Victorian Women Lawyers

women lawyers association of nsw

Assistant Secretary
International Human rights and Anti-Discrimination Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

1 February 2012

Dear Sir/Madam,

Consolidation of Commonwealth Anti-Discrimination Laws

Victorian Women Lawyers (VWL) and the Women Lawyers Association of New South Wales (WLANSW) are voluntary associations that promote and protect the interests of women lawyers and engages with legal and social justice issues, particularly those that affect women. We represent women in the legal profession across Victoria and New South Wales.

Victorian Women Lawyers has previously provided a submission in relation to the consolidation of Commonwealth Anti-Discrimination Laws in February 2011. We now provide this submission, in association with the Women Lawyers Association of New South Wales in response to the Attorney General's Department Discussion Paper on the consolidation of Commonwealth Anti-Discrimination Laws.

Preliminary Comments

VWL and WLANSW support the government's move to consolidate Commonwealth anti-discrimination legislation.

We submit that a Consolidated Act should not result in any diminution of existing protections in the law, and in drafting the consolidated legislation the government should adopt a consistent and best-practice approach to protection from discrimination.

We further submit that a Consolidated Act should be developed with reference to the applicable international law principles, and that international law and conventions should be used as a source of guidance in the development of the Consolidated Act.

In particular, we support measures that will simplify and strengthen the protections against sex discrimination and increase transparency, accountability and enforceability in relation to those protections.

We also note the importance of considering the operation and role of the consolidated act with reference to other federal and state laws, particularly the *Fair Work Act 2009.*

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In summary, VWL and WLANSW submit that:

- A Consolidated Act should not result in any diminution of existing protections in the law;
- A Consolidated Act should reflect a best-practice approach to providing protection from discrimination;
- A Consolidated Act should be developed with reference to international law principles;
- A Consolidated Act should include the object of achieving substantive equality between men and women;
- A Consolidated Act should be simplified and remove undue technicality;
- A Consolidated Act should not include exemptions on the basis of gender;
- Any exemptions in the Consolidated Act should be temporary and reviewable;
- The AHRC should develop guidelines for the granting of exemptions, in line with the objectives of the consolidated act;
- A Consolidated Act should include a positive duty to take reasonable and proportionate measures to eliminate discrimination;
- The AHRC (or an alternate body) should be empowered to investigate complaints of discrimination and implement and enforce compliance measures;
- A Consolidated Act must be accompanied by comprehensive, funded community education campaigns; and
- A Consolidated Act must be accompanied by increased funding for legal information and advice.

In relation to the questions raised in the government's discussion paper, we provide the following reponse:

Question 1: What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

VWL and WLANSW support steps to simplify and clarify the definition of discrimination in a Consolidated Act, noting the disparate technical definitions contained in existing Commonwealth anti-discrimination law can be difficult to apply.

As a first point, we consider any definition in the Consolidated Act should avoid the diminution of protections under the existing legislation, and to that end we note the Government's commitment to this point.

The definitions of discrimination found in international law and the *Fair Work Act* 2009 take a unified approach, and do not maintain the distinction between direct and indirect discrimination.

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While we reiterate our overarching comments that the Consolidated Act should be developed with reference to international law principles and that the Consolidated Act should be consistent with other federal legislation, such as the *Fair Work Act* 2009, we make no submission as to the benefit of a unified test.

In particular, we consider the point that Australian Courts are familiar with a separate test, and the continued application of a separate test may build on and refine existing jurisprudence.

We do note, however, that the separate definitions explicitly recognise that indirect discrimination is of equal consideration, and is equally unlawful, as direct discrimination.

When taking into account the experiences of women lawyers and the systemic and structural discrimination that exists within the legal industry and beyond, we submit that any definition of discrimination adopted by the Consolidated Act should ensure that both direct and indirect discrimination are clearly covered and that the act should have an overarching aim of eliminating systemic and structural discrimination.

Should a separate test for direct and indirect discrimination be adopted, we would reject the application of a comparator test, which we note has been difficult to apply[1]. The need for a 'comparator' has often led to quite torturous assessments of who that appropriate person would be. No area is this more obvious than in cases of pregnancy discrimination where one has to find a comparison employee who is not pregnant yet in the same or similar circumstances of a pregnant person.[2]

We submit that a detriment test, similar to that applied in the Victorian *Equal Opportunities Act* 2010 (Vic)[3], be adopted. Such a test would require an applicant to demonstrate that they have experienced unfavourable treatment because of a protected attribute.

VWL and WLANSW submit that a test of reasonableness should not be included in the definition of discrimination in the Consolidated Act.

If a test of reasonableness were considered necessary, we submit that the Consolidated Act should provide specific criteria for decision makers to apply. For example, we would submit that the test used in international law that any limitation on a person's human rights be legitimate, necessary and proportionate, may be an appropriate example. Similarly, we would point to the criteria set out in the Victorian *Charter of Human Rights and Responsibilities*[4] provides a useful example of factors to be considered when assessing reasonableness.

