

Mainstreaming Equality in the ACT

An equality duty for the ACT *Discrimination Act*



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October 2008

Contents

ACKNOWLEDGEMENTS	5
PREFACE	6
ABBREVIATIONS	8
EXECUTIVE SUMMARY	10
RECOMMENDATIONS	12
INTRODUCTION	15
PART 1: WHY THE ACT <i>DISCRIMINATION ACT</i> NEEDS A POSITIVE DUTY	17
The complaints-led model	17
The nature of discrimination	18
Mainstreaming equality	19
PART 2: POSITIVE DUTIES THROUGHOUT AUSTRALIA AND THE WORLD	21
A. Employment legislation	21
Commonwealth employment legislation	21
NSW and QLD employment legislation	23
The Canadian and South African <i>Employment Equity Acts</i>	24
B. Australian discrimination legislation	25
The Commonwealth <i>Disability Discrimination Act</i>	25
The NT <i>Anti-Discrimination Act</i>	26
The WA Policy Framework for Substantive Equality	26
C. Proposed Australian Legislation	26
The proposed Victorian <i>Equality Act</i>	26
Proposed changes to the Commonwealth <i>Sex Discrimination Act</i>	28
D. Legislation outside Australia	29
Northern Ireland <i>Act</i>	29
Welsh <i>Government Act</i>	29
The South African <i>PEPUDA</i>	30
Equality duties in the UK	31
PART 3: A POSITIVE DUTY FOR THE ACT <i>DISCRIMINATION ACT</i>	32
The ACT discrimination law framework	32
A recommended model	33
A. Framing the duty	33
B. Grounds	36
C. Duty-bearers	36
D. Duty content	39
E. Enforcement	41

CONCLUSION	44
APPENDIX A:	45
A. Employment legislation	45
B. Australian legislation	56
C. Proposed Australian legislation	59
D. Legislation outside Australia	61
APPENDIX B:	71
BIBLIOGRAPHY	74
Legislation	74
Government reports / legislative reviews	79
Texts, books and journals	83
Other sources	88

Acknowledgements

This report was produced with the kind assistance of the staff of the ACT Human Rights Commission.

I would like to thank staff from the offices of the Commissioners for Human Rights & Discrimination, Health Services & Services for Older People, Disability & Community Services and Children & Young People for sharing their expertise and enthusiasm for this project.

Special thanks go to my immediate supervisor, Belinda Barnard for her time, generosity and support throughout my internship.

Preface

This report was completed for the ACT Human Rights Commission ("HRC") during a placement with the Australian National Internships Program.

The report, *Mainstreaming Equality in the ACT*, recommends the addition of an equality duty to the *Discrimination Act 1991* (ACT).

The existing Act prohibits discrimination on a number of grounds. A positive equality duty would require action, for example, to promote equality or eliminate discrimination.

The Commission has a mandate under the ACT's bill of rights, the *Human Rights Act 2004* ("HRA")¹ and administers the *Discrimination Act 1991* ("Discrimination Act") and the *Human Rights Commission Act 2005* (ACT).² That legislation confers a number of powers on the Commission, including the power to grant exemptions from the *Discrimination Act*.³ The office also handles complaints under the *Discrimination Act* and reports to the ACT Attorney-General about the effect of Territory laws on human rights.⁴

The *Discrimination Act* has not been substantially reviewed since its enactment in 1991 and the recent ratification of the *Convention on the Rights of Persons with Disabilities* and Federal Attorney-General's recent push to harmonise Australian discrimination law makes this an ideal time to consider the effectiveness of our statute.⁵ The HRC has made a number of requests for the government to review the legislation and a motion calling on the Stanhope Government to amend the *Discrimination Act* to include a positive duty was unanimously accepted at an ALP conference earlier this year.⁶ The HRC supports such a move and requested this report to aid review of the Act and help formulate a duty specifically for the ACT.

Positive duties that apply to a range of prohibited grounds for discrimination are a relatively recent development in discrimination law. With many jurisdictions finetuning new provisions or still at the proposal stage, academic texts quickly become outdated. Leading writers in the field contribute substantially to legislative proposals and reviews, as a result, much of the literature on positive duties focuses on single statutes and fails to draw on the experience of other jurisdictions. This report aims to build on lessons learned from a range of existing and proposed positive duties and therefore, largely relies on legislation and legislative reviews, which provide the most up-to-date information available.

¹ *Human Rights Act 2004* (ACT).

² *Discrimination Act 1991* (ACT); *Human Rights Commission Act 2005* (ACT).

³ *Discrimination Act 1991* (ACT) s109.

⁴ ACT Human Rights Commission, *Human Rights & Discrimination Commissioner "About Us"*, ACT Human Rights Commission
<<http://www.hrc.act.gov.au/index.cfm?MasterTypeID=2&SectionTypeID=12&MainTypeID=12>>
(Accessed 18 September, 2008).

⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A /RES/61/106, arts 5(3), 14(2), 24(2)(c), 24(5)(c), 27(1)(i), (entered into force 3 May 2008); Attorney-General Robert McClelland, 'Standing Committee of Attorneys-General', (Press release, 28 March 2008) 18.b. Accessed at
<<http://www.attorneygeneral.gov.au/www/Ministers/robertmc.nsf/Page/RWPA7434F9ED00CDACBCA25741A003910D7>> at 20 October 2008.

⁶ Human Rights Commission, *Annual Report 2007-2008* (2008) 10; ACT Labor, *Australian Labor Party Australian Capital Territory Branch Platform 2008-2009* (2008) 128.

Time and word restrictions unfortunately limit this report. The addition of an equality duty to the ACT *Discrimination Act* would require a careful drafting process, influenced by political and economic concerns beyond the scope of this report. While means of minimising the administrative burden created by positive duties have been considered, the report is primarily a recommendation and does not address arguments against enacting such a provision.

The recommendations describe a preferred model for an ACT duty, but are necessarily broad and provide multiple alternatives in order to optimise the chances of a duty being adopted and avoid ruling-out any options that might be considered. The recommendations envisage a duty that is in some ways similar to that included in the Stanhope Government's policy platform but seek to improve the proposed model and provide details not yet considered.

The report is however, unique in its up-to-date analysis of a broad range of existing and proposed positive duties and formulation of an equality duty specifically designed for the ACT. It is hoped that the report will aid review of the *Discrimination Act*, to improve the legislation as a means of achieving equality within the ACT.

Abbreviations

ACT	Australian Capital Territory
ACTCAT	Australian Capital Territory Civil and Administrative Tribunal
AHRC	Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission)
ALP	Australian Capital Territory Labor Party
APS	Australian Public Service
APS Commissioner	Public Service Commissioner
APS Act	<i>Public Service Act 1999</i> (Cth)
Canadian EEA	<i>Employment Equity Act</i> , SC, 1995, c. 44 (Canada)
CHRC	Canadian Human Rights Commission
Commonwealth Authorities Act	<i>Equal Employment Opportunity (Commonwealth Authorities) Act 1987</i> (Cth)
DDA	<i>Disability Discrimination Act 1992</i> (Cth)
DED	Disability Equality Duty
Discrimination Act	<i>Discrimination Act 1991</i> (ACT)
EEO Management Plan	Equal Employment Opportunity Management Plan
EEP	Employment Equity Plan
EOC	Victorian Equal Opportunity Commission
EOWWA	<i>Equal Opportunity for Women in the Workplace Act 1999</i> (Cth)
EOWW Agency	Equal Opportunity for Women in the Workplace Agency
EU	European Union
GED	Gender Equality Duty
NSW	New South Wales
NT	Northern Territory
PEPUDA	<i>Promotion of Equality and Prevention of Unfair</i>

	<i>Discrimination Act, No. 5 of 2000 (South Africa)</i>
QLD	Queensland
RED	Race Equality Duty
SA EEA	<i>Employment Equity Act, No. 55 of 1998 (South Africa)</i>
SDA	<i>Sex Discrimination Act 1984 (Cth) or Sex Discrimination Act 1975 (UK)</i>
The Submission	<i>Australian Human Rights Commission's Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality (2008)</i>
VCAT	Victorian Civil and Administrative Tribunal
Victorian Charter	<i>Victorian Charter of Human Rights and Responsibilities Act 2006 (VIC)</i>
Victorian Review	<i>An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report, June 2008</i>
WA	Western Australia

Executive Summary

The *Discrimination Act* has played an essential role in protecting the right to equality in the ACT but has not been substantially reviewed since its enactment in 1991. The HRC requested this report to aid that review process. The report considers the need to include an equality duty in the *Discrimination Act* and formulates a duty based on examples in proposed and existing discrimination legislation.

Part 1:

Why the ACT *Discrimination Act* needs a positive duty

All existing Australian discrimination law prohibits discrimination on listed grounds. Those laws are 'negative' because they create a duty *not* to discriminate. 'Positive' duties require duty-bearers to *act*, an equality duty might for example, require duty-bearers to promote equality.

The *Discrimination Act* prohibits discrimination rather than imposing positive duties. Aside from the HRC's own-motion inquiry power, the Act is a 'complaints-led' model that only applies once a complaint has been received. Legislation that depends on complaints is only as powerful as the people who rely on it. Victims of discrimination often come from the most vulnerable groups in society, while those responsible for discrimination can be well-financed, experienced litigants. Positive duties shift the responsibility to implement discrimination law to duty-bearers, reducing the burden on victims.

Prohibitions are reactive and while they have successfully eliminated many of the most overt forms of discrimination, 'negative' duties are ill-suited to more complex sources of inequality like indirect discrimination and entrenched disadvantage. Indirect discrimination occurs where a condition of employment or access to services applies to all people in the same way, but is harder for certain people to comply with for reasons related to an attribute protected under discrimination law. Indirect discrimination is prohibited under the *Discrimination Act* but is hard to identify and has become increasingly difficult to prove. Past discrimination can result in entrenched disadvantage so great that those people most in need of protection fall outside the ambit of discrimination law.

'Mainstreaming' equality overcomes many of the flaws associated with the reactive, complaints-led model by placing equality considerations at the centre of all policies and decision-making by duty-bearers. An equality duty based on a mainstreaming model is recommended for the ACT.

Part 2:

Positive duties throughout Australia and the world

A number of jurisdictions have already included or propose to include positive duties in their discrimination legislation. Almost all of the provisions considered create a two-part duty requiring the elimination of discrimination and promotion of equality. Most adopt a similar mainstreaming framework, requiring duty-

bearers to develop, implement, report on and commit to ongoing revision of compulsory equality plans or voluntary action plans. Those plans are typically based on consultation with protected groups and analysis of the equality impacts of existing policies. The plans set objectives and establish standards against which progress can be tested. Patterns in enforcement measures have also emerged, revealing a degree of consensus as to how positive duties should be framed, what they should involve and how they should be enforced.

Many duties only apply in an employment context but more recent legislation extends further. Slight differences in duties allow the ACT to choose the most successful elements from each:

- The Canadian and NT Acts expand the requirement to 'accommodate' needs, traditionally used in disability discrimination legislation, to create a more general positive duty.
- WA imposes a positive duty through policy rather than legislation.
- Northern Ireland imposes an obligation to promote 'good relations' between particular groups.
- Welsh legislation imposes a duty on its National Assembly and creates a right to judicial review.
- South Africa's *PEPUDA* imposes duties on all its citizens.
- The UK's GED, DED and RED create separate obligations but a recent review has recommended that they be combined to 'declutter' the law.
- As the only other jurisdiction in Australia with a bill of rights, Victoria's proposed *Equality Act* provides a useful example for the ACT.

Part 3:

A positive duty for the ACT *Discrimination Act*

The final stage of the report recommends a range of options and a preferred model for a positive duty in the ACT. To be effective and minimise potential administrative burdens, any positive duty added to the *Discrimination Act* must be suited to the needs, existing institutions and policies of the Territory. Recent amendments to the *HRA* make it unlawful for public authorities to act 'in a way that is incompatible with human rights'. Public authorities are also required to submit annual reports on measures taken in relation to the *HRA*, multiculturalism, women, and Aboriginal and Torres Strait Islanders. These obligations are similar to those that might be imposed by a positive duty and could be modified and expanded to cover private entities and form the basis for a duty under the *Discrimination Act*. Recommendations for the form that duty might take are listed on the following page.

Conclusion

As the first jurisdiction in Australia to adopt a bill of rights, the ACT has a proud history at the forefront of human rights in this country. Although equality duties are a relatively recent development in discrimination law, their enactment in an increasing number of jurisdictions demonstrates a clear momentum toward the establishment of positive duties as a standard element of discrimination legislation. The ACT is ready to take this next step toward achieving substantive equality within our community; without a positive duty, we risk being left behind and unable to provide the protections necessary to overcome entrenched disadvantage and guarantee equality for all.

Recommendations

The *Discrimination Act* should be amended to include an equality duty.

A. Framing the duty

The way an equality duty is worded has a significant impact on its scope and how easily it can be understood and implemented by duty-bearers.

Recommendation A.1.

The ACT duty should include an obligation to 'prevent discrimination' and 'advance equality' in all areas of a duty-bearer's public functions.

Recommendation A.2.

The ACT duty should *not* include a specific obligation to 'promote good relations' at this stage. Such an obligation would be inherent in a duty to prevent discrimination or advance equality.

Recommendation A.3.

The ACT duty should *not* be framed as requiring duty-bearers to reasonably 'accommodate' or make 'reasonable adjustments' to meet the needs of protected groups (as is required by duties in the NT and Canada), such obligations would be inherent in a duty to prevent discrimination or advance equality.

Recommendation A.4.

The qualification 'as far as possible' should be included in the ACT duty so that duty-bearers would be required to:

- a. Prevent discrimination; and
- b. Advance equality
as far as possible.

B. Grounds

Recommendation B.

The *Discrimination Act* protects people against discrimination based on particular grounds. An ACT duty should apply to all of the protected grounds listed under s7 of the *Discrimination Act*.

C. Duty-Bearers

Equality duties impose obligations on particular entities or individuals known as duty-bearers.

Recommendation C.1.

The ACT duty should apply to public authorities.

Recommendation C.2.

The ACT duty should apply to private entities in a way that ensures they are not overburdened and can effectively comply with the duty.

Recommendation C.3.

Government agencies should compel compliance through procurement practices.

Recommendation C.4.

The ACT duty should include an 'opt-in' provision allowing entities to volunteer to be made subject to the duty.

D. Duty Content

Once a duty has been framed, it should set out the actions necessary to comply with it.

Recommendation D.1.

The ACT duty should require duty-bearers to develop and implement equality plans.

Recommendation D.2.

Guidelines should be developed to assist duty-bearers to comply with the duty.

Recommendation D.3.

Equality plans should be compulsory for duty-bearers. If equality plans are not made compulsory, voluntary action plans should be allowed, based on the same key elements.

Recommendation D.4.

If equality plans are made compulsory, duty-bearers should have to report to supervisory bodies on their implementation of equality plans.

E. Enforcement

Equality duties can be enforced in a number of different ways.

Recommendation E.1.

Progress reports by duty-bearers or summaries of those reports should be tabled in the ACT Legislative Assembly as a means of rewarding compliance and publicising non-compliance.

Recommendation E.2.

The HRC (or a new body charged with administering a positive duty under the *Discrimination Act*) should be given principal responsibility for assessing progress reports. Additional resources should be allocated accordingly.

Recommendation E.3. (Private entities)

If a duty is enacted that applies to *private entities* and makes implementing equality plans compulsory, the duty should adopt a similar enforcement scheme to those under the existing NSW and QLD positive duties and their Canadian and South African equivalents.

This would give a designated supervisory body power to:

- a. investigate possible breaches;
- b. negotiate enforceable undertakings based on measures necessary to bring a duty-bearer into compliance with the duty; and
- c. issue compliance notices capable of enforcement by a tribunal.
- d. Reporting obligations should be supported by imposing fines for failure to submit annual reports or equality plans on time and intentionally providing false information.

Recommendation E.4. (Public authorities)

If a duty is enacted that applies to *public authorities* and makes implementing equality plans compulsory, the duty should adopt a similar enforcement model to those under the existing NSW and QLD positive duties.

That would give a designated supervisory body power to:

- a. investigate possible breaches;
- b. negotiate enforceable undertakings based on measures necessary to bring a duty-bearer into compliance with the duty; and
- c. issue recommendations for compliance to relevant Ministers, to be passed on to authorities via Ministerial Directions.

Recommendation E.5.

If an ACT duty is enacted that does *not* require duty-bearers to develop and implement equality plans or submit progress reports, a similar enforcement scheme to that recommended for Victoria should be adopted. That would allow a supervisory body to use powers to ensure compliance with the *Discrimination Act* generally, to conduct investigations and issue compliance notices requiring the development of equality plans.

Introduction

The *Discrimination Act* was enacted to 'eliminate, so far as possible, discrimination...in the areas of work, education, access to premises, the provision of goods, services, facilities and accommodation and the activities of clubs', and

to 'promote recognition and acceptance of...the principle of equality of opportunity for all people'.⁷

The Act prohibits discrimination on a number of grounds including sexuality, transsexuality, status as a carer, breastfeeding, race, religion, disability, age and spent conviction.⁸ Unlike most discrimination legislation, the Act does not define discrimination in terms of a 'comparator'; under the ACT Act, discrimination occurs where a person has been treated unfavourably because they have one of the protected attributes listed above.⁹

The Act also gives force to the equality provisions in the *HRA*, which state that

'(e)everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground'.¹⁰

Although groups that have traditionally been discriminated against tend to be 'better off' in the ACT than they are nationally, inequality remains a problem.¹¹ Achieving equality in a diverse community is a complex but important goal that ultimately requires cultural change. The *Discrimination Act* must be kept up-to-date so that the people it seeks to protect can benefit from the most recent developments in the struggle for equality.

All of Australia's existing discrimination legislation prohibits discrimination on particular grounds. Those laws are 'negative' in that they create a duty *not* to discriminate. 'Positive' duties require duty-bearers to *act*, for example to promote equality. A positive equality duty might involve duty-bearers offering additional training to women returning from maternity leave so that they can keep pace with recent developments, publishing information in multiple languages or advertising jobs in media likely to reach groups that are currently underrepresented in an organisation's workforce.¹²

Australian anti-discrimination legislation contains a range of different positive duties, but no 'general' duty applying to all of the protected grounds for discrimination under a given Act, in all areas of public life.¹³ Legislative reviews have recommended the adoption of such a duty in Australia and similar

⁷ *Discrimination Act 1991* (ACT) s4.

⁸ *Ibid*, s7.

⁹ *Ibid*, s8.

¹⁰ *Human Rights Act 2004* (ACT) s8(3).

¹¹ ACT Office for Women, *ACT Women's Plan* (2004) 1; Minister for Multicultural Affairs, *Multicultural Strategy 2006-2009* (2006) 13-14, 17-18, 21-22, 29, 35-6, 39-40; Chief Minister's Department, *Building Our Community: The Canberra Social Plan* (2004) 20, 24, 26, 28, 31, 33; ACT Chief Minister's Department, *The Canberra Plan 2008: Towards our Second Century* (2008) 5, 6, 17, 28, 29, 30, 37, 43.

¹² Interights, *Internal Discrimination Law: A Handbook for Practitioners* (2005) 103-108.

¹³ See Part 2.

provisions have recently been enacted in a number of other countries.¹⁴ That momentum is matched by growing consensus on the content of general positive duties.¹⁵ This convergence of action and legal opinion makes now an ideal time for the ACT to adopt a general positive duty. Earlier this year, the Federal Government ratified the *Convention on the Rights of Persons with Disabilities* which contains a number of positive duties and the Stanhope Government made adding a positive duty to the *Discrimination Act* part of its 2008-2009 policy platform.¹⁶

The ACT's historical and ongoing commitment to human rights has prepared us well for this next step towards achieving equality. An equality duty would be consistent with the *Canberra Social Plan* and *HRA*.¹⁷ With QLD and NSW having already adopted positive duties and Victoria proposing to add such a duty to its *Equal Opportunity Act*,¹⁸ the ACT would not be acting alone.

Without an equality duty, the Act will be left unable to protect the most vulnerable people in our community and guarantee the right to equality.

¹⁴ See Part 2.

¹⁵ Silvia Borelli, 'Positive Obligations of States and the Protection of Human Rights' (2006) 15.3 *Interights Bulletin* 101, 101; Director General of the International Labour Organisation, *Equality at work: Tackling the challenges* (2007) 54-55, Accessed at <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6779> at 25 October 2008.

¹⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, A/RES/61/106, arts 5(3), 14(2), 24(2)(c), 24(5)(c), 27(1)(i), (entered into force 3 May 2008); *Australian Labor Party Australian Capital Territory Branch Platform 2008-2009*, 128.

¹⁷ *Towards our Second Century*, 34-48; *Human Rights Act 2004* (ACT), Preamble, s8(3).

¹⁸ *Anti-Discrimination Act 1977* (NSW) s122C; *Equal Opportunity in Public Employment 1992* (QLD) s4; *Equal Opportunity Act 1995* (VIC); Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008) Recommendation 9.

Part 1:

Why the ACT *Discrimination Act* needs a positive duty

The *Discrimination Act* has played an essential role in protecting the right to equality in the ACT, but almost twenty years after its enactment, many of the groups that the legislation seeks to protect remain disadvantaged.¹⁹ Introduction of an equality duty could significantly improve the Act.

