

**Human Rights and Anti-Discrimination Bill
2012 Exposure Legislation Draft**

December, 2012



NATSILS

**NATIONAL ABORIGINAL & TORRES
STRAIT ISLANDER LEGAL SERVICES**

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1. About the NATSILS

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) is the peak national body for Aboriginal and Torres Strait Islander Legal Services in Australia. The NATSILS have almost 40 years' experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The NATSILS are the experts on justice issues affecting and concerning Aboriginal and Torres Strait Islander peoples. The NATSILS represent the following Aboriginal and Torres Strait Islander Legal Services (ATSILS):

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS)

2. Introduction

The NATSILS make this submission to the Australian Government in response to the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (the Bill). Previously in February 2012 the NATSILS made a detailed submission on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper (the Discussion Paper) and we are pleased to see that many of our recommendations have been addressed in the Bill.

The NATSILS would like to congratulate the Government on the many positive ways in which the Bill succeeds in streamlining human rights protections and improving access to justice by simplifying the legal process. The NATSILS also welcome the focus on prevention that is evident within the Bill through the inclusion of a range of voluntary measures by which business can work with the Australian Human Rights Commission (AHRC) to create codes of practice, action plans and certification of special measures.

It is disappointing however, that the opportunity to further strengthen protections and improve the effectiveness of the system has not been taken. In particular, the NATSILS are concerned that the provisions surrounding special measures have not been brought into line with Australia's international human rights obligations, that the list of protected attributes has not been expanded to include a person's irrelevant criminal record, social status or status as a victim of family violence and that the AHRC has not been given the appropriate powers to enable it to fulfil its function in providing a more effective compliance regime.

These successes and failures will be further discussed in the submission below.

3. Summary of Recommendations

Recommendation 1

That the definition of human rights instruments as per clause 3(2) be expanded to include the Declaration on the Rights of Indigenous Peoples.

Recommendation 2

That the definition of race as a protected attribute be reconsidered to more accurately reflect its interpretation in case law.

Recommendation 3

That a person's irrelevant criminal record be included in the list of protected attributes covered in the Bill.

Recommendation 4

That a person's social status be included in the list of protected attributes covered by the Bill.

Recommendation 5

That a person's status as a victim of family violence be included in the list of protected attributes covered by the Bill.

Recommendation 6

That the special measures provisions in the Bill be amended to encompass the following elements as prescribed by international human rights law:

- *An explicit statement that special measures must be a proportionate means of achieving their purpose of securing substantive equality;¹*
- *That proportionality means that the measure must be the least restrictive option for achieving substantive equality;*
- *That special measures confer a direct benefit on the affected group;*
- *That membership of the group subject to special measures must be self-identified;²*
- *That the free, prior and informed consent, as defined by international law, of the group/s affected is required for a special measure to be legitimate;³*

¹ *General Recommendation No. 32*, Committee on the Elimination of Racial Discrimination, 75th sess,

² *Ibid*, 34.

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, I-14668, art 1 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, I-14531, art 1 (entered into force 3 January 1976); *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 3, 18, 19; *General Recommendation No. 23: Indigenous Peoples*, Committee on the Elimination of Racial Discrimination, 51st sess, [23], [4] (d), UN Doc A/52/18, annex V (1997).

- *That the use of special measures must not lead to the maintenance of separate rights for separate groups;⁴ and*
- *That special measures must be consistent with the Convention on the Elimination of Racial Discrimination, including article 2 (1)(a), and as explained by the Declaration on the Rights of Indigenous Peoples.⁵*

Recommendation 7

That the Bill be amended to include a positive duty on all public sector organisations to eliminate discrimination and harassment based on all protected attributes.

Recommendation 8

That the vicarious liability provisions in the Bill be amended to include a requirement that ALL reasonable precautions must have been taken, and due diligence exercised, to avoid the conduct for vicarious liability not to apply.

Recommendation 9

That the Bill be amended to articulate areas of public life as the ‘political, economic, social, cultural or any other field of public life’. The current list of areas under clause 22(2) may be retained to serve as examples.

Recommendation 10

That the Bill be amended to allow for representative complaints to be taken to the Federal Court and the Federal Magistrates Court so long as the representative body can demonstrate a connection to the subject matter of the complaint.

