



NATSILS Submission on the Consolidation of Commonwealth Anti-Discrimination Laws

February 2012



Victorian Aboriginal Legal Service Co-operative Ltd



Aboriginal Legal Service of Western Australia



Aboriginal Legal Rights Movement Inc

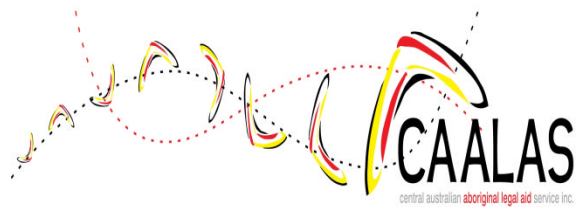


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1. About the NATSILS

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander justice issues in Australia. The NATSILS have almost 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The NATSILS are the experts on justice issues affecting and concerning Aboriginal and Torres Strait Islander peoples.

The NATSILS are comprised of the following Aboriginal and Torres Strait Islander Legal Services:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS);

2. Introduction

This submission is in response to the Discussion Paper released by the Commonwealth Attorney-General's Department in September 2011 regarding the consolidation of Australia's Federal anti-discrimination laws into a single, consolidated Act. The NATSILS welcome the consolidation of the Commonwealth anti-discrimination laws as an opportunity to harmonise and strengthen current protections against discrimination. The NATSILS congratulate the Labor Government on its commitment to the non-diminution of current protections and willingness to consider additional provisions to further prevent discrimination, provide effective remedies to those who suffer discrimination, and encourage substantive equality.

Discrimination harms not only the individual aggrieved, but society as a whole. As such, the responsibility to prevent discrimination and enforce standards should be borne by every member of society rather than just individual complainants. Through the consolidation process, the NATSILS hope that the laws can be reshaped to engage the positive duty we all hold to address discrimination proactively and relieve some of the burden placed on lone individuals to enforce equality standards on society's behalf. It is also hoped that through this process, discrimination law in Australia will be less complex and more accessible, inclusive and flexible.

The NATSILS welcome the opportunity to contribute to the consolidation process and congratulate the Government on consulting with the Australian public on its development. This submission is not intended to comprehensively address all the questions contained within the Discussion Paper, but rather those considered a priority. The NATSILS would like to provide the following for consideration.

3. Objects of the Act

Despite not being covered in the Discussion Paper, several submissions already presented to the Government have discussed the need for the objects of the Act to be clearly stated within the consolidated Act. Both the Australian Human Rights Commission (AHRC)¹ and the Discrimination Law Experts' Group² have recommended the inclusion of an objects section that clearly states that the Act is to give effect to, and be interpreted in accordance with, Australia's international human rights obligations with the purpose of eliminating discrimination and promoting substantive equality. The NATSILS endorse this recommendation.

RECOMMENDATION 1

That the consolidated Act state that the objects of the Act are to eliminate discrimination, promote substantive equality and give effect to Australia's international human rights obligations. As such, the Act should also state that it is to be interpreted to be consistent with such obligations.

4. Meaning of Discrimination

4.1 What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

4.1.1 Unified Test

The NATSILS recommend that separate tests for direct and indirect discrimination be maintained for the following reasons:

¹ Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination Law: Australian Human Rights Commission Submission to the Attorney-General's Department* (2011), 5.

² Discrimination Law Experts' Group, *Consolidation of Commonwealth Anti-Discrimination Laws Submission* (2011), 7-8.

- Direct and indirect discrimination are distinct forms of discrimination and it is important to recognise them as such. Combining them may result in confusion and a weaker definition than if kept separate.
- Aboriginal and Torres Strait Islander Legal Services' (ATSILS) clients are often victims of systemic discrimination which more frequently takes the form of indirect discrimination and thus, having a clear and concise definition of indirect discrimination is important.
- Indirect discrimination allows for some actions that are 'reasonable' but would otherwise be discriminatory and there is concern that if a combined definition was created such exceptions could weaken current protections against direct discrimination.

RECOMMENDATION 2

That separate definitions and tests for direct and indirect discrimination be maintained.

4.1.2 Direct Discrimination

The NATSILS recommend that the comparator test for direct discrimination should be abandoned. It is the experience of ATSILS that in applying the comparator test, significant obstacles have arisen due to difficulties in identifying a suitable comparator. The comparator test requires that a person in materially the same circumstances as the person claiming discrimination must be identified to prove there has been differential treatment. In many cases, it is impossible to find a suitable comparator and courts are therefore compelled to rely on a hypothetical comparator and how the discriminator may have treated them.

The NATSILS also recommend against using the test found in the *Racial Discrimination Act 1975 (Cth) (RDA)* in the consolidated Act as there is concern that the requirement that the claimed discriminatory act must impair or nullify a human right will raise difficulties in that there is no clear definition of what constitutes a human right in Australia.

The NATSILS are therefore of the view that the best option is to adopt the detriment test whereby the claimant has to show that they have suffered detriment or disadvantage because of a certain act or treatment and that such an act or treatment was caused by the claimant's protected attribute.

