

# CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

## REGULATION IMPACT STATEMENT

### SECTION ONE: BACKGROUND

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#### *Reforms in context*

Government policy has long recognised that anti-discrimination protections are crucial to enable all Australians to participate fully in public life, address historical disadvantage, and promote social cohesion. Since 1975, this policy has been supported by four separate pieces of legislation, each of which deals with different grounds of discrimination:

- *Racial Discrimination Act 1975* (RDA)
- *Sex Discrimination Act 1984* (SDA)
- *Disability Discrimination Act 1992* (DDA), and
- *Age Discrimination Act 2004* (ADA).

Generally, these laws:

- cover both ‘direct’ and ‘indirect’ discrimination<sup>1</sup>
- prohibit discrimination on certain grounds or ‘attributes’ (for example, race, sex, disability, age)<sup>2</sup> in key areas of public life (such as work, education, access to goods and services, accommodation and administration of laws and government programs), and
- provide for a range of exemptions to ensure that the legislation strikes the right balance between preventing inappropriate discrimination on the one hand while making allowances for legitimate distinctions on the other hand (for example, the inherent requirements of a particular job).

A fifth Act, the *Australian Human Rights Commission Act 1986* (AHRC Act), establishes the Australian Human Rights Commission (the Commission) and regulates the processes for making and resolving complaints under the other four Acts.

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<sup>1</sup> Direct discrimination occurs where a person is treated less favourably than another person in the same circumstances on the ground of their protected attribute. Indirect discrimination occurs where an apparently neutral condition or requirement is imposed which has the effect of disadvantaging a group with a particular protected attribute and which is not reasonable in the circumstances. For example, a shop imposing a ‘no headwear’ policy would *indirectly* discriminate against members of religions that require its adherents to wear head coverings.

<sup>2</sup> The term ‘protected attribute’ is used to refer to a characteristic or attitude which is protected, ie discrimination on the basis of that attribute is prohibited.

There are also provisions relating to discrimination in employment in the *Fair Work Act 2009* (FW Act) on taking adverse action (such as restricting promotions) in or termination of employment based on specified protected attributes. These attributes are not consistent with those protected under other Commonwealth legislation.

In April 2010, the Government announced its intention to consolidate the existing anti-discrimination laws into a single Act. The consolidation project was established as a Better Regulation Ministerial Partnership between the Attorney-General and the Minister for Finance and Deregulation and is part of Australia's Human Rights Framework.

In the Media Release announcing the project the Government notes that consolidating all Commonwealth anti-discrimination legislation into one Act will reduce the regulatory burden and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and business, particularly small business. Effective anti-discrimination legislation is an important element in removing barriers to greater inclusion and participation in society. Anti-discrimination law should be clear and easy to understand because people should not need expensive legal advice to know their rights and obligations.

The consolidation of federal anti-discrimination laws provides an opportunity to consider the existing framework, and explore opportunities to improve the effectiveness of the legislation to address discrimination and provide equality of opportunity to participate and contribute to the social, economic and cultural life of our community.

As part of this project, the Government is also delivering on its commitment to introduce new prohibitions on discrimination on the basis of sexual orientation and gender identity. In addition, the Government has also committed to considering a number of the recommendations made by the Senate Legal and Constitutional Affairs Committee in its inquiry into the effectiveness of the *Sex Discrimination Act 1984*.

Each State and Territory also has its own anti-discrimination legislation. While largely consistent, there are slight differences in grounds of discrimination, coverage and procedures under these laws. The Commonwealth and State and Territory anti-discrimination regimes operate concurrently. The Government does not intend to alter the existing concurrent operation as part of the consolidation project, although the consolidated Act could serve as a platform for renewing the previous exercise to harmonise Commonwealth, State and Territory anti-discrimination law through the Standing Council on Law and Justice.

### ***Structure of Regulation Impact Statement***

This regulation impact statement (RIS) examines proposals to consolidate and streamline the anti-discrimination regulatory scheme, drawing on the outcomes of the extensive community consultation and international and domestic research. It is structured as follows in accordance with Office for Best Practice Regulation guidelines:

- Problem
- Government's objectives

- Broad options
- Analysis of broad options
- Analysis of additional issues – new grounds of discrimination, interaction with other Commonwealth and State and Territory regimes
- Consultation
- Implementation and Review

## SECTION TWO: IS CONSOLIDATION OF ANTI-DISCRIMINATION LAWS NECESSARY? (The Problem)

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### *Existing anti-discrimination legislation*

As noted above, there are six existing Commonwealth Acts that deal with aspects of the Commonwealth anti-discrimination regime, the RDA, SDA, DDA, ADA, AHRC Act and the FW Act. This section provides an overview of the anti-discrimination legislation which is being consolidated as part of this project, namely the RDA, SDA, DDA, ADA and the AHRC Act. It also identifies the problems that exist with the current legislative regime – that is:

- Discrimination still exists, impacting on the wellbeing of individuals and productivity more generally. The legislative regime has not been effective in eliminating discrimination and markets have not operated effectively to ‘remove’ discriminatory behaviour;
- The current arrangements are inefficient with coverage of attributes varying across both Commonwealth and State and Territory legislation, with this inconsistency resulting in much uncertainty for businesses and individuals as to their rights and responsibilities. This uncertainty has resulted in added complexity and costs for businesses in understanding their obligations.

### ***Racial Discrimination Act 1975***<sup>3</sup>

The RDA prohibits discrimination on the basis of an individual’s race, colour, descent or national or ethnic origin. Racial discrimination can be either direct (such as when a real estate agent refuses to rent a house to a person because they are of a particular racial background); or indirect (for example, if a company prohibits people from wearing hats or other headwear at work, as this is likely to have an unfair effect on people from some racial or ethnic backgrounds).

Unlike the SDA, the DDA and the ADA (see below), the RDA does not provide a discrete definition of discrimination and then identify the specific areas of public life in which that discrimination is unlawful. Instead, it includes a general prohibition against racial discrimination in all areas of public life, leaving some flexibility and uncertainty as to what actions would be considered racial discrimination. Employment, education, accommodation, access to services and access to public places are areas which would fall within the broad definition.

The Act also establishes a right to equality before the law and prohibits racial vilification or public behaviour which may offend or insult an individual because of their race, colour or origin.

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<sup>3</sup> The following sections are based on materials prepared by the Australian Human Rights Commission (Federal Law Discrimination online and Guides to the four Acts – see [www.humanrights.gov.au](http://www.humanrights.gov.au) )

While the Act prohibits certain behaviours, it also imposes 'vicarious liability' on employers for the actions of their employees. An employer can be vicariously liable for the actions of an employee where the employer did not take reasonable steps to prevent racial discrimination occurring. For example, an employer could be liable for the actions of an employee for a decision not to employ an individual because of the individual's race, if the employer did not have appropriate policies in place to avoid such discrimination from occurring.

Where an individual is discriminated against on the basis of their race, a complaint can be lodged with the Australian Human Rights Commission.

The Act applies concurrently with any State and Territory law that may prohibit racial discrimination.

The RDA was the first Commonwealth unlawful discrimination statute to be enacted and is different in a number of ways from the SDA, DDA and ADA. This is because it is based to a large extent on, and takes important parts of its statutory language from, the International Convention on the Elimination of all Forms of Racial Discrimination. A copy of ICERD is scheduled to the RDA.

Unlike the SDA, DDA and ADA which contain a wide range of permanent exemptions and a process for applying for a temporary exemption, there are only a limited number of statutory 'exceptions' to the operation of the RDA. These exceptions include the performance of an artistic work or anything said as part of a discussion or debate for any genuine public interest or academic discussion.

### ***Sex Discrimination Act 1984***

The purpose of the SDA is to prohibit discrimination on the basis of the gender of an individual. SDA covers discrimination on the grounds of:

- sex
- marital status
- pregnancy or potential pregnancy
- breastfeeding, and
- family responsibilities.

The definitions of discrimination include both 'direct' and 'indirect' discrimination, although only direct family responsibilities discrimination is prohibited. Direct discrimination is when a person is treated less favourably than a person of the opposite sex would be treated in the same or similar circumstances. For example, it would be 'direct sex discrimination' if male and female employees are doing exactly the same work, but male employees are being paid more.

Indirect sex discrimination occurs when there is a rule or policy that is the same for everyone but has an unfair effect on people of a particular sex. For example, it may be indirect sex discrimination if a policy says that managers must work full-time, as this might disadvantage women because they are more likely to work part-time because of caring responsibilities.

Part II Divisions 1 and 2 of the SDA set out the areas of public life in which it is unlawful to discriminate for all grounds other than family responsibilities. These areas of life include:

- *Employment.* For example, when someone is trying to get a job, equal pay or promotion.
- *Education.* For example, when enrolling in a school, TAFE, university or other colleges.
- *Access to premises* used by the public. For example, using libraries, places of worship, government offices, hospitals, restaurants, shops, or other premises used by the public.
- *Provision of goods, services and facilities.* For example, when a person wants goods or services from shops, pubs and places of entertainment, cafes, video shops, banks, lawyers, government departments, doctors, hospitals and so on.
- *Accommodation.* For example, when renting or trying to rent a room in a boarding house, a flat, unit or house.
- *Activities of clubs and associations.* For example, wanting to enter or join a registered club, (such as a sports club, RSL or fitness centre), or when a person is already a member.
- *Administration of Commonwealth laws and programs.* For example, discretionary decisions by government officials made under laws or programs (but not including non-discretionary decisions – that is, where a law provides that a program is only available for people of one sex, such as maternity leave).

Discrimination on the ground of family responsibilities is made unlawful only in the area of employment and is limited to direct discrimination. Under the SDA, family responsibilities include responsibilities to care for or support a dependent child or a member of your immediate family. For example, it may be discrimination for an employer to refuse to employ a person, demote a person or reduce a person's hours of work because they need to care for a member of their family.

Sexual harassment is also covered by the SDA. Sexual harassment is any unwelcome sexual behaviour which makes a person feel offended or humiliated where a reasonable person, would have anticipated the possibility of that reaction in all the circumstances. For example, unwelcome physical touching, staring or leering, or emailing pornography or rude jokes. Like discrimination, sexual harassment is unlawful in a broad range of areas of public life.

As with the RDA (above), the SDA also imposes 'vicarious liability' on employers for the actions of their employees. Vicarious liability extends only to those acts done 'in connection with' the employment of an employee. In one case, for example, sexual harassment was held to have occurred in the early hours of the morning in a serviced apartment that the

complainant and another employee were sharing whilst attending a work related conference. The employer was held vicariously liable.<sup>4</sup>

The SDA contains a number of permanent exemptions. These exemptions include allowing services for members of one sex, accommodation provided solely for persons of one sex who are students at an educational institution, insurance, sport and combat duties. The SDA also empowers the Australian Human Rights Commission to grant temporary exemptions from the operation of certain provisions of the Act. The precise scope and nature of a temporary exemption is determined by the Commission in each instance. Temporary exemptions are granted for a specified period not exceeding 5 years.

### ***Disability Discrimination Act 1992***

The *Disability Discrimination Act 1992* (DDA) provides protection for everyone in Australia against discrimination based on disability. Disability discrimination happens when people with a disability are treated less fairly than people without a disability. Disability discrimination also occurs when people are treated less fairly because they are relatives, friends, carers, co-workers or associates of a person with a disability.

The DDA covers discrimination on the ground of disability, including discrimination because of having a carer, assistant, assistance animal or disability aid. The DDA also prohibits discrimination against a person because their associate has a disability.

'Disability' is broadly defined and includes past, present and future disabilities, including because of a genetic predisposition to that disability, as well as imputed disabilities. 'Disability' also expressly includes behaviour that is a manifestation of the disability (for example, behavioural difficulties which may result from mental illnesses such as autism or schizophrenia).

Similarly to the RDA and SDA (above) the definition of discrimination includes both direct and indirect disability discrimination. Behaviour can also be discriminatory where there was a failure to make 'reasonable adjustments' that would provide for a person with such a disability. For example, this would mean that if a person with a disability is the best person for the job then the employer must make workplace changes or 'workplace adjustments' if that person needs them to perform the essential activities of the job. Examples of 'workplace adjustments' employers may need to make include:

- *Changing recruitment and selection procedures.* For example, providing a sign language interpreter for a deaf person, or ensuring the medical assessor is familiar with a person's particular disability and how it relates to the job requirements.
- *Modifying work premises.* For example, making ramps, modifying toilets, providing flashing lights to alert people with a hearing loss.
- *Changes to job design, work schedules or other work practices.* For example, swapping some duties among staff, regular meal breaks for a person with diabetes.

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<sup>4</sup> *Leslie v Graham* [2002] FCA 32.

- *Modifying equipment.* For example, lowering a workbench or providing an enlarged computer screen.
- *Providing training or other assistance.* For example, induction programs for staff with a disability and co-workers, mentor or support person for a person with an intellectual disability, including staff with a disability in all mainstream training.

The DDA makes it unlawful to discriminate on the ground of disability in many areas of public life, reflecting those areas in the SDA (see above). However, there are some differences in these areas of life, for example:

- the DDA explicitly prohibits discrimination in sport, other than where a person is not able to effectively compete or where the event is designed for people with a particular disability (such as the Paralympic Games). In contrast, the SDA does not explicitly prohibit discrimination in sport, but implicitly prohibits this discrimination through other areas of life, such as employment, provision of services and membership of clubs (and includes an explicit exemption for single-sex sporting events where strength, stamina or physique are relevant),
- while the SDA only applies to partnerships of at least 6 partners, the DDA applies to partnerships of at least 3 partners, and
- the SDA applies to clubs with at least 30 members and which serve liquor, while the DDA applies to all clubs, regardless of size or liquor licence, that maintain their premises from the funds of the club.

In each of these areas of life, a failure to make ‘reasonable adjustments’ to ensure that a person with a disability is treated in the same manner or has similar opportunities as a person without a disability is also discrimination. A reasonable adjustment is anything that does not cause unjustifiable hardship. The DDA contains a list of factors to consider when determining whether an adjustment will cause unjustifiable hardship:<sup>5</sup>

- the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned
- the effect of the disability of any person concerned
- the financial circumstances, and the estimated amount of expenditure required to be made, by the first person
- the availability of financial and other assistance to the first person, and
- any relevant action plans given to the Commission under section 64.

Harassment of a person in relation to their disability or the disability of an associate is also explicitly covered by the DDA (Part II Division 3) and is unlawful in the areas of employment, education and the provision of goods and services.

The DDA contains a number of permanent exemptions, recognising situations in which it is permissible to take a person’s disability into account. These include in the provision of

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<sup>5</sup> DDA section 11.



superannuation or insurance,<sup>6</sup> to protect public health<sup>7</sup> and to recognise the relevance of disability to other public policy matters such as social security,<sup>8</sup> migration<sup>9</sup> and service in the armed forces.<sup>10</sup>

Like the SDA and the ADA, the DDA empowers the Australian Human Rights Commission to grant temporary exemptions from the operation of certain provisions of the Act.<sup>11</sup> For example, for the duration of the Olympic Games and Paralympic Games in Sydney in 2000, the Commission granted an exemption to permit the transfer of accessible buses from existing services across Sydney to services in relation to the Olympic Games and Paralympic Games.

The DDA provides that duty holders under the Act (such as employers or service providers) may develop voluntary 'action plans' that specify policies and programs to help them comply with their DDA obligations. Action plans can be registered with the Commission. They are voluntary, non-binding and have limited effect on the action planner's legal obligations.

Another feature of the DDA is the Attorney-General's power to develop legally binding standards. Standards have been developed for access to premises, transport and education. Standards are a mechanism for providing additional certainty and guidance on specific obligations under legislation.

### ***Age Discrimination Act 2004***

The ADA makes it unlawful in certain circumstances to discriminate against people on the basis of their age. It covers discrimination against people at any age – including discrimination against older people and young people.

The key features of the ADA are broadly analogous similar to those in the SDA and the DDA, with similar areas of public life covered accompanied by a range of exemptions, including the ability for the Commission to grant temporary exemptions. However, there are small differences between the ADA, DDA and SDA in this regard, including:

- the ADA does not apply to membership of clubs, while the SDA and DDA do
- the ADA applies to partnerships of at least 6 partners (mirroring the SDA rather than the DDA approach)
- the ADA does not specifically prohibit discrimination in sport, again similar to the SDA approach rather than that in the DDA.

### ***Australian Human Rights Commission Act 1986 – complaints process and equal opportunity in employment regime***

The AHRC Act establishes the Commission and regulates the processes for making and resolving complaints under the other four Acts.

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<sup>6</sup> DDA section 46.

<sup>7</sup> DDA section 48.

<sup>8</sup> DDA section 51.

<sup>9</sup> DDA section 52.

<sup>10</sup> DDA sections 53-54.

<sup>11</sup> DDA sections 55-58.

The first stage in making an unlawful discrimination complaint is to lodge it with the Commission, which must investigate the complaint and try to resolve it where possible through conciliation. If conciliation fails, the complainant may commence proceedings in the federal courts.

The AHRC Act also contains a separate discrimination complaints stream that gives effect to Australia's obligations under International Labour Organization (ILO) Convention No 111. The Commission has the function of seeking to conciliate complaints of discrimination in employment. This process does not include the option of proceeding to the federal courts. If the Commission cannot conciliate the matter and considers that a discriminatory act has occurred, it must report to the Attorney-General who must table the report in Parliament.

Equal opportunity in employment discrimination applies to a broader range of attributes than those covered by unlawful discrimination under the ADA, DDA, RDA and SDA. The additional attributes are:

- sexual preference
- religion
- political opinion
- industrial activity
- social origin
- nationality
- criminal record, and
- medical record.

These grounds are limited to employment only. Exemptions for inherent requirements of the job and religious belief also apply. For example, it is not discrimination if a person is, because of their particular attribute(s), unable to perform the inherent requirements of the job (such as a blind person being unable to drive a vehicle or, in a dramatic performance, choosing a person with particular attributes for historical accuracy or authenticity). Similarly, it is not discrimination to, in the employment decisions in relation to a religious organisation, act in accordance with the doctrines of that religion (such as requiring the headmaster of a religious school to be a practising member of that religion).

### ***FW Act 2009***

In addition, the FW Act also provides that it is unlawful to take 'adverse action' against a person based on certain attributes. Section 342(1) of the FW Act defines what 'adverse action' means in the context of different relationships, including action taken by an employer against an employee, action taken by a prospective employer against a prospective employee, and action taken by a principal against an independent contractor. Adverse action under the FW Act includes:

- dismissing an employee;

- injuring an employee in his or her employment
- altering the position of an employee to the employee's prejudice
- discriminating between the employee and other employees of the employer
- refusing to employ a prospective employee
- discriminating against a prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee, and
- threatening to take the actions outlined above, and organising such action. For example, if an employer threatened to dismiss an employee because of their race, this would constitute adverse action.

There is some overlap between the grounds covered under the anti-discrimination Acts, the AHRC Act and the FW Act. For example, age, disability, race, sex, marital status and family responsibilities are attributes covered under the anti-discrimination Acts and the FW Act. In practice, this means that if an employee was not promoted because of a ground covered under multiple regimes (such as race or sex), they could consider taking action under any of the applicable regimes (although they are not permitted to commence action under more than one regime).

Under the anti-discrimination Acts, the complainant bears the burden of proving that the respondent treated them less favourably because of their protected attribute. In contrast, the FW Act provides that once an allegation of adverse action has been made, the respondent bears the burden of proving that the reason for the action was not a prohibited one (i.e. that the action was not because of the applicant's protected attribute).

Some stakeholders have found that the burden of proof under current anti-discrimination laws are often impossible for complainants to satisfy in the absence of ready access to evidence, which is usually held by the respondent<sup>12</sup>. The reverse burden of proof model under the FW Act means applicants claiming discrimination in employment may prefer to take action under the FW Act rather than the anti-discrimination Acts. Data on choice of jurisdiction was sought during consultations. While there was some anecdotal evidence on the difficulties of using the anti-discrimination regime, there was no data that identified a clear trend in relation to how a complainant decides in which jurisdiction to commence a complaint – rather it seems dependant on the circumstances of a particular case.

Appendix A sets out which grounds are protected under Commonwealth Acts.

### ***State and Territory anti-discrimination legislation***

Finally, there is also anti-discrimination legislation at the State and Territory level. This legislation operates concurrently, which means that an employer can have certain

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<sup>12</sup> National Association for Community Legal Centres, *Response to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, September 2011, available at: <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/Consolidation%20-%20Discussion%20Paper%20-%20Submissions%20-%20National%20Association%20of%20Community%20Legal%20Service%20-%201%20Feb%202012.PDF> [accessed 16 July 2012]

obligations under both the relevant Commonwealth legislation and the State or Territory legislation. It also means that action could be taken by an individual under any applicable regime, but again there are barriers to commencing action in more than one jurisdiction.

These regimes largely operate similar to the Commonwealth protections. Appendix A also sets out which grounds are protected in each State and Territory jurisdiction.

### ***The role of anti-discrimination laws***

A key focus of anti-discrimination regulation is 'to change attitudes about traditionally vulnerable and marginalised groups within society, and challenge barriers to the equal participation of these groups in work, education and other fields of life'.<sup>13</sup> The Regulation Impact Statement accompanying the introduction of the ADA noted that 'anti-discrimination laws have become an accepted part of the legal landscape'. A key objective of Government action to prevent age discrimination was 'to promote attitudinal change across society. This attitudinal change is needed so that people are judged on their actual capacity rather than age being used as a blunt proxy for capacity'. These objectives, the RIS noted, are long term goals and difficult to measure.

In 2004, a Productivity Commission Review of the DDA considered the reasons for government involvement in combating disability discrimination. These reasons can be extended to discrimination generally. The Productivity Commission outlined various 'social arguments' for government action to prevent disability discrimination. These included a set of values or principles that informs the 'equality principle'. The Commission outlined Fredman's description of these principles as being in a continuum from 'formal equality' to restitutionary notions which encompass redressing past disadvantage and the principle of redistributive justice to achieve a 'fairer' distribution of benefits.<sup>14</sup> The Productivity Commission concluded that '[o]verall, these social arguments reflect strong support for government intervention to require, at a minimum, formal equality'.<sup>15</sup> Further, adopting a 'social model', based on the principle that all members of society are entitled to equal opportunities to participate in the economic, social and political life of the community' it, in effect requires 'substantive equality' – differential treatment where there is necessary to achieve equal access opportunities.<sup>16</sup>

In its submission to the Discussion Paper on Consolidation of Commonwealth Anti-Discrimination Laws<sup>17</sup>, the Discrimination Law Experts Roundtable made some comments about the nature of discrimination, the harm it does and the role of law in addressing it. They note that:

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<sup>13</sup> Orchiston and Smith, 'Empowering Victims of Family Violence: Could Anti-Discrimination Laws Play a Role by Changing Workplace Attitudes and Practices?' in *Australian Review of Public Affairs*, March 2012, Sydney Law School Research Paper No. 12/32, p4.

<sup>14</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992*, 14 July 2004, pp156-158.

<sup>15</sup> *ibid*, p157.

<sup>16</sup> *ibid*, p158.