Recommendations

- That the Consolidated Act should contain a simplified definition of discrimination, to remove undue technicality;

[1] See, for example, the discussion and outcome in *Purvis v New South Wales* [2003] HCA 62.
[2] See Allsop J's comments in *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 (30 July 2002) at paragraphs 120-122.
[3] *Equal Opportunities Act 2010* (Vic) s.8(1)
[4] *Charter of Human Rights and Responsibilities Act* 2006 (Vic) s.7(2)

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- The Consolidated Act should aim to eliminate systemic and structural discrimination;
- That a test of reasonableness should not be applied;
- That the Consolidated Act should aim to achieve substantive equality across the protected attributes, and particularly between men and women.

Question 2: How should the burden of proving discrimination be allocated?

VWL and WLANSW do not make a submission in relation to this question.

Question 3: Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

VWL and WLANSW support the use of special measures that seek to redress historical inequality and disadvantage. These measures are important in a framework that seeks to achieve substantive equality. The use of special measures has been important to see progression of women, in fields such as employment.

By way of example, a temporary special measure could encompass Norway's recent recommendation pursuant to Australia's Universal Periodic Review, that Australia institute quotas to increase the proportion of women on public and private sector boards from the current average of 8.4%[5] to 40%.[6] Special measures that seek to achieve substantive equality between men and women should be temporary in nature, and able to be removed once equal status between women and men is achieved.

We note that the current provisions in current anti-discrimination law are inconsistent. VWL and WLANSW recommend that a minimum standard for special measures should be the relevant international convention from which the law is sourced. The *Convention on the Elimination of All Forms of Discrimination against Women* provides for temporary special measures aimed at 'accelerating de facto equality between men and women' as well as special measures 'aimed at protecting maternity'.[7]

Recommendations

[5] Equality of Opportunity for Women in the Workplace Agency, '2010 EOWA Australian Census of Women in Leadership,' December 2010, <http://www.eowa.gov.au/Australian_Women_In_Leadership_Census/2010_Australian_Women_In_Leadership_Census.asp>, accessed 5 February 2011.

[6] Draft report of the working group, Universal Periodic Review – Australia, January 2011, <http://www.ohchr.org/EN/HRBodies/UPR%5CPAGES%5CAUSession10.aspx>, accessed 5 February 2011.

[7] Convention on the Elimination of All Forms of Discrimination against Women, Article 4

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- That special measures should be included to redress historical inequality and disadvantage;

- That a minimum standard for special measures be applied, with reference to the relevant international convention.

Question 4: Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

The VWL and WLANSW support the duty to make reasonable adjustments and take positive steps to address disadvantage experienced by someone with a certain attribute. Currently the *Disability Discrimination Act 1992* (Cth) (DDA) is the only Commonwealth Act to contain such an explicit duty.

The VWL and WLANSW submit that the Consolidated Act should include the duty to make reasonable adjustments across all other attributes contained in the Act. Referencing other legislation, such as the *Fair Work Act 2009*, 'reasonable adjustments' would include, but not be limited to, flexible workplace arrangements, access to buildings/transport, education and employment. The VWL and WLANSW specifically note that the DDA currently defines 'unjustifiable hardship'.[8] This should be retained in the Consolidated Act to ensure that the needs to an individual, or class of individuals, would not unreasonably impose hardship on the person or organisation whose duty it is to provide the reasonable adjustments.[9]

Recommendation

- That the duty to make reasonable adjustments be applied to all protected attributes in the Consolidated Act;

- That the Consolidated Act ensures that any special measures would not unreasonably impose hardship on the person or organisation whose duty it is to provide the reasonable adjustments.

Question 5: Should public sector organisations have a positive duty to eliminate discrimination and harassment?

VWL and WLANSW are in favour of a consistent, positive duty on goods and service providers, and employers, to prevent discrimination. VWL and WLANSW consider that Australia's anti-discrimination legislation could be more effective in reducing discrimination if it were to prescribe proactive measures to promote equality.[10] We note that the current structure of anti-

[8] Disability Discrimination Act 1992 (Cth) s 11 – see generally: http://corrigan.austlii.edu.au/au/legis/cth/consol_act/dda1992264/s11.html
[9] Please also see s 15 of the Canadian *Human Rights Act 1985*.
[10] Draft report of the working group, Universal Periodic Review – Australia, January 2011, http://www.ohchr.org/EN/HRBodies/UPR%5CPAGES%5CAUSession10.aspx, accessed 5 February 2011.

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discrimination law relies on individuals being willing and able to assert their rights, usually by bringing a complaint and/or commencing legal proceedings.

We agree that public sector organisations should have a positive duty to eliminate discrimination and harassment across the broad range of services provided by government departments and organisations.

It is clear that a positive duty is a critical element in the structure of anti-discrimination law through the maintenance of non-discriminatory practices such as flexible work place arrangements, educating staff on unacceptable workplace behaviour, self-auditing and equality performance measures. More broadly, the imposition of a positive duty on the Australian public sector to eliminate discrimination and harassment to clients, not just employees, would improve the provision of services and goods.