The complaints-led model

The *Discrimination Act* prohibits discrimination rather than imposing positive duties. Although the HRC can investigate potentially discriminatory acts or services without a complaint,²⁰ the ACT Act primarily relies on victims to bring complaints, making it a 'complaints-led model'.²¹

Legislation that depends on complaints is only as powerful as the victims who rely on it. Victims of discrimination often come from the most disadvantaged groups in society and are amongst the least able to enforce their rights.²² Many victims have an historically-justified distrust of government institutions and are financially, intellectually, linguistically or emotionally ill-equipped to pursue complaints. Those responsible for discrimination are often well-financed, powerful and experienced litigants.²³ As a result, the disadvantage victims experience in their everyday lives is often replicated in courts and tribunals.²⁴ These barriers to success mean that many victims choose not to complain and the statute is never triggered.²⁵

The complaints-led model makes the *Discrimination Act* reactive rather than proactive. Most legislation is reactive, but some activities can only be effectively regulated with proactive duties. Occupational health and safety legislation for

¹⁹ *ACT Women's Plan*, 1; *Multicultural Strategy*, 13-14, 17-18, 21-22, 29, 35-6, 39-40; *The Canberra Social Plan* (2004) 20, 24, 26, 28, 31, 33; *Towards our Second Century*, 5, 6, 17, 28, 29, 30, 37, 43; *HRC Annual Report 2007-2008*, 28.

²⁰ *Human Rights Commission Act 2005* (ACT) s48.

²¹ Sandra Fredman and Sarah Spencer, 'Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes' (2006) 6 *European Human Rights Law Review* 598, 599.

²² *An Equality Act for a Fairer Victoria*, 6, 14.

²³ Fredman and Spencer, 'Beyond Discrimination' 599; Beth Gaze, 'The Sex Discrimination Act After 20 Years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27 *University of New South Wales Law Journal*, 914, 919; Margaret Thornton, lecture for ANU Law Course *Human Rights in Australia* (12 September 2008).

²⁴ Thornton (ANU Lecture).

²⁵ *Ibid*.

example, would provide little protection if it only prohibited 'dangerous acts'.²⁶ The HRC provides community education as a means of promoting compliance with the *Discrimination Act* but the legislation contains few proactive enforcement measures.

The nature of discrimination

The nature of discrimination makes reactive legislation alone inappropriate. Discrimination often causes damage that cannot be undone or adequately compensated. If a person is not offered a job for discriminatory reasons and the position is given to another applicant, that job cannot be given to the complainant once discrimination has been proved. Even after making a successful complaint, victims may feel unable to return to the workplace they complained about to enjoy the benefits of a discrimination finding.

Discrimination compounds pre-existing disadvantage. Ongoing discrimination against groups such as women and Indigenous Australians has led to entrenched disadvantage. A group that has had inadequate access to education as children will lack the qualifications necessary to apply for certain jobs and therefore, remain economically disadvantaged and underrepresented in decision-making roles.²⁷ As a result, that group's ability to improve their status will be limited. The impact of such disadvantage is often so great that discrimination legislation cannot reach the groups affected. The *Discrimination Act* might help a person discriminated against in a job interview, but cannot assist a person who never applied because past discrimination denied them the necessary qualifications.

Existing legislation has ended many of the most blatant forms of discrimination, but is ill-equipped to deal with indirect discrimination and entrenched disadvantage.²⁸ Discrimination can be difficult to identify. A condition of employment or access to services discriminates indirectly where it applies in the same way to everyone, but is more difficult for certain people to comply with.²⁹ A number of cases have recognised requiring full-time work as a condition that indirectly discriminates against women, who are more often the primary bearers of parental responsibilities.³⁰ However, recent decisions have adopted narrow, technical interpretations, which favour the employer's prerogative to set conditions over the rights of individuals.³¹ Those decisions have severely limited protections against indirect discrimination available through the courts.³² Many of

²⁶ *An Equality Act for a Fairer Victoria*, 38 (1.94).

²⁷ Fredman and Spencer, 'Beyond Discrimination', 601.

²⁸ Beth Gaze, 'The Sex Discrimination Act After 20 Years', 914, 916.

²⁹ *Discrimination Act 1991* (ACT) s8(1)(b); Nicholas Bamforth, 'Setting the Limits of Anti-Discrimination Law: Some Legal and Social Concepts' in Janet Dine and Bob Watt (eds) *Discrimination Law: Concepts, Limitations and Justifications* (1996) 50, 58; Katherine Lindsay, Neil Rees and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008) 5, 120; Australian Human Rights Commission, *Federal Discrimination Law* (2008) Accessed online at <<http://www.AHRC.gov.au/legal/FDL>> (25 September, 2008) 4.3.1; Gaze, 'The Sex Discrimination Act After 20 Years', 915, 917.

³⁰ AHRC, *Discrimination Law*, 4.3.1.

³¹ K. Lee Adams, 'Defining Away Discrimination' (2006) 19.3 *Australian Journal of Labour Law*, 263 (pages numbers not provided) ("Conclusion", "Gleeson CJ: Requirement not unreasonable"); Thornton (ANU Lecture); Belinda Smith, 'Australian Anti-Discrimination Laws: Framework, Developments and Issues' in Takashi Araki and Hiroya Nakakabu (eds) *New Developments in Employment Discrimination Law* (Forthcoming book, 2008), 108. Accessed at <http://www.jil.go.jp/english/events_and_information/documents/clls08_smith.pdf> at 8 September 2008; Gaze, 'The Sex Discrimination Act After Twenty Years', 918.

³² *Ibid*.

the complaints received by the HRC are settled through conciliation.³³ Conciliation allows respondents to avoid the publicity associated with discrimination claims and work with complainants to end the discrimination that led to the complaint. Conciliation however, does not occur in a vacuum and respondents reluctant to develop equality solutions may hold-out for court hearings that make it harder for complainants to succeed.

Indirect discrimination provisions were never far-reaching enough to deal with the most entrenched forms of disadvantage and recent judicial interpretations mean that they are now less able to stop systematic discrimination. An equality duty could address these problems by requiring duty-bearers to consider how their decisions affect disadvantaged groups rather than wait for a complaint before acting.

The *Discrimination Act* already contains a weak duty to act positively in its vicarious liability provisions.³⁴ Section 121A makes a person responsible for acts of discrimination by a representative.³⁵ Employers for example, will be treated as having committed any acts of discrimination engaged in by their employees. To avoid being held liable, a person must demonstrate that they 'took all reasonable steps to prevent the representative from engaging in the conduct'.³⁶ An equality duty might therefore be regarded as a form of risk-management, compliance with which would reduce the likelihood of legal action under vicarious liability provisions. Vicarious liability provisions create a need for positive action but again, are only activated by a complaint and therefore still suffer from the problems associated with complaints-led legislation.

Mainstreaming equality

Positive duties solve many of the problems inherent in complaints-led legislation by shifting the responsibility to implement discrimination law from complainants to duty-bearers. Equality duties can take a variety of forms, but almost all adopt a "mainstreaming" approach.

"Mainstreaming" aims to incorporate equality considerations into all policies, procedures, decision-making and planning by duty-bearers.³⁷

Mainstreaming policies are designed to leave space for duty-bearers to adopt creative solutions to inequality. By requiring consultation and making equality considerations relevant to all areas of a duty-bearer's activities, mainstreaming approaches also perform an important educative function and are better able to promote cultural change than traditional, complaints-led legislation.³⁸ A mainstreaming duty would thereby support the goals of the *HRA* in fostering a 'human rights culture' in the ACT.

³³ Peter Bailey and Annemarie Devereux, 'Operation of anti-discrimination laws in Australia' in Kinley, David (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (1998) 292; Human Rights Commission, *Annual Report 2007-2008*, 29.

³⁴ Lindsay et al, *Australian Anti-Discrimination Law*, 648.

³⁵ *Discrimination Act 1991* (ACT) ss121A(1)(a) and 121A(2).

³⁶ *Ibid*, s121A(3).

³⁷ Sandra Fredman, *Discrimination Law* (2002) 176; Charlotte Williams, 'Can Mainstreaming Deliver? The Equal Opportunities Agenda and the National Assembly for Wales' (2001) 14.1 *Contemporary Wales*, 57, 57; Paul Chaney, 'New and Unexplored Possibilities—The Welsh Legislature's Statutory Duty to Promote Equality of Opportunity (2002) 21.1 *Equal Opportunities International*, 19, 26.

³⁸ *An Equality Act for a Fairer Victoria* (2.7-2.12).

The ACT needs an equality duty that promotes cultural change, relieves victims of the burden of enforcing their rights and helps combat the effects of entrenched and systemic disadvantage. The introduction of a mainstreaming approach to the complaints-led *Discrimination Act* is therefore, an essential step toward achieving equality in the Territory.

Part 2:

Positive duties throughout Australia and the world

A number of jurisdictions throughout Australia and the world have already included or propose to include positive duties in their discrimination legislation. All of those duties are based on a mainstreaming approach and most adopt the same broad framework, requiring duty-bearers to:

- collect data to identify barriers to equality and whether specified groups are underrepresented;
- review the impact of current policies on equality;
- consult with employees and representatives of protected groups on how to improve equality in the organisation;
- develop an equality plan to fulfil the duty; and
- report periodically to an oversight body, such as the local human rights or equal opportunities commission, on the implementation of the plan;
- where a report reveals that a duty-bearer has not made satisfactory progress under their equality plan, the oversight organisation can take action to enforce the duty.

Despite these similarities, slight differences in the legislation remain, allowing the ACT to create a duty based on the best elements of each. Details of the legislation discussed below are reproduced for comparison in Appendix A.

A. Employment legislation

Commonwealth employment legislation

Together, the Federal *Equal Opportunity for Women in the Workplace Act 1999* ("EOWWA"), *Public Service Act 1999* ("APS Act") and *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* ("Commonwealth Authorities Act") impose duties on all employers at the Commonwealth level with more than a certain number of employees.³⁹ The *APS Act* applies to the APS and the *EOWWA* to higher education institutions and employers with 100 or more employees.⁴⁰ The *Commonwealth Authorities Act* applies to authorities

* See Appendix A for a comparison of the legislation discussed in this Part.

³⁹ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) Part II; *Public Service Act 1991* (Cth) ss10, 18; *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth).

⁴⁰ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s3.

established by a Commonwealth Act for a public purpose, with more than forty employees.⁴¹

The *Commonwealth Authorities Act* requires relevant authorities to 'develop and implement'⁴² an equality plan designed to ensure that appropriate action is taken by the authority to promote equal opportunity for and eliminate discrimination against groups including women, Aboriginal and Torres Strait Islanders, migrants and persons with a disability.⁴³ An authority 'shall take any action necessary to give effect to its program and have regard to the program in exercising powers in relation to employment'.⁴⁴

The *APS Act* requires agency heads to establish a workplace diversity program to assist in giving effect to APS Values 'in relation to employment matters'.⁴⁵ APS Values include promoting equity in employment and providing a 'workplace that is free from discrimination and recognises and utilises the diversity of the Australian community'.⁴⁶ Legally binding directions from the APS Commissioner clarify that the duty includes measures ensuring that all forms of discrimination are prevented and assisting employees to balance their work, family and other carer responsibilities effectively by 'encouraging the development of mutually beneficial work practices'.⁴⁷

The *EOWWA* requires relevant employers to 'develop and implement'⁴⁸ an 'equal opportunity for women in the workplace program' to ensure that discrimination is eliminated and 'measures taken...to contribute to the achievement of equal opportunity in relation to employment matters'.⁴⁹

The equality plans required by each of the Acts essentially follow the mainstreaming model described above.⁵⁰ Employers, agency heads and authorities have to prepare annual reports on the implementation of their equality plans.⁵¹ *EOWWA* reports are lodged with the Equal Opportunity for Women in the Workplace Agency ("EOWW Agency"), which was established to administer the Act;⁵² Commonwealth authorities lodge their reports with the relevant Minister and agency heads with the APS Commissioner.⁵³ Each oversight body then compiles a report to be tabled in Parliament, based on the progress reports received.⁵⁴ *EOWWA* duty-bearers can divide their reports into two documents, so that parts referring to the effectiveness of their equality plan can be submitted confidentially.⁵⁵

⁴¹ *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) s3.

⁴² *Ibid.*, s5.

⁴³ *Ibid.*, s3.

⁴⁴ *Ibid.*, s7.

⁴⁵ *Public Service Act 1999* (Cth) s18.

⁴⁶ *Public Service Act 1999* (Cth) s10.

⁴⁷ *Public Service Commissioner's Directions 1999*, Direction 3.2(2).

⁴⁸ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s6.

⁴⁹ *Ibid.*, ss6, 3.

⁵⁰ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ss8(1), 8(2), 8(3), 4; *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) s6; *Public Service Act 1999* (Cth) s18; *Public Service Commissioner's Directions 1999*, Direction 3.5(1)(a).

⁵¹ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s13(1); *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) s9(1); *Public Service Commissioner's Directions 1999*, Direction 3.5.

⁵² *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ss8A, 13A(1).

⁵³ *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) s9(1).

⁵⁴ *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) s9(3)(ii); *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ss12, 15; *Public Service Act 1999* (Cth) s44; *Public Service Commissioner's Directions 1999*, Direction 3.5.

⁵⁵ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ss13(3), 14, 15.

Tabling reports in Parliament enforces duties via a 'naming and shaming'⁵⁶ process and allows oversight bodies to supervise and influence the implementation of equality plans.⁵⁷ It is however, a weak enforcement measure compared to other jurisdictions.

The reports tabled are based on annual reports from a large number of duty-bearers so non-compliant individuals receive little attention. The power of bad publicity as a means of enforcement is therefore largely lost and in the case of employers under the *EOWWA*, entirely lost where the most crucial elements of reports can be kept confidential.

NSW and QLD employment legislation

Both NSW and QLD impose duties on public authorities to eliminate discrimination and promote equality in employment through the development of compulsory equality plans.⁵⁸ The duties under the *NSW Anti-Discrimination Act 1977* and *QLD Equal Opportunity in Public Employment Act 1992* apply to a range of protected grounds.⁵⁹ NSW duty-bearers submit progress reports to the Director of Equal Opportunity in Public Employment and QLD duty-bearers to the Commissioner for Public Service Equity.⁶⁰

If the Director or Commissioner is not satisfied with the report, they can refer the report to the NSW Anti-Discrimination Board or QLD Anti-Discrimination Tribunal respectively.⁶¹ The Board can investigate the referral and the Tribunal can suggest conciliation.⁶² Both bodies must produce a report, which can make recommendations to the relevant Minister.⁶³ Ministers can pass recommendations on to authorities through binding directions.⁶⁴

⁵⁶ *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) s9(3)(ii); *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ss12, 15; *Public Service Act 1999* (Cth) s44(1).

⁵⁷ *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) ss10, 11, 12; *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ss18, 19; *Public Service Act 1999* (Cth) s41(1)(g); Public Service & Merit Protection Commission, *Diversity Guidelines* (2001) Public Service Commission, <<http://www.qpsc.gov.au/publications01/diversityguidelines.htm>> at 2 October 2008, 4.

⁵⁸ *Anti-Discrimination Act 1977* (NSW) ss122C, 122J; *Equal Opportunity in Public Employment Act 1992* (QLD) ss 4(2), 6(1), 7.

⁵⁹ *Anti-Discrimination Act 1977* (NSW) s122C; *Equal Opportunity in Public Employment Act 1992* (QLD) s3.

⁶⁰ *Anti-Discrimination Act 1977* (NSW) s122J; *Equal Opportunity in Public Employment Act 1992* (QLD) s14.

⁶¹ *Anti-Discrimination Act 1977* (NSW) s122M; *Equal Opportunity in Public Employment Act 1992* (QLD) s15.

⁶² *Anti-Discrimination Act 1977* (NSW) s122R; *Equal Opportunity in Public Employment Act 1992* (QLD) s17.

⁶³ *Anti-Discrimination Act 1977* (NSW) s122R; *Equal Opportunity in Public Employment Act 1992* (QLD) ss21-24.

⁶⁴ *Anti-Discrimination Act 1977* (NSW) s122S; *Equal Opportunity in Public Employment Act 1992* (QLD) ss21-24

The Canadian and South African Employment Equity Acts

The Canadian and South African *Employment Equity Acts* impose generally applicable obligations to develop employment equity plans.⁶⁵

The Canadian *Employment Equity Act* ("Canadian Act"),⁶⁶ imposes a duty on private sector employers with more than 100 employees, in connection with federal work.⁶⁷ Core public administration bodies,⁶⁸ public administration agencies and specified public sector employers with more than 100 employees are also bound.⁶⁹

The South African *Employment Equity Act* ("SA Act"), applies to municipalities, government contractors, organs of the state and private employers with more than fifty employees and a specified minimum annual turnover.⁷⁰ Non-designated employers can volunteer to be bound by the Act under s14.⁷¹

The Canadian duty requires 'reasonable accommodation' to achieve equal representation,⁷² though measures that would cause 'undue hardship' are not required. The SA Act, requires designated employers to 'implement affirmative action measures' including numerical targets (but not quotas), to achieve employment equity.⁷³

Designated private sector employers under the *Canadian Act* report annually to their relevant Minister and public sector employers to the President of the Treasury Board.⁷⁴ Employers under the SA Act report annually to the Director General ("DG") of the Labour Department, or once every two years if they have less than 150 employees.⁷⁵

Both Acts empower inspectors to investigate duty-bearers' compliance with the duty. Where inspectors believe an employer has breached the duty, the inspector must try to negotiate an *undertaking* by the employer to comply.⁷⁶ If agreement cannot be reached or the undertaking is breached, the investigator can issue a *direction* to comply.⁷⁷ Under the *Canadian Act*, directions must be issued by the Canadian Human Rights Commission ("CHRC").⁷⁸ In South Africa, inspectors can issue the direction themselves, but employers can appeal to the DG.⁷⁹ Employers can further appeal a direction, to the Employment Equity Review Tribunal under the *Canadian Act* and the Labour Court under the SA Act.⁸⁰ The CHRC or DG can apply to the Court or Tribunal if a direction is breached. Both the Court and Tribunal can make orders that directions be

⁶⁵ *Employment Equity Act*, No. 55 of 1998 (South Africa), s13(1); *Employment Equity Act*, SC, 1995, c.44, (Canada) ss9(1), 10(1).

⁶⁶ *Employment Equity Act*, SC, 1995, c.44.

⁶⁷ *Ibid*, ss3, 4(1)(a).

⁶⁸ *Ibid*, ss3, 4(1)(b).

⁶⁹ *Ibid*, ss3, 4(1)(c) and (d).

⁷⁰ *Employment Equity Act*, No. 55 of 1998, s3, Sch IV.

⁷¹ *Ibid*, s14.

⁷² *Employment Equity Act*, SC, 1995, c.44, ss5, 6(a).

⁷³ *Employment Equity Act*, No. 55 of 1998, s13(1).

⁷⁴ *Employment Equity Act*, SC, 1995, c.44, s21.

⁷⁵ *Employment Equity Act*, No. 55 of 1998, ss13(1), 21.

⁷⁶ *Ibid*, s36.

⁷⁷ *Employment Equity Act*, SC, 1995, c.44, s25(3); *Employment Equity Act*, No. 55 of 1998, s37.

⁷⁸ *Employment Equity Act*, SC, 1995, c.44, s25(2).

⁷⁹ *Employment Equity Act*, No. 55 of 1998, ss37, 39.

⁸⁰ *Employment Equity Act*, No. 55 of 1998, s40; *Employment Equity Act*, SC, 1995, c.44, ss27, 28.

complied with and provide remedies.⁸¹ Under the *SA Act*, the DG can conduct their own investigations and apply to the Court where a request or recommendation is not complied with.⁸²

Both Acts also allow for the imposition of fines for violations of the Act including failure to provide information and the provision of incorrect information.⁸³

B. Australian discrimination legislation

The Commonwealth Disability Discrimination Act

The *Disability Discrimination Act 1992* ("DDA") allows the Minister to create 'disability standards' in relation to a number of areas including employment, education, accommodation, access to premises and public transport.⁸⁴ It is unlawful to breach a disability standard and the usual exemption provisions do not apply,⁸⁵ although a person who complies with disability standards will not be liable to the unlawful discrimination provisions under Part II of the Act.⁸⁶

The *Disability Standards for Accessible Public Transport 2002* essentially list the equipment, facilities and services necessary to remove discrimination from public transport services and impose a timetable for implementation.⁸⁷ The *Disability Standards for Education 2005* require consultation and 'reasonable adjustment' so that students with a disability can participate 'on an equal basis'.⁸⁸ Adjustments that would cause 'unjustifiable hardship' are not required.⁸⁹ Standards for access to premises have also been proposed but have not yet been enacted.⁹⁰

The DDA allows service providers to develop action plans, a voluntary equivalent to equality plans, aimed at improving service to people with a disability and eliminating discrimination against them.⁹¹ Even without a legislative requirement, service providers are increasingly developing and registering plans with the AHRC for publication on the Commission's website to gain recognition for their 'diversity efforts'.⁹² The website also lists government departments that fail to provide government information in forms accessible to all people.⁹³

⁸¹ *Employment Equity Act*, SC, 1995, c.44, s30; *Employment Equity Act*, No. 55 of 1998, s50.

