



Law Council
OF AUSTRALIA

POLICY STATEMENT

Consolidation of Commonwealth Anti-Discrimination Laws

March 2011

Please note, this Policy Statement is currently under review.



Need for a Consolidated Commonwealth Anti-Discrimination Regime

1. The current Commonwealth anti-discrimination regime provides an important legislative framework for promoting equality in Australia and contains many positive features that operate to protect against certain forms of discrimination in certain circumstances. Despite these features, many individuals and groups within the Australian community experience discrimination, and the notion of substantive equality remains, at least for some, still out of reach.²
2. The current Commonwealth regime also deals with different grounds of discrimination in different ways. Four grounds of discrimination — sex, age, disability and race — are dealt with under specific Acts,³ each containing a complaints process which includes a process of investigation and conciliation which, if unsuccessful, can result in a court hearing. Other more limited protections are provided under the *Australian Human Rights Commission Act 1986* (Cth) for discrimination on other grounds such as sexual preference, trade union activity or political opinion, however complaints on these grounds may only be investigated by the Australian Human Rights Commission and cannot culminate in a court process. This results in a confused and fragmented scheme, which is difficult to use.
3. The Law Council supports reforms to the current Commonwealth anti-discrimination regime that:
 - (a) make it easier to access and understand;
 - (b) improve its capacity to address all forms of discrimination;
 - (c) promote equality; and
 - (d) implement Australia's international obligations in this area.⁴
4. For these reasons, the Law Council supports the consolidation of the existing Commonwealth discrimination laws⁵ in to a single Act (the consolidation process), provided that this process preserves or enhances existing protections against discrimination and improves the ability of the regime to promote substantive equality, as well as removing the regulatory burden on business.

Objects and Purpose of a Consolidated Act

5. Given that Australia does not currently have a Commonwealth Human Rights Act or any specific constitutional recognition of the right to equality, the symbolic and substantive importance of the consolidated Act should not be underestimated. Such legislation must include a clear commitment to promoting substantive equality and protecting against unlawful discrimination in the context of Australia's international obligations to do so.
6. The Law Council supports a preamble to the Act which:
 - (a) makes specific reference to the inherent dignity and equality of human beings, founded in the Universal Declaration of Human Rights and makes specific reference to the right to equality as a key obligation that Australia has accepted under international law;
 - (b) clearly sets out the objects and purpose of the Act, which should include:
 - (i) to achieve substantive equality, including equality before the law in Australian society;
 - (ii) to eliminate, as far as possible, discrimination against persons on the grounds protected under the Act;
 - (iii) to ensure, as far as practicable, that persons with the attributes protected under the Act have the same rights to equality before the law as the rest of the community; and
 - (iv) to promote recognition and acceptance within the community of the principle that persons with such attributes have the same fundamental rights as the rest of the community.

New Protections against Discrimination

7. The Law Council supports the Government's commitment to additional protection relating to a person's sexual orientation or gender status as part of the consolidation process.⁶
8. The Law Council also supports consideration of the addition of grounds relating to:
 - (a) religious conviction;
 - (b) political opinion;



- (c) association with, or relation to, a person identified on the basis of any protected grounds or attributes;
 - (d) irrelevant criminal record; and
 - (e) any other ground that causes or perpetuates systemic disadvantage, undermines human freedom, or adversely affects the equal enjoyment of a person's rights or freedoms in a serious manner comparable to discrimination on one of the listed grounds.⁷
9. The Law Council notes that the grounds in subparagraphs 8(a) to (c) are currently protected under certain State and Territory laws⁸ as well as under the 'general protection' provisions of *Fair Work Act 2009* (Cth) ('the FWA').⁹
10. Careful consideration must be given to how new grounds co-exist and interact with the relevant provisions in the FWA.¹⁰