The Victorian Government endorsed this position through its implementation of a positive duty in the *Equal Opportunity 2010* (Vic).[11] VWL and WLANSW submit that a similar duty should be established under a Consolidated Act to promote reasonable and proportionate steps to eliminate discrimination, in the first instances, in public sector organisations. The imposition of a positive duty should not be restricted to the public sector. We recommend that the duty should extend to the private sector, within a determined period of time following the formation of the Consolidated Act. This duty could be phased-in across the public and private sector in close collaboration with the Workplace Gender Equality Agency (which is set to replace the Equal Opportunity for Women in the Workplace Agency).

Recommendations:

- That the Consolidated Act should include a consistent, positive duty on public sector organisations to prevent discrimination;
- That the Consolidated Act should impose a duty to take reasonable and proportionate steps to eliminate discrimination;
- That these duties should extent to the private sector.

Question 6: Should the prohibition against harassment cover all protected attributes? if so, how would this most clearly be expressed?

VWL and WLANSW do not make a submission in relation to this question.

Question 7: How should sexual orientation and gender identity be defined?

[11] *Equal Opportunity Act 2010* (Vic) s 15 – see generally: http://corrigan.austlii.edu.au/au/legis/vic/consol_act/eoa2010250/s15.html

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The *Yogyakarta Principles* define sexual orientation as a 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.[12]

In Australia, the terms used to characterise sexual orientation in legislation vary from state to state. The Northern Territory, Queensland, South Australia, and Australian Capital Territory anti-discrimination and equal opportunity acts use the term 'sexuality'[13]; whilst Tasmania, Victoria and Western Australia use the phrase 'sexual orientation'[14], and NSW uses the more specific term, 'homosexuality'.[15] In a number of states, the definition of sexuality and sexual orientation incorporates gender identity.

VWL and WLANSW understand that there are varying views on appropriate terminology in this area. However, we submit that use of the terms sexual preference, homosexuality and sexuality are not appropriate. VWL and WLANSW propose that the definition and protection is drafted on terms that are sufficiently inclusive and broad so as to ensure protection from discrimination on the basis of actual or presumed sexual orientation, gender identity and expression and intersex and sex identity. It is asserted that the legislation should recognise the broad scope of the concept sexual orientation and extend protection to characteristics or traits associated to, or imputed to, diverse sexual orientations.

Recommendation

- A Consolidated Act should provide protection from discrimination on the basis of actual or presumed sexual orientation, including associated or imputed characteristics.

Question 8: How should discrimination against a person based on the attribute of an associate be protected?

VWL and WLANSW do not make a submission in relation to this question.

Question 9: Are the current protections against discrimination on the basis of these attributes appropriate?

Family Violence

People experiencing family violence may be 'subject to direct and indirect adverse treatment in the workplace, as a result of their experience' of family violence.[16] Such treatment may

[12] International Commission of Jurists, *The Yogyakarta Principles: Principles On The Application Of Human Rights Law In Relation To Sexual Orientation and Gender Identity* (2007), http://www.yogyakartaprinciples.org/principles_en.htm.
[13] *Anti-Discrimination Act* (NT), s 19(c); *Anti-Discrimination Act 1991* (Qld), s 7(n); *Equal Opportunity Act 1984* (SA), s 29(b); *Discrimination Act 1991* (ACT), s 7(1)(b).
[14] *Anti-Discrimination Act 1998* (Tas), s 16(c); *Equal Opportunity Act 1996* (Vic), s 6(6) (1); *Equal Opportunity Act 1984* (WA), s 35O.
[15] *Anti-Discrimination Act 1977* (NSW), pt 4C, s 49ZG.
[16] Australian Human Rights Commission, *Submission to ALRC Commonwealth Family Violence Inquiry*, 21 April 2011.

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include being denied access to flexible working arrangement or leave, or ultimately having their employment terminated.

Under existing Commonwealth anti-discrimination law it is difficult for a person experiencing family violence to prove the requisite nexus between the discrimination experienced and an attribute that is currently protected (for example, sex, family responsibilities or disability).

As a result, VWL and WLANSW consider that family violence should be included as a protected attribute under any Consolidated Act. VWL and WLANSW submit:

- the definition of family violence should be gender neutral and consistent across Commonwealth legislation;[17]
- any new attribute should apply to both direct and indirect discrimination;
- any new attribute should apply in all areas of public life; and
- any new attribute should cover people who have (or who are perceived to have) previously experienced or currently be experiencing family violence.[18]

VWL and WLANSW note that several overseas jurisdictions have enacted legislation that prohibits discrimination in an employment context on the basis of family violence.[19]

Discrimination on the basis of hours worked

VWL and WLANSW identify the failure to protect workers from discrimination on the basis of working less than full-time hours as a significant gap in anti-discrimination law. Some 45% of women work part-time (17% of men)[20] and two-thirds of part-time employees are women.[21]It is proposed that such a prohibition be included in the Consolidated Act particularly as it would clarify and make simpler to apply indirect sex discrimination provisions protecting part-time women workers and provide a gender neutral right protecting men as well.

