Law Council
OF AUSTRALIA

Sex and Age Discrimination Legislation Amendment Bill 2010

Senate Committee on Legal and Constitutional Affairs

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GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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Acknowledgement

The Law Council wishes to acknowledge the assistance of the Law Council's Equalising Opportunities in the Law Committee, the New South Wales Bar Association, the New South Wales Law Society and the Law Institute of Victoria in the preparation of this submission.

Executive Summary

1. Advocating for the elimination of all forms of discrimination and the promotion of equality is a long standing priority for the Law Council of Australia and its constituent bodies.

2. The Law Council wishes to acknowledge the particular assistance of the Law Council's Equalising Opportunities in the Law Committee, the New South Wales Bar Association, the New South Wales Law Society and the Law Institute of Victoria in the preparation of this submission.

3. The Law Council is keen to ensure that the Commonwealth anti-discrimination regime, including the *Sex Discrimination Act 1984* (Cth) (SDA) and the *Age Discrimination Act 2004* (Cth), is effective at addressing discrimination and promoting equality in Australia. To this end, the Law Council welcomes the introduction of the reforms proposed in the *Sex and Age Discrimination Legislation Amendment Bill 2010* (the 2010 Bill), particularly those designed to:

   (a) ensure that protections from sex discrimination apply equally to women and men;

   (b) extend existing protections from discrimination on the grounds of family responsibilities to both women and men in all areas of work;

   (c) establish breastfeeding as a separate ground of discrimination;

   (d) provide greater protection from sexual harassment for students and workers;

   (e) amend the current test for sexual harassment in section 28A; and

   (f) give effect to provisions of other relevant international instruments in addition to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);

   (g) establish the position of Age Discrimination Commissioner

4. The Law Council has a history of advocacy in relation to the reforms proposed in Schedule 1 of the 2010 Bill, which implement part of the Commonwealth Government's response to the recommendations of the 2008 Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Effectiveness of the Sex Discrimination Act ('the 2008 Senate Inquiry').[1]

5. The Law Council, with the assistance of its Equalising Opportunities in the Law Committee and the NSW Bar Association (NSW Bar), actively participated in the 2008 Senate Inquiry and many of the recommendations made in the report of the Senate Inquiry reflected the concerns raised by the Law Council.[2] Further detail of the Law Council's engagement with the 2008 Senate Inquiry, the key

[1] Report of the Senate Committee on Legal and Constitutional Affairs, Inquiry into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality (12 December 2008) available at http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/index.htm (2008 Senate Inquiry)

[2] Law Council of Australia and the New South Wales Bar Association joint submission to the Senate Legal and Constitutional Affair's Inquiry into the Effectiveness of the *Sex Discrimination Act* (15 August 2008) available at http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/submissions/sublist.htm.

recommendations of the 2008 Senate Inquiry and the Governments' response to those recommendations is contained in Attachment A.

6. While the reforms proposed in Schedule 1 of the 2010 Bill are welcome, the Law Council is disappointed that the 2010 Bill does not address many other key recommendations made by the 2008 Senate Inquiry, including recommendations that the SDA be amended to:

   (a) impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities; [3]

   (b) include a general prohibition against sex discrimination and sexual harassment in any area of public life;[4]

   (c) include a general equality before the law provision, providing that women and men are entitled to equality in law including equality before the law, equality under the law, equal protection of the law and equal enjoyment of human rights and fundamental freedoms; [5]

   (d) include an express requirement that the SDA be interpreted in accordance with those international conventions Australia has ratified which create obligations in relation to gender equality, including the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW); [6]

   (e) amend the definition of discrimination in section 5 to either: better align with the definition of 'discrimination against women' in Article 1 of CEDAW, or, in the alternative, remove the requirement for a comparator and reflect the definition of direct discrimination found within section 8 of the *Discrimination Act 1991* (ACT); [7]

   (f) ensure that employees of State and Territory government instrumentalities are afforded protection equal to that of any other employee; [8]

   (g) ensure that certain differential treatment is not described as discriminatory[9] and that the provisions relating to differential treatment contained in the SDA are consistent with those contained in other relevant legislation; and

   (h) expand the powers of the Australian Human Rights Commission, and in particular, the Sex Discrimination Commissioner.[10]

7. Without implementing these key recommendations, the effectiveness of the SDA in eliminating sex discrimination and promoting gender equality remains limited.[11]

[3] 2008 Senate Inquiry Recommendation 14.
[4] 2008 Senate Inquiry Recommendation 8.
[5] 2008 Senate Inquiry Recommendation 9
[6] 2008 Senate Inquiry Recommendations 1, 3-6, 8.
[7] 2008 Senate Inquiry Recommendation 5
[8] 2008 Senate Inquiry Recommendation 11
[9] 2008 Senate Inquiry Recommendation 27
[10] 2008 Senate Inquiry Recommendation 29, 34, 37
[11] This view was shared by the UN Committee on the Elimination of Discrimination Against Women in its recent Concluding Observations on Australia, see Concluding Observations of the Committee on the Elimination of All Forms of Discrimination Against Women: Australia, 30 July 2010, CEDAW/C/AUS/CO/7 available at http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-AUS-CO-7.pdf;

8. The Law Council supports the swift implementation of the 2010 Bill, subject to the reservations above.

9. The Law Council notes that the Commonwealth Government has committed to 'streamline and harmonise Commonwealth anti-discrimination legislation' as part of the Government's response to the National Human Rights Consultation.[12]

10. While the Law Council looks forward to this potentially comprehensive review of the federal anti-discrimination regime, the Council submits that the specific recommendations made by the 2008 Senate Inquiry in relation to the SDA identified above can and should be implemented now and should not be delayed by the broader review process.

11. The Law Council also supports the establishment of the position of Age Discrimination Commissioner under Schedule 2 of the 2010 Bill. The establishment of this position will provide greater focus on the issue of age discrimination than is allowed under the current arrangements where the Sex Discrimination Commissioner also acts as the Age Discrimination Commissioner.

12. The Law Council also recommends expansion of the powers of both the Sex Discrimination Commissioner and the Age Discrimination Commissioner.

the need to implement these recommendations is also included as a recommendation in the Australian Human Rights Commission's *2010 Gender Equality Blueprint* (June 2010) available at http://www.hreoc.gov.au/sex_discrimination/publication/blueprint/index.html (Gender Equality Blueprint)

[12] Commonwealth Government's response to the 2008 Senate Inquiry Report on the Effectiveness of the *Sex Discrimination Act 1984* (May 2010) p. 21 available at http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/gov_response.pdf (Government Response)

Law Council's Support for the Amendments

Support for Schedule 1 Amendments

13. The Law Council generally supports the objects of the 2010 Bill,[13] and supports the enactment of reforms designed to improve the effectiveness of the SDA. There are a number of reforms proposed in Schedule 1 of the 2010 Bill that reflect the issues raised and recommendations made by the Law Council and the NSW Bar during the 2008 Senate Inquiry, including those reforms designed to:

- specifically recognise international instruments (other than CEDAW) which contain relevant obligations in relation to promoting gender equality for both men and women and provide a broader constitutional basis for the provisions in the SDA (item 3);[14]

- provide specific protections against direct and indirect discrimination on the grounds of breast feeding (items 2, 6, 15, 17); [15]

- extend the protections currently available against discrimination on the grounds of family responsibilities (items 5, 11-14 18); [16]

- broaden protections available in Division 3 Part II of the Act in relation to sexual harassment, for example by amending the test for sexual harassment in section 28A of the Act,[17] extending the protections available to students; and protecting workers from sexual harassment by customers, clients and other persons with whom they come into contact in connection with their employment (items 23, 29, 53 - 60); [18]

- amend paragraphs 48(1)(g),(ga) and (gb) to ensure that the Australian Human Rights Commission (AHRC, formerly the Human Rights and Equal Opportunity Commission, HREOC) can:

  - report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to discrimination on the ground of breastfeeding and family responsibilities;

  - prepare, and to publish guidelines for the avoidance of discrimination on the ground breastfeeding and family responsibilities; and

  - with the leave of the court, intervene in proceedings that involve issues of discrimination on the ground of breastfeeding and family responsibilities (item 68).[19]

[13] The Law Council notes that the *Sex Discrimination Amendment Bill 2010* was first introduced in June 2010, but lapsed before passing through both Houses of Parliament with the calling of the 2010 Federal Election. The Bill was re-introduced in September 2010, renamed the *Sex and Age Discrimination Legislation Amendment Bill 2010*, with Schedule 1 of the Bill containing the provisions of the *Sex Discrimination Amendment Bill 2010* and Schedule 2 of the Bill containing new provisions in relation tot he appointment of the Age Discrimination Commissioner.
[14] This implements 2008 Senate Inquiry Recommendation 2.
[15] This implements 2008 Senate Inquiry Recommendation 12.
[16] This implements 2008 Senate Inquiry Recommendation 13.
[17] This implements 2008 Senate Inquiry Recommendation 15.
[18] This implements 2008 Senate Inquiry Recommendation 18
[19] This implements 2008 Senate Inquiry Recommendation 30.