<sup>17</sup> Released for consultation by the Attorney-General's Department for a consultation period of 22 Sept 2011 – 1 February 2012.

discrimination unfairly excludes women and members of particular groups and limits their capacity to fulfil their potential in society. It manifests in a wide variety of ways, ranging from blatant and intentional prejudicial conduct to the unintentional imposition of apparently neutral barriers. To address discrimination fairly and effectively in its many manifestations, anti-discrimination law needs to be wide in its coverage but also sophisticated and nuanced so that it can apply to the great diversity of human experiences, goals and needs.<sup>18</sup>

### ***Economic reasons for intervention***

The Productivity Commission outlined the economic reasons for government intervention, concluding that:

while government intervention to address disability discrimination might primarily be based on social arguments there are also good economic reasons for government action. Neoclassical assumptions about rational behaviour are unlikely to hold when dealing with emotive issues like discrimination, and the existence of market failures means that relying on markets will not deliver efficient quantities of accessible goods, services, employment or education.<sup>19</sup>

Bennington and Wein canvass the neo-classical arguments and note that ‘many economists who accept the neo-classical perspective worry that discrimination apparently persists even when competition exists. Thus, it has been suggested that the economic process cannot be insulated from inaccurate stereotypes about the productivity levels of workers of different minority groups.’<sup>20</sup>

The Productivity Commission commented that the benefits of ‘self-worth’ and ‘inclusion’ that flow from the DDA (and, by extension, other anti-discrimination laws), although defying ‘conventional accounting, is undoubtedly of great value to people with disabilities, their carers, associates and the general community’.<sup>21</sup>

### **CASE STUDIES**

The following case studies of complaints conciliated by the Australian Human Rights Commission, taken from the Commission’s website, demonstrate the importance of anti-discrimination laws to allow individuals to pursue equal opportunities to participate in the economic, social and political life of the community.

#### **Body corporate meetings made accessible**

A man who has a physical disability complained that he was unable to participate in meetings of the body corporate of his apartment block as they were held at a venue he could

<sup>18</sup> Discrimination Law Experts’ Group submission, ‘Consolidation of Commonwealth Anti-Discrimination Laws Attorney-General’s Department Discussion Paper’, 13 Dec 2011, p6.

<sup>19</sup> op cit n12, p166.

<sup>20</sup> Bennington and Wein, ‘Anti-discrimination legislation in Australia: fair, effective, efficient or irrelevant?’ in *International Journal of Manpower* (2000) Vol 21, Issue 1 p22.

<sup>21</sup> op cit n12, p151.

not enter. The complaint was resolved with an agreement to hold meetings in accessible venues in future.

### **Adjustments in safety training**

A man who has a lower arm amputation complained that he had not been permitted to participate in a number of components of a safety training course.

The complaint was resolved when the training authority agreed to permit him to undertake these components using modified equipment and if successfully completed to issue him with partial certification which would recognise those situations where he could and could not perform the roles required.

Although anti-discrimination laws cannot, on their own, provide equal opportunity for people 'who have been historically been treated unfairly because of attributes such as race, gender or disability', they are 'one important step along the path to real equal opportunity for all members of the community'.<sup>22</sup>

### ***Business case for diversity***

In its submission to the Senate Standing Committee on Legal and Constitutional Affairs' 2008 inquiry into the effectiveness of the SDA, the Australian Chamber of Commerce and Industry (ACCI) noted that '[t]here is a strong business case for diverse and inclusive workplace cultures which possess clear norms against discrimination'. ACCI acknowledged that there are benefits to employers in achieving recognition as an employer with a discrimination-free culture which can accrue in staff well being, high quality job applicants, productivity, lower absenteeism, fewer conflict issues requiring resolution and higher rates of retention. As part of the same process, Australian Women Lawyers noted the benefits of introducing flexible work measures include improved staff retention, increased productivity and reduced absenteeism.

In its more recent submission on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, ACCI confirmed that it is 'a strong supporter of well-designed anti-discrimination laws with clear duties that balance the interests of all parties'.<sup>23</sup> In the same process, the Business Council of Australia commented:

[t]he BCA is strongly supportive of efforts to create a more inclusive society that allows all citizens to realise their potential so as to ensure their full participation in economic and social life. Expanding opportunities and removing artificial barriers to contribution and engagement can benefit everyone.<sup>24</sup>

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<sup>22</sup> Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law*, The Federation Press, 2008, pp2-3.

<sup>23</sup> ACCI submission, 'Consolidation of Commonwealth Anti-Discrimination Laws Attorney-General's Department Discussion Paper', Feb 2012, p5.

<sup>24</sup> Business Council of Australia submission, 'Consolidation of Commonwealth Anti-Discrimination Laws Attorney-General's Department Discussion Paper', Feb 2012, p1.

There is a growing body of evidence concerning the benefits of diversity to the productive capacity of businesses and, in turn, to the economy. The Diversity Council of Australia outlines these benefits, including:

- minimising costs associated with unnecessary staff absenteeism
- reducing avoidable costs associated with turnover, recruitment and re-training
- positioning organisations to receive positive rather than adverse publicity in relation to its people management practices
- providing a safe and healthy work environment
- generating productivity benefits through retention of valued staff
- improving staff morale, and
- minimising legal exposure and risk.<sup>25</sup>

A 2003 study on the costs and benefits of diversity, conducted on behalf of the European Commission (Directorate-General for Employment, Industrial Relations and Social Affairs) concluded that 'the business case for investment in workforce diversity is embryonic and fragmented. However, it noted that 'a potentially powerful case for investment in workforce diversity policies is beginning to emerge'.<sup>26</sup>

One area where solid research exists is in analysing the benefits of encouraging gender diversity. The Impact Assessment accompanying the new UK Equality Bill in 2009 outlined the costs of failing to recognise women's skills and under-utilising their abilities in the workplace. It concludes that 'failure to utilise the talents and potential of the diverse range of individuals who make up the workforce or to respond to demand from the diverse communities has an economic cost'. An estimate of the total benefits of increasing women's employment and reducing occupational segregation is given as between 1.3 to 2.0 per cent of UK's GDP.<sup>27</sup>

Similarly, the Regulation Impact Statement on the proposed amendments to the *Equal Opportunity for Women in the Workplace Act 1999* refers to the benefits of gender diversity to the productive capacity of organisations and, in turn, to the economy. It cites a report from Catalyst which found that 'in four out of five industries in the United States, the companies with the highest women's representation on their top management teams experiences a higher total return to shareholders than the companies with the lowest representation of women'.<sup>28</sup> The RIS also notes the link between productivity and better use

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<sup>25</sup> Diversity Council of Australia submission, 'Consolidation of Commonwealth Anti-Discrimination Laws Attorney-General's Department Discussion Paper', Feb 2012, p6.

<sup>26</sup> Centre for Strategy and Evaluation Services on behalf of the European Commission, 'The Costs and Benefits of Diversity: A Study on Methods and Indicators to measure the costs-effectiveness of diversity policies in enterprises', October 2003, p15.

<sup>27</sup> Equality Bill (UK) Impact Assessment, Version 4 December 2009 at p18 and p26.

<sup>28</sup> see Regulation Impact Statement to the Equal Opportunity for Women in the Workplace Amendment Bill 2012, p6.

of women in the workplace. Recent research from Goldman Sachs JB Were has found that 'closing the gap between male and female workforce participation rates would have important implications for the Australian economy, boosting the level of Australian GDP by 11 per cent'.<sup>29</sup>

The RIS accompanying the introduction of the ADA also discussed the broad consequences of not countering age discrimination. A Social Policy Research Centre report found that the social and economic implications of the exclusion and marginalisation of older workers from the labour market are wide-ranging. Economic and social effects include increases in health and welfare costs, the possibility of poverty among older persons, and exclusion from the community.<sup>30</sup> The RIS also cites the finding from the Intergenerational Report that, given Australia's ageing population, 'key priorities for ensuring fiscal sustainability should include preserving a well-targeted social safety net that encourages working-age people to find jobs and remain employed; and encouraging mature age participation in the labour force'.<sup>31</sup>

Although, as noted above, anti-discrimination legislation does not inevitably lead to increased participation in employment or other social areas (such as sports and clubs) it has an important role to play in enhancing participatory opportunities which, in turn, leads to productivity benefits as outlined above and increased benefits of 'social capital' which is increasingly recognised as influencing economic wellbeing.<sup>32</sup>

### ***Effectiveness of current anti-discrimination laws***

Given the accepted role for Government in anti-discrimination law and the importance of these laws in helping to increase productivity and social capital, this section analyses the extent to which the current regime is effective and efficient. That is, the effectiveness of the current anti-discrimination laws in reducing discriminatory behaviour, and the efficiency of those laws.

The Productivity Commission noted that '[i]t is not easy to measure intangible concepts such as the level of discrimination'.<sup>33</sup> Given the role of anti-discrimination laws as outlined above, it is difficult to link the effectiveness of the existing regime to a measurable outcome – it has longer term objectives including broader attitudinal change and benefits such as self-worth and inclusion which are difficult to measure using conventional accounting.<sup>34</sup>

The four core Acts cover discrimination on the grounds of sex, race, disability and age. However, there is evidence that there is still a need to work towards a more inclusive society in these areas.

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<sup>29</sup> Toohey, T., Colosimo, D, & Boak, A., *Australia's Hidden Resource: The Economic Case for Increasing Female Participation*, Goldman Sachs JB Were cited in *ibid*, p7.

<sup>30</sup> Social Policy Research Centre, 'The Recruitment of Older Australian Workers: A Survey of Employers in a High Growth Industry', Dec 2001.

<sup>31</sup> Treasurer's Intergenerational Report, 2002-03 Budget Paper No 5.

<sup>32</sup> *op cit*, n12, p125.

<sup>33</sup> *op cit*, n12, p65.

<sup>34</sup> *op cit*, n12, p151.



A study undertaken in 2000 (prior to the introduction of the ADA) attempted to evaluate the perceived effects of anti-discrimination legislation in the recruitment and selection process, from the viewpoints of both job applicants and employers. A sample of 180 private sector employer and 186 job applicants in Melbourne were interviewed. The study concluded that 'discrimination at the recruitment and selection stages is still very common and that anti-discrimination legislation has only had a limited effect'.<sup>35</sup>

In 2011, the Government released a Baseline Study assessing human rights needs in Australia as part of developing a National Human Rights Action Plan. The Baseline Study noted that '[p]articular groups in the community continue to face impediments when seeking remedies, services and equality of opportunity. Among these groups are Aboriginal and Torres Strait Islander peoples; women; children and younger people; older people; gay, lesbian, bisexual and sex and/or gender diverse people; people at risk of experiencing homelessness; people with disability; carer; people in prisons; and refugees, asylum seekers, migrants and people from culturally and linguistically diverse backgrounds'.<sup>36</sup>

The Productivity Commission noted that analysing complaint statistics 'is a relatively crude guide to the level and nature of discrimination in the community. However, the outcomes of the complaints process can give some insight into the likely presence of discrimination'.<sup>37</sup> This is because 'complaints data measure how many people believe they have experienced discrimination and are willing and able to make a formal complaint. Complaints do not indicate whether discrimination necessarily has occurred, nor does the absence of complaints necessarily indicate an absence of discrimination'.<sup>38</sup>

The table below shows the level of enquiries and complaints received by the Australian Human Rights Commission for the period 2006-07 to 2010-11, based on data contained in the Australian Human Rights Commission Annual Reports.

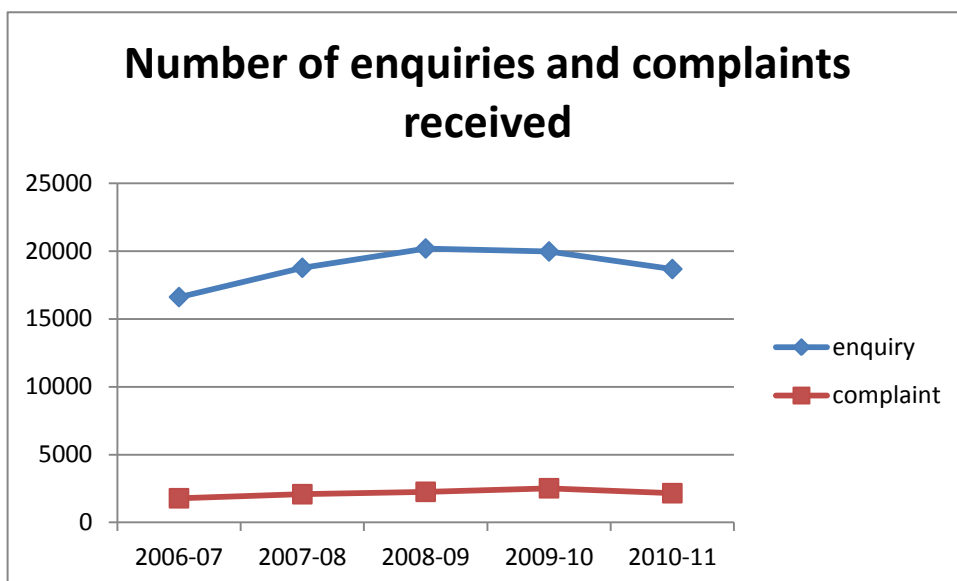
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<sup>35</sup> op cit, n18, p32.

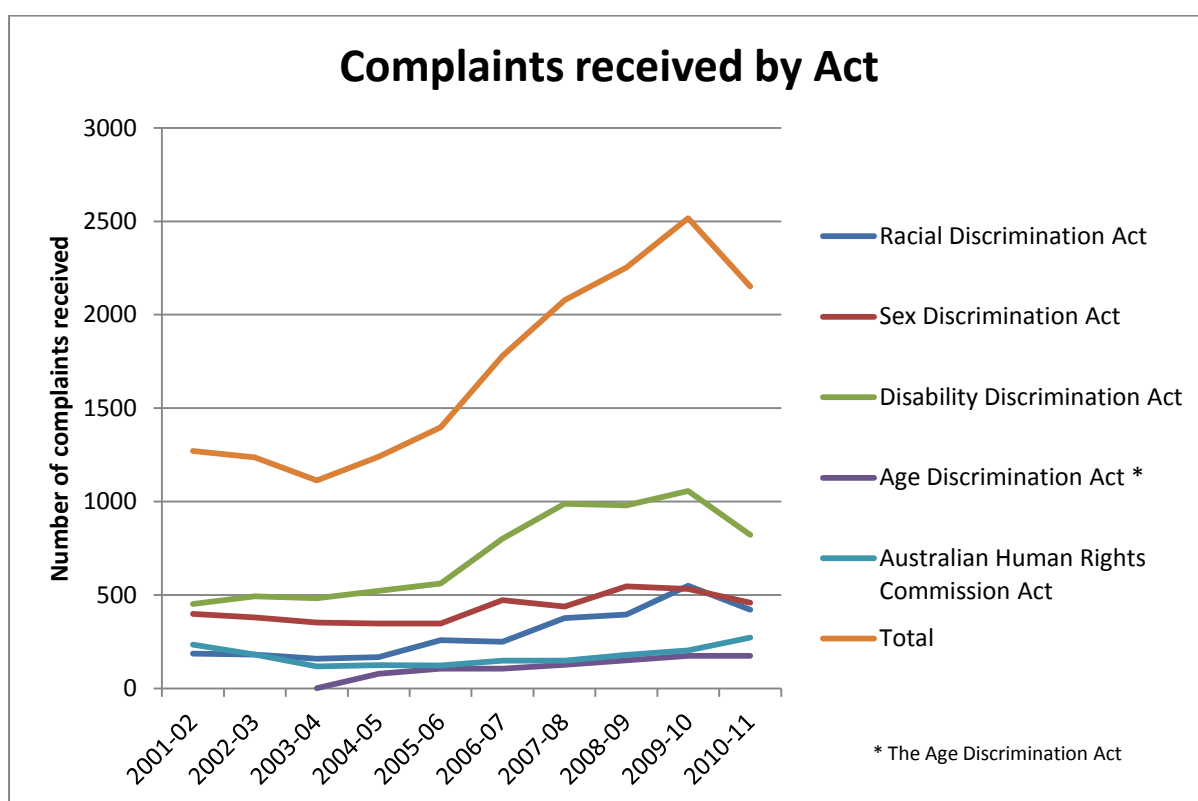
<sup>36</sup> Attorney-General's Department, *National Human Rights Action Plan: Baseline Study 2011*, p162.

<sup>37</sup> op cit, n12, p 67.

<sup>38</sup> op cit, n12, p66.



The table below provides a break-down of the complaints received by Act over the period 2001-02 to 2010-11.



While the figures do not show a clear trend in complaint or inquiry levels over time, it can be said that the apparent total number of complaints per year shows no sign of abating. Figures from State and Territory commissions, which have concurrent jurisdiction, also support this conclusion. For example, an article in *Equal Time* in 2007, on the 30<sup>th</sup> anniversary of the *New South Wales Anti-Discrimination Act 1977* commented, '[t]he social landscape of Sydney and New South Wales has changed dramatically in those thirty years, but discrimination continues'.

The NSW Anti Discrimination Board fields 10,000 enquiries and investigates over 1000 formal complaints each year from people who are still experiencing discrimination. In the 30 years of operation, the Board has investigated 34,290 cases. People are still denied a new job or promotion because of their sex. Workers are still experiencing difficulties because they have a disability. Race discrimination is still occurring at pubs and bars. Workplaces are still not free from bullying and harassment.

In the three years since this article, complaints have continued to be received at over 1000 per year.

The introduction of the FW Act on 1 July 2009 gave new powers to the Fair Work Ombudsman to investigate, and potentially litigate against, employers in cases of unlawful workplace discrimination matters. The Fair Work Ombudsman received and assessed 1171 complaints relating to workplace discrimination in 2010-11. The number was up 46 per cent on the 801 complaints received in 2009-10.<sup>39</sup>

The level of complaints can only be considered an indicator of the level of discrimination actually occurring. There is very little research available that actually tracks the level of discrimination that exists within society. Therefore, it is very difficult to draw any conclusions about the effectiveness of the current regime in reducing the levels of discrimination within society.

Despite this, the 2004 Productivity Commission report found that '[g]iven its relatively short period of operation, the *Disability Discrimination Act 1992* appears to have been reasonably effective in reducing overall levels of discrimination. However, there is still some way to go to achieve its object of eliminating discrimination'.<sup>40</sup>

Anti-discrimination regimes are intended to encourage an attitudinal change, which will necessarily occur over a long period of time. While the evidence suggests that certain types of discriminatory behaviour may have reduced, the current regime cannot yet be seen as fully effective in eliminating discrimination from society. More time will be needed, but some of the factors identified in the following parts of this section may also be reducing the effectiveness of the laws.

### ***Efficiency of the current regime and scope for regulatory improvement***

A key issue is the extent to which the current legislative regime operates efficiently, and the extent to which there is scope for improving the efficiency of the regulatory framework.

It has been generally accepted over time that the four core anti-discrimination Acts are now substantially inconsistent and unnecessarily complex. They were drafted over three decades and a significant amount of difficult case law has arisen. As Kirby J remarks in *X v*

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<sup>39</sup> FW Act Media Release 10 November 2011.

<sup>40</sup> op cit n12 Finding 5.9.

*Commonwealth*, 'the field of anti-discrimination law is littered with the wounded'.<sup>41</sup> During consultation as part of this project, business stakeholders identified inconsistent coverage of the Acts and uncertainty for businesses in the application of provisions as causing problems for businesses in understanding their obligations. The Australian Chamber of Commerce and Industry (ACCI) particularly indicated strong support for 'well-designed anti-discrimination laws with clear duties the balance the interests of all parties', with the object of increasing diversity in the workplace.<sup>42</sup> In this context, ACCI noted:

ACCI does not support regulation to be created which is onerous on employers, creates ambiguous duties, increases red-tape and costs, or creates excessive litigation.

Complex law makes compliance difficult and therefore diminishes the educational and attitudinal change impacts such laws can make, with businesses less likely to engage with anti-discrimination law and therefore make changes of their own initiative, despite the well-understood benefits of a discrimination-free workplace. For example, a separate Act for each attribute implies a fiction that discrimination only occurs in relation to one attribute at a time. In particular, where an individual has more than one overlapping attributes (such as being an Aboriginal woman), there are different legal obligations on organisations to not discriminate on the bases of race and sex, and should discrimination occur, it is unclear how legal action should be taken. Submissions to the Baseline Study accompanying the National Human Rights Action Plan consistently highlighted the importance of acknowledging the problems caused by 'intersectionality'<sup>43</sup>

A number of concerns have been raised about current Commonwealth anti-discrimination law, from both human rights/employee stakeholders and business and other duty holders, with many differing views – these are outlined below. However, there is one clear factor on which all stakeholders agree: the purpose underlying current anti-discrimination law does not need to change – it is simply that the purpose could be more efficiently achieved.

### ***Inconsistency of coverage***

The effectiveness of current anti-discrimination laws is compromised by the differences in coverage between the four main Commonwealth Acts, the AHRC Act, the State and Territory anti-discrimination laws and the FW Act. The four core Commonwealth anti-discrimination laws cover a number of attributes – race, that a person is or has been an immigrant, sex, marital status, pregnancy and potential pregnancy, breastfeeding, family responsibilities, disability and age. Additional attributes are protected under the FW Act and/or at the State and Territory level, including sexual orientation, gender identity, religion, political opinion, industrial activity, criminal record and nationality. Attachment A shows the different coverage of attributes across the jurisdictions.

Anti-discrimination legislation is focussed on regulating 'public' activities such as work, education, the provision of goods and services, the provision of accommodation and public

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<sup>41</sup> *X v Commonwealth* (1999) 200 CLR 177, 213.

<sup>42</sup> *op cit* n23, p5.

<sup>43</sup> *op cit*, n35, p39.

administration. There is some inconsistency between the four core Acts in approach<sup>44</sup>. For example, the ADA, DDA and SDA makes discrimination unlawful in specific activities in specific areas of public life, while subsection 9(1) of the RDA provides it is unlawful to do a discriminatory act based on race which interferes with the enjoyment of 'any human right or fundamental freedom in the political, economic, social cultural or any other field of public life'. Courts have generally preferred a broad interpretation of subsection 9(1) and it is generally thought to cover a broader range of areas and activities than the other Acts<sup>45</sup>.

Within this broad approach, there is also further inconsistency in relation to discrete issues, for example:

- volunteers are protected from discrimination under the RDA, but not the SDA, DDA or ADA
- as noted earlier, the DDA prohibits discrimination in any club which maintains facilities from its proceeds (and by prohibiting discrimination in any area of public life, the RDA takes the same approach), while the SDA only prohibits discrimination in relation to clubs with at least 30 members which serve liquor and the ADA provides no specific protection
- the SDA and ADA prohibit discrimination by partnerships of at least 6 partners, the DDA applies where there are at least 3 partners and the RDA prohibits discrimination by all partnerships, regardless of size, and

the DDA explicitly prohibits discrimination in sport and the RDA prohibits discrimination in sport as an 'area of public life', while the ADA and SDA only prohibit such discrimination through other related areas (employment, provision of services, membership of clubs). The tests for vicarious liability also differ between the Acts, with different tests to establish liability and different defences applying:

- the RDA and SDA cover the relationship between employer and employee and between principal and agent. The ADA and DDA cover the relationships between employer and employee and between principal and agent but also include the relationships (for companies) between the company and directors, employees, and agents.
- each Act limits vicarious liability to situations where there is a sufficient connection between the unlawful act and the relationship to give rise to vicarious liability. The ADA and DDA tests require the unlawful act to be committed 'within the scope of [the person's] actual or apparent authority'.<sup>46</sup> The RDA and SDA tests require the unlawful act to be 'in connection with' the person's employment or duties as an agent.<sup>47</sup>

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<sup>44</sup> A full analysis of the inconsistencies was outlined in the *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* which was publically released on 22 September 2011. Available at: [www.ag.gov.au/antidiscrimination](http://www.ag.gov.au/antidiscrimination)

<sup>45</sup> *Baird v State of Queensland* [2006] FCAFC 162.

<sup>46</sup> ADA section 57.

<sup>47</sup> SDA section 106.