⁸² *Employment Equity Act*, No. 55 of 1998, ss43, 45.

⁸³ *Employment Equity Act*, SC, 1995, c.44, ss25, 35; *Employment Equity Act*, No. 55 of 1998, s36.

⁸⁴ *Disability Discrimination Act 1992* (Cth) s31.

⁸⁵ *Ibid.*, ss32, 33.

⁸⁶ AHRC, *Federal Discrimination Law*, 5.2.5; DDA, s34.

⁸⁷ *Disability Standards for Accessible Public Transport 2002*, div 1.2(2); Smith, "Australian Anti-Discrimination Laws: Framework, Developments and Issues", 112.

⁸⁸ Smith, "Australian Anti-Discrimination Laws: Framework, Developments and Issues", 112; *Disability Standards for Education 2005*, divs 2.2, 3.4.

⁸⁹ *Disability Standards for Education 2005*, div 10.2.

⁹⁰ AHRC, *Federal Discrimination Law*, 5.2.5.

⁹¹ *Disability Discrimination Act 1992* (Cth) s60.

⁹² Smith, "Australian Anti-Discrimination Laws: Framework, Developments and Issues", 113.

⁹³ Federal Disability Commissioner, *Web Watch: Accessibility of government websites* (2008) Australian Human Rights Commission <http://www.hreoc.gov.au/disability_rights/webaccess/webwatch.htm> at 25 October 2008.

The NT Anti-Discrimination Act

Like the *Canadian Act*,⁹⁴ the *Anti-Discrimination Act 1996* (NT)⁹⁵ expands the concept of 'reasonable accommodation',⁹⁶ usually associated with disability discrimination legislation,⁹⁷ to create a generally applicable positive duty.⁹⁸ Duties to 'reasonably accommodate' are regarded as narrower and less certain than duties to eliminate discrimination or promote equality.⁹⁹

The WA Policy Framework for Substantive Equality

Western Australia's *Policy Framework for Substantive Equality* creates a non-legislative public sector duty to 'eliminate systemic racial discrimination in the provision of public sector services' and 'promote sensitivity to the different needs of client groups'.¹⁰⁰

C. Proposed Australian Legislation

Two recent legislative reviews have recommended the imposition of general positive duties in Australia.

The proposed Victorian Equality Act

The recent review of the *Equal Opportunity Act 1995* (VIC) ("the Victorian Review") recommends the enactment of a positive duty to 'eliminate discrimination, as far as possible'.¹⁰¹

Similarities between the ACT and Victoria make the Victorian Review particularly relevant to the development of an ACT duty. Victoria is the only other Australian jurisdiction with a bill of rights. The *Victorian Charter of Rights and Responsibilities* also adopts a 'dialogue model'¹⁰² and already imposes an obligation on public authorities similar to that which will come into force in the ACT on 1 January 2009.¹⁰³ The ACT Discrimination Tribunal is also soon to be incorporated into the ACT Civil and Administrative Tribunal ("ACTCAT"), which is modelled on the Victorian Civil and Administrative Tribunal ("VCAT").

⁹⁴ *Employment Equity Act*, SC, 1995, c. 44.

⁹⁵ *Ibid.*, s5(b).

⁹⁶ *Anti-Discrimination Act 1996* (NT) s24.

⁹⁷ Gay Moon, 'From equal treatment to appropriate treatment: What lessons can Canadian equality law on reasonable accommodation teach the UK?' (2006) 6 *European Human Rights Law Review*, 695, 695.

⁹⁸ *Anti-Discrimination Act 1996* (NT) s19.

⁹⁹ See Part 3: "Framing the duty" (page 34).

¹⁰⁰ *WA Framework for Substantive Equality 2004*, 7.

¹⁰¹ *An Equality Act for a Fairer Victoria*, Recommendation 9.

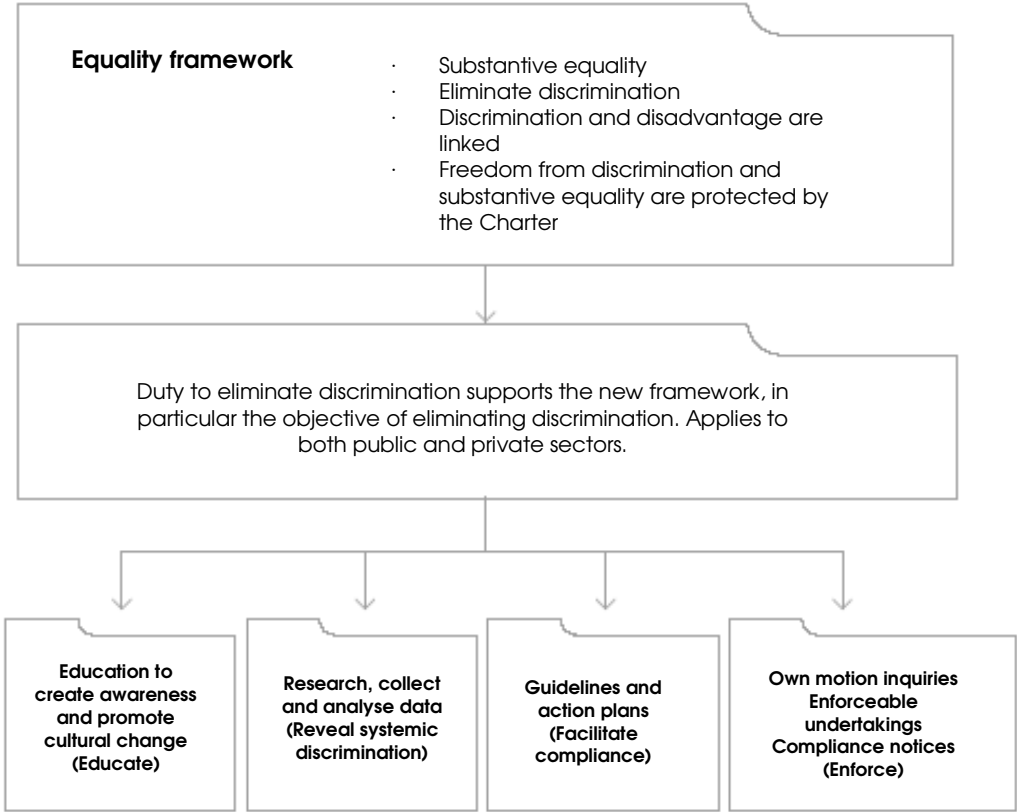
¹⁰² *Charter of Human Rights and Responsibilities Act 2006* (VIC) ss32, 36.

¹⁰³ *Charter of Human Rights and Responsibilities Act 2006* (VIC) s38; *Human Rights (Amendment) Act 2008* (ACT) Part 5A.

The Review proposes allowing voluntary action plans to be registered with the Victorian Equal Opportunity Commission (“EOC”), those that meet the minimum requirements could be posted on the Commission’s website.¹⁰⁴ It was also recommended that the Commission be empowered to assess duty-bearer’s compliance on request and issue compliance guidelines.¹⁰⁵

The bottom line of the framework at Figure 1 (below) outlines a spectrum of compliance measures. As the review proposes no specific reporting obligations, failure to comply with the positive duty could only be discovered where the EOC conduct an own-motion inquiry.¹⁰⁶ Inquiries might lead to the negotiation of enforceable undertakings,¹⁰⁷ though under the proposed scheme, an undertaking could be made without an inquiry if an unlawful act has occurred or is likely to occur.¹⁰⁸ Where an undertaking is breached, the EOC could apply to the VCAT for enforcement.¹⁰⁹

Figure 1: Outline of *Equality Act* Framework¹¹⁰



¹⁰⁴ Ibid, Recommendation 60, (6.56), (6.65), (6.68).

¹⁰⁵ Ibid, Recommendation 60.

¹⁰⁶ Ibid, Recommendation 67.

¹⁰⁷ Ibid, Recommendation 74.

¹⁰⁸ Ibid, Recommendation 72.

¹⁰⁹ Ibid, Recommendation 75.

¹¹⁰ Ibid, Figure 1 at 42.

Where the EOC has completed an inquiry and identified a breach of the Act the Commission could issue a compliance notice telling the duty-bearer what must be done to comply, possibly including the development of an action plan.¹¹¹ Duty-bearers could then appeal compliance notices to the VCAT;¹¹² where a notice is not complied with, the EOC could apply to the Tribunal.¹¹³ Reports based on inquiries could also be sent to the Attorney-General for tabling in Parliament.¹¹⁴

Proposed changes to the Commonwealth Sex Discrimination Act

The AHRC's recent submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Effectiveness of the *Sex Discrimination Act 1984* (Cth) in Eliminating Discrimination and Promoting Gender Equality ("the Submission") recommends the inclusion of positive duties either in the existing *Sex Discrimination Act* ("SDA") or a proposed *Commonwealth Equality Act*.¹¹⁵ The Submission proposes a two-staged inquiry with stage one 'recommendations' to be implemented immediately and stage two 'options for reform' to be completed within three years, as part of an inquiry into an *Equality Act* for Australia or alternatively, an ALRC inquiry into the *SDA*.¹¹⁶

The Submission proposes the immediate introduction of

a positive obligation on employers and other appropriate persons to reasonably accommodate the needs of workers in relation to their pregnancy or family and carer responsibilities. Failure to meet this obligation would be an actionable form of discrimination.¹¹⁷

Stage 2 reforms could include adding a gender equality duty to the *SDA* and,¹¹⁸ if an *Equality Act* is introduced, the inclusion of a similar general duty.¹¹⁹

The Submission proposes that organisations not covered by the *EOWWA* be allowed to submit voluntary action plans to either the EOWW Agency or AHRC.¹²⁰ The AHRC also submitted that the *EOWWA* or *SDA* should be amended to create a power to audit action plans and possibly issue compliance notices.¹²¹

The Submission also suggested that the government use its purchasing power to promote equality by only entering contracts with service providers that comply with the Act or develop action plans.¹²²

¹¹¹ Ibid, Recommendations 76 and 78.

¹¹² Ibid, Recommendation 79.

¹¹³ Ibid, Recommendation 80.

¹¹⁴ Ibid, Recommendation 81.

¹¹⁵ Human Rights and Equal Opportunities Commission submission to the 'Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the *Sex Discrimination Act 1984* (Cth) in Eliminating Discrimination and Promoting Gender Equality' (2008).

¹¹⁶ AHRC Submission, Recommendation 1.

¹¹⁷ Ibid, 282, Recommendation 17.

¹¹⁸ Ibid, Option for Reform A.

¹¹⁹ Ibid, 804.

¹²⁰ Ibid, Option for Reform J.

¹²¹ Ibid, Option for Reform K (Note: the suggestion that compliance notices be issued is only included in the text of the Submission at (748), not Option for Reform K).

¹²² Ibid, Recommendation 53 (751).

D. Legislation outside Australia

Northern Ireland Act

Sections 75 of the *Northern Ireland Act 1998*, creates separate duties to promote equality and 'good relations'.¹²³ The first duty applies to a range of groups,¹²⁴ the second only between 'persons of different religious belief, political opinion or racial group'.¹²⁵

All public authorities under the Act have to create equality schemes.¹²⁶ There are no reporting requirements but authorities must submit their schemes to the Equality Commission for approval and revise the plans every five years.¹²⁷ The Commission can either approve a scheme or send it to the Secretary of State who can approve the plan, request a revised scheme or write a new scheme.¹²⁸ If the Commission receives a complaint about an authority not complying with instructions from the Secretary of State, the Commission can conduct an investigation.¹²⁹ The complainant must have been directly affected by the authority's non-compliance and have given the duty-bearer time to respond.¹³⁰ Investigation reports can include recommendations and if those recommendations are not complied with, the Commission can refer the matter to the Secretary of State who can direct the authority to comply.¹³¹

This combination of reporting and complaints-based enforcement addresses the problems associated with complaints-led models, whilst limiting the caseload created by the duty. This approach has however perhaps placed too great a restriction on the number of cases that progress to the hearing stage,¹³² although the Northern Ireland Equality Commission reports that the duty overall has led to significant advances in equality.¹³³

Welsh Government Act

The *Welsh Government Act 1998* imposes a positive duty on the country's national legislature to 'make appropriate arrangements with a view to securing that' its business is conducted and functions are exercised, with 'due regard to the principle that there should be equality of opportunity for all people'.¹³⁴ The Act creates a direct legal remedy for citizens, allowing them to seek judicial review of the legislature's actions.¹³⁵

¹²³ *Northern Ireland Act 1998*, c.47, ss75(1), 75(2).

¹²⁴ *Ibid*, s75(1).

¹²⁵ *Ibid*, s75(2).

¹²⁶ *Ibid*, Sch 9, ss4(2), 4(3).

¹²⁷ *Ibid*, Sch 9, ss6, 8(3).

¹²⁸ *Ibid*, Sch 9, ss6, 7.

¹²⁹ *Ibid*, Sch 9, s10(1).

¹³⁰ *Ibid*, Sch 9, ss10(2), 10(4).

¹³¹ *Ibid*, Sch9, s11.

¹³² Equality Commission for Northern Ireland, *Section 75 - Keeping it Effective: Reviewing the Effectiveness of the Northern Ireland Act 1998* (2007) 53.

¹³³ *Ibid*, 4-5.

¹³⁴ *Welsh Government Act 1998* (c. 38), ss48, 120; Chaney, 'New and Unexplored Possibilities', 19.

¹³⁵ *Ibid*.

This progressive model has been praised for its influence on policy across the political divide and for lending greater legitimacy to the newly-created Welsh legislature.¹³⁶

The South African PEPUDA

The South African *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* ("PEPUDA")¹³⁷ is designed to apply to persons and employers who are not duty-bearers under the nation's *Employment Equity Act*.¹³⁸ The PEPUDA can override inconsistent Acts of Parliament and imposes a general 'duty and responsibility to promote equality'¹³⁹ on the State and 'all persons'.¹⁴⁰

The duty on the State includes obligations to educate the public, enact necessary legislation and develop equality plans for Ministers to submit to the SAHRC.¹⁴¹ The Commission assesses plans according to criteria listed in the Regulations to the Act and can make recommendations to relevant Ministers.¹⁴² The SAHRC has similar powers in relation to progress reports.¹⁴³

People operating in the public domain, including government contractors and organisations exercising public power, are also required to promote equality and develop and implement equality plans.¹⁴⁴

Public domain employers with 150 or more employees must submit equality plans and progress reports to the Director-General of the relevant department, who assesses the documents according to the same criteria used by the SAHRC.¹⁴⁵ Employers must also make a declaration of adherence to the Code of Practice annexed to the Regulations, which explains the operation of the Act, includes examples of unfair discrimination and its effects and lists commitments not to discriminate on prescribed grounds.¹⁴⁶

Public domain employers of 50-150 people have to adopt measures to promote equality, rather than produce an equality plan and only have to report to the relevant government department if asked.¹⁴⁷ Employers with less than fifty employees have the same obligations except that they are not required to publicise measures to promote equality.¹⁴⁸

¹³⁶ Equality of Opportunity Committee, National Assembly of Wales, *Report on Mainstreaming Equality in the Work of the National Assembly* (2004), (4.22); Rawlings in Chaney, 'New and Unexplored Possibilities', 22.

¹³⁷ *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 5 of 2000.

¹³⁸ Carole Cooper and Robert Lagrange, 'The Application of the Promotion of Equality and Prevention of Unfair Discrimination Act and the Employment Act', 22 *Industrial LJ Juta* (2001) 1532, 1533.

¹³⁹ *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 5 of 2000, ss5(2), 5(3); Cooper and Lagrange, 'The Application of the Promotion of Equality and Prevention of Unfair Discrimination Act and the Employment Act', 1533.

¹⁴⁰ *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 5 of 2000, s24.

¹⁴¹ *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 5 of 2000, ss25(1), 25(4), 25(5); *Promotion of Equality and Prevention of Unfair Discrimination Act 2000 Regulations*, reg 24(3)(c).

¹⁴² *Promotion of Equality and Prevention of Unfair Discrimination Act 2000 Regulations*, reg 25(2).

¹⁴³ *Ibid*, reg 26.

¹⁴⁴ *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 5 of 2000, s26.

¹⁴⁵ *Ibid*, reg 29(5)(c).

¹⁴⁶ *Ibid*, reg 29(6), Annex C.

¹⁴⁷ *Ibid*, reg 30(1).

¹⁴⁸ *Ibid*, reg 31.

The Act also creates a duty on all persons, NGOs, community organisations and traditional institutions to promote equality 'in their relationships with other bodies in their public activities',¹⁴⁹

By imposing responsibilities with different requirements on all South Africans, the Act recognises the fundamental nature of rights against discrimination as well as the importance of not overwhelming smaller organisations.

Equality duties in the UK

Public authorities in the UK are currently subject to separate gender, race and disability equality duties, introduced in response to EU directives.¹⁵⁰

The equality duties impose general obligations, requiring specified public authorities to promote equality and eliminate discrimination with regard to race, gender or disability, except where measures would be 'unreasonable or impracticable'.¹⁵¹

More specific duties are included in orders and regulations, which require public authorities to produce gender, race and disability equality schemes.¹⁵² Most public authorities report annually on their implementation of equality schemes and the schemes must be reviewed every three years.¹⁵³ The race duty applies to a wider range of bodies but imposes lesser obligations on smaller public authorities.¹⁵⁴

The duties are enforced by the Equality Commission, which can issue compliance notices that can be enforced by the courts.¹⁵⁵

The Government now proposes to 'declutter'¹⁵⁶ UK discrimination law by streamlining the three duties to create a single duty. That duty would be extended to cover new protected grounds.¹⁵⁷ No enforcement measures have yet been considered but the duty would have three 'limbs':¹⁵⁸

- i. eliminating unlawful discrimination;
- ii. advancing equality of opportunity; and
- iii. advancing good relations between different groups.

¹⁴⁹ *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 5 of 2000, s27(1).

¹⁵⁰ Government Equalities Office, *Framework for a Fairer Future – The Equality Bill* (2008) 112.

¹⁵¹ *Sex Discrimination Act 1975* s76A1; *Disability Discrimination Act 2005* s49A1; *Race Relations Act 1976* s71(1); *Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005*, reg 3(2); *Sex Discrimination (Public Authorities) (Statutory Duties) Order 2006*, ord 3(2);

¹⁵² *Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005*, reg 2(3); *Sex Discrimination (Public Authorities) (Statutory Duties) Order 2006*, ord 2(1); *Race Relations (Statutory Duties) Order 2001*, ord 2(2).

¹⁵³ *Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005*, reg 2(4), 4; *Sex Discrimination (Public Authorities) (Statutory Duties) Order 2006*, ord 4, 6(1); *Race Relations (Statutory Duties) Order 2001*, ords 2(3), 4(5).

¹⁵⁴ *Race Relations (Statutory Duties) Order 2001*, ords 3, 4(5).

¹⁵⁵ *The Equality Act 2006* (UK) ss31, 32.

¹⁵⁶ Government Equalities Office, *Framework for a Fairer Future – The Equality Bill* (2008) 6.

¹⁵⁷ UK Government, *The Equality Bill – Government Response to the Consultation* (2008), (2.59).

¹⁵⁸ *Ibid*, (2.24).

Part 3:

A positive duty for the ACT *Discrimination Act*

This final stage of the report recommends an equality duty for the ACT *Discrimination Act* designed to suit the Territory's needs, existing institutions and practices. Although costs and political considerations are beyond the scope of this report, the recommendations favour a duty that minimises potential administrative burdens without losing force.

The ACT discrimination law framework

Complaints under the *Discrimination Act* are currently dealt with by the HRC. Complaints are considered by the Human Rights and Discrimination Commissioner and may be referred to conciliation by HRC staff.¹⁵⁹ Complaints that are not resolved at the HRC can be referred by the complainant to the Discrimination Tribunal, which is soon to be incorporated into the new ACTCAT.¹⁶⁰ The ACT also has a bill of rights that recognises rights to equality and against discrimination.¹⁶¹ The *HRA* adopts a 'dialogue model' that requires laws to be interpreted 'so far as it is possible to do so consistently with...(their) purpose...in a way that is compatible with human rights',¹⁶² where that is not possible, a declaration of incompatibility can be made but the law cannot be struck down.¹⁶³

Until amendments to the *HRA* come into force in January 2009 (see discussion at 37),¹⁶⁴ equality rights under the *HRA* can only be enforced via the *Discrimination Act*. The limitations inherent in complaints-led discrimination legislation may mean that a positive duty needs to be added to the *Discrimination Act* in order to achieve the standard of equality set out in the *HRA*.

¹⁵⁹ *Human Rights Commission Act 2005* (ACT) s51.

¹⁶⁰ *Discrimination Act 1991* (ACT) s77.

¹⁶¹ *Human Rights Act 2004* (ACT) s8(3).

¹⁶² *Human Rights Act 2004* (ACT) ss30, 32(3). Section 30 has recently been amended by the *Human Rights (Amendment) Act 2008*, which substitutes the word 'consistent' for 'compatible' so that 'so far as is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is consistent with human rights'. The new standard will be effective as of January 2009.

¹⁶³ *Human Rights Act 2004* (ACT) ss32, 33.

¹⁶⁴ *Human Rights (Amendment) Act 2008* (ACT) Part 5A.

