Priorities for federal discrimination law reform

Legal Aid NSW submission to the Australian Human Rights Commission

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, discrimination, employment, social security and access to essential social services. This submission draws on the casework experience of our civil lawyers in providing these services.

Should you require any further information, please contact

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Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the Australian Human Rights Commission (**AHRC**) in response to the discussion paper on priorities for federal discrimination law reform (**the discussion paper**).

Advice about discrimination forms a significant part of the Legal Aid NSW civil law service. In the 2018/19 financial year we provided 639 services in discrimination law, and in 2017/18 we provided 799 services in discrimination law.

We provide responses to the relevant questions in the discussion paper below. We also refer the AHRC to our submission to the National Inquiry into Sexual Harassment in Australian Workplaces, which contains recommendations that are relevant to this consultation. We have included relevant recommendations from that submission in our response below.

1. ***Do you agree that the principles outlined in the Discussion Paper should guide discrimination law reform?***

Legal Aid NSW supports the principles proposed by the AHRC to guide reform to federal discrimination law. We agree that federal discrimination law should be:

- Clear
- Consistent
- Comprehensive
- Intersectional
- Remedial
- Accessible
- Preventative

2. ***What are the key factors relevant to the need for federal discrimination law reform?***

3. ***Are there other major challenges that exist with federal discrimination law that require reform?***

Federal discrimination law should be reformed to address problems arising from:

- the complexity of laws and the need for consistent definitions
- differences between federal and state/ territory laws
- the burden of proof which is too onerous on complainants
- gaps in protection under discrimination law including limitations in existing protected attributes and the need for new protected attributes of religion, criminal record, experience of domestic violence and social origin
- limitations in the complaint-based system
- the need for a positive duty to prevent discrimination.

We provide further information and recommendations on these points below.

Complexity

We support the AHRC's comments in the discussion paper regarding the complexity of discrimination law and the problems this causes.

In Legal Aid NSW's experience, the complexity of discrimination law makes it difficult for people to know and understand their rights and comply with the law. This is particularly problematic for our clients seeking discrimination advice on one or more ground, or where there is a choice of forum. Clients are often confused and overwhelmed by the broadly similar but not identical concepts and definitions. In some instances, this can be a deterrent to our clients making complaints. Complexity also adds to the cost, duration and uncertainty of legal claims.

We support the AHRC's recommendation in the discussion paper for a more uniform approach to definitions that are applicable across areas, such as discrimination, victimisation, special measures and reasonable adjustments. We also reiterate our support for a consolidated federal discrimination Act and harmonised federal and state discrimination law to the fullest extent possible. Where definitions differ between Acts, the legislation should be amended to reflect the greatest level of protection.

Burden of proof too onerous

In our view, the current burden of proof across each of the federal discrimination Acts is too onerous for complainants who are required to establish that a respondent has treated them unfairly on the basis of a protected attribute. In our experience, it is difficult and rare for applicants to have access to direct evidence of the reasons for the respondent's actions. We agree with Associate Professor Simon Rice's comments to the 2008 review of the *Sex Discrimination Act 1984* (Cth):

> A complainant must… prove the reason for another person's conduct, when all knowledge of it is in the mind of the other person, any evidence of it is in the control of the other person, and the power to contradict any allegation is with the other person. A complainant must prove as a fact, on the balance of probabilities, the unarticulated reason for a person's conduct – a very difficult exercise. This approach to proof often enables a person to avoid accountability for their discriminatory conduct, simply because they are not called on to explain it.[1]

We submit that a better approach would be one similar to the onus provisions in the general protections provision of the *Fair Work Act 2009* (Cth) (**Fair Work Act**).[2] Once an applicant has established that they have been subjected to less favourable treatment and possess a protected attribute, it should be assumed that the less favourable treatment was taken because of the protected attribute, unless the respondent proves otherwise.

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[1] The Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, (December 2008) paragraph 6.47.
[2] *Fair Work Act 2009* (Cth) s 361 (FW Act).

Gaps in discrimination law

Legal Aid NSW agrees that federal discrimination laws have gaps in protection that undermine their effectiveness. We support the AHRC's suggestion for reform to address limitations in coverage of existing protected attributes and the need for new protected attributes. We comment further on these issues in response to questions four and five below.

4. What, if any, changes to existing protected attributes are required?

In our view, reform is needed to address the following limitations.

(a) Lack of protection for unpaid workers including volunteers and interns.

Unpaid workers are not included in the definition of employment under any of the existing federal discrimination laws.[3]

This is a significant gap and leaves a substantial number of people vulnerable to discrimination without recourse. The most recent General Social Survey conducted by the Australian Bureau of Statistics found that 5.8 million people in Australia (or 31 per cent) had volunteered in 2014. The highest rate of volunteering was among young people aged 15 – 17 years. This figure does not include people who did unpaid work under some form of compulsion because of unemployment (for example, work for the dole) or as part of study commitments.[4]

Unpaid interns can be particularly vulnerable to mistreatment in the workplace. Many are young people with limited workplace experience. Interns, regardless of their age, may feel that they must tolerate mistreatment in order to get experience, paid work or positive references. The lack of legal protection for this group can reinforce this perception.

(b) Limited protection for people with carer's responsibilities

A significant number of working Australians have caring responsibilities, including for children, elderly parents or family members with disability.

The *Sex Discrimination Act 1984* (Cth) (**SDA**) only provides protection from direct discrimination on the basis of family responsibilities in work related areas.[5] The *Disability Discrimination Act 1992* (Cth) (**DDA**) provides some protection for people with carer's responsibilities,[6] which extends all the protections of the DDA to associates of people with disability.