Australia ratified ILO Convention 175 in July 2011. It requires that part-time employees receive the same protection as comparable full-time workers including in relation to discrimination, wages, maternity and employment protection and paid annual, public holiday and sick leave. The

[17] See work done in relation to definitions and a common interpretative framework by the Australian Law Reform Commission: Australian Law Reform Commission, *Family Violence- A National Legal Response*, ALRC Report 114 (2010) and Australian Law Reform Commission, *Family Violence- Commonwealth Laws*, DP 76 (2011).

[18] See: Andrea Durbach, Deputy Sex Discrimination Commissioner 'Domestic Violence Discrimination and the Consolidation of Anti-Discrimination Laws'(Paper delivered at the Safe at Home, Safe at Work Conference, Melbourne, 5 December 2011) and Alana Heffernan, Lee Matahaere, Domestic violence discrimination in the workplace: Is statutory protection necessary? (Our Work Our Lives Conference, 2010). See also: Australian Law Reform Commission, *Family Violence-Commonwealth Law*, DP 76 (2011) ch 17.

[19] See, eg, *New York State Executive Law* (US) §§ 296-1(a); *New York City Administrative Code* (US) § 8-107.1; *Revised Code of Washington* 49 § 4976 (US) § 49.76; *California Labor Code* (US) §§ 230, 230.1; *Unlawful Action Against Employees Seeking Protection 2007* Fla Stat §741–313 (US) § 741.313; *Anti-Violence Against Women and Their Children Act 2004* (Philippines) s 43.

[20] ABS, *Labour Force Survey*, Cat. No. 6202.0, June 2010.

[21] ABS, Labour Force Survey, Detailed ElectronicDelivery, Cat. No. 6202.0, Jun 2010.

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EU has implemented a similar provision in the Part-time Workers Directive in 1997.[22] The Dutch *Equal Treatment Act 1994* already complied with this and is a model for providing protection against any discrimination/distinction between workers on the basis of hours worked. It provides such treatment unless justified. It makes it clear that part-time work is to be valued equally as full-time work and that workers have rights to the same conditions and benefits regardless of hours worked.

An example of the problems faced by part-time workers in Australia is demonstrated by initial research[23] into Modern Awards. This has illustrated the poorer working conditions and resultant insecurity they impose on part-time workers (both casual and permanent) in care awards in comparison to full-time equivalents (e.g. in relation to overtime & shift payments & variation of hours provisions).

As a result, VWL and WLANSW submit that Working hours should be included in the list of attributes upon which it is unlawful to discriminate

Recommendations

- Family violence should be included as a protected attribute under the Consolidated Act. The definition of family violence should be gender neutral and consistent across Commonwealth legislation; any new attribute should apply to both direct and indirect discrimination; any new attribute should apply in all areas of public life; and any new attribute should cover people who have (or who are perceived to have) previously experienced or currently be experiencing family violence.

- Working hours should be included in the list of attributes upon which it is unlawful to discriminate.

Question 10. Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?

VWL and WLANSW support strengthening protections for people affected by intersectional discrimination. As noted in the Senate Standing Committee report:

> [F]ederal anti-discrimination legislation, including the Act, has a limited capacity to address discrimination on intersecting grounds, such as sex and race, or sex, disability and age.[24]

[22] Council Directive 97/81/EC.

[23] Charlesworth S & Heron H (forthcoming) 'New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture?' *Journal of Industrial Relations.* See also Whitehouse G, Connolly T, Rooney P and Fenton E (2011) 'Working-time insecurity in permanent part-time employment: patterns in Queensland childcare'. Non–refereed proceedings of the *25th Conference of AIRAANZ*, New Zealand Work & Labour Market Institute, AUT University, 2-4 February 2011.

[24] Standing Committee on Legal and Constitutional Affairs *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, 43.

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The Consolidated Act should include mechanisms to ensure that intersectional discriminations are appropriately recognised, and redressed. VWL and WLANSW submit that provisions similar to Recommendation 19 of the Senate Standing Committee *Sex Discrimination Act 1984* (Cth) SDA Inquiry be adopted:

> "11.58 The committee recommends that the HREOC Act should be amended to provide that, where a complaint is based on different grounds of discrimination covered by separate federal anti-discrimination legislation, then HREOC or the court must consider joining the complaints under the relevant pieces of legislation. In so doing, HREOC or the court must consider the interrelation of the complaints and accord an appropriate remedy if the discrimination is substantiated."

While consolidation should eliminate some of the problems associated with compartmentalising discrimination, we recommend that provisions modelled on Recommendation 19 be explicitly included in order to ensure that intersectional discrimination is appropriately addressed.

