NACLC Submission to the Commonwealth Attorney General

Access to Justice and Systemic Issues : Consolidation of Federal Discrimination Legislation

March 2011

1. Introduction

A. OVERVIEW OF THIS SUBMISSION

This submission is jointly made by the National Association of Community Legal Centres (**NACLC**) and a number of community legal centres (**CLCs**) across Australia, including:

- Aboriginal Legal Service of Western Australia (Inc)
- Cairns Community Legal Centre Inc.
- Hawkesbury Nepean Community Legal Centre
- Human Rights Law Resource Centre
- Inner City Legal Centre
- Kingsford Legal Centre
- NSW Disability Discrimination Legal Centre Inc
- Public Interest Advocacy Centre Ltd
- Public Interest Law Clearing House Inc. (Vic)
- Redfern Legal Centre
- Women's Legal Services NSW

This submission provides an overview of some of the key issues arising from the Attorney-General's proposed consolidation of existing federal discrimination legislation. It focuses on access to justice and reducing systemic discrimination. Where necessary, a number of our key recommendations are supported by a justification and case studies (see Part 3). NACLC will submit a second paper to address the extent to which legal tests for discrimination should be amended and areas of protection that should be broadened.

NACLC welcomes the Attorney-General's decision to consolidate federal discrimination laws. This process is an important opportunity for Government to consider the effectiveness of the current legislative regime and to address gaps in the system. In the view of NACLC and the CLCs that have contributed to this submission, federal discrimination law needs to be enhanced to enshrine Australia's international human rights obligations into domestic law and to promote substantive equality.

We recommend that the Government consolidate the current federal discrimination legislation into an Equality Act. However, the consolidation project should not reduce current protections against discrimination contained in federal legislation – rather, the aim of the project should be to ensure substantive equality for individuals.

B. ABOUT NACLC AND CLCS

NACLC is the peak national organisation representing CLCs in Australia. Its members are the state and territory associations of CLCs that represent the over 200 centres in various metropolitan, regional, rural and remote locations across Australia.

CLCs are not-for-profit, community-based organisations that provide free legal advice, casework, information and a range of community development services to their local or special interest

communities. CLCs' work is targeted at disadvantaged members of society and those with special needs, and in undertaking matters in the public interest. CLCs have been advocating for a rights based approach to equitable access to the justice system for over 30 years. CLCs are often the first point of contact for people seeking assistance and/or the contact of last resort when all other attempts to seek legal assistance have failed.

In 2009-10, CLCs in the Commonwealth and State Community Legal Service Program:

- provided over 168,000 information, support and referral services;
- provided more than 247,000 individual advices;
- worked on over 68,000 individual cases;
- concluded 2,869 community legal education projects (and worked on many more that have continued into the new year); and
- finalised 1,051 law or policy reform projects (and worked on many more that have continued into the new year).[1]

The CLCs that have contributed to this submission have substantial expertise in discrimination law. This submission draws on CLCs' many years of practical experience assisting clients to navigate both the federal and state or territory systems. CLCs bring particular expertise and understanding of what the barriers are to accessing justice for people who have experienced discrimination as we work every day with clients to overcome these barriers.

C. 'ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES' AND 'ABORIGINAL PEOPLES'

Throughout this submission, Aboriginal and Torres Strait Islander peoples are referred to as 'Aboriginal peoples'. NACLC acknowledges the diversity in culture, language, kinship structures and ways of life within Aboriginal and Aboriginal and Torres Strait Islander peoples, and recognise that Aboriginal peoples and Torres Strait Islander peoples retain their distinct cultures irrespective of whether they live in urban, rural, regional or remote parts of the country. The use of the word 'peoples' also acknowledges that Aboriginal peoples and Torres Strait Islander peoples have a 'collective, rather than purely individual dimension to their livelihoods'.[2]

[1] National Association of Community Legal Centres, *NACLC Annual Report 2009/10*, available at www.naclc.org.au.

[2] Australian Human Rights Commission, *Social Justice Report 2009* (2009), page 6, http://www.hreoc.gov.au/social_justice/sj_report/sjreport09/index.html.

2. Summary of Recommendations

A. OVERARCHING RECOMMENDATIONS

1. The aim of any consolidation of federal discrimination law should be to promote substantive equality within the Australian community and to enshrine Australia's international human rights obligations into domestic law. The Preamble to the Act should reflect this intention.
2. The international human rights instruments that Australia is a party to should be annexed to the Equality Act – namely the Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**), the International Covenant on Civil and Political Rights (**ICCPR**) and the Convention on the Rights of Persons with Disabilities (**CPRD**).
3. The Government should consolidate the current federal discrimination legislation into an Equality Act.
4. The Government's anti-discrimination law consolidation project should not reduce current protections against discrimination contained in federal legislation.

