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21 December 2012

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Dear Committee Secretary

Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2013

Victoria Legal Aid (VLA) welcomes the opportunity to provide comments on the Human Rights and Anti-Discrimination Bill 2013 (**Bill**). The enclosed submission supports the Bill and makes some suggestions for improvements to the content of the Bill to further enhance legal protections against discrimination.

As a major provider of legal services to socially and economically disadvantaged Victorians, VLA has a strong interest in promoting greater compliance with discrimination laws and ensuring that people are supported to seek redress for discrimination, harassment, victimisation and vilification. Research shows that a community that is inclusive, respectful of difference and intolerant of discrimination will have better public health and education outcomes. Robust laws and policies that promote substantive equality can also lead to a reduction in violence crime and family breakdown.

By supporting people to seek redress for discrimination VLA seeks to reduce disadvantage in the community. In 2011-12, VLA provided legal advice and assistance in over 1,270 discrimination matters and our Legal Help telephone information service responded to 3,732 discrimination and employment related queries. Our dedicated Equality Law Program holds weekly anti-discrimination law advice sessions and assists clients with complaints of discrimination in various jurisdictions, including the Federal Court and the Federal Magistrates Court.

If you have any queries about this submission, please contact Kristen Hilton (Director, Civil Justice Access and Equity) on _____ or Melanie Schleiger (Manager, Equality Law Program) on _____

Thank you for the opportunity to contribute to this Inquiry. We would welcome any further opportunity to assist the inquiry.

Yours faithfully

SAUL HOLT SC

A/Managing Director

**Exposure Draft Human Rights and Anti-Discrimination Bill 2012
SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL
AFFAIRS COMMITTEE INQUIRY**

21 December 2012

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About Victoria Legal Aid

Victoria Legal Aid is a major provider of legal services to socially and economically disadvantaged Victorians. We aim to provide improved access to justice and legal remedies to the community and to pursue innovative means of providing legal aid that are directed at minimising the need for individual legal services in the community. We assist people with their legal problems at locations such as courts, tribunals, prisons and psychiatric hospitals as well as in our 15 offices across Victoria. We also deliver community legal education and assist more than 80,000 people each year through Legal Help, our free phone assistance service.

The 2012 *Legal Australia-Wide Survey – Legal Need in Victoria* confirms that discrimination is a legal problem that is more often experienced by poorer people, particularly people on government payments.¹ Discrimination compounds disadvantage because it tends to result in multiple adverse impacts, including physical and stress related illness, relationship breakdown, having to move home and significant financial hardship.² Research shows that a community that is inclusive, respectful of difference and intolerant of discrimination will have better public health and education outcomes. Robust policy, legislative and community imperatives that promote both formal and substantive equality can also lead to a reduction in violence, crime and family breakdown.³

By supporting people to seek redress for discrimination, harassment, victimisation and vilification we seek to promote equality and reduce disadvantage in the community. In 2011-2012, VLA provided legal advice and assistance in over 1,270 discrimination matters and our Legal Help telephone information service responded to 3,732 discrimination and employment related queries. Our dedicated Equality Law Program holds weekly anti-discrimination law advice sessions and regularly provides advice and representation to clients who suffer discrimination, harassment, victimisation and vilification. We assist clients with complaints of discrimination in various jurisdictions, including the Federal Court and the Federal Magistrates Court, using various legislation, including federal anti-discrimination legislation, the *Fair Work Act 2009* (Cth) and the *Equal Opportunity Act 2010* (Vic). These services form part of VLA's holistic services to our priority clients that aim to reduce disadvantage and meet overall legal need in the community.

¹ Law and Justice Foundation, *Legal Australia-Wide Survey – Legal Need in Victoria* (August, 2012) 27 and 85.

² *Ibid*, 172.

³ See, for example, R Wilkinson and K Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (2009); and VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report* (2007) at <<http://www.vichealth.vic.gov.au/Programs-and-Projects/Freedom-from-discrimination/More-than-Tolerance.aspx>>; Victorian Equal Opportunity and Human Rights Commission, *Economics of equality: An investigation in to the economic benefits of equality and a framework for linking the work of the Commission with its impact on the wellbeing of Victorians* (2010) at <http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=570:economics-of-equality&Itemid=690>.

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Executive Summary

In November 2012, the Attorney-General's Department released an Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012 (Bill)*. The Bill was referred to the Senate Legal and Constitutional Affairs Committee (**Committee**) for inquiry and report by 18 February 2013.

VLA supports the passage of the Bill which will consolidate the Federal anti-discrimination and human rights laws into a single legislative framework. We welcome the commitment to work towards a more comprehensive and streamlined equality framework and support the key changes in the Bill that will progressively realise these objectives. VLA considers that the Bill represents the most significant consolidation and improvement of legal protections against discrimination in Australian history.

In particular, VLA supports and endorses the following aspects of the Bill, noting that these provisions reflect key recommendations made by VLA in its submission to the consolidation project:⁴

- the inclusion of the objects and purposes clause (clause 3)
- the shared burden of proof clause (clause 124)
- the unified definition of discrimination (clause 19)
- the inclusion of a positive 'special measures' clause (clause 21)
- coverage of the Bill to all areas of public life (clause 22).

VLA has also identified scope for further improvement and made related recommendations, which are listed below. VLA encourages the Committee to consider amending the Bill in light of these recommendation to ensure that the protections against unlawful discrimination are not weakened or limited.

VLA makes these recommendations with the support of substantial casework experience in discrimination matters. The case studies used throughout this submission are real. Where names have been used, they have been changed to protect the client's privacy.

⁴ Victoria Legal Aid, *Submission to the Commonwealth Attorney-General and the Minister for Finance and Deregulation on Consolidation of Commonwealth Anti-Discrimination Laws* (1 February 2012), ('VLA submission to Consolidation Project'), available at: <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australianshumanrightsframework/Documents/Victoria%20Legal%20Aid.doc>

Summary of recommendations

| <i>Protected Attributes</i> | <i>See page</i> |
|--|-----------------|
| 1. The existing protection from discrimination on the basis of irrelevant criminal record should be restored and included in the Bill. | 12 |
| 2. The Bill should also protect against discrimination on the basis of physical features, being a victim of violent crime, being a victim of family violence and homelessness. | 13 |

| <i>Coverage</i> | <i>See page</i> |
|---|-----------------|
| 3. Protection against discrimination should be consistent across all attributes and all areas of public life. Specifically, we recommend that those attributes that are only protected in the area of work (and events connected to the area of work) be protected in all areas of public life. | 14 |
| 4. The right to equality before the law should be extended to all attributes (not just race). | 16 |

| <i>Exceptions</i> | <i>See page</i> |
|---|-----------------|
| 5. The exception for justifiable conduct should be amended as follows to ensure the protection against unlawful discrimination is not diminished: <ul style="list-style-type: none">• Subclause 23(3)(b) be amended to state that the ‘aim is a legitimate aim that is consistent with the objects of the Act’ to ensure that a high threshold is maintained in terms of commercial and/or business objectives.• Subclause 23(3)(c) be amended to require a ‘rational connection test’ between the conduct and the objectives of the conduct to make the test simpler and fairer.• Subclause 23(4)(d), relating to the cost and feasibility of engaging in other conduct, be removed. | 17 |
| 6. That the Minister undertake public consultation on the operation of the exceptions in the Bill as part of the statutory review process. | 20 |
| 7. That clause 27 of the Bill be amended to remove disability from the list of attributes covered by the migration exception. | 21 |