- each of the four Acts provides a defence of reasonable preventative action. Under the ADA and DDA, an employer or principal will not be liable for acts committed by an employee or agent where they took 'reasonable precautions and exercised due diligence to avoid the conduct'. The RDA and SDA excuse the employer or principal from liability if they 'took all reasonable steps to prevent the employee or agent from doing the act'.

The use of different tests to establish vicarious liability in different Acts is uncertain and confusing, making it difficult for employers to know whether they have met the appropriate test. It is also difficult for employers to demonstrate that they have definitively exhausted *all* reasonable steps, as set out in the RDA and SDA, to satisfactorily make out the defence.

Similarly, there are specific exceptions and exemptions from the prohibition on discrimination across the Acts, some of which are expressed differently despite relating to the same type of behaviour. For example, each Act permits conduct designed to benefit people with a particular attribute to address historical disadvantage (such as women or Indigenous Australians). However, by employing different tests, the current Acts provide confusion for people who seek to take such measures to address disadvantage, particularly where it is to address disadvantage on more than one ground (such as Indigenous women).

Even the central concept, the meaning of discrimination, differs across the Commonwealth anti-discrimination laws, with the SDA, DDA and ADA requiring the construction of a hypothetical comparator (ie a person in the same position but without the protected attribute), leading to confusion about what constitutes discrimination particularly as the courts have not been consistent in the application of this 'test'. The RDA prohibits discrimination in the 'enjoyment of human rights', which has also led to uncertainty as to what is a 'human right' in this context.

These differences between the Acts impact on users, particularly businesses and organisations which must implement obligations under all of the Acts. Disparities between the Acts and the absence of a harmonised anti-discrimination regime add to costs associated with compliance for businesses in training and educating staff on discrimination matters, as well as increasing costs for legal and specialist assistance. In practice, however, it would appear as though the majority of businesses already adopt the highest existing requirements.

In addition, many businesses are also subject to State and Territory anti-discrimination laws. These varying laws can require different practices throughout national offices or require multiple exemptions to be sought, imposing an excessive regulatory burden on businesses and significant uncertainty.

From the perspective of an individual, the inconsistency may have more of a practical effect, as it is unclear which legislation may apply in a given situation, and an individual may have to seek legal advice to understand the options available to seek redress for a particular incident. Such costs would be in addition to any harm incurred by the individual.

## ***Uncertainty of obligations***

### **Definition of discrimination**

The current anti-discrimination law model used in Australia can be described as a ‘closed model’<sup>48</sup> – unlawful discrimination is precisely defined, leaving less discretion to the courts. Thus, Australia’s scheme specifically defines discrimination as direct or indirect.<sup>49</sup> The Public Interest Law Clearing House (Vic) Inc (PILCH) stated in its submission on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper:

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.<sup>50</sup>

The current distinction between direct and indirect discrimination is highly technical. For example, the ADA, DDA and SDA use the ‘comparator test’ which focuses on establishing direct discrimination by comparing the treatment of the complainant to the treatment of others who lack their protected attribute. Often, this results in cases regularly turning on a particular judge’s view on how the discriminator (the person who is thought to have made a decision that discriminated against an individual) might have treated a hypothetical person without the protected attribute. Results are unpredictable and have created significant uncertainty. The High Court has noted that by ‘defining discrimination in this manner language has been employed which is both complex and obscure and productive of further disputation’.<sup>51</sup>

The definition of indirect discrimination in the DDA and the RDA also contains technical concepts such as the need to show that people with a protected attribute be unable to comply with a condition imposed by the discriminator. It is not clear what standard must be met to show that a person *cannot* comply with the condition (rather than that the condition disadvantages people with the attribute, as is the standard under the other Acts).

These definitions have been criticised as being inconsistent, complex and uncertain by the Senate Standing Committee on Legal and Constitutional Affairs.<sup>52</sup> In its submission to the

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<sup>48</sup> See Smith, B, ‘Models of Anti-Discrimination Laws – Does Canada offer any lessons for the reform of Australia’s laws?’, Law and Society Association Australia and New Zealand (LSAANZ) Conference 2008 *Whither Human Rights*, 10-12 December University of Sydney, p3.

<sup>49</sup> This is in contrast to an ‘open model’ such as that used in Canada where discrimination is broadly defined – see *ibid*, p1.

<sup>50</sup> PILCH Submission to the Attorney-General’s Department on the Consolidation of Commonwealth Anti-Discrimination Laws, 1 February 2012, p9.

<sup>51</sup> *IW v The City of Perth and others [1997] HCA 30*, p 137 as cited in Smith *op cit* n47, p5.

<sup>52</sup> Senate Standing Committee on Legal and Constitutional Affairs, *The effectiveness of the Sex Discrimination Act 1984 in eliminating and promoting gender equality* (2008) (‘SDA Report’), paragraph 11.12.

Discussion Paper on the proposed consolidation of anti-discrimination laws, the Australian Human Rights Commission notes:

[s]eparate provision for direct and indirect discrimination has led to the conclusion in most judicial interpretation that the concepts are separate and do not overlap. A need to choose which category of discrimination a particular situation falls within, introduces an unnecessary layer of complexity for the Commission in seeking to explain rights and responsibilities, and for people and organisations seeking to understand, use, or comply with the legislation.<sup>53</sup>

Complex, uncertain laws detract from the long-term goals of anti-discrimination laws – promoting both formal and substantive equality and attitudinal change. Belinda Smith of the University of Sydney argues that ‘[i]f discrimination is defined too narrowly, it will only operate to address a narrow band of discrimination and promote a limited form of equality. If the definition is too complex or difficult to prove, the law will be less effective at changing behaviour’.<sup>54</sup>

PILCH argues that ‘[t]he 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’.<sup>55</sup>

This complexity causes problems in practice for both individuals and businesses. From the perspective of a business it means that it is not always clear what actions are necessary to comply with the existing requirements. For example, a decision-maker within a business may be of the view that they did not discriminate, as they would have treated a person without that attribute in the same manner, however, until the matter is considered by a court, a level of uncertainty will remain. This in turn may result in increased costs associated with legal advice.

Similarly, for an individual who has been discriminated against, the uncertainty can result in a higher level of legal costs, which may in fact deter action being taken.

### Permissible discrimination

The Acts seek to recognise that certain conduct should not be unlawful. In particular, a person’s attributes may be relevant to particular circumstances. The Acts also recognise that certain adjustments would impose unreasonable costs on an organisation. The Acts achieve this policy outcome through a range of exceptions and exemptions, intended to strike a balance between the ‘the rights and interests of individuals against the compliance burden and risk to businesses’.<sup>56</sup> The current range of exceptions and exemptions provided under Commonwealth discrimination law is inconsistent and potentially confusing, with

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<sup>53</sup> Australian Human Rights Commission Submission to the Attorney-General’s Department on the Consolidation of Commonwealth Anti-Discrimination Laws, December 2011, p9.

<sup>54</sup> op cit, n47, p1.

<sup>55</sup> op cit, n49, p9.

<sup>56</sup> op cit n21, p31.



exceptions under one Act not necessarily applying to another Act, or applying but with a different standard to be met. For example:

- the exceptions relating to insurance differ between the SDA,<sup>57</sup> DDA<sup>58</sup> and ADA<sup>59</sup>
- there are significant inconsistencies in the coverage and drafting of the inherent requirement provisions<sup>60</sup> across DDA,<sup>61</sup> ADA,<sup>62</sup> SDA<sup>63</sup> and potentially the RDA<sup>64</sup> (and
- the SDA<sup>65</sup> and ADA<sup>66</sup> contain a broad permanent exemption for 'voluntary organisations' for discrimination on grounds covered by those Acts against members/potential members. This exemption is not provided under the RDA or DDA. The DDA<sup>67</sup> contains a more limited exemption for 'clubs and incorporated associations', where a 'club' is defined broadly, and may include some voluntary organisations.

As a result of these inconsistencies, it is not possible for a business to assume that an exception that would apply in relation to discrimination on the basis of one particular attribute would apply in relation to another, or where the exception does apply, that it applies in similar terms.

For example, the DDA and ADA each contain an exception where a person is unable to carry out the inherent requirements of a job because of an individual's age or disability. These two acts differ in relation to the areas of work to which the exception applies, for example, in the ADA the exception only applies with respect to determining who should be offered employment and dismissal of employees, while in the DDA it also applies to the terms and conditions of being offered employment, promotion and transfer. Further confusion is caused by the SDA containing a similar yet different exception to unlawful discrimination, for the 'genuine occupational qualifications' for a job. While covering similar concepts, expressing these exceptions in different terms across the Acts causes difficulties for employers to know whether an exception that applies to one attribute, such as the age of a potential worker, will equally apply to another attribute, such as a disability of a current employee.

The 2008 Senate Committee's review of the effectiveness of the SDA recommended consideration of replacement of a number of permanent exemptions with a general limitations clause.<sup>68</sup> In making this recommendation, it was noted:

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<sup>57</sup> SDA section 41.

<sup>58</sup> DDA section 46.

<sup>59</sup> ADA section 37.

<sup>60</sup> It is not discrimination if a person is, because of their particular attribute(s), unable to perform the inherent requirements of the job (such as a blind person being unable to drive a vehicle).

<sup>61</sup> DDA section 21A.

<sup>62</sup> ADA subsections 18(4) and (5), 19(3) and (4), 20(2) and (3) and 21(4) and (5).

<sup>63</sup> SDA section 30.

<sup>64</sup> RDA subsection 15(1).

<sup>65</sup> SDA section 39.

<sup>66</sup> ADA section 36.

<sup>67</sup> DDA subsection 27(4).

<sup>68</sup> op cit n51, Recommendation 36.

The committee is attracted to the idea of a general limitations clause replacing the existing permanent exemptions. Such an approach is clearly more flexible and allows for a more nuanced approach to balancing of rights and interests where these are in conflict. While the committee acknowledges that this approach provides less certainty, Australia would have the experience of other jurisdictions to draw upon and HREOC would be able to play a role in educating the public about the practical application of the provision. Most importantly, it would allow the Act to evolve with prevailing community attitudes rather than freezing the exceptions at a particular point in time.<sup>69</sup>

ACCI supports the idea of a general limitations clause but notes that it 'would strongly oppose the removal of the existing inherent requirements exemption or general occupational requirements exemption'. It suggests that '[a] rationalised exemption should apply to all areas of work and for all protected attributes' for 'actions which are for a legitimate purpose related to the operation requirements of the business or undertaking...and for which the requirement is proportionate to fulfil that objective'.<sup>70</sup> The Business Council of Australia also supports consideration of a general limitations clause 'to streamline the law and allow for flexibility in application over time'.<sup>71</sup>

### ***Complaints process***

The current regime is primarily a complaints driven model. That is, it relies on individuals pursuing complaints through litigation. The SDA Review commented that '[a] recurring theme in the evidence was that [the SDA] is ineffective in addressing systemic discrimination because it adopts an enforcement model based upon individual complaints and remedies'. PILCH's recent submission noted:

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 behaviour and lead to the development of anti-discrimination practices predominantly through the adversarial lens of Courts and legal disputes.<sup>72</sup>

The SDA Review received 'detailed evidence concerning the inherent limitations of the individual complaint system as well as the practical difficulties involved in pursuing complaints and how these might be addressed'.<sup>73</sup> The Committee made recommendations in relation to standing requirements, increasing time limits for lodging an application with the courts after termination and altering the burden of proof.

The Committee also took note of issues raised by respondents. The Victorian Automobile Chamber of Commerce (VACC) noted that the time and costs involved in defending a complaint are also significant and that employers therefore sometimes feel compelled to make a payment on commercial grounds'. Similarly, ACCI also submitted that many

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<sup>69</sup> *ibid*, p175.

<sup>70</sup> *op cit* n21, p32.

<sup>71</sup> *op cit* n22, p2.

<sup>72</sup> *op cit* n49, p11.

<sup>73</sup> *op cit* n51, p69.

employers 'simply settle claims, regardless of the strength of the applicant's case, in order to avoid the costs of litigation'.<sup>74</sup>

The current complaints driven process has three main practical problems that impact on the ability of both individuals and businesses to fully engage in the resolution of complaints.

Concerns around the existing burden of proof relate to the serious difficulties complainants face in establishing a causal link between their protected attribute and the respondent's actions (as these facts are predominantly in the knowledge of the respondent). This increases the likelihood that individuals are unable to sufficiently demonstrate the reason a particular action occurred. In its recent submission Legal Aid NSW noted:

The experience of Legal Aid NSW in providing civil law advice suggests countless examples where a person is complaining of unfair treatment on the basis of a protected attribute but has no evidence, other than a belief or a feeling, that the attribute was the reason for the treatment. In those circumstances, although solicitors can advise the person that it is their right to lodge a complaint and see if any supporting evidence arises during the complaints or court process, more often than not such evidence will not arise because it is in the mind, or occasionally in documentation, of the respondent only. The Legal Aid NSW experience is that, in the majority of instances, the result of the advice to the person is that they choose not to pursue a complaint because they have no evidence of the unlawful reason for the unfavourable treatment.<sup>75</sup>

The cost of litigation is a concern for both individual complainants and businesses/employers. Under the current system, the unsuccessful party in a litigation matter must pay the costs of the successful party (although the courts have discretion in how they award costs). Stakeholders have said that the risk of an adverse costs order is a significant barrier to justice as it prevents many people from pursuing their discrimination claim. Similarly, as mentioned above, many respondents settle complaints early to avoid the further legal costs associated with litigation.

In addition, there is concern that the current arrangements do not allow for unmeritorious complaints to be dismissed early in the complaints process. This often results in businesses and employers having to spend a significant amount of time and resources defending unfounded and unmeritorious complaints.

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<sup>74</sup> op cit n51, p74.

<sup>75</sup> Legal Aid NSW, *Submission to the Attorney-General's Department on the Consolidation of Commonwealth Anti-discrimination Laws*, February 2012, available at: [http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/Consolidation%20-%20Discussion%20Paper%20-%2020151%20-%20Legal%20Aid%20NSW%20-%20201%20Feb%202012%20\(pdf\).PDF](http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/Consolidation%20-%20Discussion%20Paper%20-%2020151%20-%20Legal%20Aid%20NSW%20-%20201%20Feb%202012%20(pdf).PDF) [accessed 17 July 2012], 7.

## ***Conclusion***

The long-term goal of anti-discrimination law is hard to measure and evaluate. However, it is a goal that is accepted by both society in general and businesses as one that will ultimately benefit both individuals and productivity as a whole. Improving the efficiency and streamlining the way the current laws operate will contribute to moving towards a discrimination-free culture.

### SECTION THREE: GOVERNMENT'S OBJECTIVES

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There are several objectives of Government action to consolidate Commonwealth anti-discrimination law. At the broadest level, the objective is continuing to work towards a discrimination-free culture and provide equality of opportunity to participate and contribute to the social, economic and cultural life of the community. A secondary objective is to create a legislative regime that supports the broad objective by adopting laws that are as clear as possible so that businesses and other stakeholders understand their obligations and can meet these obligations with assistance where necessary. In doing so, the Government is seeking to:

- reduce complexity and inconsistency in regulation to make it easier for individuals and business to understand rights and obligations under the legislation
- retain existing protections in federal anti-discrimination legislation
- ensure simple, cost-effective mechanisms for resolving complaints of discrimination, and
- clarify and enhance protections where appropriate.

These objectives fit within the broader objectives outlined in the following Government initiatives:

- Better Regulation Ministerial Partnerships – as part of the Government's Better Regulation Agenda, the ongoing program of Better Regulation Ministerial Partnerships ensures disciplined and coordinated approach to delivering regulatory reform across government
- Australia's Human Rights Framework – launched in April 2010, the Framework sets out initiatives to help protect and promote human rights in Australia and lead to a fairer and a more just society.
- Clearer Laws reform – as part of the Government's *Strategic Framework for Access to Justice* and in recognition of the fact that the increasing complexity of the law can make it difficult for people to understand their entitlements and comply with their obligations, the Government has committed to developing clearer laws and practical measures to reduce the volume and complexity of legislation. This includes legislating only where necessary and focusing on reducing complexity in our laws and encouraging the evaluation and review of laws to reduce complexity.

## SECTION FOUR: DESCRIPTION OF OPTIONS

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This section provides an overview of each of the broad options that are considered in the RIS. These options are for a general framework to better encourage and support a discrimination-free culture. Section Five includes a detailed impact analysis of each of these options, with Section Six providing a description and analysis of some additional issues.

As noted above, the objective of Government action at the broadest level is to create a legislative regime that supports a discrimination-free culture. Complete deregulation in the area of anti-discrimination is not considered as an option in this RIS, as this would not meet the broad objective. In addition, as noted in the Background, the Australian Government has a number of international obligations that oblige it to take action to address discrimination in a range of areas. The Productivity Commission, in its Review of the DDA, stated that:

the Commission considers that the objectives of the DDA cannot be achieved without federal legislation. There are no satisfactory alternatives to a DDA, and there are good social and economic reasons for its retention.<sup>76</sup>

As a result, for the reasons outlined in Section Two, Government legislative action will continue to be necessary to protect those most vulnerable to discrimination and the option of removal of the existing anti-discrimination legislation has not been considered.

The options that are considered in this RIS are:

Option One: retain the status quo

Option Two: an omnibus act that addresses significant inconsistencies with no broader reform

Option Three: a simplified act with increased use of voluntary sub-legislative guidance

Option Four: a proactive anti-discrimination regime involving a significant expansion of the framework, the imposition of positive duties and specific obligations and a formal regulator.

These options are outlined further below.

In addition, Section Six includes a number of additional issues that could be considered with each of the options identified. These issues relate to the potential coverage of additional attributes of gender identity and sexual orientation, and the coverage in the context of employment of religion, political opinion, industrial activity, social origin, nationality, criminal record and medical record and limits on the operation of religious exemptions where Commonwealth funding is given to provide services. Options for dealing with these additional issues are outlined and assessed in Section Six.

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<sup>76</sup> op cit, n12,p xxxix.

### ***Option One: Retain the status quo***

Option One is to retain the current regime of anti-discrimination laws spread throughout five separate pieces of legislation.

This option would have the following features:

- no amendments would be made to existing legislation, and
- a new sixth Act would be introduced to fulfil the Government's election commitment to prohibit discrimination on the basis of sexual orientation and gender identity (see Section Six for further analysis).

### ***Option Two: An omnibus act that addresses significant inconsistencies with no broader reform***

Option Two would combine the five Commonwealth Acts into one Act as primarily a machinery change with amendments to address the most glaring and significant inconsistencies.

This option would have the following features:

- minimal change required to achieve internal consistency, following an approach that would involve the least change for the least attributes (for example, the current 'comparator' test for direct discrimination used by the majority of the four Acts (ADA, DDA and SDA) would also apply to race)
- rationalisation of existing inconsistent definitions and coverage using a minimal change approach, with the median option chosen to rationalise inconsistencies (for example: middle-ground approach of 'more than 3 partners' in the definition of 'partnership' as used by the DDA would apply across all grounds of discrimination - as there is no agreed standard across discrimination law, this option would involve considering each individual inconsistency across the current Acts and determining the 'middle ground')
- current complaints process would be retained
- separate equal opportunity in employment discrimination regime in AHRC Act would be retained, and
- the introduction of new grounds of discrimination on the basis of gender identity and sexual orientation (see Section Six for further analysis)

### ***Option Three: a simplified act with increased use of voluntary sub-legislative guidance***

Option Three would involve removal of all inconsistencies (although some principles, such as equality before the law and vilification, will continue to apply to one or more grounds of discrimination only).

However, this option would build on Option Two by taking best practice examples from other anti-discrimination laws, both domestically and internationally, to seek to develop the simplest and most efficient anti-discrimination laws. For the most part, there would not be any significant change to the principles underlying anti-discrimination law.

Option Three would have the following features:

- where there are gaps and inconsistent approaches across the existing Acts, the highest current standard would be adopted:
  - inconsistent coverage (for example, the RDA's approach of prohibiting discrimination in all areas of public life would be used over the approach of the other Acts which refer to the specific areas of public life, relationships and activities – this will impact on the coverage of volunteers, partnerships, clubs and member-based associations and sport).
- wherever possible, the operation of the law would be made clearer and more efficient without a substantial change in practical outcome:
  - a simple definition for 'discrimination', incorporating unfavourable treatment based on an attribute and conduct which disadvantages people with an attribute, including harassment of people based on their attributes.
  - replacing most existing exceptions and exemptions with a provision that conduct which is justifiable is not unlawful, and
  - rationalising inconsistent concepts such as the test for vicarious liability.
- the introduction of new grounds of discrimination on the basis of gender identity and sexual orientation and integrating the separate equal opportunity in employment discrimination regime in AHRC Act into the unlawful discrimination complaints regime (for work matters only) (see Section Six for further analysis)
- a package of measures to assist business to understand their obligations, assisting to shift the focus from remedying wrongs to avoiding discrimination, including:
  - a statement of obligations clearly outlining existing duties
  - building on measures in the existing Acts, such as voluntary action plans and Commission-issued guidelines
  - empowering the Commission to, on request, conduct a review of an organisation's policies and practices
  - empowering the Commission to, on application, certify conduct as constituting a special measure to achieve equality
  - introducing a co-regulatory scheme, empowering the Commission to certify industry codes or other standards, to apply the principles in the Act to specific circumstances (for example, the Australasian Rail Association's code for accessible rail travel for people with a disability, developed in consultation



with industry experts, the Commission, people with disability and the States and Territories)

- this power could also be used to develop a code for small business or the not-for-profit sector, providing off-the-shelf policies to be adopted by small organisations, enabling recognition of other applicable regulatory schemes, such as Australian Standards or relevant State or Territory regimes, and
- streamlining the complaints process and other functions of the Australian Human Rights Commission:
  - a shifting burden of proof to ensure the burden of proving facts (in this case, the reason for a respondent's actions) is on the person who is in the best position to know those facts
  - providing that the default position in any court action relating to discrimination is that each party bears its own costs, consistent with the position under the FW Act and each State and Territory anti-discrimination law, and
  - enhancing the Commission's ability to dismiss unmeritorious complaints at an early stage and limiting access to court in these circumstances.

Further details on this option are outlined in the table in Section Five.

### ***Option Four: a proactive anti-discrimination regime involving a significant expansion of the framework, the imposition of positive duties and specific obligations and a formal regulator***

Option Four is the introduction of a proactive anti-discrimination regime, the so-called '4<sup>th</sup> generation' of equality law. This option includes a significant expansion of the existing regulatory framework, imposing positive duties and specific obligations on organisations, such as mandatory plans and reporting, and transforming the role of the Commission into a regulator akin to other bodies such as the ACCC, ASIC or the Fair Work Ombudsman.

This option would represent a significant change from the existing regime, with predominantly negative obligations enforced through individual complaints, to a regulatory model which imposes obligations on individuals and organisations to take specified steps to avoid discrimination against individuals based on specified attributes. This creates a positive duty to take reasonable and proportionate steps to undertake actions to avoid discrimination. A prohibition on discrimination would complement this approach. This approach is similar to that adopted in the *Equality Act 2010* (UK), is more closely aligned with the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) and draws on certain elements of the *Equal Opportunity Act 2001* (Victoria).