Recommendation 11

That in partnership with the Bill a substantial increase in funding be provided to legal assistance services, including ATSILS, Community Legal Centres and Legal Aid Commissions in order to assist individuals in accessing remedies for instances of discrimination.

Recommendation 12

That consideration again be given to amending the role and functions of the AHRC to include:

- *Empowering the AHRC to inquire into State and Territory laws and practices;*
- *Empowering the AHRC to institute proceedings in its own name when issues of fact or law affect a number of people;*
- *Empowering the AHRC to have ‘naming and shaming’ powers and to issue compliance notices post investigations;*

⁴ *General Recommendation No. 23: Indigenous Peoples*, Committee on the Elimination of Racial Discrimination, 51st sess, [19], UN Doc A/52/18, annex V (1997).

⁵ *Ibid*, 18.

- *Empowering the AHRC to enter into enforceable agreements with duty holders and seek enforcement of such through the Administrative Appeals Tribunal;*
- *Assigning each protected attribute its own Commissioner who has a statutory obligation to produce an annual report on progress towards equality to which the Government be required to formally respond to within 6 months; and*
- *Enshrining the amicus curiae and intervention powers of AHRC as a right so that leave from the court is not required.*

4. Objects of the Act

The NATSILS are pleased to see that the objects of the Act include references to eliminating discrimination, promoting substantive equality and giving effect to Australia's international human rights obligations. However, we are concerned that clause 3 (2) does not include the *Declaration on the Rights of Indigenous Peoples*⁶ (The Declaration) as one of the human rights instruments relevant to the objects of the act. While not a binding international human rights treaty, the Declaration is increasingly be recognised as customary international law and is the single most important human rights instrument in relation to protecting the rights of Aboriginal and Torres Strait Islander peoples. Given the high levels and broad range of discrimination faced by Aboriginal and Torres Strait Islander peoples in Australia, the Declaration is the only instrument that comprehensively protects their unique rights as the First Peoples of Australia.

Recommendation 1

That the definition of human rights instruments as per clause 3(2) be expanded to include the Declaration on the Rights of Indigenous Peoples.

5. Application to State and Territory Governments

The NATSILS previously recommended that the highest standard be maintained in relation to the application of the Bill to State and Territory governments and instrumentalities. Hence, we are pleased to see that the Bill binds the Commonwealth in all its capacities under clause 15.

6. Protected Attributes

6.1 Additional Attributes

The NATSILS are disappointed that the Government has missed the opportunity to further expand the list of protected attributes to cover several emerging attributes from which discrimination can often occur.

6.1.1 Race

Race as defined under the *Racial Discrimination Act 1975* (Cth) (RDA) has been interpreted quite generously by the courts and case law has found that in addition to colour, descent

⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007.

and national or ethnic origin race also includes Aboriginal language groups and other smaller definitional units.⁷ In our previous submission, the NATSILS recommended that the wording in the Act defining race should be refined to reflect this. The NATSILS are disappointed that such has not been reflected in the Bill and would like to reiterate the importance of this recommendation.

Recommendation 2

That the definition of race as a protected attribute be reconsidered to more accurately reflect its interpretation in case law.

6.1.2 Irrelevant Criminal Record

The NATSILS are disappointed that our previous recommendation calling for a person's irrelevant criminal record to be included in the list of protected attributes has not been accepted. It is well documented that Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system. People with criminal records are regularly discriminated against even if their criminal record is very old and no longer relevant. This form of discrimination persists despite research demonstrating that a person's prior criminal record is an unreliable indicator of future behaviour.⁸ Australia has ratified the International Labour Organisation Convention Concerning Discrimination in Respect of Employment and Occupation (ILO 111).⁹ In addition to specifying certain grounds of non-discrimination, the ILO 111 also leaves room for States parties to add further grounds of non-discrimination. In 1989, Australia added a number of further grounds, including "criminal record".¹⁰ There is therefore, an obligation on Australian governments to pursue policies to ensure that discrimination on the ground of irrelevant criminal record is eliminated.

There are foreseeable situations whereby a person's criminal record should justifiably cause them to be discriminated against. For example, an individual convicted of sex offences against a child being discriminated against in employment as it relates to jobs involving interaction with children. However, by using the wording 'irrelevant criminal record' in addition to the exception for justifiable conduct under clause 23 of the Bill, such situations would be free from the definition of discrimination.