14. The Law Council supports the enactment of these provisions, and urges this Committee to recommend that the 2010 Bill be passed, subject to the further recommendations below.

Impact of Sex Discrimination Act Amendments on other Relevant Laws

15. Currently, there are important differences between the sex discrimination regimes in force in the different Australian jurisdictions, with inconsistent substantive and procedural requirements under Commonwealth, State and Territory anti-discrimination laws.

16. These differences mean that complainants may be in a position where they must elect the jurisdiction within which to bring a complaint, being either through the AHRC or the relevant State or Territory agency.

17. The 2010 Bill proposes a number of additional protections at the Commonwealth level, such as those relating to family responsibilities, breastfeeding and sexual harassment, and appears to broaden the Commonwealth's constitutional basis for enacting these expanded protections.[20]

18. These amendments are likely to have an impact on whether and when complainants elect to bring a complaint under the SDA or a relevant State or Territory Act, particularly as existing discrimination legislation in a number of jurisdictions also extends to the areas of protection proposed by the 2010 Bill.

19. For example, the new Victorian legislation[21] includes: coverage of discrimination on the ground of breastfeeding and status as a carer;[22] new mechanisms designed to respond to systemic discrimination and promote substantive equality, for example by empowering the Victorian Equal Opportunity and Human Rights Commission to conduct public inquiries into discrimination issues of public significance;[23] and an express positive duty on employers in certain circumstances to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation.[24] These reforms significantly extend the coverage of the Victorian legislation and address many of the concerns raised by the Law Council and noted by the Senate Committee in relation to the SDA.

20. While the Law Council does not intend to comment in any detail on the impact of the 2010 Bill on the operation of discrimination regimes in the States and Territories, it strongly encourages the Commonwealth Government to utilise the SDA as a best practice model for the prohibition of sexual discrimination and the promotion of gender equality in Australia.

21. The Commonwealth legislation should provide a high level of protection, and an effective complaints procedure, for persons experiencing discrimination on the grounds of sex. The Law Council is of the view that the Commonwealth Government is well placed to take the lead in this area. The Law Council also encourages the Commonwealth Government to pursue options for harmonising anti-discrimination laws across jurisdictions and seek to expedite the harmonisation

[20] For example see items 24-27 of the 2010 Bill, which amend existing sections 9 and 10A of the SDA to expand reliance on the external affairs power in s51(xxix) and the corporations powers in section 51(xx) of the Constitution.
[21] *Equal Opportunity Act 2010* (Vic), for further information see http://www.equalopportunitycommission.vic.gov.au/projects%20and%20initiatives/eoa2010.asp
[22] *Equal Opportunity Act 2010* (Vic) s6(b) and (i)
[23] *Equal Opportunity Act 2010* (Vic) Part 9 Division1.
[24] *Equal Opportunity Act 2010* (Vic) s15

project currently being considered by the Standing Committee of Attorneys General.[25]

22. The Law Council also notes that other Commonwealth legislation provides important protections against discrimination, particularly when discrimination occurs in the workplace.

23. For example, the *Fair Work Act 2009:*

(a) provides that an employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.[26] Significantly, there is a reverse onus of proof for such claims. This means that where an employee alleges that they have been the subject of prohibited adverse action by their employer, it is presumed that the action was taken for that reason or with that intent unless the employer proves otherwise;

(b) includes caring responsibilities as a ground for unlawful termination claims;[27]

(c) contains civil remedy provisions and penalties dealing with unlawful discrimination,[28]

(d) contains expanded equal remuneration provisions, which enable Fair Work Australia to make orders to ensure that there will be equal remuneration for work of equal or comparable value.[29] Equal remuneration orders can be sought on the application of an affected employee, an employee organisation representing affected employees, or the Sex Discrimination Commissioner; and

(e) provides the Fair Work Ombudsman with significant powers to investigate non-compliance with the provisions of the *Fair Work Act,* including, for example, the powers to initiate an investigation into adverse action taken by an employer against an employee on a prohibited ground, without requiring a complaint to be made.[30]

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[25] For further information see http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_achievements#Anti-discrimination%20laws:%20harmonisation.

[26] See *Fair Work Act 2009* (Cth) s351. The acts which may constitute "adverse action" against an employee or prospective employee are set out at *Fair Work Act 2009* (Cth) s342. For adverse action to constitute 'unlawful discrimination' under the Act there must be a connection between the adverse action taken and the attributes set out in s351. That is, the adverse action must have occurred because of a person's or group's; race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

[27] *Fair Work Act 2009* (Cth) s772 (1)(f).

[28] *Fair Work Act 2009* (Cth) s539

[29] *Fair Work Act 2009* (Cth) s302. The Law Council notes that the meaning, scope and application of this provision is currently being considered by Fair Work Australia in the Fair Work Australia Equal Remuneration Case 2010 (C2010/3131). For further information on this case, including submissions, statements and decisions, and transcripts, can be found at http://www.fwa.gov.au/index.cfm?pagename=remuneration&page=introduction.

[30] *Fair Work Act 2009* (Cth) s682(1)(c). For more information on the functions and powers of the Fair Work Ombudsman see *Fair Work Act 2009* (Cth) Part 5-2, see also http://www.fairwork.gov.au/about-us/pages/default.aspx .

24. The Law Council supports these protections which highlight the importance of prohibiting discrimination in the modern workplace. However, these protections are not in themselves sufficient to deal with all matters relating to sex discrimination.

25. The Law Council submits that an improved SDA, with its important normative and symbolic significance, broader coverage beyond the employment environment and particular complaints procedure, is required to provide the strongest legislative protection against sexual discrimination and harassment.

Support for Schedule 2 Amendments

26. The Law Council also supports the amendments proposed in Schedule 2 of the 2010 Bill which, if enacted, would establish the position of Age Discrimination Commissioner for the first time at the federal level.

27. The AHRC currently allocates the functions administered under the Age Discrimination Act to the Sex Discrimination Commissioner.[31] This amendment will create a separate Age Discrimination Commissioner, who will be specifically responsible for age discrimination issues. The Law Council welcomes these amendments which will ensure that issues relating to the age discrimination regime are afforded equal prominence within the broader anti-discrimination regime and raise the visibility of age discrimination as an issue to be taken seriously by the Australian community.

28. The amendments contained in Schedule 2 of the 2010 Bill are generally based on those provisions appointing the existing Discrimination Commissioners, such as those in Part V of the SDA. The Law Council notes that it has raised a number of concerns in relation to the limited powers of the Sex Discrimination Commissioner and has advocated for those powers to be extended, for example to enable the Commissioner to initiate his or her own inquiry. These concerns and recommendations apply equally in the context of the *Age Discrimination Act 2004* (Cth) and are discussed further below.

Further Recommendations

29. While the Law Council generally welcomes the introduction of the reforms proposed in the 2010 Bill, it is concerned that a number of key recommendations made by the 2008 Senate Inquiry have been overlooked, or not fully included, in the 2010 Bill.

30. The 2010 Bill represents an important opportunity to address the identified shortcomings in the effectiveness of the SDA at eliminating sexual discrimination and promoting general equality.

31. In order to capitalise on this opportunity, and build upon the comprehensive and robust findings of the 2008 Senate Inquiry, the Law Council urges this Committee to give further consideration to the following issues and recommendations for amendment to the 2010 Bill.

Discrimination on the grounds of family responsibilities – proposed section 7A

32. As noted above, the Law Council strongly supports the introduction of provisions designed to ensure that the protections in respect of discrimination on the grounds

[31] See Press Release by the Australian Human Rights Commission, 'Introduction of legislation welcome' (30 September 2010).

of family responsibilities extend to indirect discrimination and apply to all areas of employment.

33. The Law Council generally welcomes the introduction of proposed section 7A which will expand the protections currently available under the SDA for discrimination on the grounds of family responsibilities, but holds some concerns about the nature and scope of the proposed provision.

34. Proposed section 7A provides:

*(1) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's family responsibilities if, by reason of:*

(a) the family responsibilities of the aggrieved person; or

(b) a characteristic that appertains generally to persons with family responsibilities; or

(c) a characteristic that is generally imputed to persons with family responsibilities;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or not materially different, the discriminator treats or would treat a person without family responsibilities.

*(2) For the purposes of this Act, a person (the **discriminator**) discriminates against another person (the **aggrieved person**) on the ground of the aggrieved person's family responsibilities if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons with family responsibilities.*

(3) This section has effect subject to sections 7B and 7D.

