INTRODUCTION

Legislation prohibiting discrimination exists at both the federal and state and territory levels in Australia. The states and territories each have a single ‘anti-discrimination’ or ‘equal opportunity’ Act and there are five federal Acts, namely the Racial Discrimination Act 1975 (Cth) (“RDA”), the Sex Discrimination Act 1984 (Cth) (“SDA”), the Disability Discrimination Act 1992 (Cth) (“DDA”), the Age Discrimination Act 2004 (Cth) (“ADA”), and the largely procedural Australian Human Rights Commission Act 1986 (Cth) (“AHRC Act”). Although there is some variation in coverage and definitions across the jurisdictions, the legislation is very similar, as is the complaint resolution model. This paper focuses on the federal laws because they have recently undergone an extensive review.

In 2010 the federal government announced that it would review the five federal Acts with a view to consolidating them into one Act. A secondary goal of this review was to reduce the regulatory burden on business owing to inconsistencies in the Acts in terms of coverage, their definitions of unlawful discrimination and the exceptions. In addition, during the 2010 election campaign, the government committed to introducing provisions to prohibit sexuality discrimination if it was re-elected. An exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) (“HRADB”) was

1 Eg the Equal Opportunity Act 2010 (Vic).
3 Note the language used by Lindsay Tanner in the government’s media release: “Consolidating all Commonwealth anti-discrimination legislation into one Act will reduce the regulatory burden and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and business, particularly small business”: ibid.
4 The government started this process after its election in 2007 by giving same sex couples the same rights and entitlements as de facto couples in relation to superannuation, various taxes, social security and child support.
released in November 2012 after extensive public consultation. The government immediately referred the Bill to the Senate Legal and Constitutional Affairs Legislation Committee (“Senate Committee”) for a quick public inquiry and the Committee’s final report was released on 21 February 2013. At the time of writing, it is not certain what will become of the Bill, especially given that the federal election is to be held in September 2013, so there are limited opportunities for the Bill to be passed. Only the reforms to prohibit sexuality discrimination have bi-partisan support.

Part 1 of this paper presents an overview of the substantive law, concentrating on the law at the federal level, and identifies the problems with the law, including definitions of discrimination and the onus of proof, and considers whether the HRADB will address these problems. Part 2 examines the procedural law, in particular the individual enforcement model, and identifies problems with this model. The Bill proposes only minor procedural changes. Notably, it does not propose to change the role of the statutory equal opportunity commission, which is essentially a neutral complaints handler. Part 3 of the paper compares the role of the Australian Human Rights Commission (“AHRC”) with equivalent institutions in the United States of America, Ireland and the United Kingdom and poses questions for consideration as to how the AHRC’s role could be reconceptualised so that it is able to tackle discrimination and promote equality more effectively.

PART 1 - AUSTRALIA’S ANTI-DISCRIMINATION LAWS

1. The Prohibited Grounds of Discrimination

Discrimination is prohibited on a range of grounds including race, colour, national origin, sex, marital status, pregnancy, disability and age. To meet the government’s election promise, the HRADB proposes to protect two additional attributes – sexual orientation and gender identity. It also proposes to prohibit workplace discrimination based on industrial history, medical history, nationality or citizenship, political opinion, religion and social origin which are grounds listed in four ILO instruments that can currently only be the subject of a complaint to the AHRC but are otherwise unenforceable. In addition, the Senate Committee recommended adding ‘domestic violence’ and

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5 The exposure draft was released on 20 November 2012 and submissions to the Senate Committee closed on 21 December 2012. The Committee received 3,464 submissions and held three days of public hearings in early 2013.
7 See the dissenting report by the Coalition Senators: ibid from 100.
8 In their early days, only race and sex discrimination were prohibited but the grounds have been expanded over the last three decades and this process is ongoing.
9 Clause 17. The Senate Committee recommended changes to the drafting of the definitions of these attributes: above n6, Recommendations 1 and 2.
10 Clause 17.
11 As listed in cl 3(3). The objects of the Bill include to give effect to Australia’s obligations under ILO instruments: cl 3(1).
12 See the definition of ‘discrimination’ in the AHRC Act s 3(b)(ii), s 11(f) and Part II Div 4, and the Australian Human Rights Commission Regulations 1989 (Cth) reg 4.
‘irrelevant criminal record’ as protected attributes but at the time of writing, the government had not said whether it would implement these recommendations.