Further, for complainants whose experience of discrimination is the compounded result of intersectional discrimination, additional procedural difficulties may arise in relation to proving causation. As the NACLC submitted to the Standing Committee SDA Inquiry, intersectional discrimination is more than the sum of its parts – it is an entirely new entity.[25] Thus, establishing causation may be particularly difficult for complainants whose experience of discrimination is not based on a single protected attribute. On this ground, VWL and WLANSW submit that complainants should not be required to prove which attribute was the cause of the discrimination, provided that the complainant can establish discrimination on the basis of one or more of the relevant protected attributes.[26]

Recommendations

- That provisions modelled on Recommendation 19 of the SDA report be explicitly included in a Consolidated Act in order to ensure that intersectional discrimination is appropriately addressed.
- That a Consolidated Act specify that complainants are not required to prove which attribute was the cause of the discrimination, provided that the complainant can establish discrimination on the basis of one or more of the relevant protected attributes.

Question 11: Should the attribute of equality before the law be extended to sex and/or other attributes?

We support the introduction of a general provision that requires equality before the law for all protected attributes. We endorse the Australian Human Rights Commission's submission of 6

[25] NACLC, in the SDA report, 41.
[26] This recommendation is drawn from that made by the Equality Rights Alliance: Women's Voices for Gender Equality *Submission to the Attorney-General's Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 16.

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December 2011[27] on this point, which outlines that it is beneficial for the Consolidated Act to clearly state that people can challenge inconsistent state and territory laws under s. 109 of the *Australian Constitution*, which can be best managed with a prescribed laws provision to identify and review inconsistencies.

Recommendation

- That the attribute of equality before the law be extended to all protected attributes.

Question 12: What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

We refer you to our later discussion on exemptions, in response to questions 20 – 23.

Question 13: How should the consolidation bill protect voluntary workers from discrimination and harassment?

VWL and WLANSW support the protection of persons from discrimination and harassment in all spheres of public life. This protection should extend to persons engaged in volunteer work.

VWL and WLANSW support the comments in the Discussion Paper regarding the significant contribution of volunteers to Australian society and the economy.[28] A large number of women lawyers volunteer and provide their legal skills to community legal centres, to boards, and other community groups. VWL and WLANSW are also aware of general trend that women are more likely than men to volunteer and on average volunteer more hours over a year.[29] The contribution of volunteers is important and protection from discrimination should not be denied to persons working side-by-side with paid employees.

The Work Health and Safety legislation which came into effect on 1 January 2012 at a Commonwealth level and in many states and territories defines 'workers' to include volunteers.[30] Under this legislation, volunteers have both the protections, and responsibilities, or other (non-volunteer) workers with respect to health and safety. VWL and WLANSW consider that this approach could be adopted for protections from discrimination and harassment.

Any changes to the law in this area should include an education campaign to educate volunteer organisations in their obligations. It may also be necessary to phase in these requirements so that volunteers can also be educated about their responsibilities. We also note that Safe Work Australia provides a dedicated volunteer assistance line to assist volunteers and volunteer organisations to understand their obligations under the new laws.[31] We recommend a similar service accompany any change to Commonwealth anti-discrimination legislation

[27] Australian Human Rigths Commission 'Consolidation of Commonwealth Anti Discrimination Law' 6 December 2011, p.27
[28] Discussion Paper, p 27.
[29] Australian Bureau of Statistics, 2010, *4441.0 - Voluntary Work, Australia*.
[30] See Work Health and Safety Act 2011 (Cth), section 7.
[31] Safe Work Australia, see http://www.safeworkaustralia.gov.au/News/Pages/TN230111-1.aspx

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Recommendations

- That the Consolidated Act support the protection of persons from discrimination and harassment in all spheres of public life;

- That any changes to the law in this area should include an education campaign to educate volunteer organisations in their obligations.

Question 14: Should the consolidation bill protect domestic workers from discrimination? If so, how?

We refer to our submission above at Question 13 and our position that a Consolidated Act should not include exceptions on the basis of gender.

VWL and WLANSW support the protection of persons from discrimination and harassment in all spheres of public life.

Question 15: What is the best approach to coverage of clubs and member based associations?

Aside from providing the comment that, as member based organisations, VWL and WLANSW aim to support the protection of persons from discrimination and harassment in all spheres of public life, we do not provide a submission in relation to this question.

Question 16: should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?

We recommend that the Consolidated Act apply to partnerships irrespective of size. This approach will overcome the inconsistency in Commonwealth discrimination law provisions without diminishing the protections currently granted to partners under the *Racial Discrimination Act* 1976 (Cth) (RDA Also, it will avoid creating an inconsistency with other working arrangements in Commonwealth discrimination law, as outlined in the Discussion Paper.

In the alternative, we recommend that the legislation be applied to all partnerships irrespective of size, but include an exception similar to that found in the Victorian *Equal Opportunity Act*[32]. Under this exception, we suggest that a firm may discriminate on the basis of a partner's impairment because the adjustments are not reasonable, or the partner could not adequately perform the genuine and reasonable requirements of partnership even after the adjustments are made, having regard to the relevant facts and circumstances.