| <i>Complaints and Compliance Framework</i> | | <i>See page</i> |
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| 8. | That the Bill include a positive obligation on duty holders to eliminate discrimination and harassment to relieve the burden that falls to individuals to make a complaint in order to effect change. | 22 |
| 9. | That the Commission have the power to conduct own motion investigations and compliance actions without requiring an individual complaint to be made. | 25 |
| 10. | That the Commission be given the discretion to publish action plans only where it considers that the plan meets minimum requirements for compliance with the law. | 25 |
| 11. | That the Commission regularly review any compliance codes to ensure that they comply, or continue to comply, with the objects of the Bill. | 25 |
| 12. | That the US approach to costs in discrimination matters be adopted, whereby cost orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation. | 26 |
| | Alternatively, clause 133 of the Bill, which lists certain circumstances that the Court may take into account when making a costs order, should be expanded to include considerations of the public interest in the case and any relevant vulnerabilities of the parties to the proceeding. | |
| 13. | That, as part of its review of the National Partnership Agreement on Legal Assistance Services, the Commonwealth Government review funding to legal aid and specialist community legal services to ensure the provision of adequate legal assistance to complainants in discrimination matters. | 27 |
| 14. | That guidance (in the form of guidelines issued by the Commission) be available to courts regarding the amount of monetary compensation payable and that courts be directed to take into account both past and future effects of the discrimination on the complainant. | 28 |

Significant improvements to the existing legal framework

Objectives of the Bill

This Bill presents a historic opportunity to build on existing legislation and give effect to Australia's obligations under human rights and other instruments in support of a more inclusive, rights-respecting community. For this reason, VLA strongly supports the objects of the Bill to:

- eliminate discrimination, sexual harassment and racial vilification, consistent with Australia's obligations under human rights instruments and ILO instruments
- give effect to Australia's obligations under the human rights instruments and the ILO instruments
- provide for the continued existence of the Australian Human Rights Commission as Australia's national human rights institution
- promote recognition and respect within the community for:
 - the principle of equality (including both formal and substantive equality); and
 - the inherent dignity of all people
- recognise that achieving substantive equality may require the taking of special measures or the making of reasonable adjustments
- enable complaints alleging unlawful conduct to be resolved in a way that emphasises alternative dispute resolution, promotes just outcomes for all parties and is low-cost and accessible to all.

VLA supports the interpretation of the substantive provisions of the Bill in accordance with these objects (set out in clause 3), noting that section 15AA of the *Acts Interpretation Act 1901* requires the interpretation that would best achieve the objects of the Act to be preferred.

In our experience, a significant barrier to equality has been that discrimination law is often narrowly understood or narrowly interpreted. In our submission to the Consolidation Project we supported the inclusion of an objects clause that sets out the beneficial purpose of consolidated anti-discrimination legislation. We submitted that the inclusion of an objects clause would guide decision-makers to respond to allegations of discrimination in a way that promotes substantive equality.

Accordingly, we support the proposed objectives of the Bill to guide the interpretation of the law and the promotion of equality in accordance with Australian's international human rights obligations.

Coverage of the Bill to all areas of public life

Discrimination is often systemic and multifaceted and can occur within a range of cultural institutions and areas of public life. Our experience as one of the largest non-profit equality law practices in Victoria is that the law can play an effective role in addressing discrimination in all fields of public life. For this reason, we welcome expanding protection against discrimination to any area of public life, as is the case under section 9 of the *Racial Discrimination Act 1975 (RDA)*.

We consider that this change will contribute to a more inclusive society, and provide redress for harmful conduct such as that illustrated below.

Case study 1 – inadequate reach of current laws

Juanita’s neighbours were renovating their property. This meant that there were tradesmen at the neighbouring property all day Monday to Saturday. Juanita had to travel past her neighbour’s property to go to work and back each day. When she was walking past, the tradesmen would shout sexual comments to and about Juanita, such as “I wouldn’t mind filling her hole”.

Juanita dreaded leaving the house and the prospect of having to walk this gauntlet every day. She found it highly distressing, intimidating and humiliating. In a very real way it impeded her ability to participate in society on an equal basis because of her sex. However, because Juanita and the tradesmen were not in a relationship covered by the areas of public life enumerated under the *Sex Discrimination Act 1984* (Cth) or the *Equal Opportunity Act 2010* (Vic) (**EO Act**), Juanita had no legal redress. Had the abuse been racially-based, then Juanita would have been protected by Part IIA of the RDA. Likewise, had the sexual harassment occurred in Queensland, Juanita would have been protected by s 118 of the *Anti-Discrimination Act 1991* (Qld).

Supporting compliance through simplified definitions of discrimination

VLA supports the simplification of anti-discrimination laws. We consider that the simplification and clarification of the definition of discrimination will assist to promote greater compliance with anti-discrimination laws and assist business and service providers to understand their legal obligations. It is our experience that discrimination disputes can resolve fairly swiftly once the parties have a clearer understanding of their rights and obligations and the power imbalance between the parties is somewhat corrected.

Clause 19 of the Bill addresses some of the growing complexity associated with the operation of the ‘comparator test’ for direct discrimination and the current approach to indirect discrimination. The proposed unified definition is consistent with our submission to the Consolidation Project and will promote greater clarity for business and the community.

Case study 2 – complexity of existing laws

John has a genetic condition that causes muscle degeneration. In 2006, he lost the ability to walk unassisted. John’s apartment is on the second floor of a building with only stair access. The interior of the apartment was custom designed for John and in every other respect it is ideal for his needs. While his family searched for a ground floor home elsewhere, they were unable to find a house that was wheelchair accessible and close to his mother’s workplace, which was necessary in order for her to care for him during lunchtimes when he was recovering from surgery.

The owner’s corporation refused to allow the construction of a lift to John’s apartment, which would have allowed him wheelchair access to his home. This meant that John had to be carried by family and friends (mainly his mother) up a

number of flights of stairs from the street or car park to his unit. As a result, John, a 20 year old man, suffered indignity, lack of independence, strained friendships, and he was often stuck indoors for days at a time.

John and his mother lodged a complaint of discrimination on the basis of John's disability against the owner's corporation to the Australian Human Rights Commission.

The six year long dispute that followed could have been avoided if the owner's corporation had known clearly from the outset what its obligations were under Federal disability discrimination law.

The law that applies to this situation is incredibly complex, and John and his mother found the legal process to be drawn out, confusing and often frustrating. It took two years to resolve the dispute after lodging a legal complaint, and the matter did not even go to hearing.

John and his mother described the final mediation as "life-changing". When the members of the owner's corporation heard first hand about the impact on John of becoming virtually confined to his home, there was an extraordinary change in atmosphere, and a real breakthrough in understanding and empathy for their neighbours.