Discrimination is currently prohibited in the areas of employment, education and access to goods and services but the HRADB proposes a simpler phrase, namely that discrimination is unlawful if it is “connected with any area of public life”.

2. Definitions of Discrimination

Australian law prohibits direct discrimination (disparate treatment) and indirect discrimination (disparate impact), as well as sexual harassment in employment. However, the statutory definitions of direct and indirect discrimination have been interpreted in a technical, restrictive fashion which makes them difficult to apply. For instance, the definition direct discrimination based on sex is a situation where the discriminator:

“treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.”

The most difficult aspects of this definition are identifying a comparator (particularly in disability discrimination cases) and establishing a causal link between the less favourable treatment and the prohibited ground. This is compounded by the fact that the complainant bears the onus of proof.

Indirect sex discrimination is defined as is a situation where the discriminator:

“discriminates against another person (the aggrieved person ) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.”

The complainant bears the onus of proof for establishing the existence of a condition, requirement or practice which had a disadvantageous effect but if the respondent can show that this was reasonable, the complainant’s claim will fail.

Although the HRADB specifically avoids using the terms ‘direct’ and ‘indirect’ discrimination in defining discrimination, the phraseology it uses is very familiar. Clause 19(1) states:

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13 Above n6, Recommendations 3-5.
14 Clause 22. The so-called ILO grounds are only prohibited in work and work-related areas: cl 17(3).
15 Except for the RDA which uses the definitions from the International Convention on the Elimination of all forms of Racial Discrimination (“CERD”).
16 As discussed below, as most cases are settled, the courts have had very few opportunities to provide any guidance on the meaning of the legislation.
17 SDA s 5(1).
18 SDA s 5(2).
19 See eg SDA s 7B. Only the federal Acts and the Acts in in Queensland and Victoria require the respondent to prove ‘reasonableness’. Elsewhere, the complainant must show that the requirement, condition or practice was unreasonable.
“A person (the first person) discriminates against another person if the first person treats, or proposes to treat, the other person unfavourably because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes.”

Clause 19(3) states:

“A person (the first person) discriminates against another person if:

(a) the first person imposes, or proposes to impose, a policy; and
(b) the policy has, or is likely to have, the effect of disadvantaging people who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and
(c) the other person has that attribute or combination of attributes.”

The only change is the reference to a combination of protected attributes which was included to target compounded or intersectional discrimination. Unsurprisingly, the proposed definitions are not contentious but they will not address the conceptual problems with the existing definitions. Proposed changes to the burden of proof may be of assistance.

3. The Burden of Proof

Currently, the complainant bears the burden of proof for establishing discrimination except in relation to the ‘reasonableness’ requirement in indirect discrimination. This presents a considerable hurdle for complainants, coupled with the restrictive interpretations of the law, and is one of the reasons most complaints are settled, as discussed in Part 2. The heavy burden of proof has been a long standing criticism of anti-discrimination law yet successive legislatures have failed to address it even though other jurisdictions have had a shifting burden of proof for some time.

One of the most innovative changes proposed in the HRADB is a shifting burden of proof. Clause 124(1) provides that once the complainant adduces evidence from which the court could decide, in the absence of any other explanation, that the respondent acted unlawfully, it will be presumed to be so unless the contrary is proved. The purpose of this clause is simply to require the person who is best able to explain the reason for their decision or behaviour – the respondent – to do so. The burden to do so will only arise once the complainant has established a prima facie case. Unfortunately, the clause has been misunderstood by commentators and members of the Senate Committee. It was incorrectly labelled as a ‘reverse onus’ which creates a ‘presumption of guilt’ and detractors said it will lead to a

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20 Clause 19(2) of the exposure draft appeared to qualify the definition of unfavourable treatment by stating that it could include “conduct that offends, insults or intimates” another person. Due to the potential infringement of this clause on the right to free speech, it was universally criticised during the consultation period and the Senate Committee recommended its removal: above n6, Recommendation 6. For this reason, it will not be discussed further.