Recommendation

- That the Consolidated Act apply to partnerships regardless of size.

[32] *Equal Opportunities Act 2010* (Vic) s.34

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Question 17: Should discrimination in sport be separately covered? If so, what is the best way to do so?

VWL and WLANSW do not make a submission in relation to this question.

Question 18: How should the consolidation bill prohibit discriminatory requests for information?

VWL and WLANSW do not make a submission in relation to this question.

Question 19: Can the vicarious liability provisions be clarified in the consolidation bill?

VWL and WLANSW do not make a submission in relation to this question

Question 20: Should the consolidation bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?

Question 21: How should a single inherent requirements / genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

Question 22: How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

Question 23: Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

In the submission made by VWL in February 2011, VWL submitted that:

- a Consolidated Act should not contain exceptions ;
- any exemptions in the Consolidated Act must be temporary and reviewable; and
- the AHRC should develop guidelines for the granting of exemptions, in line with the objectives of the Consolidated Act.

VWL and WLANSW submit that the Consolidated Act should adopt a general limitations clause to replace other exceptions as far as possible. However, such a clause should not diminish existing protection in any way.

VWL and WLANSW consider that the removal of exceptions and the restriction of exemptions is a key step in eliminating discrimination. As emphasised in the submission made by VWL in February 2011, the right to equality of treatment and opportunity should be considered a

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fundamental human right and thus, exemptions from equality or treatment should be restricted as far as possible in line with Australia's human rights obligations.

The 'contracting out' of anti-discrimination law should be prohibited under the Consolidated Act.

In exceptional circumstances temporary exemptions may be required, however the granting of such exemptions is a serious matter and in granting exemptions the objects of the Consolidated Act should be paramount and exemptions must be temporary, for the shortest possible time and narrow in coverage.

The AHRC currently grants exemptions under the DDA, SDA and *Age Discrimination Act* 2004 (Cth) (ADA) using internal guidelines. VWL and WLANSW submit that there should be:

- both substantive and process criteria for temporary exemptions across all grounds;
- a consistent process for considering and granting temporary exemptions across all grounds
- clear and publicly available guidelines which are consistent with the objects of the Consolidated Act; and
- a public register of exemptions granted and refused.

Recommendations

- A Consolidated Act should include a general limitations clause.

- Aside from a general limitations clause, a Consolidated Act should not make provision for any permanent exemptions or exceptions.

- The AHRC should continue to grant temporary exemptions upon application under the Consolidated Act. There should be both substantive and process criteria for temporary exemptions across all grounds; a consistent process for considering and granting temporary exemptions across all grounds; clear and publicly available guidelines which are consistent with the objects of the Consolidated Act; and a public register of exemptions granted and refused.

Question 24: Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

It is essential that the Consolidated Act not result in any diminution of existing protections in the law.

The mechanisms provided in the Discussion Paper (s 171) are advocated by the VWL and WLANSW in addition to a well-funded, national education program specifically linked to co-regulation and standards. Without ongoing education of employers and the general community, the efforts to eliminate discrimination and harassment run the risk of becoming sidelined and a 'nice to have' option.

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Specifically, we submit that education of rights and responsibilities is an essential factor in the success of a Consolidated Act. We note that there are well developed programs in place to inform the community about work entitlement and workplace injuries, but there is a notable absence of a strategic Commonwealth anti-discrimination campaign. Targeted education campaigns are critical to informing the community about the definition of discrimination and protections available under the Consolidated Act. Adequate funding for community education must accompany a Consolidated Act.

Recommendations

- That a well-funded, national education program be implemented in relation to obligations under the Consolidated Act;
- That the Consolidated Act must be accompanied by adequate funding for community education.

Question 25: Are any changes needed to the conciliation process to make it more effective in resolving disputes?

VWL and WLANSW support any attempt to create low cost, early resolutions of disputes under a Consolidated Act.

However, with particular reference to women, we note that there may be issues of power imbalance associated with attending a conciliation to resolve a dispute in the arena of discrimination. With reference to our experience as advocates, and as women, we note that conciliation may not always be the most appropriate means of dispute resolution for complaints of discrimination.

We refer to the submission of the Equality Rights Alliance[33], and their discussion of the 'triage' model adopted by the New Zealand Human Rights Commission's dispute resolution process, and its focus on the most effective, informal and efficient manner of resolving complaints.

In particular, we would support the introduction of a model that allows complainants to elect to take their complaint straight to a decision making body, in circumstances where a face to face or informal mode of dispute resolution may be inappropriate.

We also support the introduction of a compulsory register of outcomes in the resolution of discrimination complaints, at conciliation or otherwise. We propose that a de-identified summary of a complaint, including the ground of complaint, key issues, and outcome, be provided to a central body such as the AHRC.

