Exceptions should be available to preserve legitimate rights to freedom of association (eg. membership which is limited in order to support the needs of people of a particular age, gender or ethnicity, reduce disadvantage suffered by a people of a particular group, or preserve a minority culture) subject to the principles of necessity proportionality and legitimacy. 	<p>Clubs and member-based associations – Q15</p>
<p>Recommendation 13</p> <ul style="list-style-type: none"> ▶ The coverage of vicarious liability provisions of the Consolidated Law should specifically provide for the relationship of volunteer and community organisation. ▶ Broadening the scope of vicarious liability provisions to acts done by volunteers that are ‘in connection with’ their role may be too wide in the NFP context, and lead to a reluctance on the part of community organisations to involving volunteers. Consideration should be given to other options and further consultation with the sector conducted. ▶ A community organisation should not be liable for acts committed by a volunteer where the community organisation has taken reasonable action to prevent or avoid the conduct occurring. Importantly the defence should take into consideration (and be proportionate to) the size and resources of the organisation. ▶ A comprehensive education and awareness-raising campaign will be required to inform the not-for-profit sector about their new obligations and potential liabilities under the Consolidated Law. ▶ A staged commencement approach should be adopted to allow NFPs sufficient time to understand the new legislation and make necessary adjustments to their operations and practices. 	<p>Vicarious liability provisions – Q19</p>
<p>Recommendation 14</p> <ul style="list-style-type: none"> ▶ Exceptions and exemptions under the Consolidated Law should be determined on the basis of the human rights law principles of necessity, proportionality and legitimacy. 	<p>General limitations clause – Q20</p>

<ul style="list-style-type: none"> ▶ All current exceptions and exemptions should be subject to a public and transparent review process for compliance with Australia's international human rights obligations and with the principles of necessity, proportionality and legitimacy. ▶ The Consolidated Law should specifically state that all exceptions and exemptions are required to be a necessary and proportionate means of achieving a legitimate end or purpose. 	
<p>Recommendation 15</p> <p>The exemptions for religious organisations contained in the <i>Sex Discrimination Act 1984</i> and the <i>Age Discrimination Act 2004</i>, should not be retained in the Consolidated Law.</p> <p>The Consolidated Law should include no exemptions for religious organisations in relation to the protected attributes of sexual orientation and gender identity.</p> <p>If any exemptions for religious organisations are to be retained they should:</p> <ol style="list-style-type: none"> a. be subject to a process which requires transparency about the extent and justification of the exemption in relation to a particular religious body; and b. not be available in respect of 'functions of a public nature' including functions undertaken pursuant to Government funding. 	<p>Exemptions for religious organisations – Q22</p>
<p>Recommendation 16</p> <p>The Consolidated Law should provide a cause of action in respect of all protected attributes enabling complainants to go directly to the courts and should confer power on the Federal Court and Federal Magistrates Court to make appropriate orders where discrimination is proved.</p>	<p>Cause of Action</p>
<p>Recommendation 17</p> <p>The Consolidated Law should make provision for the registration of de-identified conciliated agreements in a court of federal jurisdiction.</p>	<p>Conciliation processes – Q25</p>
<p>Recommendation 18</p> <p>The Consolidated Law should make provision for standing in the Federal Court for organisations which have established a special or significant interest in a matter.</p>	<p>Court processes – Q26</p>
<p>Recommendation 19</p> <p>The Consolidated Law should provide no exemption for acts carried out in direct compliance with State or Territory laws.</p>	<p>Provisions governing jurisdictional interactions – Q29</p>

2 Objects

2.1 Objects of the Act

Objects clauses in legislation assist Courts and Tribunals, lawyers, complainants and respondents to interpret laws by better understanding Parliament's intended policy objectives for the legislation and the principles underlying those objectives. Consistent with the Government's aims identified in its Discussion Paper, including an objects clause in a consolidated equality law (**Consolidated Law**) would assist individuals and business to understand their rights and obligations, and clarify protections.

Our view is that the Courts have tended to take a narrow and restrictive reading of the current legislation and to ignore international human rights instruments and jurisprudence, which has often led to a narrowing of protections for victims of discrimination. An objects clause would provide guidance to Courts by reinforcing that the Consolidated Law is beneficial legislation and that the Courts are empowered to consider international instruments when interpreting the law.

The objects clause should address the promotion of substantive equality through progressive realisation. The explicit aim should be equality of outcome not just equal opportunity. The objectives should include the elimination of unlawful discrimination by providing protection against discrimination and effective remedies against unlawful discrimination. Qualifiers such as 'so far as possible'⁷ or 'to the greatest possible extent'⁸ should be removed as they undermine the clarity and strength of the objects.

The clause should recognise that discrimination is often caused by structural or systemic inequalities and state that the purpose includes the identification and elimination of structural or systemic causes of discrimination. The *Victorian Equal Opportunity Act 2010* (Vic) (**Victorian EO Act**) includes a useful provision regarding systemic causes of discrimination in its objects clause.⁹

Recommendation 1

The Consolidated Law should include an objects clause that includes the following:

- ▶ The promotion of substantive equality (as opposed to merely formal equality);
- ▶ The elimination of discrimination, without qualifiers such as 'so far as is possible';
- ▶ A statement empowering Courts to have regard to international instruments and jurisprudence when interpreting the legislation; and
- ▶ Recognition of the structural and systemic causes of discrimination.

⁷ See *Sex Discrimination Act 1984* (Cth) (**SDA**) s3; *Disability Discrimination Act 1992* (Cth) (**DDA**) s3; and *Age Discrimination Act 2004* (Cth) (**ADA**) s3.

⁸ See *Victorian EO Act* s3.

⁹ See *Victorian EO Act* s3.

3 Meaning of Discrimination

3.1 Definition of Discrimination – Question 1

The current definitions of discrimination contained in the various Commonwealth anti-discrimination laws are all different. This makes compliance more complicated and costly for business and understanding of the protections difficult for complainants, particularly when faced with multiple grounds of discrimination. In PILCH's experience, many of our clients find the current laws too difficult to navigate without the assistance of a lawyer. A Consolidated Law should provide one definition of discrimination which applies to all attributes. This is the approach taken in the *Victorian EO Act*. One definition for all protected attributes would achieve the Government's aim of simpler, more consistent regulation in which it is easier for individuals and duty holders to understand their rights and obligations.

The current distinction between direct and indirect discrimination is technical and legalistic. For PILCH clients, this reinforces the need for them to engage a lawyer to assist with their complaint and advise whether the impugned conduct amounts to discrimination of one kind or another. A unified test of discrimination would provide for simpler and more accessible laws and might avoid legalistic disputes about which category certain conduct falls into.

However we recognise the difficulty that a unified test might create renewed uncertainty for a period of time as the new definition is tested in the Courts. If the two categories were retained it should be made clear that they are not mutually exclusive, as suggested in the Discrimination Law Experts' Group's Submission (*Experts' Submission*).¹⁰ A clear statement that the two categories are not mutually exclusive would do away with the need for complainants to specify whether the alleged conduct amounted to direct or indirect discrimination and avoid legal arguments about whether a claim had been accurately pleaded or the wrong category had been identified.

The other significant difficulty with the current definitions is the comparator test in the definition of direct discrimination. The comparator test is too rigid and complex to apply and this creates uncertainties, increased legal costs and barriers to justice, for all parties. Often the difficulty arises in identifying an appropriate comparator, such as is often the case in complaints of disability discrimination in education.¹¹ The other difficulty is that the process becomes highly artificial and legally technical when hypothetical comparators must be constructed which may have limited relevance to the factual scenario and assessments made about how the comparator might have been treated differently. In these instances the comparator test is very unhelpful.

The crux of the inquiry should be whether there was unfavourable treatment and why. A test which focuses on detriment or unfavourable treatment is to be preferred because of its simplicity. See for example s 8(1)(a) of the *Discrimination Act 1991*(ACT) which provides that a person discriminates against another if 'the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7'. The *Victorian EO Act* test is another example of a simpler test that focuses on unfavourable treatment.¹²

The difficulties with the definition of discrimination for complainants are inextricably linked to the issue of the burden of proof which is addressed at 3.3 below.

¹⁰ *Discrimination Law Experts' Group Submission* (2011) (*Experts' Submission*), p9-10, available at <http://www.equalitylaw.org.au/elrp/submissions/>.

¹¹ See, eg, *Purvis v NSW* [2003] HCA 62.

¹² See *Victorian EO Act* s8.

Recommendation 2

The Consolidated Law should contain:

- ▶ one definition of discrimination for all protected attributes; and
- ▶ a unified definition of discrimination (rather than the distinction between direct and indirect discrimination) which does not specify a comparator test and focuses on unfavourable treatment.

3.2 Special measures- Question 3

A special measures provision is important and should apply to all protected attributes. Such a provision should be modeled on the concept of special measures under international law. We endorse the Submission of the Human Rights Law Centre in relation to special measures.¹³

Recommendation 3

The Consolidated Law should include a special measures clause which applies to all protected attributes and is modelled on the concept of special measures under international human rights law.

3.3 Burden of proof - Question 2

The issue of burden of proof is critical for PILCH's clients. Commonly our clients seek assistance with discrimination complaints and whilst their claim appears meritorious and they are able to establish less favourable treatment, they lack sufficient evidence to satisfy the high burden of proof for causation, that is, that the less favourable treatment was 'because of' the protected attribute.

Proof of causation in discrimination cases is frequently a matter of proving the reason for the respondent's actions, which is usually done by documentary evidence in the possession of the respondent or establishing what was in the mind of the respondent through oral evidence of the respondent. Complainants find that they do not have access to the relevant evidence. That the burden rests on the complainant when s/he is not in a position to prove the motivations or state of mind of the respondent seems unfair and becomes a significant barrier to justice for the complainant.

We recognise the need to balance the interests of complainants and respondents and ensure the legislation is simple to apply and does not over-burden either party. However, currently the burden of proof rests too heavily on the party who tends to be in a position least able to produce the relevant evidence. Therefore PILCH recommends allocating part of that burden to the respondent, who generally is in a better position, due to access to documentation and witnesses, to prove key matters relevant to the alleged discrimination. As noted in the Experts' Submission, 'all major comparable countries use some mechanism to require the respondent to produce evidence of the basis for their action.'¹⁴

The approach taken in the United Kingdom's anti-discrimination laws and under the *Fair Work Australia Act 2009*(Cth)¹⁵ is a shifting burden, where the complainant must establish a prima facie case of unlawful discrimination and then the evidentiary burden shifts to the respondent to prove the non-discriminatory reasons for the impugned conduct. This was also the approach recommended for reform of the Sex

¹³ Human Rights Law Centre, *Consolidation of Commonwealth Anti-Discrimination Laws* (2012) (**HRLC Submission 2012**), available at <http://www.equalitylaw.org.au/elrp/submissions/>.