22 The Victorian legislation was the most recent anti-discrimination statute to be reformed but the onus of proof was not changed.

23 Eg the United Kingdom: Equality Act 2010 (UK) s 136. See also the discussion in Allen above n21.
‘flood’ of unmeritorious claims which will cost employers to defend.\textsuperscript{24} Although the Senate Committee recommended the retention of this clause, it has been the subject of vociferous opposition which will no doubt continue when the Bill is introduced into Parliament.\textsuperscript{25}

4. Defences and Exceptions

The SDA, DDA and ADA contain numerous exceptions to the prohibition of discrimination which permit,\textsuperscript{26} for example hiring a woman to work in a shop because she will be required to attend a female dressing room, imposing criteria for the appointment of priests or ministers, youth wages and differently priced insurance premiums according to age or gender.\textsuperscript{27} Organisations can also seek an exemption for conduct that would otherwise be discriminatory, to permit female only sessions at swimming pools, for example.\textsuperscript{28}

The HRADB proposes to replace most of the exceptions with a general defence of ‘justification’ which requires the respondent show that conduct was undertaken in good faith for the purposes of achieving a legitimate aim and a reasonable person would consider the conduct would achieve the aim and was proportionate to that aim.\textsuperscript{29} This proposal is much simpler than having multiple exceptions to each form of discrimination and trying to predict the type of conduct which requires a legislative exception. It is also a stronger as a policy statement than having longstanding statutory exceptions to the Act because it requires the respondent to explain their conduct and justify why it was not discriminatory.

The most contentious exceptions are those in the SDA and ADA which permit discrimination by religious institutions in employment, education and the provision of goods and services. For example, an exception to the SDA provides that the prohibition against discrimination on the basis of sex, marital status or pregnancy in making an offer of employment or dismissing an employee does not make it “unlawful for a person to discriminate against another person on the ground of the other person’s sex, marital status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith.\textsuperscript{24}

\textsuperscript{24} See eg views of the dissenting Senators in the Senate Committee’s Report above n 6 103-10 and testimony extracted in majority report. See also newspaper reports in the days following the Bill’s release: Patricia Karvelas, ‘ALP lowers bar on discrimination laws’ (\textit{The Australian}, 20 November 2012); Chris Merritt, ‘New-look statute fails on harmonious front’ (\textit{The Australian}, 20 November 2012); Ben Packham, Lanai Vasek ‘Change in proof discrimination laws worries opposition’ (\textit{The Australian}, 20 November 2012); Dan Harrison, ‘Change in discrimination laws will swamp courts with complaints: Brandis’ (\textit{The Age}, 20 November 2012); Patricia Karvelas, Annabel Hepworth, ‘Bosses slam discrimination laws’ (\textit{The Australian}, 22 November 2012); James Allan, ‘Guilty or not business will pay’ (\textit{The Australian}, 22 November 2012).

\textsuperscript{25} Part of the explanation for the backlash against the shifting burden is that the relatively new \textit{Fair Work Act 2009} (Cth) contains a burden of proof provision which sets a lower threshold, namely a complainant is only required to make an allegation that conduct took place for an unlawful reason before the burden shifts: s 361.

\textsuperscript{26} The RDA, like CERD, does not contain exceptions.

\textsuperscript{27} See eg SDA s 30; ADA s 37.

\textsuperscript{28} See eg SDA, s 44.

\textsuperscript{29} Clause 23.
in order to avoid injury to the religious susceptibilities of adherents of that religion or creed." The exceptions have been used to perpetuate discrimination against same sex couples in the provision of aged care and against women in employment.