We note the current system publishes selective information[34], and we submit that this gives an incomplete and misleading indication of the outcomes that might be available.

[33] Equality Rights Alliance 'Submission to the Attorney-General's Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper' 19 December 2011, pp. 22 - 24

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We submit that this register of outcomes would be useful for complainants, advocates and duty holders to demonstrate the operation of anti-discrimination legislation and provide a realistic measure of outcomes at all stages of the complaints process.

Recommendations

- That the Consolidated Act focuses on low cost, early resolutions of complaints;
- That a triage model be adopted for managing complaints arising under the Consolidated Act;
- That a de-identified register of outcomes be kept in relation to complaints arising under the Consolidated Act.

Question 26: Are any improvements needed to the court process for anti-discrimination complaints?

VWL and WLANSW support the implementation of new mechanisms to address discrimination. VWL and WLANSW believe that a critical element in addressing discrimination is improving the community's access to protections available under anti-discrimination legislation.

VWL and WLANSW support a procedural framework that improves access to the complaints process. We note that the considerable costs involved with legal proceedings can be a deterrent for complainants to pursue matters beyond conciliation. Therefore, for the complaints process to be accessible, greater emphasis should be placed on low cost resolution methods.

The court process should, however, be developed with regard to power imbalances that may exist between the parties. This is particularly the case in instances of gender discrimination or harassment, where complainants may not feel capable of conciliating their complaint with the alleged perpetrator. It may also be appropriate for complainants to have their case heard by an independent arbiter. VWL and WLANSW support the right of complainants to elect to have their complaint heard before a relevant tribunal or court. The Victorian *Equal Opportunity Act* 2010 currently provides a mechanism which allows a person to make an application to the Victorian Civil and Administrative Tribunal, whether or not the person has brought their complaint to the Victorian Commission first.[35]

An essential factor in the success of a Consolidated Act is to educate the community about their rights and obligations. Rights to protection from discrimination are not well understood. The Department of Victorian Communities 'CALD Women's Project' recommended the development of educational programs for migrant women because many women do not understand their rights and entitlements in the workplace and are less clear about discriminatory practices.[36] This experience is not limited to migrant women. While there are well developed programs in place to

[34] http://www.hreoc.gov.au/complaints_information/register/index.html
[35] *Equal Opportunity Act* 2010 (Vic) section 122.
[36] Success Works, CALD Women's Project Final Report (Department for Victorian Communities, 2005), 85.

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inform the community about work entitlements and workplace injuries, but there is an absence of a strategic Commonwealth anti-discrimination education campaign. Targeted education campaigns are critical to informing the community about what is discrimination and the protections available under the Consolidated Act. Adequate funding for community education must accompany a Consolidated Act.

An essential measure to any improvements to the court process is to increase access to legal assistance at the early stages of a complaint. VWL and WLANSW submit that people must have information about, and access to advice about, their legal rights. Free or low cost legal assistance should be available for in the field of anti-discrimination law. Agency operated advice lines and established specialist legal centres are key effective services that are easy to access and are well established in the community. The provision of ongoing assistance from these services, rather than merely initial advice, is critical in ensuring that complainants are well supported and prepared. In addition, VWL and WLANSW support an extension of the Federal Court's legal assistance program,[37] and the establishment of a corresponding scheme in the Federal Magistrate's Court.

VWL and WLANSW submit that the Consolidated Act must be coupled with appropriate funding levels to support access to legal information, advice and representation.

Recommendations

- That the Consolidated Act should aim to improve the community's access to protections available under anti-discrimination legislation;
- That the Consolidated Act should be coupled with appropriate funding for legal information, advice and representation for claimants and duty holders;
- That the court process should be developed with regard to power imbalances that may exist between the parties.

Question 27: Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

A method of effectively addressing anti-discrimination is to permit relevant bodies to monitor and enforce individual complaints. At present the Australian Human Rights Commission does not have the power to enforce Australia's anti-discrimination laws. VWL and WLANSW recommend that the AHRC be empowered to proactively investigate complaints without relying on individual complaints. The AHRC should also be permitted to commence own-motion investigations. These powers should be coupled with an enforcement role. This framework is essential for effective regulation.[38] For example, the AHRC could be given the power to issue compliance notices and

[37] http://www.fedcourt.gov.au/litigants/general/legalassistance.html

[38] See the discussion of potential regulatory models in Belinda Smith, 'Not the Baby and the Bathwater-Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 8(4) *Sydney Law Review* 689-732.

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enforce penalties for non-compliance in a manner similar to agencies such as the Fair Work Ombudsman and WorkSafe Victoria.[39]

We repeat our comments in response to Question 26 regarding the provision of education campaigns and resources to enable people to understand the law. We also repeat our comments that the provision of free or low cost legal advice is necessary to support people seeking access to the compliance regime.

Recommendations

- That the relevant body be empowered to monitor and enforce individual complaints;
- That the relevant body be empowered to commence own-motion investigations, along with powers to enforce findings;
- That the Consolidated Act be coupled with appropriate funding for legal information and support to claimants and duty holders.