B. PROVISIONS THAT SHOULD BE RETAINED IN AN EQUALITY ACT

5. Discrimination can be established where an act is done for more than one reason, if one reason is discriminatory.
6. Protection from victimisation.
7. Protection from discrimination based on an attribute of an associate.
8. Protection from requests for information for discriminatory purposes.
9. Vicarious liability and aiding and abetting provisions.
10. Disability Standards.

C. CONCILIATION AGREEMENTS

11. The Equality Act should have provision for agreements reached in settlement to be legally binding through registration with the court. Applications to the court for enforcement should be simple and low cost.

D. COURT PROCESS

12. A complainant should be able to make an application directly to a court, rather than first going through investigation and conciliation by the Australian Human Rights Commission (**AHRC**).
13. The AHRC should be able to initiate an application to a court, either on behalf of an individual or for the benefit of a group of people or a section of the community. The ability of the AHRC to intervene or appear as amicus in discrimination cases should be retained.
14. The Federal Court (**FCA**) and the Federal Magistrates Court (**FMCA**) should become no costs jurisdictions in discrimination matters, except for vexatious or frivolous proceedings.
15. The burden of proof should shift so that once a prima facie case has been raised by the complainant, the respondent must prove that the conduct was justified and not unlawful

(consistent with section 136 of the *Equality Act 2010* (UK) and section 361 of the *Fair Work Act 2009* (Cth)).

16. Remedies available in discrimination matters should include corrective and preventive orders, as well as injunctions.

17. A complainant (whether individual or a representative group) should be able to make an application for injunction when necessary.

18. A specialist division of the Federal Court and the Federal Magistrates Court should be established to hear discrimination law matters. Judicial members should have ongoing training in discrimination law.

19. The specialist division should develop rules and procedures that increase the ability of self represented litigant to conduct their own case.

E. FUNDING

20. Alongside an Equality Act, there should be increased funding to CLCs and legal aid to provide representation to complainants.

F. SYSTEMIC DISCRIMINATION

21. AHRC Discrimination Commissioners should be given the power to investigate and initiate proceedings in relation to conduct that appears unlawful, without an individual complaint.

22. The role and powers of the AHRC and the Discrimination Commissioners should be expanded to address systemic discrimination. These powers should include monitoring of respondents, commencing complaints, intervening in matters, and reporting to Federal Parliament and the public on discrimination matters.

23. The AHRC should have the power to commence proceedings, in the absence of an individual complaint, to enforce breaches of disability standards. This should include the introduction of civil penalty provisions in the Equality Act.

24. A positive duty of equality should be placed on public and private bodies.

25. The Equality Act should include provision for 'representative complaints' and complaints by groups on behalf of, or in the interest of members.

26. The *Federal Court of Australia Act 1976* (Cth) should be amended to make the standing provisions in discrimination matters consistent with those of the *Australian Human Rights Commission Act 1986* (Cth).

G. EXCEPTIONS, EXEMPTIONS AND SPECIAL MEASURES

27. The Equality Act should contain a single exception clause with a simple test – of 'proportionate means of achieving a legitimate end or purpose.'

28. Exemptions should be time limited and granted on a case-by-case basis for individual forms of conduct. The same simple test requiring that an exception be a 'proportionate means of achieving a legitimate end or purpose' should be applied to exemptions under the Equality Act. There should also be a public and transparent process for granting exemptions.

29. Special measures should be separately and fully defined in the Equality Act as 'lawful activity' and as being beneficial for a particular group.

30. The Equality Act should provide legislative protections in the development, design and delivery of Special Measures that meet the minimum standards for special measures set out in the Committee on the Elimination of Racial Discrimination General Comment No. 32.

31. The Federal Government should establish a policy of consultation with Aboriginal peoples that meets the benchmarks established in the Declaration on the Rights of Indigenous Peoples. This includes, at a minimum, that consultation is consistent with Aboriginal peoples' right to self determination, and ensure that Aboriginal peoples provide free, prior and informed consent to any measures which target them (whether directly or indirectly).

32. The Equality Act should provide for 'genuine occupational qualification for a position that relates to gender' and also 'measures designed to promote equal opportunities'.

3. Access to Justice for People Experiencing Discrimination

A. OVERVIEW: CHALLENGES OF A COST JURISDICTION

The current federal discrimination framework for discrimination is complex and creates significant barriers to access to justice. In NACLC's experience, the most significant barrier for people experiencing discrimination is the system of resolving complaints itself – and particularly the difficulties associated with the risks of adverse costs orders in the Federal Court system.

As a result of the risk of an adverse costs order, many complainants are reluctant to even lodge complaints at the AHRC, preferring state-based, tribunals where parties bear their own costs. Where matters are contested at a federal level, NACLC's experience is that most cases settle – even very strong discrimination complaints. As a result, courts at a federal level have not developed robust jurisprudence in this area of law. Decisions by the judiciary are critical to the development of discrimination law in Australia, and in discrimination law developing a strong normative role within the community. The system as it presently stands is a war of attrition, where even very strong cases are settled because individual complainants cannot face the risks and pressure of litigation against well resourced respondents.