The government made a political commitment that it would not weaken the exceptions for religious organisations, yet the HRADB proposes a broader exception than the existing law. Although sex has been removed as an attribute, the exception in the HRADB permits discrimination by religious bodies and educational institutions not only on the basis of marital or relationship status, pregnancy, but also on the basis of the new grounds – gender identity, religion and sexual orientation – and potential pregnancy, which arguably covers all women to the age of menopause. The only way the exception has been restricted is that it will not apply if the discrimination is connected with the provision of Commonwealth funded aged-care.

Although the Senate Committee recommended the removal of the exception in relation to the provision of services where the discrimination would otherwise be unlawful and recommended that organisations which provide a service to the public and intend to rely on the exception must state this in a publicly available document, the day after the Senate Committee released its report, a national newspaper reported that the government had confirmed it would not stray beyond the original goals of the reform which did not include changing the exceptions given to religious organisations. Therefore, it is unlikely that the exceptions will be narrowed any further.

5. Special Measures and Reasonable Adjustments

As the discussion thus far shows, Australia’s anti-discrimination laws are predominantly concerned with prohibiting discrimination and providing redress for those who were subject to unlawful behaviour. The only means of promoting equality is through the exception for special measures in the anti-discrimination Acts or a requirement to make reasonable adjustments to enable participation.

In its only consideration of special measures, the High Court said they are an exception to the idea of formal equality and not to be regarded as a means of achieving equality. The HRADB takes a different view. It clearly states that special measures are not discrimination if they are taken to achieve

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30 Section 38(1). See also ss (2) and (3) and ADA s 35.
31 See views expressed in submissions received by the Senate Committee as summarised in its report: above n6 from 56.
32 Clause 33.
33 Clause 33(3).
34 Above n6, recommendations 11 and 12.
36 See eg RDA s 8(1), SDA s 7D.
37 See eg DDA ss 5(2), 6(2).
38 Gerhardy v Brown (1985) 159 CLR 70. For a similar interpretation see Proudfoot v Australian Capital Territory Board of Health (1992) EOC ¶92-417 in which it was held that to provide a female only health service is discriminatory but the service was valid as a special measure under s 33 of the SDA, which has since been repealed and replaced by s 7D.
equality. Special measures are defined as a law, policy or program, or conduct engaged in good faith for the sole or dominant purpose of advancing or achieving substantive equality for people, or a class of people, who have a particular protected attribute or combination of two or more protected attributes which a reasonable person would consider was necessary in order to advance or achieve substantive equality. In order to give the process more certainty and transparency, the HRADB proposes that a person seeking to impose a special measure would be able to seek a determination from the AHRC that the measure meets the criteria, which will indemnify the measure against a discrimination claim.

Reasonable adjustments only apply in the context of disability discrimination and they do not impose a positive obligation. The DDA states that the failure to make, or propose to make, reasonable adjustments for a person with a disability amounts to direct or indirect discrimination unless the reasonable adjustment would impose an unjustifiable hardship. The HRADB does not propose to impose a direct obligation on employers or service providers to make reasonable adjustments to enable a person with a disability to fully participate. Instead, it states that the exception for inherent requirements of work does not apply if a reasonable adjustment could have been made to enable a person with a disability to carry out the inherent requirements of a particular job and the adjustment was not made. In effect this imposes an obligation on an employer or service provider if they want to avoid a discrimination claim, though some employers may weigh the small risk of a claim being made and the cost to settle it against the cost of making a reasonable adjustment and choose not to make the adjustment.

The only other way the HRADB deals with these two important concepts is in the objects clause which acknowledges that it may be necessary to take special measures or make reasonable adjustments in order to achieve substantive equality.

PART 2 – THE PROCESS OF RESOLVING A DISCRIMINATION COMPLAINT

The process of resolving a federal discrimination complaint is much the same as in the states and territories. Under the federal system, a person who has experienced discrimination, whether in employment, education or the provision of goods and services, can lodge a complaint at the AHRC.