As part of the settlement of this matter, the owner's corporation and its members agreed to advocate for the provision of further guidance about this complex issue.

We consider that the unified definition of discrimination is an important step towards promoting outcomes that support the objects of the Act and in particular, advance the promotion of substantive equality in the community. The new definition will also provide a more meaningful guide for businesses and service providers about their obligations under the consolidated legislation.

The shared burden of proof

VLA strongly supports the shared burden of proof clause in the Bill (clause 124), which will require the applicant to first establish a prima facie case that the discriminatory conduct occurred, before the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action, or that the conduct is justified, or that another exception applies. The Explanatory Notes to the Bill make clear that the policy rationale for this change is that the respondent is in the best position to know the reason for the discriminatory action and to have access to the most relevant evidence.⁵

We consider concerns about this provision to be unwarranted, as there is a functioning precedent in the *Fair Work Act 2009* (Cth) (**FWA**). Section 361 of the FWA provides that the alleged reason for an action is to be presumed, unless proved otherwise. This goes further than clause 124 of the Bill, which requires the applicant to make out a prima facie case of discrimination before the burden shifts to the respondent.

⁵ *Human Rights and Anti-Discrimination Bill 2012, Explanatory Notes* (Explanatory Notes), page 89 at [463].

In our view, shifting the burden of proof is key to addressing discrimination in our community.

Our experience shows that clients who suffer even the most severe discrimination, sexual harassment and victimisation regularly decide not to make a formal complaint due to difficulty proving the conduct.⁶ In our experience, this is primarily due to the following reasons:

- there are no witnesses to the discrimination, harassment or victimisation
- the witnesses are afraid of losing their jobs or of other negative ramifications if they support the complainant
- the complainant does not have access to the names or contact details of witnesses, or to other information and documentation that is in the possession and control of the alleged discriminator.

These problems have been referred to as the employer's 'monopoly on knowledge'. The following case study illustrates the effect that this power imbalance often has on complaints of discrimination.

Case study 3 – fear of negative repercussions

Our client, Annie, a casual factory worker, is told by the factory manager that she must have sex with him or she will lose her job. Annie cannot afford to lose her job, and so she has sex with him at the workplace during work hours, when he demands that she do so. Annie becomes clinically depressed and, after almost two years, she refuses to have sex with him anymore. He victimises Annie by reducing her work hours, isolating her and unfairly disciplining her.

Recently, the manager has started sexually harassing Annie's co-worker, Belinda, by putting pornography on her computer, and touching his groin and telling Belinda that she must have sex with him if she wants to work there. Belinda refuses to do so and is also subsequently treated punitively.

Belinda depends on her job to support her family, and is scared of being further punished by the manager if she complains. She does not want to give evidence in support of Annie or make a formal complaint of her own unless she can first find alternative employment. Without Belinda's evidence, Annie will have difficulty proving that the manager's conduct was unwelcome, so she does not pursue a complaint.

Alternatively, complainants are forced to settle their complaints for much lower amounts of compensation than what the conduct warrants. This is demonstrated by the following case study.

⁶ VLA submission to the Consolidation Project, recommendation 4, page 21.

Case study 4 – lack of access to evidence

Julie was a receptionist in a small company and lodged a complaint of serious sexual harassment against both the general manager of the company and his son, who was employed as Julie's manager. The complaint led to the termination of her employment. However, she did not have the contact details of former employees of the company who had witnessed the conduct, and current employees that had witnessed the conduct would not assist her. It was determined that Julie's prospects of success were low and she settled her complaint for an amount that was less than the alleged harassment would warrant.

We anticipate that the approach adopted in the Bill will address some of these concerns.

Matters for further consideration by the Committee

Attributes

Clause 17 of the Bill specifies the protected attributes for the purposes of the Bill. Relevantly, this list includes all attributes previously protected by Federal anti-discrimination legislation, with the exception of criminal record.

Irrelevant criminal record

VLA supports the inclusion of 'criminal record' as a protected attribute in the Bill. We do not accept that uncertainty about the cost of prohibiting criminal record discrimination is a valid reason for allowing it to occur. This reason is flawed because the Commission has been making reasoned findings about alleged breaches of criminal record discrimination since 1987⁷ and 'irrelevant criminal record' has been a protected attribute in Tasmania since 1999.⁸ It is also an inadequate reason, as it diminishes the adverse individual and social impact of such discrimination.

Many of our clients have had contact with the criminal justice system and have a criminal record as a consequence. Our experience has been that these clients find it difficult to rehabilitate or reintegrate after serving a prison sentence. They report discrimination in employment, housing and other services on the basis of their criminal record. This discrimination regularly occurs even where the past criminal activity has no relevance to the job or service sought. The result is that a disadvantaged and vulnerable group of people is further marginalised.

Further, this is an effective lessening of the existing protections against discrimination, and not consistent with the Federal Government's undertaking that the Bill will not reduce existing protections or coverage of anti-discrimination laws. Currently individuals can bring a complaint of discrimination on the basis of criminal record to the Commission for conciliation under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**). However, under the Bill there will be no jurisdiction to receive these complaints.

We also note the concern of the Commission that the removal of this jurisdiction (in relation to hearing complaints of discrimination on the basis of criminal record) will leave unclear how Australia will comply with its obligations under the International Labour Organisation *Discrimination (Employment and Occupation) Convention* (1958).⁹

Recommendation 1: That the existing protection from discrimination on the basis of irrelevant criminal record be restored and included in the Bill.

⁷ See *Australian Human Rights Commission Act 1986* (Cth), s29.

⁸ *Anti Discrimination Act 1998* (Tas), s3.

⁹ *Exposure Draft: Human Rights and Anti-Discrimination Bill 2012*, Submission of the Australian Human Rights Commission, December 2012, recommendation 3, pages 7 – 8.

Other attributes not protected by the Bill

In our submission to the consolidation project VLA recommended that the category of protected attributes should be extended to include the following grounds:¹⁰

- Physical features
- Being a victim of violent crime
- Being a victim of family violence
- Homelessness

However, as drafted, the Bill will not provide protection from unlawful discrimination on the basis of these attributes. We are concerned that the omission of these attributes is a missed opportunity to provide support and protection to some of the more hidden forms of discrimination experienced by some of society's most vulnerable people. This observation is borne out by these examples from our clients:

- We have acted for clients who have been discriminated against based on physical features – such as having buck teeth – which do not fall within the definition of disability. This attribute has been protected in Victoria since 1995.
- We have identified the need for additional protection for victims of domestic violence and victims of violent crime. Some of our clients have been victims of rape. Upon disclosure of these incidents to employers and education providers these clients have been branded as 'overly sensitive', 'troublesome' and requiring 'special treatment'.
- Our family law practitioners report that victims of family violence are indirectly discriminated against by employers who fail to provide flexible work conditions where a person is not able to come to work due to their experience of family violence. Moreover, clients have reported a reluctance to report family violence to their employers due to the stigma, embarrassment or because they fear they may be treated differently.
- In 2011– 2012, 30% of VLA clients had no income and 50% were receiving some form of government benefit or pension. Some of our clients have reported that they have been deemed to be ineligible for rental properties because they receive Centrelink benefits, even where they can afford the rent. Discrimination in rental accommodation is even more acute where an individual has had a period of homelessness and is unable to account for periods where they were not in stable accommodation. The absence of an avenue for redress for these individuals results in further, and often more acute, disadvantage.