35. "Family responsibilities" is defined in section 4A to mean responsibilities of an employee to care for or support a dependent child, or any other immediate family member who is in need of care and support.

36. This amendment is intended to address Recommendation 13 of the 2008 Senate Inquiry, which provides:

> *The committee recommends that the prohibition on discrimination on the grounds of family responsibilities under the Act be broadened to include indirect discrimination and discrimination in all areas of employment.*[32]

37. The proposed amendments are intended to be available to both women and men[33] and would apply to include direct and indirect discrimination.

38. Items 37 and 38 of the Bill would repeal existing subsection 14(3A) and ensure that the protections against discrimination on the grounds of breastfeeding and family responsibilities proposed by sections 7AA and 7A apply to all aspects of employment covered by section 14.

39. The explanatory memorandum to the Bill also makes it clear that the proposed provision does not allow complaints to be brought by people without family

[32] See 2008 Senate Inquiry Recommendation 13.
[33] Explanatory Memorandum p. 5

responsibilities in relation to rights, privileges, or other conditions which recognise the special needs of people with family responsibilities.[34]

40. The Law Council notes that these amendments do not fully implement the relevant recommendations of the 2008 Senate Inquiry in relation to discrimination on the basis of family responsibilities. In particular, the amendments do not address recommendation 14, which provides:

> *The committee recommends that the Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities, modelled on section 14A of the Equal Opportunity Act 1995 (VIC).*

41. This recommendation was supported by HREOC (now the AHRC) which submitted that:

> *... the imposition of a positive obligation on employers would involve "a subtle re-positioning of the SDA, rather than a dramatic change" because the prohibition on indirect [sex] discrimination [in s7B] already prohibits "the unreasonable imposition of barriers that disadvantage, for example, women with family responsibilities." Nevertheless ... the change would be an important one:*
>
> *Firstly, the current obligation is merely implied and may not be immediately apparent to employers and others unless they or their advisers have considerable experience in the operation of the SDA. By making the obligation clear and mandatory, respondents are therefore on clear notice of what they are required to do, rather than having to fathom their obligations from the case law.*
>
> *Secondly, repositioning the obligation as a positive duty is an important statement of principle that employers must actually take steps to redress discrimination. It is a clear call to action, rather than a muffled warning that doing nothing carries a liability risk*[35]

42. The imposition of a positive obligation on employers to accommodate an employee's reasonable request for flexible work arrangements has also been included as a recommendation in the AHRC's *2010 Gender Equality Blueprint*, where it has been observed that:

> *In many workplaces, caring is still seen as an individual choice. Workplaces do not adequately support employees who have caring roles. Many workers are not able to obtain the flexible work arrangements they need. When it gets too hard to juggle their various responsibilities, some have no option but to resign.*
>
> *There has been a lot of talk about the importance of 'flexible work' and getting the 'work-life balance' right.*
>
> *However, the simple reality is that quality flexible working arrangements are still not common in Australian workplaces. Where flexible work policies are available, unsupportive workplace cultures mean that many workers – and*

[34] Explanatory Memorandum p. 5

[35] HREOC, *Submission 69*, pp 104-109. See also Community and Public Sector Union - State Public Services Federation, *Submission 24*, p. 3; Human Rights and Equal Opportunity Commission, *It's About Time: Women, men, work and family,* Sydney, March 2007, pp 60-65.

men in particular – report being reluctant to use them. … While women report having better access to family friendly employment conditions, using these often comes at the expense of job quality, pay, satisfaction with hours worked and career progression.

To be effective, flexible work arrangements need to be an accepted part of all Australian workplaces. They need to be available to both men and women and cover all forms of caring responsibilities, not just young children.[36]

43. The *Equal Opportunity Act 1995* (Vic), referred to as an appropriate model for this type of provision by the 2008 Senate Inquiry, has since been replaced by the *Equal Opportunity Act 2010* (Vic). A new provision has been included in that Act to protect against discrimination on the grounds of family responsibilities for persons at the time employment is offered,[37] however, the general provision protecting against discrimination on the grounds of family responsibilities (section 14A) remains largely unchanged,[38] and is now contained in section 19 of the 2010 Act as follows:

19 Employer must accommodate employee's responsibilities as parent or carer

(1) An employer must not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer.

Example

An employer may be able to accommodate an employee's responsibilities as a parent or carer by allowing the employee to work from home on a Wednesday morning or have a later start time on a Wednesday or, if the employee works on a part-time basis, by rescheduling a regular staff meeting so that the employee can attend.

(2) In determining whether an employer unreasonably refuses to accommodate the responsibilities that an

employee has as a parent or carer, all relevant facts and circumstances must be considered, including—

(a) the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and

(b) the nature of the employee's role; and

(c) the nature of the arrangements required to accommodate those responsibilities; and

(d) the financial circumstances of the employer; and

(e) the size and nature of the workplace and the employer's business; and

(f) the effect on the workplace and the employer's business of accommodating those responsibilities, including—

[36] Australian Human Rights Commission's *2010 Gender Equality Blueprint* (June 2010) p. 11, see also Recommendation 2.
[37] See *Equal Opportunity Act 2010* (Vic) s17.
[38] Section 19 of the 2010 Act replicates section 14A of the 1995 Act in full, with the addition of subparagraph 19(2)h) as the only amendment.

(i) the financial impact of doing so;

(ii) the number of persons who would benefit from or be disadvantaged by doing so;

(iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and

(g) the consequences for the employer of making such accommodation; and

(h) the consequences for the employee of not making such accommodation.

44. In response to the Senate Inquiry's recommendation, the Commonwealth Government did not commit to introducing amendments based on section 14A of the *Equal Opportunity Act 1995* (Vic). Instead it referred to the protections offered by the *Fair Work Act 2009* and National Employment Standards which 'operate together to promote flexible workplaces that balance the need for employees to manage their work and family responsibilities with the genuine requirements of business.'[39]

45. The Law Council maintains its view that the SDA should include a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities and urges this Committee to recommend that the 2010 Bill be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities, modelled on section 14A of the *Equal Opportunity Act 1995* (VIC).

46. The Law Council notes that recent amendments to sections 5 and 6 of the *Disability Discrimination Act* 1992 (Cth), which took effect on 5 August 2009,[40] impose an obligation to make reasonable adjustments for a person with disability, where the failure to make such adjustments has, or would have, the effect that the person with disability is treated less favourably than a person without disability .[41] These amendments illustrate that Commonwealth legislation has recognised that there are particular circumstances where positive action in the form of reasonable accommodation or reasonable adjustment is needed to eliminate discrimination.

47. Amending the SDA to include a positive duty on employers will ensure that the SDA not only protects against direct and indirect discrimination on the grounds of family responsibilities in all areas of employment, but encourage employers to take positive steps to accommodate an employee's reasonable request for flexible work arrangements and reinforce the protections in industrial relations legislation, which covers most but not all employees.

Meaning of sexual harassment – amendments to section 28A

48. The amendments to s 28A dealing with sexual harassment proposed by the 2010 Bill reflect a number of the submissions made by the Law Council and the NSW Bar to the 2008 Inquiry and recommended by the Inquiry in relation to:

[39] Government Response to the report on the Sex Discrimination Act 1984 (May 2010) p. 8
[40] These amendments were introduced by the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (the Bill).
[41] *Disability Discrimination Act 1992* (Cth) s5(2). Reasonable adjustments' is defined in subsection 4(1) as adjustments that do not impose an unjustifiable hardship on the person making the adjustments

- The need to expand the definition of sexual harassment to include the circumstance that sexual harassment occurs if a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

- The need to include a non exhaustive list of subjective matters to be taken into account in assessing reasonableness.

49. The Law Council supports the amendment to section 28A. However, the Law Council notes that other key recommendations in relation to sexual harassment have not been implemented by the 2010 Bill.

50. At the 2008 Senate Inquiry, the Law Council recommended that in place of the prohibition of sexual harassment in the public areas of life set out in Division 3 of Part II of the SDA, a provision making sexual harassment unlawful per se ought to be adopted, similar to the prohibition in section 118 of the *Anti-Discrimination Act 1991* (Qld).

51. Section 118 of the *Anti-Discrimination* Act *1991* (Qld) provides simply that a person must not sexually harass another person, thus prohibiting sexual harassment in all fields of activity rather than limiting the prohibition to prescribed areas of public life only. This is in line with the obligation under CEDAW to eliminate all forms of discrimination, which is not limited to eliminating discrimination only in certain areas of public life.[42]

52. This recommendation was reflected in recommendation 8 of the Senate Inquiry Report, which provides:

> *The committee recommends that the Act be amended to include a general prohibition against sex discrimination and sexual harassment in any area of public life equivalent to section 9 of the Racial Discrimination Act 1975.*

53. In making these recommendations, the Committee noted that:

> *… the absence of general protection provisions in the Act sends an unfortunate message that sex discrimination and sexual harassment are primarily private matters which should only be prohibited in narrowly specified public spheres. [43]*

54. The Law Council maintains its position that a general prohibition against sexual harassment in any area of public life should be introduced and strongly urges the Committee to recommend that the 2010 Bill be amended to include such a provision.