A recommended model

The recommended model outlines options for each of the essential elements of the positive duty: (i) how it should be framed, (ii) which protected grounds should be covered, (iii) who the duty should apply to, (iv) what it should require duty-bearers to do and (v) how the duty should be enforced.¹⁶⁵

A. Framing the duty

Eliminating discrimination and promoting equality

The Victorian Review recommended a duty to eliminate discrimination, but most existing duties adopt a combination of obligations requiring elimination of discrimination and promotion of equality.¹⁶⁶ Two-part duties recognise eliminating discrimination and promoting equality as inextricably linked; one duty without the other could not assist protected groups at different stages in the movement toward equality. Achieving equality demands positive action taken in parallel, ensuring that the causes of disadvantage are stopped and the ongoing impact of disadvantage remedied.

Some duties are employment-specific. However, any positive duty added to the *Discrimination Act* (like the *HRA*) is likely to apply to public authorities at least,¹⁶⁷ whose equality policies affect both employees and the public that relies on their services.¹⁶⁸ A general rather than employment-based duty should be preferred.

The ACT ALP has proposed a duty to ‘prevent discrimination’.¹⁶⁹ While duty-bearers may find the term more difficult to understand and implement than a duty to ‘eliminate’ discrimination, the term ‘prevent’ would highlight the proactive nature of the duty and existing vicarious liability provisions, as well as the emphasis that mainstreaming places on systemic discrimination and entrenched disadvantage.

The UK government intends to adopt a general duty to ‘advance’ rather than ‘promote’ equality.¹⁷⁰ The term ‘advance’ is stronger than ‘promote’ and should

¹⁶⁵ Leading writer Sandra Fredman outlines what she believes to be the basic elements in her book *Discrimination Law* (at 177) and the article ‘Beyond Discrimination’ written with Sarah Spencer (at 605-6); Victoria’s *An Equality Act for a Fairer Victoria* uses an alternative framework to formulate its recommended duty (at (1.102)), the approach used in this report is a practical combination of those three examples.

¹⁶⁶ Examples: *An Equality Act for a Fairer Victoria* (1.90); *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) s5; *Sex Discrimination Act 1975* (UK) s76A1; *Disability Discrimination Act 2005* (UK) s49A1; *Race Relations Act 1976* (UK) s71(1); *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 5 of 2000, s24; AHRC Submission, Option for Reform A; *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s3; *Anti-Discrimination Act 1977* (NSW) s122C; *Equal Opportunity in Public Employment Act 1992* (QLD) ss4(1), 4(2).

¹⁶⁷ The *Human Rights (Amendment) Act 2008* (ACT) Part 5A (see discussion at p.37) will impose an obligation on ‘public authorities’; the ACT Labor Party’s 2008-2009 policy platform includes amending the *Discrimination Act* to include a positive duty on ‘public bodies’: *Australian Labor Party Australian Capital Territory Branch Platform 2008-2009*, 128.

¹⁶⁸ See *WA Framework for Substantive Equality*, which includes a duty ‘to promote sensitivity to the needs of different client groups’ in its policy.

¹⁶⁹ *Emphasis added*, *Australian Labor Party Australian Capital Territory Branch Platform 2008-2009*, 128.

¹⁷⁰ *Government Response to the Equality Bill* (2.24).

be preferred as requiring outcomes rather than merely encouraging efforts to achieve equality.

Recommendation A.1:

The ACT duty should include an obligation to 'prevent discrimination' and 'advance equality' in all areas of a duty-bearer's public functions.

A duty to promote good relations

Both the *Northern Ireland Act* and the proposed UK *Equality Bill* include a duty to promote good relations.¹⁷¹ A 2007 review of the Irish provision found that after almost a decade, duty-bearers were still struggling to understand the 'good relations' duty but maintained that good relations are 'inextricably linked'¹⁷² to the duty to promote equality.¹⁷³

A duty to promote good relations recognises the impact that social attitudes and interaction can have both as a form of discrimination and a barrier to equality. Genuine equality includes a person's freedom to participate equally and feel safe in expressing their identity. Many of the forms of inequality suffered by persons for example of a particular sexual orientation, religion or gender status cannot be identified through statistical surveys of workplace representation. The duty to promote good relations is particularly relevant to Northern Ireland's history of religious conflict.

The duty highlights the importance of developing guidelines for duty-bearers. Duties that appear too vague or abstract risk being treated as merely aspirational and becoming impossible to comply with, ineffective and unenforceable. Duty-bearers have struggled with even the more simple duties to eliminate discrimination and promote equality. It is therefore not recommended that a separate duty to promote good relations be added to the *Discrimination Act* at this early stage.

Recommendation A.2:

The ACT duty should *not* include a specific obligation to 'promote good relations' at this stage. Such an obligation would be inherent in a duty to prevent discrimination or advance equality.

Accommodation / adjustment

The Commonwealth *Disability Discrimination Act*, NT *Anti-Discrimination Act*, Canadian *Employment Equity Act* and proposed obligations under the *SDA* all include variations on the requirement to 'accommodate' or make 'adjustments' for the needs of protected groups.¹⁷⁴ This formulation has caused confusion in Canada and suggests that positive action need only be taken where absolutely necessary.¹⁷⁵

¹⁷¹ *Government Response to the Equality Bill*, (2.24); *Northern Ireland Act 1998*, c.47, s75(2).

¹⁷² *Section 75 - Keeping it Effective*, 20.

¹⁷³ *Section 75 - Keeping it Effective*, 22.

¹⁷⁴ Examples: *Disability Standards for Education 2005*, Div 2.2, 3.4; *Anti-Discrimination Act 1996* (NT) s24; *Employment Equity Act*, SC, 1995, c. 44, s5(b); AHRC Submission, Recommendation 17.

¹⁷⁵ Canadian Government, *Review of the Employment Equity Act*, response to Standing Committee on Human Resources Development and the Status of Persons with Disabilities, Parliament of Canada, *Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act* (2002), 11.

Recommendation A.3:

The ACT duty should *not* be framed as requiring duty-bearers to reasonably 'accommodate' or make 'reasonable adjustments' to meet the needs of protected groups, such obligations would be inherent in a duty to prevent discrimination or advance equality.

Exceptions, standards and qualifications

A number of existing positive duties incorporate standards, exceptions or qualifications. Terms such as 'appropriate action',¹⁷⁶ 'reasonable'¹⁷⁷ and 'due regard'¹⁷⁸ limit the activities required by positive duties, as do express exceptions for measures that would cause 'undue hardship'¹⁷⁹ or be 'unreasonable or impracticable'.¹⁸⁰

Qualifications and exceptions recognise that the extent to which duty-bearers can ensure the achievement of equality goals envisaged by positive duties is limited; success will often depend on responses that duty-bearers cannot control.

The Victorian Review recommends implementation of a duty to 'eliminate discrimination as far as possible'.¹⁸¹ It relies on a 'possibility' standard that duty-bearers are well-placed to assess based on their own capabilities and circumstances. The terms 'reasonableness' and 'undue hardship' have confused duty-bearers by importing notions of objective universal standards, less closely linked to the individual duty-bearer.¹⁸² Such qualifications also appear to establish expectations based on the degree of effort involved, rather than a duty-bearer's abilities. The requirement to have 'due regard' to equality considerations has also been criticised as less powerful than 'action-based' instructions and recent Australian cases have tended to interpret terms like 'reasonable' in a way that places economic and administrative efficiency ahead of individual rights.¹⁸³

¹⁷⁶ (Emphasis added) Legislation using the term 'appropriate action': *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) ss3, 5; *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s3.

¹⁷⁷ Legislation using the term 'reasonable': *Employment Equity Act*, SC, 1995, c. 44, ss5(b), 6(a); *Disability Standards for Education 2005*, Divs 2.2, 3.4; AHRC Submission, Recommendation 17, Option for Reform A and Option for Reform G.

¹⁷⁸ Legislation using the term 'due regard': *Northern Ireland Act 1998*, c.47, ss75(1), 75(2); *Government of Wales Act 1998* (c. 38) s48; *Disability Discrimination Act*, 1995, c. 13 (UK) s49A(1); *Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005* (UK) reg 3(2); *Sex Discrimination Act 1975* (UK) s76A(1); *Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Orders 2006*, ord 3(2); *Race Relations Act 1976* (UK) s71(1).

¹⁷⁹ Legislation using the term 'undue hardship': *Employment Equity Act*, SC, 1995, c. 44, ss5(b), 6(a).

¹⁸⁰ Legislation using the terms 'unreasonable or impracticable': *Northern Ireland Act 1998*, c.47, ss75(1), 75(2); *Government of Wales Act 1998* (c. 38) s48, *Disability Discrimination Act*, 1995, c. 13 (UK) s49A(1) *Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005* (UK) reg 3(2); *Sex Discrimination Act 1975* (UK) s76A(1); *Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Orders 2006* ord 3(2), *Race Relations Act 1976* (UK) s71(1).

¹⁸¹ *An Equality Act for a Fairer Victoria*, Recommendation 9.

¹⁸² Fredman and Spencer, 'Beyond Discrimination', 604; Canadian Government response to *Review of the Employment Equity Act*, 11.

¹⁸³ Fredman and Spencer, 'Beyond Discrimination', 604; Thornton (ANU Lecture). Example cases: *NSW v Amery and Others* (2006) 226 ALR 196, 204; *Department of Foreign Affairs and Trade v Styles* (1989) 88 ALR 621; *Qantas v Christie* (1998) 72 ALJR 634; *Schou v Victoria* (2001) 3 VR 655; *Kelly v TPG Internet Pty Ltd* (2003) 176 FLR 214 cited in Lee Adams, 'Defining Away Discrimination'.

Recommendation A.4:

The qualification, 'as far as possible' should be included in the ACT duty so that duty-bearers would be required to:

- a. prevent discrimination; and
- b. advance equality
as far as possible.

B. Grounds

This report recommends the implementation of a broad equality duty. Different duties will inevitably be more or less relevant to different duty-bearers. The directions for annual reports by public authorities in the ACT allow authorities to argue that a particular requirement is not relevant to their organisation.¹⁸⁴ A similar provision could be attached to a positive duty, to ensure that the benefits that all protected groups could take from a particular duty are considered, without requiring duty-bearers to adopt meaningless measures just to comply with the legislation. A duty applying to all protected attributes listed under the *Discrimination Act* would provide the widest possible benefits and be consistent with the international law understanding of human rights as 'universal, indivisible and interdependent'.¹⁸⁵

The creation of separate duties and statutes has caused difficulties in the UK and as the analysis in Part 2 demonstrates, Australia already faces a similar problem.¹⁸⁶

The proposed review of the *Discrimination Act* is likely to recommend the addition of new grounds to those listed under s7, any positive duty should be linked to that section to allow simultaneous amendment.

Recommendation B:

An ACT duty should apply to all of the protected grounds listed under s7 of the *Discrimination Act*.

C. Duty-bearers

Public authorities

All jurisdictions considered in Part 2 have positive duties that apply to public authorities. Public authorities are more easily regulated than private sector organisations because they are subject to Ministerial Directions. Public authorities include a range of government organisations as well as private entities engaged in 'functions of a public nature'.¹⁸⁷

¹⁸⁴ ACT Chief Minister, *Chief Minister's 2007-2010 Annual Report Directions* (2007) C.17, C.19, C.20, C. 22, accessed at <<http://www.psm.act.gov.au/publicationsaz.htm>> at 10 October 2008, 6.

¹⁸⁵ *Vienna Declaration and Program of Action* (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993) Art 5.

¹⁸⁶ *Framework for a Fairer Future – The Equality Bill* (6).

¹⁸⁷ That formulation appears in the *Human Rights (Amendment) Act 2008* (ACT) ss40, 40A.

The ACT has already recognised the benefits of applying equality legislation to public authorities.¹⁸⁸ Amendments to the *HRA* coming into force in 2009, make it unlawful for a public authority to act 'in a way that is incompatible with a human right' or to 'fail to give proper consideration to a relevant human right' in making a decision.¹⁸⁹ Individuals will be able to bring actions in the ACT Supreme Court for breach of the new provisions.¹⁹⁰ The introduction of a positive duty for public authorities would be a logical extension of the *HRA* provisions and the list of public authorities covered by the new duty could be modelled on the *HRA* definition.¹⁹¹ Public authorities are also already required to take some positive action toward achieving equality outcomes for women, Aboriginal and Torres Strait Islanders and racial minorities.¹⁹²

Recommendation C.1:

The ACT duty should apply to public authorities.

Private sector

The *EOWWA* is the only Australian legislation created specifically to impose positive duties on private sector employers.¹⁹³ Economic theory supporting maximum corporate autonomy,¹⁹⁴ a reluctance to create judicial means of enforcing human rights and fear of overburdening small businesses have all contributed to the failure to impose positive duties on the private sector.¹⁹⁵

Existing duties avoid the risk of overburdening small businesses by restricting their application to duty-bearers with more than a specified number of employees or contracts of a certain value.¹⁹⁶

The *EOWWA* duty already applies to private sector employers in the ACT. However, that duty applies only in an employment context and only protects women's rights. The equality duty envisaged for the ACT would cover a wider range of protected groups and extend beyond employment matters. Possible inconsistencies and difficulties arising from the interaction of an ACT duty and the Commonwealth duty would need to be carefully considered. The current state of the law, whereby private employers only have to address equality considerations relating to women, ignores the needs of other disadvantaged groups.

An obligation applying to private entities would allow the *Discrimination Act* to protect many more people than a duty applying to public authorities alone. Although a range of private entities would be covered by an obligation on

¹⁸⁸ ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (2006) 29, 32; *Human Rights Amendment Bill 2007 Explanatory Statement*, s40; the ACT Labor Party's 2008-2009 policy platform includes amending the *Discrimination Act* to include a positive duty on 'public bodies': *Australian Labor Party Australian Capital Territory Branch Platform 2008-2009*, 128.

¹⁸⁹ *Human Rights (Amendment) Act 2008* (ACT) s40B.

¹⁹⁰ *Ibid*, s40C.

¹⁹¹ *Ibid*, ss40, 40A.

¹⁹² *Annual Report Directions*, 34. (These requirements are discussed below and reproduced in Appendix B).

¹⁹³ *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ss6, 3.

¹⁹⁴ Thornton, *The Liberal Promise*, 107; John Braithwaite and Peter Drahos, *Global Business Regulation* (2001) 515, 517.

¹⁹⁵ Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (2002) 33-34, 35.

¹⁹⁶ Examples: Canadian Government response to *Review of the Employment Equity Act*, 10; *Equal Opportunity for Women in the Workplace Act 1999* (Cth) ss6, 3; *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) ss3, 5; *Employment Equity Act*, SC, 1995, c. 44, ss4, 5; *Employment Equity Act*, No. 55 of 1998, ss3, 12; *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 4 of 2000, ss27, 29, 30, 31.

public authorities,¹⁹⁷ large areas of employment and service provision are entirely private and would not be covered by a duty restricted to public functions. The more widely a positive duty applies, the better it reflects the notion that protecting and respecting rights is a responsibility for the entire ACT community.¹⁹⁸

The ACT positive duty should apply to those private entities that are able to fulfil their responsibilities under the provision in a meaningful way. Requirements under a duty can be staggered to suit the entity to which they apply and involve as many organisations as possible.¹⁹⁹

Recommendation C.2:

The ACT duty should apply to private entities in a way that ensures they are not overburdened and can effectively comply with the duty.

Even if the legislative duty is not applied to private entities, the duty could be effectively imposed on private sector organisations providing services to the government by requiring compliance with the duty through procurement practices. The *Government Procurement Act* already requires the consideration of 'probity and ethical behaviour',²⁰⁰ an equality plan could provide a clearer alternative. A policy of only contracting with private bodies that comply with equality duties is likely to be required by any duty applying to public authorities.

Recommendation C.3:

Public authorities should compel compliance through procurement practices.

An 'opt-in' provision

The *HRA* allows private organisations to 'opt-in' to the obligation on public authorities.²⁰¹ The UN also recognises the importance of 'corporate citizenship' in its Global Compact.²⁰² The explanatory statement attaching to the new *HRA* provisions noted the importance of opt-in provisions in promoting 'cultural change' and that,

the private sector can and does make important contributions to the well-being of society...(and) (e)ncouraging broader, voluntary compliance with human rights standards is a natural progression in the process of ensuring the best possible outcomes for Canberrans.²⁰³

Any organisations not covered by the proposed duty should be able to 'opt-in'.

Recommendation C.4:

The ACT duty should include an 'opt-in' provision.

¹⁹⁷ See *Human Rights (Amendment) Act 2008* (ACT) ss40, 40A.

¹⁹⁸ *Human Rights Act 2004* (ACT) Preamble.

¹⁹⁹ Example: *Promotion of Equality and Prevention of Unfair Discrimination Act Regulations 2000*, regs 29, 30, 31.

²⁰⁰ *Government Procurement Act 2001* (ACT) s22A(3)(a).

²⁰¹ *Human Rights (Amendment) Act 2008*, s40D.

²⁰² The UN Global Compact allows businesses to commit to practices aimed at ensuring that globalisation benefits all economies and societies: *About the Global Compact: Overview of the UN Global Compact* (2008) United Nations Global Compact <<http://www.unglobalcompact.org/AboutTheGC/index.html>> at 25 October 2008.

²⁰³ *Human Rights Amendment Bill 2007 Explanatory Statement*, s40.

Other potential duty-bearers

Positive duties under the *PEPUDA* and *Government of Wales Act* impose obligations on groups not usually included in equality duties, the legislature,²⁰⁴ judiciary and general population.²⁰⁵

The ACT legislature is excluded from the list of public authorities to which the new s40 of the *HRA* applies,²⁰⁶ the courts are also excluded so as not to conflict with High Court jurisprudence 'suggesting that Australia has one unified common law'.²⁰⁷ The *HRA* was created as a 'dialogue' model, with no intention of restricting the legislature's power to legislate as it sees fit;²⁰⁸ a positive duty applying to the legislature would have that effect. Therefore, despite the beneficial impact of the duty on the Welsh National Assembly, it is not recommended that the ACT duty apply to the judiciary or, at this stage, the Legislative Assembly.

South Africa's *PEPUDA* imposes duties on the entire population.²⁰⁹ Neither the duty on private individuals or non-profit organisations is subject to enforcement provisions. Unenforceable duties risk undermining the Act by creating the impression that equality duties more generally are merely aspirational. The preamble to the *HRA* encourages individuals 'to see themselves...as responsible for upholding the human rights of others', an unenforceable obligation on individuals would achieve little more.²¹⁰

D. Duty content

Unless they are given substantive content, positive duties set goals that appear abstract and difficult to achieve. All of the positive duties considered in this report adopt a mainstreaming approach, underpinned by the development of equality plans. The ACT should require duty-bearers to develop equality plans based on the same mainstreaming framework as those considered in Part 2.²¹¹

Duty-bearers would have to:

- Appoint a person with sufficient authority to take charge of monitoring and implementing the plan;
- Consult with protected groups and their representatives;
- Collect data on the representation of relevant groups in the duty-bearer's organisation;
- Analyse the data collected and the impact of existing policies;
- Set objectives for improving equality;
- Develop standards against which the success of the plan can be judged;

²⁰⁴ *Government of Wales Act 1998* (c. 38) ss48, 120; *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 4 of 2000, ss25, 1.

²⁰⁵ *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 4 of 2000, ss24, 27.

²⁰⁶ *Human Rights Amendment Bill 2007 Explanatory Statement*, s40(2)(a); *Human Rights (Amendment) Act 2008* (ACT) s40(2)(a).

²⁰⁷ *Human Rights (Amendment) Act 2008* (ACT) s40(2); Example of the application of that High Court jurisprudence to the *HRA*: *S.I. bhnf C.C. v K.S. bhnf I.S.* (2005) ACTSC 125.

²⁰⁸ *Ibid.*

²⁰⁹ *Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 4 of 2000, ss24, 27.

²¹⁰ *Human Rights Act 2004* (ACT), Preamble.

²¹¹ Spencer and Fredman also recommend this model: Spencer and Fredman 'Beyond Discrimination', 605.

- Monitor the implementation of the plan;
- Review the plan when necessary; and
- Submit annual progress reports.

All of the above steps must be informed by guidelines developed to explain and assist compliance with the duty.²¹² Training currently provided by the HRC could be adjusted for that purpose, with the appropriate resources.

The proposed Victorian *Equality Act* will only require voluntary action plans. The *EOWWA*, *Commonwealth Authorities Act* and NSW and QLD legislation however, all require compulsory equality plans. A compulsory scheme is preferred as a means of involving reluctant organisations in achieving equality. Those organisations that are disinclined to make efforts to improve equality are likely to benefit the most from a positive duty. Not all duty-bearers need be subject to the same requirements.

The ACT already requires public authorities to submit annual reports including information similar to that which might be required under an equality plan.²¹³ The *Chief Minister's 2007-2010 Annual Report Directions* require reports in relation to the *HRA*, the ACT's *Multicultural Strategy*, Aboriginal and Torres Strait Islanders and the status of women (see Appendix B).²¹⁴ The Auditor-General assesses compliance with the directions and the reports are tabled in the Legislative Assembly and made available to the public.²¹⁵ Action reported in relation to *HRA* obligations has so far been disappointing, though recent amendments to the *HRA* are likely to force improvement.²¹⁶ Incorporating the other reporting obligations into a legislative duty under the *Discrimination Act* may well have a similar effect.