Enhancement of Existing Protections

11. The Law Council supports consideration of enhancement of current protections by:
- (a) Expanding the Australian Human Rights Commission's (AHRC's) role and powers to include:
 - (i) investigating incidents of discrimination on its own volition without needing to rely upon a formal individual complaint or a reference from Government;
 - (ii) providing comprehensive and enforceable remedies in relation to all forms of discrimination prohibited under the consolidated Act; and
 - (iii) reporting to the Attorney-General on any organisation that fails to implement the recommendations the AHRC made pursuant to an investigation of that organisation.
 - (b) Establishing mechanisms to ensure that the Commonwealth Government responds appropriately and without delay to recommendations made by the AHRC, and that the implementation of this response is monitored.
 - (c) Incorporating positive duties to prevent or remove discrimination in relation to each ground protected under the consolidated Act.
- (d) Expanding the Commonwealth anti-discrimination regime to protect volunteers.
 - (e) Including a general prohibition on harassment on any of the grounds protected under the consolidated Act, such as that contained in section 26 of the *Equality Act 2010* (UK).
 - (f) Providing more specific guidance, clarification and more direction about the offence and ramifications of victimisation. This could include, for example, consideration of the onus of proof in relation to the offence of victimisation, which could be modelled on the adverse action provisions in the *Fair Work Act 2009* (Cth) and require that the respondent prove that it was not responsible for the victimisation of the complainant.

Review and Reform of Key Provisions

Definitions

12. Anti-discrimination law should be clear and readily understood. Under the existing Commonwealth regime, different definitions and tests for discrimination are currently employed in the various Acts. For example, the definition of 'direct' discrimination in three of the four key Commonwealth anti-discrimination laws requires the demonstration of less favourable treatment in circumstances that are the same or are not materially different¹¹ and has resulted in complex arguments concerning identification of comparators.¹² The framing of a complaint of indirect discrimination is also complex, not least because of the intricacy of the definition of the term as it exists in three of the four key Commonwealth anti-discrimination laws.¹³
13. The Law Council supports a comprehensive review of each of the provisions of the existing Commonwealth discrimination laws that contain definitions of or tests for 'discrimination' to determine:
- (a) whether these tests and definitions give rise to difficulties for complainants, respondents and/or the courts;
 - (b) whether these key definitions comply with the relevant international law definitions contained in Conventions to which Australia is a party.



14. If the existing definitions are found to give rise to such difficulties or fail to comply with international human rights standards, the Law Council supports consideration of the following alternative models:
- (a) a definition which refers to ‘unfavourable treatment’ because of a protected attribute or ground, such as that contained in section 8 of the *Discrimination Act 1991* (ACT); or
 - (b) a definition which removes the distinction between direct and indirect discrimination and defines ‘discrimination’ as including “any distinction, exclusion, preference, restriction or condition made on the basis of a protected attribute, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.”¹⁴
15. The consolidation process should also be utilised as an opportunity to review the effectiveness of the existing ‘special measures’ provisions, which provide in effect that certain beneficial measures for particular groups are not to be considered discriminatory.¹⁵ The Law Council supports a ‘special measures’ provision which aligns with how that term is understood at international law.¹⁶

Onus and Standard of Proof

16. The consolidation process should also review the onus of proof and standard of proof employed under the existing anti-discrimination regime, having regard to the need to balance the interests of complainants and respondents.
17. The Law Council supports consideration of the approach adopted under the FWA and in the United Kingdom.¹⁷ Under this approach, a complainant must establish an arguable case, and then the respondent has the evidentiary burden of establishing the reasons for the impugned conduct or conditions.
18. In relation to the standard of proof to be employed, consideration should be given to clarifying the confusion surrounding the *Briginshaw* test¹⁸ and making it clear that the test to be applied is the normal civil standard of proof as set out in section 140 *Evidence Act 1995* (Cth).¹⁹

Exceptions to and exemptions from unlawful discrimination

19. The consolidation process should look carefully at the exceptions to and exemptions from unlawful discrimination in the existing Commonwealth regime. Consideration should be given to defining an exception as conduct which, but for the operation of the excepting provision, would be unlawful discrimination.²⁰ Consideration should also be given to defining an exemption as a permissive authorisation for conduct which, but for the operation of the exemption, would be unlawful.²¹
20. Where possible, the Law Council supports streamlining the exceptions and exemptions in the four key Commonwealth Acts,²² though it is acknowledged that in some cases, the exception may be specific to the particular ground (for example, inherent requirements and disability²³).