Any review of federal discrimination law must contemplate that the majority of CLCs advise complainants who have a choice against using the federal system in matters that are likely to be litigated. This represents one of the most significant barriers to accessing justice and to the development of federal discrimination law.

Case Study

Darren worked as a labourer. He lived in western Sydney with his young family and had a mortgage. He was sacked from his job as his employer believed he had a medical condition that could affect his job in the future. Darren disputed that he did have a medial condition and therefore did not believe it affected his ability to do his job. Darren's doctor supported this.

Darren lodged proceedings with the AHRC which failed to settle. A CLC assisted Darren and told him that his case had the potential to be a test case. Darren lodged proceedings in the Federal Magistrates Court. Despite advice from the CLC and a barrister that his case was relatively strong, Darren accepted a low figure settlement at a Federal Magistrates' Court mediation. Darren did this as he was worried about an adverse costs order and the subsequent risk that he may lose his house. He wanted to seek justice but felt the risks just seemed too great.

B. COMPLAINT PROCESS AND CONCILIATION: COMBINED IMPACT OF NEGOTIATING IN THE SHADOW OF A COSTS JURISDICTION AND EMOTIONAL COST TO COMPLAINANTS

The experience of many CLCs is that clients find the current federal discrimination process to be an ineffective means of resolving their complaints.

In the current federal discrimination system, alternative dispute resolution in the form of conciliation is employed at the first instance. The advantage of alternative dispute resolution is that it is a relatively informal process and minimises the expenses to the parties. However, the conciliation process can disadvantage the complainant. There is often a power imbalance between them and the respondent, which is often a company or a government agency. This power imbalance is even more significant when the complainant is not represented, usually due to insufficient resourcing of advocacy and legal organisations.

In NACLC's experience, most discrimination cases settle. However we believe that many settle on terms that do not reflect the seriousness of the discrimination or that result in inadequate compensation to the complainant. When considering the effectiveness of the current federal discrimination system, the high percentage of conciliated outcomes cannot in itself be seen as a success. In NACLC's view, this occurs because of the costs jurisdiction that complainants must enter if the matter does not settle and many complaints settle on terms that do not reflect the merits of their case. Our experience is that compensation offered in conciliation agreements is generally very low (often below $10,000). Therefore, the decision to litigate in a costs jurisdiction is made even more difficult when legal costs for the matter could easily be three or four times this amount.

In addition to costs considerations, there are other barriers to accessing justice within the current discrimination framework – namely, barriers to physical access, and the psychological costs and the time commitment involved in pursuing litigation (particular for people with disabilities). It is also difficult for people living outside metropolitan areas to commence proceedings in a the FCA or FMCA without a solicitor acting on their behalf. These barriers contribute to the dearth of decided cases and expertise among the judiciary in this area of law, making it even more difficult for practitioners to provide advice on prospects of success to complainants. This leads to more cases settling and fewer systemic outcomes.

Case Study

Mary used a wheelchair and felt she had experienced discrimination from a public transport provider. As a result of their conduct she had been unable to get home and had felt extremely vulnerable. She lodged a discrimination complaint with the AHRC. Her primary focus was to try and ensure that what happened to her did not happen to someone else in the future, but she also sought compensation for pain and suffering. The matter did not settle and as Mary felt passionately about this issue she lodged proceedings in the FCA. She received advice that it was a potential test case and a CLC acted for her. The respondents employed a large law firm and a barrister. They fought the claim vigorously and said that Mary's claim had no merit and they would

pursue her for their costs. Although Mary was worried about this, she continued her case.

The case settled at Federal Court mediation on the terms Mary had offered at the AHRC, nine months earlier. Tens of thousands of dollars were expended on legal fees. The CLC that assisted Mary believed the matter had not resolved at the AHRC because the respondent did not believe Mary would commence proceedings at Court, and that the matter would simply go away if it did not settle.

For the purpose of discrimination complaints, the FCA and FMCA should become no-cost jurisdiction, except for vexatious or frivolous proceedings, or for unreasonable conduct during the proceedings, in line with state and territory discrimination tribunals.

Additionally, a no-costs jurisdiction would also ensure consistency with adverse action claims under the *Fair Work Act 2009* (Cth). This is significant as many discrimination claims relate to employment matters, and so could be brought under the *Fair Work Act 2009* (Cth). Therefore it is important to ensure that in relation to costs, the legislative schemes are consistent.

RECOMMENDATION: The Federal Court and the Federal Magistrates Court should become no costs jurisdictions in discrimination matters, except for vexatious or frivolous proceedings.