Recommendation 3

That a person's irrelevant criminal record be included in the list of protected attributes covered in the Bill.

⁷ See *Gerhardy v Brown* (1985) 159 CLR 70.

⁸ UK research suggests that most people who are found guilty of an offence, only offend once, and the offences are more likely to have been committed when the person was young. See Julian Prime et al, "Criminal careers of those born between 1953 and 1978", *Home Office Statistical Bulletin No. 4* (2001) available at <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=189868>. See also Federation of Community Legal Centres (Vic), *Submission: Draft Model Spent Convictions Bill* (2009), 6.

⁹ *Convention concerning Discrimination in Respect of Employment and Occupation, Adopted 25 June 1958*. Ratified by Australia in 1973 and incorporated into domestic law by virtue of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

¹⁰ *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) 4 (a) (iii).

6.1.3 Social Status

The NATSILS are disappointed that our previous recommendation calling for a person's social status to be included in the list of protected attributes has not been accepted. The Human Rights Law Centre (HRLC) has defined the term 'social status' to include not only persons who are homeless, but also those who are at risk of – or recovering from – a period of homelessness. Accordingly, they define 'social status' to mean a person's status as homeless, unemployed or a recipient of social security payments.¹¹

The Committee on Economic, Social and Cultural Affairs acknowledges that:¹²

A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

In 2006 a study by the Public Interest Law Clearing House Homeless Persons Legal Clinic found that amongst 183 people experiencing homelessness, almost 70 per cent were treated unfairly in the area of accommodation on the grounds of homelessness or social status. A further 60 per cent experienced unfair treatment on the same grounds in the area of goods and services. Despite the strong evidence that discrimination on the basis of social status is prevalent, it currently remains lawful in all Australian jurisdictions. By contrast, a number of overseas jurisdictions provide legal protections against social status discrimination including New Zealand, Canada, the USA and the UK.

Recommendation 4

That a person's social status be included in the list of protected attributes covered by the Bill.

6.1.4 Victim of Family Violence

The NATSILS are disappointed that our previous recommendation calling for a person's status as a victim of family violence to be included in the list of protected attributes has not been accepted. The United Nations Committee on the Elimination of Discrimination Against Women acknowledges that gender-based violence such as family violence is a form of discrimination in itself, which compounds other inequalities in public life.¹³ Including a person's status as a victim of family violence as a protected attribute would help protect victims of family violence from further harm, maintain their ability to escape their situation, and encourage victim's to speak up by providing a protective framework. Given the high rates of family violence within Aboriginal and Torres Strait Islander communities, this would be a particularly important development for Aboriginal and Torres Strait Islander peoples. Family violence should be defined broadly to include both physical and non-physical forms

¹¹ UN Economic and Social Council, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009), [19].

¹² Committee on Social, Economic and Cultural Affairs, General Comment No. 20, 2 July 2009 available at <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc>.

¹³ *General Comment No. 19*, Committee on the Elimination of Discrimination Against Women, 11th sess, [23], UN Doc A/47/38 (1992).

of violence perpetrated by a family member or other person who is in a domestic relationship with the victim.¹⁴

Financial independence and access to services are vital for many people trying to escape violent relationships. Research has shown, however, that victims of family violence tend to experience discrimination and inequality in the workplace.¹⁵ A survey conducted by the Australian Domestic and Family Violence Clearinghouse found that being a victim of family violence limited workers' capacity to obtain secure employment. It also resulted in workers being tired, distracted, unwell or late, thereby limiting their ability to hold down jobs and progress in the workplace.¹⁶ Even though many victims do not disclose the reasons for their decline in performance either for fear of the consequences or because they believe the information is not relevant in the employment context, such should still be covered a general characteristics extension, as discussed below. In addition, victims of domestic violence also report experiencing discrimination in access to goods and services and the provision of housing.¹⁷

Recommendation 5

That a person's status as a victim of family violence be included in the list of protected attributes covered by the Bill.

6.1.5 Characteristics Extension

As discrimination frequently occurs because of concerns about characteristics which members of a group relating to a protected attribute either often have, or have imputed to them, the NATSILS previously recommended that a general characteristics extension be included in the Bill. We are pleased to see that this has occurred under clause 17(2).