This option would have the following features:

- imposition of a positive duty on organisations (including both public and private sector agencies) to consciously carry out their functions in a non-discriminatory way

- this obligation would require organisations to take steps to address barriers to equality and to ensure that their policies, practices and services do not have an unjustifiable adverse impact on people with prescribed attributes
  - it would include equality performance measures in service/agency planning, evaluation and accountability frameworks<sup>77</sup>
  - discrimination would still be permitted where it is 'justifiable', allowing consideration of a duty-holder's particular circumstances including functions and resources, of organisations to be taken into account
  - only require reasonable action, as with all other aspects of anti-discrimination law, permitting the individual circumstances, including functions and resources, of organisations to be taken into account
- organisations above a specified size would be required to develop an anti-discrimination plan detailing steps that will be taken by an organisation to avoid discriminating behaviour occurring, to be made available on request and submitted to the Commission on an annual basis, with annual reporting on progress against achieving goals and targets identified in the plan
  - the role of Commission would change to that of a formal regulator, similar to the Fair Work Ombudsman, promoting and monitoring compliance with Commonwealth anti-discrimination law by:
    - formally requesting and approving an anti-discrimination plan from an organisation
    - conducting compliance audits
    - assessment of annual reports from organisations on compliance against the anti-discrimination plan, with the Commission directing further action if considered appropriate, enforceable through civil penalty provisions
    - power to enter and audit premises where concerns about discriminatory behaviour have been reported
    - power to commence an action for non-compliance itself, without having to wait for a complainant to formally commence action, and

increased use of co-regulatory mechanisms to assist business to comply with their obligations (such as those outlined in Option Three).

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<sup>77</sup> See Discrimination Law Experts' Roundtable, 'Report on recommendations for a consolidated federal anti-discrimination law in Australia', 29 Nov 2010 (updated 31 March 2011), p24.

## SECTION FIVE: IMPACT ANALYSIS

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This section provides an analysis of the impacts of each of the options identified above. In considering each of the options, the impact on key stakeholders is considered, including business (including not-for-profit organisations), government (including the Commission), individuals and society in general.

The impact of anti-discrimination regimes is difficult to quantify – it has long term objectives including broader attitudinal change and benefits such as self-worth and inclusion which are difficult to measure using conventional accounting. Changing attitudes is a long term strategy, and one which result in benefits over the longer term, rather than significant or widespread immediate benefits. Quantification of benefits is also problematic because of the difficulties with quantifying the effects of ‘costs’ incurred by an individual such as emotional hurt suffered as a result of discriminatory comments or loss of self-esteem. The Productivity Commission noted that the costs and benefits of the DDA (and this could be extended to other discrimination law) ‘are likely to be widespread and, to a large extent, intangible and non-measurable’.<sup>78</sup> In its submission to this review, the Equal Opportunity Commission Victoria warned ‘against the application of a rigid costs/benefits analysis without regard for the overriding value and importance of protecting human rights’.<sup>79</sup>

In the context of the DDA, the Productivity Commission notes that ‘summing up the costs and benefits of the DDA and associated instruments impose on the community as a whole is fraught with difficulty. This is particularly the case where compliance with the DDA is either voluntary or enforced through complaints’.<sup>80</sup> Compliance costs can vary greatly among organisations depending ‘on their commitment to the objectives of the Act, their degree of interaction with people with disabilities, and the success with which they meet their obligations’.<sup>81</sup> Costs and benefits vary significantly from one organisation to the next, with little scope for generalisation. This reasoning can be extended from the disability sphere to interactions with discrimination law on the basis of other protected attributes.

Given this, this section is primarily based on a qualitative discussion and analysis of the impacts from a whole of society perspective. This will be supplemented by more detailed analysis, including quantification, from two perspectives: that of a business (with some additional acknowledgement of small business); and that of a potential applicant.

### ***Option One: retain status quo***

This option would retain the existing five Acts and involve the introduction of a new Act to meet the Government’s commitment to prohibit discrimination on the basis of sexual orientation and gender identity.

#### **Costs**

It has been generally accepted over time that the four core anti-discrimination Acts are now substantially inconsistent and unnecessarily complex. This complexity, along with

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<sup>78</sup> op cit n12, p 115

<sup>79</sup> ibid

<sup>80</sup> ibid, p149.

<sup>81</sup> ibid, p137.

inconsistency in coverage across the Commonwealth and State and Territory anti-discrimination laws, leads to uncertainty of obligations for those covered by the laws.

### *Business and individuals*

Under Option One, there would be no new costs to business or individuals. However, the costs that flow from the existing complexity of the laws would remain. These include costs associated with training, understanding and seeking to implement the current complex and uncertain laws, including legal or other business adviser costs. While the existing arrangements would be unchanged, these are neither well understood nor established through clearly articulated precedents in such a way that provides certainty to businesses or other organisations with obligations.

During the consultation period on this project, advice was sought from stakeholders in relation to the potential costs to businesses and individuals of complying with anti-discrimination law, but there was insufficient data provided to enable a conclusive statement of costs. However, the Diversity Council of Australia (DCA) notes that '[r]eadily quantifiable costs of diversity complaints to the organisation may take the form of negotiated damages (known to have reached \$225,000 in individual matters), awarded damages (known to have exceeded \$100,000), and legal fees (quotes of more than up to \$100,000 to defend complex complaints are not uncommon). The experiences of DCA members indicate that legal costs can regularly exceed \$100,000 in more complex cases and it would not be uncommon for legal fees to exceed double this amount'.<sup>82</sup>

### **Benefits**

The Acts would likely continue to have the educative effects they have had to date (as spelt out in Section Two), leading over time to a reduction in discrimination. However, these would continue to be limited by the problems encountered by complex and inconsistent Acts (as also set out in Section Two).

### *Business*

As this option would maintain the status quo, which includes the current complexity of the law, there are no identifiable additional benefits accruing to business.

### *Individuals*

As is the case for business above, given that this option would maintain the status quo, there are no identifiable additional benefits accruing to individuals.

### **Assessment against Government's objectives**

This option does not meet the Government's objectives for this project, in that it fails to reduce complexity and therefore improve regulation, while doing nothing to clarify and enhance protections against discrimination.

The current complexity of the law means that businesses and other service providers may not comply with their obligations because the obligations are difficult to understand and compliance requirements are unclear. Within a regime that depends on voluntary

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<sup>82</sup> *ibid*, p7.

compliance, the costs to individuals and society as a whole would be significant. As the Productivity Commission notes, individuals with disability (and, by extension, other protected attributes) can derive important benefits from anti-discrimination legislation in the form of greater consumption opportunities, which arise because of increases in income. A reduction in discriminatory practices also leads to significant intangible benefits for individuals such as an increased sense of self-worth and equality and a general feeling of belonging and inclusion in the community.<sup>83</sup> If the anti-discrimination regime is not operating as effectively as possible the opportunity for individuals and society as a whole to receive these benefits is compromised.

This means that business would not be in the best position to take advantage of the benefits arising (as outlined in Section Two) from a strong and consistent anti-discrimination law, which encourages upfront compliance by setting out clear obligations and focusing on education. The continuing complexity of the law may lead to increased exposure to claims coming to court based on misunderstanding of rights and obligations. The Productivity Commission noted that ‘the uncertainty about the likelihood, timing and cost implications of a complaint is a problem for businesses’.<sup>84</sup>

The introduction of a sixth Act to prohibit discrimination on the basis of sexual orientation and gender identity, and the requirement for further legislation to introduce any additional grounds now or in the future, would create additional complexity and therefore regulatory burden, contrary to the Government’s objectives.

### ***Option Two: an omnibus act with no broader reforms***

Option Two would combine the five Commonwealth Acts into one Act as primarily a machinery change with amendments to address the most glaring and significant inconsistencies.

This would create changes for every aspect of the current provisions, whereby coverage for each issue across each Act would either:

- increase to a higher standard in another Act
- decrease to a lower standard in another Act, or
- move to an alternative standard, representing the ‘middle ground’ between existing standards across the Acts.

### **Costs**

#### *Society in general*

There would be no significant new costs to society from this option, but the ability of individuals and society in general to enjoy the benefits that flow from a more efficient and simpler anti-discrimination regime would be compromised. This Option is likely to have the same costs as Option Three, but without any of the additional benefits of that Option.

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<sup>83</sup> *ibid*, p118.

<sup>84</sup> *ibid*, p139.

An omnibus Act with minimal change would hamper efforts in moving towards consistency between the Commonwealth regime and the regimes under the FW Act and State and Territory anti-discrimination regimes, due to the different levels of coverage and the introduction of further inconsistency by taking the 'middle ground' approach.

### *Business*

Businesses may incur additional costs associated with the need to familiarise themselves with the changes to the Acts, such as updating policies to reflect the changes to the Acts, identifying which changes would impact on them, and put in place policies and procedures to reflect this. For larger businesses this will involve management time and legal or human resources staff time. In addition, there may be additional costs associated with updating printed material, refreshing training material and advising employees of their new obligations.

Data on the number of businesses with policies in place was sought during consultation, but not provided. A number of stakeholders anecdotally indicated that small businesses rarely had specific anti-discrimination policies, while others indicated that for other businesses most policies were drafted at a high level, which should require minimal updating from the proposed changes. Therefore, no indicative information on the number of businesses which would need to update policies can be provided.

For small and medium businesses familiarisation will likely be based on information provided by third parties, such as industry bodies or guidelines provided by the Commission, and as formal policies and procedures are likely to be limited in this sector, costs will be small.

Based on anecdotal figures from companies which provide such services, where policies are to be updated, such updates could cost between \$1,000 and \$5,000 depending on the nature of the policies currently in place. High-level policies would involve minimal changes, costing at the lower end of this range. Where detailed policies are in place, changes would more likely cost at the higher end of this range. That said, these costs are based on engaging an external consultant to update policies – the costs would be less if any changes were prepared internally.

The costs associated with updating policies will also vary depending on the nature of the changes. This Option proposes taking a 'middle ground' approach to issues which are treated inconsistently. This would result in some current protections being scaled up while others are scaled down. This would cause further complexity in updating policies and could therefore push costs of doing so to the higher end of the range provided above.

Similar anecdotal figures were provided regarding staff training in relation to the changes. The cost to engage an external consultant to provide such training could range from \$2,000 to \$20,000, depending on the size and scope of such training. As above, an option which scales some protections up while others are scaled down would likely contribute to the complexity of this training and lead to costs at the higher end of this range.

While any practical changes would be minimal, there would be some costs for those businesses that choose to update policies (approximately \$1,000 to \$5,000) or conduct staff training (between \$2,000 and \$20,000), depending on the size of the organisations, as outlined above. However, many businesses do not have policies to update and would be

unlikely to have specific staff training on these issues given the minimal practical effect of the changes.

### *Government*

Ongoing costs to Government, including the Commission, would be likely to remain at levels consistent with current obligations. The Commission would incur some transitional costs associated with implementation of the new regime, such as updating public information / websites / training courses. However, the Commission was provided \$6.6 million over four years under Australia's Human Rights Framework ('the Framework') to expand its community education role, which could include some work related to implementing these changes.

Government agencies, as employers, are also likely to incur some transitional compliance costs updating internal Government policies etc. These would be of a similar cost as set out above for other businesses.

### *Individuals*

There would be no new costs for individuals but many of the existing costs would remain, as the option continues to rely on an individual complaints model.

### **Benefits**

#### *Society in general*

Under Option Two, there would be some benefits arising from having obligations in one Act and addressing some of the more obvious inconsistencies. A benefit of the Option Two consolidation would be the location of all obligations within one piece of legislation and the removal of some of the more significant inconsistencies as outlined above. To the extent that the changes can make it easier for business to understand their obligations and comply, there could potentially be a reduced level of discrimination in society, but it is not anticipated to make a measurable difference.

#### *Business*

Businesses would benefit from co-location and greater consistency of obligations and rights. However, these benefits will be limited as much of the technical complexity in the existing Acts would be retained.

#### *Individuals*

Similarly, individuals may benefit both from co-location and greater consistency of obligations and rights. However, these benefits will be limited as much of the technical complexity in the existing Acts would be retained, as well as the limitations of the current complaints process.

### **Assessment against Government objectives**

This Option partially meets the Government objective of streamlining legislative requirements. This Option does nothing to address the other objectives, but is not inconsistent with them. However, as it incurs some cost impact for updating policies as for

Option Three (and indeed, due to the complexity of the approach, may incur higher costs than for Option Three), but with only minimal benefits, it does not meet the Government's overall objectives.

### ***Option Three: a simplified act with increased use of voluntary sub-legislative guidance***

Option Three does not propose to change the underlying principles of anti-discrimination law, but proposes a consolidated law which more efficiently achieves these principles. This option is based on the idea that the principle of non-discrimination is simple – a person's irrelevant attributes should not be taken into account in decisions affecting the person. However, real life situations are complex, with many factors to take into account. Where the law seeks to describe in detail when certain conduct is prohibited and when it is permissible, complexity inevitably results.

The costs and benefits of Option Three's five key features are assessed below. As outlined above, the costs and benefits are difficult to quantify. This model of anti-discrimination law (in contrast with Option Four) will continue to be based on negative obligations (that is, the obligation not to discriminate). As the Productivity Commission notes, under this model, compliance can be treated by some organisations as optional, to be enforced in the breach.<sup>85</sup> Therefore, duty holders may choose to, for example, develop formal policies and training for their staff to ensure they comply or may make no changes, depending on their assessment of the risk of discrimination, or at least being the subject of a complaint. Option Three continues this voluntary compliance model; however, the aim is to encourage more upfront compliance by making the anti-discrimination laws and obligations more user-friendly.

#### ***1) Resolving inconsistencies in coverage by taking the highest current standard***

In establishing this project, the Government committed to no diminution of protections, while reducing the regulatory burden by removing unnecessary inconsistencies and overlap. The simplest way to meet both these objectives is to take the existing highest standard and apply it across all grounds of discrimination. By adopting the RDA approach of prohibiting discrimination in all areas of public life, the following inconsistencies are also resolved:

- volunteers and voluntary workers will be covered in relation to all grounds
- all partnerships will be covered, regardless of size
- all public clubs (that is, those that maintain their facilities out of their funds) will be covered, subject to appropriate exceptions for clubs designed specifically for people with a particular attribute, such as people of a particular race or sex or with a particular disability), and

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<sup>85</sup> op cit n12, p137.



- all sporting activities will be covered (subject to appropriate exceptions where strength, stamina or physique is relevant).

## **Costs**

### *Business*

The impact on businesses and the not-for-profit sector will be similar. Where organisations have existing policies in place outlining anti-discrimination strategies and workplace diversity policies, these would need updating. As the overall practical impact of the changes would be similar in scope to Option Two, similar costs will be incurred as for that option. As outlined under Option Two, anecdotal advice from companies that provide such services suggest that updating policies could cost between \$1,000 and \$5,000, and staff training could cost between \$2,000 and \$20,000, depending on the complexity of changes required. Option Three should incur costs towards the lower end of these ranges, as a simple scaling up to the highest current standard is much simpler than the approach in Option Two. In particular, workplace policies may already take the highest approach for simplicity, meaning no changes at all would be required.

### *Government*

Much of the impact on businesses and the not-for-profit sector would be supported by an education and awareness campaign accompanying the amendments, as well as an enhanced focus on examples and templates provided by the Commission,<sup>86</sup> as part of the ongoing implementation of the Framework by both the Attorney-General's Department and the Commission.<sup>87</sup> As was outlined under Option Two, the Commission was provided \$6.6 million over four years under the Framework for education related purposes, which could include some work related to implementing a consolidated Act.

The Government's dedicated one-stop shop website for businesses ([business.gov.au](http://business.gov.au)) refers to the Commission's website and State and Territory anti-discrimination websites. In most instances, these policies will not require much updating as they reflect the broad principles of discrimination law (and therefore will be consistent with the redrafted legislation which does not amend these principles) rather than referring specifically to legislative provisions.

## **Benefits**

Using the highest current standards approach is one way of implementing a best practice model that could be used for future harmonisation of anti-discrimination regimes. It also ensures that there will be no diminution of current protections for individuals.

### **Case study – taking the highest current standard – volunteers**

As an example, any organisation which is covered by the 'any area of public life' approach of the RDA would also be covered in relation to the other grounds of discrimination. However,

<sup>86</sup> Australian Human Rights Commission website, Information for Employers, [http://www.humanrights.gov.au/info\\_for\\_employers/policies/index.html](http://www.humanrights.gov.au/info_for_employers/policies/index.html) viewed at 30 April 2012.

<sup>87</sup> Australia's Human Rights Framework, April 2010 – see <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/default.aspx>

as the obligation is only to not discriminate on these grounds, and there is no reason to believe that discrimination is currently occurring on these grounds, this is not expected to have any practical regulatory impact.

For example, one area which may be affected by using the 'highest current standard approach' of 'any area of public life' is coverage of volunteers. Currently, volunteers and unpaid workers are not protected under the SDA, DDA or ADA. Claims can be brought under the RDA under 'any area of public life'. The costs and benefits of moving to the 'any area of public life' approach is analysed below, using the case study of volunteers.

### **Costs**

Where businesses have volunteers or voluntary workers (including interns / work experience students etc) they will need to update and extend their existing policies and procedures to cover these volunteers. As existing policies are already in place for paid employees, businesses have agreed, as part of consultation, that costs will be minimal.

The costs for the not-for-profit sector will also be minimal. Those organisations also agreed this as part of the consultation process. Not-for-profit organisations in Australia have to comply with anti-discrimination requirements under the RDA. As a result, the additional costs incurred with covering volunteers and voluntary workers for all other grounds will be minimal, involving only the extension of existing arrangements regarding race to other grounds with costs only potentially incurred in relation to updating awareness / training.

Costs are also limited by the fact that there are already obligations on NFPs in relation to the provision of goods and services, facilities and accommodation and in relation to membership.

### **Benefits**

Continuing with the case study of volunteers, the benefits of the highest current standards approach can be canvassed.

For individuals who possess the protected attributes significant benefits will accrue in terms of social inclusion and connectedness, as well as potentially assisting with obtaining paid work, self-value and self-esteem.

For society in general, with an ageing population and the fact that volunteers over the age of 65 contribute more hours on average than younger volunteers (see [http://www.volunteering.com.au/tools\\_and\\_research/volunteering\\_statistics.asp](http://www.volunteering.com.au/tools_and_research/volunteering_statistics.asp)), it is important to encourage these volunteers to continue to contribute. The removal of barriers through anti-discrimination policies will assist with this.

### **Conclusion**

The benefits of implementing an anti-discrimination regime operating to the highest current standard and therefore towards achieving a discrimination-free culture can be seen in this example. Businesses and NFPs will incur minimal costs (updating policies where they specifically mention coverage of volunteers) and updating awareness or training to extend coverage from race to other grounds. Accordingly, these benefits outweigh the minimal costs.

The same analysis can be applied to other areas which will be affected by use of the 'all areas of public life' approach. These are:

- definition of partnership which will now include all partnerships (the RDA approach) rather than the 3 partner approach of the DDA or 6 partner approach of the SDA and ADA

- definition of club and member-based association which will now include all public clubs (the RDA approach as articulated by the definition in the DDA - associations (incorporated and unincorporated) that provide and maintain facilities from the funds of the association. This contrasts with the SDA approach which prohibits discrimination by 'associations which have at least 30 members, provide and maintain facilities from the funds of the association and sell and supply liquor on the premises'.

- sport where discrimination will now be prohibited across all attributes rather than just race and disability (with exceptions in place for competitive sport).

## **2) Clearer and more efficient laws**

There are a number of matters in anti-discrimination law which would benefit not just from consistency, but from a simpler approach. In particular, the current exceptions and exemptions in the Acts are designed to recognise that a person's attributes can be relevant and therefore distinctions on this basis might be appropriate (for example, providing certain medical services only to members of one sex, hiring an actor with particular attributes to ensure historical accuracy or preventing people under a certain age from consuming alcohol).

The current approach is neither the most efficient nor the most accurate approach to this issue. Expressing these situations as part of a general approach that conduct which is justifiable is not unlawful would more closely recognise the true nature of the conduct (ie that it is not an 'exception' from unlawful discrimination, but rather a limit on that concept). Providing a range of factors to assess whether conduct is justifiable will assist organisations to determine to understand the real reasons for their conduct.

In addition, in seeking to set out when discrimination is unlawful, the current discrimination Acts take an overly legalistic approach, which is difficult to understand and has led to undesirable results in litigation. Under this Option, a simple definition for 'discrimination', incorporating unfavourable treatment based on an attribute and conduct which disadvantages people with an attribute, and explicitly including harassment of people based on their attributes, will improve understanding of this important concept.

### **Costs**

#### *Business*

As with Option Two, there may be familiarisation costs, such as updating policies to reflect the changes to the Acts, identifying which changes would impact on them, and put in place policies and procedures to reflect this. In addition, there may be additional costs associated with updating printed material, refreshing training material and advising employees of their new obligations.

Many businesses and not-for-profit organisations are likely to consider that the replacement of most existing specific exceptions and exemptions with a general principle increases uncertainty. This is because the definition of what is justifiable will be left to the Commission and courts to develop over time, rather than being specified in legislation. As a result, some businesses may become more cautious and either spend more on legal advice or potentially adopt less efficient practices to avoid challenge, such as not firing unproductive staff where they have a protected attribute. The extent of this behaviour cannot be estimated, but to help avoid this cost the measures at part 4) are also proposed. A small number of businesses may also incur legal costs in clarifying the new provisions through the courts. Over time, however, uncertainty should decrease as case law develops.

## **Benefits**

### *Society in general*

Under Option Three, the law will be more accessible, easier to understand and easier to implement. This will be achieved both through the drafting of the law itself and inclusion of a range of other measures to provide further guidance on obligations and thus increased certainty for organisations (see further below).

The benefits of using a more principles-based approach will accrue to individuals and, ultimately, society in general. Smith points out that if discrimination law is defined too narrowly it will 'promote a limited form of equality'. As outlined in Section Two, the current prescriptive requirements in both the tests for proving discrimination have led to difficulties in proving a complaint. The law is sometimes difficult to enforce and thus less effective at changing behaviour.<sup>88</sup> Reducing the prescriptive requirements, both in the definition of discrimination and in the permanent exceptions will lead to a more flexible regime.

Individual complainants will also benefit from the simpler reference to discrimination being 'on the basis of one or more protected attribute'. A complainant will no longer have to identify which specific attribute was the operative attribute in the conduct alleged.<sup>89</sup> This approach will be beneficial for individuals with more than one attribute (eg a woman with a disability).

### *Business*

Clearer and simpler laws can potentially reduce the general one-off familiarisation costs for new businesses and other duty-holders by reducing the time taken to understand the law and explain it to employees and any volunteers.

Clarifying inconsistent concepts such as the test for vicarious liability can potentially assist business and other duty-holders to know what their obligations are. Submissions from the business sector did not support any expansion of the standards for vicarious liability.<sup>90</sup> Well understood core concepts will be used in a more consistent manner so obligations are clear. Thus, the test will use the RDA and SDA concept of requiring the unlawful act to be 'in connection with 'the person's employment or duties as an agent', rather than the arguably more confusing test from the ADA an DDA 'within the scope of [the person's] actual or

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<sup>88</sup> op cit, n47, p1.

<sup>89</sup> op cit, n75, p8.

<sup>90</sup> op cit, n22, p4.

apparent authority'. This will be balanced by the clear defence from the ADA and DDA so that an employer or principal will not be liable for acts committed by an employee or agent where they took 'reasonable precautions and exercised due diligence to avoid conduct'. This defence is clearer than the alternative in the RDA and SDA – 'took all reasonable steps to prevent the employee or agent from doing the act'. This approach will be complemented by a 'clear statement of obligations' in the legislation (see below) and by continuing some existing exceptions to provide transitional certainty (for example, exceptions relating to superannuation, insurance and credit).