¹⁴ Experts' Submission, p12.

¹⁵ *Equality Act 2010* (UK); *Fair Work Australia Act 2009* (Cth) ss361, 783.

Discrimination Act 1984 (Cth) (**SDA**) by the Senate Standing Committee on Legal and Constitutional Affairs in its inquiry into that Act.¹⁶

The advantage of this approach is that it shares the burden more fairly between the parties and requires the respondent, who is likely to have greater access to the evidence that shows the basis for the action, to produce that evidence at an earlier stage of Court proceedings. It would focus the parties' attention on the key issue, the basis for the action, and because respondents are likely to be clearer about what evidence they will be required to produce, they may be more forthcoming with that evidence during pre-Court negotiations. This in turn could have the effect of enabling parties to resolve matters more quickly and without resorting to Court proceedings.

Case study: Burden of Proof

Jack was engaged as a contractor in an insurance company when he was discouraged from applying for a permanent position because 'you have experience but there are younger people coming through'. Jack was provided with advice from pro bono lawyers that his case for age discrimination in employment had a "reasonable chance" of succeeding, but that because of the burden of proof requirement, Jack required more evidence of his claim. The evidence that was likely to support his claim was the oral and documentary evidence of the interview and the insurance company. While Jack settled the claim at conciliation for a nominal sum of \$1,000, the burden of proof reduced his options and put him in a weaker negotiating position vis a vis his employer.

Recommendation 4

The Consolidated Law should contain a shifting burden of proof, whereby the complainant must establish a prima facie case of unlawful discrimination and then the burden of proof shifts to the respondent to establish the lawful basis for its actions.

3.4 Equality before the law

We refer to and endorse the Submission made by the Human Rights Law Centre in relation to the inclusion of an 'equality before the law' provision.

This is a significant gap in current federal anti-discrimination laws. Its inclusion would bring Australian law into line with our international human rights obligations and with one of the foundational concepts of democracy: equal treatment by and under the law. An equality before the law provision would require that Commonwealth, State and Territory laws are non-discriminatory in both operation and effect and enable individuals to challenge laws which do not have that effect. In relation to concerns that special regimes for persons with particular protected attributes would not be lawful, specific carve-outs could be included to enable such regimes to operate lawfully. Such carve-outs should of course be subject to compliance with the established human rights principles of necessity, proportionality and legitimacy.

Recommendation 5

The Consolidated Law should include a general 'equality before the law' provision applying to all protected attributes.

¹⁶ Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008), see Recommendation 22, available at http://www.apf.gov.au/senate/committee/legcon_ctte/sex_discrim/report/index.htm.

3.5 Positive duties - Question 5

The current anti-discrimination laws could be significantly strengthened by moving from a purely complaints-based model of regulation, which relies on individuals making a complaint of discrimination and then misconduct being punished, to a model imposing positive duties to promote substantive equality and eliminate systemic discrimination. The current laws are reactive and focus on negative conduct and disputes. As a result they provide no mechanisms for addressing systemic discrimination, fail to recognise positive behavior and lead to the development of anti-discrimination practices predominantly through the adversarial lens of Courts and legal disputes.

The current approach also places the majority of the burden of enforcing the legislation and identifying discrimination, on the victims, who are often the parties with the fewest resources and least capacity to do so. This means that many instances of discrimination go unchecked because victims are not in a position to pursue complaints due to the impact of their minority status.¹⁷

In the HPLC's experience, for clients who are experiencing disadvantage and other barriers to accessing the justice system,¹⁸ the process of lodging and pursuing a complaint is complicated and often overwhelming. In many cases, the discrimination that has made a person feel dejected and isolated, will also deter them from taking steps to make a complaint.

Furthermore, people who have experienced discrimination throughout much of their lives often do not identify the treatment as unlawful because they have come to expect nothing better. The below extract from the section of a report prepared by the HPLC consumer group explains this idea of lowered expectations:

When we spoke to people, we heard stories about them being grateful for substandard services or accommodation. We think this is wrong and we think this shows how people experiencing homelessness are being failed by services. If people expect less they will be given less. We spoke to one man who was grateful to live in a rooming house with 30 other people and a single shared kitchen. We spoke to other people who felt scared to complain about crap service because they felt lucky to have anything or were too scared to rock the boat. Nobody else would put up with this and yet homeless people are thankful. Instead of having 'rights', some people we spoke to considered their situation in terms of 'privileges'.¹⁹

Instead the Consolidated Law should adopt a proactive, preventative and positive approach to discrimination. Positive duties would encourage a more holistic approach by duty holders and move anti-discrimination work from legal and risk departments to operational parts and public facing of an organisation. Many larger organisations have already undertaken internal policy reviews and implemented compliance systems in relation to anti-discrimination laws. In many cases, little more work would be required by such duty holders to comply with a positive duty. In addition, a positive duty should recognise the varying capacities of duty holders to establish compliance systems.

Positive duties are also better able to address systemic discrimination or effect cultural change than individual fault-based mechanisms, because they encourage institutional change and awareness across all

¹⁷See, eg, State of Victoria, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review and Final Report* (2008) (**DOJ Report 2008**), [1.97] available at: <http://www.justice.vic.gov.au/resources/9/0/90008100404a4171a7d2ff5f2791d4a/final+version+--+final+report.pdf>.

¹⁸ These may include: mental health issues; substance dependence; unemployment; illiteracy; physical health problems or disability; and language, financial or cultural barriers.

¹⁹ In April 2010, the HPLC was appointed by the Victorian Department of Human Services to undertake a series of six consumer consultations to inform development of the Victorian Homelessness 2020 Strategy. See PILCH HPLC, *Victorian Homelessness 2020 Strategy: Summary of consumer consultations* (June 2010) (**Homelessness 2020 Strategy**) p16, available at: <http://prod.admin.pilch.roadhouse.com.au/Assets/Files/Homelessness%202020%20consumer%20consultations%20-%20final%20report.pdf>.

protected attributes. Further they encourage institutions to collate data and thereby self-diagnose discriminatory cultures or structures.

Positive duties exist in some of the current Commonwealth anti-discrimination laws²⁰ and the *Victorian EO Act*²¹ and have operated for some time without significant additional burden on business. Further there are a number of comparative jurisdictions that have positive duties to promote equality in their anti-discrimination laws with some evidence reported of beneficial impacts.²²

For example, the *Victorian EO Act* clearly sets out a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation.²³ As stated by the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**): 'Instead of allowing organisations to simply react to complaints of discrimination when they happen, the Act requires them to be proactive about discrimination and take steps to prevent discriminatory practices'.²⁴

In relation to systemic discrimination, it is important that the positive duty is enforceable by the Australian Human Rights Commission (**AHRC**) powers to investigate and prosecute breaches and both the AHRC and the Courts should be empowered to make findings and remedial orders that address systemic or underlying causes of discrimination.

Recommendation 6

The Government should include in the Consolidated Law an enforceable positive duty to promote substantive equality and eliminate systemic discrimination.

²⁰ See, eg, *DDA* s5(2) and 6(2).

²¹ *Victorian EO Act* s15

²² HRLC Submission 2012, p9-10.

²³ *Victorian EO Act* pt9. See also, Victorian Equal Opportunity and Human Rights Commission, *Equal Opportunity Act 2010: Positive Duty (VEOHRC Positive Duty)* available at: http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&layout=item&id=1127&Itemid=572.

²⁴ VEOHRC Positive Duty.

4 Protected Attributes

PILCH strongly supports the inclusion of sexual orientation and gender identity as protected attributes under the Consolidated Law. PILCH endorses the Submission of the Human Rights Law Centre in relation to sexual orientation and gender identity.²⁵

4.1 Protected Attributes - Question 9

4.1.1 Homelessness and Discrimination

An effective anti-discrimination framework needs to recognise the link between discrimination and disadvantage in Australia – discrimination both leads to and perpetuates disadvantage. It has “a negative impact on the fair distribution of life chances, including access to education, employment, housing and good health”.²⁶

In addition to the attributes currently protected, two attributes which are common bases for discrimination are:

- ▶ homelessness, unemployment and receipt of social security (**Social Status**); and
- ▶ irrelevant criminal record.²⁷

Based on the experience of PILCH and the HPLC, this section discusses how discrimination on these grounds is experienced (i.e. what it looks like in a day-to-day context) and how it contributes to and perpetuates disadvantage.

PILCH recommends that it be made unlawful to discriminate on the basis of Social Status and irrelevant criminal record in Australia.

4.1.2 Social Status

Background – Homelessness in Australia today

On census night in 2006, approximately 105,000 Australians were homeless, including approximately 7,480 families.²⁸ There are 173,000 households on waiting lists for public housing in Australia²⁹ and the wait can be up to 15 years. In 2009, there was a deficit of 493,000 affordable dwellings for people with the lowest incomes.³⁰

²⁵ HRLC Submission 2012, p19.

²⁶ DOJ Report 2008, p26 citing B Link and J Phelan, “Conceptualising Stigma”, Annual Review of Sociology (2001) 26, 363.

²⁷ Under ss30–32 of the *Australian Human Rights Commission Act 1986* (Cth), HREOC can handle complaints about discrimination in employment or occupation on the basis of criminal record. While important, this limited protection should be expanded to deliver effective protection from discrimination on this ground.

²⁸ Homeless Australians fall into three broad groups, including those who are:

- sleeping rough (living on the streets);
- living in temporary accommodation, such as crisis accommodation and refuges or staying with friends or relatives; and
- staying in boarding or rooming houses with no secure lease and no private facilities.

See Chris Chamberlain and David MacKenzie, Australian Bureau of Statistics, *Australian Census Analytic Program: Counting the Homeless* (2006).

²⁹ Productivity Commission, *Report on Government Services 2010* (2010) available at: <http://www.pc.gov.au/gsp/reports/rogs/2010>.

³⁰ National Housing Supply Council, Australian Government, *National Housing Supply Council – 2nd State of Supply Report* (2010) p103 available at: <http://www.nhsc.org.au/supply.html>.

The causes of homelessness in Australia are multiple and interrelated and include an acute shortage of affordable housing, unemployment, poverty, discrimination, structural inequalities and family violence,³¹ as well as individual hardships such as physical and mental health issues, contact with the criminal justice system and experiences with state care and child protection systems.

In 2009 there were 2,081,000 people of working age on income support payments, including Newstart Allowance, Disability Support Pension, Parenting Payment and Carer Payment: 37% of income support recipients had a disability sufficiently severe to qualify them for a Disability Support Pension and 14% were unemployed for more than 12 months.³²

The importance of making it unlawful to discriminate on the basis of Social Status should be considered with these levels of homelessness and disadvantage in mind.