6.2 Intersectional Discrimination

In its submission to the previous Discussion Paper, the AHRC noted that:

...when a complaint is made alleging discrimination on the basis of more than one attribute or on the basis of a combination of attributes, the complaint is routinely accepted by the Commission and handled as a single complaint rather than as a series of complaints on separate grounds. The effect of expressly providing for intersectional coverage would in the Commission's view be to make the present position clearer and to avoid unnecessary

¹⁴ Belinda Smith and Tashina Orchiston, *Domestic Violence Victims at Work: The Role of Anti-Discrimination Law* (2011) 16 – 17.

¹⁵ Belinda Smith and Tashina Orchiston, *Domestic Violence Victims at Work: The Role of Anti-Discrimination Law* (2011) 16 – 17. See also: Braaf and Meyreing, *Seeking Security: Women's Economic Wellbeing During and Following Domestic Violence*, Australian Domestic and Family Violence Clearinghouse, March 2011, available at www.austdvclearinghouse.unsw.edu.au/financial_security.htm; VicHealth, *National Survey on Community Attitudes to Violence Against Women 2009* (March 2010) 47; McFerran, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse, October 2011.

¹⁶ McFerran, L, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse, October 2011.

¹⁷ Human Rights Law Centre, *Realising the Rights to Equality* (2012), 26.

disputes, rather than creating a new set of obligations. The Commission anticipates that a simple and effective drafting approach to this issue can readily be identified.¹⁸

The NATSILS also endorsed this position and in the interest of clarity similarly recommended that the Bill should apply to discrimination based on one or more attributes. We are pleased to see that this has been included within the definitions of direct and indirect discrimination in the Bill.

6.3 Discrimination Based on Association

The rights of those associated with a person with a protected attribute as it relates to discrimination are already protected in the *Disability Discrimination Act 1992* (Cth) (DDA), RDA and most State and Territory discrimination and equal opportunity Acts. The NATSILS are pleased that the Government has honoured its commitment to the non-diminution of current protections in this instance, and have carried such protections over to the Bill in relation to all protected attributes.

In addition, the NATSILS also welcome the fact that coverage is also given to a person, or an associate of a person, who has possessed one of the protected attributes in the past or may possess one in the future.

7. Meaning of Discrimination

7.1 Defining Direct and Indirect Discrimination

The NATSILS previously recommended that separate tests be retained for direct and indirect discrimination for the following reasons:

- Direct and indirect discrimination are distinct forms of discrimination and it is important to recognise them as such. Combining them may result in confusion and a weaker definition than if kept separate;
- Aboriginal and Torres Strait Islander Legal Services' (ATSILS) clients are often victims of systemic discrimination which more frequently takes the form of indirect discrimination and thus, having a clear and concise definition of indirect discrimination is important; and
- Indirect discrimination allows for some actions that are 'reasonable' but would otherwise be discriminatory and there is concern that if a combined definition was created such exceptions could weaken current protections against direct discrimination.

Hence, we are pleased to see that the Bill contains separate tests for direct and indirect discrimination under clause 19.

NATSILS further recommended that the test for direct discrimination be based on the detriment test as used in the Australian Capital Territory and Victoria, and that the test for

¹⁸ Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination Law: Australian Human Rights Commission Submission to the Attorney-general's Department* (2001), 25.

indirect discrimination be based on that used in the *Age Discrimination Act 2004* (Cth)(ADA) and the *Sex Discrimination Act 1984* (Cth) (SDA). We are satisfied that the definitions under clause 19(1) and (3), in conjunction with the definition of ‘justifiable conduct’ under clause 23(3) and (4), address our recommendations.

We also welcome the explicit prohibition against harassment based on any protected attribute at clause 19(2) which brings the Bill in line with well-established domestic case law and international principles of human rights.

7.2 Special Measures Provisions

In the interests of consistency and reducing complexity, the NATSILS previously recommended that a single special measures provision applying to all protected attributes be included in the Bill. We are pleased to see that this has occurred. However, the NATSILS also previously expressed our concerns that the special measures provisions contained in the RDA are too broad and fail to meet Australia’s international human rights obligations and that such should be remedied in the new Bill.