RECOMMENDATION 3

That the test for direct discrimination be based on the detriment test as used in the Australian Capital Territory and Victoria.

4.1.3 Indirect Discrimination

The NATSILS are of the view that the best test for indirect discrimination is that found in the *Age Discrimination Act 2004* (Cth) (ADA) and the *Sex Discrimination Act 1984* (Cth) (SDA) in that:

- A duty holder requires people to comply with a condition, requirement or practice;
- The condition, requirement or practice disadvantages members of a group who share a protected attribute; and
- The condition, requirement or practice is not reasonable in the circumstances.

However, the NATSILS are of the further view that the word ‘reasonable’ in the last element of the test should be replaced with ‘legitimate and proportionate’. This would clarify that for an act to be excluded from meeting the test for indirect discrimination it would have to be in order to achieve a legitimate goal and be proportionate to achieving that goal. This would bring the test in line with international human rights law.

RECOMMENDATION 4

That the test for indirect discrimination be based on that used in the ADA and SDA except that the term ‘reasonable’ be replaced with ‘legitimate and proportionate’.

4.2 How should the burden of proving discrimination be allocated?

The NATSILS argue that the practice of placing the burden of proof solely on the complainant is not the most effective practice when dealing with direct discrimination cases. As Adam Fletcher from the Castan Centre for Human Rights Law argues “few victims of discrimination are likely to be in a position to produce documentary evidence, particularly if they have been fired from a job or excluded from a club or no longer have access to records or witnesses”.³ Fletcher went on to state that “practitioners and rights advocates have reported that this issue prevents many potential meritorious cases from proceeding, which is clearly a sign that this aspect of the system requires attention”.⁴ Furthermore, the Discussion Paper recognised that “allocating the burden of proving causation in direct discrimination to the complainant requires the complainant to prove matters relating to the state of mind of the respondent, which may be both difficult and unfair”.⁵ Alternatively

³ Adam Fletcher, *Rolling the Federal Anti-Discrimination Acts into One ‘Great Big New Law*, Castan Centre for Human Rights Law Blog, posted Monday 5 December 2011.

⁴ Ibid.

⁵ Australian Government Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (2011), 15-16.

however, completely shifting the burden of proof to the respondent, as occurs under the Fair Work Act, may further expose duty holders to vexatious complaints.

Internationally, few other jurisdictions follow the practice of placing the burden solely on the complainant, with the UK, EU, Canada and the USA using an alternative system whereby the burden of proof shifts to the respondent once the complainant has established a *prima facie* case. This system addresses the difficulties complainants can have in accessing proof of discrimination whilst protecting duty holders from vexatious complaints by virtue of the *prima facie* requirement. This system has been in operation in said jurisdictions for some time without significant problems in practice.

RECOMMENDATION 5

That the UK, EU, Canada and USA model be adopted whereby the burden of proof in direct discrimination cases shifts to the respondent once the complainant has established a *prima facie* case.

For similar reasons to those outlined above, the NATSILS argue that the best model for indirect discrimination is that once the complainant has established the discriminatory impact of a condition, requirement or practice, the burden of proving that the condition, requirement or practice was legitimate and proportionate, and thus does not constitute indirect discrimination (as per test at Recommendation 4) should shift to the respondent.

RECOMMENDATION 6

That the burden of proving that a condition, requirement or practice is legitimate and proportionate in indirect discrimination cases shifts to the respondent once the complainant has established the discriminatory impact of a condition, requirement or practice.

4.3 Should the consolidation Act include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

In the interests of consistency and reducing complexity, the NATSILS recommend that a single special measures provision applying to all protected attributes be drafted for inclusion in the consolidated Act. Current special measures provisions in domestic law fail to meet Australia's international human rights obligations. The consolidated Act must adopt a special measures provision that encompasses the following elements:

- An explicit statement that special measures are solely for the purpose of achieving substantive equality for disadvantaged groups and must be a proportionate means of achieving that purpose;⁶
- That proportionality means that the measure must be the least restrictive option for achieving substantive equality;
- That special measures confer a direct benefit on the affected group;
- That membership of the group subject to special measures must be self-identified;⁷
- That in accordance with international law, free, prior and informed consent from the group/s affected is required for a special measure to be legitimate;⁸
- That special measures must be temporary and must cease once the goal of substantive equality is achieved;⁹
- That the use of special measures must not lead to the maintenance of separate rights for separate groups;¹⁰ and
- That special measures must be consistent with the Convention on the Elimination of Racial Discrimination, including article 2 (1)(a), and as explained by the Declaration on the Rights of Indigenous Peoples.¹¹

4.3.1 Consent of Affected Groups

With specific regard to the consent of affected groups, Justice Brennan in *Gerhardy v Brown*, in considering whether a law applying to only one race could be classified as a special measure, emphasised the need for consultation with the affected group:

The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.¹²

The requirement for consent is essential for a measure to be meaningfully declared as being for the 'advancement of certain racial or ethnic groups'.¹³ This view is

⁶ *General Recommendation No. 32*, Committee on the Elimination of Racial Discrimination, 75th sess, [11], UN Doc CERD/C/GC/32 (2009).