Public authorities in the ACT therefore already have experience with reporting obligations and implementing equality strategies and the obligations created by the *Annual Report Directions* could be streamlined for incorporation into the kind of equality plan described above. Public authorities could be required to report on their progress annually, though private entities or smaller organisations might be allowed to report less frequently.²¹⁷

Recommendation D.1:

The ACT duty should require duty-bearers to develop and implement equality plans.

Recommendation D.2:

Guidelines should be developed to assist duty-bearers to comply with the duty.

²¹² Guidelines or 'toolkits' have been developed for all of the Acts considered in this report, examples: *APS Diversity Guidelines*; Equal Opportunity for Women in the Workplace Agency, *Developing a Workplace Program*, Equal Opportunity for Women in the Workplace Agency <http://www.eowa.gov.au/Developing_a_Workplace_Program/Six_Steps_to_a_Workplace_Program.aspx> at 19 September, 2008; *Employment Equity Act 1998 Regulations*, Gazette 8474 (2006) Forms and Annexures EEA1-EEA12 (South Africa).

²¹³ *Annual Report Directions*, 3.

²¹⁴ *Ibid*, C. 17, C.19, C.20, C. 22 (See Appendix B for a reproduction of the reporting instructions).

²¹⁵ *Ibid*, 3, 11.

²¹⁶ *Annual Report Directions*, C. 17; *Human Rights (Amendment) Act 2008* (ACT) Part 5A (see above p.37).

²¹⁷ Example: *Employment Equity Act*, No. 55 of 1998, ss13(1), 21.

Recommendation D.3:

Equality plans should be compulsory for duty-bearers. If equality plans are not made compulsory, voluntary action plans should be allowed, based on the same key elements.

Recommendation D.4:

If equality plans are made compulsory, duty-bearers should have to report to supervisory bodies on their implementation of equality plans.

E. Enforcement

Substantive equality is a complex goal and mainstreaming approaches are designed to leave space for the development of creative solutions, but without some degree of enforcement, equality objectives risk being ignored.

Consequently, positive duties are not enforced where a duty-bearer fails to achieve equality objectives, but where they refuse to take measures required by legislation or government directives.

‘Naming and shaming’

Positive duties typically require duty-bearers to submit progress reports on the implementation of their equality plans so that their compliance with the duty can be monitored.²¹⁸ Supervisory bodies often compile the reports they receive and table the reports in Parliament to publicise compliance and ‘name and shame’ duty-bearers that do not fulfil their obligations.²¹⁹ The effectiveness of such measures is however, limited and ‘naming and shaming’ alone will not be sufficient.²²⁰

The HRC already has a naming and shaming power though natural justice requirements limit its use.²²¹ The power has not yet been exercised though the Commission is currently considering using the power in relation to a number of different bodies.

Recommendation E.1:

Progress reports by duty-bearers or summaries of those reports should be tabled in the ACT Legislative Assembly as a means of rewarding compliance and publicising non-compliance.

As the organisation charged with administering the *Discrimination Act*, the HRC is the most appropriate existing body to supervise the implementation of equality plans. Alternately, a new body could be created specifically to administer the proposed positive duty; additional resources would need to be allocated in

²¹⁸ Examples: *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) s9(1); *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s13(1); *Public Service Commissioner’s Directions 1999*, dir 3.5(1)(b); *Equal Opportunity in Public Employment Act 1992* (QLD) s14(1).

²¹⁹ Example: The EOWWA explicitly states that non-compliant duty-bearers can be named as such in the EOWW Agency’s report to Parliament (*Equal Opportunity for Women in the Workplace 1999* (Cth) s19).

²²⁰ Thornton (ANU Lecture); Smith, ‘Australian Anti-Discrimination Laws: Framework, Developments and Issues’, 113; See also the discussion of enforcement measures under Commonwealth employment legislation and the Commonwealth *Disability Discrimination Act* in Part 2.

²²¹ *Human Rights Commission Act 2005* (ACT) s86.

either case. If government contractors are made duty-bearers, reports should be submitted to the relevant department so that the workloads of supervising bodies are shared.

Recommendation E.2:

The HRC (or a new body charged with administering a positive duty under the *Discrimination Act*) should be given principal responsibility for assessing progress reports. Additional resources should be allocated accordingly.

Undertakings, compliance notices, courts and tribunals

As recommended above, the ACT duty should require compulsory equality plans and progress reports from at least some duty-bearers. Progress reports would be the principal means of identifying breaches of the duty. If reports are submitted to Ministers for assessment, the Minister should summarise their findings and submit that summary to the relevant supervisory commission (Recommendation E.2). Where the supervisory body suspects that a duty-bearer has not complied, inquiries could be made and an enforceable undertaking negotiated. Where agreement cannot be reached or an undertaking is breached, the supervisory body should be able to issue a compliance notice that can be appealed to or enforced by the Discrimination Tribunal (or the new ACTCAT, which should be operational by the time any positive duty is enacted).

This model relies heavily on progress reports as a means of identifying non-compliance, it is therefore essential that the information provided by duty-bearers is correct.

Recommendation E.3. (Private entities)

If a duty is enacted that applies to *private entities* and makes implementing equality plans compulsory, the duty should give a designated supervisory body power to:

- a. investigate possible breaches;
- b. negotiate enforceable undertakings based on measures necessary to bring a duty-bearer into compliance with the duty; and
- c. issue compliance notices capable of enforcement by a tribunal.
- d. Reporting obligations should be supported by imposing fines for failure to submit annual reports or equality plans on time and intentionally providing false information.

The caseload could be minimised by allowing compliance notices to be issued in response to breaches discovered by the supervisory body but only allowing complaints about non-compliance with those notices to be made by individuals directly affected by the breach.²²² While this partial return to a complaints-led system is not ideal, it is preferable to a duty enacted without enforcement provisions as a result of concerns that the Tribunal's caseload would be too great.

Duties on public authorities can generally be enforced by empowering either the supervising commission or one of the other supervising bodies to make

²²² That is the approach taken under the *Northern Ireland Act 1998* (c. 47), Sch 9, s7, s10.

recommendations for compliance to a relevant Minister, to be passed on through Ministerial Directions.²²³

Recommendation E.4. (Public authorities)

If a duty is enacted that applies to *public authorities* and makes implementing equality plans compulsory, the duty should give a designated supervisory body power to:

- a. investigate possible breaches;
- b. negotiate enforceable undertakings based on measures necessary to bring a duty-bearer into compliance with the duty; and
- c. issue recommendations for compliance to relevant Ministers, to be passed on to authorities via Ministerial Directions.

The Welsh duty creates a direct remedy by allowing citizens to seek judicial review of compliance with the duty.²²⁴ However, as the UK has discovered, where complainants have to pursue a remedy alone, positive duties recreate the kind of power imbalance typically associated with complaints-led negative obligations.²²⁵ This model is not recommended for a jurisdiction like the ACT, which values the principles of education and cooperation reflected in its 'dialogue model' bill of rights and conciliation of discrimination complaints.

If a duty is enacted that does not require progress reports on compulsory equality plans, a less specific enforcement process could be adopted, using the supervising body's powers to ensure compliance with the *Discrimination Act* generally, for example via the HRC's existing power to initiate own-motion investigations.²²⁶ Recommendations or compliance notices issued in response to inquiries should include requiring the development of equality plans.²²⁷

Recommendation E.5.

If an ACT duty is enacted that does *not* require duty-bearers to develop and implement equality plans or submit progress reports, the principal supervisory body should be able to use powers to ensure compliance with the *Discrimination Act* generally, to conduct investigations and issue compliance notices requiring the development of equality plans.

Supervisory bodies' assessments of equality or action plans should not be considered 'approvals'. Although measures taken to comply with the duty may be relevant to discharging vicarious liability in relation to individual complaints made under the Act's existing provisions, compliance with a positive duty should not be determinative.²²⁸

²²³ Examples: *Anti-Discrimination Act 1977* (NSW) ss122R, 122S; *Equal Opportunity in Public Employment Act 1992* (QLD) s24.

²²⁴ Chaney, 'New and Unexplored Possibilities', 19.

²²⁵ In *Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor* (2008) EWHC 1865 (32-34), Silber J commented specifically on the impact of the lengthy complaints and appeals processes on the young complainant.

²²⁶ *Human Rights Commission Act 2005* (ACT) s48; This approach is similar to those recommended in *An Equality Act for a Fairer Victoria*, Recommendations 67, 72, 73, 77, 78.

²²⁷ This was recommended in *An Equality Act for a Fairer Victoria*, Recommendations 75, 78, 80.

²²⁸ The *Disability Discrimination Act 1992* (Cth) exempts duty-bearers that comply with disability standards from individual discrimination complaints: s34.

Conclusion

The ACT *Discrimination Act* has led to significant advances in equality over the seventeen years since its enactment. The ACT has however, not yet achieved substantive equality for all.

Our *Discrimination Act* is due for review and introduction of a duty to prevent unlawful discrimination and advance equality would overcome many of the flaws in our existing, complaints-led model. An equality duty would enable the Act to better address indirect discrimination and entrenched disadvantage, whilst helping public authorities and other potential duty-bearers comply with existing obligations under the *HRA*, *Chief Minister's Annual Report Directions* and the *Discrimination Act's* own vicarious liability provisions.

Efforts to achieve equality have already led the ACT to develop many of the institutions and practices needed for a positive duty. As the first jurisdiction in Australia to adopt a bill of rights, the ACT has a proud history at the forefront of human rights in this country and we are ready to take this next crucial step toward achieving substantial equality in our community.

Appendix A:

Legislative provisions enacting positive duties

The following table provides a summary of the provisions creating positive duties under legislation considered in Part II. (Table includes direct reproductions and paraphrased provisions).

A. Employment legislation

Duty-bearer	Duty	Protected grounds / groups	Enforcement
Commonwealth <i>Equal Employment Opportunity (Commonwealth Authorities) Act 1987 (Cth)</i> (Australia)			
· Educational institutions · Commonwealth authorities with 40+ employees: ss3, 5.	Duty to create a program Relevant authorities must 'develop and implement an equal employment opportunity program designed to ensure that appropriate action is taken by the authority to promote equal opportunity for and eliminate discrimination against designated groups: ss3, 5. A relevant authority shall take any action necessary to give effect to its program and any person who exercises powers in relation to employment matters in the authority shall have regard to the	· Women · Aboriginal and Torres Strait Islanders · Migrants with English as a second language and their children · Persons with a physical or mental	Reporting obligations: Relevant authorities must prepare a report on the implementation of their plan over the last 12 months and submit it to the relevant Minister: s9(1). A program report shall provide, in respect of the period to which it relates: s9(2) a. a detailed analysis of the action taken by the relevant authority to develop and implement its program;

	program in exercising those powers: s7. Program content: s6. Without limiting the generality of the definition of <i>program</i> in subsection 3(1), the program of a relevant authority shall provide for action to be taken: a. to inform employees of the contents of the program and of the results of any monitoring and evaluation of the program under paragraph (h); b. to confer responsibility for the development and implementation of the program (including a continuous review of the program), on a person or persons having sufficient authority and status within the management of the relevant authority to enable the person or persons properly to develop and implement the program; c. to consult with each trade union having members affected by the proposal for the development and implementation of the program in accordance with this Act; d. to consult with employees of the relevant authority, particularly employees who are women or persons in designated groups; e. for the collection and recording of statistics and related information concerning employment by the relevant authority, including the number of, and the types of jobs undertaken by, or job classifications of: (i) employees of either sex; and(ii) persons in designated groups; f. to consider policies, and examine practices, of the relevant authority, in relation to employment matters to identify: (i) any policies or practices that discriminate against women or persons in designated groups; and (ii) any patterns (whether ascertained statistically or otherwise) of lack of equality of opportunity in respect of women or persons in designated groups; g. to set: (i) the particular objectives to be achieved by the program; and (ii) the quantitative and other indicators against which the effectiveness of the program is to be assessed; h. to monitor and evaluate the implementation of the program and: (i) to assess the achievement of those objectives; and (ii) to assess the effectiveness of the program by comparing statistics and information collected and recorded under paragraph (e) with the indicators against which the effectiveness of the program is to be assessed.	disability: s3.	b. an assessment of the achievement of objectives set in the Plan and the Plan's effectiveness according to indicators established in the Plan. c. particulars of each direction given by the Minister under section 12 (see Minister's powers below). Minister's powers: If a report does not satisfy the requirements under s9(2), the Minister can request a further report: s9(3)(i). Once a satisfactory report has been supplied it will be tabled in both houses of Parliament: s9(3)(ii). The relevant Minister can request a special report on the development and implementation of the plan: s10 The relevant Minister can make recommendations regarding the plan, a relevant authority that does not comply must provide the Minister with reasons: s11. The relevant Minister can give directions to relevant authorities about the performance of its duties under the Act: s12.
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Commonwealth

Equal Opportunity for Women in the Workplace Act 1999 (Cth) (Australia)

- Higher education institutions that are employers - Natural persons, bodies or associations with 100+ employees (not including Commonwealth, State or Territory authorities): s3.	Duty to create a program A relevant employer must implement an equal opportunity for women in the workplace plan designed to ensure that 'appropriate action is taken to eliminate all forms of discrimination by the relevant employer against women in relation to employment matters' and that 'measures are taken by the relevant employer to contribute to the achievement of equal opportunity for women in relation to employment matters': ss6, 3. Program content: s8. - Before developing a workplace program, a relevant employer must: - confer responsibility for the development and implementation of the program (including continuous review of the program) on a person or persons having sufficient authority and status within the management of the relevant employer to enable the person or persons properly to develop and implement the program; and - consult with employees (or their nominated representatives) of the relevant employer, particularly employees who are women. - In preparing a workplace program, a relevant employer must prepare a workplace profile. The workplace profile must relate to the employer's workplace at a specified date occurring not more than 6 months before the start of the period to which the program relates. - After preparing the profile, the relevant employer must prepare an analysis of the issues relating to employment matters that the employer would need to address to achieve equal opportunity for women in the employer's workplace. - The program must provide for - actions to be taken in relation to priority issues identified in the analysis; and - evaluation of the effectiveness of the actions in achieving equal opportunity for women in the employer's workplace. - A workplace program of a relevant employer may contain any	Women	The Act establishes the EOWW Agency to administer the Act: s8A. Reporting obligations: Relevant employers must submit an annual report on the implementation of their program: s13(1). Reports must be submitted to the EOWW Agency: s13A(1). The report must: (s13(2)) - set out the workplace profile; and - describe the employer's analysis of the issues in the employer's workplace relating to equal opportunity for women; and - describe the actions taken by the employer during the reporting period to address the priority issues identified in the analysis; and - describe the actions that the employer plans to take in the next reporting period to address issues in the employer's workplace relating to employment matters that the employer would need to address to achieve equal opportunity for women in the employer's workplace Confidential reports: The report may contain an evaluation of the effectiveness of the actions in achieving equal opportunity for women in the employer's workplace. If it does not, such an evaluation must be submitted in a confidential report under s14: s13(3). Public reports: Public reports can be included in the EOWW Agency's annual report to the Minister for tabling in Parliament: ss12, 15.
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	other provision that the relevant employer thinks fit that is not inconsistent with the objects of this Act. 6. A relevant employer must have a workplace program for each 12 month reporting period (s13A).		Waiver: Employers can ask the EOWW Agency to waive the reporting requirement but only if the employer has supplied reports for the last three years and the Agency is satisfied that the employer 'has taken all reasonably practicable measures to address the issues relating to employment matters that affect equal opportunity for women in the employer's workplace': s13C. EOWW Agency powers: The EOWW Agency can request additional information from employers following the lodgement of an annual report: s18. Where an employer fails to lodge a report or fails to provide further information requested under s18 the Agency can name the employer as having failed to do so in its report to the Minister for tabling in Parliament: s19.
Commonwealth <i>Public Service Act 1999 (Cth) and Public Service Commissioner's Directions 1999</i> (Australia)			
Australian Public Service Agency Heads: s18	The Act: An Agency Head must establish a workplace diversity program to assist in giving effect to the APS Values: s18. The provision is headed 'Promotion of employment equity'. Legally binding directions: Agency heads must put in place measures to: (Direction 3.2). · ensure that all forms of discrimination are prevented, consistent with Commonwealth law; and · recognise the positive advantages of, and help make best use of, the diversity in the workplace and the Australian community; and · assist employees to balance their work, family and other caring responsibilities effectively by encouraging the development of mutually beneficial work practices in the Agency. The relevant APS values are: s10 · Merit-based employment: s10(b)	Under direction 2.1.3: · Aboriginal and Torres Strait Islanders · Gender · Race or ethnicity · Physical or mental disability.	Agency heads must evaluate and report on the effectiveness and outcomes of the program annually: Direction 3.5(1)(b). The report must contain sufficient information for the APS Commissioner to: (Direction 3.5(2)). a. evaluate and make an assessment of the effectiveness of Agencies' workplace diversity programs; and b. make the assessment for the purpose of the Commissioner's report under s44 of the Act.(Under s44 the APS Commissioner must prepare an annual report on the 'state of the public service' for presentation to Parliament).

	- Non-discrimination and diversity: s10(c) - Fair, flexible, safe and rewarding workplaces: s10(j) - Equity in employment: s10(l) Parts of the APS Code of Conduct are also relevant: s13 - An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment: s13(3). - An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS: s13(11). Program content: The workplace diversity program must include measures directed at ensuring that: (Direction 3.3). - corporate, business and human resource plans demonstrate that the agency values the diverse backgrounds of its employees and values, and is able to access and make use of the diverse skills and experience of its employees; - workplace structures, systems and procedures help employees balance their work, family and other caring responsibilities effectively; - engagement decisions take account of the diversity of the Australian community as well as the agency's organisational and business goals and the skills required for the job; and - employment decisions are transparent, equitable and procedurally fair.		
New South Wales <i>Anti-Discrimination Act 1977 (NSW)</i>			
s122B(1): - NSW Departments - Teaching service - Divisions of the Government Service to which s4H of the <i>Public Sector Employment and Management Act</i>	The objects of this Part are: s122C - to eliminate and ensure the absence of discrimination in employment on the grounds of race, sex, marital or domestic status and disability, and - to promote equal employment opportunity for women, members of racial minorities and persons who have a disability, in the authorities to which this Part applies. 122J Preparation and implementation of management plans - Each authority shall prepare and implement an equal	s122C: - Sex - Marital or domestic status - Disability - Women - Racial minorities - Persons with a disability	Authorities must send a copy of their management plan to the Director of Equal Opportunity in Public Employment ("the Director"): s122J(6) s122I (4) The functions of the Director of Equal Opportunity in Public Employment are: - to advise and assist authorities in relation to management plans, - to evaluate the effectiveness of management plans

2002 applies - State owned corporations - Police Service - Other groups proclaimed by the Governor.	employment opportunity management plan (EEO) in order to achieve the objects of this Part. 2. The management plan of an authority shall include provisions relating to: - the devising of policies and programmes by which the objects of this Part are to be achieved, - the communication of those policies and programmes to persons within the authority, - the collection and recording of appropriate information, - the review of personnel practices within the authority (including recruitment techniques, selection criteria, training and staff development programmes, promotion and transfer policies and patterns, and conditions of service) with a view to the identification of any discriminatory practices, - the setting of goals or targets, where these may reasonably be determined, against which the success of the management plan in achieving the objects of this Part may be assessed, - the means, other than those referred to in paragraph (e), of evaluating the policies and programmes referred to in paragraph (a), - the revision and amendment of the management plan, and - the appointment of persons within the authority to implement the provisions referred to in paragraphs (a)-(g). 2. The management plan of an authority may include provisions, other than those referred to in subsection (2), which are not inconsistent with the objects of this Part.		in achieving the objects of this Part, and - to make reports and recommendations, at least once in each year, to the Minister as to: (i) the operation of management plans, and (ii) such matters as the Director thinks appropriate relating to the objects of this Part. - Where the Director is dissatisfied with any matter relating to the preparation, amendment or implementation of a management plan by an authority or any failure or omission of an authority with respect to the preparation, amendment or implementation of a management plan, the Director may refer the matter to the Board: s122M - The Board can then investigate (s122N) and request information from the authority: s122P - At the end of an investigation the Board can make a recommendation to the Director or authority, or make a report with or without recommendations to the relevant Minister: s122R - The Minister can direct an authority to change its management plan and the authority must comply: s122S
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Queensland

Equal Opportunity in Public Employment Act 1992 (QLD)