In retaining specific exceptions, current inconsistencies across the different Acts would be removed, providing increased clarity and certainty of obligations. For example, the current exceptions relating to insurance differ between the SDA, DDA and ADA<sup>91</sup> – under this Option, the exception would be presented in a more streamlined manner in one place in the Act, with a single test applicable to all attributes to which the exception applies (age, sex and disability). As the existing differences between the exceptions are technical only, removing these inconsistencies should not require a change in practices but will aid understanding for insurance providers.

Similarly, the defence of 'inherent requirements of the job' uses the clear factors set out in the DDA (considering the person's past training, qualifications and experience relevant to the particular work, the person's performance in working for the respondent, and any other factor that is reasonable to take into account). The defence will apply in work and work-matters which encompasses both determining who should be offered employment and dismissal of employees, and the terms and conditions of being offered employment, promotion and transfer. This approach addresses business concerns about the need to retain the inherent requirement exemption to allow discriminatory 'actions which are for a legitimate purpose related to the operation requirements of the business or undertaking...and for which the requirement is proportionate to fulfil that objective'.<sup>92</sup>

### **3) *Enhanced protections - new protected attributes of sexual orientation and gender identity, integration of equal opportunity in employment regime and limitations on religious exemptions***

See Section Six for further analysis.

### **4) *Measures to assist business***

To assist to address any uncertainty that may follow from the use of high level, principles-based provisions, the Act would support a range of sub-legislative measures to give guidance and provide certainty where appropriate. A range of measures which could be included in this context are set out in the description of the option in Section Four above.

The Commission is already empowered to issue guidelines. This option would involve greater emphasis on these guidelines as a means to assist business and other organisations to understand and comply with their responsibilities under the Act. In particular, they could be used to provide further detail on some of the new concepts in the Act. They could also be designed in way to ensure they could be used as 'off-the-shelf' policies for smaller

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<sup>91</sup> See p25.

<sup>92</sup> op cit, n6, p32.

organisations. Compliance with these guidelines would not be mandatory, but it would be evidence of compliance with the Act.

All other measures proposed would remain entirely voluntary. These are:

- building on measures in the existing Acts, such as voluntary action plans and Commission-issued guidelines
- empowering the Commission to, on request, conduct a review of an organisation's policies and practices
- empowering the Commission to, on application, certify conduct as constituting a special measure to achieve equality, and
- introducing a co-regulatory scheme, empowering the Commission to certify industry codes or other standards, to apply the principles in the Act to specific circumstances.

They would be legally unnecessary due to the general limitation for conduct which is justifiable or which constitutes a special measure to achieve equality. Businesses would neither be expected nor encouraged to use any of the measures.

During consultation on this project, the Business Council of Australia, ACCI and the Australian Industry Group (Ai Group) were supportive of the development of a range of mechanisms to assist with greater certainty and compliance. Recognising that there are a number of measures that could be utilised to assist with compliance, the Ai Group stated in its submission that:

Ai Group would welcome the development of further voluntary guidance material to assist duty holders to comply with their obligations under Commonwealth anti-discrimination law.

...

If the Government decides to allow for co-regulation in the consolidation bill, it **must** be voluntary and non-binding on duty holders.

...

An option to obtain certification of special measures by the Commission would be a useful tool for employers who are uncertain of the lawfulness of the special measures implemented at their workplace. Certification should not be mandatory.<sup>93</sup>

More specifically, in its submission on the project, ACCI believe[d]:

that models such as co-regulation do have merit within the framework of anti-discrimination laws. Moreover, there should be consideration of how standards (internally developed or industry developed) can be utilised to enhance compliance.<sup>94</sup>

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<sup>93</sup> The Australian Industry Group's submission, 'Consolidation of Commonwealth Anti-Discrimination Laws Attorney-General's Department Discussion Paper', 1 Feb 2012, pp 20-22..

<sup>94</sup> op cit, n23, p34..

Further to this, the Business Council of Australia submitted that it:

supports full consideration of the Productivity Commission's recommendation that co-regulation be used to improve certainty for business (paragraph 179). Allowing flexible mechanisms, like co-regulation, has the potential to reduce compliance costs while still achieving stated policy objectives. By harnessing industry-specific knowledge, such an approach can reduce the risk of one-size-fits-all rule-making.<sup>95</sup>

### **Costs**

The Act would enable the Commission to recover its costs associated with those measures which benefit individual organisations and/or industries, such as certification of special measures to achieve equality or industry codes or reviews of organisational policies and practices. A Cost Recovery Impact Statement would be developed as part of the process to establish appropriate fees.

In relation to the introduction of a co-regulatory scheme, whereby the Commission could certify industry codes or other standards, variance in the type, scope and complexity of different industries makes it difficult to provide an estimate of the costs in preparing such a proposal. It is anticipated there would be only a modest uptake of this mechanism by those industries which judge a certified code or standard to be in their best interests in order to provide greater certainty, having regard to the cost of preparing such a code. There will be costs for those industries that do choose to utilise the voluntary co-regulatory mechanism, likely to range from \$20,000 to over \$100,000, depending on a range of potential variables. These variables include:

- the degree of technical detail included in the code (for example, setting a particular gradient for a wheelchair accessible ramp)
- the application of the code (such as whether it applies to one business or a whole industry, or whether it applies to a limited geographical area or any organisation operating in Australia), and
- whether the elements of the code are new or simply adopt existing standards prescribed elsewhere (for example, matters already provided for in an Australian Standard).

### **Benefits**

These measures are voluntary but available for organisations which choose to take advantage of them to seek further clarity or guidance. During consultation, business groups raised concerns that obligations are difficult to identify as they are located throughout the legislation. An upfront clear statement of obligations that are contained in the Act will not impose any new regulatory burden but will assist in providing clarity and is consistent with Clearer Laws principles.

Some of the measures, such as a certification of special measures to achieve equality or certification of an industry code, could operate as a complete defence to a discrimination

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<sup>95</sup> op cit, n24, p2..

complaint made under any Commonwealth, State or Territory law, providing more certainty to organisations than currently exists. Other measures, such as a review of organisational policies and practices and voluntary action plans, would not operate as a complete defence but would be evidence of compliance with the Act.

As outlined in Section Two, organisations that value and capitalise on employee diversity have productive and fulfilling workplaces which help them attract and retain employees. Taking advantage of these measures to meet obligations and promote diversity will benefit relevant businesses and service providers.

### **5) Streamlined complaints**

While Option Three is focussed on improving understanding and therefore upfront compliance, disputes will continue to arise. Accordingly, this option also includes a number of measures to streamline the complaints system, as set out above in Section Four.

#### **Costs**

##### *Business*

As discussed in Section Two, there is some anecdotal evidence on the difficulties of using the anti-discrimination regime, partly because of the way the current burden of proof operates. Making changes to the burden of proof by shifting the burden to the respondent once a prima facie case has been made out could increase the number of complaints within the anti-discrimination regime. As the burden of proof will only apply if a complaint is taken to court, rather than the earlier conciliation stage of proceedings, this change will only have an impact in a limited number of situations. In these cases, though, the respondent organisation could bear increased legal costs in defending their conduct. As noted under Option One, costs can exceed \$100,000 for defending complex cases.

However, the claimant will still be required to establish substantiated facts from which a presumption of discrimination arises (that is, a complainant must demonstrate that he or she has a protected attribute and that there was, on the face of it, unfavourable treatment.) Once this is established, the burden will shift to the respondent to explain the reasons for their conduct, including that it was not because of the complainant's attributes or that the conduct was justifiable or covered by another exception in the Act. This will allow an early opportunity for respondents to explain the reasons for their conduct and reduce the length of court proceedings. For example, if a respondent has a merit report clearly showing the basis for making an employment decision this can be demonstrated upfront. This could increase the likelihood that meritorious complaints will be settled earlier.

In addition, the overall cost impact should be minimised by the Commission's ability to dismiss unmeritorious complaints at an early stage and prevent them going to court.

##### *Society in general*

Providing that the default position in any court action relating to discrimination is that each party bears its own costs, would remove a significant barrier to justice, where the risks of an adverse costs order prevents many people from pursuing their discrimination claim. As conciliation before the Commission remains a compulsory step, coupled with the enhanced



ability for the Commission to resolve unmeritorious claims, it is not expected that this will lead to an increase in unfounded complaints.

### *Government*

Streamlining complaints will have a positive impact on the Commission's costs. By being able to focus on the real issues arising in meritorious complaints, rather than those in unmeritorious complaints, the Commission's complaints resources will be able to be used more efficiently.

### **Benefits**

#### *Individuals*

The Discussion Paper notes that the impact of the requirement on individual discrimination claimants having the burden of proving 'the basis' for their disadvantaging or less favourable treatment by the duty holder is a barrier to bringing a discrimination complaint. The Discrimination Law Experts Group submission on the Discussion Paper notes that it is extremely difficult for a complainant to prove what is in the mind of the respondent and that many cases of direct discrimination fail because, although less favourable treatment is proved, the court cannot be satisfied that it was 'on the basis' or 'because' of the protected attribute.<sup>96</sup> The shifting burden approach takes an inquiry straight to the issue: what happened and why? The Experts Group comments that this will avoid:

time-consuming and costly preliminary technical issues, and enable a respondent to volunteer what they know about what they are alleged to have done. It ensures that court hearings and conciliation proceedings focus on the central issue of whether what happened was discriminatory, and will lead to clearer case law which will provide better guidance on the law.<sup>97</sup>

The level of benefit depends on the extent to which the Commonwealth anti-discrimination regime is used for pursuing a discrimination claim, rather than under the FW Act regime or State and Territory regimes. That is, while this will allow for faster resolution of complaints brought under this regime, it will have no impact on complaints brought in the FW Act or State and Territory jurisdictions.

#### *Business*

Enhancing the Commission's ability to dismiss unmeritorious complaints at an early stage, and limiting access to court in these circumstances, will have a clear benefit for employers and other organisations who comply with the Act, in limiting the costs associated with defending spurious claims.

Further detail on the proposed changes proposed as part of this Option, and a summary of the costs and benefits of each set of changes, is set out in the following table:

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<sup>96</sup> *ibid*, p 12.

<sup>97</sup> *ibid*

	Issue	Changes proposed by Option Three	Impact analysis
1.	<b>Unlawful discrimination</b>		
	<p>a) Discrimination means:</p> <ul style="list-style-type: none"> <li>• unfavourable treatment because of an attribute, or</li> <li>• a condition, requirement or practice that disadvantages people with an attribute.</li> </ul> <p>b) Special measures to achieve equality do not constitute discrimination.</p> <p>c) Recognise discrimination on the basis of a combination of attributes (intersectional discrimination)</p> <p>d) The scope of each attribute includes:</p> <ul style="list-style-type: none"> <li>• characteristics associated with the attribute, either actually, generally or assumed</li> <li>• past or potential future attributes</li> <li>• assumed attributes, and</li> <li>• having an associate with the attribute</li> </ul>	<ul style="list-style-type: none"> <li>• Removes the requirement (from SDA, DDA, ADA) to construct hypothetical comparator to determine discrimination.</li> <li>• Removes the requirement (from DDA, RDA) that the person <i>cannot</i> comply with the condition.</li> <li>• Clarifies that attribute-based harassment constitutes discrimination.</li> <li>• Single special measures test clarifies the operation of this provision (largely adopts existing concepts, although different language is used in each Act)</li> <li>• Express recognition that discrimination can be because of a combination of attributes.</li> <li>• Ensures scope of 'disability' in DDA applies to all attributes</li> </ul>	<p><b>Costs:</b></p> <ul style="list-style-type: none"> <li>• No significant costs as changes will have no practical impact</li> </ul> <p><b>Benefits:</b></p> <ul style="list-style-type: none"> <li>• Makes it easier to understand the law. Small cost savings for legal advice over time through reduction of need to be familiar with case law.</li> </ul>

	Issue	Changes proposed by Option Three	Impact analysis
2.	<b>When discrimination and other conduct is unlawful and when it is not unlawful</b>		
	<p>a) Discrimination is unlawful in connection with any area of public life</p> <p>b) Justifiable conduct is not unlawful</p> <ul style="list-style-type: none"> <li>• Conduct is justifiable if done in good faith for a legitimate aim and is proportionate to that aim.</li> <li>• Does not apply if employer could have made a reasonable adjustment to accommodate a person's disability.</li> <li>• Factors to consider will provide guidance as to when conduct is justifiable.</li> </ul> <p>c) Exception for discrimination in connection with an inherent requirement of a job.</p> <ul style="list-style-type: none"> <li>• Does not apply if employer could have made a reasonable adjustment to accommodate a person's disability.</li> </ul> <p>d) Inclusion of other specific exceptions from the existing Acts to provide certainty</p> <p>e) Sexual harassment is unlawful in connection with any area of public life – no exceptions apply</p>	<ul style="list-style-type: none"> <li>• Replaces detailed lists of areas of life, relationships and activities used in SDA, DDA, ADA, covering: <ul style="list-style-type: none"> <li>○ volunteers and voluntary workers</li> <li>○ partnerships regardless of size</li> <li>○ all public clubs that maintain their facilities out of their funds (with exceptions for clubs designed specifically for people with a particular attribute)</li> <li>○ all sporting activities (with exception where strength, stamina, physique is relevant)</li> </ul> </li> <li>• Justifiable conduct provides flexible approach, replacing use of many specific exceptions and exemptions</li> <li>• No practical change with inherent requirements, but single test will be clearer</li> <li>• Some exceptions and exemption remain to provide certainty – to be reviewed within 3 years</li> </ul>	<p><b>Costs:</b></p> <p><i>Business and not-for-profit organisations</i></p> <ul style="list-style-type: none"> <li>• Only in exceptional circumstances will organisations need to understand the intricacies or detail of the changes made, as the general principle of non-discrimination remains unchanged.</li> </ul> <p><i>Government</i></p> <ul style="list-style-type: none"> <li>• Cost for AHRC and government of education and awareness campaign</li> </ul> <p><b>Benefits:</b></p> <p><i>Business</i></p> <ul style="list-style-type: none"> <li>• Simple coverage provisions make compliance easier</li> <li>• Flexible approach allows individual circumstances to be considered</li> </ul> <p><i>Individuals</i></p> <ul style="list-style-type: none"> <li>• Potential for reduced level of discrimination based on sex, disability and age or sexual harassment.</li> </ul>

	Issue	Changes proposed by Option Three	Impact analysis
<b>3.</b>	<b>Mechanisms to assist business</b>		
	<p>a) Measures to provide guidance:</p> <ul style="list-style-type: none"> <li>Commission guidelines on any matters covered by the Act</li> <li>voluntary action plans</li> <li>Commission (on request only) conduct a review or audit of policies, practices, etc.</li> </ul> <p>b) Measures to provide certainty:</p> <ul style="list-style-type: none"> <li>Binding standards (for disability only)</li> <li>Commission can issue temporary exemptions while organisations take steps to improve compliance with the Act</li> <li>Commission can certify that certain conduct is a special measure, providing certainty to the organisation.</li> <li>Commission can certify codes or other relevant standards – conduct which complies with a code is not unlawful.</li> </ul> <p>c) All measures are voluntary</p> <p>d) Commission can charge to recover its costs for measures which benefit individual organisations or industries (review, exemptions, special measures, codes).</p>	<ul style="list-style-type: none"> <li>Voluntary action plans previously available in DDA only.</li> <li>Power for Commission to conduct reviews/audits is new</li> <li>Temporary exemptions not previously available for RDA.</li> <li>Power to provide certainty and to encourage taking of special measures is new.</li> <li>Power to provide certainty to industries through 'co-regulation' for industries that wish to utilise it is new.</li> <li>Power for Commission to charge to recover costs is new</li> </ul>	<p><b>Costs:</b></p> <p><i>Business</i></p> <ul style="list-style-type: none"> <li>All powers are voluntary – no new obligations or compulsory costs</li> <li>Will be costs for developing codes for industries who wish to utilise them – but no requirement to do so.</li> </ul> <p><i>Government</i></p> <ul style="list-style-type: none"> <li>Any upfront costs for the Commission can be recovered through charging arrangements</li> </ul> <p><b>Benefits:</b></p> <p><i>Business</i></p> <ul style="list-style-type: none"> <li>Provide guidance and certainty as to what is and is not permitted.</li> </ul> <p><i>Individuals</i></p> <ul style="list-style-type: none"> <li>Voluntary action plans and certification of special measures may encourage non-discriminatory practices</li> </ul>
<b>4.</b>	<b>Streamlining complaints</b>		
	<p>a) Shifting burden of proof</p> <ul style="list-style-type: none"> <li>The complainant must establish a <i>prima facie</i> case of discrimination. Burden then shifts to respondent to explain the non-discriminatory reasons for conduct, that the conduct is justifiable or that another exception applies.</li> </ul>	<ul style="list-style-type: none"> <li>Previously, the burden of proof was on the individual making the complaint of discrimination (the complainant). The burden is not reversed as in the FW Act, but rather shifted, so relevant evidentiary aspects of the burden fall</li> </ul>	<p><b>Costs:</b></p> <p><i>Business</i></p> <ul style="list-style-type: none"> <li>Shifting burden of proof will impose higher burden on business to defend claims, but</li> </ul>

	Issue	Changes proposed by Option Three	Impact analysis
	<ul style="list-style-type: none"> <li>• <i>Prima facie</i> case requires complainant to establish sufficient facts, which in the absence of another explanation, points to unlawful discrimination having occurred.</li> <li>• Respondent must lead evidence to rebut the <i>prima facie</i> case.</li> </ul> <p>b) Court is a no-cost jurisdiction (i.e. each party bears own costs), with full judicial discretion to award costs in interests of justice.</p> <p>c) Enhanced ability for Commission to dismiss clearly unmeritorious complaints without involving respondents, which may only proceed to court with leave.</p>	<p>on the respondent.</p> <ul style="list-style-type: none"> <li>• Previously, court was a cost jurisdiction (the unsuccessful party paid the successful party's costs).</li> <li>• Will require a higher standard for lodging a complaint (that is, must disclose clear cause of action). Where matters dismissed early by the Commission, access to court is 'by leave' only, instead of 'as of right', assisting in early disposal of unmeritorious matters.</li> </ul>	<p>this should reflect what is in their knowledge as a decision maker</p> <p><b>Benefits:</b></p> <p><i>Business</i></p> <ul style="list-style-type: none"> <li>• Shifting burden of proof may provide opportunities to end claims earlier where there is clear evidence of non-discriminatory reasons (eg merit report)</li> <li>• Early dismissal of unmeritorious complaints will reduce costs</li> </ul> <p><i>Individuals</i></p> <ul style="list-style-type: none"> <li>• Shifting burden of proof means that complainants don't have to prove matters that are not within their knowledge</li> <li>• A no-cost jurisdiction will improve access to justice</li> </ul> <p><i>Government</i></p> <ul style="list-style-type: none"> <li>• Streamlined complaints will improve efficiency of Commission resourcing</li> </ul>

	Issue	Changes proposed by Option Three	Impact analysis
5.	<b>Other issues</b>		
	a) Vicarious liability can be incurred in relation to any actions of employees, officers, etc, in connection with their duties, except where the organisation took reasonable precautions and exercised due diligence.	<ul style="list-style-type: none"> <li>• Uses the broadest coverage test that applies in some of the existing Acts – change for age and disability.</li> <li>• Uses the broadest defence that applies in some of the existing Acts – change for race and sex.</li> </ul>	<p><b>Costs:</b></p> <p><i>Business</i></p> <ul style="list-style-type: none"> <li>• Current distinctions are legalistic and technical only – adopting the current highest standard will simplify the law and have minimal practical impact.</li> </ul> <p><b>Benefits:</b></p> <p><i>Business</i></p> <ul style="list-style-type: none"> <li>• A single test will improve understanding and compliance</li> <li>• Removing the narrow ‘all reasonable steps’ defence will provide greater certainty for business</li> </ul>
	b) Act will wholly bind the State and Territory governments.	<ul style="list-style-type: none"> <li>• Currently binds in all aspects except sex discrimination in employment.</li> </ul>	<p><b>Costs:</b></p> <p><i>States and Territories</i></p> <ul style="list-style-type: none"> <li>• Minimal practical costs– only change is in relation to sex discrimination, currently covered under State and Territory anti-discrimination law</li> </ul> <p><b>Benefits:</b></p> <p><i>Individuals</i></p> <ul style="list-style-type: none"> <li>• Discrimination law which applies throughout Australia gives clearer coverage</li> </ul>

### ***Assessment against Government objectives***

This Option meets all of the Government's objectives set out in Section Three.

The Option benefits individuals primarily through introducing new protected attributes in more situations and, where they have been subject to discrimination, through introduction of the shifting burden of proof.

The overall impact for business and not-for-profit organisations is uncertain, as:

- There are one-off costs of familiarisation and update of policies and training materials, which to a greater or lesser extent applies to all organisations.
- The new approach will potentially increase uncertainty for many businesses.
- The shifting burden of proof will increase costs for any organisation that has a complaint go to court.

But, in the longer term there may be some cost savings for business through simplifying concepts and having greater consistency, and through the Commission having greater ability to dismiss unmeritorious complaints.

### ***Option Four: a proactive anti-discrimination regime involving a significant expansion of the framework, the imposition of positive duties and specific obligations and a formal regulator***

As outlined in Section Four above, this option introduces a proactive anti-discrimination regime, including an expansion of the existing framework to impose positive duties and specific obligations on organisations, such as the development of mandatory anti-discrimination plans and reporting to the Commission. The role of the Commission will also change, with more active enforcement and the power to commence proceedings for individual non-compliance, or in cases of systemic failures.

#### **Costs**

There are a range of costs that will arise from this option. These will be incurred across all sectors of the economy as outlined below.

#### **Business**

Businesses are likely to be required to update existing material and internal procedures for promoting anti-discriminatory behaviour. The scale of these changes will vary depending on the size of the business. Small businesses are likely to incur costs primarily due to the time taken to understand changes to their legislative obligations. Medium and large scale businesses will be required to undertake similar work, as well as updating existing internal material (such as human resources policies) to reflect legislative changes; preparing and submitting an anti-discrimination plan to the Commission for approval. Where policies already exist that deal with some aspects of behaviour covered by this option (such as a business action plan developed under the DDA) these plans will need to be updated (The

Commission website has links to 669 plans, in addition, a further 40 plans have been listed for airports and airlines (<http://www.infrastructure.gov.au/aviation/aawg/disability.aspx> includes a list of plans prepared by airports and airlines). Available data suggests that approximately 700 businesses have plans that meet this requirement; however, there is no obligation on businesses to provide their plans to the Commission or publish them, so this figure may not be an accurate indicator.

Data from the ABS indicates that in June 2009, over 6,300 businesses had over 200 employees (ABS 8165.0). It can therefore be assumed that while a number of businesses already have some plans in place, the majority of businesses would need to develop an anti-discrimination plan for submission to the Commission.

Developing an anti –discrimination plan is likely to require a reasonable level of resources, particularly for large businesses, with key tasks to be undertaken including:

- an assessment of current arrangements, employment practices and policies
- identification of issues that need to be addressed
- the development of strategies to deal with identified issues (eg development of specific training on appropriate workplace behaviour)
- consultation on draft documents, and
- monitoring and reporting arrangements.

In some instances, organisations will not have the expertise or capacity to undertake the work in-house, potentially requiring the use of consultants or other external advisors. However, the Commission and some industry groups may provide assistance through the development of templates and the provision of training on the development of an action plan. In assessing the need to make reasonable adjustments implicit in the positive duty requirement, the cost would be somewhat alleviated by the existence of the Disability (Access to Premises – Buildings) Standards 2010 which set out precise obligations for providing access to premises for people with disability (mirrored in the Building Code of Australia and State and Territory building law). These options may reduce the amount of effort required by some businesses.