⁷ *Ibid*, 34.

⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, I-14668, art 1 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, I-14531, art 1 (entered into force 3 January 1976); *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 3, 18, 19; *General Recommendation No. 23: Indigenous Peoples*, Committee on the Elimination of Racial Discrimination, 51st sess, [23], [4] (d), UN Doc A/52/18, annex V (1997).

⁹ *General Recommendation No. 32*, Committee on the Elimination of Racial Discrimination, 75th sess, [27], UN Doc CERD/C/GC/32 (2009).

¹⁰ *Ibid*, 19.

¹¹ *Ibid*, 18.

¹² *Gerhardy v Brown* (1985) 159 CLR 70, (Brennan J).

¹³ see Article 1(4) of the *Convention on the Elimination of Racial Discrimination* and section 8 of the *Racial Discrimination Act 1975* (Cth).

consistent with the right to self-determination under Articles 1 of both the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, which are concerned with the right of people to have a say in matters relating to their own welfare. Furthermore, in direct relation to Aboriginal and Torres Strait Islander peoples, the Declaration on the Rights of Indigenous Peoples¹⁴ and the Committee on the Elimination of Racial Discrimination¹⁵ has clarified that Australian governments have an obligation to ensure that no decisions directly relating to Aboriginal and Torres Strait Islander peoples' rights and interests are made without their informed consent. Methods of consultation and obtaining consent should also be consistent with international human rights standards and thus, reflect Aboriginal and Torres Strait Islander models of decision-making.¹⁶

4.3.2 Special Measures with an Air of Permanency

The requirement that special measures must be temporary, cease once the goal of substantive equality is achieved and not lead to the maintenance of separate rights, may initially raise some concerns about the legitimacy of some legislative actions currently deemed to be special measures. Concerns have been raised in the past that special land rights laws, for example, have an air of permanency about them and would thus fail the special measures test recommended above. However, this point was clarified in *Gerhardy v Brown* when the High Court found that South Australia's 1981 Pitjantjatjara Land Rights Act was a special measure even though it had an obvious air of permanency. It was found that the law had the sole purpose of securing the advancement of the Pitjantjatjara Aboriginal people, was necessary because of the importance of land to Indigenous culture and that objectives of the law had not been reached, and hence qualified as a special measure.¹⁷ For example, Justice Mason stated that:

In the first the proviso is that "such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." In the second the proviso requires that the measures shall not "entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." The difference in expression does not warrant a difference in interpretation because both provisions insist that the special measures shall be discontinued after achievement of the objects for which they were taken. Even so, there is some difficulty in fitting legislative regime of the type in question within the framework of the proviso. It is looking primarily to measures of a temporary character, perhaps conferring special rights, which will alleviate the disadvantages under which the people of a particular race labour at a particular stage in their evolution. In the present case the legislative regime has about it an air of permanence. It may need to continue indefinitely if it is to preserve and protect the culture of the Pitjantjatjara peoples. Whether that be so is a question which can only be answered in the fullness of time and in the light of the future development of the

¹⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 3, 18, 19.

¹⁵ *General Recommendation No. 23: Indigenous Peoples*, Committee on the Elimination of Racial Discrimination, 51st sess, [4] (d), UN Doc A/52/18, annex V (1997); *General Recommendation No. 32*, Committee on the Elimination of Racial Discrimination, 75th sess, [18], UN Doc CERD/C/GC/32 (2009).

¹⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 18, 19.

¹⁷ *Gerhardy v Brown* (1985) 159 CLR 70

Pitjantjatjara peoples and their culture. The fact that it may prove necessary to continue the regime indefinitely does not involve an infringement of the proviso. What it requires is a discontinuance of the special measures after achievement of the objects for which they were taken. It does not insist on discontinuance if discontinuance will bring about a failure of the objects which justify the taking of special measures in the first place.¹⁸

Hence, while special measures must not lead to the maintenance of separate rights for separate groups and must be temporary, they may in fact legitimately continue for a very long time as the objective that they are designed to achieve, substantive equality, may take a very long time.

4.3.3 Testing the Legitimacy of Special Measures

The NATSILS are concerned that requiring duty holders to seek the authorisation of an independent body may result in an excessive administrative burden which could discourage the use of special measures. The NATSILS therefore, endorse the approach taken in the *Victorian Equal Opportunity Act 2010* (Vic) whereby duty holders are not required to seek permission from an independent body to enact special measures. Rather, if a person brings a discrimination complaint and the duty-holder can establish that the conduct or circumstances complained of constitute a special measure within the meaning of the act (see recommended definition of special measures above at 4.3), then the complaint should be dismissed.

RECOMMENDATION 7

That the consolidated Act adopt a single special measures provision that applies to all protected attributes and takes into consideration notions of international human rights law relating to legitimacy, proportionality, consultation, consent and self-determination.

