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## Realising the Right to Equality

Discrimination protections for a modern and inclusive Northern Territory

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Freedom. Respect. Equality. Dignity. Action.



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## About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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# 1. Introduction

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## 1.1 Scope of this submission

This submission responds to the Modernisation of the Anti-Discrimination Act Discussion Paper (**Discussion Paper**)<sup>1</sup> released by the Department of the Attorney-General and Justice in September 2017 regarding the modernisation of the *Anti-Discrimination Act (the Act)*.

Strong protections from discrimination ensure that all Territorians are equally respected for who they are. They improve understanding and tolerance within the community to protect the welfare of all.

The Human Rights Law Centre (**HRLC**) welcomes the review which should be used as an opportunity to strengthen and modernise the Northern Territory's anti-discrimination laws by adopting global best-practice standards to promote substantive equality and eliminate discrimination.

The most effective way to promote equality and eliminate discrimination is through a human rights framework. This approach is also consistent with the recommendations of the National Human Rights Consultation Committee which, in 2009, recommended that the Federal Government audit and amend legislation – particularly anti-discrimination legislation – to ensure compliance with Australia's international human rights obligations.<sup>2</sup>

A human rights approach requires that legislation, regulation, monitoring and reporting systems be developed with a focus on positive measures to achieve *substantive* equality. As the Committee on Economic, Social and Cultural Rights explains, substantive equality is concerned 'with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience'.<sup>3</sup> In addition to equal opportunities, substantive equality is concerned with equal outcomes. In order to achieve substantive equality, Australia must work to eliminate those forms of discrimination that have become institutionalised in laws, policies, practices and social structures – otherwise known as systemic discrimination.

A human rights framework can inform and guide domestic policy in complex areas such as discrimination and equality. The international human rights framework has been at the forefront of recognising the more insidious forms of discrimination, including indirect, systemic and compounded discrimination. International law relating to the right to freedom from non-discrimination and the right to equality has developed over time and we welcome this opportunity to revisit the Act to better reflect the values of modern Territorians.

The HRLC submits that drawing on the experience and expertise reflected in international human rights standards will enhance the effectiveness of the Act and help make the Northern Territory a fairer, more inclusive society for all.

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<sup>1</sup> Discussion Paper: Modernisation of the *Anti-Discrimination Act*, Department of the Attorney-General and Justice (September 2017).

<sup>2</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report*, (2009), [Recommendation 4].

<sup>3</sup> The Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009) [7].

## 1.2 Applicable international human rights obligations

Non-discrimination and equality constitute basic and general principles relating to the protection of all human rights.<sup>4</sup>

Australia is obliged to ensure full and effective legislative protection of the rights to non-discrimination and equality.<sup>5</sup> These obligations arise under the International Covenant on Civil and Political Rights (**ICCPR**); International Covenant on Economic, Social and Cultural Rights (**ICESCR**); International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**); Convention on the Rights of Persons with Disabilities (**CRPD**); and the Convention on the Rights of the Child (**CRC**).

For example, article 2(2) of ICESCR requires that State Parties 'undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The Committee on Economic, Social and Cultural Rights has confirmed that this obligation extends to the requirement to ensure substantive equality.<sup>6</sup>

The ICCPR at article 2(1) provides that States Parties are obligated to respect and ensure the rights in the Covenant 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Article 26 of the ICCPR further provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The rights to equality and freedom from discrimination bring with them a guarantee that individuals will have the right to effective protections and remedies before courts and tribunals.

## 1.3 Summary of recommendations

The HRLC makes the following recommendations for the Act, as discussed in more detail throughout this submission.

### **Reforms proposed in the Discussion Paper:**

**Recommendation 1:** The definition of sexual orientation should follow international best practice and be defined as follows:

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<sup>4</sup> Human Rights Committee, *General Comment No. 18: Non-discrimination (Thirty-seventh session, 1989)*, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003).

<sup>5</sup> See, eg, International Covenant on Civil and Political Rights (**ICCPR**) arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights (**ICESCR**); Convention on the Elimination of all forms of Discrimination Against Women (**CEDAW**); Convention on the Elimination of Racial Discrimination (**CERD**); Convention on the Rights of Persons with Disabilities (**CRPD**), art. 5.

<sup>6</sup> 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].

*“sexual orientation” means each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender identity or the same gender identity or more than one gender identity.*

**Recommendation 2:** The Act should be amended to include the attribute of “gender identity” defined as follows:

*“gender identity” means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to the person’s designated sex at birth.*

A note or example be added to the definition that confirms that discrimination against brotherboys and sisters girls fall would be captured by the definition of gender identity.

**Recommendation 3:** The Act should be amended to protect a new attribute of “sex characteristics” defined as follows:

*“sex characteristics” means a person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.*

**Recommendation 4:** The Act should be amended to

- prohibit conduct, called ‘vilification’, which occurs otherwise than in private and that expresses, or is reasonably likely in the circumstances to incite, hatred towards, serious contempt for, severe ridicule or revulsion of, a person or people with a protected attribute.
- prohibit conduct, called ‘attribute based harassment’, which occurs otherwise than in private and that seriously offends, insults, humiliates or intimidates another person because of a protected attribute. This prohibition should have defences to allow for freedom of expression; and
- introduce a criminal offence of ‘aggravated vilification’ or ‘criminal vilification’.

Further consideration should be given to whether these protections should apply to all protected attributes.

**Recommendation 5:** The Act should be amended to include a person’s ‘status as a victim of family violence’ as a protected attribute.

**Recommendation 6:** The HRLC supports the inclusion of protections from discrimination on the basis of ‘lawful sexual activity’ and/or ‘profession, trade, occupation or calling’. Any amendment should be informed by the experience of Territory based organisations with expertise on this issue.

**Recommendation 7:** The Act should be amended to include ‘social status’ as a protected attribute, defined to mean a person’s status as homeless, unemployed or a recipient of social security payments.

**Recommendation 8:** The Act should be amended to protect discrimination against all assistance animals in line with the inclusive definition in the *Disability Discrimination Act 1992* (Cth).

**Recommendation 9:** The Act should make provision for representative complaints by organisations with a legitimate interest in a particular subject matter.

**Recommendation 10:** The definition of clubs in the Act should be amended to remove the requirement regarding liquor, and consideration should be given to removing exemptions for clubs beyond exemptions for minority or vulnerable groups.

**Recommendation 11:** The Act should be amended to extend protection of sexual harassment to all areas of public life.

**Recommendation 12:** The Act should be amended to extend the definition of services to protect someone who is providing a service, to clarify that the actions of police constitute a service, and to remove the broad exclusion of not for profit community groups.

**Recommendation 13:** The Act should be amended to remove religious exemptions in the areas of education, employment and accommodation and to provide greater clarity around how competing rights can be balanced when an application for an exemption is made to the Anti-Discrimination Commissioner.

**Recommendation 14:** The Act should not be amended to remove protection for places of cultural or religious significance without consultation with Aboriginal and Torres Strait Islander communities.

**Recommendation 15:** The Act should be amended to remove the exclusion of assisted reproductive treatment services from the operation of the Act.

**Recommendation 16:** The Act should be amended to confirm that work includes volunteers and shared workplaces so that they are protected from discrimination.

**Recommendation 17:** The Act should be amended to clarify that the obligation to accommodate a special need requires proactive action.

**Recommendation 18:** The Act should be amended to remove the definitions of and reference to man and woman, replace "parenthood" with "carer responsibilities", change "marital status" to "relationship status" and clarify the scope of "de facto partner" to ensure all modern relationships are captured.

**Reforms outside the Discussion Paper:**

**Recommendation 19:** The definition of discrimination should be amended to simplify direct discrimination and introduce protection from indirect discrimination.

**Recommendation 20:** The Act should be amended to place the burden of proof on the Respondent once the Applicant has established a basis for a claim under the Act.

**Recommendation 21:** The Act should be amended to enable the Anti-Discrimination Commissioner to undertake compliance action to enforce discrimination law.

**Recommendation 22:** The Act should be extended to apply to all areas of public life, beyond the areas currently specified in the Act.

**Recommendation 23:** The Act should be amended to remove all specific exceptions and replace them with a general exception applying principles of necessity, proportionality, and legitimacy.

**Recommendation 24:** The Act should include an enforceable positive obligation on the public and private sector to promote equality and eliminate unlawful discrimination.

**Recommendation 25:** Legal aid bodies, community legal centres and the Anti-Discrimination Commission must be adequately funded and supported to ensure the effective operation of the Act.

**Recommendation 26:** A human rights charter act or should be introduced in the Northern Territory.

## 1.4 Glossary

The following defined terms and acronyms are used throughout this submission.

<i>Age Discrimination Act 2004</i> (Cth)	ADA
<i>Anti-Discrimination Act</i> (NT)	The Act
Australian Human Rights Commission	AHRA
<i>Australian Human Rights Commission Act 1986</i> (Cth)	AHRCA
Convention on the Elimination of All Forms of Discrimination against Women	CEDAW
Convention on the Rights of Persons with Disabilities	CRPD
<i>Disability Discrimination Act 1992</i> (Cth)	DDA
<i>Equality Act 2010</i> (UK)	UK Act
<i>Fair Work Act 2009</i> (Cth)	FWA
Human Rights Law Centre	HRLC
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
International Convention on the Elimination of All Forms of Racial Discrimination	CERD
<i>Racial Discrimination Act 1975</i> (Cth)	RDA
<i>Sex Discrimination Act 1984</i> (Cth)	SDA
United Nations Human Rights Committee	HRC

## Terminology<sup>7</sup>

**Sex** refers to a person's biological characteristics. A person's sex is usually described as being male or female, however some people may not be exclusively male or female (intersex).

**Intersex** refers to people who are born with genetic, hormonal or physical sex characteristics that are not typically 'male' or 'female'.

**Gender** refers to the way a person identifies or expresses their masculine or feminine characteristics.

**Gender identity** refers to a person's deeply held internal and individual sense of gender. A person's gender identity is not always exclusively male or female and may or may not correspond to their sex.

**Trans** is a general term for a person whose gender identity is different to their sex at birth.

## 2. Gender, Sexuality and Intersex Protections

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### 2.1 Sexual orientation

The term 'sexual orientation' is currently defined narrowly in the Act to mean the sexual characteristics of homosexuality, heterosexuality, and bisexuality.

The HRLC does not support using the definition of sexual orientation in the *Sex Discrimination Act 1984* (Cth) (**SDA**). The HRLC supports a broad, inclusive definition which is not restricted to these binaries and labels and comprehensively captures conduct characterized by prejudice based on a person's sexual orientation. A definition of sexual orientation that consists of categories or labels attributed to particular types of sexual orientation (that are undefined) is unnecessarily and unhelpfully limited and does not reflect the lived reality of people in relationships today and the disadvantage they face because of their sexual orientation.