We consider that the Federal government has power to extend the application of the Act to these protected attributes by virtue of its external affairs power, and as a signatory to the various human rights instruments that are listed in clause 3 of the Bill.

¹⁰ VLA submission to Consolidation Project, recommendation 10, page 24.

Social origin

We note that the term 'social origin' is given its ordinary meaning in the Bill. We recommend that a statutory note be included to make clear that the definition of social origin includes socio-economic status.¹¹

Recommendation 2: That the Committee consider amendments to the Bill to introduce protection against discrimination on the following grounds:

- physical features
- being a victim of violent crime
- being a victim of family violence
- homelessness.

Coverage

As the Bill is currently drafted, discrimination on the basis of certain attributes is only unlawful if the discrimination occurs in relation to work. These attributes are:

- Family responsibilities
- Industrial history
- Medical history
- Nationality or citizenship
- Political opinion
- Religion
- Social origin.

VLA is concerned that limiting the protection of certain attributes to work and work-related areas creates unnecessary confusion and inconsistency in terms of the application of the Bill and does not promote the objectives of greater consistency and a more streamlined Act.

It is also inconsistent with the protections afforded against discrimination by most State and Territory equality legislation. Given that this is the case, the regulatory impact would be minimal and far outweighed by broadening the protection against discrimination based on these attributes.

Limiting protections to one area of public life will also create unfairness for people who have experienced discrimination on the basis of those attributes in other areas of public life. For example, under the Bill, a person who is refused a job in a café because they are a practising Muslim could bring a complaint of unlawful discrimination on the basis of their religion under the Bill, but the same person could not bring a complaint if they were refused service in the café on the basis of their religion.

¹¹ Commentators have argued that the term 'social origin' includes the attribute of social status. For example Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 Deakin Law Review 295.

Another example might be where a student applies to play cricket at a local community club. The club restricts membership and services to Australian citizens. The student is a permanent resident of Australia, but is a South African citizen. The student has been refused membership of the club and the ability to play sport on the basis of his nationality, but could not make this complaint as the coverage of the Bill does not extend to clubs and sport in relation to this attribute.

We also consider that limiting the protection of some attributes to the area of employment creates an effective hierarchy of attributes dependent on the areas of public life where those attributes are protected. Creating two categories of attributes has the potential to have a negative effect on the protection against intersectional discrimination. 'Intersectional discrimination' recognises that a claim of discrimination can be brought on the basis of multiple protected attributes.¹²

For example, a father experiences discrimination in the provision of accommodation when he is told by a real estate agent that he was refused a rental property because he is 'African looking' and because he has two young children 'who are going to make noise'. The protection against intersectional discrimination should operate to enable the client to make a complaint on the basis of race, nationality and family responsibilities status to the Australian Human Rights Commission. However, because nationality and family responsibilities status are not protected attributes in relation to the provision of accommodation, he could not make this complaint under the Bill (although he could do so under most State and Territory legislation).

Counter-arguments to extending coverage of the Bill

The counter-arguments that have been made about extending the coverage of the Bill are that it would increase the regulatory burden, and that the prohibition of discrimination would be overbroad and unreasonably impact on other human rights, such as freedom of expression. However, for the reasons set out below, VLA considers that the regulatory impact would be minimal and appropriate limitations on the right to equality are incorporated in the Bill.

It has been unlawful to discriminate based on race in any area of public life since the commencement of the RDA in 1975 by virtue of section 9 of the RDA. This has not resulted in a floodgate of claims. In 2011-2012 the Australian Human Rights Commission received only 22 complaints of racial discrimination under section 9, being 4% of all racial discrimination complaints received by the Commission. This is despite a recent survey by VicHealth finding that 97% of Aboriginal Victorians surveyed experienced racism in the previous 12 months, with over 70% of respondents experiencing eight or more racist incidents.¹³ These were not trivial incidents: two thirds of respondents were spat at, had an object thrown at them, were hit or threatened to be hit because of their race.¹⁴

¹² See the meaning of discrimination in clause 19(1) of the Bill, where discrimination may arise where a person treats another person unfavourably because the other person has a protected attribute or attributes. Likewise the definition of discrimination in subclause 19(3) 'where people with a particular attribute or attributes are disadvantaged by a policy'.

¹³ VicHealth, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities* (November 2012), available at < <http://www.vichealth.vic.gov.au/Publications/Freedom-from->

There are relatively few areas of public life that are not already covered by discrimination laws. Further, most states and territories already prohibit discrimination based on many of the above attributes in areas of public life other than work. Extended coverage of the Bill will therefore require minimal changes to the practices and policies of organisations that currently comply with anti-discrimination legislation. In light of this, and given that there will be a need to educate the community about changes resulting from the passage of the Bill in any event, the regulatory burden will be minimal.

To the extent that concerns of over breadth are valid, they are addressed by the general exception for conduct that is justified (clause 23); which will provide a defence when the law applies too broadly. For example, a person responding to a complaint of discrimination based on political opinion in an area of public life could defend their conduct by relying on clause 23. The person might state that they engaged in the conduct for the legitimate aim of expressing their political views and robust political debate, and that their conduct is proportionate to that aim, bearing in mind the right to freedom of expression and political participation, the implied Constitutional freedom of political communication and our democratic and representative system of government.

Recommendation 3: Protection against discrimination should be consistent across all attributes and all areas of public life. Specifically, we recommend that those attributes that are only protected in the area of work (and events connected to the area of work) be protected in all areas of public life.

Equality before the law

Victoria Legal Aid supports equality before the law for all people. Clause 60 of the Bill confines the express recognition of equality before the law to people of all races.

As the Explanatory Notes to the Bill make clear, this clause reflects the existing section 10 of the RDA. VLA recommended that this protection be extended to all attributes in our submission to the Consolidation Project.¹⁵

While there may be few formal instances of non-compliance with this obligation, the ramifications and systemic nature of the discrimination in those instances is significant as illustrated by the following example.

Case study 5 - Unequal access to parenting payments

In 2006, changes to social security legislation meant that a number of our female clients who were receiving Centrelink payments before the amendments were no longer eligible for parenting payment benefits where they left their relationship – even if the relationship was abusive. This legislative anomaly had the consequent and possibly unintended effect of discriminating against women. An equality before the law provision would have provided a legal recourse to address this situation.

discrimination/Mental-health-impacts-of-racial-discrimination-in-culturally-and-linguistically-diverse-communities.aspx>, 2.

¹⁴ Ibid.

¹⁵ VLA submission to the Consolidation Project, recommendation 14, page 24.

Recommendation 4: That the right to equality before the law should be extended to all attributes (not just race).