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[3] We note that the draft *Religious Discrimination Bill* does include unpaid work within the definition of employment.
[4] Australian Bureau of Statistics, General Social Survey: Summary Results, Australia, 2014 (Catalogue 4159.0, 29 June 2015). An additional 335,200 people reported doing unpaid work for an organisation or group in the previous 12 months only because of employment or study commitments. As the General Social Survey was not designed to specifically seek information about this unpaid work, the results for this type of activity may not represent the full extent of such work in the adult population.
[5] *Sex Discrimination Act 1984* (Cth) s 7A (SDA).
[6] *Disability Discrimination Act 1992* (Cth) s 7 (DDA).

However, discrimination on the basis of family responsibilities is often indirect. We agree with the comments of the then Attorney-General in the second reading speech introducing the *Sex Discrimination Amendment Bill 1995* (Cth), which introduced the current formulation of indirect discrimination in section 5(2) of the SDA:

> Tackling indirect discrimination is essential because barriers to equality are often the result of the application of practises, conditions or requirements which appear to be neutral but which in fact impact adversely on members of a particular group.[7]

The SDA provides some protection from indirect discrimination on the basis of family responsibilities for women, with a line of authorities considering that the care of children is a characteristic of women.[8] To date, courts have taken judicial notice of the fact that women are the dominant caregivers of young children, and have not required evidence of this.[9]

The SDA does not provide any protection from indirect discrimination on the basis of family responsibilities for men. It is unclear if the SDA would provide any protection against indirect discrimination on the basis of family responsibilities for women who have responsibility to care for family members other than children, such as elderly parents or a sibling.

Encouraging men to take on more caring work is a way to address gender inequality. For example, it supports a woman's ability to return to work and over time may help to address the gender pay gap. It also supports men to be more involved with their children and family. Conversely, only affording women protection from indirect discrimination on the basis of family responsibilities may serve to entrench traditional gender roles and the unequal division of caring work.

Both women and men should be protected from indirect discrimination on the basis of family responsibilities. This protection should be expressly legislated. It is foreseeable that at some point care for children may not be accepted as a characteristic of women. Encouraging men to contribute more to caring for their families should not jeopardise the protection that women currently have from indirect discrimination on the basis of family responsibilities.

We support the SDA being amended to expressly provide protection from both direct and indirect discrimination on the basis of family responsibilities in work, and agree that consideration should be given to this protection applying in all areas of public life.

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[7] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 1995, 2460 (Michael Lavarch, Attorney-General).
[8] *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122*, Mayer v Australian Nuclear Science & Technology Organisation* [2003] FMCA 209, *Howe v Qantas Airways Ltd* [2004] FMCA 242.
[9] *Howe v Qantas Airways Ltd* [2004] FMCA 242.

Case Study: Men seeking part time work to care for their children

Our client, a man, worked full-time as an accountant. He requested to work part-time to care for his children, a 3-year-old and one year old twins, so that his wife could return to work.

Our client's employer refused his request to work part time. Our client was aware that women in similar roles to him worked part-time so that they could care for their children. Our client's perception was that his employer did not allow him to work part-time because of his sex.

As a man, our client was unable to make a complaint to the Australian Human Rights Commission of indirect discrimination on the group of family responsibilities, within the meaning of the SDA.

(c) Lack of protection for state government employees under the SDA

Unlike all other federal discrimination Acts, the protection from discrimination in employment outlined in the SDA does not apply to employees of the states or state instrumentalities.[10] Employees of state instrumentalities are also unable to make sexual harassment complaints under the SDA.

In New South Wales, this means that the almost 400,000 employees of state and local government[11] are not protected by the SDA, and must bring sex discrimination claims, including sexual harassment claims, under the *Anti-Discrimination Act 1977* (NSW) (**NSWAD Act**). While the protection from sex discrimination provided by the NSWAD Act and the SDA are broadly similar, there is a significant difference in the powers of adjudicators. Where the NSW Civil and Administrative Tribunal (**NCAT**) finds a complaint of sex discrimination substantiated, it may award damages not exceeding $100,000.[12] Conversely, there is no limit on the sum of damages that the Federal Court or Federal Circuit Court can award if it finds a breach of the SDA.[13]

We are not aware of any cogent reason justifying the SDA not applying to state government employees. All workers in NSW, and other states, should have the same rights in relation to sex discrimination and sexual harassment. We strongly support amendment of the SDA to ensure that it applies to state government employees. We note that the Senate Standing Committee on Legal and Constitutional Affairs recommended this reform in its 2008 Inquiry into the effectiveness of the SDA.[14]

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[10] SDA s 12 states that the SDA does not bind the Crown in right of a State, unless expressly provided. SDA Part II Division 1, which contains the prohibition on discrimination in work, does not expressly provide that the Crown in right of a State is bound by those section. SDA, s 13(1) provides that s 14, which contains the provisions regarding discrimination in employment, does not apply to employment by a State instrumentality.

[11] New South Wales Public Service Commission, *Workforce Profile Report 2018*, chapter 2.

[12] *Anti-Discrimination Act 1977* (NSW), s 108(2)(a).

[13] *Australian Human Rights Commission Act 1986* (Cth), s 46PO(4) (AHRC Act).

[14] The Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, (December 2008), xiv.

(d) Limited protection against discrimination based on immigrant status

As observed in the AHRC's 'Federal Discrimination Law' publication, s 5 of the *Racial Discrimination Act 1975 (*Cth) (**RDA**) extends the operation of various sections of the RDA to include discrimination on the basis of a person's status as an immigrant.[15] However, there is little case law on the meaning of 'immigrant status'.