It would be very unfortunate if a claim were not to succeed simply because of the technical limitations of such definition. This would undermine the intent of the protections. For example, a woman in a relationship with a person who is gender diverse could be treated unfairly because of her relationship

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<sup>7</sup> Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights*, National Consultation Report (2015).

with that person but the defendant to a claim may attempt to argue that the woman's attraction to a gender diverse person is neither homosexual, heterosexual or bisexual.

The Yogyakarta Principles, developed at a meeting of international human rights experts and accepted as a universal standard, define sexual orientation as follows:

*Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.<sup>8</sup>*

This definition reflecting international best practice is inclusive of people who are transgender, gender diverse in addition to covering people who are homosexual, bisexual, pansexual, asexual and heterosexual. The definition also includes people who do not identify as a particular sexual orientation but who would nevertheless, through their conduct or their experience of attraction, could be described as falling within a particular type of sexual orientation including, for example, 'men who have sex with men' (MSM) who do not identify as gay or bisexual despite having sex with men.

The HRLC strongly agrees with the commentary in the Discussion Paper that 'transsexuality' is not a sexual orientation but rather a term related to gender identity and should be removed from the definition of sexual orientation. We also would discourage the use of this term generally as it is outdated.

**Recommendation 1:**

The definition of sexual orientation should follow international best practice and be worded as follows:

**"Sexual orientation"** means each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.

## 2.2 Gender identity

Gender identity is not currently protected under the Act, which puts the Northern Territory out of step with all other states and territories and federal discrimination law. This is a significant gap in legal protection that should be remedied, and means that trans and gender diverse Territorians and brotherboys and sistergirls are protected from discrimination across the rest of Australia, but not in their home territory. While the SDA does apply in the Northern Territory it does not have comprehensive coverage<sup>9</sup> and a lack of coverage at a Territory level denies residents a face-to-face local option for resolution of complaints, given the Australian Human Rights Commission is based in Sydney. This is particularly concerning for Aboriginal and Torres Strait Islander people who are therefore unable to access to a culturally competent local service, or a person with a disability who

<sup>8</sup> Yogyakarta Principles (2006), Preamble.

<sup>9</sup> See *Sex Discrimination Act 1984* (Cth), section 9.

may have difficulties communicating over the phone or online. The federal jurisdiction has other disadvantages and barriers for complainants including its costs rules.

Including 'gender identity' as a protected attribute would provide important protections for trans and gender diverse Territorians but also bring the NT into line with international human rights standards. The Committee on Economic, Social and Cultural Rights has confirmed that gender identity is a prohibited ground of discrimination under international law.<sup>10</sup> Gender identity discrimination can and does occur in all the areas of public life protected by the Act. For example an employer may refuse to hire someone because of their gender identity or refuse to use their preferred name and pronouns following their transition, forcing them to leave their employment. Trans and gender diverse people face higher levels of mental health issues, unemployment and poverty as a result of this discrimination.<sup>11</sup> Another example may be a doctor making offensive comments to a patient about their gender identity and refusing to provide particular health services. This can make trans and gender diverse people feel unwelcome and may cause them to disengage from health services. The lower physical and mental health outcomes experienced by trans people, gender diverse people and brotherboys and sistergirls, including as a result of discrimination in accessing basic health services, have been well documented.<sup>12</sup>

The HRLC supports protection from gender identity discrimination under the Act and recommends that gender identity be given a broad definition in line with Australian and international best practice. The HRLC strongly cautions against definitions of gender identity from outdated statutes in other jurisdictions, which limit protections to circumstances where a person identifies as a man or a woman and therefore does not protect against discrimination in circumstances where a person identifies as both or neither male or female. These definitions would fail to protect gender diverse and non-binary people and no longer represent best practice.

The Yogyakarta Principles define gender identity as follows:

*Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>13</sup>*

The SDA condenses this definition as follows in section 4:

*"gender identity" means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.*

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<sup>10</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 20 (Non-discrimination in Economic, Social and Cultural Rights)*, at [32].

<sup>11</sup> LGBTI Health Alliance, *The Statistics at a glance: The mental health of lesbian, gay, bisexual, transgender and intersex people in Australia* (2016) <https://lgbtihealth.org.au/statistics/>.

<sup>12</sup> LGBTI Health Alliance, *The Statistics at a glance: The mental health of lesbian, gay, bisexual, transgender and intersex people in Australia* (2016) <https://lgbtihealth.org.au/statistics/>.

<sup>13</sup> Yogyakarta Principles (2006), Preamble.

The above definition is inclusive of transgender and gender diverse people. The HRLC also recommends that a note or example be added to the definition that confirms that discrimination against brotherboys and sistergirls fall would be captured by the definition of gender identity.

A key feature of the definition is the clarification that medical intervention is not necessary in order for someone to establish they have any particular gender identity within the meaning of the Act. Although a number of trans or gender diverse people may experience symptoms of gender dysphoria that require clinical treatment and support, being trans is not an "illness" and does not in itself require diagnosis. Requiring an individual to undergo invasive, expensive and, in many cases, unnecessary surgery imposes a discriminatory burden on trans and gender diverse people.

The definition is universal and encompasses someone whose gender identity aligns with their designated sex at birth. Nevertheless, in our view it is appropriate to retain the protected attribute of 'sex' to ensure there are no protection gaps. For example, there may be policies or practices that could somehow be construed to discriminate on the basis of biological sex rather than gender. It would be unfortunate for the removal of the 'sex' attribute to have the unintended consequence of reducing the available protections from discrimination.

Act as proposed in the Discussion Paper.

**Recommendation 2:**

The Act should be amended to include the attribute of "gender identity" defined as follows:

*"gender identity" means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to the person's designated sex at birth.*

A note or example be added to the definition that confirms that discrimination against brotherboys and sistergirls fall would be captured by the definition of gender identity.

### 2.3 Sex characteristics

People with intersex variations can also experience discrimination in all of the areas of public life covered by the Act. Unfortunately, protection for people with intersex variations is not currently expressly protected under the Act, unlike in the SDA, Tasmania and South Australia. The HRLC strongly supports the position in the Discussion Paper that a specific protection for people with intersex variations is required to provide clear protection from discrimination on this basis. A 2015 survey reported that 2 in 3 people with an intersex variation had experienced discrimination on the basis of their intersex variation from strangers, and 70% never or rarely discussed their intersex variations with strangers.<sup>14</sup>

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<sup>14</sup> OII Australia, *New publication "Intersex: Stories and Statistics from Australia"* (3 February 2016) <https://oii.org.au/30313/intersex-stories-statistics-australia/>.

As part of the 2012 inquiry into the federal Human Rights and Anti-Discrimination Bill,<sup>15</sup> OII Australia included the following case study:

*T is a 15 year old child, with male sex of rearing, who has just been diagnosed with 47,XXY when his doctor ran some tests as a result of significant breast development and other physical changes. T has been shunned by other pupils at school and has experienced bullying due to his physical differences. These include allegations that this makes him partly a woman, or gay. His religious school has recently banned a gay couple from a school formal. T should be protected from harassment at any school.*

The SDA approaches this protection by adding 'intersex status' as a protected attribute which is defined as:

*the status of having physical, hormonal or genetic features that are:*

- (a) neither wholly female nor wholly male; or*
- (b) a combination of female and male; or*
- (c) neither female nor male.<sup>16</sup>*

Intersex advocacy organisations such as Organisation Intersex International Australia have criticised this definition for its focus on deficits, or in other words what people with intersex variations lack.<sup>17</sup>

The Yogyakarta Principles Plus 10 introduce a new attribute of 'sex characteristics' instead of intersex status and provide the following definition:

*Understanding 'sex characteristics' as each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty;<sup>18</sup>*

**Recommendation 3:**

The Act should be amended to protect a new attribute of "sex characteristics" defined as follows:

**"sex characteristics"** means a person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.

<sup>15</sup> OII Australia, *Submission on the proposed federal Human Rights and Anti-Discrimination Bill* (9 December 2012) 20.

<sup>16</sup> *Sex Discrimination Act 1984* (Cth), section 4.

<sup>17</sup> See OII Australia's website: <https://oii.org.au/18106/what-is-intersex/>

<sup>18</sup> Yogyakarta Principles Plus 10 (2017), preamble.

### 3. Vilification

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Vilification can have a significant effect on an individual – making them feel unsafe at work or in public, afraid of being targeted or attacked because of an innate attribute which they cannot change. Left unchecked, hate speech also has a profound effect on our community more broadly. It encourages hatred or prejudice to be directed towards a group of people in our society. It can directly cause increases in violence, discrimination and abuse because of who you are or who you love. Vilification protections were introduced under law in response to social movements which directly vilified people because of their race or religion (e.g. Jewish people during WWII). Protection from racial vilification is enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>19</sup>

The HRLC supports the proposal in the Discussion Paper that the Act be amended to prohibit vilification on the basis of all protected attributes in any public place. As highlighted in the Discussion Paper, racial hatred is covered in all other state and territory laws, and vilification on the basis of other attributes such as disability, gender identity and sexual orientation are covered in Tasmania,<sup>20</sup> New South Wales,<sup>21</sup> Queensland,<sup>22</sup> and the ACT.<sup>23</sup> Currently, only racial vilification is protected in the Northern Territory under a federal law which requires a complaint to be made to the Australian Human Rights Commission in Sydney. For example, if someone regularly yells homophobic and disturbing abuse at a gay man on his way to work each day he has no legal recourse to protect himself from being a victim of repeated hate speech under discrimination law.

The same rationale that underpins these protections on the basis of race – namely the aim of ‘prohibiting behaviour which affects not only the individual but the community as a whole’<sup>24</sup> – is equally important for other protected attributes. However, further consideration should be given to whether these protections should apply to all protected attributes. For example, some religious organisations argue against vilification or offensive conduct protections on the basis of religious belief.

Racism and racial vilification cause harm to individuals, to groups and society as a whole.<sup>25</sup> For example, a 2010-11 survey found that high levels of racism towards Aboriginal communities in Victoria was associated with poorer mental health and reduced life chances for Aboriginal Victorians.<sup>26</sup>

The same is true for other attributes. For example, the Australian Human Rights Commission found in a comprehensive survey that almost 75% of respondents had experienced some type of bullying, harassment or violence on the basis of their sexual orientation, gender identity or intersex status.<sup>27</sup> A

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<sup>19</sup> See Article 4, International Convention on the Elimination of All Forms of Racial Discrimination

<sup>20</sup> *Anti-Discrimination Act 1998* (Tas), section 19.

<sup>21</sup> *Anti-Discrimination Act 1977* (NSW), sections 38S, 49ZT, and 49ZXB.

<sup>22</sup> *Anti-Discrimination Act 1991* (QLD), section 124A.

<sup>23</sup> *Discrimination Act 1991* (ACT), section 67A.