General exception for justifiable conduct

We are concerned that the current drafting of the exception for justifiable conduct is unreasonably broad and lowers protection against discrimination. However, we are in favour of a general exception for discrimination in principle, and consider that the provision can be finetuned to overcome these defects. To this end, we recommend the following specific amendments to clause 23:

- clarify that a 'legitimate aim' is one that accords with the objects of the Act;
- require a 'rational connection test' between the conduct and the objectives of the conduct;¹⁶ and
- remove the requirement that, when determining whether conduct is justified, specific consideration be given to the cost and feasibility of engaging in other conduct.

Clarify 'legitimate aim'

The proposed clause 23 lacks a common element of many proportionality tests, which is that the conduct be 'demonstrably justified in a free and democratic society'. In *R v Oakes*, the Supreme Court of Canada held that in the Canadian context this phrase embodies:

'respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.'¹⁷

It is VLA's submission that, while this wording does not need to be replicated, the Bill should explicitly state that any limits on the right to equality must be compatible with the objects of the Bill to ensure that the provision is applied restrictively, as in other jurisdictions.

Unless the exception for justifiable conduct is interpreted and applied narrowly, there is a real risk that respondents will justify discriminatory conduct using solely commercial or profit-based arguments. This would not be consistent with the objects of the Bill, or Australia's commitment to meet its obligations under the international human rights instruments to which it is a party.

While section 15AA of the *Acts Interpretation Act 1901* (Cth) requires the Bill to be interpreted in accordance with the objects clause, and subclause 23(4)(a) requires that the objects of the Bill be taken into account when determining whether subclause 23(3) is satisfied, we consider that more express guidance is required to ensure a narrow interpretation of this subclause.

¹⁶ See *R. v. Oakes* [1986] 1 SCR 103, 1986 CanLII 46 (SCC). The second limb of the 'Oakes test' relates to the minimum impairment principle, which requires a decision-maker to evaluate whether the effect of the conduct would cause minimal impairment to the right or freedom in question.

¹⁷ *Ibid*, [64].

Require a ‘rational connection’ between the conduct and its aim

Currently, subclause 23(3)(c) provides that ‘the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve [the] aim’ of the discriminatory conduct. VLA submits that this wording is complex, inconsistent with proportionality tests in comparative jurisdictions, and will significantly water down current protections against direct discrimination.

This criterion could be made fairer, simpler and consistent with comparative proportionality tests by replacing it with the ‘rational connection test’. That is, requiring there to be a rational connection between the conduct and its aim. Significantly, this test would simply require evidence of the effect (or likely effect) of the conduct, rather than evidence of what a reasonable person and the person in question believed the effect (or likely effect) of their conduct would be. As a fact-based rather than view-based test, the ‘rational connection test’ avoids the risk of perpetuating discriminatory views that are widely held.

The ‘rational connection test’ was applied as part of a proportionality test by the Supreme Court of Canada in the seminal case of *R v Oakes*,¹⁸ and remains the applicable test in that jurisdiction when considering whether a breach of the right to equality is justified. This approach is also consistent with the appropriate international human rights framework, including the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant of Civil and Political Rights (Siracusa Principles)*.¹⁹

Remove subclause 23(4)(d)

As worded, the defence for justifiable conduct risks lowering the bar for protection against discrimination, and this risk is heightened by subclause 23(4)(d), which requires consideration of the cost and feasibility of engaging in other conduct that would achieve the same aim. Given that this factor could be considered under subclause 23(3)(d), subclause 23(4)(d) suggests that cost and feasibility should be given greater weight than other factors, when current Federal anti-discrimination case law states otherwise. For example, jurisprudence on the scope of the unjustifiable hardship test in the *Disability Discrimination Act 1992 (DDA)* has indicated that the bar for meeting this defence is high, and that arguments about the commercial considerations and financial cost of making adjustments must be carefully balanced against the aims and purposes of the DDA as anti-discrimination legislation, and the Parliament’s intention in enacting beneficial legislation.²⁰

In practice, the exception for justifiable conduct recommended by VLA would operate like this:

¹⁸ [1986] 1 SCR 103, 1986 CanLII 46 (SCC).

¹⁹ *UN Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex* (1985).

²⁰ See for example: *Francey v Hilton Hotels of Australia Pty Ltd* (1997) EOC 92 – 193; *For All Alliance (Hervey Bay) v Hervey Bay City Council* [2004] FMCA 915. See also Justice Bell’s comments about the scope of exemption provisions in equality legislation, applying the reasonable limitations test in section 7(2) of the Charter: *Lifestyle Communities (No 3)* (exemption) [2009] VCAT 1869, at [20], [30], [32].

Limitations analysis example (applying the 'rational connection test')

A bar owner refuses entry to a person under 18. This conduct is permissible because:

- (a) the refusal was made in good faith, for the purpose of complying with the bar owner's liquor licensing obligation
- (b) the refusal is intended to achieve the legitimate purpose of complying with the bar owner's liquor licensing obligation not to allow entry to persons aged under 18, which is consistent with the objects of the Bill
- (c) there is a rational connection between the refusal and the purpose
- (d) refusing the person entry is reasonably necessary to achieve the purpose of complying with the bar owner's licensing obligation and
- (e) the refusal is a proportionate means of meeting the obligation.²¹

Benefits of a general exception for justifiable conduct

Subject to the abovementioned amendments, VLA endorses the inclusion of a general exception for justifiable conduct (clause 23 of the Bill), which has the following benefits.

- It provides parties and decision-makers with a framework for making decisions about when discriminatory conduct should be permitted, and when it should not. This is compared with the current test of 'reasonableness' for indirect discrimination, which involves inherently subjective judgements.
- It encourages transparent decision-making, as the reasoning process must be set out.
- It encourages straightforward and consistent jurisprudence, which will increase certainty for complainants. There are discrimination cases (for example, *Purvis v New South Wales*) where the inability to limit direct discrimination has resulted in a technical and narrow approach being taken to the relevant legal tests, notably in the application of the causation and comparator tests.²²

²¹ The Siracusa Principles are reflected in the 'reasonable limitations' test in section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides:
[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors including –
a) the nature of the right; and
b) the importance of the purpose of the limitation; and
c) the nature and extent of the limitation; and
d) the relationship between the limitation and its purpose; and
e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

²² [2003] HCA 62; 217 CLR 92; 202 ALR 133.

Recommendation 5: That clause 23 be amended as follows:

1. Subclause 23(3)(b) be amended to state that the 'aim is a legitimate aim that is consistent with the objects of the Act', to ensure that a high threshold is maintained in terms of commercial and/or business objectives.
2. Subclause 23(3)(c) be amended to require a 'rational connection test' between the conduct and the objectives of the conduct to simplify the test and ensure consistency with comparative legal tests.
3. Subclause 23(4)(d), relating to the cost and feasibility of engaging in other conduct, be removed.