In *Jin v University of Queensland*,[16] the Federal Circuit Court held that s 5 of the RDA did not extend the operation of the indirect discrimination protection in s 9(1A) of the RDA to immigrant status.[17] As a result, while a person can claim indirect discrimination based on 'race, colour, descent or national or ethnic origin', they cannot claim indirect discrimination on the grounds of immigrant status.[18]

The RDA currently provides limited protection for discrimination for a person or relatives or associate of a person who is or has been an immigrant. As noted above, principles of consistency and clarity should guide the reform of discrimination law.

Further, where laws are amended for the purposes of making them consistent, the law should be amended in a manner that does not remove existing rights. For these reasons, discrimination law should protect direct and indirect discrimination on the ground of immigrant status.

5. What, if any, new protected attributes should be prioritised?

There is a strong need for additional protected attributes of religion, criminal record, experience of domestic violence and social origin.

Religion

Clients seek advice from Legal Aid NSW regarding religious discrimination, primarily in employment.[19] However, currently in NSW and federally, protection from religious discrimination is inadequate.[20]

Legal Aid NSW supports in-principle legal protection from religious discrimination. We note that the federal government has recently consulted the public on an Exposure Draft

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[15] *Racial Discrimination Act 1975* (Cth) (RDA), ss 11, 12(1), 13, 14(1), 14(2), 15(1), 15(2) and 18.
[16] *Jin v University of Queensland* [2015] FCCA 2982 ('*Jin*'). In this case Ms Jin argued that the University had indirectly discriminated against her in the provision of a service by requiring her to have a first degree from an Australian university, which she did not, being an American postgraduate.
[17] *Jin* (n16) [38].
[18] *Jin* (n16) [41]-[42].
[19] In the 2017/18 to 2018/19 financial years Legal Aid NSW provided 24 advice and minor assistance services regarding discrimination on the ground of religion. 17 of these services were regarding religious discrimination in employment.
[20] The *Anti-Discrimination Act 1977* (NSW) does not include a prohibition on discrimination on the ground of religious belief. It does provide some limited protection through the prohibition on racial discrimination, which is defined to include ethno-religious origin. The AHRC Act provides limited protection from religious discrimination in employment and occupation, and not in other areas of public life. Complaints of religious discrimination that are not successfully conciliated cannot be dealt with by a court.

Religious Discrimination Bill, which if passed, would fill this gap. Legal Aid NSW provided a submission to this consultation.[21]

> ***Case Study: lack of legal remedy for discrimination on the ground of religion in NSW***
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> Our client was an Australian citizen and a devout Muslim. He was in custody but had a security clearance that allowed him to attend TAFE.
>
> Our client's religion required him to pray five times per day and our client wished to pray while he was at TAFE. Our client and other Muslim students started praying in a public area of the TAFE. Security guards told our client that he was not permitted to pray in this area. The TAFE permitted students of other religions to pray in the public area.
>
> Our client made a complaint to TAFE and as a result, his permission to attend TAFE was revoked.

Criminal record

There is a strong need for an enforceable remedy for discrimination on the basis of irrelevant criminal record in employment. Clients seek assistance from Legal Aid NSW regarding this issue, which affects some of the most marginalised people in society.

Irrelevant criminal record is defined as discrimination under AHRC Act,[22] however it is not a ground of unlawful discrimination.[23] The AHRC can investigate complaints of discrimination in employment on the basis of irrelevant criminal record and, where appropriate, try to resolve them by conciliation. If the AHRC is satisfied that discrimination has occurred, it can report to the Minister.[24] However, there is no enforceable remedy and an applicant cannot go to court because of discrimination on the basis of irrelevant criminal record.

Discrimination on the basis of irrelevant criminal record is a major impediment to many people's participation in the workforce, ability to support themselves and their families, and reintegration into the community after release from prison or the youth justice system. In our experience, the existing protections from discrimination on the basis of irrelevant criminal record in employment under the AHRC Act, spent convictions,[25] and privacy legislation,[26] are inadequate to address this problem.

For example, young people with a juvenile criminal record can face difficulties obtaining employment because of discrimination based on an irrelevant criminal record. It is a common misconception that a person's criminal record is 'wiped' when they turn 18. In

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[21] Available here: https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0013/32422/190916-Legal-Aid-NSW-Submission-to-AGD-Religious-freedoms-consultation.pdf
[22] AHRC Act, s 3(1) and *Australian Human Rights Commission Regulation 2019* (Cth), reg 6(a)(iii)
[23] AHRC Act, s 3.
[24] AHRC Act, ss 31 and 32A.
[25] *Criminal Records Act 1992* (NSW).
[26] *Privacy and Personal Information Protection Act 1998* (NSW).

NSW, convictions and non-convictions for offences committed when a person is under 18 may still be disclosed on a criminal history check until they are spent. As many stakeholders submitted to the NSW Parliamentary Committee inquiry into Youth Diversion, this can have significant consequences on a young person's opportunity for rehabilitation and reintegration.[27] Legal Aid NSW considers that this issue should be addressed by introducing irrelevant criminal record as a protected attribute in unlawful discrimination in employment, and reforming the law regarding children's criminal records and spent convictions.

Introducing irrelevant criminal record as a protected attribute in unlawful discrimination in employment would be balanced by the existing inherent requirements defence, which would permit employers to discriminate against employees and potential employees, where their criminal record prevents them from being able to fulfil the inherent requirements of the role.

Case Study: Discrimination on the basis of irrelevant criminal record

Our client was a young single mother who was working as a supervisor in an aged care facility. Our client's employment was terminated when a criminal record check revealed that five years earlier our client had been convicted of a theft related offence for failing to correctly report her income whilst she was receiving Centrelink benefits.

At the time our client was working part time, studying and was also living in a violent relationship. Our client explained the circumstances of the offending to her manager, but our client was dismissed because the employer maintained that she may have to make minor budgetary decisions in her role, and her criminal record was therefore relevant.