Inclusion of a General Equality Before the Law Provision

55. At the 2008 Senate Inquiry, the Law Council submitted that the SDA should be amended to include a provision, similar to section 8 of the *Human Rights Act 2004* (ACT), providing that women and men are entitled to equality in law including equality before the law, equality under the law, equal protection of the law and equal enjoyment of human rights and fundamental freedoms.

[42] See Law Council of Australia and the New South Wales Bar Association joint submission to the Senate Legal and Constitutional Affair's Inquiry into the Effectiveness of the *Sex Discrimination Act* (15 August 2008) at [141].
[43] See 2008 Senate Inquiry Report [11.23]

56. The Law Council and the NSW Bar submitted that an amendment of the SDA to recognise the principle of equality of men and women might appropriately provide as follows:

> *Recognition of the principle of the equality of women and men*
>
> *(1) Women and men are entitled to equality in law, where equality in law includes equality before the law, equality under the law, equal protection of the law, equal benefit of the law and the full and equal enjoyment of human rights and fundamental freedoms.*
>
> *"Laws" is taken to include all Commonwealth, State, Territory and/or local Acts, Rules and Regulations.*
>
> *(2) In particular, everyone has the right to equal and effective protection against discrimination on any ground.*
>
> *(3) Any law, policy, program, practice or decision which is inconsistent with equality in law on the ground of sex is inoperative to the extent of the inconsistency*
>
> *(4) Women and men have the right to enjoy their human rights without distinction or discrimination of any kind.*

57. The Law Council and the NSW Bar submitted that such a provision would assist to ensure consistency with Australia's obligations under Article 2(a) of CEDAW, which obliges States Parties to pursue by all appropriate means a policy of eliminating discrimination against women and:

> *... embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle.*[44]

58. It was further submitted that the inclusion of legislative provision enacting Australia's obligation under Article 2(a) of CEDAW would assist in addressing the historical insufficiency and unreliability of the common law to protect women's rights.[45] This is of particular importance in the absence of any constitutional recognition of the principle of equality of women and men in Australia, and in the absence of a federal bill of rights.

59. The need for a general equality before the law provision was also strongly supported by the AHRC), who recommended that the SDA be amended to include a general equality provision modelled on section 10 of the *Racial Discrimination Act 1975* (Cth). The AHRC explained that:

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[44] The Law Council and the NSW Bar explained that constitutional validity of a provision recognising the equality of women and men (based on the external affairs power under section 51(xxix), *Commonwealth of Australia Constitution Act*) could be underpinned not only by Article 2(a) of CEDAW but also by Articles 2, 3 and 26 of the ICCPR[44] and Articles 2(2), 3, 7(a)(i), 7(c), 10(2), 12(2)(b) of the *International Covenant on Economic, Social and Cultural Rights.*

[45] See for instance ALRC, *Equality Before the Law: Justice for Women,* (August 2000) ALRC 69 ('*Equality Before the Law')* p. 57-58. available at http://www.austlii.edu.au/au/other/alrc/publications/reports/69/vol1/ALRC69.html (ALRC Equality Before the Law)

...the Preamble to the SDA affirms the right to equal protection and equal benefit of the law without discrimination on the ground of sex, marital status, pregnancy or potential pregnancy. However, the Preamble does not give rise to enforceable legal rights or obligations. It has no application to the discriminatory effects of statutory provisions. The current wording of the Preamble also fails to mention family and carer responsibilities.

In the interests of ensuring complete and faithful implementation of Australia's international human rights obligations, [AHRC} considers that the reference to equality before the law in the Preamble of the SDA is insufficient. Rather, it may be appropriate to include the right to equality before the law within the body of the SDA by inclusion of a similar provision to s 10 of the RDA. [46]

60. The Law Council also notes that similar recommendations have been made in past reviews of Australia's anti-discrimination laws, for example by the Australian Law Reform Commission in Part 1 of the Equality Before the Law report.[47]

61. During the 2008 Senate Inquiry, the Senate Committee acknowledged these concerns. The Committee described the coverage provided by the SDA as a 'patchwork', which was both unnecessarily complex and undesirable. It recommended that the SDA be amended to include a general prohibition against sex discrimination and sexual harassment in all areas of public life equivalent to section 9 of the *Racial Discrimination Act 1975* (Cth).[48] It also supported the proposals that the SDA be amended to include a general equality before the law provision equivalent to section 10 of the *Racial Discrimination Act 1975*.[49]

62. In its response to this recommendation, the Commonwealth Government noted that:

Inserting a general prohibition provision and equality before the law provision in other anti-discrimination legislation [than the Racial Discrimination Act] would represent a significant change in approach by the Commonwealth and needs to be considered further in the context of the consolidation project [proposed as part of Australia's Human Rights Framework – see Attachment A]. The recommendations are likely to have a significant impact on State and Territory legislation and would require extensive consultation before implementation.

63. The Law Council nevertheless urges this Committee to recommend that the 2010 Bill be amended to include a general equality before the law provision in the SDA.

64. The inclusion of such a provision would help ensure that the 2010 Bill constitutes a meaningful response to the 2008 Senate Inquiry (and to the recommendations of previous reviews in this area) and fully implements Australia's obligations under CEDAW. The inclusion of such a provision would also send a clear message to both the Australian and international community that Australia considers the right to equality before the law to be worthy of specific legislative protection. The Law Council considers that the 2010 Bill provides an important opportunity to insert equality before the law provision in the SDA, where it is highly relevant. Insertion of such a provision in other anti-discrimination legislation can be further considered in the context of the Commonwealth's anti-discrimination consolidation project.

[46] As quoted in 2008 Senate Inquiry Report at [4.9].
[47] ALRC Equality Before the Law, para 3.21
[48] 2008 Senate Inquiry Recommendation 8
[49] 2008 Senate Inquiry Recommendation 9

Interpreting the SDA in line with Australia's international obligations in relation to gender equality

65. The Law Council supports the Senate Committee's recommendation that the SDA be interpreted in accordance with CEDAW, as well as other international conventions Australia has ratified which create obligations in relation to gender equality, such as the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and relevant International Labour Organisation (ILO) Conventions.[50]

66. This is consistent with the established common law rule of statutory interpretation that a statute is to be interpreted and applied, so far as its language admits, in a manner which is consistent with the basic rights of the individual.[51]

67. This principle resonates particularly strongly in the context of the SDA, which was enacted to give domestic effect to Australia's obligations under CEDAW.[52]

68. In order to ensure that the SDA is interpreted in a manner that gives full domestic effect to Australia's obligations under CEDAW, and other relevant international conventions to which it is a party, the Law Council encourages the Commonwealth Government to fully implement the Senate Committee's recommendation 3 and amend the SDA by inserting an express requirement that the Act be interpreted in accordance with relevant international conventions Australia has ratified including CEDAW, ICCPR, ICESCR and the ILO conventions which create obligations in relation to gender equality.

Amending the Definition of Direct Discrimination to Comply with CEDAW

69. In line with the above position, the Law Council and the NSW Bar have previously recommended that the concept of sex discrimination under section 5 of be amended to better align with the definition of 'discrimination against women' in Article 1 of CEDAW.[53]

70. Central to the operation of CEDAW is the concept of equality, which includes *formal equality* (where people are treated the same regardless of the relevant characteristic) and *substantive equality* (which recognises that sometimes differential treatment is necessary to ensure an equal outcome and thereby

[50] 2008 Senate Inquiry Recommendation 3.

[51] This principle was recently explained by Gleeson CJ in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19];. See also *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Lim* at 38 per Brennan, Deane and Dawson JJ. *Dietrich v The Queen* (1992) 177 CLR 292 at 306 per Mason CJ and McHugh J; *John Fairfax Publications v Doe* (1995) 37 NSWLR 81 at 90 per Gleeson CJ. See also *Maxwell on the Interpretation of Statutes* (7th Ed, 1929) at 127; Pearce & Geddes, *Statutory Interpretation In Australia* (5th ed 2001) at [5.14]. The approach is not limited in its application to ambiguous statutory provisions: *Brown v Classification Review Board* (1998) 154 ALR 67 at 78 per French J; *Secretary of State, Ex Parte Simms* [2000] 2 AC 115 at 130 per Lord Steyn, 131 per Lord Hoffman. Rather, wherever the language of a statute is susceptible of a construction which is consistent with the terms of the relevant international instrument and the obligations which it imposes on Australia, that construction must prevail: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J. See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 per Gummow and Hayne JJ. See also Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141 at 149; Statutory Interpretation And Human Rights, address to the Pacific Judicial Conference by the Hon JJ Spigelman AC, Vanuatu, 26 July 2005; also J J Spigelman, "Principle of Legality and the Clear Statement of Principle" (2005) 79 ALJ 769.