What is discrimination on the basis of social status?

Homelessness brings with it acute social exclusion, including difficulty accessing housing, education, transport, health care and employment, as well as isolation and marginalisation within the community.

The St Vincent de Paul Society reports that:

*[o]ur extensive experience in the [homelessness] sector leads us to believe that there is a significant issue in relation to discrimination against this particular group in the community who have very complex needs and are very vulnerable.*³³

People experiencing homelessness suffer both:

- ▶ direct discrimination – based on unfair and inaccurate assumptions about a homeless person's lifestyle, character and ability to pay for goods and services; and
- ▶ indirect discrimination – when requirements are imposed to access goods and services, which homeless people are unable to meet.

Discrimination on the basis of Social Status and homelessness can occur for a number of reasons.

Homeless people find they are discriminated against because of factors such as:

- ▶ their appearance;
- ▶ their source of income (such as Centrelink benefits);
- ▶ association with or assistance by a welfare agency; or
- ▶ being unable to meet certain requirements – such as having a fixed address.

Poor presentation is a common trigger for discrimination. In 2006, the HPLC conducted a series of detailed consultations with over 180 homeless Victorians about their experience of discrimination (***Discrimination Consultations***). The purpose of these consultations was to gather data regarding the nature and extent of social status discrimination in Victoria.

Respondents to the Discrimination Consultations noted that being homeless and poor made it difficult to always present well. One participant spoke of being discriminated against on the basis of his appearance. He explained that he approached the hospital with a broken hand, a clearly visible injury, but the hospital

³¹ See Australian Institute of Health and Welfare, *Government-Funded Specialist Homelessness Services: SAAP National Data Collection Annual Report 2010–11: Australia* (2011) p12, which showed that domestic or family violence was the single most common reason why people sought support from government-funded specialist homelessness services, available at: <http://www.aihw.gov.au/publication-detail/?id=10737420853>.

³² Australian Council of Social Service, *Beyond stereotypes: Myths and facts about people of working age who receive social security*, ACOSS Paper 175 (May 2011) 3 available at: http://acoss.org.au/images/uploads/beyond_stereotypes.pdf.

³³ Letter of support from St Vincent de Paul Society to PILCH HPLC dated 12 August 2002.

thought he was in casualty because he was looking for drugs. He was turned away by security and never got to see the Triage nurse. He also spoke of repeatedly being pulled over by the police based on his appearance.³⁴

Discrimination also often occurs when an individual's only income is from Centrelink benefits. One woman explained: "although I can't prove it, I applied for more than 40 flats in 4 weeks and didn't get one. Some places (share accommodation) also said 'no' once I said I was on a benefit".³⁵

Welfare agencies and community organisations report that the mere association of a person with certain support services can be a ground of discriminatory treatment. For example, the Salvation Army Social Housing Service in Warrnambool reported that:

*A middle aged man approached a local backpacker accommodation facility in Warrnambool and enquired whether they had any vacancies. He was told yes, so he went to the Salvation Army Social Housing Service for financial assistance. He went back to the backpackers and handed over a Salvation Army cheque for his accommodation. When the proprietor saw the cheque he said to the man, 'Sorry. We've just had a busload arrive and no longer have any vacancies.'*³⁶

In 2010, the HPLC made a video clip, *I Just Want a Fair Go: Homelessness & Discrimination*.³⁷ The video runs for six minutes available on our website. It contains personal stories about people's experiences of discrimination while homeless. We encourage the Attorney-General's Department to watch this footage.

Discrimination in accommodation

The most direct and immediate effect of the discrimination is that people who have been homeless in the past and therefore have gaps in their rental history, are using their social security payments to cover the rent, or are being assisted by a welfare agency, are denied tenancies despite their ability to pay rent.

Seventy per cent of people surveyed in the HPLC's Discrimination Consultations reported that they had experienced discrimination on the basis of social status at the hands of accommodation providers. Respondents experienced discrimination in private rental, boarding houses, transitional or crisis accommodation, hotels and public housing.³⁸

Discrimination in the provision of accommodation often occurs when accommodation providers refuse to accept full or even partial payment of bonds and rent from welfare agencies or the Office of Housing. Applicants on Centrelink benefits often face tougher conditions than other people. Jan Kenny of Hamilton Accommodation Program reports that: '[r]eal estate agents demand higher bonds from social security recipients. No real estate agents accept a full Office of Housing bond – tenants must put in at least one week's cash themselves.'³⁹

A case worker from the Emergency Accommodation Support Enterprise reported that women fleeing domestic violence often experience discrimination on the basis of their homelessness and reported:

It is this organisation's general experience that single women with children – whether they be victims of domestic violence or young homeless women who are pregnant or parenting – have great

³⁴ HPLC Submission 2008, p18.

³⁵ HPLC Submission 2008, p16.

³⁶ HPLC Submission 2008, p17.

³⁷ HPLC, *I Just Want a Fair Go: Homelessness & Discrimination* (2010) available at: <http://www.pilch.org.au/afairgo/>.

³⁸ HPLC Report 2007, p12–13. Private rental or real estate agents (41% or 75 respondents), boarding houses (24% or 44 respondents), transitional or crisis accommodation (20% or 36 respondents), hotels and public housing (each 19% or 35 respondents) and caravan and backpackers (each 17% or 32 respondents).

³⁹ HPLC, *Promoting Equality: Homeless Persons and Discrimination* (2002), p13.

*difficulty in obtaining private rental regardless of whether it is housing or caravan park accommodation.*⁴⁰

Case study: Discrimination against family violence victims – Accommodation

A case worker from regional Victoria worked with Jenny, who was homeless and a victim of domestic violence. When Jenny inquired about accommodation at a central caravan park in Bendigo, she was advised that there was accommodation available. However, as soon as she mentioned that the Emergency Accommodation Support Enterprise were working with her, the caravan park realised that she was homeless and a victim of domestic violence and advised her that they had made an error and in fact had no vacancies.⁴¹

Case study: ‘Undesirable boarders’ evicted

The HPLC assisted a client who received a Disability Support Pension in connection with his mental illness. He tried to obtain accommodation at a rooming house in Fitzroy. St Vincent de Paul undertook to pay rental amounts to the rooming house proprietor, upon invoice, until he obtained stable accommodation. Shortly after he moved in, the rooming house proprietor evicted him for ‘failure to pay rent’. St Vincent de Paul had never been invoiced. When the proprietor of the rooming house was contacted, the proprietor apologised for the ‘mistake’ but stated that, unfortunately, the client could not return as there were no longer any vacancies. In the HPLC’s experience, the practice of evicting ‘undesirable boarders’ (that is, homeless persons referred by a welfare agency) when a rooming house is full, remains widespread.⁴²

Discrimination in the provision of goods and services

A similar picture of discrimination emerged from the HPLC’s research in relation to goods and services providers. Almost 60 per cent of respondents to the HPLC’s Discrimination Consultations had been discriminated against by goods and services providers on the basis of their homelessness. Discrimination is most often experienced from restaurants, cafes or bars, banks, retail shops, hospitals and telecommunications providers.

In addition to direct discrimination based on appearance, people experiencing homelessness are frequently unable to meet requirements imposed to access goods and services. For example, service providers often require a permanent address or landline telephone number before providing services to a customer. In addition to being demoralising and humiliating, the effect of this discrimination in many cases is to deprive people of necessary services, including accommodation, food and medical attention.

⁴⁰ HPLC Submission 2008, p18.

⁴¹ HPLC Submission 2008, p17 citing a case worker from Emergency Accommodation Support Enterprise, Loddon Campaspe Region.

⁴² HPLC Submission 2008, p17 citing Phil Lynch, former Director of the HPLC.

Case study: Discrimination by service providers

A Community Development Worker from St Mary's House of Welcome spoke about Anthony who is homeless and has a mental illness. She told of the way that he is often asked to leave services due to his appearance, which is perceived to be threatening and upsetting to other service users. The services she identified as having discriminated against Anthony because of his appearance included Centrelink, hospitals, police, schools, banks and boarding houses.⁴³

Case study: Making homeless people move on

Gary is a homeless man who slept outside a coffee shop one night. When he woke up in the morning, he ordered a coffee from the shop and had the intention to pay for it. Gary was told by the shopkeeper to move on. Every time Gary goes to a food court, he would be told that he cannot sit there, that he cannot bring his bag into the food court and that he must leave his bag outside. Gary said that these experiences made him feel very low.

Discrimination in employment

Participants in the Discrimination Consultations discussed how homelessness affects their ability to get a job, and to maintain employment. One participant reported that he was fired from his job because he was getting to work late due to not having an alarm clock.⁴⁴

In order to get a job, participants reported that they need an address and a bank account. Participants also reported that employers discriminate against people who have worked at The Big Issue because they know the person is, or has been, homeless. Participants suggested that there is a stigma that surrounds homeless people which results in further discrimination – as a participant at Ozanam House said: 'They think we're untrustworthy'.⁴⁵

Many participants explained that employment increases a person's sense of self worth, making them feel positive and that they have made a contribution and allowed a person to make progress in other areas of their lives. There was overwhelming agreement among participants that they wanted to work but faced numerous barriers to do so.

Case to add Social Status as a protected attribute

Including Social Status as a protected attribute would have concrete benefits for people experiencing homelessness and poverty. It would:

- ▶ establish a norm of non-discrimination against homeless people;
- ▶ create public awareness that homeless people should not be treated less favourably;
- ▶ give homeless people an avenue to complain and seek redress when they have experienced discrimination; and

⁴³ HPLC Submission 2008, p18 citing Anne Emery, Community Development Worker, St Mary's House of Welcome, Melbourne.

⁴⁴ Homelessness 2020 Strategy, p8.

⁴⁵ Homelessness 2020 Strategy, p8.

- ▶ encourage the Government to take positive steps to address the special needs of people who are homeless.

The cost of not addressing discrimination on the ground of Social Status for society, from both an economic and a human rights perspective, as well as for the individuals themselves, is more than can be afforded.

Recommendation 7

The Consolidated Law should extend protection against discrimination on the basis of a persons' homelessness, unemployment status or receipt of social security.

4.1.3 Irrelevant Criminal Record

Currently, the *Australian Human Rights Commission Act 1986* (Cth) provides some protection against discrimination on the basis of irrelevant criminal record in employment (such as being refused a job, denied training opportunities or promotions, dismissed from employment, or being harassed at work on the basis of criminal record).⁴⁶

Criminal record discrimination is not, however, unlawful under federal law. The AHRC can:

*investigate complaints of discrimination in employment on the basis of criminal record and, where appropriate, try to resolve them by conciliation. When a complaint cannot be resolved by conciliation, or where conciliation is inappropriate, and the Commission finds that there has been a breach of human rights or that workplace discrimination has occurred, it may prepare a report for the federal Attorney-General which must be tabled in Parliament.*⁴⁷

PILCH submits that the Consolidated Law should make it unlawful to discriminate on the basis of irrelevant criminal record in employment, the provision of goods and services and accommodation.