In addition, the extent of work required may be reduced in Victoria where businesses are already obliged to prepare an ‘Equality in the Workplace’ policy. Other jurisdictions (NSW, WA and SA) also have some requirements in relation to disability reporting and planning, which may reduce the scope of work required in these jurisdictions.

A conservative estimate of costs using the BCC suggests that if an anti-discrimination plan was a mandatory requirement and all businesses with over 200 employees were required to prepare and submit a plan to the Commission for approval, and then implement the plan through training, costs to the business sector would be in the order of \$24m to \$54m for the initial development of the strategy, with ongoing costs in the order of \$73m pa to \$110m pa. These costings have focused on staff time, and do not include allowances for publication and distribution of printed material to staff, alterations to infrastructure etc. If this requirement were extended to medium size businesses or even to small businesses, these



estimates would quickly extend to hundreds of millions of dollars for the initial costs, with ongoing costs of over \$140m pa.

Some medium and small businesses are also likely to prepare an anti-discrimination plan on a voluntary basis, as some businesses will see benefits associated with being proactive. However, these costs have not been included on the basis that they are incurred on a voluntary basis.

The Australian Chamber of Commerce and Industry submission recommends some form of small business exemption in recognition of the limited ability of small businesses to comply with additional red tape.<sup>98</sup> Limiting the mandatory requirements for anti-discrimination plans to those businesses with over 200 employees would be consistent with this view, and recognises in particular the limited ability of small businesses to comply with such a requirement.

A study in the United Kingdom into the costs associated with establishing a single equality duty suggests that the costs ranged considerably, with some organisations reporting that the development of a single equality scheme (which is similar to that considered as part of this proposal), required up to an additional 200 days, or six months for an individual, which would suggest that costs are significantly higher than those estimated above.<sup>99</sup> The RIS prepared for the introduction of the Equality Duty also included some expected costs associated with the introduction of the scheme, however, further research has suggested that these costs are significantly below those expected to be incurred.<sup>100</sup>

The use of 'template' plans of plans developed by an industry association or other such body, while reducing costs for businesses, may also reduce the ability and incentive for businesses to be flexible and creative in how they address a range of issues. A 'one-size fits all' approach will not necessarily be the most efficient, and the savings arising from reduced initial costs will need to be off set against potentially higher costs.

The introduction of mandatory anti-discrimination plans may have competition impacts, as smaller businesses and some medium sized businesses will be less able to comply and proactively deal with issues. This may result in them being unable to continue to offer services. The Productivity Commission Report on the DDA identifies this risk and notes that changes to the DDA to require more proactive action will be more likely to impose restrictions on competition.<sup>101</sup>

It is worth noting that while a number of submissions were supportive of a more co-regulatory approach, the Business Council of Australia does not support positive duty being imposed on businesses.<sup>102</sup>

### Not-for profit

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<sup>98</sup> op cit, n21, pp 5-9.

<sup>99</sup> Schneider Ross, 'Equality Duties, Assessing the Cost and Cost Effectiveness of the Specific Race, Disability and Gender Equality Duties', June 2009 p19.

<sup>100</sup> See Nigel Williams, 'Assessing the Damage: Assessing the Equality Act Impact Assessment', November 2011 <http://www.civitas.org.uk/pdf/equalityactimpact.pdf>

<sup>101</sup> op cit, n12, pp 114-115.

<sup>102</sup> op cit, n22, p5.

Not-for-profit organisations will be impacted in the same way as other businesses. However, these organisations may have additional costs associated with reviewing processes and procedures for volunteer staff (if this additional attribute is included).

### Government

The key impact on Government will relate to the preparation and submission by agencies of an anti-discrimination plan to the Commission for consideration. While the majority of Government agencies are expected to have existing procedures and policies in place, this option is likely to require the updating of these procedures and policies, and the consolidation of material into a single strategy. This process will require additional resources. However, the impact could be reduced by allowing this to occur in line with regular updating of these policies and procedures.

Additional costs arising from alterations to infrastructure (for example to provide disability access) are likely to be minimal, as Government agencies are expected to already be proactively addressing these issues.

### Commission

The impact on the Commission is likely to be significant. This is because of the change in the Commission's function in relation to the assessment of anti-discrimination plans. If, as a minimum, this obligation were to extend to large businesses only, this would impose an obligation on the Commission to 'assess' all plans (expected to be in the order of 6,000 – 6,500 (assuming approximately 6,300 businesses with 200 plus employees plus voluntary submission of plans by some small and medium sized businesses), within a reasonable period of time as set out in any transitional arrangements. The resource requirements of the Commission would be expected to increase, with at least an additional 10 FTE required to assess plans in a timely fashion.

Costs may also be incurred in monitoring and enforcing compliance, for example, if the preparation and submission of anti-discrimination plans were mandatory, the Commission would be required to enforce this obligation, which may include developing strategies to work with organisations to assist them with the preparation of a plan, as well as taking enforcement action against those organisations who fail to comply.

The Commission will also incur a number of transitional costs associated with updating material on requirements, updating its website and other public information, dealing with inquiries from businesses and individuals about the changes and the change to their responsibilities and other transitional type issues. This would be expected to require additional resources for a period of at least several months prior to the commencement of the new regime, to at least 6 to 12 months following its commencement.

The Commission would require significant additional resourcing under this option. While full costs have not been assessed, the Commission's current annual expenses are \$23.4m, while the Fair Work Ombudsman, which has a similar role in educating, monitoring and enforcing as the model proposed for the Commission in Option Four, has current annual expenses of \$136.6m (although the Commission would have a scaled down role compared to that of the Fair Work Ombudsman).

### Individuals

The cost impact on individuals from this option is hard to quantify. However, the cost incurred by individuals is likely to be limited to a minor (if any) cost increase in the purchase of goods or services (assuming that businesses pass on these costs to consumers).

### Society in general

Costs to society in general are likely to be limited to those identified above, and no additional costs are likely to be incurred.

### **Benefits**

#### Business

Benefits to businesses arising from this option may include:

- reduced staff turn-over and absenteeism
- a reduction in the likelihood of complaints being made against a business
- a reduced risk of businesses being found vicariously liable for the behaviours of employees, and
- the potential to increase market share through proactively targeting specific sectors, such as the aged or those with a disability.

This option may deliver benefits including reduced workforce turn-over and increased staff loyalty, reduced absenteeism, and may extend to improved workplace environment and more positive work environment with improved productivity outputs.

A recent EOWA paper refers to research suggesting that the cost to replace an individual staff member is between 33% and 75% of the individual's salary on commencement.<sup>103</sup> Media reports note that in 2008, the total cost of staff turnover for Australian businesses was \$100 billion a year in lost productivity, training and recruitment costs.<sup>104</sup> This figure suggests that any strategies a business can put in place to retain existing staff and to reduce staff turn-over, will deliver significant savings over time.

The approval and implementation of an anti-discrimination plan by a business is likely to significantly reduce the likelihood of a complaint being made against a business. This will deliver financial and other benefits to a business in reducing the time spent resolving a complaint. While just over 50% of complaints are resolved within 6 months, some take up to 12 months to finalise. This suggests that where conciliation is undertaken the business will need to divert resources to seeking legal advice on the complaint and participating with the Commission in conciliation proceedings, potentially for a period of up to 12 months. In some cases, it would also avoid costs associated with actions in the Federal Court or Federal Magistrates Court (it is important to note that approximately half of all complaints are resolved through a conciliation process, the remainder are terminated, discontinued, subject

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<sup>103</sup> Equal Opportunity for Women in the Workplace Agency 'Generation F: Attract, Engage, Retain', April 2008.

<sup>104</sup> R Browne, The Age, 'Staff turnover costs \$100bn a year', 17 August 2008.

to administrative closure or withdrawn). Complainants can also pursue action in the Federal Court or the Federal Magistrates Court. As stated in Option Three, the Diversity Council of Australia (DCA) notes that '[r]eadily quantifiable costs of diversity complaints to the organisation may take the form of negotiated damages (known to have reached \$225,000 in individual matters), awarded damages (known to have exceeded \$100,000), and legal fees (quotes of more than up to \$100,000 to defend complex complaints are not uncommon). The experiences of DCA members indicate that legal costs can regularly exceed \$100,000 in more complex cases and it would not be uncommon for legal fees to exceed double this amount'.<sup>105</sup>

Approval of plan (and implementation) may reduce a business' likelihood of being found vicariously liable for discriminatory behaviour by an employee or individual, this is because the business would be more likely to be able to demonstrate that they had taken all reasonable steps to advise employees about what type of behaviour is acceptable in the workplace, and have processes in place to deal with unacceptable behaviour.

The adoption of a co-regulatory approach and developments of codes which specify what is required to comply with the regime provide certainty to businesses regarding expectations and provide a defence to vicarious liability of employers.<sup>106</sup>

Businesses may also benefit from an increase in consumer awareness of their policies, which may extend to expansion of potential market (for example, through providing improved access to facilities, will enable those with mobility difficulties to access shop etc).

### Not-for profit

Not-for-profit organisations are likely to see benefits similar to those incurred by businesses.

### Government

The Government is likely to see improvements in workforce retention and lower turn-over of staff associated with option four. As noted above, the costs associated with replacing staff can range from 33% - 75% of the initial salary. Further focus by Government agencies on eliminating discriminatory behaviour, through anti-discrimination plans, could therefore deliver significant savings from reduced staff turn-over.

### Commission

The Commission is likely to receive fewer complaints following the introduction of the scheme over the long term. Initially, there may be an increase in complaints, due to a rise in expectations by individuals about the speed with which anti-discrimination plans will be implemented. However, over time, as those strategies are implemented, it is likely that the number of inquiries and complaints will reduce as businesses act in a proactive manner to improve practices, and as more internal processes are established to deal with and resolve complaints.

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<sup>105</sup> op cit, n23, p7.

<sup>106</sup> op cit, n21, p30 and op cit, n21, p2.

### Individuals

The benefit to individuals is likely to be the reduction of discrimination experienced by those who possess the protected attributes. For those individuals, the benefit is likely to be significant. For example, it would avoid the need for the particular individual to make a complaint about discriminatory behaviour, or suffer from hurt arising from that behaviour.

The submission by PILCH (Public Interest Law Clearing House (Vic) Inc) states that '[t]he 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'.<sup>107</sup> Therefore, the benefits accruing to those individuals with the protected attributes who are the victims of discrimination are likely to be significant, as the burden arising from the enforcement of their rights is also removed<sup>108</sup>.

Data from the Commission on finalising complaint in 2010 – 11 shows that just over 50% of complaints are finalised within 6 months of receipt, but that complaints can take up to 12 months to be resolved. This has the potential to impose added stress and financial constraints on complainants.

### Society in general

The benefits accruing to society more generally are likely to be more widespread. By placing a proactive duty on businesses to adopt anti-discrimination plans, it indicates that society in general expects a higher standard and a change of attitude towards those individuals with protected attributes. While it does not go as far as requiring positive discrimination strategies, it does strongly signal the type of behaviour that is considered to be acceptable within the community. This is likely to result in a faster change in attitude within society, as individuals will have to acknowledge and take positive steps to reduce discrimination. While it is not possible to measure the change in attitude, it is likely to be more apparent and occur more quickly under option four than the other options that are considered. A reduction in the level of discrimination will result in more equality within society, which is generally accepted to deliver productivity benefits to society.<sup>109</sup>

In addition to these broader benefits, society in general will benefit from the reduced burden on individuals of enforcing their rights, and a fall in discrimination and reduction in claims (as more clarity is provided for business as to how to meet their obligations).

All of these benefits are likely to result in an increase in wellbeing and productivity, but as noted above, it is difficult to quantify these benefits due to the difficulties in quantifying the existing level of discrimination within society. However, PILCH notes that a positive duty, would promote 'substantive equality and eliminate systemic discrimination'.<sup>110</sup>

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<sup>107</sup> op cit, n49, p136.

<sup>108</sup> see also Gaze and Hunter, *Enforcing Human Rights - An Evaluation of the new regime* Themis Press, 1 Dec 20120, p18 which notes that the cost of pursuing court action 'for the individuals involved on the other side, the stress is personal as well as financial and may be extreme'.

<sup>109</sup> op cit n12

<sup>110</sup> op cit, n49, p12.

## SECTION SIX: ANALYSIS OF ADDITIONAL ISSUES

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Regardless of whether Option One, Two, Three or Four is chosen, the following issues also need to be considered in the context of anti-discrimination reform. This section provides an analysis of these issues.

This section considers the options for addressing discrimination:

- on the basis of sexual orientation and gender identity
- by religious organisations receiving Commonwealth funding to provide aged care services
- on the basis of additional attributes also covered by FW Act (industrial activity, political opinion, social origin, religion), and
- on the basis of additional attributes only covered by equal opportunity in employment discrimination attributes in work only (nationality, criminal record and medical record).

In addition, the following issues are considered more generally:

- the interaction with the FW Act, and
- the interaction with State and Territory anti-discrimination regimes

### ***New protected attributes***

In reviewing the existing anti-discrimination laws that operate at a Commonwealth level, it is prudent to consider the extent to which the existing regime provides adequate protections and whether it is necessary to consider expanding the coverage of the Act to include new attributes for which protection is afforded under the regime. These include gender identity and sexual orientation, how to deal with additional attributes presently covered by the FW Act and the equal opportunity in employment discrimination regime. The operation of the existing religious exemption in the context of introducing gender identity and sexual orientation was also a major issue arising through consultation and is considered here.

### ***Gender identity and sexual orientation***

The high levels of discrimination facing the lesbian, gay, bisexual, transsexual and intersex<sup>111</sup> (LGBTI) community is well documented.<sup>112</sup> Currently, unlike in state and territory

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<sup>111</sup> The *Legislation Act 2001* (ACT) defines an 'intersex person' as 'a person who, because of a genetic condition, was born with reproductive organs or sex chromosomes that are not exclusively male or female'.

<sup>112</sup> See for example:

- Inner City Legal Centre, 'Outing Injustice: Understanding the legal needs of LGBTI communities in NSW', 2011.
- Australian Human Rights Commission, 'Addressing sexual orientation and sex and/or gender identity discrimination - Consultation report' 2011.
- Gay & Lesbian Health Victoria and Australian Research Centre in Sex, Health & Society, *Private lives: A report on the health and wellbeing of GLBT Australians* (2006), available at: <http://www.glhv.org.au/report/private-lives-report>, accessed 14 June 2012, p. 51.

laws, there is little protection in federal law from discrimination on the basis of sexual orientation and gender identity. Protection is only provided at the Commonwealth level against discrimination based on sexual orientation under the FW Act, and therefore protection is only provided to individuals against discrimination based on their sexual orientation in relation to employment. State and Territory legislation however, provides protection against discrimination based on sexual orientation and gender identity (see Appendix A).

In October 2010, the Australian Human Rights Commission commenced a public consultation process to canvass the experiences and views of people who may have been discriminated against on the basis of their sexual orientation or sex and/or gender identity.

The Commission's consultation report<sup>113</sup> identified that discrimination against people based on their sexual orientation and gender identity was prevalent, particularly in the areas of employment and the provision of goods and services. Statistics reveal that 10.3% of LGBTI people have been refused employment or denied a promotion based on their sexuality.<sup>114</sup> Another study found that 52% of gay and lesbian people suffered discrimination in their current employment because of their sexual orientation.<sup>115</sup> Discrimination on the basis of sexual orientation and gender identity also has a significant impact on the mental health and wellbeing of LGBTI people – it is estimated that suicide attempts by gay, lesbian and bisexual people are between 3.5 to 14 times higher than that of the heterosexual population.<sup>116</sup>

A large number of participants in the Commission consultation argued that the introduction of protection at the Commonwealth level would lead to cultural change in Australia by sending a powerful message regarding equality. Participants commented on a number of other practical benefits from this legislation, including that it would provide a wider range of remedies for discrimination and lead to greater national consistency in anti-discrimination protections.

Many participants observed that there is gap in protection from discrimination as there is uncertainty about the extent to which Commonwealth agencies are bound by State and Territory anti-discrimination laws. The Law Council of Australia provided some examples of potential everyday situations in which unfair discrimination might occur against individuals who are in contact with Commonwealth agencies. For example, an employee in a

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- Working It Out, Homophobia in the Workplace, available at: [http://workingitout.org.au/homophobia\\_workplace.html](http://workingitout.org.au/homophobia_workplace.html), accessed 14 June 2012.
  - Suicide Prevention Australia, Position Statement: Suicide and self-harm among Gay, Lesbian, Bisexual and Transgender communities (2009), available at: <http://suicidepreventionaust.org/wp-content/uploads/2012/01/SPA-GayLesbian-PositionStatement.pdf>, accessed 14 June 2012, p. 3.

<sup>113</sup> Australian Human Rights Commission, 'Addressing sexual orientation and sex and/or gender identity discrimination - Consultation report' 2011.

<sup>114</sup> Gay & Lesbian Health Victoria and Australian Research Centre in Sex, Health & Society, Private lives: A report on the health and wellbeing of GLBT Australians (2006), available at: <http://www.glhv.org.au/report/private-lives-report>, accessed 14 June 2012, p. 51.

<sup>115</sup> Working It Out, Homophobia in the Workplace, available at: [http://workingitout.org.au/homophobia\\_workplace.html](http://workingitout.org.au/homophobia_workplace.html), accessed 14 June 2012.

<sup>116</sup> Suicide Prevention Australia, Position Statement: Suicide and self-harm among Gay, Lesbian, Bisexual and Transgender communities (2009), available at: <http://suicidepreventionaust.org/wp-content/uploads/2012/01/SPA-GayLesbian-PositionStatement.pdf>, accessed 14 June 2012, p. 3.

Commonwealth department who is discouraged by the Senior Executive from applying for promotion due to his transgender status.<sup>117</sup>

In 2010, the Government made an election commitment to cover sexual orientation and gender identity as protected attributes in the consolidated Act.

### ***Options for dealing with this in a consolidated act***

#### ***Option One: maintain the status quo***

##### ***Costs***

This approach would not address the current inconsistencies or lack of coverage by Commonwealth anti-discrimination law (with the exception of limited coverage under the FW Act). The law would remain fragmented, with States and Territories providing different coverage of discrimination on the basis of sexual orientation and gender identity, and only limited coverage at the Commonwealth level. Additionally, this would not reflect a best-practice model. Existing costs are likely to continue at current levels for businesses, with the majority of these due to compliance with State and Territory legislation, rather than any compliance costs associated with Commonwealth legislation.

Existing levels of discrimination are likely to continue, imposing costs on individuals with these attributes with the fragmented approach limited in its ability to promote attitudinal or systemic change. Some gaps in coverage (eg discrimination by Commonwealth agencies) would remain. In addition, the inconsistencies in coverage will see costs incurred by individuals in attempting to seek redress where discrimination has occurred remain at current levels. Such costs would include the need to seek legal advice to determine whether or not there is any protection from discriminatory behaviour, and under which regime (FW Act or State and Territory legislation) any action could be commenced.

At a broader level, the costs to society of not enabling full engagement with society by people based on their sexual orientation or gender identity will remain.

##### ***Benefits***

There would be no benefits for any stakeholders arising from this option.

#### ***Option Two: introduce the new attributes into the consolidated Act***

The other option is to introduce the new attributes of sexual orientation and gender identity in the consolidated Act.

##### ***Costs***

There would be some costs under this approach, although it is likely to be limited, as the consolidated Act would mirror existing State and Territory definitions of these attributes. Businesses which are already covered by State and Territory laws would only need to make very minimal changes to existing policies or conduct further staff training. However,

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<sup>117</sup> see op cit, n78, Section 6: The potential benefit of federal laws protecting from discrimination and harassment on the basis of sexual orientation and sex and/or gender identity, pp 17-20.



Commonwealth agencies would be required to undertake some amendments to update existing policies and procedures to reflect changes to the Commonwealth legislative requirements, with associated training of staff to increase awareness of the new responsibilities, although it is expected that such costs would be minimal and could be done as part of general workplace training. In particular, as any updates would be done at the same stage as updating policies to take account of general changes by adopting Options Two, Three or Four, no further costs would be incurred in this regard (see Section Five for further information on these costs).

However, if broader Option One was chosen (ie retaining four separate discrimination Acts) the introduction of new protections for sexual orientation and gender identity could involve updating policies and training which would involve costs in line with the costs outlined in Section Five (ie for updating policies - between \$1,000 and \$5,000 depending on the nature of the policies currently in place and for training - from \$2,000 to \$20,000, depending on the size and scope of such training). As the only change taking place would be to add detail on the coverage of two new protected attributes (sexual orientation and gender identity) which are already covered by State and Territory legislation, the costs of updating policies would be at the lower end of the scale.

In addition, Commonwealth agencies and businesses risk incurring additional costs associated with responding to any allegations of discrimination under the Commonwealth regime, potentially including legal costs associated with defending any claims, as noted in Section Five, these costs can exceed \$100,000 for complex cases, although for business, these costs could have already been incurred under State and Territory regimes. Each of the States and Territories cover sexual orientation as a protected attribute to some extent. Sexual orientation is generally defined as heterosexuality, homosexuality, lesbianism and bisexuality. Most States and Territories also cover 'gender identity' to include:

- males who identify as female
- females who identify as male, and
- intersex people (ie people born of indeterminate sex) who identify as male or female

The Commonwealth law will mirror these protections across all areas of public life.

### ***Benefits***

This option would lead to greater national consistency in anti-discrimination laws, and bridge gaps in the existing legislation (eg discrimination by Commonwealth agencies). This approach would reflect a move towards a best practice model in Commonwealth anti-discrimination legislation, which will assist in moving towards later harmonisation between Federal and State/Territory anti-discrimination law.

This option would also provide a wider range of remedies for people who are discriminated against on the basis of their sexual orientation or gender identity. Additionally, introducing these protections will send a powerful message regarding equality, and may lead to cultural change in the community.

Such change has the potential to result in some benefits for individuals with these attributes. In its consultation on *Addressing sexual orientation and sex and/or gender identity discrimination*, the Australian Human Rights Commission found that:

A large number of comments argued that the introduction of such protections would lead to cultural change in Australia by sending a powerful message regarding equality. Participants commented on a number of other practical benefits from this legislation, including that it would provide a wider range of remedies for discrimination and lead to greater national consistency in anti-discrimination protections.<sup>118</sup>

A particular focus is the potential benefits of cultural change, following from this symbolic statement by Government. For example, a reduction in the discrimination faced when purchasing goods and services will potentially lead to an increase in wellbeing.

[S]uch a law would provide an important federal symbolic statement about the unacceptable nature of such discrimination. This would contribute to ensuring that all persons are treated with dignity and respect regardless of their sexual orientation or sex/gender identity. This symbolism would, it is hoped, extend beyond the formal scope of the law to the community more generally and so affect the way in which lesbian, gay, bisexual, intersex and trans people are treated by other individuals on a day-to-day basis. The absence of this kind of legislation could be seen by some in the Australian community as suggesting the Commonwealth government does not take this kind of discrimination seriously, or worse, sees nothing wrong with such discrimination.<sup>119</sup>

## **Conclusion**

The Government considers that LGBTI people are extremely vulnerable to discrimination and recognises the message that prohibiting discrimination on the basis of sexual orientation and gender identity will send to these individuals and society as a whole. For this reason, the Government made an election commitment to introduce these grounds into anti-discrimination law. On the basis that any cost impact on organisations will be limited, primarily arising from updating existing policies, given the existing obligations to not discriminate on these grounds under State and Territory law, and in line with the Government's election commitment, Option Two is the preferred option.