[52] See Schedule to the *Sex Discrimination Act.* CEDAW opened for signature on 18 December 1979. Entry into force generally: 3 September 1981. Entry into force for Australia: 27 August 1983.

[53] Law Council of Australia and the New South Wales Bar Association joint submission to the Senate Legal and Constitutional Affair's Inquiry into the Effectiveness of the *Sex Discrimination Act* (15 August 2008) at [14]

differential treatment is not necessarily unfair or unfavourable discrimination). This is reflected in the way 'discrimination against women' is described in Article 1 of CEDAW:

> *For the purpose of the present Convention, the term "discrimination against Women" shall mean any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economical, social, cultural, civil or other fields.*

71. Currently, the SDA does not incorporate all aspects of this definition. Rather the SDA describes discrimination in terms of "direct discrimination" and "indirect discrimination". Limitation of the SDA to regulation of these types of discrimination fails to fully address the central obligation in CEDAW, namely the promotion of equality of opportunity. Instead, the SDA definitions of discrimination are premised on the notion of formal equality. This means that the SDA is unable to address ingrained and institutional inequality, where different treatment may be required to achieve equal outcomes between men and women.[54]

72. For this reason, the Law Council and the NSW Bar have previously recommended that the concept of sex discrimination under section 5 of be amended to better align with the definition of 'discrimination against women' in Article 1 of CEDAW.[55]

73. The Law Council and the NSW Bar have previously submitted that broadening the definition of 'sex discrimination' under the SDA so that it is in accordance with the term 'discrimination against women' in Article 1 of CEDAW will enable the removal of the current definition of 'direct discrimination', defined in section 5(1) in terms of less favourable treatment, and the simplification of the concept in section 5(2) of the SDA of 'indirect discrimination', thus more readily allowing for systemic discrimination to be addressed.[56]

74. The Law Council and the NSW Bar explained that amending the definition of direct and indirect discrimination under the SDA to reflect the definition in Article 1 of CEDAW would also:

    (a) more appropriately establish the substantive and positive right of women to equality and the enjoyment of human rights and fundamental freedoms, in line with the objectives of CEDAW;

    (b) promote an outcomes-focused approach to the prohibition of discrimination against women which will assist in addressing systemic discrimination;

    (c) capture all forms of discrimination and enable the removal of the limitation currently in the SDA of prohibition of discrimination only in the proscribed areas of public life in Divisions 1 and 2 of Part II;

[54] The Hon. Justice Mary Gaudron, The Mitchell Oration 1990, *"In The Eye Of The Law: The Jurisprudence of Equality* , 24 August 1990.
[55] Law Council of Australia and the New South Wales Bar Association joint submission to the Senate Legal and Constitutional Affair's Inquiry into the Effectiveness of the *Sex Discrimination Act* (15 August 2008) at [14]
[56] Law Council of Australia and the New South Wales Bar Association joint submission to the Senate Legal and Constitutional Affair's Inquiry into the Effectiveness of the *Sex Discrimination Act* (15 August 2008) at [15][19]. See also ALRC Equality Before the Law Recommendation 3.2

(d) *ensure that the SDA is structured to apply to discrimination against women in all fields of activity, rather than only limited areas of public life. This will also broaden the types of conduct captured by the SDA.* [57]

75. This recommendation is also consistent with recommendations of the Australian Law Reform Commission made in 1994[58] and the House of Representatives Standing Committee on Legal and Constitutional Affairs in 1992.[59]

Alternative Recommendation to amend Definition of Direct Discrimination

76. In the alternative, the Law Council submits that the definition in the SDA be amended to reflect the definition of direct discrimination found within section 8 of the *Discrimination Act 1991* (ACT), and also adopted in section 8 of the Victorian *Equal Opportunity Act 2010*.

77. Section 8 of the *Discrimination Act 1991* (ACT) defines direct discrimination in terms of unfavourable rather than less favourable treatment as follows:

> *(1) For this Act, a person discriminates against another person if—*
>
> *(a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; …*

78. As explained in the earlier Law Council and NSW Bar submission, incorporating a definition of direct discrimination that relies on unfavourable rather than less favourable treatment removes the need for the identification of a real or hypothetical comparator, which is required for the purposes of determining whether a complainant has been treated less favourably under the SDA.[60]

79. Under the definition of direct discrimination as it is currently formulated under the SDA, a complainant must prove, in addition to a causal link between the attribute and the conduct, that the conduct constituted less favourable treatment when objectively assessed by comparison with an identified real or hypothetical comparator.

80. As previously noted by the Law Council and the NSW Bar, determining the characteristics of a hypothetical comparator has proved troublesome for the courts, thus making it inherently difficult for complainants to demonstrate that they have been treated less favourably.[61] The hypothetical comparator has also given rise to difficulties for the Commission when undertaking its conciliation role, and also for lawyers providing advice to complaints.

81. These concerns were shared by the Senate Inquiry and reflected in its recommendations 3 to 6 that the SDA be amended to:

(a) insert an express requirement in the SDA that the SDA be interpreted in accordance with relevant international conventions Australia has ratified

[57] Law Council of Australia and the New South Wales Bar Association joint submission to the Senate Legal and Constitutional Affair's Inquiry into the Effectiveness of the *Sex Discrimination Act* (15 August 2008) at [15]-[19]. See also ALRC Equality Before the Law pp. 41-42.
[58] ALRC Equality Before the Law, Part 1.
[59] House of Representatives Standing Committee on Legal and Constitutional Affairs *Halfway to Equal, Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* 1992, AGPS.
[60] See for instance *Purvis v State of New South Wales* (2003) 217 CLR 92 at [223]-[225].
[61] Law Council of Australia and the New South Wales Bar Association joint submission to the Senate Legal and Constitutional Affair's Inquiry into the Effectiveness of the *Sex Discrimination Act* (15 August 2008) at [68]. See also *Purvis v State of New South Wales* (2003) 217 CLR 92 at [223]-[225].

including CEDAW, ICCPR, ICESCR and the ILO conventions which create obligations in relation to gender equality;[62]

(b) amend the definitions of direct discrimination in sections 5 to 7A of the SDA to remove the requirement for a comparator and replace this with a test of unfavourable treatment similar to that in paragraph 8(1)(a) of the *Discrimination Act 1991* (ACT);[63]

(c) amend section 7B of the Act to replace the reasonableness test in relation to indirect discrimination with a test requiring that the imposition of the condition, requirement or practice be legitimate and proportionate.[64]

82. The Commonwealth Government has 'noted' these recommendations and stated that it will consider these matters as part of the consolidation project (discussed further at Attachment A).

83. The Law Council maintains its position that the definition of 'sex discrimination' needs to be amended to better align with at least the CEDAW definition or hat the definition of 'direct discrimination' be amended to refer to unfavourable rather than less favourable treatment and considers that, in light of the comprehensive 2008 Senate Inquiry into these matters, this Committee should recommend that the 2010 Bill be amended to include a provision that at least amends the current definitions in sections 5 and 7A of to remove the requirement for a comparator and replace this with a test of unfavourable treatment.

Ensuring that the SDA applies to State and Territory Government Instrumentalities

84. Section 13 of the SDA currently limits its application to State and Territory[65] government instrumentalities. This provision is unique in the federal anti-discrimination regime.

85. During the 2008 Senate Inquiry, the Law Council and the NSW Bar, along with other organisations such as the AHRC recommended that section 13 be repealed to give those employees protection equal to that of any other employee.

86. This recommendation was adopted by the Senate Inquiry which recommended the repeal of section 13, and the amendment of subsection 12(1), to ensure that the Crown in right of the State and Territory government instrumentalities are comprehensively bound by the Act.'[66]

87. In its response to this recommendation, the Commonwealth Government recognised that "other Commonwealth anti-discrimination legislation has a wider coverage than the SDA" and stated that it would consider this as part of the consolidation project (discussed further at Attachment A).

88. The Law Council maintains its position that the SDA should be amended to apply to State and Territory Government instrumentalities and, as the SDA is the only piece of Commonwealth anti-discrimination legislation currently with this exemption urges the . Committee to recommend such an amendment rather than delaying it until the review of all such legislation is complete.

[62] 2008 Senate Inquiry Recommendation 4
[63] 2008 Senate Inquiry Recommendation 5
[64] 2008 Senate Inquiry Recommendation 6
[65] By virtue of the definition of State in section 4 of the SDA to include Territories.
[66] 2008 Senate Inquiry Recommendation 11.