Experience of domestic and family violence

Legal Aid NSW supports recommendations made by individuals and other bodies, including the AHRC, for experience of domestic and family violence to be a protected attribute under discrimination law.[28]

[27] Legislative Assembly of New South Wales Law and Safety Committee, *The Adequacy of Youth Diversion Programs in New South Wales* (Report, September 2018), 36-37.

[28] See for example, submissions on this issue to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) [3.51]-[3.60]; Yashina Orchiston and Belinda Smith, *'Empowering victims of family violence: Could anti-discrimination laws play a role?'* (2012), *Australian Review of Public Affairs*.

Victims and survivors of domestic and family violence experience prejudice and exclusion in many areas of public life.[29] In our experience, discrimination against victims and survivors is prevalent in employment and accessing housing, and compounds the harm that they have experienced. In the workplace, this can include discrimination through declining requests to take time off to attend court proceedings or relocate housing or schools. Discrimination in the housing context can include refusing to offer someone a tenancy because they have terminated a previous tenancy under domestic violence provisions of the *Residential Tenancies Act 2010* (NSW).[30]

Employment, and the financial independence that it can provide, as well as access to alternative accommodation, are key enablers of escaping violent relationships.

We consider that existing laws are inadequate to address both direct and indirect discrimination experienced by victims and survivors of domestic and family violence. While the National Employment Standards (**NES**) in the Fair Work Act provide some protections for victims and survivors of domestic and family violence, we consider that certain gaps remain. For example, under the Fair Work Act employees are entitled to five days of unpaid domestic and family violence leave per year,[31] however this can be quickly exhausted. Employees who have completed at least 12 months of service with their employer, or who are long term casuals, and who have experienced violence from a member of their family, may also request flexible working arrangements.[32]

However, in our casework experience, many victims of domestic and family violence start new jobs as a step towards getting their life back together and often do not qualify to request flexible working arrangements. Protection from discrimination on the ground of experience of domestic and family violence would also strengthen the domestic violence termination provisions in the NSW *Residential Tenancies Act*, which assist tenants to end their tenancies early if they are experience domestic and family violence.

We consider that providing for this additional protection from discrimination would result in better outcomes for the victim beyond their experience in accessing employment and housing. For example, research by the Law and Justice Foundation of New South Wales has found that experiencing domestic and family violence is highly correlated with experiencing a broad range of other legal problems. Respondents to the Legal Australia-Wide (LAW) Survey who had experienced domestic and family violence in the previous 12 months were 10 times more likely than others to experience legal problems, including a wide range of family, civil and criminal law issues. The research found that the risk of experiencing family law problems was a massive 16 times higher for those who had

[29] See for example, Yashina Orchiston and Belinda Smith, *'Empowering victims of family violence: Could anti-discrimination laws play a role?'* (2012), *Australian Review of Public Affairs*; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013) [3.51]-[3.60].
[30] *Residential Tenancies Act 2010* (NSW), ss 105A and 105I.
[31] FW Act s 106A.
[32] FW Act s 65.

experienced domestic and family violence.[33] They were also at least three times more likely to experience problems related to employment, financial rights, government payments, health, housing, personal injury and rights issues.[34]

While this research did not examine the role that discrimination based on experience of domestic and family violence may play in creating other legal problems, it demonstrates the significant and compounding disadvantage that victims and survivors of domestic and family violence often experience.

Creating an additional protected attribute of experience of domestic and family violence in the areas of public life that are currently covered by other discrimination laws would address some of this disadvantage, signal that domestic and family violence is unacceptable, provide legal protection from this form of discrimination and acknowledge the harm it causes to victims.[35]

Providing protection from discrimination based on experience of domestic and family violence is also consistent with Australia's obligations under the United Nations *Convention on the Elimination of All Forms of Discrimination against Women*, which requires governments to take appropriate measures to eliminate discrimination against women in all areas of life including in employment, and to ensure that women have access to safe and healthy working conditions.[36]

It is also consistent with the *International Labour Organisation Violence and Harassment Convention, 2019 (No. 190),*[37] which Australia has not yet ratified.

[33] Christine Coumarelos, *Quantifying the legal and broader life impacts of domestic and family violence* (Law and Justice Foundation of New South Wales, 2019), 24.
[34] Christine Coumarelos, *Quantifying the legal and broader life impacts of domestic and family violence* (Law and Justice Foundation of New South Wales, 2019), 1 and 10.
[35] Yashina Orchiston and Belinda Smith, *'Empowering victims of family violence: Could anti-discrimination laws play a role?'* (2012), *Australian Review of Public Affairs*.
[36] Article 11, *Convention on the Elimination of All Forms of Discrimination against Women,* opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981).
[37] Articles 6 and 10(f).

Case Study: Discrimination against victim of domestic and family violence in employment

Our client was a victim of domestic violence perpetrated by her former partner and father of her young child. After separating from her partner, our client obtained employment in an office administration role. About three months after our client commenced employment, her former partner commenced Family Court proceedings in relation to custody of our client's child.

Around this time our client also began assisting police in relation to criminal charges against her former partner resulting from the domestic violence.

Because of the potential criminal law proceedings, the need to care for her young daughter and the pressure of university study, our client asked her employer for flexible work arrangements. Given that our client had not been employed for one year, she was not entitled to the right to request flexible working conditions in the National Employment Standards.

The employer told our client that she may need to resign, unless some agreement could be reached about her working hours. A week later, our client was made redundant, despite staff being advised only a fortnight earlier that no job losses would occur in the near future.