<sup>24</sup> Second reading speech, *Racial Hatred Act 1995* (Cth), 15 November 1994, [3336].

<sup>25</sup> Professor Chesterman cited in Rees, Lindsay and Rice, *Australian Anti-discrimination Law: Text, Cases and Materials* (Federation Press, 2008), 532.

<sup>26</sup> VicHealth et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities. Experiences of Racisms: A Summary* (2012). See also VicHealth et al, *Building on Our Strengths: A Framework to Reduce Race-based Discrimination and Support Diversity in Victoria* (2011).

<sup>27</sup> Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights National, National Consultation Report* (2015), page 15.

study by the Australian Research Centre in Sex, Health and Society found a strong link between homophobic abuse and significantly higher rates of self-harm and suicidal ideation in young people.<sup>28</sup>

In order to address harmful attribute based conduct which currently falls outside the Act the HRLC supports the introduction of two protections, outlined below. These proposals are similar to the recommendations made by Professor Simon Rice in the ACT Law Reform Advisory Council report following a review of the *Discrimination Act 1991 (ACT)*:<sup>29</sup>

- The HRLC recommends that the Act be amended to prohibit conduct, called 'vilification', which occurs otherwise than in private and that is expresses, or is reasonably likely in the circumstances to incite, hatred towards, serious contempt for, severe ridicule or revulsion of, a person or people with a protected attribute.
- The HRLC recommends the Act should be amended to prohibit conduct, called 'attribute based harassment', which occurs otherwise than in private and that seriously offends, insults, humiliates or intimidates another person because of a protected attribute. This prohibition should have defences to allow for freedom of expression.
- The HRLC recommends the Act should be amended to introduce a criminal offence of 'aggravated vilification' or 'criminal vilification'.
- Further consideration should be given to whether these protections should apply to all protected attributes. For example, some religious organisations argue against vilification or offensive conduct protections on the basis of religious belief.

**Recommendation 4:**

- The Act be amended to prohibit conduct, called 'vilification', which occurs otherwise than in private and that is expresses, or is reasonably likely in the circumstances to incite, hatred towards, serious contempt for, severe ridicule or revulsion of, a person or people with a protected attribute.
- The Act should be amended to prohibit conduct, called 'attribute based harassment', which occurs otherwise than in private and that seriously offends, insults, humiliates or intimidates another person because of a protected attribute. This prohibition should have defences to allow for freedom of expression.
- The Act should be amended to introduce a criminal offence of 'aggravated vilification' or 'criminal vilification'.
- Further consideration should be given to whether these protections should apply to all protected attributes.

<sup>28</sup> Australian Research Centre in Sex, Health and Society, *Writing Themselves in 3: The third national study on the health and wellbeing of same sex attracted and gender questioning young people* (2010), page 51.

<sup>29</sup> ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT) Final Report* (2015)

## 4. Additional attributes

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### 4.1 Family violence status

People who have survived family violence should not be treated less favourably in the workplace or in any area of public life. A failure to adequately protect survivors of family violence at a time when they are at their most vulnerable – such as when they are attempting to leave an abusive partner – can prevent them from finding safety.

The HRLC supports the inclusion of a new attribute of 'status as a victim of family violence' in the Act. Currently if a woman is dismissed by her employer because of circumstances related to family violence (e.g. because her abusive partner is constantly calling and attending her workplace), she would not be protected under the Act. While she is protected under the federal FWA, an unfair dismissal application must be lodged within 21 days and conciliation is over the phone, removing the option for face-to-face support in the Territory. The FWA is also obviously limited to employment whereas the circumstances where victims of family violence may face unfair treatment are much broader, as discussed further below.

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 of itself, which compounds other inequalities in public life. The Committee has said:

*Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and **impair their ability to participate in family life and public life on a basis of equality.**<sup>30</sup> (Emphasis added).*

For these reasons the Committee has called on all member states, including Australia, to take 'all legal and other measures that are necessary to provide effective protection of women against gender-based violence'.<sup>31</sup> The inclusion of 'status as a victim of family violence' as a protected attribute would play an important role in protecting Territorians, especially women, from both the immediate and consequential harm resulting from family violence.

Such protections are especially important in the workplace. Two thirds of women affected by family violence are in paid employment.<sup>32</sup> Financial independence is vital for many women trying to escape violent relationships. Hence, maintaining secure, paid employment often provides a pathway for women out of family violence situations.<sup>33</sup> Research has shown, however, that victims of family violence tend to experience discrimination and inequality in the workplace.<sup>34</sup> A survey conducted by

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<sup>30</sup> Committee on the Elimination of Discrimination Against Women, *General Comment No. 19, 11<sup>th</sup> session* (1992), paragraph 23.

<sup>31</sup> *Ibid*, paragraph 24(t).

<sup>32</sup> Australian Bureau of Statistics, *Personal Safety Survey, Catalogue No 4906.0* (2005), 11, 34.

<sup>33</sup> Australian Law Reform Commission, *Family Violence – Commonwealth Laws, Discussion Paper No 76* (2011), paragraphs 14.11 – 14.13.

<sup>34</sup> Belinda Smith and Tashina Orchiston, *Domestic Violence Victims at Work: The Role of Anti-Discrimination Law, Working Paper* (2011). See also: Braaf and Meyreing, *Seeking Security: Women's Economic Wellbeing During*

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.<sup>35</sup> 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, which compounds the harm they suffer. Incorporating this protection in the Act would encourage victims to speak-up about family violence within a protective framework.

Discrimination against victims of family violence is not limited to the workplace. Victims of family violence also tend to experience discrimination in access to goods and services and the provision of housing. Given that women are disproportionately affected by family violence, this type of discrimination contributes to the substantive inequalities that women experience in *all* aspects of public life. It also impacts on women's equal enjoyment of other rights, such as the right to health.<sup>36</sup>

Including a person's 'status as a victim of family violence' as a protected attribute in the Act would go some way towards realising women's rights and promoting substantive sex equality in the Northern Territory. The HRLC recommends that family violence be defined broadly to include both physical and non-physical forms of violence (such as emotional and economic abuse) perpetrated by a family member or other person who is in a domestic relationship with the victim.<sup>37</sup>

**Recommendation 5:**

The Act should be amended to include a person's 'status as a victim of family violence' as a protected attribute.

## 4.2 Lawful sexual activity

The HRLC supports efforts to tackle the discrimination experienced by sex workers. In addition to the right to freedom from discrimination and the rights outlined in the Discussion Paper discrimination against people who engage in sex work can impact on their rights to health and housing.<sup>38</sup> Australia is a signatory to the United Nations Political Declaration on HIV and AIDS and has committed to protect and promote human rights for sex workers and to "intensify national efforts to create enabling legal, social, and policy frameworks".<sup>39</sup>

The HRLC supports the inclusion of lawful sexual activity as a protected attribute under the Act. The attribute of 'lawful sexual activity' is already protected in other jurisdictions such as Victoria. An

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*and Following Domestic Violence*, Australian Domestic and Family Violence Clearinghouse (2011); VicHealth, *National Survey on Community Attitudes to Violence Against Women 2009* (2010) at 47; McFerran, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse (2011).

<sup>35</sup> L MFerran, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse (2011).

<sup>36</sup> E.g. research undertaken by VicHealth has shown that family violence is the leading contributor to death, disability and illness in women aged 15 – 44 years. See VicHealth, *The Health Costs of Violence: Measuring the burden of disease caused by intimate partner violence* (2004), 8.

<sup>37</sup> Belinda Smith and Tashina Orchiston, *Domestic Violence Victims at Work: The Role of Anti-Discrimination Law*, Working Paper (2011) at pp 16 – 17.

<sup>38</sup> Amnesty International, *Sex Workers at Risk: A Research Summary on Human Rights Abuses Against Sex Workers* (2016), pages 15-16.

<sup>39</sup> United Nations, *Resolution adopted by the General Assembly 65/277, Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS* (2011) s80, s39.

alternative or additional proposal to the introduction of the attribute of 'lawful sexual activity' is to protect against discrimination on the basis of profession, trade, occupation or calling, similar to the Australian Capital Territory.<sup>40</sup>

A national survey by the Scarlet Alliance, Australian Sex Workers Association, albeit now a little dated, found that people who do sex work experienced discrimination on the basis of their occupation in a number of areas:

*goods and services (applying for credit or loans), advertising (discriminatory advertising policies and fees), housing and accommodation (eviction, refusal of accommodation, unfavourable treatment), seeking other employment (particularly in teaching professions) and access to justice (barriers to sex workers reporting crimes, giving evidence at hearings, work taken as evidence of bad character).*<sup>41</sup>

In order for the 'lawful sexual activity' attribute to have utility for sex workers, consideration must also be given to reforming the *Prostitution Regulation Act* (NT) which outlaws brothels, where sex workers may have more protection than they do operating out of their own homes and soliciting in a public place.<sup>42</sup>

The HRLC broadly recommends that consideration be given to the position of organisations such as SWOP which have expertise in and knowledge of the experience of discrimination by people who engage in sex work.

**Recommendation 6:**

The HRLC supports the inclusion of protections from discrimination on the basis of 'lawful sexual activity' and/or 'profession, trade, occupation or calling'.

Any amendment regarding lawful sexual activity and discrimination experienced by sex workers should be informed by the experience of Territory based organisations with expertise on this issue.

### 4.3 Social status including accommodation status

No one should face discrimination because they do not have a stable home or stable job. Mistreatment against people experiencing homelessness or who have previously experienced homelessness perpetuates disadvantage and continue the cycle of homelessness. Similarly, people living in poverty or surviving on social security payments can face stigma and discrimination which reinforces and perpetuates their disadvantage.