Alternative Complaints Procedure

21. Members of the Law Council’s Constituent Bodies and Committees who regularly interact with the existing Commonwealth discrimination regime have identified a range of deficiencies with the existing complaints procedure, including the delay between the making of a complaint, referral to conciliation and to court if conciliation is unsuccessful.
22. The Law Council supports consideration of a mechanism for complainants to have the option to proceed directly to the court, such as the current practice in relation to the decision making tribunal under the *Equal Opportunity Act 2010* (Vic).²⁴ The Law Council considers that it is important to also include a process that provides for early conciliation in the consolidated Act in the event that a complainant is given a choice to proceed directly to court.
23. Consideration should also be given to provisions whereby complainants are provided with assistance in drafting a complaint. While a complaint need not be a technical legal document, a poorly drafted complaint can undermine a complainant’s case, not only at a hearing but also at the point of negotiation.



Review of Remedies and Costs

24. The consolidation process should include a review of the types of remedies available for successful complaints under the existing Commonwealth anti-discrimination regime both through the AHRC investigation and conciliation processes and through the courts. The effectiveness of both monetary compensation remedies and non-monetary remedies, such as changes in policies and procedures used by respondents, should be considered. The level of monetary compensation awarded in anti-discrimination matters is relatively modest compared to other areas of law where personal harm has been done.
25. The provision of effective remedies for unlawful discrimination is one of the international obligations Australia has assumed under the human rights Conventions to which it is a party, including the *International Covenant on Civil and Political Rights* (ICCPR), which provides that State Parties must provide an effective remedy for breaches of rights.
26. Costs tend to follow the event under the four key Commonwealth laws,²⁵ though this was not always the case.²⁶
27. The Law Council is of the view that the prospect of a costs burden in the event of a failure by a complainant to prove a claim may deter potential complainants from seeking relief under the legislation, which may undermine the primary object of the consolidated Act to prevent and prohibit discrimination.
28. The Law Council supports consideration of the approach to costs taken under the FWA as a suitable model for the consolidated Act. Under the FWA, a party may be ordered to pay costs in limited circumstances, such as where proceedings were instituted vexatiously or without reasonable cause.²⁷

Structure of the Consolidated Act

29. The consolidated Act should be a fully integrated Act, rather than a mere consolidation of the existing individual laws. This means that, where possible, the consolidated Act should include general provisions that apply to all grounds and contain one process for making and determining complaints. However, in order to ensure that the existing protections are not diluted in any way, the consolidated Act should also maintain those provisions specific to a particular ground that currently provide protection under the individual

Acts, for example the reasonable adjustments provisions in the *Disability Discrimination Act 2004* (Cth).

30. The Law Council supports consideration of the structure of the *Equality Act 2010* (UK) as an appropriate model. This Act has general provisions, including general limitation provisions and a single complaints process, but also includes specific provisions in relation to each of the particular grounds of discrimination (known as attributes).

Interaction with other laws

31. Increasingly, industrial law and in particular the FWA is being utilised to deal with certain workplace disputes which previously tended to be almost the exclusive province of anti-discrimination law.²⁸ This demands that particular consideration be given to the interaction between anti-discrimination laws and certain discrimination-like provisions in the FWA,²⁹ with a view to minimising duplication.³⁰
32. The process of consolidation should also be accompanied by renewed moves to harmonise anti-discrimination laws across Australia, a process already commenced by the Standing Committee of Attorneys-General.