C. CONCILIATION AND ACCESS TO THE COURTS

NACLC submits that the current complaint and conciliation process should be retained as an option for individuals. The benefits are that it is low cost and informal, it can be empowering, and it allows for flexibility in the resolution of complaints. It can usually take place in a location that is convenient for the parties.

However, in some cases, it is clear that the complaint cannot be resolved by conciliation, or that particular respondents have a fixed position in relation to discrimination complaints. In these cases, the AHRC investigation and conciliation process merely delays eventual consideration by a court and causes 'complainant attrition' where the case drags on so long that the complainant decides not to continue.

RECOMMENDATION: A complainant should be able to make an application directly to a court, rather than first going through investigation and conciliation by the AHRC.

RECOMMENDATION: The AHRC should be able to initiate an application to a court, either on behalf of an individual or for the benefit of a group of people or a section of the community. The ability of the AHRC to intervene or appear as amicus in discrimination cases should be retained.

D. CONCILIATION AGREEMENTS

Many complainants successfully obtain a settlement at the AHRC that the respondent never complies with. This is a significant problem with the federal conciliation system as there is no effective mechanism to enforce these agreements.

There is also no accurate way of determining in how many 'settled' matters the respondent fails to fully comply with the agreement. CLCs often spend many months chasing the respondent to ensure compliance. In our experience, many matters 'settled' at the AHRC are never concluded in the terms agreed.

The effectiveness of discrimination conciliation agreements could be improved if they could be registered with a federal court and enforced as court orders. Such a mechanism should be included in any consolidation legislation in order to increase the effectiveness of federal discrimination law.

RECOMMENDATION: The Equality Act should have provision for agreements reached in settlement to be legally binding through registration with the court. Applications to the court for enforcement should be simple and low cost.

E. LEGAL REPRESENTATION

Pursuing a discrimination complaint is a very personal type of litigation that can be emotionally draining and stressful. Without legal advice and representation, many complainants simply do not pursue their complaint. CLCs are not able to meet the current demand for representation in discrimination matters and cannot act on behalf of all potential clients.

The challenge for unrepresented complainants is further compounded by the shift towards a more formal style of conciliation. In the past, conciliations may have been more informal, with neither party represented. However, in NACLC's experience, respondents are increasingly retaining legal representation at the conciliation phase, which significantly disadvantages unrepresented complainants.

Case Study

Igor had recently migrated to Australia in order to study. He sought a part time job in a factory. On his first day at work he was called names and racially abused. At the end of his shift, one of the colleagues who had been abusing him played a 'prank' on him and he ended up falling over and being taken to hospital. Igor had in fact been assaulted. He returned to work some time later and was still subjected to racial taunts. He was later sacked and brought a discrimination complaint. He sought assistance from a CLC. He was still emotionally distressed by what had happened to him as a result of the assault in particular. He said that without legal representation, he did not think he would be able to pursue his claim.

Case Study

Ada had been working with a community organisation. She had been experiencing unwanted sexual advances from a colleague. These escalated and she was warned by colleagues that he had done this to other women before. One afternoon, he locked Ada in a room and tried to touch and kiss her. Ada was petrified as she could not escape from the room. After this incident, Ada suffered a very serious mental health breakdown and was hospitalised. She later brought a complaint with the help of a CLC but remained extremely fragile and at times suicidal. Without legal representation she simply could not have continued her claim.

The consolidation process should ensure that complainants have adequate access to legal advice and representation, at both conciliations before the AHRC and at the FCA and FMCA. The availability of legal aid grants for discrimination matters should be increased and the eligibility criteria under existing Commonwealth legal aid guidelines should be amended so that there is no requirement to show substantial benefit being gained by the public or sections of the public. Funding provided to specialist and low cost legal services, such as CLCs, to assist people to make complaints under federal discrimination legislation should be increased.

RECOMMENDATION: Alongside an Equality Act, there should be increased funding to CLCs and legal aid commissions to provide representation to complainants.

F. BURDEN OF PROOF

The current burden of proof requirements under the federal discrimination system places too great an evidentiary burden on the individual complainant. In NACLC's experience, the burden of proof is often impossible for complainants to satisfy, particularly in the absence of ready access to the evidence, which in our experience is usually held by the respondent.

RECOMMENDATION: The burden of proof should shift so that once a prima facie case has been raised by the complainant, the respondent must prove that the conduct was justified and not unlawful (consistent with section 136 of the *Equality Act 2010* (UK) and section 361 of the *Fair Work Act 2009* (Cth)).

G. REMEDIES

NACLC recommends that the remedies available under s 46P0(4) of the *Australian Human Rights Commission Act 1986* (Cth) should be expanded to grant the AHRC power to make corrective and preventative orders. Although s 46P0(4) provides federal courts broad power and a non-exhaustive list of remedies, courts are reluctant to make injunctive orders that

prohibit or compel specified conduct. The power to make corrective and preventative orders will also assist in addressing systemic discrimination.