4.4 Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

While the failure to make reasonable adjustments is currently only protected in the *Disability Discrimination Act 1992* (Cth) (DDA), as explained in the Discussion Paper, it is implicit in the concept of indirect discrimination as proscribed in the other three anti-discrimination Acts.¹⁹ A stand-alone obligation therefore, would clarify the existing rights and obligations of parties as they apply to all protected attributes.

¹⁸ Gerhardy v Brown (1985) 159 CLR 70

¹⁹ Australian Government Attorney-General's Department, above n 5, 58.

RECOMMENDATION 8

That the consolidated Act explicitly state that a failure to make reasonable adjustments for a person with a protected attribute or attributes constitutes discrimination.

4.5 Should public sector organisations have a positive duty to eliminate discrimination and harassment?

Public sector organisations are supposed to be model organisations, setting standards for others to follow. Adopting a positive duty in the consolidated Act would establish a proactive approach to preventing discrimination as opposed to relying on a reactive system that only deals with discrimination after the fact. A positive duty on the public sector to eliminate discrimination and harassment would also relieve the burden placed on individual complainants to enforce human rights standards as they apply to discrimination. Such a positive duty already exists under the *Equal Opportunity Act (Vic) 2010*.

In adopting a positive duty to eliminate discrimination and harassment, what constitutes compliance would need to be clarified so that duty holders are aware of their obligations. For example, as evidence of compliance with a positive duty to eliminate discrimination and harassment, duty holders could point to organisational policies to prevent discrimination, training of staff in what constitutes discrimination, and the development of action plans along with monitoring and measuring tools for the implementation of such. Furthermore, guidelines for compliance could also be developed by the AHRC or the Federal Attorney-General's Department.

RECOMMENDATION 9

That the consolidated Act place a positive duty on public sector organisations to eliminate discrimination and harassment based on all protected attributes.

4.6 Should the prohibition against harassment cover all protected attributes? If so, how would this most clearly be expressed?

The AHRC notes in its submission that any harassment based on a protected attribute will constitute unlawful discrimination.²⁰ This principle is well-established in domestic case law and is also consistent with international principles of human rights. Thus, including an explicit prohibition against harassment would not create any new obligations upon duty holders but would serve as clarification.

²⁰ Australian Human Rights Commission, above n 1, 75.

RECOMMENDATION 10

That the consolidated Act include an explicit prohibition against harassment based on any protected attribute in all areas of public life protected by the legislation.

5. Protected Attributes

5.1 Are the current protections against discrimination on the basis of these attributes appropriate?

5.1.1 Race

Race as defined under the RDA has been interpreted quite generously by the courts as evidenced by case law and the NATSILS propose that the wording in the Act defining race should be refined to reflect this. For example, the RDA defines race as including colour, descent and national or ethnic origin however, case law has found that race also includes Aboriginal language groups and other smaller definitional units.²¹ There may also be need for further consideration as to how race and cultural identity interplay.

RECOMMENDATION 11

That the definition of race as a protected attribute be reconsidered to more accurately reflect its interpretation in case law.

5.1.2 Additional Attribute – Irrelevant Criminal Record

It is well documented that Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system. People with criminal records are regularly discriminated against even if their criminal record is very old and no longer relevant. This form of discrimination persists despite research demonstrating that a person's prior criminal record is an unreliable indicator of future behaviour.²² Australia has

²¹ See *Gerhardy v Brown* (1985) 159 CLR 70.

²² UK research suggests that most people who are found guilty of an offence, only offend once, and the offences are more likely to have been committed when the person was young. See Julian Prime et al, "Criminal careers of those born between 1953 and 1978", *Home Office Statistical Bulletin No. 4* (2001) available at <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=189868>. See also Federation of Community Legal Centres (Vic), *Submission: Draft Model Spent Convictions Bill* (2009), 6.

ratified the International Labour Organisation Convention Concerning Discrimination in Respect of Employment and Occupation (ILO 111)²³, which requires all parties to:

declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.²⁴

In addition to specifying certain grounds of non-discrimination, the ILO 111 also leaves room for States parties to add further grounds of non-discrimination. In 1989, Australia added a number of further grounds, including “criminal record”.²⁵ There is therefore, an obligation on Australian governments to pursue policies to ensure that discrimination on the ground of irrelevant criminal record is eliminated.

There are foreseeable situations whereby a person’s criminal record should justifiably cause them to be discriminated against. For example, an individual convicted of sex offences against a child being discriminated against in employment as it relates to jobs involving interaction with children. In order to take such situations into account, the NATSILS recommend either using the term *irrelevant* criminal record in the consolidated Act or applying a general limitations clause (discussed below) that would permit discrimination on the basis of a criminal record if such discrimination constitutes a proportionate means of achieving a legitimate aim or purpose.

RECOMMENDATION 12

That a person’s criminal record be included as a protected attribute under the consolidated Act, subject to either a determination of relevance or a general limitations clause.