What is discrimination on the basis of irrelevant criminal record?

Discrimination against individuals with a criminal record is based on stereotypes about what a criminal record means for a person's financial capacity or 'trustworthiness'. People with previous convictions should be considered on their merits, assessed on their strengths and weaknesses in terms of skills, knowledge, experience, reliability and any other relevant factor.

In some circumstances, a criminal record will be relevant to a job a person is seeking or the service they are trying to access. However, only where the nature of the offence indicates a real likelihood of re-offending, or where there is a genuine need for someone not to have a criminal record, should a criminal record be relevant to a person's employment or their ability to access a service.

As Hugh de Kretser, Executive Officer of the Federation of Community Legal Centres, explains:

*It is perfectly legitimate for a child-care centre to ensure that no staff have relevant sex offences. But it is unreasonable for a real estate agency to refuse to hire a receptionist because she was fined \$50 for using cannabis nine years ago. A bank could refuse to hire someone with a recent fraud or dishonesty offence, but it would be unreasonable for a supermarket to dismiss a shelf-stacker because the criminal record check revealed a drunk and disorderly conviction six years ago.*⁴⁸

Importantly, while criminal record discrimination is most prevalent in employment, it is not limited to this field and continues to present barriers to people seeking to access accommodation or goods and services.

⁴⁶ See AHRC, *Discrimination in Employment on the Basis of Criminal Record (AHRC Discrimination in Employment)*, available at: http://www.hreoc.gov.au/human_rights/criminalrecord/.

⁴⁷ AHRC Discrimination in Employment

⁴⁸ Hugh de Kretser, 'Criminal Record Checks can Raise Skeletons Better Left Buried', *The Age* (23 May 2006), p13.

Discrimination in employment

Criminal record checks are increasingly becoming a standard part of the recruitment process. Individuals with a criminal record will often self-exclude from applying for positions that require a criminal record check as they believe that the existence of a criminal record – no matter how irrelevant, minor or old – will prevent them from being fairly considered for the position.

As these case studies from a 2005 report by the Fitzroy Legal Service and Job Watch show, even a finding of guilt with no conviction recorded or an old and irrelevant criminal record can create barriers to employment.⁴⁹

Case study: Drink driving record used to terminate contract as a cleaner

Dimitri had a history of drink driving and had spent a short time in jail because of it. He had never been charged or found guilty of dishonesty offences. He secured employment as a cleaner in a large suburban shopping complex. After working for three weeks his employers learned of his criminal history and terminated the employment. He was told his services were no longer required because of his prison record. Dimitri was devastated, having competently run his own cleaning business in the past. He was assisted to find similar employment at an organisation that did not conduct criminal record checks.⁵⁰

Case study: Finding of guilt but no conviction relied on by employer

Rhianna was charged and found guilty on several counts of obtaining property by deception. Rhianna pleaded guilty and no conviction was recorded. She received a fine and a Community Based Order for six months to perform 70 hours of unpaid community work.

When Rhianna applied for work a short time later she was requested to undergo a police check. To her surprise the check revealed the guilty verdict. She was refused employment due to her record. Not only was Rhianna shocked because she did not think that a non conviction would be recorded on her criminal record, she was also upset because she did not feel that the charges were relevant to the job.

⁴⁹ Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform* (2005) (***Criminal Records in Victoria***), p28.

⁵⁰ *Criminal Records in Victoria*, p19.

Discrimination in accommodation

Individuals with a criminal record also experience difficulty in securing accommodation. It is difficult for an individual to explain gaps in rental history without explaining their prison history. Real estate agents will often refuse to consider applicants with a criminal record.

Case study: Ex-prisoner denied private rental

Kelvin was released from prison and lived for a short period with his girlfriend. He was referred to the Salvation Army after his relationship broke down and he became homeless. Kelvin stayed in the service for six weeks, during which time he investigated private rental with a support worker. He was apprehensive as he believed he had no hope of finding private rental. With one real estate agent he was rejected because he was only able to give them a brief rental history and his prison story. His support worker wrote a letter to the management but no answer was received despite follow up calls.

During Kelvin's time with the Salvation Army, Kelvin was an excellent tenant – rigid in keeping his unit clean and in paying rent. In fact, many ex-prisoners have good living and house skills which can be carried into civilian life.⁵¹

Effects of discrimination on the basis of 'irrelevant criminal records'

Discrimination can have extremely negative consequences including:

- ▶ hindering access for offenders to employment, accommodation, goods and services;
- ▶ increasing the likelihood of recidivism;
- ▶ exacerbating social exclusion and stigmatisation; and
- ▶ harmful mental and psychological effects.

The consequences of such discrimination can be particularly serious for people who have just re-entered the community after a period of incarceration as those individuals often lack social networks to turn to for assistance. Discrimination is particularly detrimental when it prevents former offenders from securing employment. If a person cannot obtain employment because of an irrelevant criminal record, it immediately limits their other opportunities in the community. Moreover, an individual who is unable to secure gainful employment is more likely to resort to low level offences like begging and theft. Research in the United Kingdom has shown that employment can reduce re-offending by between a third to a half.⁵²

Discrimination also exacerbates social exclusion and stigmatisation of former offenders. An inability to “make a fresh start”, or the experience of unequal treatment when attempting to “go straight” creates barriers to reintegrating into the community. As discussed above, experiencing discrimination can also have health consequences. Allowing discrimination on the basis of irrelevant criminal records is unfairly punishing former offenders who have already served their debt to society.

Case to add 'irrelevant criminal record' as a protected attribute

Including irrelevant criminal record as a protected attribute in the Consolidated Law would have concrete benefits for former offenders. It would:

⁵¹ Criminal Records in Victoria, p21.

⁵² United Kingdom Home Office, Breaking the Circle: A report on the review of the rehabilitation of offenders (2002) [3.16] available at: <http://www.homeoffice.gov.uk/documents/breaking-the-circle.html>.

- ▶ establish a norm of non-discrimination against people with an irrelevant criminal record;
- ▶ create public awareness that former offenders should not be treated less favourably;
- ▶ give people an avenue to complain and seek redress when they have experienced discrimination on the basis of an irrelevant criminal record;
- ▶ impose an obligation upon duty holders to respect the right to non-discrimination on the basis of irrelevant criminal record and abstain itself from discriminating on that basis; and
- ▶ encourage duty holders to take positive steps to address the special needs of people who are former offenders.

Moreover, anti-discrimination legislation could offer further protection to individuals who have committed offences in circumstances where a Court did not consider that a conviction should be recorded.

Recommendation 8

'Irrelevant criminal record' should be added as a protected attribute in the Consolidated Law.

4.2 Associates- Question 8

Protection for associates of persons with protected attributes is provided for in the *Racial Discrimination Act 1975* (Cth) (**RDA**), *Disability Discrimination Act 1992* (Cth) (**DDA**) and most States and Territories anti-discrimination legislation. In order to create consistent laws that enable simpler and clearer compliance across jurisdictions, the Consolidated Law should incorporate protection for associates.

Recommendation 9

The Consolidated Law should include a provision extending protection against discrimination to associates of persons with one or more protected attribute.

4.3 Intersectional discrimination- Question 10

Many of PILCH's clients complain about discrimination on a number of grounds and yet the current anti-discrimination laws do not allow for complaints to be made on the basis of more than one protected attribute (called intersectional or compounded discrimination).

For instance, there is a frequent intersection between homelessness, unemployment, receipt of social security payments and age, mental health or disability and gender.

A recent review of over 400 open HPLC files revealed that, in addition to experiencing or being at risk of homelessness:

- 24 percent of clients have severe mental health issues;
- 23 percent of clients have drug and alcohol dependence issues; and
- 17 percent of clients experience multiple complex needs.⁵³

As shown in the Case Study 'Discrimination against family violence victims' above at p18, Jenny was a female victim of domestic violence who was discriminated against when securing accommodation. Her treatment could not easily be reduced to her being a female, her status as a domestic violence victim or to her being homeless, but rather a combination of each of these attributes.

⁵³ For the purposes of the HPLC file review, "multiple complex needs" referred to more than one of: severe mental health issues, drug and alcohol dependence, cognitive impairment, domestic violence and challenging behaviour.

These figures identify the complexity of circumstances facing many marginalised and disadvantaged Australians. Extending protection against intersectional discrimination is a realistic way of recognising people's complex and often inter-related circumstances and would lead to more effective protection against unequal treatment that cannot be neatly linked to a single head of discrimination.

The AHRC in its Submission notes that it routinely accepts complaints made on the basis of more than one protected attribute and deals with them 'as a single complaint rather than as a series of complaints on separate grounds'.⁵⁴ Therefore the AHRC contends that an express provision enabling complaints of intersectional discrimination would not be creating a new set of legal obligations but simply codify current practice. On this basis the inclusion of a provision providing for intersectional discrimination complaints seems not to be contentious.

Recommendation 10

The Consolidated Law should contain a provision confirming protection against intersectional discrimination and enabling complaints of intersectional discrimination to be made.

⁵⁴ AHRC, Consolidation of Commonwealth Discrimination Law Submission (2011) (*AHRC Submission 2011*), at 5.3, p 25, available at <http://www.hreoc.gov.au/legal/submissions/index.html>.

5 Protected Areas of Public Life

5.1 Voluntary workers - Question 13

5.1.1 Voluntary workers should be protected from discrimination and harassment

Volunteers contribute greatly to the economic and social welfare of Australia. To give some indication of the scale of volunteering in Australia, statistics on our not-for-profit (**NFP**) sector reveal that:

- ▶ There are around 600 000 not-for-profit organisations in Australia. The bulk of these are small, non-employing organisations that rely on the voluntary contributions of members and others.
- ▶ In 2006-2007 the direct value of volunteer work across Australia was estimated at \$14.6 billion.
- ▶ 5.2 million people volunteered, providing approximately 729 million volunteer hours' work in 2006.⁵⁵
- ▶ The estimated number of volunteers in Australia doubled from 1995 to 2010.⁵⁶

PILCH supports the protection of volunteers against discrimination and harassment on the basis of protected attributes within the new Consolidated Law.

Across Australia, legislative protection against discrimination and sexual harassment of volunteers has been recommended by numerous law reform reports and reviews. Queensland, South Australia, the Australian Capital Territory and Tasmania have all legislated to provide protection against discrimination to volunteer, trainee or unpaid workers. The only jurisdictions that do not yet provide full protection against discrimination and harassment in the volunteering workplace are New South Wales, Western Australia, the Northern Territory and Victoria.