Question 28: Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

We support the Commonwealth's objectives, as expressed in the Discussion Paper, to consistently manage and balance the interactions of Commonwealth anti-discrimination laws with other anti-discrimination frameworks, so as not to diminish any existing protections. We support the prescriptive approach taken in current ADA, DDA and SDA, as it ensures, as far as possible, that Parliament has turned its mind to any potential inconsistencies with other discrimination laws. It also gives people a clearer understanding that their rights under one Commonwealth statutory framework interact with others, making the legislative framework easier to navigate.

In addition, VWL and WLANSW submit that there should be greater interaction between the organisations that administer *Fair Work Act 2009* and Commonwealth discrimination law. For example, there should be arrangements between organisations that complaints made to Fair Work Ombudsman (FWO) can be conciliated by AHRC.

Once an employment related complaint has been conciliated unsuccessfully at the AHRC, if the applicant decides not to purse court proceedings, the AHRC should refer that matter to FWO for investigation. This ensures that complaints are not lost once the individual runs out of steam to pursue them further.

Recommendations

[39] This may require the separation of conciliation functions and enforcement/educative functions of the AHRC.

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- That the Consolidated Act should be consistent with other Commonwealth legislation, such as the *Fair Work Act* 2009.

- There should be provision for referral of complaints made to the Fair Work Ombudsman to conciliation by the AHRC.

Question 29: Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

As an overarching principle, VWL and WLANSW submit that a Consolidated Act should not result in the diminution of any present protections, including those afforded by existing state and territory discrimination laws. However, we also support a transition to a comprehensive Commonwealth system of anti-discrimination legislation, comparable to the coverage provided by the *Fair Work Act 2009* in relation to employment.

The present situation in which the commonwealth anti-discrimination laws do not 'cover the field' have led to a confusing regulatory environment for both employers and complainants alike. While the RDA, SDA, DDA and ADA each contain provisions designed to allow state and territory laws to operate concurrently when consistent with commonwealth legislation,[40] it is submitted that a nationalized system would both reduce the regulatory burden on employers, and allow complainants to more effectively pursue claims[41] by eliminating the problem of conflicting regulations. The problem of 'forum shopping' would also be eliminated, allowing a consistent body of jurisprudence to develop, as opposed to the patchwork of decisions that presently exists at the State, Territory and Commonwealth levels.

A Consolidated Act must be carefully drafted to ensure that no existing state or territory protections are diminished during the harmonization process. VWL and WLANSW recognise that a Consolidated Act provides a unique opportunity to not only harmonise the various anti-discrimination instruments, but to greatly strengthen the protections by adopting the highest possible protections available within existing instruments, and applying them consistently to all protected attributes.

Recommendation

- That a Consolidated Act 'cover the field', provided that no existing state or territory protections are diminished during the harmonization process.

[40] Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper,* September 2011, 57-58.

[41] As noted by the Discussion Paper, while the provisions relating to the concurrent operation of state/territory and commonwealth laws are fairly uncontroversial, in areas of inconsistency a number of problems arise. For instance, the RDA and the SDA do not provide any exemption for acts done in compliance with State or Territory laws when inconsistent with Cth provisions, whereas the DDA and the ADA allow scope for regulations to be made exempting acts done in direct compliance with State or Territory laws. See Discussion Paper, 58.

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Question 30: Should the consolidation bill apply to State and Territory Governments and instrumentalities?

VWL and WLANSW support an eventual move to a comprehensive national system of anti-discrimination regulation, similar to the coverage the *Fair Work Act 2009* now has over employment regulation. It is confusing and difficult for employers to comply with a different regime of Commonwealth and state regulation. A national system would be beneficial in ensuing consistency and be less of a regulatory burden. It would be less confusing to applicants and respondents if the question of forum shopping was removed. A consistent body of jurisprudence would then develop, as opposed to the patch work of decisions that exist at the State, Territory and Commonwealth level.

We submit that in the meantime, the Consolidated Act should aim, as far as possible, to be consistent with state and territory instrumentalities, and in particular should aim to avoid the diminution of any protections provided by State or Territory Government instrumentalities.

However, we note that there may be constitutional issues in the Consolidated Act applying to State and Territory Governments and instrumentalities, and these issues should be taken into consideration in this regard.

Recommendations

- That the consolidated act should aim to be consistent with state and territory instrumentalities, where appropriate;
- That the consolidated act should aim to avoid the diminution of any protections provided by State or Territory Government instrumentalities.

VWL and WLANSW would welcome the opportunity to provide further comments on the consolidation of Commonwealth anti-discrimination laws as the process continues.

For further information please contact the Co-Chair of the VWL Law Reform Committee, Emily Hart (PH: (03) 9605 2780) or the President of the Women Lawyers Association of New South Wales, Rebecca Barry (PH: 0466 157 087).

Yours Sincerely

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