The Act should prohibit discrimination on the basis of social status. We use the term 'social status' to include not only persons who are homeless, but also those who are at risk of – or recovering from – a

<sup>40</sup> *Discrimination Act 1991* (ACT),

<sup>41</sup> Scarlet Alliance and the Australian Federation of AIDS Organisations, *Unjust and Counter-productive: The Failure of Governments to Protect Sex Workers From Discrimination* (1999)

<sup>42</sup> *Prostitution Regulation Act* (NT), sections 4 and 10.

period of homelessness. Accordingly, we define 'social status' to mean a person's status as homeless, unemployed or a recipient of social security payments.<sup>43</sup>

Homelessness is a growing problem in Australia and affects all demographics. In 2015-2016, nearly two thirds of Australians accessing homelessness services were women, nearly a third were aged under 18, and a quarter were Aboriginal or Torres Strait Islander.<sup>44</sup> Homelessness due to family violence represented 36% of total demand on homelessness services.<sup>45</sup>

People experiencing homelessness face violations of a wide range of human rights including the right to health, the right to education, the right to work, the right to liberty and security of the person, the right to privacy, the right to social security, and the right to vote.<sup>46</sup> The UN Committee on Economic, Social and Cultural Rights confirmed that states should take concrete steps to address discrimination on the basis of social disadvantage and articulated the problem as follows:

*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.*<sup>47</sup>

International human rights bodies acknowledge that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'. The Human Rights Committee has found a difference between employed and unemployed persons to constitute discrimination on the basis of 'other status'.<sup>48</sup> Further, a recent UN Special Rapporteur report made the recommendation that homeless people must be recognised as a protected group in all relevant domestic anti-discrimination and hate-crime laws.<sup>49</sup>

A number of overseas jurisdictions provide legal protections against socio-economic discrimination. For example, in New Zealand, the *Human Rights Act 1993* prohibits discrimination on the basis of 'employment status', which is defined as being unemployed, receiving an income support benefit or receiving accident compensation payments.<sup>50</sup> Similarly, the Canadian *Charter of Rights and Freedoms 1982*, which contains a non-exhaustive list of prohibited grounds of discrimination,<sup>51</sup> has been interpreted to provide varying degrees of protection for people who are in receipt of social security assistance, unemployed, homeless or poor. Discrimination on the basis of 'source of income' is prohibited in the legislation of Nova Scotia, Alberta, British Columbia, Manitoba, Prince Edward Island and the Yukon. Ontario and Saskatchewan use the term 'receipt of public assistance'.<sup>52</sup> The province of Québec has human rights legislation prohibiting discrimination on the ground of 'social

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<sup>43</sup> Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295.

<sup>44</sup> Australian Institute of Health and Welfare, *Specialist Homelessness Services 2015-2016 Web Report* (2016), accessed online 29 November 2017.

<sup>45</sup> *Ibid.*

<sup>46</sup> For detail of how these rights are affected see Australian Human Rights Commission, *Homelessness is a Human Rights Issue* (2008), accessed online 29 November 2017.

<sup>47</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 20 on non-discrimination in economic, social and cultural rights (2009), paragraphs 35-36.

<sup>48</sup> *Cavalcanti Araujo-Jongens v Netherlands* (418/90).

<sup>49</sup> Report of UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (2015), paragraph 91(f)

<sup>50</sup> Human Rights Act 1993 (NZ) s 21 sub-s 2

<sup>51</sup> Article 15(1) provides that "Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination".

<sup>52</sup> Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (23 June 2000) <<http://canada.justice.gc.ca/chra/en/index.html>>.

condition'. In the United States, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution – which provides equal protection of the law – has been interpreted as prohibiting discrimination on the basis of status, including socio-economic status and homelessness.<sup>53</sup>

In Europe, the right to freedom from discrimination on the grounds of 'social origin' is recognised in Article 14 of the European Convention on Human Rights (ECHR). Commentators have argued that the attribute of 'social origin' includes the ground of 'social status'.<sup>54</sup> The United Kingdom's *Human Rights Act 1998* (UK), which was enacted to give legislative effect to the ECHR, incorporates Article 14 of the ECHR provides equivalent protections against 'social origin' and, by extension, 'social status' discrimination. Consideration could be given to incorporating a new attribute of 'social status' which covers both accommodation status and socioeconomic status.

The HRLC recommends that the definition be drafted to encompass insecure or inadequate housing in addition to a lack of housing (e.g. couch-surfing, rooming houses, caravan parks). The Australian Bureau of Statistics developed the following definition of homelessness after a period of consultation:

*When a person does not have suitable accommodation alternatives they are considered homeless if their current living arrangement:*

- is in a dwelling that is inadequate; or
- has no tenure, or if their initial tenure is short and not extendable; or
- does not allow them to have control of, and access to space for social relations.<sup>55</sup>

The term 'homeless' should be interpreted in line with this definition.

**Recommendation 7:**

The Act should be amended to include the protected attribute of 'social status', defined to mean a person's status as homeless, unemployed or a recipient of social security payments.

#### 4.4 Carer assistance-animals

The HRLC supports the definition of assistance-animals extending beyond visual, hearing or mobility impairments to be inclusive of all assistance animals. Unlike the Act, the *Disability Discrimination Act 1992* (Cth) (DDA) does not limit the protection from discrimination on the basis of an assistance animal to particular forms of disability.<sup>56</sup> Assistance animals can now be trained to assist with a broad range of disabilities including people with diabetes by alerting them when their blood sugar levels are going low,<sup>57</sup> and people with post-traumatic stress disorder by detecting signals of anxiety.<sup>58</sup> Limiting protection to visual, hearing and mobility impairments creates an unjustified hierarchy of rights for people with disabilities in the Northern Territory based on the type of disability they have.

The Convention on Rights of Persons of Disabilities, to which Australia is a signatory, requires states to take appropriate measures to ensure people with disabilities do not face barriers in accessing

<sup>53</sup> See, for example, *Pottinger v City of Miami*, 810 F Supp 1551, 1578 (SD Fla 1992).

<sup>54</sup> See, for example, Lynch and Stagoll, above.

<sup>55</sup> Australian Bureau of Statistics, *Information Paper – A Statistical Definition of Homelessness* (2012)

<sup>56</sup> Compare *Disability Discrimination Act 1992* (Cth), section 8 with *Anti-Discrimination Act* (NT), section 21.

<sup>57</sup> See for example Paws for Diabetics Inc: <http://pfd.org.au/index.php>

<sup>58</sup> See for example Assistance Dogs Australia: <http://www.assistancedogs.org.au/>

transportation, public spaces, or employment.<sup>59</sup> If a person with a disability requires their assistance animal be with them at all times then allowing some assistance animals to be excluded poses an unacceptable barrier to their access.

Currently the Act defines guide dog as 'a dog that is trained to provide assistance to a person who has a visual, hearing or mobility impairment'.<sup>60</sup> The Discussion Paper proposes that if the categories of disability were to be expanded the definition this would need to be restricted to certified or specifically trained animals. It is unclear why this concern is applied to other disabilities when it is not currently a requirement for visual, hearing or mobility impairments. The DDA definition of assistance animal includes the following:

*a dog or other animal trained:*

*(i) to assist a person with a disability to alleviate the effect of the disability; and*

*(ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.<sup>61</sup>*

This definition is inclusive of all disabilities and does not impose restrictive accreditation requirements on people with disabilities.

**Recommendation 8:**

The Act should be amended to protect discrimination against all assistance animals in line with the inclusive definition in the *Disability Discrimination Act 1992 (Cth)*.

## 5. New Reforms

### 5.1 Representative complaint model

The HRLC supports the proposal that the Act make provision for representative complaints of discrimination.

A key problem with the discrimination framework in the Act is that it places an onerous burden on individuals to enforce their rights to equality through complaints. This is particularly problematic in situations of workplace discrimination and harassment, where complainants and witnesses are often financially dependent on the discriminator and discouraged from making a complaint or giving evidence by the potential repercussions within their workplace, as well as their industry. For various reasons, the large majority of people with legitimate complaints under Australian anti-discrimination laws do not report the conduct or make a complaint. For example, the AHRC's national prevalence survey found that 1 in 2 women experience pregnancy or parental discrimination at work yet only 6% of these women made a formal complaint within their organization and only 4% made a complaint to a government agency.<sup>62</sup>

<sup>59</sup> Convention on the Rights of Persons with Disabilities, Articles 9 and 27.

<sup>60</sup> *Anti-Discrimination Act (NT)*, section 4.

<sup>61</sup> *Disability Discrimination Act 1992 (Cth)*, section 9(2)(c)

<sup>62</sup> Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review Report* (2014)

Enabling representative complaints would go some way towards relieving this burden on individuals. Such a change would also have the potential to produce positive outcomes that reach beyond the circumstances of one individual, thereby contributing to systemic change and substantive equality.

The HRLC cautions against adopting the approach under the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA) which currently permits representative complaints to the Commission.<sup>63</sup> It is extremely difficult for a representative body to pursue the matter in the Federal Courts if the complaint is unresolved at the Commission stage. This is because, unless the representative body is itself 'aggrieved' by the discrimination, it will not be an 'affected person' for the purposes of s 46PO(1) of the AHRCA, meaning that it may not bring proceedings before the Court. The situation is further complicated by s 33D(1) of the *Federal Court of Australia Act 1976* (Cth), which provides that only a person who has a 'sufficient interest' to commence a proceeding against the respondent on his or her own behalf has standing to bring a representative proceeding against the respondent on behalf of other persons who have the same or similar claim against the respondent. Hence, the aggrieved person on behalf of whom a representative complaint is made may be forced to pursue their claim through the courts on their own.

The HRLC maintains that organisations with a legitimate interest in particular subject matter should have standing to commence and pursue discrimination proceedings on behalf of aggrieved persons, particularly where the claim involves a systemic problem that affects a wide class of persons.<sup>64</sup>

#### **Recommendation 9**

The Act should make provision for representative complaints by organisations with a legitimate interest in a particular subject matter.

## 5.2 Broadening the scope of clubs

As the Discussion Paper highlights, the definition of clubs in the Act is unnecessarily restrictive and there is no longer any justification for specifying that a club sells or supplies liquor on its premises.<sup>65</sup> The HRLC supports the Act being amended to remove this requirement from the definition.

Consideration should also be given to reforming the exemptions regarding clubs in the Act. In particular the exemption which allows discrimination by a club on the ground of sex in membership of a club if the club provides association wholly or mainly for people of one sex.<sup>66</sup> This falls short of Australia's international legal obligations to ensure that women are protected from discrimination by organisations, enterprises and individuals in both the public and private spheres.<sup>67</sup>

To compare with federal discrimination law, the RDA sets the highest benchmark as it contains no such exemptions for these types of bodies. The DDA permits discrimination in this area only insofar as persons with a particular disability are permitted to form an exclusive club or association. The ADA

<sup>63</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c).

<sup>64</sup> Standing Committee on Legal and Constitutional Affairs, *Report on the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality*, (December 2008), Recommendation 21.

<sup>65</sup> See the definition of clubs in section 4(c) of the *Anti-Discrimination Act* (NT)

<sup>66</sup> *Anti-Discrimination Act* (NT), section 47(3)(a)

<sup>67</sup> CEDAW, art 2(e) and general recommendation 25, above n, [7].

allows 'voluntary bodies', including all not-for-profit associations, to discriminate on the basis of age in connection with the admission of members and the provision of benefits, facilities and services.<sup>68</sup> The SDA contains the most complex array of exemptions including for single-sex clubs. On the whole, these exemptions are inconsistent, outdated and confusing.

The HRLC submits that such exemptions for clubs, charities and voluntary bodies – organisations that can wield considerable economic, political and social power are unnecessary and allow discrimination to go unchecked in areas where there is significant scope for unfair treatment and harm to vulnerable people. These exemptions should be removed in their entirety, except insofar as they may provide special protection to remedy disadvantage faced by minority or vulnerable groups (such as children, elderly people and those with a particular disability).