Specific exceptions

A refined general exception for justifiable hardship also sets an appropriate threshold for permissible discrimination. Unfortunately, a number of the specific permanent exceptions in the Bill do not meet this threshold, largely due to the blanket nature of their application. It is not desirable to have specific permanent exceptions that are inconsistent with the objects of the Bill and that are unnecessary in any event, given the general exception at clause 23.

If the specific exceptions are retained, then VLA supports the statutory review of the operation of the exception provisions in three years time, in accordance with clause 47 of the Bill. VLA recommends public consultation on the operation of the exception and exemption provisions as part of the statutory review process.

Recommendation 6: That the Minister undertake public consultation on the operation of the exceptions in the Bill as part of the statutory review process.

Migration exception

The application of some exceptions in federal anti-discrimination laws can be very broad and negatively affect vulnerable people. For brevity, we do not comment on all of these exceptions. However, we draw the Committee's particular attention to the migration exception, which has an adverse impact on exceptionally vulnerable individuals.

Clause 27 of the Bill retains specific exceptions for discriminatory conduct on the basis of age, disability, or marital or relationship status in accordance with the *Migration Act 1958* (Cth) (**Migration Act**). VLA considers that disability-based discrimination against potential migrants is often unjustified. This exception is not consistent with the objects of the Bill or Parliament's intention to enact beneficial legislation addressing discrimination and promoting equality.

VLA represents vulnerable people in the migration system, including clients with primary applications, appeals to merits review tribunals, and judicial review applications. Anecdotal evidence is that visa applicants with children with disabilities have been refused visas on the basis of the disabilities of their children. These cases exemplify the way in which the 'health criteria' in the *Migration Regulations 1994* (Cth) can unfairly disadvantage a person on the basis of their disability. A recent case study demonstrates the discriminatory effect of these criteria.

Case study 6 – skilled community worker rejected because of vision impairment

Without the protection of anti-discrimination law, the Migration Act allows refusal of a visa to a skilled worker because of their disability even where it doesn't interfere with their ability to work. The following case study is taken from the Joint Standing Committee on Migration's 2010 *Inquiry into the Migration Treatment of Disability*.²³

Ms K is a migrant from India living with extended family in Victoria. She was refused a Skilled Sponsored Subclass 886 visa in October 2009 because she has a vision impairment.

Ms K speaks four languages and is a highly skilled community and welfare worker. She worked in India as an associate social worker, working with children with disabilities, their families, schools and teaching staff, and later she worked as an HIV counsellor for the prevention of parent to child transmission of the disease with the Punjab States Aids Control Society.

In Melbourne, Ms K obtained a diploma in community welfare, having completed both undergraduate and post-graduate qualifications in social work in India. She has undertaken work experience placements as part of her recent qualification in Australia. She writes and types all her work using voice output software and has been assessed as having a high level of competency in all aspects of daily living, including shopping, cooking, self-care and work.

Ms K and her husband's families and support structures are located in Australia, including Ms K's mother and only sibling. Her failure to gain permanent residency would force her to leave her family in Australia and return to India. In 2010, Ms K's case was rejected by the Migration Review Tribunal and submissions were made for consideration of Ministerial discretion under section 351 of the Migration Act.

Recommendation 7: That clause 27 of the Bill be amended to remove disability from the list of attributes covered by the migration exception.

Positive duty to eliminate discrimination

VLA supports the creation of a positive duty to eliminate discrimination, harassment and victimisation, as exists in Victoria.²⁴ We consider that the introduction of a positive duty, and a regulator who is empowered to enforce that duty, are important steps to overcome the limits of a complaint-based system of addressing discrimination.

A positive duty should require duty holders to take proactive steps to eliminate discrimination, sexual harassment and victimisation. This obligation is already implied by existing obligations not to discriminate and vicarious liability provisions, however these obligations are only imposed if a complaint is made. A positive duty obligation would require duty holders to take proactive steps to prevent discrimination from occurring, which would

²³ *Enabling Australia: Inquiry into the Migration Treatment of Disability*, Joint Standing Committee on Migration, June 2010, Case Study 6.1, p145.

²⁴ *Equal Opportunity Act 2010* (Vic), ss14 and 15.

then reduce the need for complaints to be made to ensure compliance with the law. This approach would lessen the current burden on individuals to effect change by making a complaint against a discriminator.

By reducing the prevalence of complaints, a positive duty would also benefit duty holders. The Regulation Impact Statement (**RIS**) also noted that there could be other significant benefits for business arising from the introduction of a proactive compliance scheme, including reduced staff turn-over and absenteeism, a reduced risk of businesses being vicariously liable for employee conduct and the potential to increase market share through proactively targeting specific sectors such as older workers or workers with a disability.²⁵

Recommendation 8: That the Bill include a positive obligation on duty holders to eliminate discrimination and harassment to relieve the burden that falls to individuals to make a complaint in order to effect change.

Enhanced compliance and regulatory functions for the Commission

A significant weakness of Australian anti-discrimination law is its reliance on a complaints-based system, where individuals must hold discriminators to account.²⁶ In VLA's experience, this is particularly problematic in situations of workplace discrimination where complainants and witnesses are often financially dependent on the discriminator and are discouraged from making a complaint by the potential repercussions within their workplace and industry. Research confirms that the majority of people with legitimate complaints of discrimination and harassment under Australian anti-discrimination law do not report the conduct or make a complaint.²⁷

In our experience, clients are deterred by these factors:

- fear of negative consequences for themselves, particularly in employment matters
- shame and humiliation in connection with the conduct
- difficulties proving the conduct, including due to:
 - witness reluctance to give evidence
 - lack of access to documents, such as emails, and other information held by the perpetrator
- the complexity of the law and legal processes
- disadvantage due to factors such as illiteracy, lack of education, disability and/or poor English-speaking skills
- vulnerability caused by the detrimental psychological effects of the discrimination/harassment/vilification and/or personal circumstances
- lack of free anti-discrimination law services and
- the poor cost-benefit of litigation.

²⁵ See *Consolidation of Commonwealth Anti-Discrimination Laws Regulation Impact Statement*, pages 59 – 60.

²⁶ VLA submission to the Consolidation Project, pages 10 – 12.

²⁷ See, for example, Australian Human Rights Commission, *Sexual Harassment: Serious Business – Results of the Sexual Harassment National Telephone Survey (2012)*, 40 and 49, which found that only 20% of people who had been sexually harassed in the workplace made a formal report or complaint, largely due to a lack of faith in the complaint process and fear of negative repercussions.

The following case study illustrates the difficulty with requiring vulnerable victims to hold their discriminators to account.

Case study 7 – a lifetime of discrimination and harassment

Alice is a female with an interest in cars and motorbikes. She has worked in male-dominated fields her whole life and has been subjected to sexual harassment and discriminatory behaviour in almost every job. Alice was 15 when she started her first job as a casual petrol station attendant. She worked with an older full-time male who would regularly slap her on her bottom. It made her feel very uncomfortable, but she was too shy and embarrassed to say anything to anyone.

Alice then worked as a receptionist. The owner of the company wanted Alice to date her son. The son would regularly come to the office, sit in the reception area and stare at Alice. During his visits the owner would suggest that her son give Alice massages. Alice made excuses about why she did not want to date the owner's son, not wanting to cause offence.