## ***Religious organisations receiving Commonwealth funding***

In the context of introducing the new attributes of sexual orientation and gender identity, the question of how the current religious exemptions might apply arose. There is some anecdotal evidence that religious organisations discriminate on the grounds of sexual orientation and gender identity (see further below) but this is not quantifiable.

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<sup>118</sup> Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination* (2011) at 17, available at [http://www.humanrights.gov.au/human\\_rights/lgbti/lgbticonsult/report/index.html](http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/report/index.html), accessed 18 July 2012.

<sup>119</sup> Victorian Bar Association comment to Australian Human Rights Commission, *op cit* n 78, p17.

During the consultation phase, the Government stated that it did not propose to change religious exemptions, except for considering how they may apply to discrimination on the grounds of sexual orientation or gender identity. In considering how the exemptions should apply, a particular example which arose was the treatment of same-sex couples in aged care, particularly where those aged care services are provided with Commonwealth funding. In addition, some stakeholders submitted that the religious exemptions should not apply to *any* services for which public funding is provided.

The question therefore is whether religious organisations that provide services with Commonwealth funding should be permitted to discriminate in their provision of those services, noting that non-religious organisations in identical circumstances are not permitted to discriminate.

Exemptions for religious organisations are only currently available on the grounds protected under the ADA and the SDA. Both Acts contain a general exemption for any acts or practices of a body established for religious purposes, that:

- conform to the doctrines, tenets or beliefs of the relevant religion, or
- are necessary to avoid injury to the religious sensitivities of adherents of that religion.

The SDA also includes exemptions for a number of specific activities such as the ordination or appointment of priests and educational institutions established for religious purposes in relation to the employment of staff and the provision of education and training.

It is appropriate to consider the issue of whether religious organisations receiving public funds to provide services to the community (for example, education and aged care facilities) should be able to discriminate, particularly in light of the Government's aged care reforms, which include maximising choice and respecting the needs of special needs groups, including LGBTI Australians, as well as the Government's broad reform agenda for the not-for-profit sector which includes improving transparency and accountability for organisations receiving taxpayer funding. This is an issue of concern that was raised in many submissions and is a contentious issue.

Religious organisations that receive Commonwealth funding primarily operate in the community and education sectors, and are particularly prevalent in the operation of school and aged care facilities.

Consultations suggested that while there does not appear to be wide-spread discriminatory behaviour generally, religious providers discriminate in the provision of services to LGBTI people. In its submission the National LGBTI Health Alliance noted one case, in December 2011, where the daughter of a same sex couple was refused entry to a religious primary school in far western NSW because her parents were in a same-sex relationship.<sup>120</sup>

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<sup>120</sup> National LGBTI Health Alliance, *Submission to the Attorney-General's Department on the Consolidation of Commonwealth Anti-discrimination Laws*, February 2012, available at: <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/Consolidation%20-%20Discussion%20Paper%20-%20Submissions%20-%20159%20-%20National%20LGBTI%20Health%20Alliance%20-%201%20February%202012.PDF> [accessed 17 July 2012], p9.

Stakeholders have reported that discrimination does occur in relation to access to aged care services. In the context of aged care, the Productivity Commission's 2011 inquiry into the provision of aged care notes:

the Commission received several submissions claiming that some GLBTI seniors face difficulty in having their needs and preferences recognised and that many face discrimination in service delivery. For example, Jo Harrison said:

'There is a growing body of evidence regarding the extent to which GLBTI elders are experiencing discrimination, or fear of discrimination, within an industry which remains unaware and uneducated as to their special needs and unique concerns'. (sub. 190, p. 4)

The GLBTI Retirement Association indicated:

'To date, clients' sexual orientation or gender identity remains largely invisible to service providers: an invisibility that impacts negatively on these clients' wellbeing, and is extremely relevant to the standard of care made available to this cohort. (sub. 57, p. 2)'.<sup>121</sup>

The National LGBTI Health Alliance also noted:

[that] many government-funded services are delivered by faith-based organisations, particularly in the health and aged care sectors. For example, nationally, the providers of residential [aged] care services are religious organisations (28.5%), private operators (27.9%), community-based providers (16.8%), charitable organisations (15.5%), local government (2.3%) and state government (9%).<sup>122</sup> Exemptions for such organisations from anti-discrimination legislation sends the message to LGBTI people that it is not safe for them to reveal their sex and/or gender identity, sexual orientation, or relationship status to *all* faith-based service providers, even if some of those organisations do not choose to discriminate.<sup>123</sup>

This causes significant distress for individuals, who are limited in accessing appropriate community services, potentially reducing their ability to access an appropriate level of service or care, or access services in their preferred locality.

### **Option One: maintain the status quo**

#### **Costs**

The costs of maintaining the status quo will impact mainly on individuals in same-sex partnerships who may continue to experience discrimination, such as in seeking aged care places at religious based aged care facilities or children of same-sex couples in seeking enrolment in a religious school.

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<sup>121</sup> Productivity Commission *Caring for Older Australians* Inquiry Report Vol 1, No 53, June 2011, p 254.

<sup>122</sup> AIHW, 2009b. Residential aged care in Australia 2007–08: A statistical overview: Canberra: AIHW. <http://www.aihw.gov.au/publications/age/age-58-10709/age-58-10709.pdf> [Accessed: 18/12/2011], p10.

<sup>123</sup> op cit, p8.

## **Benefits**

The benefits of retaining the status quo are that hospitals, aged care facilities and schools operated by religious organisations and in receipt of Commonwealth funding will not have to change their practices and will therefore not incur costs associated with amending existing policies.

### **Option Two: exemptions do not apply to religious organisations providing aged care services with Commonwealth funding**

Under this option, the consolidated Act will continue to contain an exemption for religious organisations for conduct which conforms to the doctrines, tenets or beliefs of that religion, or is necessary to avoid injury to the religious susceptibilities of adherents of that religion. This would extend across all attributes (to the extent that this conforms to such beliefs).

However, where a religious organisation is in receipt of Commonwealth funding to provide aged care services, the exemption would not apply. This will better recognise the rights to freedom of religion and freedom from discrimination and will provide greater accountability and transparency for the use of Commonwealth funding for aged care services. For provision of services without Commonwealth money, there will be no changes to the status quo.

A religious organisation that receives Commonwealth funding to provide aged care services will no longer be able to discriminate and refuse to offer services to an individual based on the individual's attributes, such as sexual orientation. In practice, however, such an organisation will still be legitimately able to give priority of access to individuals of the same religion (that is, discrimination on the basis of a person's religion is not unlawful). In addition, this approach will not affect other general exceptions from anti-discrimination law, such as special measures (for example, an aged care provider that gives priority to specific vulnerable groups).

## **Costs**

This approach would only affect religious organisations which provide aged care services with Commonwealth funding and which currently discriminate in the provision of those services.

The proposed changes would not affect the ability of religious organisations from discriminating on the basis of religion in the provision of aged care services. This is because the Act generally does not prohibit discrimination on the basis of a person's religion in the provision of services.

There are currently broad religious exemptions in the State and Territory anti-discrimination regimes, aside from Tasmania. Accordingly, the proposed change will impact on any religious organisations that provide aged care services with Commonwealth funding, other than those in Tasmania (where the current religious exemptions are already very narrow). The main cost for such providers would be in relation to updating policies and conducting staff education and training to enable relevant practices to change. In this context, it is appropriate to note that the Government is providing \$2.5 million as part of the *Living Longer*

*Living Better* aged care reform package to support older people from the LGBTI community by delivering specific sensitivity training for people who work in aged care.

Quantifying the costs of updating policies and changing practices is difficult as the number of aged-care providers who currently have overtly discriminatory practices is unknown. For those organisations that do currently exercise the use of the exemptions provided under anti-discrimination laws, there may be some minimal cost impact to change their policies and practices.

It is important to note that religious exemptions are included in anti-discrimination law to recognise the often competing rights of freedom of religion and freedom from discrimination. It is not due to the cost impact on religious organisations. These reforms will not impose any costs or burden on religious organisations that are not already in place for any other non-religious organisation providing the same aged care services, including other not-for-profit organisations.

### **Benefits**

This option would ensure people are not discriminated against in the receipt of aged care paid for, at least in part, by Commonwealth funding. This is expected to particularly benefit older LGBTI people. They are likely to have a greater choice of services, which may be of benefit through convenience of location, quality of services or lower prices. In its submission to the Productivity Commission's Inquiry into Aged Care 2010, Gay and Lesbian Health Victoria noted that:

[a] number of studies have shown that older GLBTI people may be subject to increased control and paternalism and to heterosexist attitudes from service providers, family members and other clients that reduce their quality of care and everyday freedoms. They may also be desexualized and their opportunities for having intimate, caring relationships, including sexual relationships, severely compromised. Furthermore, they may lose their connection to GLBTI community and support networks and become invisible in a predominantly heterosexual, if not heterosexist, care context.<sup>124</sup>

No longer allowing religious organisations to discriminate in this area will assist in changing attitudes in the community and provide long-term benefits to LGBTI individuals. For example, improved wellbeing and emotional support if LGBTI people are able to move into aged care facilities together and live as a same-sex couple.

### **Option Three: exemptions do not apply to religious organisations providing any services with Commonwealth funding, but permit discrimination in employment (if registered)**

Under this option, as in Option Two, the consolidated Act would continue to contain an exemption for religious organisations for conduct which conforms to the doctrines, tenets or beliefs of that religion, or is necessary to avoid injury to the religious susceptibilities of

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<sup>124</sup> Gay and Lesbian Health Victoria, 'Productivity Commission's Inquiry into Aged Care 2010', *Submission regarding the needs of gay, lesbian, bisexual, transgender and intersex (GLBTI) people*, p3.

adherents of that religion. This would extend across all attributes (to the extent that this conforms to such beliefs).

However, as in Option Two, where a religious organisation is in receipt of Commonwealth funding there would be some limitations on this exemption. Option Three would extend beyond Option Two, however, and apply to all religious organisations receiving Commonwealth funding to provide services, including schools and hospitals. Again, this would better balance the rights to freedom of religion and freedom from discrimination and would provide greater accountability and transparency for the use of Commonwealth funding. For provision of services without Commonwealth money, there would be no changes to the status quo.

The exemptions would not permit religious organisations in receipt of Commonwealth funding to discriminate in the provision of services, including education or aged care services. Religious organisations in receipt of Commonwealth funding would continue to be able to discriminate in making employment decisions, once they have registered with the Commission the doctrines and tenets of the religion, or the religious susceptibilities which require such conduct. Registration would be as of right – that is, it would not involve any merit assessment by the Commission as to whether the discrimination is permissible or not. This recognises that organisations should be able to employ people who share their ethos.

This means that where a religious organisation wishes to discriminate based on an individual's attributes for employment related decisions, this could still occur as long as the organisation (or its lead organisation or association) has registered the doctrines and tenets of the religion with the Commission. A religious organisation that receives Commonwealth funding would no longer be able to discriminate and refuse to offer services (such as aged care or educational services) to an individual based on the individual's attributes, such as sexual orientation. In practice, however, such an organisation would still be legitimately able to give priority of access to individuals of the same religion (that is, discrimination on the basis of a person's religion is not unlawful). In addition, this approach would not affect other general exceptions from anti-discrimination law, such as special measures (for example, a religious organisation which operates a women's shelter is still permitted to exclude men, as any other operator of such a shelter would be).

### **Costs**

This approach would have most effect on religious organisations which provide the following types of services:

- Hospitals
- Aged care facilities
- Schools

This approach would only apply to discrimination. It would not affect other issues relating to religious doctrine, such as the position of religious-operated hospitals on the termination of pregnancies. This is not a matter for discrimination law as it is not a service which is provided to any person, therefore there would be no unfavourable treatment because of a person's attributes, as no individual would be able to access such a service.

As with Option Two, this option would not affect the ability of religious schools or other service providers from discriminating on the basis of religion in the provision of education or other services. This is because the Act generally does not prohibit discrimination on the basis of a person's religion in the provision of services, this approach does not impact the ability of religious organisations to preference services to people who share their religion.

Again as with Option Two, there are currently broad religious exemptions in the State and Territory anti-discrimination regimes, aside from Tasmania. Accordingly, this option would impact on any religious organisations in receipt of Commonwealth funding, including aged care, health care and education providers, other than those in Tasmania (where the current religious exemptions are already very narrow). The main cost for such providers would be in relation to updating policies and conducting staff education and training to enable relevant practices to change.

Quantifying the costs of updating policies and changing practices is difficult as the number of schools, aged-care or other health care facilities who currently have overtly discriminatory practices is unknown. For those organisations that do currently exercise the use of the exemptions provided under anti-discrimination laws, there may be some minimal cost impact to change their policies and practices. There would be some costs associated in registering with the Commission, but, as most organisations would have existing policies outlining their position in relation to their doctrines, tenets and religious susceptibilities in place costs should be limited. Again, it is difficult to quantify the number of organisations who would choose to register with the Commission, as not all religious organisations discriminate in employment - those organisations which do not discriminate in their employment practices would have no additional obligations. Also, registration would not be required of each individual body - peak representative bodies (eg religious schools associations) would be able to undertake the registration process on behalf of individual organisations if all organisations in that association have the same policies and practices.

Under this option, although listing on the register would not involve merit assessment, there would be some costs imposed on the Commission in setting up and on-going administration of the register which will be absorbed. As the register would likely simply constitute a web page on the Commission's website, there would be negligible IT costs, although there will be some small staffing costs to upload the doctrines from religious organisations. Costs would be likely to peak in the first year after implementation. As noted earlier, the Commission was provided \$6.6 million over four years under Australia's Human Rights Framework ('the Framework') which could include some work related to implementing changes under a consolidated Act.

### **Benefits**

This option would ensure people are not discriminated against in the receipt of services paid for, at least in part, by Commonwealth funding. This is expected to particularly benefit older LGBTI people as well as LGBTI people in the education system. They are likely to have a greater choice of services, which may be of benefit through convenience of location, quality of services or lower prices.

No longer allowing religious organisations to discriminate in this area would assist in changing attitudes in the community and provide long-term benefits to LGBTI individuals.



Requiring religious organisations in receipt of Commonwealth funding to register their doctrines, tenets and religious susceptibilities with the Commission would benefit current and prospective employees by making the values and employment policies of the organisation clear. For example, if in registering their doctrines, tenets and religious susceptibilities with the Commission, a religious organisation makes its ethos and employment policies clear (eg, that all teachers at a particular religious school must be of a particular faith), it may provide greater accountability about how Commonwealth funding is used by ensuring that if an organisation wishes to discriminate in employment decisions, consistent with its doctrines, these are publicly available.

Such employment policies may already be made publically available, in which case, there would be no cost impact on that organisation. Including such policies on a central register may enhance overall transparency in the use of Commonwealth funding.

### **Conclusion**

As the extent to which religious organisations discriminate in the provision of services is unclear, it is not possible to be certain of the extent of benefits arising from these options. It is likely that the practical benefits will be limited by the nature of the underlying markets. Therefore, it is difficult to accurately weigh up the costs and benefits of any change. However, in light of the importance of ensuring non-discrimination in the aged care sector where funded by the Commonwealth, the fact that no religious organisation will have more onerous obligations than any other organisation providing the same services, and that the weight of evidence advocating for change related to the provision of aged care services over discrimination in other services or employment, Option Two is the preferred option.

### ***Equal opportunity in employment regime***

The AHRC Act permits complaints to be made alleging discrimination *in employment only* on a range of grounds in addition to those covered in the four discrimination Acts. This regime gives effect, in part, to our International Labour Organization (ILO) obligations.<sup>125</sup>

The Commission has the function of endeavouring, where appropriate, to effect a settlement of a matter which gives rise to a complaint under the equal opportunity in employment regime. If settlement is not achieved and the Commission is of the view that the act or practice constitutes equal opportunity in employment discrimination, the Commission reports to the Minister in relation to the inquiry. The Commission is empowered to make recommendations, including for payment of compensation, where it makes a finding of equal opportunity in employment discrimination. These recommendations are not, however, enforceable. Unlike unlawful discrimination matters, remedies are not available from the Federal Court and Federal Magistrates' Court.

The additional attributes covered under this regime that are also unlawful under anti-discrimination law<sup>126</sup> are:

- religion

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<sup>125</sup> See Schedule 1 to the AHRC Act

<sup>126</sup> 'Sexual preference' is included in the equal opportunity regime, but is separately addressed above in the section on sexual orientation.

- political opinion
- industrial activity
- social origin
- nationality
- criminal record, and
- medical record.

In the submissions on the Discussion Paper, human rights advocates, legal services, law councils and academics were generally supportive of the further strengthening of the protection of these attributes. Although the Commission may, after its inquiry, recommend that the applicant receive monetary compensation, an apology or another remedy, the Commission does not have the power to enforce these recommendations. Additionally, the Act does not provide a power for the applicant to seek to enforce the recommendations in court.

The following case demonstrates the ineffectiveness of the equal opportunity in employment regime. In *Mr CG v State of NSW (RailCorp NSW)*,<sup>127</sup> Mr CG was not offered employment at RailCorp despite being the selection panel's preferred candidate on the basis of his criminal record. The Commission found that RailCorp NSW had discriminated against Mr CG based on his criminal record, and recommended that he be paid compensation. However, RailCorp declined to pay any compensation to Mr CG, arguing that its decision not to offer Mr CG employment did not amount to discrimination. Both the Commission and Mr CG had no avenues available to enforce the recommendation. This mechanism promotes uncertainty and does not make it clear to respondents whether such conduct is permitted or not.

Some employers expressed concerns about an increase in regulatory burden and uncertainty in terms of compliance if protection for these attributes moves into the general anti-discrimination regime.

### ***Options for dealing with this in a consolidated act***

#### ***Option One: retain separate equal opportunity in employment complaints regime***

This option would essentially see the status quo remain. This would enable complaints to continue to be made where discrimination has occurred in work on the basis of religion, political opinion, industrial activity, social origin, nationality, criminal record and medical record, unless an exemption applies for the inherent requirements of the job or for religious belief. It would allow an individual to choose whether to pursue a claim under either the FW Act or under a separate anti-discrimination regime at the Commonwealth level, leaving this duplication of regimes at the Commonwealth level as well as duplication between State and Territory and Commonwealth regimes.

### **Costs**

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<sup>127</sup> [2012] AusHRC 48

The separate complaints process creates confusion and leads to significant regulatory overlap. Permitting complaints in relation to conduct which is not unlawful represents poorly designed regulation. Discrimination on these grounds cannot result in a binding remedy from a court, but employers still face the cost of dealing with such complaints when they arise. Retaining this function means retaining these costs.

The unenforceable nature of this regime means that its value in bringing about systemic change is limited. Retaining it means that the Commission would continue to incur costs in dealing with complaints within a regime that provides ineffective remedies, representing an inefficient use of Government resources.

In addition, because such conduct is not unlawful (with the exception of discrimination based on religion, political opinion, industrial activity and social origin which are prohibited under the FW Act), individuals are more likely to continue to experience some level of discrimination.

### ***Benefits***

The only benefits of retaining the status quo are that there will be that there is no need for businesses or the Commission to update policies or change practices in dealing with complaints for these protected attributes.

There is little benefit for individuals in this regime. While the Commission can seek to reach a conciliated outcome the absence of a binding remedy gives false expectations to complainants.

### ***Option Two: remove equal opportunity in employment complaints regime***

The second option is to remove this separate complaints stream. It follows from this that a decision must be made about whether to make discrimination on any of these grounds unlawful in work (to mirror the operation of the existing regime and to continue to give effect to Australia's ILO obligations).

For this purpose, the list of attributes can be divided into two categories – those that are also covered by the FW Act (religion, political opinion, industrial activity and social origin) and those that are not (nationality, criminal record and medical record).

### ***Religion, political opinion, industrial activity and social origin***

#### ***Costs***

Religion, political opinion, industrial activity and social origin are covered by the FW Act. Accordingly, there would be minimal costs to organisations in mirroring these provisions in the unlawful discrimination regime. In 2010-2011, the Commission received a small number of complaints relating to these attributes – 14 complaints on the basis of religion, 3 complaints on the basis of political opinion and 12 complaints on the basis of industrial activity. However, it is important to note that this would lead to ongoing duplication at the Commonwealth level (with coverage under both the FW Act and the anti-discrimination regime), as well as concurrent protection being provided at the State and Territory level. This would involve costs to businesses to ensure that all legislative requirements are met, the complexities are understood and policies and procedures are updated. Costs may also

be incurred by individuals in seeking legal advice as to which regime is the most appropriate to commence any action.

### **Benefits**

As outlined above, the separate function creates confusion and leads to significant regulatory overlap. Permitting complaints in relation to conduct which is not unlawful represents poorly designed regulation. This complaints scheme operates with different definitions, coverage and exceptions to that applying to unlawful discrimination. Removing this regulatory confusion and providing clear obligations not to discriminate will benefit businesses and other duty-holders by replacing the current uncertainty that stems from the regime where complaints can be made but conduct is not unlawful.

Providing clear remedies will also benefit individuals, who will be able to take binding action if they consider they have been discriminated against. Aligning the unlawful discrimination regime with the FW Act and State and Territory regimes will allow for clearer understanding of obligations and prepare the groundwork for further harmonisation in the future. However, the full benefits of a single regulatory regime will not be realised as there will still be duplication between Commonwealth legislation.

### **Nationality, medical record and criminal record**

The remaining three attributes (nationality, criminal record and medical record) are not covered by the FW Act regime but by including them in the existing scheme Australia has acknowledged they are part of Australia's ILO obligations

Nationality or citizenship is already covered by all State and Territory anti-discrimination Acts and therefore the inclusion of this ground in the unlawful discrimination regime will have minimal impact. It should be noted that Australian courts have distinguished 'national origin' from nationality, citizenship and country of residence. 'National origin' is seen as an indicator of race and is expressly covered by the RDA<sup>128</sup> while, on the other hand, nationality or citizenship can be a transient legal status.<sup>129</sup>

Prohibiting discrimination on the basis of medical record should not lead to any increase in complaints as generally this will fall into the category of discrimination on the ground of disability, apart from minor issues such as medical records relating to relationship counselling. In 2010-11 the Commission received 68 complaints on the basis of criminal record. Submissions from the business sector expressed concerns about the ability to use criminal record to establish 'general character' (this would allow criminal record to be used in a broader manner than strictly relevance to the job). Employer advocates have requested clear guidelines on what is considered 'relevant/irrelevant' in the event that the protection of this attribute is further strengthened.

Submissions on the Discussion Paper emphasised the impacts of this form of discrimination on already marginalised groups (eg people with disability, young people, lower socio-economic groups and Indigenous people). It was noted that without adequate protection on

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<sup>128</sup> RDA sections 9 and 10

<sup>129</sup> *Macabenta v Minister of State for Immigration & Multicultural Affairs* (1998) 90 FCR 202, at 212.

this basis the rehabilitation objectives of the criminal justice system could be undermined (particularly given the importance of employment in reintegration).<sup>130</sup>

### **Costs**

For both nationality and medical record, there is little evidence to show that discriminatory practices occur so shifting the grounds from the equal opportunity in employment regime to the unlawful discrimination regime should have little practical impact. In 2010-11 the Commission received no complaints on either of those grounds.

However, introducing the new ground of criminal record into the unlawful discrimination regime when it is not covered elsewhere (by the FW Act or the majority of State and Territory regimes<sup>131</sup>) could impose significant costs on businesses in preparing new guidelines and coming to terms with understanding the coverage of what is a relevant or irrelevant criminal record. There may be a substantial number of complaints as individuals allege discrimination within a regime that now provides extra remedies, including the avenue of appeal to the courts if conciliation is unsuccessful (as noted in Section Five, these costs can exceed \$100,000 for complex cases).