Social origin

Legal Aid NSW supports enforceable remedies for discrimination on the basis of all attributes in the *International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation* (**ILO 111**), including social origin. The focus of Legal Aid NSW's work is to assist socially and economically disadvantaged people. Although not often framed in such terms, discrimination and disadvantage because of social origin underpins many of our clients' experiences.

Discrimination on the basis of social origin is not unlawful under the AHRC Act and there is no enforceable remedy.[38] The Fair Work Act includes some protection from discrimination based on social origin, however for many employees this is limited to protection from dismissal. The general protection provisions of the Fair Work Act prohibit discrimination on the basis of social origin. However, this protection is limited to actions

[38] Any distinction, exclusion or preference made on the basis of social origin is defined as discrimination under section 3(1) AHRC Act and reg 6(a)(iii) *Australian Human Rights Commission Regulation* 2019 (Cth), however it is not a ground of unlawful discrimination under section 3(1) AHRC Act. As a result, there is no enforceable remedy for discrimination on the basis of social origin under the AHRC Act.

which would be unlawful under any anti-discrimination law in force in the place where the action is taken.[39]

Discrimination on the basis of social origin is not unlawful under anti-discrimination laws in force in NSW, so employees in NSW cannot use these provisions. Employees that are not eligible to make a general protections claim about their dismissal under the Fair Work Act can make an unlawful termination claim, which includes protection from dismissal because of social origin.[40] The unlawful termination provisions are intended to give effect to Australia's obligations under a number of treaties including ILO 111.[41]

Elements of social origin that are most relevant in Australia include class and geographic origin or locality. The ILO Committee of Experts has clarified that these factors are relevant to social origin, although it has not defined class. Academic commentary has described class to include economic capital (income, savings, property), social capital (relationships with others and networks of contacts) and cultural capital (including education, skills, knowledge, accents, habits, tastes, interests, manners, lifestyle).[42]

Discrimination based on class or locality is common and can be a high barrier to social mobility and equality. It also remains to some extent socially acceptable. This is demonstrated by the widespread use of derogative terms to describe people appearing to exhibit characteristics consistent with lower class identity including 'bogan', 'houso', 'bum, 'dero', 'povo', 'pov', 'dole bludger', 'westie', and 'feral.[43]

Examples of social origin discrimination include hiring practices that prefer applicants from particular areas or who have attended particular schools, or exclude from consideration applicants from other areas or other schools. This can be the result of deliberate discrimination, or unconscious bias or assumptions.

For example, the Victorian Government Recruit Smarter initiative found that CV de-identification leads to better outcomes for applicants from lower socioeconomic suburbs. The Victorian Department of Premier and Cabinet trial found that applicants from lower ranked socioeconomic suburbs were 9.4 per cent more likely to progress through the

[39] FW Act s 351.
[40] FW Act s 772.
[41] FW Act s 771.
[42] Angelo Capuano, "Giving Meaning to 'Social Origin' in International Labour Organization ('ILO') Conventions, the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth): 'Class' Discrimination and its Relevance to the Australian Context' (2016), 39(1) *University of New South Wales Law Journal*, 84.
[43] Angelo Capuano, "Giving Meaning to 'Social Origin' in International Labour Organization ('ILO') Conventions, the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth): 'Class' Discrimination and its Relevance to the Australian Context' (2016), 39(1) *University of New South Wales Law Journal*, 85, 121 - 122

selection process and receive a job offer after their CV had been de-identified to remove their home address.[44]

Other examples of social origin discrimination include private tenancy applications that ask if the applicant has made any application for social housing and discrimination against homeless people (homelessness can be considered relevant to social origin).

We support an enforceable remedy for discrimination on the basis of social origin in employment, and consideration for protection from discrimination based on social origin in other areas of public life. This would acknowledge, and go some way to addressing, the wide-ranging disadvantage experienced by many people because of their socio-economic background or status.

Case Study: Social origin discrimination in employment

Our client was 23 years old and had lived in out of home care provided by the State from the age of three until she turned eighteen. Our client obtained casual employment with a non-government organisation as a support worker. Our client's job involved supervising children living in out of home care, taking children out for activities, preparing meals, cleaning, staying overnight and other house duties.

After a few months of employment, our client was required to undertake a probity check. Our client, despite having no criminal record and a working with children check, failed the probity check.

The State considered that our client's history of having grown up in out of home care would mean that she would find it difficult to perform her job as it may trigger distressing memories from her past. This issue was not discussed with our client as a work health and safety concern. The State and the employer also did not discuss possible steps to mitigate the impact that the role may have had on our client.

The State instructed the non-government organisation to dismiss our client. Because our client had not been employed for six months, she was unable to lodge an unfair dismissal claim.

6. What is your view about the Commission's proposed process for reviewing all permanent exemptions under federal discrimination law?

Legal Aid NSW supports the AHRC's recommendation that all permanent exemptions to be reviewed.

We note the AHRC's comment that "*consideration should be given to whether a general clause for 'justifiable conduct' should be introduced*." We would welcome further detail on how a proposed justifiable conduct clause would operate, before we provide further

[44] Department of Premier and Cabinet Victoria and the Centre for Ethical Leadership University of Melbourne, *Recruit Smarter* (Report Findings December 2018), 11.

feedback on this issue. More generally, we would be concerned by a very broad defence to discrimination claims with unclear parameters.

We note that international jurisdictions including the United Kingdom (UK) and European Union use justification clauses, similar to those contemplated in the discussion paper. For example, in the UK, indirect discrimination is not unlawful if it is justified as being "*a proportionate means of achieving a legitimate aim*".[45] Consideration should be given to how justification clauses are used and interpreted in international jurisdictions, when considering whether to introduce a similar clause in Australia.