At about age 21 Alice worked at a company. Her male co-workers would constantly tell dirty jokes and talk about 'hot chicks' and what they 'do to their missus'. Among the many offensive comments that were made to her, Alice recalls sitting in a truck and the male colleague sitting next to her saying 'shut your legs, it's smiling at me'. Alice pretended that she didn't hear him.

In her late twenties Alice worked for a retailer. A co-worker regularly made offensive sexual comments to her, including 'I'd like to tie you up and whip you', 'are you the type of girl who, if I came in a shot-glass, would drink it?', and asking male customers 'are her boobs the same size as your girlfriend's boobs?' The co-worker made these numerous offensive comments, and also forcefully grabbed Alice's buttocks, in front of Alice's manager and other co-workers. However, the manager would not take action against the co-worker in support of Alice.

Alice now has depression, for which she is receiving treatment from a psychiatrist. She ended her relationship with her boyfriend because, even though she describes him as 'the sweetest guy ever', she does not trust men anymore. Alice now works alone, due to a conscious decision that she has made not to be in a situation where she can be subjected to any further workplace harassment or discrimination. However, she misses making friends through work and the social interaction.

For the first time in her working life, Alice makes a complaint against her previous employer. While her former co-workers witnessed the harassment, they are unwilling to give evidence in support of Alice's complaints because of the likely negative consequences for them if they do so. Alice settles her claim for a relatively low amount of compensation due to the difficulties proving her complaint in court. Alice's case is not isolated. Our extensive experience with clients in this area has highlighted that people are often reluctant to make complaints of discrimination and where they do so, witnesses are often unwilling to be involved.

VLA supports express powers for the Commission to directly encourage, facilitate and enforce compliance with obligations under the Bill without first receiving a complaint. At present, the Bill does not make provision for these functions.²⁸

Specifically, we consider that the Commission should be empowered to commence an investigation regarding an alleged breach of the law without requiring an individual to lodge a complaint (an 'own-motion investigation' function). In addition to this, the Commission should be empowered to:

- investigate the allegations
- compel evidence for investigations
- agree to enforceable undertakings
- issue compliance notices
- issue administrative penalties.

Enabling a regulator to enforce compliance with the law is a standard practice in other statutory regimes, including workplace safety,²⁹ privacy,³⁰ environmental protection³¹ and consumer affairs.³²

The Fair Work Ombudsman (**FWO**) also has an own-motion power to investigate employers to assess compliance with key aspects of the FWA, including potential discrimination, and to undertake industry-wide audits on suspicion of a systemic breach of the law. Where the FWO identifies a contravention of workplace laws, it can undertake a range of enforcement measures, including the acceptance of enforceable undertakings, the issue of compliance

²⁸ This was recommendation 20 in the VLA's submission to the Consolidation Project, pages 12 – 13.

²⁹ For example, Comcare is empowered under *Work Health and Safety Act 2011* (Cth) to undertake compliance inspections (an own-motion investigative power) and enforce compliance with occupational health and safety obligations by issuing letters of statutory obligation and warning, improvement notices, prohibition notices, injunctions, enforceable undertakings, civil court proceedings, and criminal prosecution for serious breaches of the Act. Similarly, Work Safe Victoria can investigate workplaces to assess compliance with health and safety law and workers' compensation law. Work Safe has the power to issue improvement notices or prohibition notices, require employers to enter into enforceable undertakings and to prosecute employers for serious breaches of the *Occupational Health and Safety Act 2004* (Vic) or the *Accident Compensation Act 1985* (Vic).

³⁰ The Privacy Commissioner of Victoria has powers under the *Information Privacy Act 2001* (Vic) to undertake own-motion investigations into statutory agencies and departments where she suspects there has been a 'serious or flagrant breach' of one or more of the Information Privacy Principles. Part 6 of the Act gives the Privacy Commissioner significant powers to obtain information and documents when undertaking investigations, and issue compliance notices following an investigation. A failure to comply with a compliance notice renders an organisation liable to prosecution.

³¹ The Environmental Protection Agency of Victoria has monitoring and enforcement obligations under the *Environmental Protection Act 1970* (Vic). These powers include an audit function, the ability to issue notices and directions to polluters (pollution abatement notices, warning notices and notices of contravention), to issue fines and to prosecute polluters for serious breaches of the Act.

³² Consumer Affairs Victoria has a range of monitoring and enforcement powers under consumer protection legislation, notably the *Fair Trading Act 1999* (Vic). These include an own-motion investigation function, the power to issue formal warning notices and adverse publicity orders and to enter into enforceable undertaking with a business, to take disciplinary action and issue a fine or to recommend criminal prosecution.

notices and the commencement of legal proceedings. We consider that the Commission should be given equivalent powers and functions to enforce compliance with federal anti-discrimination law.

While the FWO has own-motion investigation and compliance powers in relation to discriminatory conduct under the *Fair Work Act 2009*, the Bill has extensive coverage to other areas of public life outside employment, and different application and coverage within the area of employment. The Commission, as the regulatory body administering Commonwealth human rights and anti-discrimination law, is best placed to investigate and enforce compliance with that law.

The introduction of these compliance functions would also remove the burden of enforcing anti-discrimination laws from the individual complainant, and would provide comfort to witnesses who do not wish to give evidence for fear of victimisation. Further, empowering the Commission to enforce compliance with anti-discrimination law would recognise the significance of discrimination and harassment as unlawful behaviour that can result in substantial harm to individual health and safety as well as the broader community.

Recommendation 9: That the Commission have the power to conduct own motion investigations and compliance actions without requiring an individual complaint to be made.

Action plans

Clause 67 of the Bill provides for the voluntary development and amendment of action plans to assist people or organisations to avoid engaging in unlawful conduct. The Commission must publish action plans and any amendments (clause 68). However, there is no requirement that action plans must comply with the Bill before they are published. We consider that this could lead to confusion about whether duty holders are meeting their obligations under the Bill. We recommend that the Commission be given the discretion to publish action plans only where it considers that the plan meets minimum requirements for compliance with the law.

Recommendation 10: That the Commission be given the discretion to publish action plans only where it considers that the plan meets minimum requirements for compliance with the law.

Compliance Codes

VLA notes that a compliance code may provide a complete defence to a complaint of discrimination under the Bill and (depending on the drafting of the code) under State and Territory anti-discrimination legislation.³³ This could have a far-reaching effect on people's ability to complain about discriminatory conduct. VLA considers that the Commission should regularly review any compliance codes to ensure that they comply with the objects of the Bill and do not go further than necessary and should consult with relevant State bodies (including State Commissions) before making a compliance code that could affect the operation of State anti-discrimination law.

³³ Subclause 75(4).

Recommendation 11: That the Commission regularly review any compliance codes to ensure that they comply, or continue to comply, with the objects of the Bill.