5.1.3 Additional Attribute – Social Status

The Human Rights Law Centre (HRLC) has defined the term ‘social status’ to include not only persons who are homeless, but also those who are at risk of – or recovering from – a period of homelessness. Accordingly, they define ‘social status’ to mean a person’s status as homeless, unemployed or a recipient of social security payments.²⁶

²³ *Convention concerning Discrimination in Respect of Employment and Occupation, Adopted 25 June 1958*. Ratified by Australia in 1973 and incorporated into domestic law by virtue of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

²⁴ *Convention Concerning Discrimination in Respect of Employment and Occupation, adopted 25 June 1958*, art 2.

²⁵ *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) 4 (a) (iii).

²⁶ UN Economic and Social Council, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), [19].

The Committee on Economic, Social and Cultural Affairs acknowledges that:²⁷

A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

In 2006 a study by the Public Interest Law Clearing House Homeless Persons Legal Clinic found that amongst 183 people experiencing homelessness, almost 70 per cent were treated unfairly in the area of accommodation on the grounds of homelessness or social status. A further 60 per cent experienced unfair treatment on the same grounds in the area of goods and services. Despite the strong evidence that discrimination on the basis of social status is prevalent, it currently remains lawful in all Australian jurisdictions. By contrast, a number of overseas jurisdictions provide legal protections against social status discrimination including New Zealand, Canada, the USA and the UK.

RECOMMENDATION 13

That social status be included as a protected attribute under the consolidated Act.

5.1.4 Additional Attribute – Victim of Family Violence

The United Nations Committee on the Elimination of Discrimination Against Women acknowledges that gender-based violence such as family violence is a form of discrimination in itself, which compounds other inequalities in public life.²⁸ Including a person's status as a victim of family violence as a protected attribute would help protect victims of family violence from further harm, maintain their ability to escape their situation, and encourage victim's to speak up by providing a protective framework. Given the high rates of family violence within Aboriginal and Torres Strait Islander communities, this would be a particularly important development for Aboriginal and Torres Strait Islander peoples. Family violence should be defined broadly to include both physical and non-physical forms of violence perpetrated by a family member or other person who is in a domestic relationship with the victim.²⁹

Financial independence and access to services are vital for many people trying to escape violent relationships. Research has shown, however, that victims of family violence tend to experience discrimination and inequality in the workplace.³⁰ A

²⁷ Committee on Social, Economic and Cultural Affairs, General Comment No. 20, 2 July 2009 available at <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc>.

²⁸ *General Comment No. 19*, Committee on the Elimination of Discrimination Against Women, 11th sess, [23], UN Doc A/47/38 (1992).

²⁹ Belinda Smith and Tashina Orchiston, *Domestic Violence Victims at Work: The Role of Anti-Discrimination Law* (2011) 16 – 17.

³⁰ *Ibid.* See also: Braaf and Meyreing, *Seeking Security: Women's Economic Wellbeing During and Following Domestic Violence*, Australian Domestic and Family Violence Clearinghouse, March 2011, available at www.austdvclearinghouse.unsw.edu.au/financial_security.htm; VicHealth, *National Survey on Community*

survey conducted by the Australian Domestic and Family Violence Clearinghouse found that being a victim of family violence limited workers' capacity to obtain secure employment. It also resulted in workers being tired, distracted, unwell or late, thereby limiting their ability to hold down jobs and progress in the workplace.³¹ Even though many victims do not disclose the reasons for their decline in performance either for fear of the consequences or because they believe the information is not relevant in the employment context, such should still be covered a general characteristics extension, as discussed below. In addition, victims of domestic violence also report experiencing discrimination in access to goods and services and the provision of housing.³²

RECOMMENDATION 14

That a person's status as a victim of family violence be included as a protected attribute under the consolidation Act.

5.1.5 Characteristics Extension

The NATSILS recommend that there should be a general characteristics extension that applies to any characteristic generally pertaining to a person with a protected attribute. As the AHRC notes in its submission:

The Commission's 2008 submission to the Senate Legal and Constitutional Affairs Committee emphasised the importance of the "characteristics extension" in the definitions of direct discrimination which appear in the SDA, whereby discrimination is unlawful not only if it occurs because of an aggrieved person's sex, for example, but also if it occurs because of a characteristic which generally appertains, or is generally imputed, to people of that sex. The ADA makes very similar provision. Further, each State and Territory anti-discrimination or equal opportunity law already applies characteristics extensions to a range of grounds.

As noted in that earlier submission, discrimination frequently occurs because of concerns about characteristics which members of the group either often have, or have imputed to them. The Commission noted that without provision for characteristic extensions, definitions of direct discrimination could have much reduced effect.³³

RECOMMENDATION 15

That the consolidated Act adopt a general characteristics extension applying to all protected attributes, including characteristics which are imputed by a discriminator, regardless of whether they are imputed generally.

Attitudes to Violence Against Women 2009 (March 2010) 47; McFerran, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse, October 2011.

³¹ McFerran, L, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse, October 2011.

³² Human Rights Law Centre, *realising the Rights to Equality* (2012), 26.