RECOMMENDATION: Remedies available in discrimination matters should include corrective and preventive orders, as well as injunctions.

RECOMMENDATION: A complainant (whether individual or a representative group) should be able to make an application for injunction when necessary.

H. A SPECIALIST DIVISION

NACLC recommends that the Government consider establishing a specialist division of the FCA and FMCA to hear discrimination law matters. Under the current system, the nature of discrimination complaints are very different to other types of matters dealt with by Federal Court-level judges, both in terms of the law and the facts. As highlighted in the discussions above, a number of barriers exist that constrain complainants' access to the courts and, as a result, FMC and FMCA judges do not generally develop an expertise in this area of law.

NACLC therefore recommends that in order to promote discrimination law as a recognised area of expertise, consideration should be given to creating a specialist division to hear discrimination matters. Judicial officers should be recruited based on their expertise in discrimination law and should be required to undertake ongoing professional education in the law, and also training relevant to working with protected groups (for example, disability and cross-cultural awareness training).

Another challenge to the effective handling of discrimination matters at the Federal Court-level is the highly procedural nature of the Federal Court system, which makes it difficult for self-represented litigants (or anyone other than a barrister) to effectively comply with the court rules and procedures. Therefore, NACLC recommends that the Government give consideration to developing a more litigant-in-person friendly specialist court or division where the procedures are relaxed and the processes more accessible for individuals who conduct their own matters.

RECOMMENDATION: A specialist division of the Federal Court and the Federal Magistrates Court should be established to hear discrimination law matters. Judicial members should have ongoing training.

RECOMMENDATION: The specialist division should develop rules and procedures that increase the ability of self represented litigants to conduct their own cases.

4. Systemic discrimination

A. EXPANDED ROLE FOR DISCRIMINATION COMMISSIONERS AND THE AHRC

As outlined above, current federal discrimination law relies on individual complaints which are most commonly resolved through private conciliation. The limitations of this system for dealing with repeat discriminators, and for entrenched practices and systemic discrimination, have been widely discussed.[3]

Case Study

Over a period of some years, the same CLC represented a number of women who all complained of discrimination on the basis of pregnancy, family responsibility or sexual harassment against the same large company. None of the women knew each other or of each others' complaints. Each complaint settled at the conciliation stage of the process. The complainants received compensation and a statement of service. While the individual complainants were happy with the outcomes of their cases, the CLC recognized there were entrenched problems in the company, and that there is no way to systemically address such problems in the current system.

NACLC recommends that the various Discrimination Commissioners and the AHRC be given the power to investigate, of their own motion, conduct that appears to be unlawful under discrimination law, and power to commence proceedings without having to rely on an individual complaint. The Commissioners should be adequately resourced to perform this role.

Specifically, the consolidated discrimination legislation should be amended to include the role of the Commissioners to:

- regulate, monitor and enforce legislative responsibilities to prevent discrimination and promote all forms of equality;
- monitor respondents, and investigate, report and prosecute parties who repeatedly breach the Equality Act;
- be properly resourced to increase their roles as interveners and as amicus curiae in matters affecting discrimination and equality;
- have the power to commence complaints of their own motion and without the need for a specific complaint;
- report directly to Federal Parliament on equality with a requirement that Parliament respond to such reports; and

[3] See, for example, Australian Senate, *Inquiry into the effectiveness of the Commonwealth* Sex Discrimination Act 1984 *in eliminating discrimination and promoting gender equality* (2009), available at http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/index.htm. See also, Gaze. E. 'The Costs of Equal Opportunity – will changes to HREOC solve the problem of anti-discrimination law enforcement?' (2000) 25:3 *Alternative Law Journal* 125-130.

- report publically to the inconsistency of any enactment or proposed enactment with the Equality Act.

RECOMMENDATION: AHRC Discrimination Commissioners be given the power to investigate and initiate proceedings in relation to conduct that appears unlawful, without an individual complaint.

RECOMMENDATION: The role and powers of the AHRC's Discrimination Commissioners should be expanded to increase the role of the AHRC and Commissioners in addressing systemic discrimination. These powers should include monitoring of respondents, commencing complaints, intervening in matters, and reporting to Federal Parliament and the public on discrimination matters.

B. REPRESENTATIVE COMPLAINTS AND COMPLAINTS ON BEHALF OF / IN THE INTERESTS OF MEMBERS

Case Study

A disability organisation made a complaint to the AHRC on behalf of a number of individuals across Australia in relation to accessible cinemas. The disability organisation was not able to continue to represent the complainants at the Federal Court. Pursuing the complaints by commencing representative proceedings under Part IV of the *Federal Court Act 1976* (Cth) raised questions as to standing and would have been a difficult and uncertain case to run.