Recommendation 6

That the special measures provisions in the Bill be amended to encompass the following elements as prescribed by international human rights law:

- *An explicit statement that special measures must be a proportionate means of achieving their purpose of securing substantive equality;¹⁹*
- *That proportionality means that the measure must be the least restrictive option for achieving substantive equality;*
- *That special measures confer a direct benefit on the affected group;*
- *That membership of the group subject to special measures must be self-identified;²⁰*
- *That the free, prior and informed consent, as defined by international law, of the group/s affected is required for a special measure to be legitimate;²¹*
- *That the use of special measures must not lead to the maintenance of separate rights for separate groups;²² and*

¹⁹ *General Recommendation No. 32*, Committee on the Elimination of Racial Discrimination, 75th sess, [11], UN Doc CERD/C/GC/32 (2009).

²⁰ *Ibid*, 34.

²¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, I-14668, art 1 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, I-14531, art 1 (entered into force 3 January 1976); *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 3, 18, 19; *General Recommendation No. 23: Indigenous Peoples*, Committee on the Elimination of Racial Discrimination, 51st sess, [23], [4] (d), UN Doc A/52/18, annex V (1997).

²² *Ibid*, 19.

- *That special measures must be consistent with the Convention on the Elimination of Racial Discrimination, including article 2 (1)(a), and as explained by the Declaration on the Rights of Indigenous Peoples.*²³

With specific regard to the consent of affected groups, Justice Brennan in *Gerhardy v Brown*, in considering whether a law applying to only one race could be classified as a special measure, emphasised the need for consultation with the affected group:

The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.²⁴

The requirement for consent is essential for a measure to be meaningfully declared as being for the ‘advancement of certain racial or ethnic groups’.²⁵ This view is consistent with the right to self-determination under Articles 1 of both the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, which are concerned with the right of people to have a say in matters relating to their own welfare. Furthermore, in direct relation to Aboriginal and Torres Strait Islander peoples, the Declaration on the Rights of Indigenous Peoples²⁶ and the Committee on the Elimination of Racial Discrimination²⁷ has clarified that Australian governments have an obligation to ensure that no decisions directly relating to Aboriginal and Torres Strait Islander peoples’ rights and interests are made without their informed consent. Methods of consultation and obtaining consent should also be consistent with international human rights standards and thus, reflect Aboriginal and Torres Strait Islander models of decision-making.²⁸

7.3 Positive Duty on Public Sector Organisations

Public sector organisations are supposed to be model organisations, setting standards for others to follow. Hence, the NATSILS previously recommended adopting a positive duty that would establish a proactive approach to preventing discrimination as opposed to relying on a reactive system that only deals with discrimination after the fact. A positive duty on the public sector to eliminate discrimination and harassment would also relieve the burden placed on individual complainants to enforce human rights standards as they apply to discrimination. Such a positive duty already exists under the *Equal Opportunity Act (Vic) 2010* and we are disappointed that a similar duty has not been adopted in the Bill.

²³ *Ibid*, 18.

²⁴ *Gerhardy v Brown (1985)* 159 CLR 70, (Brennan J).

²⁵ see Article 1(4) of the *Convention on the Elimination of Racial Discrimination* and section 8 of the *Racial Discrimination Act 1975 (Cth)*.

²⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 3, 18, 19.

²⁷ *General Recommendation No. 23: Indigenous Peoples*, Committee on the Elimination of Racial Discrimination, 51st sess, [4] (d), UN Doc A/52/18, annex V (1997); *General Recommendation No. 32*, Committee on the Elimination of Racial Discrimination, 75th sess, [18], UN Doc CERD/C/GC/32 (2009).

²⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, arts 18, 19.

In adopting a positive duty to eliminate discrimination and harassment, what constitutes compliance would need to be clarified so that duty holders are aware of their obligations. For example, as evidence of compliance with a positive duty to eliminate discrimination and harassment, duty holders could point to organisational policies to prevent discrimination, training of staff in what constitutes discrimination, and the development of action plans along with monitoring and measuring tools for the implementation of such. Furthermore, guidelines for compliance could also be developed by the AHRC or the Commonwealth Attorney-General's Department.

Recommendation 7

That the Bill be amended to include a positive duty on all public sector organisations to eliminate discrimination and harassment based on all protected attributes.

7.4 Vicarious Liability

The NATSILS previously recommended the adoption of vicarious liability provisions based on those contained within the RDA and SDA and while the provisions in the Bill under clauses 56-58 appear to generally comply with this model, they fail to include a requirement to take *all* reasonable precautions.