Certain differential treatment should not be described as discriminatory

89. The SDA incorporates the possibility of 'affirmative' action type measures through provision to implement special measures to achieve substantive equality between the genders. This concept of special measures is drawn from the Article 4 of the CEDAW which provides for the use of temporary special measures, where necessary to accelerate de facto equality between men and women. Article 4(2) provides:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

90. This concept is reflected in section 7D of the SDA, which provides that a person does not discriminate against another person if they take special measures for the purpose of achieving substantive equality between: men and women; or people of different marital status; or women who are pregnant and people who are not pregnant; or women who are potentially pregnant and people who are not potentially pregnant.

91. In addition, section 31 of the SDA provides that is it not unlawful for a person to discriminate against a man on the ground of his sex if the discriminatory conduct relates to the grant to a woman of rights or privileges in connection with pregnancy or childbirth. Section 32 provides that it is not unlawful for a person to discriminate on the grounds of sex in the provision of services the nature of which is such that they can only be provided to members of one sex.

92. In the submission to the 2008 Senate Inquiry, the Law Council and the NSW Bar submitted that the current sections 31 and 32 of the SDA, should not be contained in Part II Division 4 of the Act which deals with exemptions. It was submitted that section 32 ought to be amended to provide that the provision of services the nature of which is such that they can only be provided to members of one sex should not be considered discrimination, in line with Article 4(2) of CEDAW. The Law Council and the NSW Bar explained that it is contrary to Article 4(2) to define services that can only be provided to women (such as services directed at pregnancy) as constituting discrimination but exempt that discrimination from the provisions of the legislation making it unlawful.

93. This position is reflected in recommendation 27 of the Senate Inquiry, which provides that:

The committee recommends that provisions such as sections 31 and 32, which clarify that certain differential treatment is not discriminatory, should be removed from Part II Division 4 which deals with exemptions and instead be consolidated with section 7D.

94. The Senate Inquiry observed that that these provisions should more logically be placed alongside the provisions which define discrimination, in particular, section 7D which deals with temporary special measures.

95. In relation to the issue of special measures, the Law Council and the NSW Bar also submitted that the SDA should make it unlawful for a person to refuse or fail to accommodate persons with a special need that a person has because of an

attribute, with the attribute being defined to include the sex, marital status, pregnancy or potential pregnancy of a person.

96. It was submitted that such a provision would assist in overcoming the historical disadvantage and discrimination suffered by women and would properly assist in addressing systemic discrimination.[67]

97. The SDA could incorporate a provision which makes it unlawful for a person to fail or refuse to accommodate such a special need, in terms similar to section 24 of the *Anti-Discrimination Act 1992* (NT), which provides:

> *(1) A person shall not fail or refuse to accommodate a special need that another person has because of an attribute.*
>
> *(2) For the purposes of subsection (1) –*
>
> *(a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and*
>
> *(b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.*

98. The Law Council and the NSW Bar also recommended that a new provision reflecting the wording of Article 4(1) of CEDAW could be incorporated into the SDA, with such a provision co-existing with the current section 7D of the SDA. The provision could read:

> *Temporary measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined by Division 1 or 2, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.*
>
> *The Sex Discrimination Commissioner should have power to make a declaration that a measure is a special measure for the purposes of the [SDA}t. Where such a declaration has been made, a person challenging the declaration shall bear the onus of proving the measure is not a special measure.*

99. The Law Council and the NSW Bar explained that a special measures provision in this form would accord with the objects of CEDAW and the obligations of States Parties to take measures aimed at accelerating de facto equality. In addition it avoids the problems associated with defining 'special measures' as constituting 'discrimination' while making that discrimination lawful, an approach not supported by CEDAW.[68]

[67] See also CEDAW Committee, General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, Thirtieth session, 2004.
[68] See Article 4(1).

100. At the 2008 Inquiry, the Senate Committee also observed that t the AHRC should exercise its power to grant temporary exemptions in accordance with the objects of the Act. While the Committee noted that this is simply codifying the existing approach that the Commission takes under its guidelines, it recommended that:

> *section 44 of the Act be amended to clarify that the power of HREOC to grant temporary exemptions is to be exercised in accordance with the objects of the Act.*

101. The Law Council maintains its position that it is necessary to clarify provisions relating to differential treatment and urges the Committee to recommend that the 2010 Bill be amended to include provisions that:

(a) make it unlawful for a person to fail or refuse to accommodate such a special need, in terms similar to section 24 of the *Anti-Discrimination Act 1992* (NT),

(b) reflect the wording of Article 4(1) of CEDAW and provide that temporary measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined by Division 1 or 2, but shall in no way entail as a consequence the maintenance of unequal or separate standards and these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved;

(c) ensure that the Sex Discrimination Commissioner has the power to make a declaration that a measure is a special measure for the purposes of the SDA. Where such a declaration has been made, a person challenging the declaration shall bear the onus of proving the measure is not a special measure.

102. The Law Council also notes that it is necessary to ensure that the provisions relating to differential treatment contained in the SDA are consistent with those contained in other relevant legislation, such as the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (EOWWA). [69]

103. The EOWWA preserves the merit principle (limiting the use of affirmative action) by providing in section 3(4) that it does not require an employer to take any action incompatible with the principle that employment matters should be dealt with on the basis of merit. [70]

104. There is a tension between this provision of the EOWWA and section 7D of the SDA in relation to special measures. As noted above, section 7D of the SDA is framed in terms of achieving substantive equality, rather than only formal equality of opportunities and would, for example, appear to permit the use of quotas. This means, for example, that under section 7D of the SDA employers may "take special measures for the purpose of achieving substantive equality between men and women" to ensure, for instance, that there are certain number of female employees.

[69] See Law Council of Australia Submission to Department of Families Housing, Community Services and Indigenous Affairs Office for Women's *Review of the Equal Opportunity for Women in the Workplace Act 1999* (23 October 2009) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=9439C358-1E4F-17FA-D29C-E08B6FECF96D&siteName=lca See also Simon Rice, *Hot Topics 40: Discrimination* (2002) 4.

[70] It does, however, create an obligation for organisations to address discrimination against women, through the elimination of discrimination and the taking of measures to promote equal opportunity. For example, the Act applies to private employers with more than 100 employees, and higher education institutions, and requires these organisations to implement programs to eliminate discrimination and contribute to the achievement of equal opportunity for women in the workplace.

In contrast, under the EOWWA, such measures are not permitted unless based on merit of the applicants, regardless of their gender.

105. The interaction of the two Acts arguably creates ambiguity and confusion as to what is permissible as a special measure.

106. The Law Council submits that the 2010 Bill provides an opportunity for the Commonwealth Government to clarify the scope of permissible special measures and the relationship between special measures and principles of merit, and ensure such terms are consistently defined and applied in the EOWWA and the SDA.[71]

Expand the powers of the Sex Discrimination Commissioner to deal with systemic discrimination

107. The Law Council strongly supports expanding the powers of the Sex Discrimination Commissioner to deal with systemic discrimination.

108. In the submission to the 2008 Senate Inquiry, the Law Council and the NSW Bar emphasised the pervasive nature of systemic discrimination. It was observed that redressing individual complaints, while perhaps providing a remedy of some utility to the complainant, does little or nothing to address the widespread underlying problem, particularly when that problem exists outside the one organisation, or across whole industries, occupations or area of the community.

109. In order to address these shortcomings, the Law Council and the NSW Bar recommended that the SDA be amended to:

    (a) empower the Sex Discrimination Commissioner to investigate systemic and/or pervasive discriminatory practices at his or her own initiative and without needing to rely upon a formal individual complaint and without requiring the consent of Australian Human Rights Commission;

    (b) enable the Sex Discrimination Commissioner to report to the Attorney-General on any organisation that fails to implement the recommendations of the Sex Discrimination Commissioner made pursuant to an investigation of that organisation.

110. These recommendations were also made by the Australian Law Reform Commission in *Equality Before the Law* Part I.[72]

111. The Senate Inquiry acknowledged the many submissions that raised similar concerns and called for the need for expanded powers for the Sex Discrimination Commissioner. It recommended that:

    further consideration be given to amending the Act to give the Sex Discrimination Commissioner the power to investigate alleged breaches of the Act, without requiring an individual complaint.[73]

[71] The Law Council notes that there was a review of the EOWWA conducted by the Department of Families Housing, Community Services and Indigenous Affairs during 2009. This review resulted in a report complied by KPMG and released in January 2010, available at http://www.fahcsia.gov.au/sa/women/pubs/general/eowa_kpmg_rpt/Pages/default.aspx. The report does not refer specifically to section 3(4) of the EOWWA, but does include a discussion of the use of targets and quotas to improve women's participation in all areas and levels of employment, Chapter 7. There appears to be no Government response to this report.