NACLC recommends that the Government consider amending current provisions in relation to representative complaints in order to address barriers to actions which may address systemic discrimination issues. In *Access for All (Hervey Bay) v Hervey Bay City Council*,[4] the court found that the applicant did not have standing to commence proceedings in the Federal Court because the majority of its members were not directly affected by the relevant conduct. This decision came out of a conflict between the representative complaints provisions in the *Australian Human Rights Commission Act* (Cth) and the *Federal Court of Australia Act 1976* (Cth).

Under section 46P(c) of the *Australian Human Rights Commission Act* (Cth), a complaint can be made 'by a person or trade union on behalf of one or more persons aggrieved by the alleged unlawful discrimination'. However, under section 46PO(1), in order to proceed beyond the AHRC to the Federal Court or the Federal Magistrates' Court with such a complaint, only an individual 'who was an affected person in relation to the complaint' may

[4] [2007] FCA 615.

make a complaint. In order to proceed as a representative complaint, a member of the representative class must commence the proceedings and be able to name at least seven members of the class who consent.

The result is that systemic issues cannot be dealt with through representative organisations representing the class of people affected, unless seven members of a class can be identified, or unless it can be proven that it itself is affected by the conduct. Given the barriers noted above, representative complaints are made very rarely. Advocacy organisations are now reluctant to bring complaints to challenge instances of systemic discrimination due to uncertainty as to whether the organisation will be found to have standing to do so if the matter proceeds beyond the AHRC level. If a complaint is not brought in relation to a specific issue or service it will continue to be discriminatory. It would be of benefit to the community at large that systemic discriminatory behaviour stopped. The lack of an effective mechanism to facilitate this impedes this objective.

RECOMMENDATION: The Equality Act should include provision for 'representative complaints' and complaints by groups on behalf of, or in the interest of members.

RECOMMENDATION: The *Federal Court of Australia Act 1976* (Cth) should be amended to make the standing provisions consistent with those of the *Australian Human Rights Commission Act* (Cth).

RECOMMENDATION: The AHRC should have the power to commence proceedings, in the absence of an individual complaint, to enforce breaches of disability standards. This should include the introduction of civil penalty provisions in the Equality Act.

C. POSITIVE DUTIES

An important way of addressing systemic discrimination is to impose positive duties to promote equality. NACLC believes that developing a culture of positive duties is crucial to reducing the extent to which individuals experience discrimination and to address larger systemic issues.

The Equality Act should include a positive equality duty that applies to both public and private bodies and which:

- places positive obligations to assess, monitor, consult and take remedial action to address discrimination where necessary;
- is sustainable and has enforcement mechanisms;
- takes account of the duty holder's size, circumstances and resources; and
- is normative and not merely an exercise in form-filling or box-ticking.

The AHRC should be empowered to facilitate and enforce compliance with the positive obligations without first receiving a complaint.[5] The AHRC could also create standards or best-practice guidelines, which would assist in the implementation and assessment of positive duties.[6]

Examples of how duty holders could discharge this duty include:

- a health service introducing an outreach program targeted towards people with certain types of disabilities who are less likely to access existing services;
- a transport company ensuring that young people are specifically consulted in relation to a new ticketing policy; and
- the development of an education program on homophobic bullying in schools.

In addition to the examples outlined in the case study below, positive duties exist in Northern Ireland, South Africa, Canada and the United States, among others.[7]

Case Study

The *Equal Opportunity Act 2010* (Vic) includes a new 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 Equal Opportunity and Human Rights Commission may investigate possible breaches of the duty that are likely to be serious and affect a class or group of people.

RECOMMENDATION: A positive duty of equality should be placed on public and private bodies.

RECOMMENDATION: The AHRC should be empowered to facilitate and enforce compliance with the positive obligation without first receiving a complaint.

[5] The Federal Government would also ensure that the AHRC was adequately resourced to perform this regulatory role.

[6] The UK's Equality and Human Rights Commission recently issued a series of guides for public authorities on the UK's new public sector equality duty. The guides cover what public authorities should do to meet the duty, including legal requrements and recommended actions. See: http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance/

[7] s 75 and Schedule 9 *Northern Ireland Act 1998* (UK); *Fair Employment and Treatment (NI) Order 1998* (UK); *Employment Equity Act 1998* (Sth Af); s 5 *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (Sth Af); *Employment Equality Act 1995* (Can); *Executive Order 11246 of Sept. 24, 1965 – Equality employment opportunity* (US).

5. Exceptions and exemptions and special measures

NACLC notes that the terms 'exception' and 'exemption' are sometimes used interchangeably in the current federal discrimination system despite having distinct meanings. Accordingly, NACLC endorses the comments made by the Discrimination Law Expert's Roundtable that the distinction between exceptions and exemptions should be clarified in an Equality Act. We also endorse their comments about special measures being treated separately from exceptions and exemptions.