Recommendation 8

That the vicarious liability provisions in the Bill be amended to include a requirement that ALL reasonable precautions must have been taken, and due diligence exercised, to avoid the conduct for vicarious liability not to apply.

8. Protected Areas of Public Life

8.1 Articulating Areas of Public Life

While the NATSILS acknowledge that the Bill as it relates to defining areas of public life does specify that areas of public life are not limited to those areas listed under clause 22(2), we do reassert our previous recommendation that a broader definition of public life, similar to that included within the RDA, be included in the Bill.

Recommendation 9

That the Bill be amended to articulate areas of public life as the 'political, economic, social, cultural or any other field of public life'. The current list of areas under clause 22(2) may be retained to serve as examples.

8.2 Equality Before the Law

The NATSILS are pleased that the right to equality before the law has been maintained in relation to race, as is in line with our previous recommendation.

9. Exceptions and Exemptions

9.1 General Limitations Clause

The NATSILS previously recommended that the Bill adopt a general limitations clause specifying that conduct which is necessary to achieve a legitimate aim and is a proportionate means of achieving that aim is not discriminatory. We are satisfied that the provision under clause 23 adequately address this recommendation.

9.2 Temporary Exemptions

The NATSILS previously recommended that temporary exemptions continue to be made available under the Bill so long as the exemption is in line with the objects of the Act and is subject to approval by the AHRC. We are satisfied that the provision under clause 83 and 84 address this recommendation.

9.3 Partnerships

The NATSILS previously recommended that in order to promote consistency the Bill should apply to all partnerships regardless of size and we are pleased to see that such has been accommodated within the Bill.

10. Complaints and Compliance Framework

10.1 Mechanisms to Assist Duty Holders

The NATSILS previously recommended that a range of proactive measures to promote compliance should be included wherever possible. We are pleased to see that under clauses 62-78 the Bill contains numerous measures to assist compliance including empowering the Minister to develop disability standards and allowing the AHRC to develop guidelines and compliance codes, review policies and programs for compliance, and receive and publish voluntary non-binding action plans. These measures will provide duty holders with increased certainty as to their obligations and promote proactive compliance. They will also go some way to relieving the burden placed on individual complainants to enforce standards on behalf of the community as a whole.

Given that the AHRC has noted that a lack of certainty around the legality of proposed special measures has discouraged businesses from using them, the NATSILS previously recommended that duty holders be permitted to voluntarily submit proposed special measures to the AHRC for a determination as to their legality, without affecting the substantive obligations placed on them by the Act. We are pleased to see that provisions for such have been included in the Bill under clauses 79-82.

10.2 AHRC Investigative Powers

Equipping the AHRC with strong and effective inquiry/investigation powers is of critical importance for complainants who often do not have access to the information that they

need to advance their complaint which the AHRC may be able to obtain. Such powers are essential in addressing the imbalance of power that can often exist in the complaints process between the complainant and the accused duty holder. For these purposes, the NATSILS previously recommended that the maintenance of provisions in section 46PM of the *Australian Human Rights Commission Act 1986* (Cth) allowing people with a reasonable excuse, including incriminating themselves, to not produce information or documents relevant to an inquiry as requested by the AHRC President, be reconsidered. The NATSILS are pleased that the provisions under clause 107 in the Bill maintain the AHRC's powers to require the provision of information or production of documents but do not replicate clause 46PM of the *Australian Human Rights Commission Act 1986* (Cth).

10.3 Compulsory Conciliation

The NATSILS previously recommended that parties continue to be required to go through the AHRC complaint process and attempt conciliation before being permitted to proceed to the court system. Doing so encourages the early resolution of disputes outside of the court system and also gives the parties an opportunity to clarify the circumstances of the complaint and to obtain the necessary information to proceed. This is particularly the case for the complainant who may not have access to the information or evidence that they need and this stage gives the AHRC time to investigate and obtain such. As such, the NATSILS are pleased to see that clause 119 of the Bill maintains the requirement that individuals must go through the AHRC process and have their complaint closed before they can proceed to court.

10.4 Court Process

10.4.1 Burden of Proof

The NATSILS previously recommended that the burden of proof should be amended so that it shifts to the respondent once the complainant has established a *prima facie* case. We are pleased that clause 124 appears to address this recommendation.