In Victoria while the *Victorian EO Act* protects voluntary workers from sexual harassment, but not discrimination, the Final Report into the Equal Opportunity Review recommended that volunteers should be given the same protection against discrimination as employees.⁵⁷

In Western Australia a recent review of the *Equal Opportunity Act 1984* (WA) recommended that the legislation be amended to protect volunteers.⁵⁸ In NSW a review of the *Anti-Discrimination Act 1977* (NSW) in 1999 recommended that the definition of work include work done by volunteers, trainees or unpaid workers.⁵⁹ While these recommendations have not been implemented to date, there is clearly wide support for the introduction of anti-discrimination laws covering volunteers (where protection does not already exist at state level).

5.1.2 How to protect volunteers

Drafting of the new Consolidated Law in relation to protecting volunteers will be critical. In considering how best to cover volunteering, it is important to recognise the community sector context in which volunteering frequently takes place.

⁵⁵ Productivity Commission, *Research report into the Contribution of the Not-for-profit Sector* (2010), p53, at <http://www.pc.gov.au/projects/study/not-for-profit/report>

⁵⁶ Volunteering Australia website at www.volunteeringaustralia.org/Volunteering-Facts/-Statistics/-The-latest-picture-of-volunteering-in-Australia.asp

⁵⁷ DOJ Report 2008, p106.

⁵⁸ Equal Opportunity Commission 2007, *Review of the Equal Opportunity Act 1984* (WA) Final Report, p42.

⁵⁹ New South Wales Law Reform Commission 1999, *Review of the Anti-Discrimination Act 1977* (NSW), Report No. 92.

Many not-for-profit community organisations (**NFPs**) that involve volunteers are small, have very limited funds, and rely heavily (or completely) on volunteers to operate. They are often set up for a public interest purpose (eg: to support marginalised and disadvantaged Australians) and as funds are raised to support their work they often have very minimal resources to devote to reviewing, understanding and complying with legislation. In our experience many struggle to comply with increasing regulation via a myriad of often confusing and overlapping laws. The sector also bears an additional regulatory burden relating to their not-for-profit status (eg: laws regulating fundraising, charity tax status, and laws relating to volunteers).

The implications of becoming involved in discrimination complaints or litigation can be drastic for a NFP – even if a successful case is not made out. We are aware of cases under current anti-discrimination laws where responding to a complaint of discrimination (by an employee, client and volunteer) has consumed all of the resources of small NFPs, causing one to almost fold, and completely wiping out the small accumulated surpluses of at least two others.

For these reasons, legislation affecting the NFP sector (especially where it imposes new obligations on volunteer-run organisations) needs to be drafted in a way that:

- ▶ makes it easy for people running the NFP to understand whether the legislation applies to their NFP;
- ▶ makes it easy for people involved in a NFP to understand what their obligations are and what will constitute compliance with the legislation;
- ▶ is proportionate and takes into account the limited resources of the organisation, their not-for-profit motive and the fact that they are volunteer run;
- ▶ is consistent with other, related legislation so as not to unnecessarily increase the regulatory compliance burden on NFPs.

We believe that volunteering should be specifically listed in the Consolidated Law as an area of public life to which the legislation applies. We appreciate that how ‘public life’ will be articulated in the Consolidated Law will be determined by the findings in relation to question 12 – in this regard we recommend a broad scope, similar to the approach in s 9 of the *RDA*, supplemented by an inclusive list of areas of ‘public life’ covered by the legislation. We submit that volunteering should be listed as such an area.

If, contrary to our preferred approach, the operation of the Consolidated Law is restricted to discrete areas of public life, then we recommend that volunteering be an area of public life to which the legislation applies.

Volunteering and involvement in clubs and member based associations are particularly important for older people who may be at risk of experiencing loneliness and social isolation. Whilst fewer in number than younger volunteers, volunteers over 65 contribute more hours on average than younger volunteers.⁶⁰ Long term association with a voluntary association provides an important focus and sense of purpose for many older Australians. There is no basis for allowing clubs and member based associations to discriminate without legitimate justification in their use of volunteers, the admission of persons as members of the voluntary body or the provision of benefits, facilities or services to members of the body.

5.1.3 Volunteers should be separately covered

We note there has been a tendency in some jurisdictions to draft similar legislation for the volunteering context by including ‘volunteers’ in the definition of ‘employee’. This approach was adopted in the *Victorian EO Act* for example. We oppose this approach. While it may be convenient for parliamentary drafters, it does

⁶⁰ Volunteering Australia Submission on the Productivity Commission’s Commissioned Study ‘Economic Implications of an Ageing Australia’ October 2004, p6.

not take sufficient account of the ability of those most impacted by these amendments (the NFP sector) to understand the laws and apply them in practice.

PilchConnect often provides training and advice to NFPs on the differences between employees and volunteers. We emphasise the key differences between these statuses and the 'indicia' of each, so that people involved in running a NFP are well aware of the different legal obligations they owe to their employees as opposed to their volunteers (eg: remuneration, leave entitlements, superannuation and statutory insurance obligations for employees). For these reasons we advise NFPs of the critical importance in being clear about (and documenting) whether a person who gets involved with their organisation is doing so as an employee or a volunteer.

It would be very confusing for NFPs and volunteers if, for the purposes of the new Consolidated Law, a 'volunteer' was taken to be an 'employee'. Further, the terms 'employment' and 'employee' have a well-known, ordinary meaning at law which have been the subject of much judicial consideration.

We note that the Queensland anti-discrimination legislation extends protection for volunteers by modifying the definition of 'work' or 'worker' to include work by both a paid worker (eg employee) and an unpaid worker (eg volunteer) rather than modifying the definition of 'employment', 'employer' and 'employee'. Similarly New South Wales' anti-discrimination legislation uses the term 'workplace participant' to include both employee and volunteer, rather than redefining 'employment'. We recommend a similar course of action for the Consolidated Law to reduce confusion and provide clarity for NFPs and volunteers.

We recommend that the Consolidated Law be drafted to include a separate definition of 'volunteer' and makes clear that all 'workers' (or 'workplace participants'), whether employees or volunteers, are subject to the provisions of the legislation.

5.1.4 How to define a volunteer

Unfortunately there are a number of different definitions of a 'volunteer' in legislation throughout Australia. It would be helpful for the NFP sector if the Commonwealth took this opportunity to settle on an agreed definition of 'volunteer'.

Some examples of varying definitions applicable to the NFP sector in Victoria are as follows:

Area of law	Legislation	Definition of volunteer
employment law	<i>Fair Work Act 2009</i> (Cth)	No definition, although the legislation only applies to 'employees' defined using ordinary common law meaning.
taxation law	<i>Income Tax Assessment Act 1997</i> (Cth) and other legislation	No legal definition of 'volunteer' for tax purposes. ATO publications refer to dictionary definition of a volunteer as someone who enters into any service of their own free will, or who offers to perform a service or undertaking. ⁶¹
OHS law (current)	<i>Occupational Health and Safety Act 2004</i> (Vic)	A volunteer is defined as 'a person who is acting on a volunteer basis (irrespective of whether the person receives out of pocket expenses)'.
liability for acts or omissions of volunteers doing community work	<i>Wrongs Act 1958</i> (Vic)	A volunteer is defined in the <i>Wrongs Act</i> as 'an individual who provides a service in relation to community work on a voluntary basis. A person is still a volunteer even if, in providing a service, he or she receives— (a) remuneration that he or she would receive whether or not he or she provided that service; or (b) out-of-pocket expenses incurred in relation to providing that service...'

⁶¹ Australian Taxation Office, *Volunteers and Tax* (NAT 4612-04.2008), available at http://www.ato.gov.au/content/downloads/SME8729_nat4612.pdf

Area of law	Legislation	Definition of volunteer
liability of acts or omissions of Cth volunteers	<i>Commonwealth Volunteers Protection Act 2003 (Cth)</i>	Section 4 defines a work a 'voluntary basis' to include an individual who either: (i) receives no remuneration for doing the work other than the reimbursement of reasonable expenses incurred by the individual in doing the work; or (ii) receives remuneration for doing the work less than the amount, if any, prescribed or determined in accordance with the regulations; and (b) does not do the work under a court order.'
working with children checks	<i>Working with Children Act 2005(Vic)</i>	Section 9 defines 'child-related work' to include voluntary work and further defines voluntary work to include 'work engaged in as a volunteer (including engaging in unpaid community work ...) other than unpaid work engaged in for a private or domestic purpose'. Further s 3(2) specifies that 'for the purposes of this Act a person does not cease to be a volunteer merely because he or she has all or any of his or her out-of-pocket expenses reimbursed.'

We are mindful that volunteering can be a relatively informal arrangement, and the selection of volunteers can occur much more randomly, compared with the employee recruitment process. Although written position descriptions and role-based selection of volunteers are becoming more common within many NFPs (and we recommend this as part of our 'best practice' approach for NFPs), there are many instances where people volunteer in the community sector in rather *ad hoc* and unstructured ways.

The issue of whether a 'volunteer' should include only those formally 'engaged' in a particular volunteer role, or more broadly any person that 'assists' an organisation (even on as-needed basis), is a key issue for consideration. In our experience NFPs are often confused about the scope of discrimination and harassment laws applicable to the people working within their organisation (which commonly, is a mix of employees and volunteers) and they are anxious to know what they must do in practice to comply with their legal obligations.

The volunteering relationship differs in some key respects from the employment relationship. Questions that NFPs ask us (at PilchConnect) highlight the particularities of the volunteering relationship – for example:

- Are the members of our committee of management / board considered to be 'volunteers'?
- Does a volunteer include someone who just turns up and offers to help out at an event we're organising (ie 'spontaneous volunteers')? Will our organisation be liable for their actions?
- Do we have to comply with discrimination laws when we recruit new (potential) volunteers?
- We have formal agreements with some of our volunteers, but not all of them. Does the law treat these people differently?

Often a NFP will have members (who pay an annual subscription) who from time to time may be called upon to become involved in an activity of the group (ie helping out at a working bee). In such situations, it may be important to clarify a person's status and rights as a *member* of the NFP as opposed to their status and rights as a *volunteer* (see also question 15 below). Similarly, members of the general public may be asked to 'get involved' with activities of a NFP organisation which may include helping out in the absence of a formal volunteering selection process. It will be important to provide clarity on whether these kinds of volunteering will be covered by the Consolidated Law.

If NFPs are to be vicariously liable for the actions of volunteers (see question 19 below), it will be imperative that volunteer-involving organisations are able to clearly identify who constitutes a 'volunteer' and have clarity about when their organisation may be liable. It may be preferable to apply a definition which requires some kind of conscious or formal decision by an organisation to 'take on' a volunteer for a defined role or purpose.