A. EXCEPTIONS

Some of the criticism of the current exceptions (and exemptions) in discrimination legislation are that they are arbitrary, unreasonable and overly broad. In many cases, permanent exceptions have institutionalised or reinforced discrimination against marginalised and disadvantaged members of Australian society.[8]

NACLC supports the recommendation in the report by the Discrimination Law Expert's Roundtable that there should be a single exception clause in the consolidated Act that is a 'simple test of "proportionate means of achieving a legitimate end or purpose"'.

There are several advantages to adopting this approach to exceptions. First, it refocuses the attention in discrimination legislation on general principles rather than statutory interpretation and seeking to evade liability through technical loopholes. Secondly, it is more consistent with the international human rights treaties on which Australia's discrimination law is based. Finally, it also means that as community expectations as to what are legitimate justifications for discrimination change, the law would be flexible enough to respond to these changing norms.

In order to provide greater understanding around the single justification exception, the AHRC would need to issue guidelines giving examples of what amounts to proportionate means and legitimate purposes.

RECOMMENDATION: The Equality Act should contain a single exception clause that is a simple test – of 'proportionate means of achieving a legitimate end or purpose'.

B. EXEMPTIONS

NACLC considers that the exemptions found under existing discrimination legislation could be expected to meet the test of proportionality and legitimacy as recommended by the

[8] See, for example, Australian Senate, *Inquiry into the effectiveness of the Commonwealth* Sex Discrimination Act 1984 *in eliminating discrimination and promoting gender equality* (2009), available at http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/index.htm. See also, Public Interest Law Clearing House (Vic) Inc and Human Rights Law Resource Centre, *Eliminating Discrimination and Ensuring Substantive Equality: Joint Submission to the Scrutiny of Acts and Regulations Committee on its Inquiry into the Exceptions and Exemptions in the* Equal Opportunity Act 1995 *(Vic)*, July 2009 and Inner City Legal Centre, *Submission to the Australian Human Rights Commission Inquiry into the inclusion of LGBTI in the Sex Discrimination Act* (2010).

Discrimination Law Expert's Round Table. Current exemptions under the Sex Discrimination Act can be found at http://www.humanrights.gov.au/lega/exemptions/index.html.

Broad religious exemptions limit the scope of the discrimination protection. This is of particular concern to NACLC as faith-based organisations provide a significant portion of publicly funded social services. A 2007 survey found that religious organisations account for 21.4% of all not-for-profit organisations.

RECOMMENDATION: Exemptions should be time limited and granted on a case-by-case basis for individual forms of discrimination. The same simple test requiring that an exception be a 'proportionate means of achieving a legitimate end or purpose' should be applied to exemptions under the Equality Act. There should also be a public and transparent process of granting exemptions.

C. SPECIAL MEASURES

Special measures are 'positive measures intended to enhance opportunities for historically and systematically disadvantaged groups, with a view to bringing group members into the mainstream of political, economic, social, cultural and civil life'.[9] Special measures are an essential component in achieving substantive equality and eliminating discrimination in Australia. However, the meaning and scope of special measures in the current discrimination framework do not meet international human rights standards for special measures, and have been relied on by successive federal governments to implement a range of discriminatory measures that do not meet the intention of special measures.

The use of special measures has been particularly problematic in the context of race discrimination generally, and with respect to Aboriginal and Torres Strait Islander peoples, specifically. In *Gerhardy v Brown*, Brennan J provided four elements that must be satisfied under the *Racial Discrimination Act 1975* (Cth) to establish a special measure. Those elements are that the measure:

- provides a benefit to some or all members of the group based on race;
- has the sole purpose of securing the advancement of the group so that the group can enjoy human rights and fundamental freedoms equally with others;
- is necessary for the group to achieve that purpose; and
- stops once the purpose has been achieved and does not set up separate rights permanently for different groups.[10]

However, the meaning and scope of special measures in Australian domestic law falls short of international human rights standards, specifically those contained in the UN Committee on the Elimination of Racial Discrimination's (**CERD Committee**) General Comment No. 32. In

[9] Rebecca Cook, 'Obligation to Adopt Temporary Special Measures under the Convention on the Elimination of All Forms of Discrimination Against Women' in Ineke Boerefijn et al (eds), *Temporary Special Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (2003), 119.
[10] *Gerhardy v Brown* (1985) 159 CLR 70, 133 (Brennan J).

particular, Australian law does not currently provide legislative protections in relation to the following recommendations:

- that the objective of the measure be either (i) alleviating and remedying present disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals; (ii) protecting those people from discrimination; or (iii) preventing further imbalances;
- that membership of the group subject to special measures be self-identified;
- that consultation be conducted with affected communities and that they participate in the design and implementation of the proposed special measures;
- that appraisals of 'need' for special measures be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective; or
- that measures be appropriate, legitimate and respect the principles of fairness and proportionality.[11]