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39 Clause 21.
40 Clause 21(2).
41 Clauses 21(1), 79-82.
43 DDA ss 5(2), 6(2).
44 DDA s 4(1).
45 Clause 24(4).
46 Clause 3(e).
47 Each state and territory has its own statutory equal opportunity commission and complainants have the choice about whether to lodge the claim under federal law or local law. Since 2011, complainants in Victoria have had the option to lodge their complaint directly at the civil tribunal and bypass the equal opportunity commission’s process: Equal Opportunity Act 2010 (Vic) Part 8.
and if the complaint falls within the Commission’s jurisdiction and has substance, the AHRC will attempt to resolve the complaint through Alternative Dispute Resolution, which usually takes the form of conciliation.

The vast majority of discrimination complaints are settled or withdrawn. For example, during the 2011-2012 financial year, the AHRC received 2,610 complaints and 48% of them were conciliated. The most common grounds of complaints were disability, sex and race and most were about employment. Settlement agreements are confidential and the AHRC does not publish information about the outcomes the parties agreed upon. In a study conducted by the author the most common terms of settlements were found to be compensation, an apology and an employment reference.

If the complaint is not settled, the complainant can proceed to a hearing in the Federal Court but very few complaints reach that stage. For example, in 2006-2007 the AHRC received 1,779 discrimination complaints but in 2007, the Federal Courts only heard 12 discrimination matters and only two were successful. As discussed above, the difficulties of proving discrimination is one reason so few cases proceed to hearing. Other reasons include the cost of litigation, the likelihood of a low compensation award or of obtaining costs, the stress of a trial and the desire to resolve the matter. The decision to settle is also a commercial decision for respondents.

If a claim is successful, courts usually order compensation at relatively small amounts, even though some statutes permit a wide range of remedies, including systemic remedies. For example, between April 2000 and October 2011, the median amount of compensation awarded in successful claims brought under the RDA was $9,750.

The only changes the HRADB proposes to make to the complaint resolution model are to give the AHRC the power to terminate a complaint if it is satisfied that the complaint is “frivolous, vexatious, etc.”

48 AHRC, Annual Report 2011-2012, Appendix 3. Australia has a parallel industrial relations regime. Since 2010, employees can take court action for employment discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin: Fair Work Act 2009 (Cth), s 351. Employees are prevented from lodging a claim under both the industrial relations regime and the equal opportunity regime at either the federal level or in the states and territories: Fair Work Act 2009 (Cth), ss 732, 734.


50 AHRC Act Part IIB. A general civil tribunal hears complaints in the states and territories.

51 Allen, above n49, Table 1; Dominique Allen, ‘Remedying Discrimination: the Limits of the Law and the Need for a Systemic Approach’ (2010) 29(1) University of Tasmania Law Review 87, 98.

52 See further Allen above n49, from 786.

53 See eg AHRC Act s 46PO(4).

54 See further AHRC, Federal Discrimination Law (2011) available at http://www.austlii.edu.au/au/other/HRLRes/2011/1/ See also Allen, above n51, Figure 3, Table 1.
misconceived or lacking in substance"\textsuperscript{55} and to alter the costs provision so that each party is required to bear their own costs unless the court considers it to be appropriate to make an order for costs.\textsuperscript{56}

The AHRC’s role in the complaint resolution process is limited.\textsuperscript{57} The AHRC is required to receive, investigate and conciliate complaints as a neutral facilitator. It cannot initiate complaints, nor can it act on behalf of either party.\textsuperscript{58} The most ‘active’ role the AHRC and its equivalents can play is to act as an amicus curiae or to intervene in litigation.

The HRADB does not propose to change the AHRC’s role in the process, although it does propose introducing compliance mechanisms including giving the AHRC the power to issue guidelines, review an organisation’s policies and procedures, and develop compliance codes for industry which will limit liability if a claim is made.\textsuperscript{59} Since the government gave assurances that it would not increase the regulatory burden on business as part of the consolidation process,\textsuperscript{60} these mechanisms would be voluntary.