10.4.2 Litigation Costs

The NATSILS previously outlined the barriers to complainants that were created by the system of awarding costs following the event and recommended moving towards a no costs jurisdiction except in cases of vexatious complaints or where one party has acted unreasonably during the proceedings. We are satisfied that the provisions under clause 133 adequately address our recommendation.

10.4.3 Representative Complaints

The NATSILS previously recommended that representative complaints should not be restricted to processes under the AHRC but rather should be allowed to be taken to the Federal Court or the Federal Magistrates Court. We are seriously concerned that provisions permitting such have not been included in the Bill.

The Government's previous Discussion Paper included several strong arguments for allowing representative complaints to proceed beyond conciliation and to be heard in the courts, including that it would:

- Make the complaints process more efficient and user-friendly;
- Assist in addressing cases of systemic disadvantage which are more difficult to raise with an individual complaint;
- Allow genuine cases which previously would not have proceeded past conciliation due to the difficulties faced by individual complainants in engaging with the complexities and costs of the court system, to be heard in the courts; and
- Lead to more judicial consideration of important provisions, which could provide greater certainty as to obligations over time.

In addition to these points, the NATSILS also suggested that in order to protect against an increase in unmeritorious complaints a requirement that representative bodies must establish a demonstrated connection to the subject matter of the complaint also be included.

Recommendation 10

That the Bill be amended to allow for representative complaints to be taken to the Federal Court and the Federal Magistrates Court so long as the representative body can demonstrate a connection to the subject matter of the complaint.

10.4.4 Resourcing

Clause 130 of the Bill generally maintains existing provisions in providing that a person involved in proceedings before the court can apply to the Attorney-General's Department for the provision of financial assistance for legal representation, but further requires that reasonableness and financial hardship be shown.

The NATSILS previously expressed our concerns in relation to the central role that legal assistance services play in facilitating access to the anti-discrimination system and the critical under-resourcing of such services. The HRLC has also previously noted that:

Australia has an obligation to ensure that victims of discrimination have access to effective remedies through our legal system. Maintaining appropriate funding to legal aid and community legal centres – which assist victims of discrimination in navigating the legal systems – is a vital component of this obligation. Accessibility of the legal system depends on awareness of legal rights and of available procedures to enforce those rights. When access to legal assistance is not available, meritorious claims or defences may not be pursued or may not be successful.²⁹

In a 2009 submission to the Federal Government, the Law Council of Australia further stated that:

Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and

²⁹ Victorian Law Reform Commission (VLRC), *Civil Justice Review Report 14*, 2008, 607.

cultural – be removed for all Australians. The legal assistance system is critical in overcoming these barriers.³⁰

An increase in funding would also be consistent with the recommendations of the Senate Committee Inquiry into the SDA.³¹

Recommendation 11

That in partnership with the Bill a substantial increase in funding be provided to legal assistance services, including ATSILS, Community Legal Centres and Legal Aid Commissions in order to assist individuals in accessing remedies for instances of discrimination.

10.5 Role and Functions of the AHRC

The NATSILS previously made several recommendations regarding how the role and functions of the AHRC could be strengthened to enable the AHRC to provide a more effective compliance regime. Many of these same recommendations were also made by many other interested parties who made submission in the previous period of consultation. The NATSILS are concerned therefore, that most of these recommendations appear to have been overlooked in the drafting of the Bill.

Recommendation 12

That consideration again be given to amending the role and functions of the AHRC to include:

- *Empowering the AHRC to inquire into State and Territory laws and practices;*
- *Empowering the AHRC to institute proceedings in its own name when issues of fact or law affect a number of people;*
- *Empowering the AHRC to have ‘naming and shaming’ powers and to issue compliance notices post investigations;*
- *Empowering the AHRC to enter into enforceable agreements with duty holders and seek enforcement of such through the Administrative Appeals Tribunal;*
- *Assigning each protected attribute its own Commissioner who has a statutory obligation to produce an annual report on progress towards equality to which the Government be required to formally respond to within 6 months; and*
- *Enshrining the amicus curiae and intervention powers of AHRC as a right so that leave from the court is not required.*

³⁰ Law Council of Australia, *Legal Aid and Access to Justice Funding 2009-10 Federal Budget*, 9 January 2009.

³¹ Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) Recommendation 24, 11.63.