Agencies: s3 - Units of the public sector - Police Service - Persons prescribed by regulation.	The purpose of the Act is to promote equality of employment opportunity in the public sector: s4(1) 2. This purpose is to be achieved by— requiring an agency develop an Equal Employment Opportunity ("EEO") management plan that will—	Target groups: s3 - Aboriginal and Torres Strait Islanders - Migrants with English as a second	EEOs must be given to the Commissioner for Public Service Equity (the Commissioner) for approval: s11. Reporting obligations Agencies must give the Commissioner an annual report on the implementation of their EEO and plan for the next
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	i. enable members of the target groups to— (A) compete for recruitment, selection, promotion and transfer in the agency and within other agencies; and (B) pursue careers in the agency and other agencies as effectively as people who are not members of the target groups; and ii. eliminate unlawful discrimination by the agency or its employees against members of the target groups with respect to employment matters; and b. requiring an agency to implement its EEO management plan. c. establishing procedures to monitor compliance with these requirements. An agency must develop an EEO management plan to ensure that appropriate action is taken by the agency—s6(1) a. to promote equal employment opportunity for; and b. to eliminate unlawful discrimination by it against; members of the target groups with respect to employment matters. <u>Section 7 sets out 8 steps for developing an EEO Management Plan:</u> 1. Issue policy statement and keep employees informed 2. Nominate a person with sufficient authority to have EEO responsibility 3. Consult with trade unions 4. Consult with employees 5. Collect statistics 6. Review policies and practices 7. Set objectives and implementation strategy 8. Assess implementation A person who exercises powers with respect to employment matters in an agency must have regard to the agency's EEO management plan in exercising the powers: s13.	language and their children · Women · People with 'a physical, sensory, intellectual or psychiatric disability' · Other groups prescribed by legislation	12 mths: s14(1). Commissioner's powers 15. If the Commissioner for Public Sector Equity ("the Commissioner") is dissatisfied with any matter relating to— a. the preparation, implementation or outcome of an agency's EEO b. management plan; or c. an agency's annual report under section 14; d. the Commissioner may do either or both of the following— · recommend to the agency's chief executive the action that the agency should take to overcome that dissatisfaction; · refer the matter to the Anti-Discrimination Tribunal ("the Tribunal"). Agencies must comply with a recommendation unless the Chief Executive explains its reasons for not complying to the relevant Minister and the Commissioner: s16 Tribunal powers · The Tribunal can recommend conciliation between the Commissioner and Chief Executive: s17 · The Tribunal can investigate a reference: s19 · The Tribunal can request information and require compliance with those requests: s21. · The Tribunal, following an inquiry, must give a report, with or without recommendations to the relevant Minister, Chief Executive and Commissioner: s22 · The recommendation could be that the EEO be changed: s23 · Agencies must comply with recommendations: s24.
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Canada

Employment Equity Act, SC, 1995, c. 44

The following employers are duty-bearers under the Act: s4(1) - Private sector employers with 100+ employees in connection with Federal work: ss4, 3. - Portions of the federal public administration set out in Sch I or IV to the <i>Financial Administration Act</i>: s4. - Portions of the federal public administration set out in Sch V to the <i>Financial Administration Act</i> with 100+ employees: s4. - Other portions of the public sector with 100+ employees as may be specified by order of the Governor in Council if recommended	Employers' duties: s5 Every employer shall implement employment equity by: - identifying and eliminating employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and - instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in: (i) the Canadian workforce (ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees. Exceptions: Measures that would cause 'undue hardship to the employer': s6(a). Employment Equity Plan ("EEP") content: s9(1): For the purpose of implementing employment equity, every employer shall - collect information and conduct an analysis of the employer's workforce, in accordance with the regulations, in order to determine the degree of the underrepresentation of persons in designated groups in each occupational group in that workforce; and - conduct a review of the employer's employment systems, policies and practices, in accordance with the regulations, in order to identify employment barriers against persons in designated groups that result from those systems, policies and practices s10(1) The employer shall prepare an EEP that - specifies the positive policies and practices that are to be instituted by the employer in the short term for the hiring, training, promotion and retention of persons in designated groups and for	- Women - Aboriginal people - Persons with disabilities - Members of visible minorities (meaning persons other than Aboriginal people, who are non-Caucasian in race or non-white in colour): s3.	Reporting obligations <u>Private sector employers</u> Private sector employers must file an annual report with the designated Minister stating: s18(1) - the industrial sector in which its employees are employed, the location of the employer and its employees, the number of its employees and the number of those employees who are members of designated groups; - the occupational groups in which its employees are employed and the degree of representation of persons who are members of designated groups in each occupational group; - the salary ranges of its employees and the degree of representation of persons who are members of designated groups in each range and in each prescribed subdivision of the range; and - the number of its employees hired, promoted and terminated and the degree of representation in those numbers of persons who are members of designated groups. The report must also include: s18(6) - the measures taken by the employer during the reporting period to implement employment equity and the results achieved; and - the consultations between the employer and its employees' representatives during the reporting period concerning the implementation of employment equity. - The Minister can grant a 1 year exemption if 'special circumstances warrant the exemption': s18(8). - The Minister must send a copy to the Canadian Human Rights Commission ("CHRC"): s18(10).
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by Treasury and the relevant Minister.	the making of reasonable accommodations for those persons, to correct the underrepresentation of those persons identified by the analysis under paragraph 9(1)(a); b. specifies the measures to be taken by the employer in the short term for the elimination of any employment barriers identified by the review under paragraph 9(1)(b); c. establishes a timetable for the implementation of the matters referred to in paragraphs (a) and (b); d. where underrepresentation has been identified by the analysis, establishes short term numerical goals for the hiring and promotion of persons in designated groups in order to increase their representation in each occupational group in the workforce in which underrepresentation has been identified and sets out measures to be taken in each year to meet those goals; e. sets out the employer's longer term goals for increasing the representation of persons in designated groups in the employer's workforce and the employer's strategy for achieving those goals; and f. provides for any other matter that may be prescribed. Standard (s11): The equity plan must, if implemented, constitute reasonable progress toward implementing employment equity as required by this Act. Monitoring and implementation s12: Every employer shall a. make all reasonable efforts to implement its employment equity plan; and b. monitor implementation of its plan to assess whether reasonable progress is being made. s13: Every employer shall, at least once during the period in respect of which the short term numerical goals referred to in paragraph 10(1)(d) are established, review its employment equity plan and revise it by a. updating the numerical goals, and b. making any other necessary changes. Communication with employees 15. (1) Every employer shall consult with its employees' representatives by inviting the representatives to provide their views concerning a. the assistance that they could provide to the employer to		The Minister must table a consolidation of the reports they receive in Parliament: s20. <u>s4(b) Public sector employers</u> Each fiscal year, the President of the Treasury Board shall present a report on the state of employment equity in s4(1)(b) public administration bodies: s21 The report must include: s21(2) a. a consolidation and analysis of i. the number of employees employed and the number of persons who are members of each designated group so employed; ii. the total number of employees employed in all portions of the federal public administration referred to in paragraph 4(1)(b) in each province and in the National Capital Region and the number of persons who are members of each designated group so employed; iii. the occupational groups of employees and the degree of representation of persons who are members of each designated group in each occupational group; iv. the salary ranges of employees and the degree of representation of persons who are members of each designated group in each range and in any subdivision of the range; and v. the numbers of employees hired, promoted and terminated and the degree of representation, in those numbers, of persons who are members of each designated group; b. a description of the principal measures taken by the Treasury Board during the reporting period to implement employment equity and the results achieved; c. a description of the consultations between the Treasury Board and its employees' representatives during the reporting period concerning the implementation of employment equity; and d. any other information that the President of the Treasury Board considers relevant.
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	facilitate the implementation of employment equity in its workplace and the communication to its employees of matters relating to employment equity; and b. the preparation, implementation and revision of the plan. s15(3): Every employer and its employees' representatives shall collaborate in the preparation, implementation and revision of the employer's employment equity plan. Duty to maintain records: s17. Duty to keep employees informed about the equality plan: s14.		<u>ss4(1)(c) and (d) public sector employers</u> ss4(1)(c) and (d) public sector employers, other than the Canadian Security Intelligence Service, shall provide an annual report to the President of the Treasury Board to be laid before Parliament, containing the same information given by the President with regard to private sector employers (except that required under s21(2)(c)): s21(3). The Canadian Security Intelligence Service must supply a similar annual report: s21(6). Powers of the CHRC · The Commission is responsible for enforcing the s5 positive duty: s22(1). · The CHRC can appoint compliance officers to conduct compliance audits of duty-bearers: s23. · Where a compliance officer is of the opinion that a duty-bearer has not complied, the compliance officer shall attempt to negotiate a written undertaking to remedy the non-compliance: s25. · Where an undertaking is not reached, the CHRC is informed and may issue a direction to comply: 25(2). · Where an undertaking has been breached the CHRC can issue a direction to comply: s25(3). Tribunals · If a duty-bearer applies for review of a direction or the CHRC believes a duty-bearer has failed to comply with a direction and makes an application to the Chairperson of the Canadian Human Rights Tribunal, the Chairperson will establish an Employment Equity Review Tribunal to hear the matter: ss27(1), 27(2), 28(1). · The Tribunal can make an order to remedy the breach: s30. · Failure to submit a report on time or include the required information or provision of incorrect information constitutes a violation for which monetary penalties of up to \$10,000 for a first violation and \$50,000 for additional violations can be imposed: s35.
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			Orders are enforced by the Federal Court: s31.
South Africa Employment Equity Act , No. 55 of 1998 (South Africa)			
Designated employers meaning: ss3, 12. · A person with 50+ employees with an annual turnover equal to or above that of a small business under Sch 4 to the Act. · A municipality. · An organ of state except the National Defence Force, National Intelligence Agency and Secret Service. · Employers bound by collective agreements under the <i>Labour Relations Act</i>. · Non-designated employers can volunteer to be bound: s14.	Duty s13(1): Designated employers must 'in order to achieve employment equity, implement affirmative action measures for people from designated groups' by: s13(2) - consulting with employees under s16. - conducting an analysis under s19 of existing policies to identify barriers to equality and the positions held by members of designated groups (including income differentials: s27. - preparing an employment equity plan ("EEP") under s20. - reporting to the Director-General on the implementation of the plan under s21. Affirmative action measures must include: s15(2) - measures to identify and eliminate employment barriers; - measures designed to further diversify the workplace based on equal dignity and respect of all people; - reasonable accommodation of people from designated groups; - Using numerical targets but not quotas to (i) ensure equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce (ii) retain and develop people from designated groups and implement appropriate training measures for skills development. Contents of employment equity plan: s20(2) - Objectives for the year - Affirmative action measures to be implemented - Numerical goals to correct underrepresentation - Timetable - Duration of the plan (cannot be longer than 5 years) - Monitoring procedures and standards for assessment - Internal procedures for complaint management - Who is responsible for implementation - Any other prescribed matter. Duty to keep records of EEPs and employee statistics: s26.	Designated groups: s3 · Black people · Women · People with disabilities	Reporting obligations Designated employers must report on the implementation of their employment equity plan. Employers of -150 employees must submit reports once every 2 yrs and those with 150+ to submit reports annually: ss13(1), 21. Employment Equality Commission (EEC) The Act establishes the EEC to assist in achieving employment equity: Ch V. Labour department · Labour inspectors are empowered to inspect designated employers to determine whether they have complied with their obligations under the Act(s35), where the employer has not, inspectors must try to negotiate an undertaking to comply: s36. · If the employer will not make an undertaking or breaches an undertaking, an inspector can make a compliance order: s37. · Designated employers can object to the Director General (DG) about a compliance order (s39). If the DG believes a compliance order should be served on the employer, the employer must comply or appeal to the Labour Court under s40. Powers of the DG · The DG can conduct its own reviews of employer compliance: s43. · The DG can request employers' records and meetings with employees: s43(2). · The DG can make recommendations as to how the employer should comply: s44. · Non-compliance with a request or recommendation can be referred to the Labour Court: s45.

	Duty to inform employees about EEP: s25.		Labour Court The Labour Court can make a compliance order an order of the court, require an employer to pay compensation (including to individual employees) and impose fines for certain breaches: ss50, 61.
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B. Australian legislation

Duty-bearer	Duty	Protected grounds / groups	Enforcement
Commonwealth <i>Disability Discrimination Act 1992 (Cth) ("DDA")</i>			
Section 31(1)(d) DDA: - Cth - State - Territory - Public authorities of the Cth - Instrumentality of a State - Public authority of a Territory Disability Standards for Accessible Public Transport 2002: Providers of public transportation services. Disability Standards for Education 2005: div 2.1 - Educational institutions - Administrators of educational institutions - Organisations that develop and accredit curricula or training courses used by other	Disability Standards for Public Transport: - Essentially create a timetable for the introduction of facilities, services and equipment. - Where the standards are complied with, a discrimination claim cannot be brought under the Part 2 of the Act: div 34. Disability Standards for Education: - Require consultation and 'reasonable adjustment' to enable disabled students to participate 'on an equal basis': divs 2.2, 3.4. - Unjustifiable hardship is a defence: divs 10.1, 10.2. - Where the standards are complied with, a discrimination claim cannot be brought under the Part 2 of the Act: DDA s34 Access to premises standards (proposed) Will create standards for access to premises.	Persons with a mental or physical disability: s4.	Disability standards and education standards The Act makes it unlawful to breach a disability standard: DDA s32. Action plans - Action plans are voluntary: DDA s60. - Organisations can register their action plans with the AHRC and have their plans included on the Commission's website: DDA s64.

education providers (These include Cth, state, territory govts and agencies as well as private organisations and individuals). Action plans: DDA s61. Service providers, meaning: · A Cth department · A State department · A Cth public authority · An instrumentality of a State · An educational institution · Person that provides goods, services or facilities.	Action plans 'May' be 'prepared and implemented' by service providers: DDA s60. The action plan of a service provider must include provisions relating to: s61. - the devising of policies and programs to achieve the objects of this Act; and - the communication of these policies and programs to persons within the service provider; and - the review of practices within the service provider with a view to the identification of any discriminatory practices; and - the setting of goals and targets, where these may reasonably be determined against which the success of the plan in achieving the objects of the Act may be assessed; and - the means, other than those referred to in paragraph (d), of evaluating the policies and programs referred to in paragraph (a); and - the appointment of persons within the service provider to implement the provisions referred to in paragraphs (a) to (e) (inclusive).		
Northern Territory Anti-Discrimination Act (NT)			
The duty applies to 'a person' under s24 but must be understood in light of the definition of discrimination (s20) which refers only to conduct in the areas of: s28 - education; - work; - accommodation; - goods, services and facilities;	Duty: Failure to accommodate special need: s24 1. A person shall not fail or refuse to accommodate a special need that another person has because of an attribute. 2. For the purposes of subsection (1) - - a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and	"Attributes": s19. · race; · sex; · sexuality; · age; · marital status; · pregnancy; · parenthood; · breastfeeding; · impairment; · trade union or employer association	The Act makes it unlawful to fail to accommodate a special need, unless an exemption under the Act applies: s19(2).

e. clubs; and f. insurance and superannuation.	b. a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute. 3. Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to - a. the nature of the special need; b. the cost of accommodating the special need and the number of people who would benefit or be disadvantaged; c. the financial circumstances of the person; d. the disruption that accommodating the special need may cause; and e. the nature of any benefit or detriment to all persons concerned.	activity; · religious belief or activity; · political opinion, affiliation or activity; · irrelevant medical record; · irrelevant criminal record; · association with a person who has, or is believed to have, an attribute referred to in this section.	
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Western Australia

Policy Framework for Substantive Equality 2004

Public sector service providers.	Duty: · to eliminate systemic racial discrimination in the provision of public sector services: p.7. · to promote sensitivity to the different needs of client groups: p7. Public sector service providers must: · Commit to implementing the policy framework by allocating responsibility and resources; · Identify clients and their needs; · Set objectives; · Monitor the implementation of their strategies; and · Review and evaluate the implementation of the policy.	Race	The strategy is public service policy not binding legislation.
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C. Proposed Australian legislation

Duty-bearer	Duty	Protected grounds / groups	Enforcement
Victoria Proposed Equality Act (VIC) (based on the inquiry <i>An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report</i> , June 2008)			
- Public - Private - Not-for-profit organisations (1.89, 1.108)	Duty to eliminate discrimination as far as possible: Recommendation 9. The Act would provide for voluntary action plans: Recommendation 60	The grounds currently covered by the <i>Equal Opportunity Act 1995</i> (VIC) plus homelessness and irrelevant criminal record: Recommendations 46 and 48.	The Victorian Equal Opportunity Commission ("EOC") would have powers to <u>facilitate</u> compliance: - The EOC would have a duty to collect and analyse data relevant to the objects of the Act: Recommendation 55. - The EOC should encourage the collection of data by all duty-holders by creating easy tools and guidance materials: Recommendation 56. - On request by public and private employers, the EOC can review their compliance with the Act: Recommendation 59. - The Commission could offer advice on voluntary action plans and keep a register of those that meet the minimum standards on its website: Recommendation 60. The EOC would be given the power to <u>enforce</u> compliance— <u>Own-motion inquiries</u>: (Recommendation 67) could lead to: an enforceable undertaking, compliance notice, or the EOC sending their report to the Attorney-General (AG) for tabling in Parliament— <u>Enforceable undertakings</u>: enforceable undertakings can be negotiated with or without an investigation (recommendation 74) where an unlawful act is or is likely to occur (recommendation 72) and tell the duty-bearer what needs to be done to comply (recommendation 73). If an enforceable undertaking is breached, the EOC can apply to VCAT for enforcement: recommendation 75.

			• <u>Compliance notices</u>: Where the EOC has completed an investigation and finds a breach, they can issue a compliance notice with recommendations or requiring the implementation of an action plan: Recommendations 76, 78. • Duty-bearers can appeal a compliance notice to VCAT: Recommendation 79. • Where a duty-bearer does not comply the EOC can apply to VCAT for an order requiring compliance: Recommendation 80. • Reports based on inquiries can be given to AG for tabling in Parliament: Recommendation 81.
Commonwealth Proposed changes to the <i>Sex Discrimination Act 1984 (Cth)</i> (“<i>SDA</i>”) / the proposed <i>Commonwealth Equality Act</i> (based on AHRC Submission to the Senate Legal and Constitutional Affairs Committee’s Inquiry into the Effectiveness of the <i>SDA</i> in Eliminating Discrimination and Promoting Gender Equality)			
The submission proposes several different positive duties, some with a broader application than others. A number of the duties are most relevant to employers and apply specifically to public sector employers and private sector employers covered by the <i>EOWWA Act</i> (see above). The submission recommends that the <i>SDA</i> be extended to apply to • States and state instrumentalities: Rec 18 • The Crown in right of the State: Rec 19. Option for Reform E proposes that the <i>SDA</i> be extended to cover discrimination in ‘all areas of public life’, a change that	The submission divided its recommendations into two stages, the first makes ‘recommendations’ (Rec) capable of immediate implementation, the second lists ‘options for reform’ (Opt) to be introduced within the next 3 years. The submission also considered the introduction of an Australian <i>Equality Act</i>. Stage 1 imposes a positive obligation on employers and other appropriate persons to reasonably accommodate the needs of workers in relation to their pregnancy or family and carer responsibilities. Failure to meet this obligation would be an actionable form of discrimination: Rec 17. - This would include an obligation not to ‘unreasonably refuse’ requests for part time work: (282) Stage 2 imposes a positive duty to take reasonable steps to eliminate discrimination and promote gender equality: Opt A.	The <i>SDA</i> currently protects the following attributes: s6 • Sex • Marital status • Pregnancy and potential pregnancy The submission recommends: • Changing ‘marital status’ to ‘couple status’: Rec 15. • Adding breastfeeding: Opt C • Adding sexuality: Opt C • Adding sex and gender identity: Opt C • Extending protections relating to family responsibilities: Opt D	Under the <i>SDA</i> <u>Action plan specific enforcement measures</u> Opt K: Consider amending the <i>EOWWA Act</i> or <i>SDA Act</i> to provide for an auditing function of Gender Equality Action Plans. - A power to issue compliance notices could be included (748). <u>Procurement</u> Rec 53: Consider how the Australian Government can best use its purchasing power to promote gender equality and address systematic discrimination. - This would require governments only to offer contracts to service providers that comply with gender equality standards, this could include creating gender equality plans: (751-52). <u>Inquiry powers</u> Rec 44: Amend the <i>SDA</i> to include a broad formal inquiry function in relation to the elimination of discrimination and promotion of gender equality.

would extend the Act to apply to not-for-profit organisations and clubs. Recommendations regarding action plans would allow organisations not covered by existing duties under the <i>EOWWA</i> to voluntarily subject themselves to the <i>SDA</i> and reporting requirements: (740), Opt J.	Positive obligation on employers(and other appropriate respondents) to take all reasonable steps to avoid sexual harassment of or by their employees: Opt G <u>Action plans</u> Opt J: Consider allowing the EOWW Agency and or AHRC to receive Gender Equality Action Plans, from bodies other than employers currently covered by the <i>EOWWA</i>. The action plans would be voluntary (740). Under an Equality Act The submission recommends a 'general positive duty to eliminate discrimination, and promote equality': (804)		- Such inquiries would be followed by a report which may include recommendations such as requiring the respondent to develop an action plan: (744) Under an Equality Act The submission did not consider enforcement measures for an <i>Equality Act</i> duty.
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D. Legislation outside Australia

Duty-bearer	Duty	Protected grounds / groups	Enforcement
Northern Ireland <i>Northern Ireland Act 1998, c.47</i>			
Public authorities: s75(3),	1. A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity— a. between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; b. between men and women generally; c. between persons with a disability and persons without; and d. between persons with dependants and persons without.	Duty to promote equality: s75(1) - Religious belief - Political opinion - Racial group - Age - Marital status - Sexual orientation	Equality schemes: Sch 9 - The EC can request that public authorities not bound by the duty submit an equality scheme: s3(1). - When the EC receives a scheme they can either approve it or send it to the Secretary of State ("SS"): s6 - The SS can approve the scheme, request a revised scheme or make a scheme for the authority. The SS shall notify the Assembly of any requests for revised schemes and provide copies of any schemes if