The CERD Committee has also stated that participation of the affected group is a minimum requirement for special measures.[12]

Case Study

One of the most concerning examples of the consequences of the current framework for special measures in Australia was the introduction of the Northern Territory Emergency Response (**NTER**). The original NTER legislation specified that any acts done under or for the purposes of the legislation are 'special measures' under the *Racial Discrimination Act 1975* (Cth).[13] The NTER amendment legislation repeals those provisions.[14] Instead, an 'objects' clause provides that 'the object of this Part is to enable special measures to be taken' in relation to (inter alia) alcohol and pornography restrictions, five-year leases over Aboriginal land and law enforcement powers.

However, simply altering the objects clause rather than substantively redesigning the measures themselves does not satisfy the criteria necessary for the measure to be a special measure. For example, the measures have not been developed with the

[11] Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination* (August 2009), paras [16]-[18], [22] and [34].

[12] Committee on the Elimination of Racial Discrimination, 'Committee on Elimination of Racial Discrimination Discusses States' Obligation to Undertake Special Measures' (Press Release, 5 August 2008).

[13] S 32 *Northern Territory National Emergency Response Act 2007* (Cth); s 4(2) *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), s 4(1) *Families, Community Service and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth).

[14] Schedule 1, item 1 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2009* (Cth).

participation and consent of affected Aboriginal individuals and communities (an obligation rests on the Government to ensure that no decision directly affecting Aboriginal peoples are taken without their consent)[15]. Further, there is insufficient evidence to demonstrate that the measures will be for the benefit of Aboriginal peoples and secure the advancement of the realisation of other human rights.

The NTER has had a significant impact on the rights of Aboriginal peoples. Until recently, it suspended the operation of the *Racial Discrimination Act 1975* (Cth) and the following rights of Aboriginal peoples: property rights, social security, adequate standard of living, health and education, self-determination, the right to work, child rights and remedies.[16] The 2009 redesign consultations were criticised for their lack of independence, absence of interpreters and 'consultation' on matters that had already been decided by the Federal Government.[17]

NACLC submits that the Equality Act must include legislative protections for the development, design and delivery of Special Measures that meet the minimum standards for special measures set out in the Committee on the Elimination of Racial Discrimination General Comment No. 32. In addition to legislative commitments, NACLC also calls on the Federal Government establish a policy of consultation with Aboriginal and Torres Strait Islander peoples that meets the benchmarks established in the Declaration on the Rights of Indigenous Peoples. This includes, at an absolute minimum, consultation that is consistent with the Aboriginal and Torres Strait Islander peoples' right to self determination, and ensuring that Aboriginal and Torres Strait Islander peoples provide free, prior and informed consent to any measures which target them (whether directly or indirectly).

NACLC also endorses the Discrimination Law Expert's Roundtable recommendation that: 'Special measures should be separately and fully defined in the Act, and clearly defined as "lawful activity". They should be specifically defined as being beneficial for a particular group.

Further, NACLC supports the inclusion of special measures that are used to redress disadvantage or marginalisation. A consolidated Equality Act should provide for 'genuine occupational qualification for a position that relates to gender' but also 'measures designed to promote equality opportunities'.

[15] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* (18 August 2007) and Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination* (August 2009).

[16] National Association of Community Legal Centres and the Human Rights Law Resource Centre, *Freedom Respect Equality Dignity: Action – NGO Submission to the UN Committee on the Elimination of Racial Discrimination (Australia)*, June 2010, p 31, www.naclc.org.au.

[17] National Association of Community Legal Centres and the Human Rights Law Resource Centre, *Freedom Respect Equality Dignity: Action – NGO Submission to the UN Committee on the Elimination of Racial Discrimination (Australia)*, June 2010, p 34, www.naclc.org.au.

RECOMMENDATION: The Equality Act should provide legislative protections in the development, design and delivery of Special Measures that meet the minimum standards for special measures set out in the Committee on the Elimination of Racial Discrimination General Comment No. 32.

RECOMMENDATION: The Federal Government should establish a policy of consultation with Aboriginal peoples that meets the benchmarks established in the Declaration on the Rights of Indigenous Peoples. This includes, at an absolute minimum, consultation that is consistent with the Aboriginal peoples' right to self determination, and ensuring that Aboriginal peoples provide free, prior and informed consent to any measures which target them (whether directly or indirectly).

RECOMMENDATION: Special measures should be separately and fully defined in the Equality Act, and clearly defined as "lawful activity". They should be specifically defined as being beneficial for a particular group.

RECOMMENDATION: The Equality Act should provide for 'genuine occupational qualifications for a position that relates to gender' but also 'measures designed to promote equal opportunities'.