**Recommendation 10:**

The definition of clubs in the Act should be amended to remove the requirement regarding liquor, and consideration to be given to removing exemptions for clubs beyond special measures exemptions for minority or vulnerable groups.

### 5.3 Sexual harassment

The HRLC supports the proposal that protection from sexual harassment be extended to all areas of public life. As outlined in the Discussion Paper, sexual harassment is protected in all areas of public life in Queensland and Tasmania however in the Northern Territory it is only protected in the limited categories of public life outlined in the Act. The impact of this is highlighted by the examples in the Discussion Paper where sexual harassment related to but outside work may escape the operation of the Act and where sexual harassment against a waitress is not protected under the Act.

Sexual harassment has been found to constitute sex discrimination in Australian courts,<sup>69</sup> and under CEDAW states are required "to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise".<sup>70</sup> The Declaration on the Elimination of Violence Against Women, which complements and strengthens CEDAW, specifically recognises "sexual harassment and intimidation [of women] at work, in educational institutions and elsewhere" as a form of violence against women.<sup>71</sup> There is no provision in these international human rights instruments for protection to be limited to any particular areas of public life.

**Recommendation 11:**

The Act should be amended to extend protection of sexual harassment to all areas of public life.

<sup>68</sup> Depending on the circumstances, these exemptions to disability and age discrimination are also likely to constitute special measures. For example, a support group established exclusively for persons with a mental illness may constitute a special measure as it would help to alleviate the isolation and disadvantage experienced by its members.

<sup>69</sup> See for example *Hughes v Car Buyers Pty Ltd* [2004] FMCA 526.

<sup>70</sup> *Convention on the Elimination of all forms of Discrimination Against Women*, article 2(e).

<sup>71</sup> *Declaration on the Elimination of Violence Against Women*, article 2(b).

## 5.4 Definition of “services” and application to Not for Profit groups

The HRLC supports the Act being extended to provide protection to people who are providing a service, and to clarify that “services” include the services provide by the Police. Under international human rights law there is no justification for limiting discrimination protections to particular relationships in public life.<sup>72</sup>

In conjunction with this reform thought should be given to an exemption which applies to seeking and receiving a service, similar to the way in which the special measures provision applies to services that are provided.<sup>73</sup> For example, it should be lawful for a woman who is seeking a pap smear to request a female doctor.

Finally, the HRLC recommends the removal of the exclusion of not-for-profit community groups from the definition of services in the Act.<sup>74</sup> This exclusion extends to an association established for community service purposes which is a not-for-profit. This exclusion does not just provide protection to small volunteer run community organisations. According to the Australian Charities and Not-for-profits Commission a not-for-profit organisation can make a profit, so long as that profit is used to further its purpose. Under this exemption it is conceivable that charity organisations such as a crisis accommodation provider could refuse to provide services to someone because they are Aboriginal or because they are transgender without breaching the Act. This is particularly concerning when the Territory has such a large number of essential welfare services that are provided by religious not for profit organisations. For example the Northern Territory Council of Social Services Directory lists 15 aged care services for the Territory and out of these 12 are run by religious organisations and 3 are run by Aboriginal and Torres-Strait Islander organisations.<sup>75</sup> These religious based services receive government funding to provide services of a public nature and should not be exempt from discrimination laws.

### **Recommendation 12:**

The Act should be amended to extend the definition of services to protect someone who is providing a service, to clarify that the actions of Police constitute a service,

The Act should be amended to remove the broad exclusion of not for profit community groups.

## 6. Removing content that enshrines discrimination

### 6.1 Religious exemptions

The HRLC supports the proposal that the following religious exemptions be removed from the Act and replaced with a general limitations defence:

<sup>72</sup> For example see Article 26 of the ICCPR which does not limit the protection any area of public life

<sup>73</sup> *Anti-Discrimination Act (NT)*, section 57.

<sup>74</sup> See section 41(2) of the Act.

<sup>75</sup> See <https://ntcoss.org.au/directory/categories/aged-care>

- Section 30(2): permits religious schools to exclude prospective students who are not of that religion.
- S 37A: permits religious schools to discriminate against employees on the grounds of religious beliefs, activity or sexuality if done in good faith to avoid offending the religious sensitivities of people of the religion.
- Sections 40(2A) and 40(3): permits religious schools as accommodation providers to discriminate by limiting accommodation to a particular religion, and generally to discriminate in accordance with religious doctrine in order to avoid offending religious sensitivities.

These exemptions are inappropriate and inconsistent with Australia's human rights obligations and international best-practice.

The exemptions are ostensibly designed to protect religious freedom. The right to freedom of religion is of vital importance and its recognition is necessary for the full realisation of human rights. However, freedom of religion is not an absolute right, meaning that freedom of religion can be limited in certain circumstances.<sup>76</sup> In cases where the right to freedom of religion conflicts with other rights, for example the right to equality, neither right should automatically prevail. Instead, competing interests should be considered and balanced. If a discriminatory policy or practice is explained and shown to be reasonable and proportionate then the discrimination should be allowed. If it cannot be shown that the discrimination is reasonable and proportionate, such discrimination should not be permitted under law.

The exemptions outlined above are extremely broad and while they may allow for justifiable discrimination in some circumstances, they may also allow for discrimination that is not reasonable and proportionate. Importantly, these broad permanent exemptions leave no scope for analysis or consideration of either the merit or the effect of the discrimination in question.

Currently, this exemption regime perpetuates a false and unjustified hierarchy of rights, entrenches systemic discrimination and generally restrains society's pursuit of equality.

Removing the above exemptions would leave the exemptions in section 51 in the Act which permit discrimination in the ordination and training of ministers of religion and any an act by a body established for religious purposes if the act is done as part of any religious observance or practice.

The HRLC supports the Discussion Paper's proposal that the above exemptions be removed and in their place religious bodies can apply for an exemption (presumably under the existing section 59 of the Act). This process would provide greater certainty for religious organisations and clarity to people engaging with religious organisations who may be on the receiving end of discriminatory conduct.

Such an amendment would also ensure that the many religious organisations that do not wish to discriminate can be clear when communicating to consumers, employees and their stakeholders that they do not and will not be engaging in discriminatory conduct. This will build trust with the community and ensure that LGBTI people, single mothers or unmarried couples can seek out services from faith

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<sup>76</sup> See for example Article 18(3) of the ICCPR

based service providers without fear of ill treatment. Currently the religious exemptions serve as a barrier to vulnerable people accessing essential social services.

The HRLC recommends that section 59 be reviewed and the broad discretion granted by section 59(3)(b) be narrowed to ensure that a clear framework is in place to balance competing rights.

**Recommendation 13:**

The Act should be amended to remove religious exemptions in the areas of education, employment and accommodation and to provide greater clarity around how competing rights can be balanced when an application for an exemption is made to the Anti-Discrimination Commissioner.

The HRLC cautions against the proposal in the Discussion Paper that section 43 also be repealed. This section provides that access to a site of cultural or religious significance can be limited in accordance with the culture or doctrine of that religion and if necessary to avoid offending cultural or religious sensibilities of adherents of that culture or religion. The Discussion Paper cites the protection provided by the *Northern Territory Sacred Sites Act* (NT) (**Sacred Sites Act**) in support of this section being removed. However it seems that section 43 provides protection that the Sacred Sites Act doesn't in two key ways:

1. The Sacred Sites Act only applies to land covered by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and has a complex registration process in section 27 whereas the Act covers all places of cultural significance.
2. While it does provide that people cannot enter or work on a sacred site without authority the Sacred Sites Act does not provide protection from a discrimination claim regarding restricted access to a site of cultural significance.

The HRLC recognises that the failure of the Sacred Sites Act to properly protect sacred sites in the Northern Territory has caused great concern to some Aboriginal communities in the past.<sup>77</sup> The HRLC urges consultation with Aboriginal and Torres Strait Islander communities before making any changes to this exemption.

**Recommendation 14:**

The Act should not be amended to remove protection for places of cultural or religious significance without consultation with Aboriginal and Torres Strait Islander communities.

<sup>77</sup> See for example ABC News David Cody, *\$500 fine for building toilet on sacred site* (2010) available online at: <http://mobile.abc.net.au/news/2010-09-17/500-fine-for-building-toilet-on-sacred-site/2264882>

## 6.2 Assisted reproductive treatment exclusion from services

The HRLC supports the removal of this exclusion which provides unjustified protection to assisted reproductive treatment services (**ART services**) from discrimination claims.<sup>78</sup> This means that ART services can discriminate against anyone on the basis of any attribute under Territory law. As the Discussion Paper notes, the only ART service operating in the Northern Territory is based in South Australia and recent reforms have removed barriers to eligibility.<sup>79</sup> However this exclusion of ART services from the definition of services under the Act precludes discrimination protection at a Territory level, leaving only the protection of federal discrimination laws.

The right to found a family is recognised under the ICCPR<sup>80</sup>, and the ICESCR recognises that the widest possible protection and assistance should be accorded to the family, particularly for its establishment.<sup>81</sup> The Committee on Economic, Social and Cultural Rights has recently confirmed that States are under an immediate obligation to eliminate discrimination against individuals or groups and to guarantee their equal right to sexual and reproductive health.<sup>82</sup> As outlined above, the obligation to protect people from discrimination under the ICCPR is not limited to particular areas of life or particular services, there is no justification for excluding this particular service from the Act.<sup>83</sup>

In addition to ensuring ART is covered by the Act consideration must be given to regulating ART in the Territory. Currently there are no laws in place governing ART in the Territory and the one service provider operating in the Territory is guided by South Australian Legislation.<sup>84</sup> This means that decisions around eligibility and procedure impacting Territorians are made by the South Australian Parliament.

### **Recommendation 15:**

The Act should be amended to remove the exclusion of assisted reproductive treatment services from the operation of the Act.

Legislation should be introduced to regulate the provision of assisted reproductive treatment in the NT.

<sup>78</sup> Assisted reproductive treatment is excluded from the definition of services by section 4(8) of the Act.

<sup>79</sup> See Section 9(1)(ba) of the *Assisted Reproductive Treatment Act 1988* (SA) which states that a condition of registration as an ART provider is that you must not refuse to provide ART to someone on the basis of their sexual orientation, gender identity, marital status or religious beliefs. Further section 9(1)(c)(ii) which states that ART can be provided if it appears unlikely that the person will become pregnant otherwise.

<sup>80</sup> ICCPR, Article 23

<sup>81</sup> ICESCR, Article 10

<sup>82</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 22 on the Right to Sexual and Reproductive Health* (2016) paragraph 34.

<sup>83</sup> ICCPR, Article 26.