We recommend that time be spent considering possible definitions and consulting further with the NFP sector so that an approach can be taken which makes it clear to people involved in running a NFP which people constitute a volunteer whom they will owe obligations to.

5.1.5 Exceptions

It is important to consider the scope of any exceptions carved out for volunteers and the NFP sector. It is important that the NFP sector not be subject to unreasonable and disproportionate regulation. If an overly high and burdensome level of compliance is imposed on the sector, then NFPs may be discouraged from engaging volunteers.

We support the inclusion of exemptions where a volunteer is unable to fulfill the inherent requirements of a particular role or lack a genuine qualification required to carry out the role. We often advise clients that they should recruit for the inherent requirements of the role, and that it is reasonable to reject a volunteer applicant on the basis that they are not suitable for the position. We believe such an approach should remain in line with any new legislation.

There are also some circumstances that are particular to the volunteer context where the nature of the work opportunity and/or the context in which volunteering occurs may warrant exemptions from obligations not to discriminate on the basis of protected attributes.

Some common enquiries we receive from NFPs which highlight the need for special measures to apply anti-discrimination laws to volunteering are set out below, for consideration:

- Our constitution states that in order to be eligible to serve on the (voluntary) board, the members must identify as having a certain gender / sexual preference / religion / age (etc). Is this unlawful?
- What kind of reasonable adjustments do we have to make for volunteers with a disability, given that we are a struggling organisation with very limited funds?

Exemptions should also take account of the resources of an organisation and be reasonable and proportionate in the circumstances (eg cost of measures for volunteers with a disability). This is particularly important in the NFP context where there are often very scarce and limited resources.

We note that age discrimination issues often arise with insurance and volunteers, as a number of insurance policies that provide personal accident cover for volunteers have exclusion clauses for volunteers under or over specified ages. The *Victorian EO Act* provides an exception against discrimination for insurers who discriminate against another person by refusing to provide an insurance policy to the other person, or in the terms on which an insurance policy is provided, if the decision is based on statistical data and is reasonable having regard to that data and any other relevant factors.⁶² An insurer may also lawfully discriminate if the discrimination is allowed under the *SDA* or the *DDA*.

This presents problems for organisations that cannot legitimately obtain adequate insurance for volunteers of all age ranges (or the cost of obtaining such a policy is exorbitant given the organisation's means), and therefore need to exclude certain volunteers and risk allegations of discrimination. An exception should be available for NFPs to legally discriminate on the basis of age in the selection of volunteers where the organisation is not able to obtain adequate insurance cover for that volunteer, or the cost of obtaining such coverage is unreasonable in the circumstances, and insurance cover is a reasonable prerequisite for the volunteer role.

⁶² *Victorian EO Act* s47.

Any specific exceptions should be subject to the overarching human rights principles that the impugned conduct is a necessary and proportionate means of achieving a legitimate end or purpose.

Recommendation 11

- ▶ Volunteers should be protected against discrimination.
- ▶ Volunteers should not be included in the definition of an 'employee'. The Consolidated Law should be drafted to include a separate definition of 'volunteer' and to make it clear that all 'workers' (or 'workplace participants'), whether employees or volunteers, are subject to the provisions of the legislation.
- ▶ The definition of 'volunteer' needs to clearly establish which people constitute a volunteer to whom the NFP will owe anti-discrimination obligations to, and what is required of NFPs to meet their obligations.
- ▶ Any new obligations should take into account the resource-constrained environment in which many NFPs operate and be reasonable and proportionate in the circumstances.
- ▶ Exemptions should be available where a volunteer is unable to fulfil the inherent requirements of a particular role (including on the basis of age where an organisation is unable to obtain adequate insurance cover or the cost of such coverage is unreasonable in the circumstances) or lacks a genuine qualification required to carry out the role, subject to the principles of necessity, proportionality and legitimacy.

5.2 Clubs and member-based associations - Question 15

5.2.1 Broad coverage

PilchConnect focuses on providing legal assistance to NFPs with 'public interest' purposes (eg organisations that support marginalised and disadvantaged people). We therefore have limited dealings with licensed clubs and organisations that are primarily established for the benefit of members. However, as a matter of policy, we see no reason to limit the Consolidated Law to licensed clubs, and have concerns about defining the scope of coverage by reference to whether an organisation maintains facilities from their funds (ie the DDA approach) or has a particular membership size. We note the submission of the AHRC that:

*... it appears arbitrary to say that a voluntary body with 29 members rather than 30 necessarily belongs in the sphere of private life; or that a voluntary body with 3000 members still necessarily belongs in the sphere of private life so long as it does not sell or supply liquor.*⁶³

We submit that further consideration and consultation with the NFP sector is required to determine exactly how the Consolidated Law should extend coverage to clubs and member-based associations. There is a need to identify an appropriate and proportionate approach, underpinned by sound public policy, and which avoids unduly burdening small community groups. Some options for consideration include:

- ▶ adopting the same threshold test used in the new uniform workplace health and safety laws – ie. if an organisation has at least one employee they will be covered by the Consolidated Law;
- ▶ defining the scope of coverage by reference to an organisation's rules of membership. An approach similar to the UK could be adopted, where organisations that have 'formal or informal rules' regarding the selection of members will be covered by the legislation, subject to a range of exemptions aimed at preserving legitimate rights of freedom of association; or

⁶³ AHRC Submission 2011, p29.

- ▶ defining the scope of coverage by reference to the legal status of the organisation. Coverage could extend to incorporated groups only.

5.2.2 Exceptions

The Consolidated Law should allow for permissible discrimination in certain circumstances. For example exceptions should apply to enable associations to discriminate in order to: support the needs of people of a particular age, gender or ethnicity; reduce disadvantage suffered by a people of a particular group; or preserve a minority culture.

We note that there is a particular need to ensure that exemptions in relation to membership of 'attribute specific' associations are appropriately drafted, and do not work to prevent recourse for individuals who are unjustly excluded from participating in community life because they do not share a protected attribute or combination of attributes. We refer to the submission of the AHRC on this issue.⁶⁴ To this end we recommend that any specific exceptions should be subject to the overarching human rights principles that the impugned conduct is a necessary and proportionate means of achieving a legitimate end or purpose.

Recommendation 12

- ▶ Coverage of clubs and member-based associations should not be limited to licensed clubs only. Consideration of a range of options and further consultation with the NFP sector is required to determine appropriate criteria for defining the scope of coverage of clubs and associations.
- ▶ Exceptions should be available to preserve legitimate rights to freedom of association (eg. membership which is limited in order to support the needs of people of a particular age, gender or ethnicity, reduce disadvantage suffered by a people of a particular group, or preserve a minority culture) subject to the principles of necessity proportionality and legitimacy.

5.3 Vicarious liability provisions - Question 19

5.3.1 Specified relationships for vicarious liability

We do not propose to address this question comprehensively. Instead we wish to raise issues for consideration regarding the potential extension of vicarious liability provisions to a volunteer-involving organisation (in relation to the acts of volunteers). We submit that in certain circumstances it may be appropriate for volunteer-involving organisations to be held vicariously liable for unlawful discriminatory acts of their volunteers.

Laws currently differ across Australia in statute and at common law as to whether vicarious liability law applies to the acts of volunteers, similar to employees in an employment relationship. As a general principle, at common law vicarious liability does not apply to the volunteer. The relationship between a volunteer and volunteer organisation is not analogous to that of an employer and employee (or that of agent and principal) where the law of agency provides that an employer/principal can be considered responsible for the negligent acts and omissions of its employees/agents.

The common law position has been varied by legislation across Australia so that, for specified purposes, an organisation assumes the liability of the volunteer. The provisions in Western Australia, South Australia, Victoria, Australian Capital Territory and the Northern Territory make a community organisation that is

⁶⁴ See AHRC Submission 2011, p31. As the AHRC notes, this could potentially be achieved by adoption of a 'legitimate and proportionate' test for permissible exclusions and/or a human rights based approach.

supervising the volunteer, vicariously liable for the actions of the volunteer.⁶⁵ The position in New South Wales⁶⁶ and Queensland however is that a community organisation is not vicariously liable for the negligence of a volunteer. In the federal jurisdiction, where a volunteer works in good faith for the Commonwealth or a Commonwealth authority, the Commonwealth will be vicariously liable for the acts of that volunteer.⁶⁷

Considering that laws in many states and the Commonwealth already extend vicarious liability for acts of volunteers, the practical effect of this reform we believe would be minimal. If drafted appropriately, it would support better practice within the NFP sector, by encouraging organisations that involve volunteers to take positive steps to reduce their risks by selecting, training and supervising volunteers.

As a matter of policy, we see no compelling reason why a volunteer should personally bear the burden of liability for actions taken in good faith as part of their authorised volunteering role (for example, if an organisation informs a volunteer of its policy not to serve clients of a particular nationality, and directs the volunteer to carry out their role in accordance with the policy – the organisation should be vicariously liable for discrimination by the volunteer). However, appropriate exceptions would need to be in place – for example, we submit that vicarious liability should not attach to the organisation where a volunteer acts contrary to instructions or outside the scope of their authorised role.

The Discussion Paper raises the question of the required nexus between a volunteers' act and the specific relationship which attracts vicarious liability. It raises two potential approaches: one where vicarious liability applies to actions done with 'authority'; and another where actions are done 'in connection with' the role. In our view neither is completely suitable.

We appreciate the difficulties of requiring actions to be directly 'authorised' by an organisation (which may result in the very narrow scope of vicarious liability), however, on the other hand, we are concerned that imposing liability on NFPs for acts done by a volunteer 'in connection' with their role may be too broad in scope, and lead to a reluctance by NFPs to involve volunteers for fear of incurring liability for acts that are outside the organisation's direct authority. Further consultation with the sector is required on this issue, and other options canvassed.

As stated in relation to question 13 above, a clear and workable definition of 'volunteer' would assist volunteer-involving organisations to understand when vicarious liability may apply - especially if NFPs are to be liable for the actions of volunteers 'in connection with' their role.

Consideration should also be given to whether volunteer board and committee members of organisations should be able to be held liable for decisions made in governing an NFP, as is the case under the *ADA* and the *DDA*. The position in relation to vicarious liability for unincorporated NFPs (if covered) will also require careful consideration, given that we note it can be difficult to identify who it was that engaged/authorised a particular volunteer, given the informal way in which these groups typically operate.

5.3.2 Defences to vicarious liability

We support the inclusion of a defence of reasonable preventative action to vicarious liability claims for volunteer actions. In our view, a community organisation should not be liable for acts committed by a volunteer where the community organisation has taken all reasonable steps to prevent or avoid the conduct occurring.