³³ Australian Human Rights Commission, above n 1, 11

5.2 Should the consolidation Act protect against intersectional discrimination? If so, how should this be covered?

In its submission to the current consultation, the AHRC noted that:

...when a complaint is made alleging discrimination on the basis of more than one attribute or on the basis of a combination of attributes, the complaint is routinely accepted by the Commission and handled as a single complaint rather than as a series of complaints on separate grounds. The effect of expressly providing for intersectional coverage would in the Commission's view be to make the present position clearer and to avoid unnecessary disputes, rather than creating a new set of obligations. The Commission anticipates that a simple and effective drafting approach to this issue can readily be identified.³⁴

The NATSILS endorse this position and agree that in the interest of clarity the consolidated Act should apply to discrimination based on one or more attributes.

RECOMMENDATION 16

That the consolidated Act apply to discrimination based on one or more protected attributes.

5.3 How should discrimination against a person based on the attribute of an associate be protected?

The rights of those associated with a person with a protected attribute as it relates to discrimination are already protected in the DDA, RDA and most State and Territory discrimination and equal opportunity Acts. Based on the Government's commitment to the non-diminution of current protections, the NATSILS therefore recommend that such protections are carried over into the consolidated Act.

RECOMMENDATION 17

That the consolidated Act apply to discrimination based on association with a person with one or more protected attributes.

6. Protected Areas of Public Life

6.1 Should the right to equality before the law be extended to sex and/or other attributes?

The right to equality before the law is currently only present in the RDA, and in light of the Government's commitment to maintaining current levels of protection, the

³⁴ Ibid, 25.

NATSILS contend that such a right in relation to race must be retained in the consolidation Act. The NATSILS are interested in how the right to equality before the law could be extended to all protected attributes, but caution that significant consideration will need to be given to how extending the right to the protected attribute of disability would affect specialised legal regimes such as guardianship and fitness to plead legislation. The inclusion of a general limitations clause may help to resolve such concerns.

RECOMMENDATION 18

That the right to equality before the law be maintained in relation to race and where possible, extended to all protected attributes after consideration has been given to how to resolve concerns regarding how this will affect specialised legal regimes such as guardianship and fitness to plead legislation.

6.2 What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

The NATSILS are of the opinion that rather than articulating areas of public life to which anti-discrimination laws apply by way of a specific list of activities such as education, employment and provision of services for example, it is preferable to use a broader simplified definition. As such, the NATSILS agree with the AHRC that the best way to articulate the areas of public life to which the consolidated Act will apply is to follow the example of the RDA. Section 9 (1) of the RDA sets out a broad definition of public life and would cover current gaps that exist under anti-discrimination law such as voluntary workers, small partnerships and member-based organisations.

While the NATSILS recommend using section 9 (1) of the RDA as a basis for articulating areas of public life to which the consolidated Act will apply, due to concerns regarding the difficulties in defining human rights and fundamental freedoms in Australian law, we recommend that this element of section 9 (1) be disconnected from the definition of public life. Thus, the preferred definition would simply draw from the RDA's reference to public life as the "political, economic, social, cultural or any other field of public life".³⁵

RECOMMENDATION 19

That the consolidated Act articulate the areas of public life to which anti-discrimination law applies in line with the broad definition set out in section 9 (1) of the RDA, excluding any reference to human rights and fundamental freedoms.

³⁵ *Racial Discrimination Act 1975(Cth)* s 9 (1).

6.3 Should the consolidation Act apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?

The NATSILS propose that the consolidation Act should apply to all partnerships regardless of size. As the Discussion Paper notes, it would be inconsistent and arbitrary to exclude small partnerships but not small businesses. This could result in the anomalous situation whereby a small partnership is able to discriminate on the basis of a protected attribute in choosing a partner but prohibited from doing so in relation to employees.

RECOMMENDATION 20

That the consolidation Act apply to all partnerships regardless of size.

6.4 Can the vicarious liability provisions be clarified in the consolidation Act?

As the Discussion paper points out, there are currently two different approaches used in the relevant laws to establish whether a person may be vicariously liable for the discriminatory actions of another. The NATSILS are supportive of the model used in the RDA and SDA being adopted in the consolidated Act. This test, which requires the unlawful act to be in connection with the person’s employment or duties as an agent provides a more satisfactory threshold in relation to the onus placed on employers and principals to establish policies to prevent discrimination. By requiring employers and principals to establish that they ‘took all reasonable steps to prevent the employee or agent from doing the act’ in order to raise a defence to vicarious liability, the model used in the RDA and SDA encourages employers and principals to make all appropriate efforts to prevent unlawful discriminatory acts. For these reasons, the NATSILS argue that the model used to define vicarious liability in the RDA and SDA be adopted in the consolidated Act.

RECOMMENDATION 21

That the consolidated Act adopt the model used in the RDA and SDA regarding vicarious liability.

7. Exceptions and Exemptions

7.1 Should the consolidation Act adopt a general limitations clause? Are there specific exceptions that would need to be retained?