Authorised by LCA Directors

Law Council of Australia
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Endnotes

- 1 See *Report of the National Consultation of Human Rights* (30 September 2009), Chapter 2.
- 2 These Acts are the: *Racial Discrimination Act 1975* (Cth) ('RDA'), *Disability Discrimination Act 1992* (Cth) ('DDA'), *Sex Discrimination Act 1984* (Cth) ('SDA'), and *Age Discrimination Act 2004* (Cth) ('ADA').
- 3 *ibid.*
- 4 See the *Report of the National Consultation of Human Rights* (30 September 2009) pp 127-128 and Human Rights Council Working Group on the Universal Periodic Review, '*Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1: Australia*', (15 November 2010) A/HRC/WG.10/AUS/2
- 5 Five specific Commonwealth Acts prohibit discrimination on the grounds of race; national or ethnic origin; sex; marital status; pregnancy; family responsibilities; disability and age. These Acts are the: *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth), and *Age Discrimination Act 2004* (Cth). More limited protections against discrimination on other grounds are also provided under the *Australian Human Rights Commission Act 1986* (Cth).
- 6 See for example Australian Government, *Universal Periodic Review National Report* (October 2010) para 52 available at https://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationInternational_Human_Rights
- 7 A similar approach is taken under the South African *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* s1(1)(xxii).
- 8 See for example *Equal Opportunity Act 2010* (Vic), the *Anti-Discrimination Act 1991* (Qld), and the *Discrimination Act 1991* (ACT).
- 9 *Fair Work Australia Act 2009* (Cth) s351.
- 10 The Law Council notes that the term 'discrimination' is not defined in the FWA, and this may have implications for how the term is understood and applied under this regime.
- 11 *Sex Discrimination Act 1984* (Cth) s5(1); *Disability Discrimination Act 1992* (Cth) s5; *Age Discrimination Act 2004* (Cth) s14.
- 12 For example, see *Purvis v New South Wales* [2003] HCA 62; 217 CLR 92.
- 13 Compare the *Sex Discrimination Act 1984* (Cth) with the other Commonwealth laws and see for example *NSW v Amery* [2006] 200 ALR 196.
- 14 This was the approach recommended by the Discrimination Law Experts' Roundtable, '*Report on recommendations for a consolidated federal anti-discrimination law in Australia*', (29 November 2010) p 6.
- 15 Special measures provisions are currently contained in *Sex Discrimination Act 1984* s7D; *Racial Discrimination Act 1975* s8; *Disability Discrimination Act 1992* s45.
- 16 For example see UN Committee on the Elimination of all forms of Racial Discrimination, General Comment 32 at [18] available at http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/a1053168b922584cc12568870055fbbc/36cc31561630e407c125764800498c03?OpenDocument
- 17 See for example, *Fair Work Australia Act 2009* (Cth) ss361 and 783; *Igen v Wong* [2005] IRLR 258. This approach was also supported by the Discrimination Law Experts' Roundtable, '*Report on recommendations for a consolidated federal anti-discrimination law in Australia*', (29 November 2010) p 8.
- 18 *Briginshaw v Briginshaw* [1938] 60 CLR 336.
- 19 See *Qantas Airways Ltd v Gama* [2008] FCAFC 69.
- 20 Discrimination Law Experts' Roundtable, '*Report on recommendations for a consolidated federal anti-discrimination law in Australia*', (29 November 2010).
- 21 *ibid.*
- 22 See for example *Sex Discrimination Act 1984* s40 which provides a 'statutory authority' exception and compare the *Racial Discrimination Act 1975*, which does not.
- 23 *Disability Discrimination Act 1992* s21A.
- 24 *Equal Opportunity Act 2010* (Vic) s122 and s133.
- 25 For example *Fetherston v Peninsula Health (No 2)* [2004] FCA 594.
- 26 For example *Ryan v Albutt t/as Albutt Exprss Holdings Pty Ltd (No.2)* [2005] FMCA 95.
- 27 *Fair Work Act 2009* (Cth) s570.
- 28 For example *Fair Work Act 2009* s351.
- 29 For example *Fair Work Act 2009* ss351 and 772(f).
- 30 For further discussion see Carol Andrades, Centre for Employment and Labour Relations Law, The University of Melbourne, *Working Paper No 47: Intersections between "General Protections" Under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries* (December 2009).





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