\textbf{PART 3 – IMPROVING THE EXISTING MODEL}

As described above, the proposed reform to Australia’s federal anti-discrimination law will consolidate five pieces of legislation and make valuable reforms to how discrimination is defined, understood and proved. As the government perceived the reform exercise to be one of consolidation and de-regulation, it has not proposed substantive changes to the enforcement model. Therefore, it has failed to address two fundamental problems with Australia’s anti-discrimination law.

First, the law is grounded in formal equality and the HRADB will not change that. The government rejected the introduction of a right to equality before the law, continuing to limit this to racial equality.\textsuperscript{61} The government also rejected introducing a positive duty to eliminate discrimination and promote equality, akin to s 149 of the \textit{Equality Act 2010} (UK). The only slight change is that the proposed objects clause recognises the principle of equality.\textsuperscript{62} In this context, it must be acknowledged that Australia’s suite of anti-discrimination laws are the country’s principal human rights documents. Unlike the United Kingdom and New Zealand, at a federal level Australia does not

\textsuperscript{55} Clause 117(2)(c).
\textsuperscript{56} Clause 133. The factors the court will consider when determining whether it is appropriate to make such an order are listed in cl 133(3).
\textsuperscript{57} This is also true of its state and territory counterparts.
\textsuperscript{58} The AHRC is also responsible for educating the Australian community about discrimination, reviewing legislation for human rights compliance, conducting investigations into issues of national importance and it can appear as an amicus curiae in some instances.
\textsuperscript{59} HRADB, Part 3-1.
\textsuperscript{60} See McClelland and Tanner, above n2.
\textsuperscript{61} Clause 60. Whether to enshrine the right to equality for Indigenous peoples in the Constitution was the subject of a separate inquiry: Expert Panel on Constitutional Recognition of Indigenous Australians, \textit{Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution} (2012).
\textsuperscript{62} Clause 3(1)(d).
have a human rights Act which contains a right to equality and unlike the United States of America, Canada and South Africa, the Australian Constitution does not protect equality. Indeed, the drafters of the Australian Constitution chose not to include such a clause because it would prevent discrimination. Thus anti-discrimination laws carry a heavy load.

Second, the changes proposed in the HRADB will not move the law away from the current individualised, fault-based reactive approach to addressing discrimination. The individual complaints based model remains unchanged and the AHRC will not play a role in enforcing the law either by assisting complainants or taking action in its own name. This was due to the government’s initial objective when it announced the reform – to decrease the regulatory burden on business and streamline the existing laws.

Part 3 focuses on the second problem because following the federal government’s recent failure to introduce a human rights Act and the Australian peoples’ reluctance to amend their Constitution, it is unlikely that an equality clause will be introduced in the near future.

Problems with the Current Enforcement Model

Australian anti-discrimination law is enforced by individuals who are required to identify the behaviour they have experienced as unlawful discrimination and choose to do something about it, namely lodge a complaint at the equal opportunity commission. As described above, most complaints are settled confidentially with an individualised remedy due to the heavy burden placed on complainants who choose to pursue a complaint.

The enforcement model has created three significant problems. First, most complaints are settled confidentially so the community is unaware of the type of discrimination which persists or how it is being addressed. Second, whether the complaint is settled or successfully proven at court, it results in an individualised remedy which may address the harm experienced by the complainant on a case-by-

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63 The Australian Capital Territory and Victoria have enacted human rights charters based on the International Covenant on Civil and Political Rights which contain a right to equality. See eg Human Rights Act 2004 (ACT) s 8. Despite an extensive national consultation in 2009 which recommended the introduction of a federal statutory human rights Act, the current government chose not to introduce one and the Coalition is diametrically opposed to one.

64 They were concerned that such a clause would prevent discrimination on the basis of race: see the Australian Constitution, s 51(vvvi). For an in-depth historical analysis, see John Williams, Bradsen, John, ‘The Perils of Inclusion: The Constitution and the Race Power’ (1997) 19 Adelaide Law Review 95.