<sup>84</sup> *Assisted Reproductive Treatment Act 1988* (SA)

## 7. Clarifying and miscellaneous reforms

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### 7.1 Work includes volunteers and modern workplaces

Volunteers are already protected from discrimination under the RDA and some state and territory anti-discrimination laws, however they are not protected under the Act. The Act should protect volunteers from discrimination at least insofar as their voluntary activities fall within an area of 'public life'. This would include, for example, volunteers who perform work in the not-for-profit organisations, government bodies, schools and emergency services.<sup>85</sup>

Not only do volunteers make an important contribution to public life, as noted in the Discussion Paper, volunteering also provides people with engagement and participation opportunities. For example, a person with a disability or parental responsibilities may engage in voluntary work to assist their transition into paid employment. In that sense, protection for volunteers is important for achieving overall substantive equality.

Further the HRLC supports the proposal that the Act be amended to cover shared workplaces. Currently the definition of "work" only protects people from being treated badly by employees or contractors of their employer or principal, it does not extend to the way employees or contractors of other organisations treat them. People with different employers/principals may share the same work space for a variety of reasons, the Discussion Paper gives the example of workers on a construction site where an electrician, a plumber, and a builder may all be engaged by different entities. If the electrician sexually harasses a plumber on site currently the Act does not provide them with any protection. To give another example, in a shopping centre a cleaner and a security guard may be employed by different entities yet share the same work space. Currently if the security guard makes rude and hurtful comments about the cleaner's religion to them there is nothing the cleaner can do under the Act to stop it, even though they would be able to bring a claim if it was another cleaner treating them badly because of their religion.

In Victoria sexual harassment protection was extended to common workplaces as follows:

- (1) *A person must not sexually harass another person at a place that is a workplace of them both.*
- (2) *For the purposes of this section it is irrelevant—*
  - (a) *whether each person is an employer, an employee or neither; and*
  - (b) *if they are employees, whether their employers are the same or different.*
- (3) *In this section "workplace " means any place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person's principal place of business or employment.<sup>86</sup>*

The HRLC recommends that an additional protection be inserted into the Act extending discrimination, sexual harassment, and victimisation protections to shared workplaces utilising the wording in the Victorian *Equal Opportunity Act 2010* (Vic).

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<sup>85</sup> By contrast, volunteering would fall outside of the 'public life', for example, where a person volunteers to coordinate a book club for a group of friends, or help a neighbour tend their garden.

<sup>86</sup> *Equal Opportunity Act 2010* (Vic), Section 94.

**Recommendation 16:**

The Act should be amended to confirm that work includes volunteers and shared workplaces so that they are protected from discrimination.

## 7.2 Failure to accommodate a special need

The HRLC supports the proposal in the Discussion Paper that the Act be amended to provide greater clarity about the positive obligation to accommodate a special need of a person with an attribute.

One key basis on which a person may require accommodation of a special need is the attribute of disability. The Convention on the Rights of Person's with a Disability highlights the importance of employers making reasonable adjustment in the workplace and service providers making adjustments to ensure accessibility.<sup>87</sup>

The Act should be amended to clarify that section 24 imposes a positive obligation on individuals and organisations to accommodate the special needs of their employees, service users, etc.

**Recommendation 17:**

The Act should be amended to clarify that the obligation to accommodate a special need requires proactive action.

## 7.3 Modernising language

Rather than removing the definitions of man and woman from the Act the HRLC recommends that reference to man and woman be removed from the Act altogether. There are three key reasons for this recommendation:

1. These terms are unnecessary for the proper functioning of the Act.
2. The use of the terms 'man' and 'woman' causes confusion as to legal position of transgender people and risks excluding gender diverse people entirely.
3. The words "man" and "woman" only appear in two contexts in the Act – "woman" is referred to in relation to artificial insemination and in vitro fertilisation, and both "man" and "woman" are referred to in relation to pregnancy and childbirth.<sup>88</sup> It is possible to remove the references to sex in these sections without extending the operation of the section.

For example section 54:

*Nothing in this Act makes it unlawful for a person to discriminate against a man on the ground of sex by reason only of the fact that that person grants to a woman rights or privileges in connection with pregnancy or childbirth.*

Could be changed to:

*Nothing in this Act makes it unlawful for a person to discriminate against a person who has not been pregnant or given birth on the ground of gender identity by reason only of the fact that person grants to a person with a different gender identity rights or privileges in connection with pregnancy or childbirth.*

<sup>87</sup> Convention on the Rights of Persons with a Disability, articles 9 and 27

<sup>88</sup> See definitions in Section 4 of the Act and the exemption in section 54 of the Act.

The HRLC also supports parenthood being replaced with carer responsibilities in recognition of the important role carers play in society. The most inclusive definition currently of carer in discrimination law in Australia is found in the *Equal Opportunity Act 2010* (Vic):

*"carer" means a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis.*<sup>89</sup>

Finally, the HRLC supports marital status being changed to relationship status in order to provide greater clarity about the scope of that attribute. Further the HRLC recommends that the definition of relationship status be reviewed to ensure it captures all modern relationships. For example, currently the Act covers someone who is married but no longer living with their partner, or who was married but their partner passed away but these extensions are not provided to someone who is or was in a de facto relationship.

**Recommendation 18:**

The Act should be amended to

- remove the definitions of and reference to man and woman;
- replace "parenthood" with "carer responsibilities"; and
- change "marital status" to "relationship status" and clarify the scope of "de facto partner" to ensure all modern relationships are captured.

## 8. Additional reforms

The HRLC has identified a number of reforms which were not canvassed in the Discussion Paper which should be considered as part of the review of the Act.

### 8.1 Definition of discrimination

The HRLC recommends that the Act be amended to simplify direct discrimination, introduce indirect discrimination protection, and confirm that discrimination protections also apply to a person who may have an attribute in the future.

#### **Direct discrimination**

The definition of discrimination in the Act reflects what is known in discrimination law as direct discrimination and includes a comparator test which is unnecessarily complex and confusing.<sup>90</sup> In order to prove direct discrimination it is necessary to show that a person is treated less favourably than a person who does not have their attribute would be treated. In many cases a hypothetical comparison is not possible. Take, for example, a disability service provider that unfairly discriminates against a client based on their particular form of disability. It may be inappropriate to compare the

<sup>89</sup> *Equal Opportunity Act 2010* (Vic), Section 4.

<sup>90</sup> *Anti-Discrimination Act* (NT), section 20(2).

client to a person without a disability, because that person would not require or be eligible for the services in any event.<sup>91</sup>

Neither Victoria's *Equal Opportunity Act 2010* (Vic) nor the *Australian Capital Territory Discrimination Act 1991* (ACT) require a comparator in order to find direct discrimination has occurred. Not only is there no express requirement for a comparator in the legislation in these jurisdictions, the relevant Tribunals have confirmed that there is no implied requirement for a comparator.<sup>92</sup> For example in Victoria the definition is simply that a person treats, or proposes to treat, another person with an attribute unfavourably because of that attribute.<sup>93</sup> This simplification and clarification of the definition of direct discrimination provides greater certainty to duty holders under the Act and people who the Act seeks to protect.

### Indirect discrimination

The current Act does not provide protection from indirect discrimination, which is protected under all other state and territory laws. An example of indirect discrimination which may not currently be captured by the Act is a workplace policy that provides benefits to an employee's husband or wife, such as access to an employee assistance program or gym membership, which excludes LGBTI employees who are unable to get married.

The HRLC supports the insertion of protection from indirect discrimination in the Act which incorporates the existence of relevant factual circumstances (e.g. a condition, requirement or practice)<sup>94</sup>; which disadvantage or would disadvantage<sup>95</sup> a group of people with one or more of the relevant protected attributes; and which is not reasonable in the circumstances.

The HRLC cautions against the indirect discrimination tests in the DDA and the RDA, where the complainant must prove that the discriminator has imposed a requirement with which they cannot comply. This means that a requirement that disadvantages a person will be lawful as long as the person can manage to cope with the requirement, even if this takes extreme effort.<sup>96</sup> Rather it should be sufficient that the complainant has been disadvantaged by the requirement condition or practice as it is under the SDA, and under discrimination laws in Victoria, the ACT and Tasmania.<sup>97</sup>

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<sup>91</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992*, (Productivity Commission Inquiry Report Vol 1, Report No 30), 30 April 2004, 308, referring to submissions by: Disability Action Inc, submission 43, 2; and National Council for Intellectual Disabilities, submission 112, 12.

<sup>92</sup> See for example *Slattery v Manningham City Council (Human Rights)* [2013] VCAT 1869

<sup>93</sup> *Equal Opportunity Act 2010* (Vic), Section 8.

<sup>94</sup> The expression 'relevant circumstances' is preferred to the phrase 'condition, requirement or practice', which has been narrowly interpreted by the Courts. See Human Rights and Equal Opportunity Commission, submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into Effectiveness of the *Sex Discrimination Act 1984* (Cth) in *Eliminating Discrimination and Promoting Gender Equality*, 1 September 2008, 73 -76.

<sup>95</sup> The term 'would' discriminate is specifically preferred to alternative constructions which refer only to the disadvantage or harm already caused. See Equal Rights Trust, *Declaration on the Principles of Equality*, 2008, 7. [Art 5] <<http://www.equalrightstrust.org/endorse/index.htm>>; Australian Human Rights Commission, submission to the Attorney General of the Commonwealth of Australia, *Consolidation of Commonwealth Discrimination Law*, 6 December 2011, 14 [46].

<sup>96</sup> *Hinchliffe v University of Sydney* [2004] FMCA 85 (17 August 2004).

<sup>97</sup> See section 5 of the SDA, section 9 of the *Equal Opportunity Act 2010* (Vic), section 8 of the *Discrimination Act 1991* (ACT), and section 15 of the *Anti-Discrimination Act 1998* (Tas).

**Recommendation 19:**

The definition of discrimination should be amended to simplify direct discrimination and introduce protection from indirect discrimination.

## 8.2 Burden of proof

A significant limitation of Australia's anti-discrimination laws is that the individual complainant bears the onus of proving, on the basis of complex legal tests, that the unlawful discrimination occurred.<sup>98</sup> This is a reason why a significant number of discrimination claims fail, are never brought, or are resolved at conciliation on the basis of settlement arrangements that do not accurately reflect the seriousness of the issue.

More effective models exist in the Fair Work Act 2009 (Cth) (**FWA**) and in comparative jurisdictions overseas. In the FWA, for example, once a *prima facie* case for unlawful adverse action (including discrimination) is established by the complainant, the respondent bears the onus of proving that its conduct was not done because of a prohibited reason. The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) outlines that this section "recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason".

Similarly, the Equality Act 2010 (UK) (**UK Act**) provides that '[i]f there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred', unless the respondent shows that it did not contravene the provision. The England and Wales Court of Appeal has commented that the law makes 'good sense given that a complainant can be expected to know how or why he or she has been treated by the respondent whereas the respondent can be expected to explain why the complainant has been so treated.'