7. Are there particular permanent exemptions that warrant particular scrutiny?

Health conditions and insurance - section 46 DDA

Legal Aid NSW has identified problems arising from the operation of the exemption in s 46 of the DDA, and the extent to which it is complied with by insurance companies.[46]

Section 46 of the DDA provides a partial exemption to the prohibition on disability discrimination regarding insurance policies and superannuation. The exemption provides that it is not unlawful for insurers to refuse to cover to a person with disability or to modify the person's insurance policy if the decision:

(i) is based on actuarial or statistical data on which it is reasonable for the insurer to rely, and
(ii) is reasonable having regard to the matter of the data and other relevant factors.

If no reliable data is available or reasonably obtainable, the decision to refuse to insure or to modify the policy is not unlawful discrimination, if the discrimination is reasonable, having regard to any other relevant factors.[47] The onus of proof is on the insurer to demonstrate that the exemption applies.

Legal Aid NSW's experience and research report, "*What's the Risk? Access to insurance for people living with health conditions*",[48] found that some insurance companies may be inappropriately using this exemption to deny cover, provide cover only with exclusions, or premium load (potentially to the extent that the person is priced out of the market).

Through our research, we also found instances of insurance companies refusing to disclose the information on which those decisions were based. We suggest that the AHRC consider ways to encourage insurance companies to comply with their obligations under the DDA, and this exemption.

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[45] *Equality Act 2010* (UK) s 19(2)(d).
[46] Legal Aid NSW, *What's the Risk? Access to insurance for people living with health conditions* (July 2019).
[47] DDA s 46.
[48] Legal Aid NSW, *What's the Risk? Access to insurance for people living with health conditions* (July 2019).

Quotes from Legal Aid NSW's report:* What's the Risk? Access to insurance for people living with health conditions*:

"I called so many travel insurers before settling on [my current travel insurer]. When I told them about my pre-existing condition, the premiums sky rocketed with five [insurers] before I found [the current insurer], even though now I am totally fit and well. Grossly unfair and discriminatory practices at play here."

"The policy was reviewed at my 10-year anniversary as I had been advised the loading may be reduced or removed at that point, but the outcome was that the loading would remain. I cancelled my trauma policy in absolute disgust and frustration – I'm 10 years clear and healthy as anything yet I'm paying twice as much for my protection. Furious!"

"[A] total lack of transparency. [The travel insurer] would not discuss evidence/information on which they based their decision. I doubt they even understood my illness. If the cancer did return, it would be a very slow process and would not affect the short trip I was planning to undertake. The companies would not move, even when I presented a doctor's letter stating that there was very little likelihood of a recurrence."

"There is a discriminatory element to the judgments made about who can/cannot get travel insurance. Just because I live with cancer doesn't mean that I shouldn't be covered when I am well enough to travel."

Exemptions from discrimination law on the ground of religion – section 38 SDA

Legal Aid NSW supports the review of the religious exemptions in the SDA and ADA. In our view these exemptions go beyond what is necessary to protect freedom of religion at the expense of allowing discrimination on grounds such as sex, sexuality and marital status. We note that the Australian Law Reform Commission is currently considering these exemptions.

There are exemptions in the SDA and ADA for the activities of bodies 'established for religious purposes',[49] and exemptions in the SDA for the activities of religious educational institutions.[50] These exemptions for religious bodies and schools are broad and permanent. They are generally confined only by a requirement that the act or practice to which the exemption applies must conform to the doctrines, tenets and beliefs of that religion and be necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Many religious bodies now receive Commonwealth funding to provide essential public services in the areas of aged care, child welfare, adoption and employment services. In 2013 the SDA was amended to provide that the exemption for religious bodies does not

[49] SDA s 37, *Age Discrimination Act 2004* (Cth) s 35 (ADA).
[50] SDA s 38.

apply in connection with the provision of Commonwealth funded aged care.[51] However, this carve out from the exemption does not apply to any other public services provided by religious bodies. Legal Aid NSW is concerned about discrimination by religious bodies that are using public funds to provide public services. In our view the exemptions in the SDA and ADA for religious bodies and schools should not apply to the provision of government funded public services.

Religious bodies and religious schools are also large employers and the majority of individuals who work for them perform roles with no religious content. Legal Aid NSW is concerned that the breadth of current exemptions means that our clients experience discrimination on the grounds of sex and marital status in their employment by religious organisations. This is demonstrated by the following case study:

Case Study: Discrimination in employment by a religious school

Our client was employed at a religious school as an English teacher and had been employed by the school on a series of fixed term 12-month contracts.

Our client became pregnant to her de facto partner. Our client told the school that she was pregnant.

The school informed our client that her contract would be terminated because she was pregnant and unmarried.

The broad scope of the exemptions also undermines Australia's obligations under the *ILO Discrimination (Employment and Occupation) Convention 1958*,[52] which provides that workers should not be subject to discrimination. This convention is scheduled to the AHRC Act and various provisions of the Fair Work Act are intended to give effect to it.[53]

Legal Aid NSW considers that religious bodies and schools should be permitted to discriminate in connection with employment in respect only of those individuals with specific religious roles or functions. However, religious bodies and schools should not be able to discriminate in relation to employment generally.

8. How can existing compliance measures under federal discrimination law be improved?

Legal Aid NSW supports the development of disability standards as a useful way to clarify requirements under the DDA and support compliance. In our view additional disability standards would be helpful in employment. Standards could outline what is an inherent requirement of a job and how to assess whether a person can perform the inherent requirements. Standards could also provide guidance on the making of a reasonable

[51] SDA s 37(2).
[52] International Labour Organization, *Discrimination (Employment and Occupation) Convention (C111)* (entered into force 15 June 1960)
[53] See for example, FW Act s 771.

adjustment in an employment context, in a similar way to the guidance provided in the Education Standards to the education sector. Issues arising from the application of these legal principles is something that we see in our employment practice on an almost daily basis. We consider that employers would welcome greater certainty around these concepts, and employees would also benefit from greater clarity regarding rights.