Costs

In its submission to the Consolidation Project, VLA supported the position that each party is to bear their own costs in proceedings in the Federal Court or the Federal Magistrates Court.³⁴ It is our practice experience that many clients will not pursue a potentially meritorious claim of discrimination or harassment in the Federal jurisdiction for fear of incurring an adverse costs order. This is a significant disincentive, particularly noting the traditional power imbalance between many complainants and respondents (particularly in the area of employment), the respondents' 'monopoly on knowledge' and the fact that people who are financially vulnerable and disadvantaged are more likely to experience discrimination.

This approach also accords with the approach to legal costs in the relevant provisions of the FWA and state and territory anti-discrimination laws.

However, because this change will significantly reduce the prospects of an applicant recovering their legal costs, even if they are successful, there is a risk that it will be harder for applicants to obtain representation on a cost contingency (or 'no-win, no-fee') basis. A lack of legal representation will deter most applicants from proceeding to hearing, even if they have a strong claim. This, in turn, will have a damaging impact on the development of jurisprudence.

VLA welcomes the change from the existing practice that 'costs follow the event', but submits that the above risk needs to be addressed. It is VLA's submission that the potential deterrence effect of a presumption that parties will bear their own costs can be ameliorated in the following ways:

- Allow cost orders against an unsuccessful defendant, but limit costs orders against unsuccessful applicants to instances where the application is frivolous, vexatious or without foundation. This is the approach taken in the United States: *Christianberg Garment Co v EEOC*.³⁵ The US Supreme Court has held that there are at least two strong equitable considerations favouring this approach, being that discrimination law is a law that Congress considered of the highest priority, and when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.
- Alternatively, amend clause 133(3)³⁶ to require the court to have regard to the public interest in the case and any relevant vulnerabilities of the parties to the proceeding when considering whether a costs order is justified.

³⁴ Clause 133.

³⁵ 434 US 4012 (1978).

³⁶ Clause 133 provides the Court with the ability to make costs orders, taking into account certain circumstances, including

a) the financial circumstances of the parties

b) whether any of the parties are receiving financial assistance or legal aid assistance

- Ensure the availability of free legal assistance (discussed further below).
- Encourage higher awards of compensation, which would cover legal costs (discussed further below).

Recommendation 12: That the US approach to costs in discrimination matters be adopted, whereby cost orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation.

Alternatively, clause 133 of the Bill, which lists certain circumstances that the Court may take into account when making a costs order, should be expanded to include considerations of the public interest in the case and any relevant vulnerabilities of the parties to the proceeding.

Legal assistance

VLA supports access to properly funded legal assistance to enable people to seek redress for unlawful discrimination. Our experience is that discrimination disputes generally resolve swiftly once the power imbalance is ameliorated and the parties have a clearer understanding of their rights and obligations. This is achieved through the provision of early targeted advice to clients, which prevents discrimination complaints from escalating into formal legal disputes. Our experience to date is that this strategy has been very effective; for at least the past three years all of our clients' disputes have resolved without the need for a final hearing at a court or tribunal, and many disputes have resolved through informal negotiations prior to the conciliation or mediation stage.

The importance of legal assistance in anti-discrimination matters has been recognised as a priority in the National Partnership Agreement on Legal Assistance Services (**NPA**). In keeping with its obligations under the NPA, in the last 18 months VLA has expanded its capacity to provide advice, assistance and education in this area and is the largest provider of free anti-discrimination advice and assistance in Victoria. However this practice is still relatively small and only assists very poor applicants, as it cannot meet current demand for free legal services in this area.

We also fund a number of community legal centres that provide anti-discrimination services. These centres also report being unable to meet the significant demand for assistance. Our experience in this area clearly shows that applicants will often choose not to pursue a discrimination complaint in court because they cannot afford legal representation, and are not eligible for legal aid.

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- c) the conduct of the parties
 - d) whether a party has been wholly unsuccessful in the proceedings
 - e) any Calderbank offers that have been made; and
 - f) any other matters the court considers relevant.

Case study 8 – lack of access to legal representation

John suffered workplace discrimination that caused him to leave his employment and require psychiatric treatment. When he sought legal aid he was unemployed with no savings, living on a friend's couch, and unable to make child-care payments. He was granted legal assistance, and we commenced acting for him in relation to a complaint of discrimination against his former employer.

The complaint did not resolve at conciliation. However, John subsequently chose to settle the matter rather than proceed to hearing, which he had wanted to do. This was largely due to the uncertainty surrounding his ongoing eligibility for legal representation by us – John would not be eligible for legal aid if he regained employment, which he was ready to do, he could not afford a private lawyer, and his complaints were not suitable for a no-win, no-fee arrangement.

Engaging a private lawyer is rarely a financially viable option in this area of the law due to the low awards of compensation, and the fact that complainants are often seeking non-monetary remedies, such as changes to workplace policies, cessation of discriminatory conduct or an apology. It is likely to be even harder to obtain legal representation if there is a statutory presumption that parties bear their own legal costs. It is our experience that most people are deterred from pursuing a complaint of discrimination if they do not have legal representation.

As a result, we still consider it essential that funding to legal aid and/or specialist community legal services is regularly reviewed to ensure that complainants receive adequate legal assistance.³⁷

Recommendation 13: That, as part of its review of the NPA, the Commonwealth Government review funding to legal aid and specialist community legal services to ensure the provision of adequate legal assistance to complainants in discrimination matters.

Compensation payments

With some notable exceptions, awards of compensation in discrimination matters are notoriously low. It is our experience that individuals are discouraged from pursuing complaints of discrimination due to the low cost-benefit of doing so. This is partly due to the low amounts of compensation that are awarded in anti-discrimination matters, which do not adequately off-set the time and expense of pursuing a complaint.

Case study 9 – low cost-benefit

Eduardo is of Afro-Cuban descent and has dark skin. He was refused entry by a nightclub because, according to the bouncer, "the owner doesn't want Africans in here." At the time, there were also two other men with dark skin who had just been refused entry – one man of Sri-Lankan descent and one man of African descent. The three men did not know each other, but they were deeply offended by the conduct and called the Police. The bouncer repeated the policy in front of the Police officer,

³⁷ VLA submission to the Consolidation Project, recommendation 24, pages 29 – 30.

but the officer said that it was up to the venue to decide who will enter its premises and that there was nothing the Police could do.

Eduardo was deeply distressed by the conduct and it triggered a psychological injury, but he did not have the names or the contact details of the witnesses, or the bouncer.

Eduardo decided not to pursue a complaint of discrimination against the venue because of the low amount of compensation that he would be likely to receive (approximately \$5,000), even if successful, and the risk that he might not succeed due to a lack of corroborating evidence, and then be subject to an adverse costs order.

VLA therefore recommends that the Commission be empowered to issue guidelines on compensation payable in discrimination matters.³⁸ These guidelines could assist courts in determining an appropriate amount of compensation in discrimination complaints. These guidelines could also assist parties in reaching settlement of a complaint at conciliation.

Recommendation 14: That guidance (in the form of guidelines issued by the Commission) be available to courts regarding the amount of monetary compensation payable, and that courts be directed to take into account both past and future effects of the discrimination on the complainant.

³⁸ Potentially, clause 62 could be amended to make provision for these types of guidelines.