The HRLC supports the introduction of a shifting onus of proof in the Act consistent with the model adopted in the general protections provisions of the FWA and the UK Act.

**Recommendation 20:**

The Act should be amended to introduce a shifting burden of proof, so that a rebuttable presumption arises once the complainant establishes a *prima facie* case of discrimination.

## 8.3 Compliance powers

Related to the proposal outlined above at 5.1 in relation to representative complaints, the HRLC supports the Northern Territory Anti-Discrimination Commission (**the Commission**) being empowered with compliance powers to enforce discrimination law. This would enable the Commission to more effectively address systemic discrimination. It would also relieve the burden that is currently placed on individual complainants, as discussed above.

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<sup>98</sup> See section 91 of the Act.

The Commission already has an own motion investigative function however enforcement powers would make this function more meaningful and effective. For example, the Commission should be empowered to enter into an agreement, sometimes described as an enforceable undertaking, with a party to the effect that it will take particular steps to ensure its compliance with the law. Such agreements should be registered with the Northern Territory Civil and Administrative Tribunal (**Tribunal**) and, once registered, ought to be treated as an order of the Tribunal. Where the substance of an investigation cannot be resolved by agreement, the Commission should be empowered to issue a compliance notice (with maximum financial penalties), or commence proceedings in the Tribunal on its own motion for breaches of the Act.

Notably, the Fair Work Ombudsman (**FWO**) has the power to bring complaints on behalf of clients and has done so on a few occasions to date in relation to discrimination matters.<sup>99</sup> However the number of prosecutions is extremely limited in comparison to the prevalence of discrimination. The FWO also has the power to issue enforceable undertakings and compliance notices.<sup>100</sup>

The existence of these powers at a Territory level would have a normative impact, even where such powers are not actually used. In other words, there would be an additional impetus on duty-holders to engage with the Commission on an informal basis, working towards compliance, in order to avoid the need for a formal investigation or compliance notice.

The obligation to respect, protect and fulfil human rights includes a duty to provide effective remedies to victims.<sup>101</sup> The European Court of Human Rights has described this as an obligation to ensure that human rights are 'practical and effective' as opposed to 'theoretical and illusory'.<sup>102</sup> With the right to an effective remedy also comes the right to a fair trial, which ensures that the legal system is fair and accessible to complainants.

The requirement to provide an effective remedy is found in many human rights conventions including the ICCPR. For example, Article 2(2) of the ICCPR requires state parties to 'adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant', and Article 2(3)(a) further provides that States must ensure that people whose rights are violated have an 'effective remedy'.

The Human Rights Committee has confirmed that domestic remedies should be appropriately adapted so as to take account of the 'special vulnerabilities of certain categories of person'.<sup>103</sup> The Committee also considers that the right to an effective remedy imposes a duty to investigate allegations of human rights breaches. The failure to discharge that duty may itself constitute a separate breach of the ICCPR.<sup>104</sup>

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<sup>99</sup> See section 682(1) of the *Fair Work Act 2009* (Cth).

<sup>100</sup> See sections 715 and 716 of the *Fair Work Act 2009* (Cth).

<sup>101</sup> Office of the United Nations High Commissioner for Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

<sup>102</sup> See, *inter alia*, *Alenet de Ribemont v. France* 3/1994/450/529 citing *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161; and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37.

<sup>103</sup> UN Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [15].

<sup>104</sup> UN Human Rights Committee, General Comment 31, above n 103. [18]

**Recommendation 21:**

The Act should be amended to enable the Anti-Discrimination Commissioner to undertake compliance action to enforce discrimination law.

#### 8.4 Compensation

The consequences of discrimination can be severe and individuals may suffer a psychological injury as a result of unlawful conduct which impacts on their capacity to work for a significant period of time. Enabling sufficient compensation to properly redress the loss suffered by the victim furthers the objects of the Act and increases the likelihood that duty holders will comply with their obligations.

Currently the Act prescribes a cap on the amount of compensation that can be awarded by the Tribunal should a claim under the Act be proven.<sup>105</sup> The amount is currently \$60,000 which is grossly inadequate in the context of awards under federal discrimination laws which can be in excess of \$300,000.<sup>106</sup> Caps on damages only exist in two other discrimination jurisdictions in Australia, New South Wales where the cap is \$100,000<sup>107</sup> and Western Australia where the cap is \$40,000.<sup>108</sup>

As outlined above, the obligation to respect, protect and fulfil human rights includes a duty to provide effective remedies to victims. The requirement to provide an effective remedy is found in many human rights conventions including the ICCPR. For example, Article 2(2) of the ICCPR requires state parties to 'adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant', and Article 2(3)(a) further provides that States must ensure that people whose rights are violated have an 'effective remedy'.

**Recommendation 22:**

The Act should be amended to remove or increase the threshold compensation available for a breach of the Act.

#### 8.5 Extension of areas of public life

The rationale underpinning the proposed reform at 5.3 above regarding sexual harassment protections applies to discrimination law as a whole. The HRLC recommends that consideration be given to extending discrimination protections to all areas of public life and public functions.

**Recommendation 23:**

The Act should be extended to apply to all areas of public life, beyond the areas currently specified in the Act.

<sup>105</sup> *Anti-Discrimination Act* (NT) Section 88(1)(b) and *Anti-Discrimination Regulations* (NT) regulation 2.

<sup>106</sup> See *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82

<sup>107</sup> *Anti-Discrimination Act 1977* (NSW) Section 108(2)(a)

<sup>108</sup> *Equal Opportunity Act 1984* (WA) Section 127(b)(i)

## 8.6 Exceptions generally

The HRLC supports the inclusion of a general defence of justification in place of a variety of ad-hoc and inconsistent permanent exceptions and defences. Replacing a larger number of permanent exceptions with a single general defence simplifies the law and promotes greater understanding, as well as providing duty-holders with greater flexibility to defend discriminatory conduct. A well drafted clause would also encourage considered and transparent decision making.

A general exception allows a nuanced balancing of rights in cases where the individual's right to non-discrimination may conflict with another right or freedom. This stands in contrast to the existing permanent exceptions, which are often arbitrary, inflexible, broad and unreasonable. Many also protect traditional social structures and hierarchies that discriminate against marginalised and disadvantaged groups, hence perpetuating inequality.

The insertion of a general exception for justified conduct is also consistent with international human rights law. International law recognises that not all differentiation constitutes unlawful discrimination. For example, the Human Rights Committee has observed that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'<sup>109</sup>

We recommend inserting a proportionality/general limitations test based on the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (**Siracusa Principles**).<sup>110</sup> Necessity, proportionality and legitimacy (in terms of legitimate bases for restricting non-absolute human rights) are well-established principles of international and comparative human rights law.<sup>111</sup> This framework is also reflected in the 'reasonable limitations test' in section 7(2) of the Victorian Charter of Human Rights and Responsibilities 2006 (Vic).<sup>112</sup>

A legitimate end or purpose may include the protection of national security; public safety, order, health or morals; or the rights and freedoms of others. A 'proportionate' response must be necessary for achieving the legitimate aim or purpose. A proportionate response – that is, a response that is rational, appropriate and adapted – must also impair rights to the minimal reasonably extent possible. In other words, it can only impinge on an individual's right to non-discrimination in the most minimal way.

The HRLC recommends that a 'rational connection test' be adopted, that is, a rational connection is required between the conduct and its aim. A rational connection test similar to that adopted in the Canadian authority of *R v Oakes*<sup>113</sup> would simply require evidence of the effect or likely effect of the conduct rather than what a reasonable person might believe the effect would be.

A general exception clause was included in the proposed *Human Rights and Anti-Discrimination Bill 2012* (Cth) which sought to replace the various disparate federal discrimination laws. It provides a template on which a provision in the Act could be based:

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<sup>109</sup> Human Rights Committee, General Comment No. 18: Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003).

<sup>110</sup> UN Commission of Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR* (1984) E/CN.4/1985/4

<sup>111</sup> In Canada, for example, exceptions to discrimination are only lawful if they are: (1) for a pressing and substantial objective; and (2) rationally connected and proportionate to that objective; and (3) give rise to the minimal discrimination necessary to achieve the objective: *R v Oakes* [1986] VSCR 103.

<sup>112</sup> UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

<sup>113</sup> As above, *R v Oakes* [1986] VSCR 103.

## **23 Exception for justifiable conduct**

### Protected attributes to which this exception applies

(1) *The exception in this section applies in relation to all protected attributes.*

### Exception for justifiable conduct

(2) *It is not unlawful for a person to discriminate against another person if the conduct constituting the discrimination is justifiable.*

### When conduct is justifiable

(3) *Subject to subsection (6), conduct of a person (the first person) is justifiable if:*

- (a) the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim; and*
- (b) that aim is a legitimate aim; and*
- (c) the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and*
- (d) the conduct is a proportionate means of achieving that aim.*

(4) *In determining whether subsection (3) is satisfied in relation to conduct, the following matters must be taken into account:*

- (a) the objects of this Act;*
- (b) the nature and extent of the discriminatory effect of the conduct;*
- (c) whether the first person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect;*
- (d) the cost and feasibility of engaging in other conduct as mentioned in paragraph (c).*

(5) *Any other matter that it is reasonable to take into account may also be taken into account.*

*Disability: conduct not justifiable if a reasonable adjustment could have been made*

(6) *In relation to discrimination on the ground of disability (or on the ground of a combination of disability and one or more other protected attributes), conduct of a person is not justifiable if:*

- (a) there is a reasonable adjustment that the person could have made; and*
- (b) if the person had made that adjustment:*
  - (i) the conduct would have had no, or a lesser, discriminatory effect; or*
  - (ii) the person would instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect.*

*Note: The concept of reasonable adjustment is dealt with in section 25.*

The HRLC supported the inclusion of this exception with the following modifications:

- Section 23(3)(b) be amended to provide that the legitimate aim must be consistent with the objects of the Act.
- Section 23(3)(c) be amended to require a 'rational connection test' in place of the existing wording.

**Recommendation 24:**

The Act should be amended to remove all specific exceptions and replace them with a general exception applying principles of necessity, proportionality, and legitimacy.

## 8.7 A positive duty

In accordance with international human rights law, Australia has a positive duty to provide effective protections against discrimination, which incorporates an obligation to strive towards achieving substantive equality.<sup>114</sup>

The HRC has stated that when certain groups of the population have traditionally been subjected to systemic discrimination, then mere statutory prohibitions of discrimination are often insufficient to guarantee true equality.<sup>115</sup> The UN High Commissioner for Human Rights has also described Australia's obligations under Article 2(2) of the ICESCR as a duty to 'detect existing discriminatory norms and repeal them, identify current discriminatory practices and adopt normative and other types of measures to eradicate them'.<sup>116</sup>

One way for Australia to better achieve this objective is to impose a positive duty on both the public and private sectors in discrimination laws.