We agree with the AHRC's views in the discussion paper, that a robust review process would be useful, to measure the effectiveness of the standards and to assess the extent to which stakeholders comply with disability standards.

We would also welcome further consideration of how similar standards or codes of practice could apply to the other anti-discrimination Acts, to provide greater certainty and improve compliance with obligations under those Acts.

9. ***What additional compliance methods would assist in providing greater certainty and compliance with federal discrimination law?***

10. ***What form should a positive duty take under federal discrimination law and to whom should it apply?***

Limitations of the complaints-based model

Legal Aid NSW considers that one of the key weaknesses in discrimination law is the complaint-based model.

Relationships in which discrimination and harassment occur often involve power imbalances, such as the relationship between employer and employee, landlord and tenant, or insurance company and consumer. Clients to whom Legal Aid NSW provides advice about discrimination are often at a further disadvantage because of their youth, cultural and linguistic background or economic circumstances. Our clients often decide not to lodge a discrimination complaint because they fear the consequences of doing so, or because they perceive the process to be too burdensome. There is scope to strengthen protection from discrimination through relieving the burden on applicants to bring complaints.

A positive duty to prevent discrimination

Legal Aid NSW supports the introduction of a positive duty on all individuals and organisations that currently have obligations under discrimination laws to take positive measures to eliminate discrimination. We consider the Victorian model to provide a good example of how this could operate. A positive duty would encourage individuals and organisations to proactively consider the adequacy and impact of their services, policies and procedures and take steps to address shortcomings. It would also reduce the burden on individuals to bring complaints to address discriminatory conduct.

A positive duty should also involve additional powers and resources for the AHRC. Similar to the Victorian model, the AHRC should be properly funded to have a compliance and monitoring function. This should involve the power to investigate serious breaches of the

positive duty, enter into compliance agreements with organisations, and refer matters to the court, Attorney-General or Parliament.

For example, in the area of employment, a positive duty would not greatly increase the legislative burden on individuals and organisations. Employers can already be held vicariously liable for the discriminatory actions of their employees when they fail to take all reasonable steps to prevent discrimination.[54] Employers can also be held liable under ancillary liability provisions if they aid or permit discrimination.[55] The courts have established that an employer will need to have taken significant action in order to satisfy the court that it took all reasonable steps to prevent discrimination.[56]

Other legislative schemes also impose positive duties on employers. For example, the national work health and safety laws, which require employers to ensure, so far as reasonably practicable, the health and safety of their workers. Given the significant impact that discrimination often has on employee wellbeing, it is arguable that existing work health and safety laws already impose a positive duty on employers to prevent discrimination.

Own motion powers for Discrimination Commissioners

As Australia's National Human Rights Institution, the AHRC should have greater powers to prevent discrimination, and be properly funded to use them. Expanded powers are consistent with the AHRC's function to promote understanding, acceptance, and public discussion, of human rights in Australia.[57]

We consider that the Discrimination Commissioners should be empowered to conduct own motion investigations into breaches of federal discrimination law, without requiring an individual complaint. For example, an investigation could arise because of information received through an anonymous report, or through information provided to the AHRC highlighting systemic discrimination in a particular sector. This could be modelled on the existing powers of the Victorian Equal Opportunity and Human Rights Commission.[58]

[54] ADA s 57, SDA s 106, DDA s 123(2), RDA ss 18A and 18E.
[55] See for example ADA s 56, SDA s 105, DDA s 122.
[56] *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.
[57] AHRC Act s 11(g).
[58] *Equal Opportunity Act 2010* (Vic) s 127.

Case Study: Victorian Equal Opportunity and Human Rights Commission uses powers to investigate discrimination by travel insurers[59]

In 2017 the Victorian Equal Opportunity and Human Rights Commission used its investigation powers to investigate discrimination based on mental health conditions in the travel insurance industry. The Commission found that the three companies it investigated, Allianz & AGA, Suncorp and World Nomads Group, sold more than 365,000 policies containing terms that discriminated against people with mental health conditions over an eight-month period.

The Commission's investigation found that the insurers also failed to establish that they took sufficient steps to meet their positive duty under the *Equal Opportunity Act 2010* (Vic) to eliminate discrimination as far as possible.

The insurers were unable to establish that they could rely on any of the available exceptions under the *Equal Opportunity Act 2010* (Vic) to lawfully discriminate.

The Commission's report, *Fair-minded cover*, noted that as a result of the investigation, all three insurers committed to changing their practices.

11. What, if any, reforms should be introduced to the complaint-handling process to ensure access to justice?

Restore 12-month time limit to make a complaint

Following legislative amendment to the AHRC Act in April 2017, the President of the AHRC may terminate a complaint if the complaint was lodged more than six months after the alleged discrimination took place.[60] In our view, this time frame is too short for many people, and should be restored to 12 months.

In our practice experience, victims of discrimination (including sexual harassment) are often significantly impacted by the discrimination. It can take them some time to overcome the shock, distress or embarrassment, and to make a complaint. Victims of discrimination also often fear the consequences that making a complaint can have on them. In the context of employment, this often involves concern about the impact on their continued employment.

Further, it can take a victim of discrimination some time to realise that unlawful discrimination is a problem about which they can seek a legal solution. For example, many workplace cultures normalise sexual harassment such as sexual jokes and banter. In the insurance context, discrimination on the basis of health conditions (disability) may be commonplace or market accepted.