	2. Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. Equality schemes: Sch 9 Public authorities to which the s75 duties apply must submit an equality scheme to the Equality Commission ("EC"): s2(1). Schemes must include the authorities' arrangements: s4(2) - for assessing its compliance with the duties under section 75 and for consulting on matters to which a duty under that section is likely to be relevant (including details of the persons to be consulted); - for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity; - for monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity; - for publishing the results of such assessments as are mentioned in paragraph (b) and such monitoring as is mentioned in paragraph (c); - for training staff; - for ensuring, and assessing, public access to information and to services provided by the authority. Schemes must also: s4(3) - Specify a timetable for measures proposed in the scheme - Include details of how they will be published Schemes must also be based on consultation with representatives of persons likely to be affected: s5. Schemes must be reviewed every 5 years: s8(3).	- Between men and women - Between persons with a disability - Between persons with and without dependents Duty to promote good relations: Between persons of different: s75(2) - religious belief - political opinion - racial group	creates: s7 - If the EC receives a complaint that an authority has not provided a revised scheme or implemented a scheme created by the SS it shall investigate the complaint or give the complainant reasons for not investigating the complaint: s10(1). - The complaint must be from someone directly affected by the non-compliance (s10(2)) and they must tell the authority before complaining, giving reasonable opportunity for response: s10(4). - Investigation reports can include recommendations, if they are not implemented within a reasonable time the EC can refer the matter to the SS who can direct the authority to comply; the Assembly must be informed of such measures: s11.
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Wales <i>Government of Wales Act 1998 (c. 38)</i>			
National Assembly of Wales.	Equal Opportunities in conduct of business: s48 The Assembly shall make appropriate arrangements with a view to securing that its business is conducted with due regard to the principle that there should be equality of opportunity for all people. Equality of opportunity: s120 1. The Assembly shall make appropriate arrangements with a view to securing that its functions are exercised with due regard to the principle that there should be equality of opportunity for all people. 2. After each financial year the Assembly shall publish a report containing— a. a statement of the arrangements made in pursuance of subsection (1) which had effect during that financial year, and b. an assessment of how effective those arrangements were in promoting equality of opportunity.	Not specified.	The Assembly Standing Committee on Equality of Opportunity must complete an annual report on the Assembly's efforts under the s120 duty: s120(2)²²⁹ Government actions can be subjected to judicial review to determine whether a duty has been breached.²³⁰
South Africa <i>Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2008 and Regulations</i>			
The Act imposes separate duties on: · The state: ss1, 25. · Persons operating in the public domain, ie government contractors or persons exercising public power: s26. · All persons, NGOs,	General duty The Act imposes a general 'duty and responsibility to promote equality' for 'all persons' and the State: s24. State duty to promote equality: s25(1). The duty includes · Developing awareness of fundamental rights · Where necessary, developing action plans · Enacting further legislation where necessary · Developing codes of practice including for reasonable accommodation · Providing assistance and training on equality issues · Developing complaints mechanisms · Popularising the Act	Section 3: · race · gender · sex · pregnancy · marital status · ethnic or social origin · colour · sexual orientation · age · disability	State duty (Regulations) · SAHRC can request information on the implementation of the equality duty: reg 25(2) · The SAHRC can also help complainants, conduct investigations and make recommendations as directed by the Equality Court ("Court"): reg 25(3) The Minister is also required to maintain a list of examples of unfair practices in the Schedule to the Act: reg 29. <u>Equality plans</u> · Must be made available on the department's website, gazetted, circulated to employees,

²²⁹ Chaney, 'New and Unexplored Possibilities', 22.

²³⁰ Ibid, 19.

community organisations and traditional institutions: s27. Those that volunteer to be bound under s14.	All Ministers must implement measures aimed at achieving equality by: s25(4) 'eliminating any form of unfair discrimination or the perpetuation of inequality in any law, policy or practice for which those Ministers are responsible'. 'preparing and implementing equality plans' which must include a time frame agreed to by the Minister for Finance. Equality plans must be submitted to the South African Human Rights Commission ("SAHRC"): s25(5). Responsibility of persons operating in public domain to promote equality s26: Persons directly or indirectly contracting with the State or exercising public power have a responsibility to— - adopt appropriate equality plans, codes, regulatory mechanisms and measures for the effective promotion of equality in the spheres of their operation; - enforce and monitor the implementation of those measures; and - report annually to regulatory authorities on the implementation of the plan. <u>Entities with 150+ employees: Regulations</u> - Must prepare an equality plan as described in the duty column - Plans are submitted to the head of the appropriate government department: s29(5)(a). - The department then analyses the plan as the SAHRC does for State plans: s29(5)(a). - The department must also assess implementation reports as the SAHRC does for state plans: s29(5)(c). - Make a declaration of adherence to the Code of Practice annexed to the regs: s29(6) (the Code essentially explains the Act, the framework in which it operates, the nature of discrimination, examples and commitments not to discriminate on prescribed grounds): Regs, Annex C. - Must display and provide copies of their plan to the public: s29(7). <u>Entities with 50-150 employees: regs s30(1)</u> - Must adopt measures to promote equality - Must report if requested by a government department - Must make a declaration of adherence to the code of practice	- religion - conscience - belief - culture - language - birth	submitted to the SAHRC and the Minister for Finance and tabled in Parliament: reg 24(3)(d). - Equality plans are submitted to the SAHRC who must give a copy to the Commission on Gender Equality: reg 25(1) - SAHRC must consider every equality plan with a view to—reg 25(2) - ascertaining whether an equality plan addresses the areas of unfair discrimination and inequalities; - assessing whether the goals and objectives are directed towards the promotion of equality; - assessing whether the measures to be implemented will achieve the stated goals and objectives; - assessing whether the measures adopted to monitor the implementation of the equality plan are appropriate; - assessing whether the criteria to evaluate the implementation of the equality plan are appropriate; - assessing whether the equality plan will achieve reasonable progress towards the eradication of systemic discrimination and the promotion of equality; - in general, reporting on the shortcomings of the equality plan, if any; - making recommendations in regard to the equality plan; and - reporting on the above matters in its report to the National Assembly required in the Constitution. - The SAHRC can make recommendations to the Minister: reg 25(4) <u>Reporting obligations</u> Annual progress reports on the implementation of equality plans must be submitted to the SAHRC for assessment: reg 26.
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	- Must display and provide copies of the measures it has taken to the public. <u>Entities with <50 employees</u> must take the same action as those with 50-150 employees but are not required to make their equality measures available to the public: regs s31. Social commitment by all persons to promote equality: s27 - Pursuant to s26, all persons, NGOs, community organisations and traditional institutions must promote equality in their relationships with other bodies in their public activities. - The Minister for Justice and Constitutional Development can develop regulations to include companies, closed corporations, partnerships, clubs, associations etc Equality plans Equality plans must contain the following information: Regs s24(3)(c) - analysis of the area of unfair discrimination - goals - measures to be implemented - time frames for implementation - monitoring mechanisms - criteria for evaluation Equality plans last five years: regs ss24(1)(b), 29(2)(a).		
United Kingdom Gender Equality Duty (“GED”) in the <i>Sex Discrimination Act 1975</i> (“SDA”) <i>Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006</i> (“the Orders”) <i>Equality Act 2006</i> (UK)			

SDA - Public authorities ("PAs") meaning anyone with functions of a public nature: s75(2)(a). - Certain public authorities including legislatures and security forces are excluded under s76A(3). - The Crown: s76A1(3B) The duty applies in relation to the public functions of public authorities: s76A(2)(b).	SDA <u>The duty</u> s76A(1): A public authority shall in carrying out its functions have due regard to the need-- a. to eliminate unlawful discrimination and harassment, and b. to promote equality of opportunity between men and women. A failure in respect of performance of the duty under subsection (1) does not confer a cause of action at private law: s76A(6). <u>Powers of the Secretary of State ("SS"): s76B(1)</u> The SS may by order impose on a person to whom the duty in s76A(1) applies, or in so far as that duty applies to a person, a duty which the SS thinks will ensure better performance of the duty under s76A(1) – although failure to comply with a duty set by the SS does not confer a cause of action at private law: s76B(4). <u>Specific duties: Scotland</u> s76C applies only to Scotland and is not considered in this table. Regulations PAs must develop and publish a Gender Equality Scheme on their implementation of the duty: reg 2(1). Development of the scheme must include: reg 2 - consultation with employees - gathering data - setting objectives with reference to pay differentials between men and women - evaluating the impact of their proposed measures Schemes are to be implemented within 3 years (reg 3) and must be evaluated every 3 years: reg 4. Measures that would be 'unreasonable or impractical' are not required: reg 3(2).	Sex	Equality Act: Enforcement <u>Assessment of compliance: s31(1)(a)</u> The Equality and Human Rights Commission ("the Commission") may assess the extent to which or the manner in which a person has complied with a duty under or by virtue of ss76A, 76B or 76C of the SDA. <u>Compliance notices: s32</u> - Where the Commission thinks that a person has failed to comply with a duty under or by virtue of (a) ss76A, 76B or 76C of the SDA— - The Commission may give the person a notice requiring them to a. comply with the duty; and b. give the Commission information on steps taken to comply. - The Commission may not give a notice under this section in respect of a duty under s76A of the SDA unless— a. the Commission has carried out an assessment under section 31 above, and b. the notice relates to the results of the assessment. - If the Commission thinks that the person has failed to comply with the notice, the Commission may apply to a court for an order requiring compliance (where the notice is related to the s76A duty the court must be the High Court, for ss76B and 76C duties the court is a county court): s32(9). Regulations PAs must report on the progress of their scheme annually: reg 6(1).
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United Kingdom

Race Equality Duty ("RED") in the *Race Relations Act 1976* ("RRA")
***Race Relations (Statutory Duties) Order 2001* ("the Orders")**
Equality Act 2006

The duty applies to public authorities (PAs) listed in Sch 1A. The list has been added to repeatedly: s71	RRA Everybody or other person specified in Sch 1A or falling within the description in Sch 1, in carrying out its functions, must have due regard to the need: s71(1) - to eliminate unlawful racial discrimination; and - to promote equality of opportunity and good relations between persons of different racial groups. The Secretary of State can, by order, impose duties on Sch1A PAs considered appropriate to ensuring better performance of the equality duty: s71(2). Orders <u>Bodies listed in Sch1</u> to this order must publish a Racial Equality Scheme setting out how it intends to fulfil its RED: ord 2(1). Schemes must include information about: ord 2(2) - existing policies that have been assessed; - arrangements for assessment and consultation; - monitoring mechanisms; - the results of assessments; - measures to ensure public access to information and services it provides; and - staff training programs. Schemes must be reviewed every 3 years: ord 2(3). <u>Educational bodies</u> - Bodies listed in Sch 2 and 3 to this order must prepare a written	Race	RRA PAs must only contract with service providers that comply with the RED.²³¹ <i>Equality Act: Enforcement</i> <u>Assessment of compliance: s31(1)(b)</u> The Equality and Human Rights Commission ("the Commission") may assess the extent to which or the manner in which a person has complied with a duty under or by virtue of s71 of the <i>RRA</i>. <u>Compliance notices: s32</u> - Where the Commission thinks that a person has failed to comply with a duty under or by virtue of (b) s71 of the <i>RRA</i>— - The Commission may give the person a notice requiring them to - comply with the duty; and - give the Commission information on steps taken to comply. - The Commission may not give a notice under this section in respect of a duty under s71(1) of the <i>RRA</i> unless— - the Commission has carried out an assessment under section 31 above, and - the notice relates to the results of the assessment. - If the Commission thinks that the person has failed to
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²³¹ Equality and Human Rights Commission, "The Race Equality Duty", Equality and Human Rights Commission website <<http://www.equalityhumanrights.com/en/forbusinessandorganisation/publicauthorities/raceequalityduty/Pages/default.aspx>> (Accessed 6 October 2008).

	statement of their policy for promoting race equality and their arrangements for fulfilling it: ord 3. • Bodies under Pt I of Sch 2 must monitor the progress of the policy and its impact on students: ord 3(2). • Bodies under Pt II of Sch 2 must monitor the progress of the policy and its impact on employees: ord 3(3). • Sch II bodies shall publish annual progress reports: ord 3(4). • Bodies in Pt III , IV and V of Sch 2 must make arrangements to fulfill their RED: ord 4 • Bodies in Pt III of Sch 2 must collect data on staff employment numbers and where they employ more than 150 full-time staff, training opportunities, benefits and detriments flowing from existing assessment procedures, grievances, disciplinary proceedings and instances in which people cease to work for the employer: ord 4(2) • Pt IV Sch2 bodies must monitor employee numbers by reference to racial groups and make use of data provided by Local Education Authorities: ord 4(3). • Pt V Sch 2 bodies shall collect data on employees according to race: ord 4(4). • All bodies must publish annual reports on the results of the above monitoring efforts: ord 4(5). <u>Monitoring by employers</u> • Employers to which the Act applies must monitor staff numbers with reference to race and where they have more than 150 employees, training opportunities, benefits and detriments flowing from existing assessment procedures, grievances, disciplinary proceedings and instances in which people cease to work for the employer: ord 5(2). • The results must be published annually: ord 4(5).		comply with the notice, the Commission may apply to a court for an order requiring compliance (where the notice is related to the s71(1) duty the court must be the High Court, for other duties the court is a county court): s32(9).
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United Kingdom

Disability Equality Duty (“DED”) in the *Disability Discrimination Act, 1995*, c. 13. (“DDA”) as amended by the *Disability Discrimination Act, 2005*, c.13 *Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005* (“the Regulations”) *Equality Act 2006* (UK)

Public authorities (“PAs”)—including anyone performing functions of a public nature,	DDA The duty: s49A1: 1. Every public authority shall in carrying out its functions have due regard to— a. the need to eliminate discrimination that is unlawful under this	Persons with a physical or mental disability	<i>Equality Act: Enforcement</i> <u>Assessment of compliance: s31(1)(c)</u> The Equality and Human Rights Commission (“the Commission”) may assess the extent to which or the
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though a number of public authorities are excluded: s49B.	Act; b. the need to eliminate harassment of disabled persons that is related to their disabilities; c. the need to promote equality of opportunity between disabled persons and other persons; d. the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons; e. the need to promote positive attitudes towards disabled persons; and f. the need to encourage participation by disabled persons in public life. The duty does not apply to: (s49C) · judicial acts · acts of parliament · military recruitment The Secretary of State can impose regulations on a public authority for the purposes of ensuring better performance by that authority of its duty under s49A(1): s49D. The Regulations PAs must publish a Disability Equality Scheme showing how they intend to fulfil their s49A(1) duty: reg 2(1). Schemes must include: reg 2(3) · consultation with disabled persons to be effected; · means of assessing impact of existing practices; · steps to be taken; · data collection arrangements and their impact on recruitment and retention of disabled employees, educational opportunities; and · Arrangements for ongoing review. Schemes must be reviewed every 3 years: reg 2(4). Nothing in this regulation imposes any duty that would be 'unreasonable or impracticable': reg 3(2).		manner in which a person has complied with a duty under or by virtue of ss49A or 49D of the <i>DDA</i>. <u>Compliance notices: s32</u> 1. Where the Commission thinks that a person has failed to comply with a duty under or by virtue of (c) ss49A or 49D <i>DDA</i>— 2. The Commission may give the person a notice requiring them to a. comply with the duty; and b. give the Commission information on steps taken to comply. 4. The Commission may not give a notice under this section in respect of a duty under s49A of <i>DDA</i> unless— a. the Commission has carried out an assessment under section 31 above, and b. the notice relates to the results of the assessment. 8. If the Commission thinks that the person has failed to comply with the notice, the Commission may apply to a court for an order requiring compliance (where the notice is related to the s49A duty the court must be the High Court, for s49D duties the court is a county court); s32(9). The Regulations PAs (listed in Sch 1) must submit annual reports on the implementation of their scheme: reg 4. Reporting PAs (listed in Sch2) must publish progress reports once every 3 years: reg 5.
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United Kingdom <i>Equality Act (Recommendations accepted in <i>The Equality Bill - Government Response to the Consultation</i>) ("the Response").</i>			
The public sector (2.3)	The Response proposes a duty with three broad "limbs" : (2.24) 1. Eliminating unlawful discrimination and harassment 2. Advancing equality of opportunity 3. Advancing good relations between different groups. Four key principles would underpin the duty: (2.26) 1. consultation/involvement 2. use of evidence 3. transparency 4. capability The structure used for the gender, race and disability equality duties will be maintained, that is, the imposition of general duties underpinned by specific duties.	(2.59) · Gender · Race · Disability · Gender reassignment · Age · Sexual orientation · Religion or belief	Enforcement measures will not be determined till 2010-2011: (2.72)

Appendix B:

Relevant obligations under the *Chief Minister's 2007-2010 Annual Report Directions*

Under the *Annual Reports (Government Agencies) Act 2004* (ACT), government agencies in the ACT are required to submit annual reports on their activities during the previous financial year. The *Chief Minister's 2007-2010 Annual Report Directions* require agencies to report on matters relating to the *Human Rights Act 2004*, multiculturalism, Aboriginal and Torres Strait Islanders and the status of women. The 'report descriptors' under the Directions give a brief account of what information is required. Part 3 suggests that these obligations could provide the basis for an equality duty. The 'descriptors' reproduced below allow comparison between the existing requirements and those proposed in Part 3.D.

Reporting obligation	Basis of requirement and report descriptor
C. 17 <i>Human Rights Act 2004</i>	<u>Basis of requirement</u> The <i>Human Rights Act 2004</i> is part of the Government's commitment to build a human rights culture in the ACT and ensure that Territory managers are working within a human rights framework. The <i>Human Rights Amendment Act 2008</i> enters into force on 1 January 2009 and has some key new provisions. The HRA currently requires the Attorney-General and the Standing Committee on Legal Affairs to alert the Legislative Assembly about the human rights consistency and implications of proposed legislation; enables the Territory Supreme Court to issue a declaration of incompatibility if it finds it impossible to interpret a law consistently with human rights and requires all persons and agencies, including Territory courts and tribunals, to interpret Territory legislation consistently with human rights. The amended HRA will provide that it is unlawful for a 'public authority' to act in a way that is incompatible with a human right or to fail to give proper consideration to a relevant human right when making a decision and victims of alleged violations of human rights will be able to commence legal proceedings if these obligations are not observed. 'Public authority' is defined in the amendments and includes public servants.

	The Human Rights Commission was established by the <i>Human Rights Commission Act (2005)</i>. There are three Commissioners: the Human Rights and Discrimination Commissioner; the Health Services Commissioner; and the Disability and Community Services & Children and Young People Commissioner. The functions of the Human Rights Commission with respect to human rights are to review the effect of Territory laws on human rights, to provide human rights education, and to advise the Attorney-General on anything relevant to the HRA. The Human Rights Commissioner exercises the human rights functions for the Commission, as well as the additional power under the Human Rights Act to seek leave to intervene in relevant court cases. <u>Report Descriptor</u> The <i>Human Rights Act 2004</i> (HRA) commenced operation on 1 July 2004. From that date all public officials have a duty to interpret legislation under which they operate consistently with human rights, unless the Territory law clearly authorises otherwise. All Government agencies are required to include in their annual reports information about the measures they have taken to 'respect, protect and promote human rights'. Agencies must report on implementation strategies and progress in incorporating human rights standards into their operations, with reference to the following · Education and training of agency staff on human rights principles. Agencies should report on the number of training sessions; provide a description of the staff who attended these training sessions (eg, legal, policy etc); and report on who provided the training. (For example, was the training one of the sessions regularly held by the Human Rights Commission?) · Internal dissemination of information to agency staff on the legislative scrutiny process. · Agencies should report on whether they distributed Human Rights Commission brochures or Department of Justice and Community Safety publications, and on the documentation developed by the agency itself in relation to human rights issues of concern to that agency. · Liaison with the Human Rights Unit on human rights principles and/or the legislative scrutiny process. Agencies should report on the number of cabinet submissions prepared; the human rights issues identified as part of the cabinet submission process (without breaching confidentiality); the number of compatibility statements issued in relation to new legislative proposals developed by the agency; and a description of any issues that had to be resolved after consultation with the Human Rights Unit. · Reviews or preparations for reviews of existing legislation for compatibility with the HRA. Agencies should report on the human rights issues raised by the existing legislative framework in which they operate; the process for identifying any necessary legislative amendments; and, if no reviews have been undertaken, the reasons for not reviewing legislation, and a timetable for future review. · Litigation. Agencies should report on any cases before courts or tribunals which have involved arguments concerning the HRA, along with responses to relevant decisions.
C.19 ACT Multicultural Strategy	<u>Basis of requirement</u> <i>ACT Multicultural Strategy.</i> <u>Report descriptor</u> Agencies must report on their progress against the relevant strategic areas and any other steps taken towards meeting the goals of the Strategy based on the ten key themes of the ACT Multicultural Strategy detailed below: · human rights; · access and equity; · ageing and aged care issues; · cultural and religious acceptance;

	· language policy; · leadership and governance; · migration of parents; · settlement services for newly arrived migrants; · terrorism; and · young people.
C.20 Aboriginal and Torres Strait Islander Reporting	<u>Basis of requirement</u> · Individual agency performance indicators for improving outcomes for Indigenous clients · Supporting whole of government approach to Indigenous policy <u>Report descriptor</u> Agencies must report annual progress against nominated performance indicators in relation to their respective services and programs that they deliver to Indigenous clients as well as, where possible, extent that mainstream services and programs are accessed by Indigenous clients. Agencies must report annually on their progress against the relevant strategic areas for action and change indicators outlined in the <i>Overcoming Indigenous Disadvantage Report</i> produced by the Productivity Commission. Strategic change indicators (for each action area) measure whether government policies and programs are making a positive difference to the lives of Indigenous Canberrans. The strategic indicators for action are: early child development and growth (prenatal to age 3); early school engagement and performance (preschool to Year 3); positive childhood and transition to adulthood; substance use and misuse; functional and resilient families and communities; effective environmental health systems; and economic participation and development.
C. 22 ACT Women's Plan 2004-2009	<u>Basis of requirement</u> To report on the ACT Government's vision for working with the community to improve the status of all women and girls. The <i>ACT Women's Plan</i> provides a shared approach for working towards this vision across ACT Government agencies. The Plan identifies six key objectives for agencies to work towards achieving. <u>Report descriptor</u> Agencies must report on their contribution to the achievement of the objectives of the ACT Women's Plan. Agencies should report on their actions undertaken and outcomes achieved, with particular reference to the relevant "indicators of success" listed in each section of the Plan, under the following objectives: · Objective One: Representation and recognition · Objective Two: Good health and wellbeing · Objective Three: Responsive housing · Objective Four: Safe, inclusive communities · Objective Five: Economic security and opportunities · Objective Six: Flexible education and training

Bibliography

Legislation

Most of the following legislation forms the basis for the comparison in Part 2 and provided the examples drawn on to formulate the recommendations in Part 3. As sources, the statutes are primarily useful as examples of existing and proposed positive duties, either demonstrating consensus on particular elements or different approaches to achieving equality that the ACT might adopt. Some extracts are included in Appendix A for more detailed comparison.