[72] ALRC Equality Before the Law Part I, pp 50-57.

[73] 2008 Senate Inquiry Recommendation 37

112. The Senate Inquiry further recommended that the SDA and the *Human Rights and Equal Opportunity Act 1986* (Cth) (now the *Australian Human Rights Commission Act 1986* (Cth)) be amended to expand the Commission's powers to conduct formal inquiries into issues relevant to eliminating sex discrimination and promoting gender equality and, in particular, to permit inquiries which examine matters within a State and Territory or under State or Territory laws.[74]

113. A similar recommendation was also included in the AHRC's *2010 Gender Equality Blueprint.*[75]

114. In its response to these recommendations, the Commonwealth Government again referred consideration of these issues to the broad anti-discrimination consolidation project.

115. The Law Council maintains its position that expanded powers are currently required for the Sex Discrimination Commissioner and urges the Committee to recommend that the 2010 Bill be amended to include provisions for the Sex Discrimination Commissioner to investigate systemic discriminatory practices as outlined above.

116. Such an amendment would help bring the SDA into line with other federal and state legislative regimes directed at preventing and prohibiting discrimination which include proactive compliance mechanisms. For example:

    (a) Under the Victorian *Equal Opportunity Act 2010,* the Victorian Equal Opportunity and Human Rights Commission is empowered to:

        (i) investigate serious systemic discrimination

        (ii) engage directly with employers and other duty holders and require compliance or an enforceable undertaking to address discrimination;

        (iii) conduct public inquiries into big discrimination issues of public significance with the consent of the Attorney-General. [76]

    (b) Under the *Fair Work Act 2009* (Cth), the Fair Work Ombudsman is empowered to enforce compliance with the provisions of the Act and investigate complaints of adverse action by an employer against an employee on a prohibited ground, such as on the basis of sex or family responsibilities, without requiring an individual complaint.[77]

<u>Expand the powers of the Age Discrimination Commissioner to deal with systemic discrimination</u>

117. The current Sex Discrimination Commissioner who is allocated functions under the *Age Discrimination Act* has noted that Australia has an ageist culture in which many people see age discrimination as acceptable and that victims of age discrimination are often unwilling to report cases.[78] In the light of such observations, the Law Council considers that the office of the Age Discrimination Commissioner

[74] 2008 Senate Inquiry Recommendation 33.
[75] Australian Human Rights Commission's *2010 Gender Equality Blueprint* (June 2010) Recommendations 12, 14.
[76] *Equal Opportunity Act 2010* (Vic) Part 9 Division 1.
[77] *Fair Work Act 2009* (Cth) Part 5-2, see in particular s682(1)(c). For further information on the role of the Fair Work Ombudsman see http://www.fairwork.gov.au/about-us/pages/default.asp.
[78] AHRC, *In Conversation: Uncovering Age Discrimination* (2010), see www.humanrights.gov.au/age/COTA_2010.html

established by the 2010 Bill should have similar powers to deal with systemic discrimination to those outlined above in relation to the Sex Discrimination Commissioner.

118. The Law Council also recommends expansion of the powers of Age Discrimination Commissioner to deal with systemic discrimination.

Broader Review of Commonwealth Anti-Discrimination Laws

119. As noted above, *Australia's Human Rights Framework*, released by the Federal Government in April 2010, included a commitment to 'harmonise and consolidate Commonwealth anti-discrimination laws to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly' ('the proposed consolidation project').

    Regardless of the proposed consolidation project, the Law Council submits that the specific recommendations made by the 2008 Senate Inquiry outlined above in relation to the SDA can and should be implemented by the 2010 Bill and should not await the outcome of what will clearly be a long-term project, which may take several years to be implemented.

Summary of Law Council Recommendations

120. Subject to the below recommendations, the Law Council supports the passage of the 2010 Bill.

121. The Law Council recommends that the 2010 Bill be amended to:

(a) impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities;

(b) include a general prohibition against sex discrimination and sexual harassment in any area of public life;

(c) include a general equality before the law provision, similar to section 8 of the *Human Rights Act 2004* (ACT), providing that women and men are entitled to equality in law including equality before the law, equality under the law, equal protection of the law and equal enjoyment of human rights and fundamental freedoms;

(d) include an express requirement that the SDA be interpreted in accordance with those international conventions Australia has ratified which create obligations in relation to gender equality, including CEDAW;

(e) amend the definition of discrimination in section 5 to:

(i) better align with the definition of 'discrimination against women' in Article 1 of CEDAW, [79] or, in the alternative

(ii) remove the requirement for a comparator and reflect the definition of direct discrimination found within section 8 of the *Discrimination Act 1991* (ACT).

(f) repeal section 13 and amend subsection 12(1) to ensure that the Crown in right of the State and Territory government instrumentalities are comprehensively bound by the SDA;

(g) expand the powers of the Australian Human Right Commission, including to:

(i) empower the Australian Human Right Commission to conduct formal inquiries into issues relevant to eliminating sex discrimination and promoting gender equality and, in particular, to permit inquiries which examine matters within a state or under state law; and

(ii) give the Sex Discrimination Commissioner and the Age Discrimination Commissioner the power to investigate alleged breaches of the Act, without requiring an individual complaint.

(h) ensure that certain differential treatment is not described as discriminatory and make it unlawful for a person to fail or refuse to accommodate such a special need in terms similar to section 24 of the *Anti-Discrimination Act 1992* (NT).

[79] Law Council of Australia and the New South Wales Bar Association joint submission to the Senate Legal and Constitutional Affair's Inquiry into the Effectiveness of the *Sex Discrimination Act* (15 August 2008) at [14]

(i) ensure that the provisions relating to differential treatment contained in the SDA are consistent with those contained in other relevant legislation, such as the EOWWA.

Attachment A: Background

2008 Senate Inquiry

122. On 26 June 2008, the Senate Legal and Constitutional Affairs Committee commenced an inquiry into the effectiveness of the SDA in eliminating discrimination and promoting gender equality (the 2008 Senate Inquiry) A number of particular issues were referred to in the Terms of Reference including:

    (a) the scope of the Act, and the manner in which key terms and concepts are defined;

    (b) the extent to which the Act implements the non-discrimination obligations of the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW) or under other international instruments;

    (c) the powers and capacity of the Human Rights and Equal Opportunity Commission and the Sex Discrimination Commissioner, particularly in initiating inquiries into systemic discrimination and to monitor progress towards equality; and

    (d) consistency of the Act with other Commonwealth and state and territory discrimination legislation, including options for harmonization.

123. On 15 August 2008 the Law Council and the New South Wales Bar Association ('the NSW Bar') made a joint submission to the Senate Inquiry into the SDA.[80] On 3 September 2008 the Law Council was invited to give evidence at the public hearing of the Inquiry which took place on 10 September 2008 in Melbourne. .The Law Council was represented by Sydney-based barristers Ms Kate Eastman and Ms Penny Thew.

124. At the Inquiry, the Law Council and the NSW Bar submitted that the SDA has been an important legislative initiative to eliminate sex discrimination and sexual harassment and has shifted perceptions about the role of women in the workplace and public life.[81] However, it was also noted that the focus of the SDA is providing a remedy to individual complainants, and as a result, the SDA has had little impact on addressing systemic sex discrimination. The Law Council and the NSW Bar expressed the view that the 2008 Senate Inquiry was an important opportunity to examine how the SD Act may better achieve equality between women and men in Australia.

125. The following key issues were raised by the Law Council and the NSW Bar regarding the effectiveness of the SDA*:*

    (a) The effectiveness of the SDA is impaired by complex concepts and technical language, therefore amendments to key definitions, such as direct and indirect discrimination, are needed.

    (b) The Sex Discrimination Commissioner should be able to initiate inquiries - particularly to address systemic change.

[80] A copy of this submission is available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6A23F6BD-1C23-CACD-2250-807AF545B13D&siteName=lca

[81] See University of New South Wales Law Journal, Forum Volume 10 No 2 - The *Sex Discrimination Act*: A Twenty Year Review 2004.

(c) There is a need to extend the protections currently offered to protect against discrimination on the grounds of carers' responsibilities and family responsibilities and to extend the prohibition on sexual harassment to all fields of activity not just certain areas of public life.

(d) Legislative amendment is required so that 'multiple discriminations' can be appropriately addressed.

(e) There is a need to promote consistency between the SDA and relevant State/Territory laws.

(f) There is a need to evaluate the effectiveness of the SDA in removing barriers to women's sustained participation and progress in the legal profession.

(g) The SDA will be more effective if it is supported by others measures that address labour discrimination including the development of industry standards.