⁶⁵ *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic) s37(2); *The Volunteer Protection Act 2001* (SA) s5; *Volunteer (Protection from Liability) Act 2002* (WA) s7; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s7(3); *Civil Law (Wrongs) Act 2002* (ACT) s9.

⁶⁶ *Civil Liability Act 2002* (NSW) s3C.

⁶⁷ *Commonwealth Volunteers Protection Act 2003* (Cth) s7.

In assessing reasonableness for the purposes of this defence (whether it be ‘all reasonable steps’ or some other wording), we submit that the size and resources of an organisation should be specifically listed as relevant factors. It would be unfair and overly burdensome for a small community organisation with little funds to be expected to take the same steps to avoid liability for their volunteers’ actions as a large organisation with a multi-million dollar budget.

It would assist community organisations to understand (and feel confident in complying with) the legislation to have examples of how ‘vicarious liability’ may work in practice. It would also assist NFPs to have a list of actions that might constitute ‘reasonable’ precautions to help them avoid being vicariously liable for discrimination perpetrated by volunteers. For example, would induction training for all volunteers on behaviour constituting sexual harassment be enough? Or providing all volunteers with a copy of a discrimination and harassment policy?

5.3.3 Support and education for the community sector

While we support in principle the application of anti-discrimination laws in the NFP/volunteering context, we are acutely aware of the significant impact that proposed reforms to federal laws would have Australia’s NFP sector. The sector is currently grappling with a range of significant regulatory reforms (for example the establishment of the Australian Charities and Not-for-profits Commission, a new statutory definition of charity, national harmonisation of OHS legislation, reforms to incorporated associations legislation in Victoria, to name a few!). Reforms to federal anti-discrimination laws would add to the growing number of legal and regulatory changes that small grassroots community groups – many of which rely on a volunteers to implement changes and monitor compliance – will be required to understand and comply with in the next 2-3 years.

For this reason a comprehensive education and awareness-raising campaign will be required to inform Australia’s 600,000 NFP organisations about their new obligations and potential liabilities under the Consolidated Law. Many volunteer-involving NFPs operate in small rural and remote communities across Australia, so a city-centric awareness campaign would not be sufficient and a national ‘roadshow’ should be planned. The education campaign should include:

plain-language information booklets and practical resources (eg templates and tools for compliance);
training sessions on how NFPs can ensure they are complying with the legislation; and
website information and phone advice.

Given the need to adequately prepare and equip the sector for what are potentially very significant changes, we recommend a long commencement date (or a ‘staged’ commencement process) for any new legislation. This will assist those within NFPs responsible for ensuring compliance – many of whom are themselves volunteers donating their time –to become familiar with the new laws and have time to make necessary adjustments to their NFP operations and volunteer management practices.

Recommendation 13

- ▶ The coverage of vicarious liability provisions of the Consolidated Law should specifically provide for the relationship of volunteer and community organisation.
- ▶ Broadening the scope of vicarious liability provisions to acts done by volunteers that are 'in connection with' their role may be too wide in the NFP context, and lead to a reluctance on the part of community organisations to involving volunteers. Consideration should be given to other options and further consultation with the sector conducted.
- ▶ A community organisation should not be liable for acts committed by a volunteer where the community organisation has taken reasonable action to prevent or avoid the conduct occurring. Importantly the defence should take into consideration (and be proportionate to) the size and resources of the organisation.
- ▶ A comprehensive education and awareness-raising campaign will be required to inform the not-for-profit sector about their new obligations and potential liabilities under the Consolidated Law.
- ▶ A staged commencement approach should be adopted to allow NFPs sufficient time to understand the new legislation and make necessary adjustments to their operations and practices.

6 Exceptions and Exemptions

6.1 General limitations clause - Question 20

The current array of permanent exceptions and exemptions to the discrimination protections are ad hoc, inconsistent, lacking in clear and consistent underlying principles and difficult for duty holders and complainants to navigate. We recommend that the exceptions and exemptions be determined based on the international human rights law principles of necessity, proportionality and legitimacy.

This might be achieved by removing all specific exceptions and exemptions and inserting a general limitations clause. We recognise the initial uncertainty this might create about whether certain conduct which is currently lawful because of a permanent exemption remains lawful under the new general limitations clause. This might be alleviated by including in Regulations a list of examples of discriminatory conduct that will be lawful because it complies with the general limitations clause.

Whether or not a general limitations clause is adopted, we recommend that all current exceptions and exemptions should be reviewed to ensure compliance with Australia's international human rights obligations and with the international human rights principles of necessity, proportionality and legitimacy. The review process should be transparent and public. Further the Consolidated Law should specifically state that all exceptions and exemptions are required to be a necessary and proportionate means of achieving a legitimate end or purpose.

Recommendation 14

- ▶ Exceptions and exemptions under the Consolidated Law should be determined on the basis of the human rights law principles of necessity, proportionality and legitimacy.
- ▶ All current exceptions and exemptions should be subject to a public and transparent review process for compliance with Australia's international human rights obligations and with the principles of necessity, proportionality and legitimacy.
- ▶ The Consolidated Law should specifically state that all exceptions and exemptions are required to be a necessary and proportionate means of achieving a legitimate end or purpose.

6.2 Exemptions for religious organisations - Question 22

PILCH recommends that the specific exemptions for religious organisations should be repealed. The current exemptions for religious organisations in the *SDA* and the *Age Discrimination Act 2004* (Cth) (**ADA**) are contrary to the principles underpinning the anti-discrimination laws of Australia. Religious organisations should not be treated differently to other entities and entitled to discriminate when the rest of the community must comply with the legislation.

The recent case of a 5 year old girl who was lawfully refused admission to a government funded kindergarten on the basis of her parents' same-sex relationship, is a tangible example of the negative effect of exemptions for religious organisations.⁶⁸ In particular this example demonstrates the broad reach of the current exemptions (ie. to education of children in government funded kindergartens) and the impact should

⁶⁸ See The Age, 'School forced to take same-sex couple's daughter', 14 December 2011, available at <http://www.theage.com.au/national/school-forced-to-take-samesex-couples-daughter-20111214-1ou92.html> This case related to NSW legislation but this discrimination would also be permitted should the Consolidated Law extend the religious organisations' exemptions to sexual orientation and gender identity.

the Government extend the exemptions for religious organisations to include the new protected attributes of sexual orientation and gender identity.

Religious organisations should be entitled to apply for temporary exemptions, in the same way as any other organisation pursuant to the general exemption provisions of each of the statutes⁶⁹ or to rely on general exceptions such as the ‘genuine occupational requirements’ provisions of those statutes.⁷⁰

If the exemptions remain we recommend the introduction of a process for claiming the exemption which requires transparency about the extent of, and the justification for, the exemption sought. We recommend the introduction of a process that requires a religious body to publish a written statement of its reliance on the exemption, the extent of the exemption sought (for instance, whether it applies to the religious body’s educational facilities and welfare services and whether it applies to all staff or only some) and of the religious doctrine or susceptibility relied on. A more developed proposal of this suggestion is put by the Lesbian, Gay, Bisexual, Transgender and Intersex Health Alliance in its submission on the Government’s Consolidation Project.

We also support the proposal put forward in the Experts’ Submission that if the exemptions are to be retained, they should not be available to religious organisations in respect of ‘functions of a public nature’ and in particular, functions undertaken by them pursuant to a contract with Government or pursuant to Government funding.⁷¹

Recommendation 15

The exemptions for religious organisations contained in the *SDA* and the *ADA*, should not be retained in the Consolidated Law.

The Consolidated Law should include no exemptions for religious organisations in relation to the protected attributes of sexual orientation and gender identity.

If any exemptions for religious organisations are to be retained they should:

- a. be subject to a process which requires transparency about the extent and justification of the exemption in relation to a particular religious body; and
- b. not be available in respect of ‘functions of a public nature’ including functions undertaken pursuant to Government funding.

⁶⁹ See, eg, *SDA* s44.

⁷⁰ See, eg, *SDA* s30(1).

⁷¹ Experts’ Submission, p16.

7 Complaints and Compliance Framework

7.1 Conciliation Process - Question 25

7.1.1 Conciliation and other forms of ADR

The current compulsory conciliation process through the AHRC is an important low cost means for our clients to have their complaints heard in a more informal, timely and flexible way than can be afforded by the court system. It is also an important opportunity for our clients to be able to explore the merit of their complaint before commencing potentially lengthy and costly litigation. In many cases, PILCH's clients are assisted by the conciliation process to understand the tribunal process, and the law as it applies to the facts of their case.

In terms of whether the conciliation stage could be broadened to include other types of alternative dispute resolution (**ADR**), PILCH agrees with the AHRC that flexibility (both of process and of outcome) is a key benefit of ADR, whether mediation, arbitration or conciliation.⁷² They all share the attributes of low cost, flexibility and relative informality.

PILCH supports the AHRC's position that the AHRC complaint inquiry function should not be removed in order to focus solely on dispute resolution. In many cases, some level of inquiry into a complaint is of significant value in enabling fairness of process and assisting parties to make informed decisions about participation in conciliation and the appropriate terms on which a complaint can be resolved.⁷³

7.1.2 Direct access to Court

The Consolidated Law should be flexible enough to allow for direct access to the Courts, in relation to all protected attributes. Flexibility is key to PILCH's clients accessing a dispute resolution forum that is cost effective and appropriate to their needs. There are instances where direct access to court may be more beneficial for our clients. This is particularly the case in matters where clients are represented and where they wish to test a point of law (for example, Case studies Way Out 2 and Humanist Society of Victoria, which we discuss below in 7.2.1). Direct access to court may also be preferable where there is a significant power and/or resource imbalance between the parties such that it is more timely and a more effective use of resources to proceed directly to Court. This avenue also allows for building of precedent in this often complex area of law.

Therefore it is important that the Consolidated Law itself confer a cause of action in respect of the doing of an act that is unlawful under a provision of the Consolidated Law (in respect of all protected attributes) and give the Federal Court (**FC**) and Federal Magistrates' Court (**FMC**) the power to make appropriate orders. This is currently not available under the *ADA* but is available under the *SDA*.

Currently, section 49 of the *ADA* provides that:

Except as expressly provided by this Part, nothing in this ADA makes it an offence to do an act that is unlawful because of a provision of Part 4.

Similarly, section 59(1) of the *ADA* provides that a breach of Part 4 of the Act does not give rise to a civil remedy. A person who has suffered due to a breach of a provision deeming it unlawful for a person to discriminate on the basis of age, has no means of redress under the *ADA*.

Rather, the complainant must rely on the provisions of the *Human Rights Commission Act 1986* which provides for an application to the FC or FMC in circumstances where a complaint to the AHRC has been

⁷² AHRC Submission 2011, [252].