### **Benefits**

Individuals with the protected attributes will benefit from having more remedies available under the discrimination law stream. However, in practice, the primary benefits are largely symbolic leading to attitudinal change. This will ultimately benefit society, given the nature and role of discrimination law as described in Section Two.

Prohibiting discrimination based on a person's nationality or citizenship will assist in further harmonisation of the Commonwealth and State and Territory anti-discrimination regimes and in fulfilling Australia's ILO obligations. As mentioned above, claims on discrimination on the basis of 'medical record' would for the most part fall within a disability discrimination complaint.

As noted above, there would be benefits to individuals with a criminal record through assisting with the rehabilitation and reintegration process.

### **Conclusion**

Better aligning the attributes already covered by the FW Act and the anti-discrimination regime (by covering religion, political opinion, industrial activity and social origin) would provide net benefits by removing a poorly designed regulatory scheme and improving consistency between anti-discrimination regimes. Similarly the costs to business of introducing nationality and medical record as protected attributes would be minimal as to do so would not introduce any substantially new obligations for business.

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<sup>130</sup> see for example Dr Bronwyn Naylor, Law Faculty, Monash University and Dr Georgina Heydon, Global Studies, Social Sciences and Planning, RMIT, Submission to Consolidation of Anti-Discrimination Laws Discussion Paper, 2012.

<sup>131</sup> Criminal record is covered in the NT and Tas

However, the costs to business and other duty-holders of implementing the introduction of criminal record into the unlawful discrimination regime would likely outweigh the benefits. There may be more appropriate models for dealing with this important issue which will not impose significant costs (such as existing privacy and spent convictions schemes).

Therefore, Option Two (removing the separate complaint regime) is the preferred option, involving removing the equal opportunity in employment regime and prohibiting discrimination on all the attributes currently covered in the equal opportunity in employment regime, with the exception of criminal record, in relation to work only.

### ***Addressing the issue of concurrent regimes***

There are also a number of more process type issues relating to the operation of the regime in general. These include the interaction between the anti-discrimination regime and the protections that exist under the FW Act against discrimination in the workplace. In addition, consideration needs to be given to the interaction between the Commonwealth regime and the regimes operating at the State and Territory level. Submissions raised the need to work towards harmonising these regimes.

The main area of overlap with the FW Act and the anti-discrimination regime is in relation to discrimination in employment. The two regimes have different complaints handling processes. The FW Act creates a compliance and enforcement regime and establishes several bodies to administer the Act, including Fair Work Australia and the Office of the Fair Work Ombudsman. Complaints under the proposed Commonwealth anti-discrimination regime are heard by the Commission. While the proposed reform will see changes to the burden of proof (see Section Five) to achieve greater consistency (with the individual having to establish there is a case to answer, and the business then bearing the burden of proving that discrimination did not occur), there will still be an option for pursuing action under either regime.

In addition, the overlap with State and Territory regimes will continue to apply.

### ***Fair Work Act***

While the consolidation project was established to consolidate the five anti-discrimination Acts – the RDA, SDA, DDA, ADA and the AHRC Act – into a single law, recognising that there is also a regime governing discrimination in the workplace in the FW Act, the discussion paper on the consolidation project sought views on whether the consolidated Act should make any improvements to the existing mechanisms in anti-discrimination law for managing the interaction with the FW Act.<sup>132</sup>

A number of submissions addressed this issue, with a range of views provided. A number of submissions recommended the creation of a single workplace discrimination regime at the Commonwealth level,<sup>133</sup> while others saw the benefits in the Commission and Fair work

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<sup>132</sup> *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 22 September 2011, pp55-56 (available at: [www.ag.gov.au/antidiscrimination](http://www.ag.gov.au/antidiscrimination)).

<sup>133</sup> See, for example, submissions from ACCI (op cit n 23) and Ai group (*Submission in response to the Discussion Paper: Consolidation of Commonwealth Anti-Discrimination Laws* (1 February 2012), available at: [www.ag.gov.au/antidiscrimination](http://www.ag.gov.au/antidiscrimination)).

Australian having concurrent jurisdiction, but with greater harmonisation of the two regimes.<sup>134</sup>

The Government recognises the overlap between the two regimes and these calls for a single regime (or, if two regimes, consistency between the two regimes). Elements of Option Three (such as introducing a shifting burden of proof) and the above proposal in relation to the equal opportunity in employment grounds (introducing as protected attributes those grounds covered by the FW Act) are steps towards aligning the regimes more closely.

Options to deal with this overlap at the Commonwealth level could include:

- Option 1 – a single workplace discrimination regime, located in the anti-discrimination Act
  - This option would provide a single complaints scheme at Commonwealth level for work-related discrimination complaints and reduce costs for businesses and individuals, as all obligations will sit within one regulatory regime.
  - It would involve minimal transitional costs to businesses and to the Commonwealth (as functions would move between Fair Work Australia (FWA) and the Commission).
- Option 2 – a single workplace discrimination regime, located in the Fair Work framework
  - As with Option 1, this would provide a single complaints scheme at Commonwealth level for work-related discrimination complaints and reduce costs for businesses and individuals, as all obligations will sit within one regulatory regime.
  - As with Option 1, this would involve minimal transitional costs to businesses and to the Commonwealth.
- Option 3 – a single set of obligations, with concurrent jurisdiction for both FWA and the Commission
  - This option would reduce costs for businesses as there would be a single set of obligations. It would not involve transitional costs to the Commonwealth.
  - While it would maintain existing duplication of complaints handling, identical complaints processes would reduce confusion. The option would also enable complaints with multiple components to be heard in a single jurisdiction (for example, complaints alleging both discrimination and unlawful termination could be made to FWA while a complaint alleging discrimination in employment and education could be made to the Commission), leading to

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<sup>134</sup> See, for example, See, for example, submissions from the Law Council of Australia and the National Association of Community Legal Centres in response the Discussion Paper: Consolidation of Commonwealth Anti-Discrimination Laws (both available at: [www.ag.gov.au/antidiscrimination](http://www.ag.gov.au/antidiscrimination)).

less litigation costs for both individuals and businesses than if two separate complaints were required.

- It could involve a risk of future confusion if changes were made to one regime and not the other.

In light of the calls from stakeholders for further holistic consideration of how workplace discrimination should be regulated at the Commonwealth level, the Government will consider whether these or other options for reform should be considered further. Any further work on this issue would take account of the submissions to this project and the outcomes of the review of the FW Act. It would also include detailed regulatory analysis of the full range of options for improving the regulation of workplace discrimination at the Commonwealth level.

### ***Interaction with State and Territory anti-discrimination regimes***

The Government also acknowledges calls from stakeholders to have a single national regime relating to discrimination. The Government has already committed to retaining the concurrent operation of State and Territory regimes as part of this project.

The Australian Government strongly supports cross-jurisdictional efforts, through the Standing Council on Law and Justice (the ministerial council of Commonwealth, State and Territory Attorneys-General), to harmonise anti-discrimination regimes.



## SECTION SEVEN: SUMMARY AND CONCLUSION

Four options to consolidate anti-discrimination law are considered:

Option One: retain the status quo

Option Two: an omnibus act that addresses significant inconsistencies with no broader reform

Option Three: a simplified act with increased use of voluntary sub-legislative guidance

Option Four: a proactive anti-discrimination regime involving a significant expansion of the framework, the imposition of positive duties and specific obligations and a formal regulator.

Considering the costs and benefits set out above and in view of the Government's objectives of:

- continuing to work towards a discrimination-free culture and provide equality of opportunity to participate and contribute to the social, economic and cultural life of the community, and
- creating a legislative regime that supports the broad objective by adopting laws that are as clear as possible so that businesses and other stakeholders understand their obligations and can meet these obligations with assistance where necessary,

it is recommended that Option Three be endorsed.

As noted above, precise quantification of costs and benefits of the options is not currently possible. This is primarily due to the voluntary nature and 'negative' obligations (that is, the obligations not to discriminate) of anti-discrimination law which uses a complaint-based enforcement model. Some quantification of the costs of Option Four is possible as this imposes positive obligations.

Option One will have no impact on business or duty-holders in that they will not be required to update existing human resources policies or implement training to understand new obligations, however it will not address the problems of legal complexity identified in Section Two of the RIS and will not assist in moving towards a more discrimination-free culture.

Similarly, Option Two will have little impact on business or duty-holders as there will be little change to the law, apart from removing glaring inconsistencies. Again, this will do little to address the problems identified in Option Two, but will itself involve minor costs to update policies and practices as necessary. Section Five includes analysis of these costs, which are expected to be at higher end of between \$1,000 and \$5,000 for businesses that have policies which require updating and between \$2,000 and \$20,000 for businesses which wish to undertake staff training on the changes.

Option Three is the preferred option. This option will consolidate the existing five pieces of legislation that comprise anti-discrimination law in Australia by adopting the highest current standard across the Acts to address gaps and inconsistent approaches and by making the

law clearer and more efficient, following the broad principles of anti-discrimination law. This approach is supported through a package of business assistance mechanisms and streamlining the complaints process and other function of the Australian Human Rights Commission.

Option Three provides a balance of costs to business and other duty-holders (such as through updating policies and practices) and benefits to the individuals and wider community that flow from a discrimination-free culture. The costs of updating policies and staff training are expected to be lower than Option Two, given the simpler approach that forms part of this option, and therefore at the lower end of the ranges listed above for Option Two. The option does not impose new positive obligations and, generally speaking, applies incremental shifts and changes in existing definitions which while resulting in increased business costs to implement the law, in light of existing obligations under the FW Act and State and Territory anti-discrimination law will be less than completely 'new' obligations. By removing inconsistencies between these regimes, this option also lays the groundwork for further harmonisation in the future.

In terms of benefits to individuals and the society in general, setting out clearer obligations through the law (including a clear statement of obligations in the legislation) and introducing new co-regulatory mechanisms will encourage a shift away from redressing wrongs to avoiding discrimination in the first place. Other aspects of Option Three such as the shifting burden of proof and introducing a no-cost jurisdiction will improve access to justice for individuals in cases that cannot be resolved by conciliation. If enforcement action *is* needed, clearer laws and a streamlined complaints process will improve access to justice, both by aiding parties' understanding of the issues and reducing complexity, and therefore the time, of litigation. Taken in combination, Option Three provides net benefits that will allow for enhanced participatory opportunities which, in turn, will lead to productivity benefits as outlined in Section Two and increased benefits of 'social capital' which is increasingly recognised as influencing economic wellbeing.<sup>135</sup>

Option Four meets the Government's objectives of moving towards a more discrimination-free culture. It is generally described as the 'fourth' generation of anti-discrimination law. It moves away from a complaint-based model to one which imposes positive obligations to redress inequality. The RIS shows that to implement this model in Australia would impose significant costs across many sectors of society (business, the not-for-profit sector, the Government and the Commission). At this time, the costs of this Option must be assessed as outweighing the benefits.

In addition, the following additional issues were considered:

- the addition of sexual orientation and gender identity as protected attributes
- the ability of religious organisations that receive Commonwealth funding to provide aged care services to continue to claim an exemption from anti-discrimination obligations, and
- the addition of further protected attributes in the context of work relating to religion, political opinion, industrial activity, social origin, nationality, criminal record and medical record.

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<sup>135</sup> op cit, n12, p125.

For each of these issues, two options were considered: keeping the status quo or making the proposed change. In the case of new attributes, the benefits, while often largely symbolic, outweighed the cost impact of the changes, as for the most part they did not introduce new obligations beyond other existing laws. However, this was not the case for criminal record, where the unclear impact and cost of the changes did not outweigh the benefits of introducing this new attribute.

In the context of changes to the religious exemptions for the provision of aged care with Commonwealth funding, it was unclear what the cost impact would be. However, as noted above, the fact that no religious organisation will have more onerous obligations than any other organisation providing the same services, making the change to limit the exemptions is the preferred option.

Therefore, the preferred options for reform of the Commonwealth's anti-discrimination regime are as follows:

- a simplified act with increased use of voluntary sub-legislative guidance
- protection of the following additional attributes:
  - gender identity and sexual orientation
  - religion, political opinion, industrial activity, social origin, nationality and medical record (in relation to work only), and
- to limit the operation of the religious exemptions for organisations in receipt of Commonwealth funding to provide aged care services to the community.

## **SECTION EIGHT: CONSULTATION STATEMENT**

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On 22 September 2011, the Australian Government released a discussion paper to guide public consultation on the consolidation of Commonwealth anti-discrimination laws and undertook a four month consultation process. The consultation was aimed at:

- developing consensus around the need for simplified and consolidated Commonwealth anti-discrimination legislation
- ensuring effective engagement with key stakeholders
- promoting policy solutions and testing support for specific proposals and options for reform, and
- minimising the risk of unintended consequences from policy changes and legislative amendments.

The discussion paper raised a number of questions on the existing federal anti-discrimination framework, including a number of technical issues on the operation of the legislation. The Attorney-General's Department received 240 written submissions from a wide range of stakeholders, including individuals, academics, human rights advocates, legal practitioners, business groups, industry bodies, religious organisations and other non-government organisations. The Department, along with the Department of Finance and Deregulation, also held three stakeholder forums and separately met directly with a number of key stakeholders.

The Department has prepared a full report on the outcomes of the consultation, which is available on the Departments website at: <[www.ag.gov.au/antidiscrimination](http://www.ag.gov.au/antidiscrimination)>. Copies of public submissions received are also available from that site. The Executive Summary to the report is summarised below.

### ***Key issues***

The majority of stakeholders, across all sectors, supported the need for a consolidated Act, with most characterising the existing Commonwealth anti-discrimination regime as inconsistent and overly complex. A number of key issues identified during the consultation are discussed below.

### ***Objects of anti-discrimination law***

Although an objects clause was not specifically raised in the discussion paper, a number of stakeholders commented on this issue. Stakeholders argued that the consolidated Act should include a detailed objects clause, reflecting the aims of promoting substantive equality and eliminating discrimination. It was recommended that the objects clause also include reference to Australia's international obligations, removing systemic discrimination and that the attainment of substantive equality may require special measures.

## ***General approach to anti-discrimination law***

The majority of stakeholders expressed preference for the consolidated Act to contain simple and flexible provisions as opposed to detailed and complex provisions. For example, most stakeholders were supportive of the inclusion of a general limitations clause in the consolidated Act.

## ***Meaning of discrimination***

Most stakeholders agreed that tests for discrimination could be simplified, including by removing the comparator elements from direct discrimination. Some business groups noted such a change could give rise to uncertainty.

## ***Burden of proof***

How to allocate the burden of proof (that is, which of the parties to a dispute (the person claiming discrimination has occurred or the person who is alleged to have discriminated) was a very divisive issue. The current burden of proof, which sits wholly with the person claiming discrimination, was identified by most human rights groups, legal practitioners and academics as creating serious difficulties for complainants in establishing a causal link between their protected attribute and the respondent's actions (as these facts are predominantly in the knowledge of the respondent). For this reason, those groups supported a shifting burden model, where once the complainant has led sufficient evidence to conclude that the action was taken for a discriminatory reason, the person alleged to have discriminated must show why it was not for that reason. Most business groups were strongly opposed to any change in the burden of proof, voicing particular opposition to the reverse burden of proof model currently utilised in the FW Act.

## ***Protected attributes***

Generally, most stakeholders supported the inclusion of sexual orientation and gender identity as protected attributes in the consolidated Act. Human rights stakeholders were in favour of a definition that maximised people's ability to self-identify, while business groups accepted the inclusion of these new attributes, but noted the importance of guidance for duty-holders on their scope. Religious groups were divided on this issue – some accepted these new attributes subject to exemptions to protect religious freedom, while others strongly opposed them.

Human rights organisations and legal practitioners strongly supported the inclusion of other attributes, such as domestic violence and criminal record. Business groups opposed these on the basis they were uncertain and imposed significant new regulatory burden.

## ***Exemptions for religious organisations***

Stakeholders were divided on this issue. Legal practitioners, human rights and business groups were in favour of abolishing religious exemptions, arguing that protection under the new attributes of gender identity and sexual orientation would be severely compromised if religious exemptions were to apply. A number of stakeholders argued that religious

exemptions should not be available when an organisation is carrying out functions using public money, particularly highlighting aged care as an area where discrimination occurs.

Conversely, religious groups were strongly opposed to any reduction in religious exemptions, arguing that broad exemptions were necessary to protect freedom of religion.

### ***Access to justice issues***

Human rights groups and legal practitioners argued that the current system creates significant barriers to access to justice as many complainants are reluctant to pursue meritorious complaints due to the risk of an adverse costs order. It was recommended that the Federal Court and Federal Magistrates Court should become no-costs jurisdictions for discrimination complaints, with an exception allowing for costs in vexatious or frivolous proceedings.

Legal practitioners, human rights and disability groups strongly supported amendments to allow organisations and advocacy groups to bring complaints to the Commission and courts in their own right in order to address systemic discrimination. Business groups strongly resisted such a move, concerned that it would lead to a rise in litigation.

Most business stakeholders and a number of religious organisations opposed any changes to the current costs or standing arrangements, arguing that any changes may lead to an increase in unmeritorious complaints.

### ***Role and functions of the Australian Human Rights Commission***

Human rights groups and legal practitioners recommended that the Commission and/or specialist Commissioners be given the power to investigate conduct that appears to be unlawful under discrimination law, as well as the power to commence court proceedings, without having to rely on an individual complaint, as a means to address systemic discrimination. Option 4 incorporates these powers. Many stakeholders specifically argued that the Commission required more resources for these additional functions in the consolidated Act.

Business groups generally opposed any extension in the Commission's role, arguing that enabling the Commission to initiate investigations and bring actions in its own right would conflict with the Commission's function as an impartial conciliator. These concerns are reflected in Section Five, in the impact analysis for Option Four.

### ***Interaction between the consolidated law and other anti-discrimination regimes***

The majority of stakeholders supported a single anti-discrimination law regime at the Commonwealth level, or at the least consistency between the consolidated Act and the FW Act. However, there were differing views about which standard of protection should be adopted across a single regime. As noted above in Section Seven, as changes to the FW Act are outside the scope of this project, further consideration of this issue (including more specific consultation on options for reform) will occur at a later date.

A number of business stakeholders also supported a single national regime, with the Commonwealth law displacing State and Territory anti-discrimination laws, rather than the current approach, which permits concurrent operation. The issues of duplication between Commonwealth and State and Territory laws has not been addressed in this consolidation project, but may be the subject of further work by the Standing Council on Law and Justice.

### ***Issues not further considered as part of the project***

There were a number of other reforms suggested during the consultation process which the Australian Government does not propose to implement as part of this project, given its largely deregulatory focus. As no changes are proposed to the existing arrangements, there has been no further detailed analysis of these issues. These issues include:

- introduction of other new attributes, such as domestic violence, criminal record and homelessness
- any changes to the vilification provisions (either through extension to other attributes or amendments to the test)
- extension of the duty to make reasonable adjustments to other attributes
- any extension to the 'equality before the law' provisions beyond race
- applying the discrimination framework to domestic workers, and
- other significant changes to the complaints framework, such as permitting direct access to the court, and/or introducing arbitration as a voluntary option while proceedings are before the Commission.

The Government is not pursuing these reforms for a number of reasons, including:

- the case for reform was not adequately made or did not receive sufficiently broad support
- there has not been sufficient consultation on the proposals to understand the impact or possible unintended consequences of any changes
- the proposals are not considered to benefit the operation of anti-discrimination law.

## **SECTION NINE: IMPLEMENTATION**

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Draft legislation to implement the proposed approach will be the subject of consultation during 2012. It is proposed to include a lead time of between 6 and 12 months between passage of the legislation and the new regime commencing to provide time for businesses and other duty holders to familiarise themselves with the new regime. This will also provide the opportunity for organisations to update policies and practices to comply with the changed arrangements.

The Government will ensure organisations are aware of the changed proposal, by working with the Commission to develop and update relevant guidance material.

It is expected there will be further opportunity to input prior to any changes being made to Commonwealth, State or Territory anti-discrimination law in the context of cross-jurisdictional work to harmonise these regimes.



## Coverage of attributes across anti-discrimination jurisdictions

	<i>Cth</i> <sup>136</sup>	<i>AHRC</i> <sup>137</sup>	<i>FWA</i> <sup>138</sup>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
<i>age</i>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>disability</i>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>having carers, guide dogs etc</i>	Yes	No	No	Yes *	Yes *	Yes	Yes *	Yes *	Yes *	Yes	Yes
<i>race</i>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>colour</i>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>nationality</i>	No	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>national origin</i>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>ethnic origin</i>	Yes	No	No	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
<i>social origin</i>	No	Yes	Yes	No	No	No	No	No	No	No	No
<i>descent or ancestry</i>	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>ethno-religious origin</i>	No	No	No	Yes	No	No	No	No	Yes	No	No
<i>immigrant status</i>	Yes <sup>139</sup>	No	No	No	No	No	No	No	Yes	No	Yes

<sup>136</sup> ADA, DDA, RDA and SDA.

<sup>137</sup> In relation to ILO equal opportunity in employment provisions.

<sup>138</sup> Only in relation to adverse action in employment provisions – see s 351 of FWA.

<sup>139</sup> Only in relation to ss 11-18 of RDA

\* Through the characteristic extension.

	<i>Cth</i> <sup>136</sup>	<i>AHRC</i> <sup>137</sup>	<i>FWA</i> <sup>138</sup>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
<i>sex</i>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>breastfeeding</i>	Yes	Yes <sup>140</sup>	Yes *	Yes *	Yes	Yes	Yes *	Yes *	Yes	Yes	Yes
<i>pregnancy</i>	Yes	Yes <sup>141</sup>	Yes	Yes <sup>142</sup>	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>marital status</i>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>same-sex relationship status</i>	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>family/carer responsibilities</i>	Yes <sup>143</sup>	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>sexual orientation</i>	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>transgender/gender identity</i>	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>religious belief or activity</i>	No	Yes	Yes	No <sup>144</sup>	Yes	Yes	Yes	No <sup>145</sup>	Yes	Yes	Yes
<i>not having a religious belief</i>	No	No	No	No	Yes	Yes	Yes	No	Yes	No	No
<i>political opinion or activity</i>	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<i>industrial activity</i>	No	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes	Yes

<sup>140</sup> Would be covered under sex.

<sup>141</sup> Would be covered under sex.

<sup>142</sup> Would be covered under sex.

<sup>143</sup> Only in relation to termination of employment.

<sup>144</sup> While ethno-religious origin is covered, this is unlikely to cover religions such as Islam or Christianity.

<sup>145</sup> SA only prohibits discrimination on ground of 'religious appearance or dress'.

	<i>Cth</i> <sup>136</sup>	<i>AHRC</i> <sup>137</sup>	<i>FWA</i> <sup>138</sup>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>
<i>association</i>	Yes <sup>146</sup>	No	No	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
<i>medical record</i>	No <sup>147</sup>	Yes	No	No	No	No	No	No	Yes	No	Yes
<i>criminal record</i>	No	Yes	No	No	No	No	No <sup>148</sup>	No	Yes	Yes	Yes
<i>physical features</i>	No	No	No	No	Yes	No	No	No	No	No	No
<i>lawful sexual activity</i>	No	No	No	No	Yes	Yes	No	No	Yes	No	No
<i>profession</i>	No	No	No	No	No	No	No	No	No	Yes	No

<sup>146</sup> Only for DDA and RDA.

<sup>147</sup> Although may be covered as disability discrimination.

<sup>148</sup> *Spent Convictions Act 1988* (WA) s 18.