126. On 15 December 2008 the Senate Inquiry reported. The report contained 43 recommendations for amendments to the SDA. These recommendations included:

(a) ensuring that the SDA is interpreted in accordance with relevant international conventions Australia has ratified including CEDAW and International Labor Organisation Conventions which create obligations in relation to gender equality.

(b) amending key definitions, such as 'martial status' and 'direct discrimination'

(c) amending the existing tests for direct discrimination, indirect discrimination and sexual harassment;

(d) ensuring that the SDA provides equal coverage to men and women;

(e) including a general prohibition against sexual discrimination and sexual harassment in any area of public life;

(f) including a general equality before the law provision modelled on section 10 of the *Racial Discrimination Act 1975*;

(g) broadening the prohibition on discrimination on the grounds of family responsibilities to include indirect discrimination in the areas of employment;.

(h) imposing a positive duty on employers to reasonably accommodate the request by employees for flexible working arrangements, to accommodate family or carer responsibilities;

(i) improving the complaints process where a complaint is based on different grounds of discrimination covered by separate federal anti-discrimination legislation;

(j) expanding the powers of the Australian Human Rights Commission (then the Human Rights and Equal Opportunity Commission), for example enabling the Sex Discrimination Commissioner to conduct formal inquiries into issues relevant to eliminating sex discrimination and promoting gender equality and in particular, to permit inquires which examine matters within a State or Territory or under State or Territory laws;

(k) providing the Australian Human Rights Commission (AHRC) with additional resources to carry out education campaigns and perform the additional roles recommended by the Senate Committee

(l) giving consideration to providing the Sex Discrimination Commissioner with the power to investigate alleged breaches of the SDA without requiring an individual complaint;

(m) conducting consultations regarding further possible changes to the SDA and reporting publicly on the outcomes of that consultation within 12 months;

(n) conducting a public inquiry into the merits of replacing the existing federal anti-discrimination Acts with a single Equality Act.

127. A number of the Committee's recommendations reflect the reforms proposed by the joint submission prepared by the Law Council of Australia and the NSW Bar

128. The implementation of these recommendations has since been identified by the UN Committee on Economic, Social and Cultural Rights as necessary to ensure Australia is fully complying with its international human rights obligations. [82]

Government's Response

129. On 5 May 2010 the Government released its response to the 2008 Senate Inquiry.[83]

130. As part of this response the Commonwealth Government indicated that it would amend the SDA to

(a) ensure the protections from discrimination provided by the SDA apply equally to women and men;

(b) establish breastfeeding as a separate ground of discrimination

(c) provide greater protection from sexual harassment for students and workers; and

(d) extend protection from discrimination on the grounds of family responsibilities to both women and men in all areas of employment.

131. The 2010 Bill, first introduced in June 2010 and again in September 2010 following the 2010 Federal Election, implements this component of the Government's response.

132. The Law Council was disappointed by the limited nature of the Government's response to the Senate Inquiry's recommendations, and in particular, the failure to address the key components of the SDA that have been found to be ineffective at

[82] Concluding Observations of the Committee on the Elimination of All Forms of Discrimination Against Women: Australia, 30 July 2010, CEDAW/C/AUS/CO/7 available at http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-AUS-CO-7.pdf.

[83] The Law Council notes that the Government's response to the Senate Inquiry was announced shortly after the Government's release of draft legislation introducing Australia's first Paid Parental Leave scheme which will provide up to 18 weeks of government-funded parental leave pay at the National Minimum Wage (currently $543.78 per week) for eligible parents of children born or adopted on or after 1 January 2011.

combating sex discrimination and promoting gender equality. [84] For example, the Government's response does not including amendments that would:

(a) ensure that the SDA is interpreted in accordance with relevant international conventions to which Australia is a party;

(b) include a general prohibition against sex discrimination and sexual harassment in any area of public life;

(c) impose a positive duty on employers to reasonably accommodate requests by employers for flexible working arrangements to accommodate family or carer responsibilities; and

(d) give the Sex Discrimination Commissioner the power to investigate alleged breaches of the Act, without requiring an individual complaint.

133. It is these key recommendations of the 2008 Senate Inquiry that the Law Council continues to urge the Commonwealth Government to implement.

134. The Government also indicated that it would consider a number of other recommendations made by the Senate Committee as part of its broader commitment to streamline and harmonise Commonwealth anti-discrimination laws – one of the initiatives included in the recently released *Australia's Human Rights Framework* ('the Human Rights Framework'), which is the Government's response to the National Human Rights Consultation. The Human Rights Framework provides:

The Government will develop exposure draft legislation harmonising and consolidating Commonwealth anti discrimination laws to remove unnecessary regulatory overlap, address inconsistencies across laws and make the system more user-friendly

It is timely to review federal anti-discrimination legislation to ensure that it is working effectively. The review will focus on removing unnecessary regulatory overlap, addressing inconsistencies across existing anti-discrimination laws and making the system more user-friendly in order to reduce compliance costs for individuals and business. This will, in turn, strengthen human rights protections.

In reviewing anti-discrimination legislation, the Government will also consider further the complaints handling processes and the related role and functions of the Australian Human Rights Commission.

The Australian Government believes streamlined anti-discrimination laws will create a more effective system of protections from unlawful discrimination, greater certainty for businesses and the most efficient enforcement mechanisms.

135. Although the Government has referred to certain 2008 Senate Inquiry recommendations that will be considered as part of the broader review of Commonwealth anti-discrimination laws, there is nothing in the Human Rights Framework that suggests that the effectiveness of the anti-discrimination regime at addressing discrimination and promoting equality will be considered as part of the review. The Law Council remains concerned, therefore, that the purpose of the review of Commonwealth anti-discrimination laws will not provide the opportunity for

[84] A copy of this media release can be found at http://www.lawcouncil.asn.au/media/news-article.cfm?article=6C3082FE-1E4F-17FA-D295-E6247A9766F6

serious consideration to be given to implementing the remaining 2008 Senate Inquiry recommendations.

Recent Recommendations from UN Committee

136. On 30 July 2010, the UN Committee on the Elimination of Discrimination against Women (the UN Committee) released its Concluding Observations following a review of Australia's compliance with the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). [85]

137. The Committee commented on a number of positive developments in Australia, such as the enactment of the *Paid Parental Leave Act 2010* and the ratification of the *Optional Protocol to CEDAW*. These two positive developments were also the subject of recommendations by the Senate Committee during the 2008 Senate Inquiry, and were welcomed by the Law Council. To date, no complaints have been made to the UN Committee under the complaints mechanism contained in the Optional Protocol.

138. The UN Committee also raised a number of serious concerns, including around legislative protection of women's rights; violence against women; participation in political and public life and the rights of disadvantaged groups of women, particularly Indigenous women, women with disabilities, migrant women, women from culturally and linguistically diverse backgrounds and women from remote or rural communities.

139. A number of these recommendations related directly to the 2008 Senate Inquiry and the present Bill. In this regard, the UN Committee recommended that Australia:

    (a) withdraw its two reservations to CEDAW as soon as possible (notwithstanding recent developments with regard to women in the armed forces and the adoption of *the Paid Parental Leave Act*);

    (b) re-table the 2010 Bill before the new Parliament as soon as possible after the elections and ensure that the 2010 Bill takes into account the key recommendations of the 2008 Senate Inquiry in order to ensure that the Bill contains provisions which will provide comprehensive protection against all forms of discrimination against women;

    (c) consider expanding the mandate of the Sex Discrimination Commissioner to address all issues of gender equality;

    (d) provide adequate funding for the implementation of the Human Rights Framework and strengthen the promotion and protection of human rights, including through the elaboration of a National Action Plan on Human Rights and the consolidation and harmonization of federal anti-discrimination law into a single Act;

    (e) give due consideration, with a view to further protecting women's human rights, to the adoption of a Human Rights Act encompassing the full range of civil, cultural, economic, political and social rights;

[85] Concluding Observations of the Committee on the Elimination of All Forms of Discrimination Against Women: Australia, 30 July 2010, CEDAW/C/AUS/CO/7 available at http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-AUS-CO-7.pdf.

(f) fully utilize the *Sex Discrimination Act* and consider the adoption of temporary special measures, in accordance with article 4, paragraph 1, of CEDAW and the Committee's general recommendation No. 25, to increase further the number of women in political and public life and to ensure that the representation of women in political and public bodies reflect the full diversity of the population, including indigenous women and women from ethnic minorities; and

(g) take concrete measures to eliminate occupational segregation including by removing barriers to women in all sectors and to ensure equal opportunities for, and equal treatment of, women and men in the labour market.

140. The Committee also noted that the provisions of CEDAW are binding on Australia and that it expects any incoming government to observe the recommendations contained in the Concluding Observations.

Attachment B: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.