⁷³ AHRC Submission 2011, [255].

terminated. That Act also empowers the FC and FMC to make a range of orders in the event of a finding that there has been unlawful discrimination.⁷⁴ Pleadings in the FC and FMC are required to specifically allege facts relating to the lodgement and termination of the complaint with the AHRC.⁷⁵

This approach is unnecessarily complex and confusing and not appropriate in all cases as discussed above. These complainants should be able to elect to issue proceedings in the FC or FMC without first making a complaint to the AHRC as is the case currently under the *SDA*. This is not possible under the *ADA*. The Consolidated Law should provide a cause of action to ensure that a person who is the victim of unlawful discrimination has a legal right to enforce the provisions and seek compensation in the FC or FMC.

Recommendation 16

The Consolidated Law should provide a cause of action in respect of all protected attributes enabling complainants to go directly to the courts and should confer power on the Federal Court and Federal Magistrates Court to make appropriate orders where discrimination is proved.

7.1.3 Need for timely resolution

Early resolution of complaints is critical to ensure access to justice and to limit the deleterious effect of unlawful discrimination on the lives of complainants. This is particularly important where clients are seeking specific services such that delays in the complaint resolution process significantly disadvantage them. For example, where clients are seeking access to early intervention programs for children with autism spectrum disorder, school assistance programs or carer respite services. PILCH supports the recommendation in the Experts' Submission that the Consolidated Law should include measures to promote early resolution of complaints, similar to the dispute resolution model contained in Part 8 of the *Victorian EO Act*.

7.1.4 Disclosure of de-identified conciliation agreements

Confidentiality provisions in the Consolidated Law should not prevent the public disclosure by the AHRC of de-identified information from conciliation agreements.⁷⁶ The ACT jurisdiction already has a process in place under the *Human Rights Commission Act 2005* (ACT) for agreements reached through conciliation at the ACT Human Rights Commission to be registered at the ACT Civil and Administrative Tribunal. These agreements are then enforceable as if they were orders of that tribunal, and at the same time are useful tools to assist compliance in individual cases and to provide guidance on the application of the Act.

Making de-identified conciliation agreements publicly available is important as it means that impecunious complainants can be provided with resources that might help them to self-manage the dispute resolution process and understand the kinds of agreements that can be reached. This is a more user-friendly approach which accords with the duties and functions of the AHRC.⁷⁷ It also capitalises on the significant public resources expended in supporting the complaint and conciliation process. This is a way that private enforcement in individual matters can potentially have a broader impact in the community and serve a public awareness purpose.

Recommendation 17

The Consolidated Law should make provision for the registration of de-identified conciliated agreements in a court of federal jurisdiction.

⁷⁴ *Human Rights Commission Act 1986* (Cth) ss46P-46PO.

⁷⁵ *Boyn v Chering Pty Ltd* [2008] FCA 961.

⁷⁶ Experts' Submission, p22.

⁷⁷ *Australian Human Rights Commission Act 1986* (Cth) ss10A,11.

7.2 Court Processes - Question 26

7.2.1 Litigation costs

As a pro bono referral service for public interest matters, PILCH has observed that the cost of bringing an anti-discrimination complaint in the FC is high and can be prohibitive for clients with meritorious claims. A major disincentive for a complainant to proceed to court, having exhausted the conciliation process, is the risk of an adverse costs order. Complainants who proceed with their complaint to a court risk all or most of their limited personal financial assets, in addition to undergoing the emotional and psychological stress of litigation.

As noted in the Experts' Submission, during the course of conciliation both parties are acutely aware of the disincentive to litigation presented by the spectre of the costs involved in taking a matter to the FC.⁷⁸ This can leave complainants in a weak negotiating position and undermines the effectiveness and advantages of the conciliation process. This is significant because, in the absence of representative actions, individual litigation is the only means of enforcing the law following an unsuccessful conciliation.

Clients with apparently meritorious matters often approach PILCH after having their matter rejected by a 'no-win no-fee' firm. It may be that many 'no-win no-fee' firms do not accept discrimination matters because the likely monetary remedy would be unlikely to cover the costs of legal representation. The rule that costs follow the event in the FC is therefore not maximizing access to justice for low to medium income clients.

The case study below indicates the costs exposure that one of our clients currently faces defending a discrimination matter in the Victorian jurisdiction.

Case study: WayOut - Not-for-profit faces \$200,000 costs order defending an appeal to Supreme Court

WayOut is a Victorian youth suicide prevention project for same-sex attracted youth in rural areas. WayOut was successful in its application to VCAT and received compensation for discrimination on the ground of sexual orientation. The respondent appealed the decision. The client received advice that if it defended the appeal and lost, there was a chance that costs would be awarded against it of up to \$200,000.

The organisation applied for a protective costs order. However, in the process of applying for this order, the parties reached a settlement between themselves with regards to costs in which they agreed on a cap.

The settlement achieved in the case study above provided the organisation with some certainty as to costs. Such certainty is not currently available to litigants represented pro bono in the FC in the absence of a legislated protective costs order regime. PILCH has made proposals for a legislated protected costs order regime.⁷⁹

7.2.2 Representative actions

The Commonwealth system should be amended to allow representative actions to be brought in the FC on behalf of multiple complainants affected by a particular course of conduct, as is currently possible in the Victorian jurisdiction under section 113 of the *Victorian EO Act*. This would give advocacy groups and human rights organisations standing in their own right and allow them to use their expertise and resources to

⁷⁸ Experts' Submission, p25.

⁷⁹ PILCH, *Submission to the Commonwealth Attorney-General on Protective Costs Orders*, (2009), available at <http://pilch.org.au/Assets/Files/PILCH%20-%20submission%20to%20Cth%20AG%20re%20PCOs%20FINAL.pdf>

pursue matters involving systemic disadvantage, rather than requiring individuals to mount their own legal challenges to discriminatory practices. To this end, PILCH supports the AHRC recommendation to simplify standing requirements and provide consistent standing rules in Commonwealth discrimination law matters, particularly in order to allow for standing for organizations who have established the existence of a special or significant interest in a matter.⁸⁰

If, instead of multiple individual complaints covering the same issue, one matter could be heard, the result would be greater efficiencies for the courts and a reduction of costs for parties. This would mean that the burden, stress and cost of litigation could be spread across the members in a representative action, rather than placed on one individual. PILCH is not aware of a public policy rationale for why representative actions can be taken at the conciliation stage but not at the FC level. This situation would appear to undermine the accessibility of anti-discrimination legislation in circumstances where systemic discrimination exists.

The case study below demonstrates a PILCH pro bono referral that could have benefited from being run as a representative action:

Case study: Humanist Society of Victoria

The Humanist Society of Victoria (**HSV**) is a not-for-profit body that represents the interests of ‘humanists’ in Victoria. HSV approached PILCH for advice about the legal obligations of the Victorian Education Department to ensure that children in Victorian public schools are not discriminated against as a result of their parents’ beliefs, particularly in the administration of religious instruction.

PILCH advised HSV that it would need to refer each individual parent who felt that their children had been discriminated against. It would have been more efficient and beneficial for these cases to have been brought as a representative action, as there was a common legal issue and there was an organisation willing to pursue the issue on behalf of these parents.

The following case study demonstrates the value that was provided to the community through a representative action in the Victorian jurisdiction.

Case study: WayOut 2 - Not-for-profit acts a representative group in discrimination proceedings in Victoria

In 2007, WayOut, a Victorian youth suicide prevention project for same-sex attracted youth in rural areas, contacted the Phillip Island Adventure Resort (**PIAR**) to book accommodation and facilities for a weekend workshop about fighting homophobia. The resort, which is operated by Christian Youth Camps Limited, refused to take the booking allegedly because of the sexual orientation of the proposed attendees.

PILCH assisted Cobaw Community Health Services (**Cobaw**), the not-for-profit organisation which manages WayOut, to obtain legal assistance to challenge the decision of the Christian Youth Camps under the *Victorian EO Act*. In VCAT, WayOut was awarded \$5000 compensation for discrimination on the basis of sexual orientation.

Although the decision is currently being appealed by Christian Youth Camps to the Supreme Court of Victoria, this case provides an example of a successful representative action brought under section 104 of the *Victorian EO Act*. This case also demonstrates the importance of representative actions for eliminating discrimination in society. WayOut was able to challenge systemic discrimination and bring about a result without the need for any individual young person to initiate proceedings as a complainant.

⁸⁰ AHRC Submission 2011, [281]-[299].

Recommendation 18

That the Consolidated Law make provision for standing in the Federal Court for organisations which have established a special or significant interest in a matter.

7.2.3 Remedies

The remedies available to claimants under the Consolidated Law should have a preventative aspect to them. This supports the objects of discrimination legislation⁸¹ and the objectives of the underlying UN Conventions to which such legislation gives effect, which are expressed in an aspirational way ('to eliminate, so far as is possible, discrimination' and to 'promote recognition and acceptance within the community of [equality principles]')⁸². While compensating individuals for the injurious effects of the impugned conduct is important, where there is a suggestion that discrimination is practiced in a systemic fashion within an organisation, PILCH supports the inclusion in the Consolidated Law of a broad range of remedies, including apologies, corrective and preventative orders such as remedies that require the implementation of a policy and/or education program aimed at addressing unlawful discriminatory practices affecting persons other than the claimant. This is a proactive approach that better empowers the Court or the AHRC to achieve the objectives of anti-discrimination legislation.

⁸¹ See, eg, *SDA* s3.

⁸² See, eg, *SDA* s3(a)-(d).

8 Interaction with Other Laws and Application to State and Territory Governments

8.1 Interactions with State and Territory Laws- Q29

There is no basis for allowing State or Territory laws to discriminate without legitimate justification.

In order to avoid arbitrary decision making and to ensure that any derogation from the protections under the Consolidated Law is reasonable and proportionate, an act done in accordance with a State or Territory law should not be treated differently under the Consolidated Law to any other act. That is, the act should not discriminate against a person on the basis of any of the protected attributes unless it constitutes a special measure or falls within the general limitations clause. Any act done in accordance with a State or Territory law should be assessed against the same criteria. If the State or Territory law is found to be inconsistent with the Consolidated Law, the State or Territory law will fall foul of s109 of the Constitution.

In the event that the Consolidated Law retains any form of specific exemptions for State and Territory laws, given the commitment made by the federal government that there will be no reduction in existing protections, no exemption should be allowed for acts done in direct compliance with State or Territory laws in relation to race and sex. If exemptions are retained for State or Territory laws in relation to disability and age, the Consolidated Law should at least provide the additional protections provided for under the DDA to discrimination based on age.

Recommendation 19

The Consolidated Law should provide no exemption for acts carried out in direct compliance with State or Territory laws.