A general limitations clause would clarify that conduct necessary to achieve a legitimate objective, and that is a proportionate means of achieving that objective, is not discriminatory. The objects of the Act, as discussed above, would need to be of

central consideration when applying any general limitations clause. The NATSILS are of the view that having a general limitations clause, as opposed to a list of exceptions, would be more desirable as it would provide increased coverage of current gaps in the list of exceptions, flexibility to adapt to changing community standards over time and provide a more case specific approach.

RECOMMENDATION 22

That the consolidation Act adopt a general limitations clause specifying that conduct which is necessary to achieve a legitimate aim and is a proportionate means of achieving that aim is not discriminatory.

7.2 Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

In their submission, the Discrimination Law Experts' Group note that in exceptional or transitional situations, temporary exemptions are sometimes required in order to make anti-discrimination legislation practical and workable and in order to protect individuals and organisations from complaints for a defined period while they work towards compliance.³⁶ The NATSILS agree with such a provision but stress that the objects of the consolidation Act, as discussed above, should be considered paramount in considering applications for exemptions. The NATSILS further agree with the Discrimination Law Experts' group in that applications for exemptions should be made to the AHRC and endorse the application process as set out in their submission.³⁷

RECOMMENDATION 23

That temporary exemptions continue to be available in the consolidated Act where successful applications are reserved for actions consistent with the objects of the Act with the approval of the AHRC.

³⁶ Discrimination Law Experts' Group, above n 2, 17.

³⁷ Ibid, 18.

8. Complaints and Compliance Framework

8.1 Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

In line with comments made above regarding positive duties, the NATSILS would like to see proactive compliance measures implemented wherever possible. As mentioned in the Discussion Paper, voluntary non-binding action plans, co-regulation with industry and the AHRC and the development of standards by the Attorney-General or AHRC would all be useful ways to provide duty holders with increased certainty as to their obligations and promote proactive compliance. This would go some way to relieving the burden placed on complainants to enforce standards on behalf of the community as a whole.

In regards to the certification of special measures, it is troublesome that the AHRC has noted that a lack of certainty around the legality of proposed special measures has discouraged businesses from using them.³⁸ Legitimate special measures are an important way of addressing ongoing disadvantage and achieving substantive equality. The NATSILS agree with the idea proposed in the Discussion Paper regarding the AHRC having the power to certify a proposed course of action as a special measure for a limited period of time, without affecting the substantive obligations placed on duty holders by the consolidated Act. This system should be voluntary however so as not to require all duty holders taking special measures to apply, which would create significant administrative burden for the AHRC, but still allow those uncertain of the legitimacy of proposed actions to obtain guidance and certainty.

RECOMMENDATION 24

That the consolidated Act contain increased proactive measures for compliance.

8.2 Are any changes needed to the conciliation process to make it more effective in resolving disputes?

8.2.1 Investigative Powers

The NATSILS propose that the inquiry powers and obligations of the AHRC be clarified due to concerns that the current inquiry/investigation practices of the AHRC are inadequate. Equipping the AHRC with strong and effective inquiry/investigation powers is of critical importance for complainants who often do not have access to the information that they need to advance their complaint which the AHRC may be

³⁸ Australian Human Rights Commission, *Submission No 69 to the SDA Report* available at http://aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/submissions/sublist.htm.

able to obtain. Such powers are essential in addressing the imbalance of power that can often exist in the complaints process between the complainant and the accused duty holder. The obligation placed on the AHRC to exercise these powers to their full extent needs to be reinforced. For these purposes, the existence of provisions in section 46PM of the *Australian Human Rights Commission Act 1986* (Cth) allowing people with a reasonable excuse, including incriminating themselves, to not produce information or documents relevant to an inquiry as requested by the AHRC President, should be reconsidered.

RECOMMENDATION 25

That the powers of the AHRC to obtain information and documents relevant to an inquiry be strengthened and clarified and a greater obligation be placed on the AHRC to exercise such powers to their full extent.

8.2.2 Compulsory Conciliation

The NATSILS recommend that parties continue to be required to attempt conciliation as complaints should be encouraged to be resolved outside of the court system where possible and appropriate. The conciliation stage also gives parties the opportunity to clarify the circumstances of the complaint and obtain the necessary information to proceed. This is particularly the case for the complainant who may not have access to the information or evidence that they need and this stage gives the AHRC time to investigate and obtain such.

RECOMMENDATION 26

That parties to a complaint continue to be required to attempt conciliation before a complaint can be progressed to the court system.

8.3 Are any improvements needed to the court process for anti-discrimination complaints?

8.3.1 Litigation Costs

The costs order system used in Commonwealth discrimination matters needs to be revised. The risk of incurring an adverse costs order discourages many victims with meritorious cases from lodging a complaint with the courts under the Commonwealth system. This significantly affects people's access to justice, especially for many discrimination victims who are already vulnerable and disadvantaged members of society, such as young people, the disabled and the elderly. Such a system does not serve the broader goals of prevention and equality as NACLC notes:

Where matters are contested at a Federal level, NACLC's experience is that most cases settle - even very strong discrimination complaints. As a result, courts at a Federal level have not

developed robust jurisprudence in this area of law. Decisions by the judiciary are critical to the development of discrimination law in Australia, and in discrimination law developing a strong normative role within the community. This system as it presently stands is a war of attrition, where even very strong cases are settled because individual complainants cannot face the risks and pressure of litigation against well resourced respondents.³⁹

Given that the current system relies heavily on individual complainants in enforcing the law, such a disincentive poses a significant barrier to the effectiveness of the system.