### Benefits of a positive duty

The attraction of a positive duty to promote substantive equality and eliminate discrimination is that it is proactive, rather than reactive. In other words, it would promote equality by requiring beneficial conduct rather than by punishing misconduct.

Imposing a positive duty would also go a long way to relieving the individual burden presently placed on individual complainants to enforce their human rights. The proactive promotion of equality also seeks to reduce the overall harm caused by discrimination in the community, instead of merely providing redress after the damage has already been done. In other words, a positive duty recognizes that 'prevention is better than cure'.<sup>117</sup>

The introduction of a positive obligation to promote substantive equality and eliminate discrimination would encourage duty holders to examine their existing policies and practices with a view to proactive compliance. It would also simplify and streamline the positive duties already imposed under federal laws.

It is anticipated that the introduction of a positive duty would not require duty-holders to develop entirely new systems. As a matter of best practice, many organisations already have compliance

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<sup>114</sup> ICCPR art 26.

<sup>115</sup> Human Rights Committee, General Comment 18 above n 4 [10]. See also Human Rights Committee, General Comment 28, Equality of Rights between Men and Women [11].

<sup>116</sup> UN Council on Economic, Social and Cultural Rights, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), [19].

<sup>117</sup> This comment was also made on the introduction of the *Equal Opportunity Act 2010* (Vic): second reading speech, 10 March 2010 [785].

frameworks in place for eliminating discrimination and identifying possible areas of non-compliance. For example, many employers already have policies, process and training in place designed to promote equality. In part, these measures may be designed so that the employer can rely on the 'reasonable precautions' if a discrimination complaint is made against it.<sup>118</sup> Those same employers would also have processes and systems in place to ensure that reasonable adjustments are made for persons with a disability. Depending on the organisation, they may also have an employment opportunity or workplace diversity program in place. The introduction of a positive duty would bring aspects of compliance together in a streamlined way. It would encourage duty holders to engage in a due diligence exercise and extend those existing frameworks, where necessary, to better promote diversity and inclusiveness.

#### Framing the positive duty

In order to meet Australia's international legal obligations the positive duty should apply across the public and private sectors. Historically, Australia's anti-discrimination laws have not distinguished between the public and private sectors. Introducing such a distinction would not only lead to inconsistent outcomes, it would also open the door to unnecessary complexities in identifying what is 'public' and what is 'private'.

In framing a positive duty, regard should be had to ensure that it:

- places positive obligations to assess, monitor, consult and take remedial action to address discrimination where necessary;
- is sustainable and enforceable;
- takes into account the duty-holder's size and resources; and
- is normative, as opposed to a box-ticking exercise.

Compliance with a positive duty to promote equality and eliminate discrimination would, necessarily, be contextually dependent. Larger organisations would need to demonstrate a more sophisticated approach to compliance management than small businesses.

#### Positive duties under existing Australian laws

There are some examples of a positive duty under the DDA. For example, following the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), the DDA was amended to make 'explicit the positive duty to make reasonable adjustments for a person with disability'.<sup>119</sup> The duty has been incorporated into the definitions of both direct and indirect discrimination (sections 5(2) and 6(2) respectively). In effect, the amendments provide a cause of action for a failure to take positive action to make reasonable adjustments.<sup>120</sup>

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<sup>118</sup> The Reasonable precautions defence, which is available under each of the federal anti-discrimination acts, prevents an employer from being vicariously liable if it can establish that it took all 'reasonable precautions' to prevent unlawful discrimination from occurring in the workplace.

<sup>119</sup> Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Cth), 8 [35].

<sup>120</sup> Nonetheless, what is described as a positive duty is still limited in the sense that there is not a proactive obligation on service providers or government agencies to ensure that existing structural features that may

Commonwealth employers also have positive duties to promote equality by maintaining 'employment opportunity programs' or 'workplace diversity programs'.<sup>121</sup> Similarly, the *Equal Opportunity for Women in the Workplace Act 1999* (Cth)<sup>122</sup> imposes limited obligations on employers to develop and implement workplace programs to ensure equality of opportunity for women, although those protections are not particularly strong.

At the state and territory level, section 15 of the *Equal Opportunity Act 2010* (Vic) includes a positive duty aimed at encouraging proactive self-regulation. The Act requires duty holders to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible. The Victorian Commission may investigate possible breaches of the duty that are likely to be serious and affect a class or group of people. However the failure to provide enforcement mechanisms for the positive duty in Victoria has limited its ability to achieve its intended purpose.

#### Positive duties in comparative jurisdictions

The introduction of a positive duty would also be consistent with emerging international best-practice. A number of comparable jurisdictions, such as South Africa, the United Kingdom, Canada and the United States, have incorporated a proactive positive duty to equality into anti-discrimination laws.<sup>123</sup>

Northern Ireland's positive duty has created a new openness on the part of policy makers to a greater range of perspectives from diverse groups. This has reportedly brought about shifts in consultation, monitoring and policy assessment procedures and encouraged greater public access to information and public services, particularly for minority ethnic groups and people with disabilities.<sup>124</sup>

Similar beneficial results have been measured in relation to the positive duties incorporated in the *Race Relations Amendment Act 2000* (UK). Evaluation of this duty has revealed that around two-thirds of authorities subject to the obligation and 89% of central government considers that the positive duty has been beneficial.<sup>125</sup>

#### **Recommendation 25:**

The Act should include an enforceable positive obligation on the public and private sector to promote equality and eliminate unlawful discrimination.

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disadvantage people with disability are removed or altered. See Commission 'Improved rights protection for people with disability' (2009) <[http://www.hreoc.gov.au/legal/publications/improved\\_dda2009.html](http://www.hreoc.gov.au/legal/publications/improved_dda2009.html)>.

<sup>121</sup> *Public Service Act 1999* (Cth); *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth).

<sup>122</sup> Draft legislation replacing the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) is expected to be tabled in Parliament during 2012.

<sup>123</sup> *Equality Act 2010* (UK), Part II, Chapter 1; *Northern Ireland Act 1998* (UK) s 75, sch 9; *Fair Employment and Treatment (NI) Order 1998*;

*Employment Equity Act 1998* (Sth Af); s 5 *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (Sth Af); *Employment Equity Act 1995* (Can); *Executive Order 11246 of Sept. 24, 1965 – Equal employment opportunity* (US).

<sup>124</sup> Christopher McCrudden, 'The Equal Opportunity Duty in the Northern Ireland Act 1998: An Analysis', in *Equal Rights and Human Rights – Their Role in Peace Building* (Committee on the Administration of Justice, 1999), 11-23.

<sup>125</sup> Ross Schneider, Commission on Racial Equality, *Towards Racial Equality: An Evaluation of The Public Duty to Promote Race Equality and Good Race Relations in England and Wales*, 2003.

## 8.8 Resourcing

Australia has an obligation under discrimination law 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.<sup>126</sup> In many instances, ‘injustice results from nothing more complicated than lack of knowledge’.<sup>127</sup>

In a 2009 submission to the Federal Government, the Law Council of Australia stated that:<sup>128</sup>

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.

The Law Council of Australia has further stated that ‘when legal assistance is not available to the economically and socially disadvantaged in our community, the integrity of the justice system is challenged’.<sup>129</sup>

It is equally important to ensure that the Commission receives enough funding to enable it perform the functions that it is given, which may include broader powers to investigate, initiate and participate in litigation and enforcement.

### **Recommendation 26:**

Legal aid bodies, community legal centres and the Commission must be adequately funded and supported to ensure the effective operation of the Act.

## 8.9 Human Rights Act

Any consideration of reform to the Territory’s discrimination law should also include consideration of introducing a human rights act or charter of human rights. A human rights act would ensure that the right to equality and non-discrimination is taken into account in all government decision making and action, as well as other fundamental human rights and freedoms.

The HRLC has been advocating for federal, state and territory human rights protection since its inception.<sup>130</sup> Victorian and the Australian Capital Territory have now had human rights legislative instruments in place for over 10 years.<sup>131</sup>

<sup>126</sup> Victorian Law Reform Commission (VLRC), *Civil Justice Review Report 14*, 2008, 607.

<sup>127</sup> Chief Justice Murray Gleeson, ‘Conference Opening and Keynote Address’ (Speech delivered at the National Access to Justice and Pro Bono conference, Melbourne, 11 August 2006).

<sup>128</sup> Law Council of Australia, *Legal Aid and Access to Justice Funding 2009-10 Federal Budget*, 9 January 2009.

<sup>129</sup> *Ibid.*

<sup>130</sup> See for example Human Rights Law Centre, *National Human Rights Consultation: Engaging the Debate* (2008)

<sup>131</sup> See *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT)

The Northern Territory Parliament has already commenced providing a statement of compatibility with human rights with new legislation, however there is no legislative protection for human rights at a territory level.<sup>132</sup>

A charter of human rights can:

- protect fundamental human rights, promote human dignity and address disadvantage;
- improve protections for Territorians who are marginalised or disadvantaged;
- improve public service delivery and accountability, and enhance transparency and responsiveness; and
- contribute to the development of a human rights culture in the Northern Territory and enhance public awareness of human rights.

The following recent real-life examples from Victoria demonstrate the ways in which a Northern Territory Charter could address disadvantage and promote human dignity:

- *Certain Children by their litigation guardian Sister Marie Brigid Arthur v Minister for Families and Children & Ors* [2017] VSC 251: The Human Rights Law Centre represented young people detained at a maximum security adult prison alleging that this constituted a breach of the *Charter of Human Rights and Responsibilities 2006 (Vic) (the Charter)*. The young people were held in small cells for 23 hours a day and denied the freedom and educational facilities available in age appropriate youth justice facilities. The Supreme Court found that the decisions which resulted in the young people being moved there constituted a breach of the Charter and therefore their detention was unlawful. This resulted in the young people, aged as young as 15 years old, being moved back to more age appropriate facilities.
- *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648: Homeless Law represented a woman and her son who were being threatened with eviction from their public housing. While the Director of Housing had followed the proper steps in obtaining a possession order through the state's residential tenancy laws, the Supreme Court found that the Director had breached the Charter by seeking to purchase a warrant to evict the family without giving proper consideration to their human rights. This enabled the family to stay in public housing and avoid homelessness.

**Recommendation 27:**

Introduce a Human Rights Act to comprehensively protect the right to equality and non-discrimination as well as other fundamental human rights and freedoms.

<sup>132</sup> See for example Northern Territory Parliament, *Statement of Compatibility with Human Rights: Adoption of Children Legislation Amendment (Equality) Bill 2017*

For more information and discussion about the modernisation of Anti-Discrimination laws, visit:

<https://justice.nt.gov.au/attorney-general-and-justice/law/open-law-reform-consultation>

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