65 It will continue to be able to intervene in proceedings relating to the Bill or human rights with leave of the court: HRADB cl 146(f).

66 Above n2

67 Of the 44 attempts to change the Constitution since Federation in 1901, only 8 have succeeded.

68 See above n61 on the move towards recognising Indigenous peoples in the Constitution though due to the failure of so many Constitutional referendums, this has been delayed in order to raise awareness amongst the Australian community about the legal significance of such recognition and to ensure that the referendum will succeed. In the interim the Act of Recognition Bill 2013 (Cth) passed the lower house in February 2013. It commits the next parliament to hold a referendum on Constitutional recognition.

69 Although it is worth noting that in some instances, compensation awards may not cover legal fees. See discussed in Allen above n49.
case basis but does nothing to address the experience of similarly situated individuals or broader inequality in the community. Third, the system is reactive so it is not designed to proactively promote equality nor does it give organisations an incentive to take the initiative and change their practices voluntarily. These problems are compounded by the limited role the AHRC plays in the process.

As Part 2 showed, the AHRC’s role in the complaint resolution process is to receive complaints and assist the parties to resolve them confidentially through conciliation. In exercising this role, the AHRC is expected to be neutral. It cannot advise or assist complainants or enforce compliance with the legislation. In addition, the AHRC is charged with educating the community about anti-discrimination law, it has the power to conduct public investigations about significant human rights issues and it can appear in court as an amicus curiae. In this role, the AHRC can act subjectively. The conflict of interest that would arise if the AHRC was able to conciliate complaints and litigate them is the reason why successive governments have not given it a role in enforcing the law, even though the government has given other Australian regulators such powers. Thus the system relies on the individual to ‘name, blame and claim’ otherwise nothing will be done about discrimination.

Models used in three comparable countries provide options for how the enforcement model in Australia could be modified either by retaining the existing model whereby the equal opportunity commission acts as a gatekeeper and resolves complaints or by separating the complaint resolution and enforcement functions.

**The Gatekeeper - the United States of America**

The Equal Employment Opportunity Commission (“EEOC”) is the federal agency responsible for investigating complaints about employment discrimination in the United States of America. Like the AHRC, the EEOC is a gatekeeper, so before a complainant can file a lawsuit in federal court they must file a ‘charge’ with the EEOC which must investigate each charge. The EEOC operates as a neutral fact-finder and if it finds that there is reasonable cause that discrimination has occurred, the Commission attempts to resolve the charge by conference, conciliation or persuasion.

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70 AHRC Act, s 46PV.
71 Most recently such concerns were expressed by the Senate Standing Committee on Legal and Constitutional Affairs, Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality (2008), 160.
72 Notably to the Fair Work Ombudsman which has been charged with enforcing federal industrial relations law since 2010. As noted above at n48, this includes a prohibition of discrimination in the workplace and the Fair Work Ombudsman has taken action against employers. See eg *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479 and *Fair Work Ombudsman v WKO Pty Ltd* [2012] FCA 1129; *Fair Work Ombudsman v Wongtas Pty Ltd (No 2)* [2012] FCA 30.
74 The EEOC enforces Title VII of the Civil Rights Act of 1964, 42 USC §2000e (1964), the Age Discrimination in Employment Act of 1967, 29 USC §633a (1967) and Titles I and V of the Americans with Disabilities Act of 1990 42 USC §§ 12101 (1990). Other federal institutions are responsible for non-employment based discrimination. For example, the Civil Rights Division of the Department of Justice is responsible for enforcing Title III of the Americans with Disabilities Act which prohibits discrimination on the basis of disability in public accommodation.

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75 Civil Rights Act, s 706(b).
cannot reach agreement, the complainant can litigate or the EEOC may decide to litigate the charge on the complainant’s behalf. The EEOC can also litigate if the complainant settles the charge because it acts in the public interest, so it can bring an action which will benefit other people.