When clients finally realise that they have a legal problem, it can take them a further period of time to obtain legal advice, particularly free legal advice. While Legal Aid NSW works

[59] Victorian Equal Opportunity and Human Rights Commission, *Fair-minded cover: Investigation into mental health discrimination in travel insurance*, (Report, 2019).
[60] AHRC Act s 46PH(1)(b).

to ensure that all clients who need urgent legal advice receive it, there is a huge demand for our services and clients sometimes need to wait to receive legal advice.

Required reporting of settlement outcomes

There is little public information available about the settlement of discrimination complaints. Consistent, de-identified reporting of settlement data by the AHRC would assist our clients, both applicants and respondents, to better evaluate their position and make more informed choices during negotiations. Outcomes data may also act as a deterrent for would-be discriminators and harassers.[61] Production of uniform data about settled discrimination complaints would also facilitate broader academic evaluation of the financial and non-financial outcomes achieved in all Australian jurisdictions over time.

Faster resolution process

The AHRC, along with state and territory anti-discrimination commissions, are frequently criticised for having slow complaint handling processes. The AHRC currently has an average time of 4.6 months to finalise complaints, with only 35 per cent being finalised within three months.[62]

While waiting for an investigation to begin or for a conciliation conference to be scheduled, our clients have been dismissed, have decided to resign, have been evicted and/or have experienced a deterioration in their mental health. All of our clients, regardless of their gender, age or life circumstances, find it stressful to make a complaint of discrimination. Delays in the process heighten the stress that our clients feel. It is also our practice experience that the longer a dispute is left unresolved, the more difficult it is to ultimately settle.

To ease the distress to vulnerable victims of discrimination, and to increase the likelihood of a mutually agreeable settlement, where appropriate the bulk of all discrimination complaints should be finalised within three months. The AHRC should be properly resourced to handle complaints more efficiently.

12. Regional access issues

In our experience, the AHRC infrequently travels to regional areas to conduct conciliations. This makes it very difficult for our clients in regional areas to access face to face conciliation, which is often preferred to, and more beneficial than, telephone conciliations.

While we understand that travelling to regional areas can be resource intensive, we suggest that AHRC provide face to face conciliation outside of Sydney metropolitan areas, where possible.

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[61] Unions NSW, *Discussion Paper: Reforms to Sexual Harassment laws* (2018), 19.
[62] Australian Human Rights Commission, 2017-2018 Complaint Statistics, 3.

13. What, if any, reforms should be introduced to ensure access to justice at the court stage of the complaints process?

Costs

The AHRC Act should be amended to provide that in all unlawful discrimination proceedings costs may only be ordered if the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause, or if the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs.

Australia's discrimination laws provide significant protections, however they are also highly technical. Under federal, state and territory anti-discrimination laws, the burden of proving unlawful discrimination lies with the applicant. The respondent, particularly where it is a corporation or government, often expends significant resources in defending the claim.

Persons who have a genuine belief that they have been discriminated against within the meaning of the law should be able to assert their rights without fear of having to pay the other sides' legal costs if they are unable to establish their claim. It is a strong disincentive to applicants in pursuing even the strongest of complaints of discrimination—that there is a risk that they may be required to pay the respondent's legal costs.

Inserting a 'costs protection' in the AHRC Act would be consistent with the protection found in section 570 of the Fair Work Act which applies, amongst other types of claims, to general protections claims. The general protections provisions of the Fair Work Act cover adverse action on grounds which are also covered by discrimination laws, such as race, sex, sexual orientation, age and disability. A costs protection is also consistent with NSW anti-discrimination law. In NSW, parties to discrimination proceedings bear their own costs unless a party can demonstrate special circumstances which warrant the Tribunal's exercise of discretion.[63]

14. Is there a need to expand protections relating to harassment and vilification on the basis of any protected attribute?

Prohibition against harassment should cover all protected attributes. This will explicitly recognise the development of case law that indicates that harassment will be discrimination where it is based on a protected attribute.

In our view, single incidents should be regarded as harassment across all of the protected attributes. While it is well accepted that a one-off incident can amount to sexual harassment,[64] and courts have granted damages in cases of a single incident of racist

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[63] *Civil and Administrative Tribunal Act 2013* (NSW) s 60.

[64] See for example *Hall v Sheiban* (1989) 20 FCR 217. Sexual harassment is defined in the SDA, and in *Hall v Sheiban* (1989) 20 FCR 217, both Wilcox and French JJ stated that while the dictionary definition of 'harass' implies repetition, the statutory definition of sexual harassment (then section 28(3) of the SDA, now replaced by section 28A) did not require repetition and did not use the word harass to define 'sexual harassment' (at 247, 279).

abuse in public,[65] disability harassment has been interpreted more narrowly as requiring repeated conduct.[66]

The DDA includes specific provisions which make it unlawful to engage in disability harassment in education, employment and the provision of goods and services.[67] The DDA does not define the term 'harassment' on the grounds of disability, and the courts have only considered the meaning of the term in a handful of cases.

In the leading case to consider these provisions, the then Federal Magistrates Court declared that *'in order to amount to harassment, the behaviour complained of must be both persistent and harrying'.*[68] Other cases have referred to the need to identify 'repeated attacks' or something repetitious or occurring on more than one occasion.[69]

In our experience, many instances of disability harassment involve single events that do not reach the threshold of persistent, harrying conduct but are nevertheless serious and have a significant impact on the victim.

[65] See *Sidhu v Raptis* [2012] FMCA 338, where the applicant was awarded $2,000.
[66] *Sluggett v Commonwealth* [2011] FMCA 609 at [674].
[67] DDA ss 35, 37 and 39.
[68] *Sluggett v Commonwealth* [2011] FMCA 609 at [674].
[69] *Penhall-Jones v State of New South Wales (No 2)* [2008] FMCA 832 at [40].