The current costs order system also affects complainants at the conciliation stage. Respondents know that complainants are often reluctant to bring court action and enter the costs jurisdiction. This puts complainants in a weak negotiating position and can often result in complainants accepting low settlements that do not reflect the merits of their case.

The consolidated Act should adopt a no costs jurisdiction for discrimination complaints, except in the case of vexatious complaints or where one party has acted unreasonably during the proceedings. This would bring the consolidated Act into line with State and Territory discrimination systems and the *Fair Work Act 2009* (Cth).

RECOMMENDATION 27

That the consolidated Act adopt a no costs jurisdiction for discrimination complaints, except in the case of vexatious complaints or where one party has acted unreasonably during the proceedings.

8.3.2 Representative Complaints

The NATSILS agree with the arguments outlined in the Discussion Paper regarding the case for allowing representative complaints to proceed beyond conciliation and to be heard in the courts, including that it would:

- Make the complaints process more efficient and user-friendly;
- Assist in addressing cases of systemic disadvantage which are more difficult to raise with an individual complaint;
- Allow genuine cases which previously would not have proceeded past conciliation due to the difficulties faced by individual complainants in engaging with the complexities and costs of the court system, to be heard in the courts; and
- Lead to more judicial consideration of important provisions, which could provide greater certainty as to obligations over time.

³⁹ National Association of Community Legal Centres, *Submission to the Commonwealth Attorney General Access to Justice and Systemic Issues: Consolidation of the Federal Discrimination Legislation* (2011) 4.

In order to protect against an increase in unmeritorious complaints the NATSILS recommend including the requirement that representative bodies must establish a demonstrated connection to the subject matter of the complaint.

RECOMMENDATION 28

That the consolidated Act include provisions allowing representative bodies to take complaints beyond conciliation to the courts so long as they can establish a demonstrated connection to the subject matter of the complaint.

8.3.3 Resourcing

The HRLC notes in its submission that:

Australia has an obligation to ensure that victims of discrimination have access to effective remedies through our legal system. Maintaining appropriate funding to legal aid and community legal centres – which assist victims of discrimination in navigating the legal systems – is a vital component of this obligation. Accessibility of the legal system depends on awareness of legal rights and of available procedures to enforce those rights. When access to legal assistance is not available, meritorious claims or defences may not be pursued or may not be successful.⁴⁰

In a 2009 submission to the Federal Government, the Law Council of Australia stated that:

Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians. The legal assistance system is critical in overcoming these barriers.⁴¹

For the consolidated Act to be effective in providing improved protections of people's rights, quality legal assistance will be necessary to facilitate access to the enforcement of such rights. The legal assistance sector is currently critically under resourced and a substantial increase in funding will be required if many victims of discrimination are to be able to assert their rights and access appropriate remedies.

RECOMMENDATION 29

That legal assistance bodies, including the ATSILS, and the AHRC be adequately resourced and supported to ensure the effective operation of the consolidated Act.

⁴⁰ Victorian Law Reform Commission (VLRC), *Civil Justice Review Report 14*, 2008, 607.

⁴¹ Law Council of Australia, *Legal Aid and Access to Justice Funding 2009-10 Federal Budget*, 9 January 2009.

8.4 Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

The NATSILS recommend that the following improvements be considered in order to strengthen the role and functions of the AHRC in providing a more effective compliance regime:

- Amending the definition of human rights in the AHRC Act to include the Convention on the Elimination of Racial Discrimination, Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Economic, Social and Cultural Rights and the Declaration on the Rights of Indigenous Peoples;
- Empowering the AHRC to inquire into State and Territory laws and practices;
- Empowering the AHRC to institute proceedings in its own name when issues of fact or law affect a number of people;
- Empowering the AHRC to have ‘naming and shaming’ powers and to issue compliance notices post investigations;
- Empowering the AHRC to enter into enforceable agreements with duty holders and seek enforcement of such through the Administrative Appeals Tribunal;
- Assigning each protected attribute its own Commissioner who has a statutory obligation to produce an annual report on progress towards equality to which the Government be required to formally respond to within 6 months; and
- Enshrining the amicus curiae and intervention powers of AHRC as a right so that leave from the court is not required and the extension of these powers to appeals.

9. Interaction with Other Laws and Application to State and Territory Governments

9.1 Should the consolidation Act apply to State and Territory Governments and instrumentalities?

In the interests of simplicity, clarity and consistency in rights protection across the country, the NATSILS propose that the consolidated Act apply to Commonwealth, State and Territory instrumentalities consistently across all grounds.

RECOMMENDATION 30

That the consolidated Act apply to Commonwealth, State and Territory instrumentalities.