**Separate Institutions – The United Kingdom and Ireland**

There are two equal opportunity commissions in the United Kingdom: the Equality and Human Rights Commission (“EHRC”) in Britain and the Equality Commission for Northern Ireland (“ECNI”). In Ireland, discrimination complaints are lodged at the Equality Tribunal which resolves them through mediation or adjudication. The Equality Authority is not responsible for handling or resolving complaints. The complaint resolution process is substantially the same in both jurisdictions. Complainants have direct access to the Equality Authority in Ireland and the Employment Tribunals and to civil courts for non-employment related complaints in the United Kingdom. The equal opportunity commissions are not responsible for complaint handling or conciliation in either country; they act as an enforcement agency. The primary way each agency has played a role in enforcement is by providing financial assistance to complainants so that they can pursue their claim.

In all three jurisdictions, the statutory equal opportunity commissions have used their enforcement powers (which primarily encompass providing assistance to complainants) to varying degrees of success. It is noted that the EEOC has faced difficulties in conducting enforcement activities due to budget restrictions and the resources consumed by its complaint handling activities. It seems therefore that the preferable model would be to divest the AHRC of its complaint handling and conciliation functions, and they could be undertaken by either a separate agency or the court. This would enable the AHRC to act as an advocate and concentrate on enforcement without any expectation that it would behave neutrally. In Australia, this model has been introduced in the federal industrial relations sphere but to date, it has not been considered for implementation in the anti-discrimination sphere which has always been regarded as separate from industrial relations.

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69 In October 2007, the three British equality commissions – the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission – were merged into one body, which is responsible for all prohibited forms of discrimination.
71 For instance, during its existence, complaint handling has consumed most of the EEOC’s resources, leaving insufficient funds for enforcement: Michael Z Green, ‘Proposing a New Paradigm for EEOC Enforcement After 35 years: Outsourcing Charge Processing by Mandatory Mediation’ (2001) 105 Dickinson Law Review 305, 309-10. Funding cuts have limited the EEOC’s enforcement activities and forced it to focus on charge processing, something the EEOC has also acknowledged: See EEOC, **US Equal Opportunity Commission, National Enforcement Plan** (1997), I, available at [http://www.eeoc.gov/eeoc/plan/nep.cfm](http://www.eeoc.gov/eeoc/plan/nep.cfm) (accessed 1/3/13).
72 I have argued elsewhere that enforcement should be undertaken strategically to maximise resources: Allen above n79 114-116.
73 See above n72.
The benefits of having a public institution charged with enforcing the law are: it will raise the law’s profile as more cases filter through to hearing or are settled without a confidentiality clause; the institution is more likely to achieve an outcome which benefits a group than an individual complainant; it encourages voluntary compliance by increasing the threat that action will be taken against non-compliant organisations; it increases access to justice through assisting complainants to pursue their claim; and it will remind the community that discrimination still exists but something is being done to address it.\textsuperscript{83}

A final consideration is the appropriate powers to give an enforcement institution in addition to enabling it to assist complainants financially and strategically. It is notable that other regulators can do more than just enforce the law by assisting complainants. For example, they can take action in their own name or have a range of escalating enforcement powers at their disposal to ensure compliance with the law.\textsuperscript{84} Therefore, in addition to reforming the model, it is also necessary to ensure that the equal opportunity commission possesses the most effective powers to enable it to ensure compliance with the law.

**ISSUES FOR DISCUSSION**

- What functions should an equal opportunity commission have? Which ones have been most effective?
- What has prevented such institutions from doing their job effectively?
- Should an equal opportunity commission ever be expected to be neutral?
- Is the ‘separate institutions’ model to be preferred?
- What enforcement activities should an equal opportunity commission engage in?

\textsuperscript{83} See further Allen above n79 from 123.

\textsuperscript{84} For example, the occupational health and safety regulators. See eg *Occupational Health And Safety Act 2004* (Vic) Part 2.