Anti-Discrimination Act 1977 (NSW)

NSW amended its *Anti-Discrimination Act* in 1980, to create an obligation on public authorities to eliminate discrimination in employment and promote equal employment opportunity. The Act requires the development and implementation of equality plans and the enforcement framework allows investigation by the Anti-Discrimination Board followed by recommendations to relevant ministers who can issue ministerial directions requiring authorities to comply.

Anti-Discrimination Act 1996 (NT)

This Act imposes an obligation in areas of public life covered by the Act (such as employment and education), not to 'fail or refuse to accommodate a special need that another person has because of an attribute'. The Act provides an example of how more traditional positive duties like requirements to accommodate or make reasonable adjustment for the needs of persons with a disability can be expanded to create a general duty.

Charter of Human Rights and Responsibilities Act 2006 (VIC)

The *Victorian Charter of Rights and Responsibilities* ("Victorian Charter") was adopted two years after the ACT's *HRA* and creates a very similar statutory bill of rights for the State. The Victorian Charter also adopts a 'dialogue model' requiring laws to be interpreted consistently with the Act, so far as possible. Where a compatible interpretation is not possible a declaration of incompatibility can be made but the law cannot be struck down. An obligation on public authorities to act in accordance with the Act has already been added to the Victorian Charter and the coming ACT obligation is almost identical. Victoria and the ACT are the only jurisdictions in Australia with bills of rights and the *Victorian Charter* and *HRA* are an important point of similarity between the two jurisdictions that make legislative developments and reviews in Victoria particularly relevant to the ACT. The Victorian review of its *Equal Opportunity Act*, which proposes the enactment of a positive duty, was therefore considered a particularly useful model for this report.

Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, A /RES/61/106 (entered into force 3 May 2008)

The *Convention on the Rights of Persons with Disabilities* was ratified by Australia and entered into force earlier this year. The Convention creates a number of positive duties, requiring 'reasonable accommodation' of the needs of persons with disabilities in several different areas of public life, including educational institutions and the workplace. The ratification of this instrument and the

Commonwealth government's apparent willingness to accept the obligations within it are indicative of the growing acceptance of positive duties as a key element of discrimination law both internationally and in Australia.

Disability Discrimination Act 1992 (Cth)

This Commonwealth Act provides for the development of disability standards imposing positive duties on public authorities and voluntary action plans which can be registered with the AHRC and posted on the Commission's website. Disability standards must be complied with and the defences under the operative Part II of the Act cannot be raised in answer complaints under either the *Public Transport Standards* or *Education Standards*. Entities that comply with disability standards however, cannot be held liable under Part II. This model was considered in the final stage of this report as an example of how positive and negative discrimination duties might interact within the one piece of legislation. Both the *Transport Standards* and *Education Standards* impose positive duties:

Disability Standards for Accessible Public Transport 2002

These standards were created under the Commonwealth *Disability Discrimination Act* and essentially require public authorities, the Commonwealth and States to comply with a timetable for the introduction of services, facilities and equipment to make public transport more accessible for people with a disability. Where the standards are complied with, a discrimination claim cannot be brought under the remainder of the Act.

Disability Standards for Education 2005

These were the second set of standards developed under the Commonwealth *Disability Discrimination Act*; they apply to educational institutions, administrators and organisations that develop and accredit curricula and training courses. The standards require 'reasonable adjustment' to enable disabled students to participate 'on an equal basis', except where 'unjustifiable hardship' would result. Where the standards are complied with, a discrimination claim cannot be brought under the remainder of the Act.

Disability Discrimination Act, 1995, c. 13 (UK); Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 (UK)

This Act was amended in 2005 to comply with the EU's disability equality directive and now imposes an obligation to 'have due regard to the need to' eliminate discrimination on the grounds of disability and 'promote equality of opportunity between disabled persons and other persons'. The content of the duty is currently spread across a number of different Acts, amendment Acts and subordinate legislation. The *Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005* were enacted to supplement the disability equality duty in the *Disability Discrimination Act 1995* (UK).

Discrimination Act 1991 (ACT)

In its current form, the ACT *Discrimination Act* prohibits discrimination and harassment against persons with specified attributes in certain areas of public life. The Act is the only means of enforcing rights against discrimination in the ACT and is the central focus of this report, which recommends that it be amended to include a positive duty. Enforcement and educative measures under the Act, in its current form, were therefore also important to formulating a duty that could be easily incorporated into the existing framework.

Equal Employment Opportunity (Commonwealth Authorities) Act 1987 (Cth)

This Act requires Commonwealth authorities to develop and implement an equal employment opportunity program designed to ensure that appropriate action is taken by the authority to promote equal opportunity for and eliminate discrimination against designated groups. Authorities have to produce and implement equality plans and report on their progress; the duty is enforced by relevant ministers. The Act provides an example of how a duty on public authorities might be framed, in particular what threshold number of employees might be appropriate.

Employment Equity Act, No. 55 of 1998 (South Africa) and Employment Equity Act 1998 Regulations

The Act applies to public and private entities and requires affirmative action to achieve employment equity. Equality plans are compulsory and the Act allows investigation of possible breaches and enforcement by the Labour Court. The *Regulations* provide supplementary details and guidelines to help duty-bearers comply with obligations under the Act.

Employment Equity Act, SC, 1995, c. 44 (Canada)

This Act closely resembles its South African equivalent and applies to public and private entities. Like the NT *Anti-Discrimination Act*, the Canadian statute requires 'reasonable accommodation' to achieve proportionate representation of designated groups in employment. The Act is enforced via the Employment Equity Review Tribunal, the decisions of which are made orders by the Federal Court.

Equality Act 2006 (UK)

The *Equality Act* was primarily enacted to merge the three equality commissions previously responsible for enforcing the race, disability and gender duties into a single Equality and Human Rights Commission ("EHRC"). The Act also includes amendments to the race, gender and disability equality duties which alter enforcement provisions to accommodate the establishment of the EHRC. This *Equality Act* is a precursor to the proposed *Equality Bill* which will combine all three duties and bring together a range of existing legislation to 'declutter' the UK discrimination law.

Equal Opportunity for Women in the Workplace Act 1999 (Cth)

This Commonwealth Act imposes an obligation to eliminate discrimination and take measures to 'contribute to the achievement of equal opportunity for women in the workplace'. It applies to private sector employers with more than fifty employees. Equality plans are compulsory but the only means of enforcement under the Act is naming in a report tabled in Parliament. Evaluations of the effectiveness of equality plans can be made confidential. It is the only positive duty in Australia to apply specifically to private authorities but only protects women's rights and allows reporting obligations to be waived and the most important elements of annual reports to be submitted privately. It is possible that this Act could cause problems if inconsistencies were to arise with an ACT duty applying to private entities.

Equal Opportunity in Public Employment Act 1992 (QLD)

The positive duty in this QLD Act is almost identical to that in the NSW *Anti-Discrimination Act*. The duty applies to public authorities and requires equality plans, it explains the necessary elements of an equality plan in steps, making it the most user-friendly legislation considered in the report.

Government of Wales Act 1998 (c. 38)

This Act imposes a duty on the Welsh National Assembly to 'make appropriate arrangements with a view to securing that its business is conducted with due regard to the principle that there should be equality of opportunity for all people'. The duty creates a right to judicial review making it the most directly enforceable duty considered in the report. The positive, bipartisan impact that this Act has had on the Welsh legislature suggests that although a duty on the ACT Legislative Assembly is highly unlikely as it would restrict parliamentary sovereignty, some form of similar duty might be highly beneficial.

Government Procurement Act 2001 (ACT)

This Act imposes conditions on the procurement practices of ACT government agencies. The Act was considered with regard to the recommendation that procurement practices be used as a means of enforcing an ACT equality duty.

Human Rights Act 2004 (ACT)

(The *Human Rights (Amendment) Act 2008* (ACT) and *Human Rights Amendment Bill 2007 Explanatory Statement* are also relevant to this source).

The *HRA* is the ACT's bill of rights. It adopts a 'dialogue model' which cannot invalidate inconsistent legislation but requires laws to be interpreted 'so far as it is possible to do so consistently with...(their) purpose...in a way that is compatible with human rights'. Where an Act is inconsistent with human rights, the Supreme Court can issue a declaration of incompatibility to be sent to the Attorney-General to respond to and present to the Legislative Assembly. The Act includes rights to equality which can to an extent be enforced via the rights against discrimination under the *Discrimination Act*.

The *HRA* was recently amended by the *Human Rights (Amendment) Act 2008*, to make it unlawful for a public authority to act 'in a way that is incompatible with a human right' or to 'fail to give proper consideration to a relevant human right' in making a decision. Individuals will be able to bring actions in the Supreme Court for breach of the new provisions which come into force in January 2009.

The *Explanatory Statement* attached to the Bill that was enacted as the *Human Rights (Amendment) Act 2008*, allowed the ACT Attorney-General to explain why the original Act was amended as it was, for example why the legislature and judiciary were not included as public authorities under the new provisions.

Those explanations and arguments, as well as the new provisions relating to public authorities, informed the process of formulating a recommended duty for the *Discrimination Act*.

Northern Ireland Act 1998, c.47

Section 75 of this Act is amongst the oldest, existing general positive duties. It applies to public authorities and imposes duties to promote equality and good relations between particular groups. The duty to promote equality applies to more protected groups than the good relations duty. The Act still requires individual complaints to trigger final enforcement measures, this enforcement model was considered as a means of reducing the caseload that might be created by an ACT duty.

Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 (South Africa)

This Act is designed to cover those parts of the South African community not included in the *Employment Equity Act*. Different duties apply to the legislature, judiciary, small private and non-profit organisations as well as private citizens. The Act was primarily considered as an example of how a duty might be applied to groups beyond public authorities and private service providers or employers. The creation of lesser duties for smaller organisations demonstrates how an ACT duty might avoid becoming too burdensome.

Promotion of Equality and Prevention of Unfair Discrimination Act Regulations 2000 (South Africa)

These Regulations supplement the *PEPUDA*. The *Regulations* outline monetary penalties for offences under the Act such as providing false information and include a code of practice that smaller duty-bearers are required to make a declaration of adherence to. The code of practice sets standards, provides examples of the kind of discrimination duty-bearers might need to address and educates them about the nature of discrimination. These regulations provide a good example of the kind of guidelines that might be created to assist duty-bearers with an ACT equality duty.

Public Service Act 1999 (Cth)

This Act imposes a very different positive duty to those in the other legislation considered in the report. The Act applies to the APS and s18 creates a duty to establish a workplace diversity program to assist in giving effect to APS Values 'in relation to employment matters'.

Race Relations Act 1976 (UK); Race Relations (Statutory Duties) Order 2001

This Act ("RRA") was amended to comply with the EU Race Equality Directive. It creates a general duty to promote equality, eliminate discrimination and promote good relations. The enforcement model was recently replaced by that under the *Equality Act* though remains virtually the same, allowing compliance notices that can be enforced on the application of the Equality and Human Rights Commission to a court. The *Race Relations (Statutory Duties) Order 2001* supplements the *RRA* positive duty and requires the development of a race equality scheme.

Sex Discrimination Act 1975 (UK); Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006

This Act was recently amended to comply with the EU gender equality directive by introducing a positive duty to have due regard to the need to promote gender equality and eliminate discrimination. The duty now operates under an almost identical enforcement scheme to the race equality duty, under the *Equality Act 2006*. The *Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006* supplements the positive duty and requires public authorities to develop gender equality schemes.

WA Policy Framework for Substantive Equality 2004

(Contributing departments: Department of Premier and Cabinet, Equal Opportunity Commission, Office of Equal Employment Opportunity, Department of Indigenous Affairs and the Office of Multicultural Interests).

This document is government policy and an example of how an equality duty, almost identical to those created by law can be imposed on public authorities without legislation. The diagrams included provide an example of what guidelines for an ACT duty might include. The WA diagrams are helpful in their representation of equality objectives as involving a chronological process but

the more detailed content is unclear and unlikely to provide duty-bearers with much assistance.

Government reports / legislative reviews

Attorney-General Robert McClelland, 'Standing Committee of Attorneys-General', (Press release, 28 March 2008) accessed at <<http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/RWPA7434F9ED00CDACBCA25741A003910D7>> at 20 October 2008.

This press release announced the most recent decisions of the Standing Committee of Attorneys-General (SCAG). SCAG is a meeting of the Australian Commonwealth, State, Territory and New Zealand Attorneys-General aimed at working together to harmonise law in a number of areas. One area of law identified for harmonisation was Australian anti-discrimination law. The introduction of positive duties is amongst the issues listed for consideration in harmonising anti-discrimination law. The HRC considered this SCAG initiative an additional reason for considering the role that a positive duty could play in the ACT. The harmonisation project also suggests that the introduction of separate duties, for example applying to separate grounds for discrimination under the *Discrimination Act* would not be favoured.

Australian Public Service Commission, *Guidelines on workplace diversity* (2001) Australian Public Service Commission <<http://www.apsc.gov.au/publications01/diversityguidelines.htm>> at 2 October 2008.

These guidelines are designed to assist agency heads and other relevant employees in developing and implementing workplace diversity plans under the *Public Service Act*. Despite the Act's focus on APS Values, these guidelines reveal that workplace diversity plans closely resemble the equality plans required by more specifically discrimination-based legislation. The guidelines are a relatively clear and useful example of the kind of supplementary materials that might be needed to help duty-bearers implement a duty in the ACT.

ACT Chief Minister, *Chief Minister's 2007-2010 Annual Report Directions* (2007) Accessed at <<http://www.psm.act.gov.au/publicationsaz.htm>> at 10 October 2008; *Annual Reports (Government Agencies) Act 2004* (ACT)

The *Annual Reports (Government Agencies) Act 2004* imposes reporting obligations on government agencies in the ACT; the Chief Minister's Directions provide supplementary details for compliance. Under the Directions, public authorities must report on actions taken under the *HRA*, the ACT's *Multicultural Strategy* and *Women's Plan* and the Commonwealth's *Overcoming Indigenous Disadvantage* report. These obligations closely resemble those that might be required by progress reports on the implementation of equality plans under a positive duty in the ACT and may form the basis for such a duty.

ACT Chief Minister's Department, *Building our Community – The Canberra Social Plan* (2004)

The *Canberra Social Plan* sets out a strategy for the future direction of the ACT community. The plan has a strong focus on social justice and many of its objectives overlap with anti-discrimination and human rights goals, which might be enhanced by a positive duty. Importantly, the *Social Plan* makes commitments to economic and social rights not included in the *HRA*, which only recognises civil and political rights. The *Plan* also contains a useful, up-to-date assessment of the make-up of the ACT community.

ACT Chief Minister's Department, *The Canberra Plan 2008: Towards our Second Century* (2008)

Only the social limb of this plan was considered. The document updates the information in and objectives set by the initial *Canberra Social Plan*. The new plan demonstrates that the social justice goals included in the first plan have remain at the centre of plans for the future of the ACT community.

ACT Chief Minister's Department, *The Canberra Social Plan – Progress Report 2007* (2007)

The *Canberra Social Plan* requires progress reports on the implementation of its objectives. This report does little more than record that the objectives due to be realised have been met and those set for the future are yet to be achieved.

ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (2006)

This review considered the first 12 months of the ACT bill of rights and led to many of the recent amendments to the *HRA*. The review considers recommendations from consultative committees and government responses. Significantly, it proposed the creation of a direct right under the Act.

ACT Office for Women, *ACT Women's Plan* (2004)

The *ACT Women's Plan* forms part of the social limb of the *Canberra Plan*. The *Women's Plan* outlines the current status of women in the ACT and subgroups and areas of particular concern then sets goals and 'performance indicators' for both the public and private spheres. This plan forms the basis for annual reporting requirements on public authorities used in the development of recommendations for an ACT positive duty. The Plan may also be of use as a rare source focussing specifically on the status of women in the ACT.

Canadian Government, *Review of the Employment Equity Act* (2002) response to Standing Committee on Human Resources Development and the Status of Persons with Disabilities, Parliament of Canada, *Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act*

This document is a response to the 2001 review of the Canadian *Employment Equity Act*. The response primarily lists the organisations created and resources allocated to support the positive duty; most of the recommendations made in the initial report were not supported. The response provides an important reminder of the influence that political responses to recommendations like this report can have on their practical influence.

Department for Social Justice and Local Government (Wales), *The Eighth Annual Equality Report: 2006-2007* (2007)

This report was required by the *Welsh Government Act*. As part of the positive duty on the National Assembly, the legislature is required to report annually on actions taken pursuant to the Welsh duty and UK general equality duties. Unfortunately, the Act lacks quantitative measures and suffers from the apparent use of bureaucratic jargon and spin.

Equality Commission for Northern Ireland, *Section 75 - Keeping it Effective: Reviewing the Effectiveness of the Northern Ireland Act 1998* (2007)

This comprehensive report is amongst the most useful reviews of existing positive duties available. The review reflects on the first six years of the section 75 duty. Unlike other legislative reviews of positive duties, the report includes comprehensive evidence of gains made as a result of the duty and makes recommendations for practical change. Recommendations clearly recognise

the importance of communicating clearly to duty-bearers and ensuring that the duty can be easily implemented. The report provided a useful model in preparing this report.

Equality of Opportunity Committee, National Assembly of Wales, *Report on Mainstreaming Equality in the Work of the National Assembly* (2004)

This report reviews the operation of the duty imposed on the Welsh National Assembly under the *Welsh Government Act*. The report considers the interaction between Wales's duties under the three UK equality duties and its duty under the *Government of Wales Act*. The report includes lessons learned from the legislature's experience as duty-bearers including the need for enforcement mechanisms, the importance of providing 'toolkits' or guidelines to assist implementation and the necessity of allocating responsibilities to specific people to avoid the risk of the duty becoming 'everyone's problem and therefore, no-one's problem'.

Equal Opportunity for Women in the Workplace Agency, *Developing a Workplace Program*, Equal Opportunity for Women in the Workplace Agency <http://www.eowa.gov.au/Developing_a_Workplace_Program/Six_Steps_to_a_Workplace_Program.asp> at 19 September 2008

The EOWW Agency website contains a range of information to assist duty-bearers in complying with their duties under the *EOWWA*. The instructions for developing a workplace program are set out as six steps. Although this formulation makes the obligations and necessary stages very clear, in practice, applying the process to a specific workplace is likely to require considerably more guidance.

Equality Unit Publication, *Equality Update: Discrimination in the Workplace January to June 2007* (2007) South African Human Rights Commission <http://www.sahrc.org.za/sahrc_cms/publish/cat_index_67.shtml> at 13 September 2008

This publication is a basic handout designed to help South Africans understand the protections available to them under both the *PEPUDA* and *Employment Equity Acts*. It provides a clear assessment of the interaction between the two Acts and gives examples of cases successfully heard and common complaint scenarios. The pamphlet exemplifies the kind of public education campaign that should accompany the adoption of a positive duty.

Government Equalities Office, *Framework for a Fairer Future – The Equality Bill* (2008)

This recent UK review proposes the enactment of a single *Equality Bill* combining the three existing equality duties. The findings are particularly relevant to Australian law as a descendant of the English legal system. The review's principal aim was to 'declutter' UK discrimination law; Australia's existing discrimination law framework suffers from similar problems.

Human Rights Commission, *Annual Report 2007-2008* (2008)

Public authorities are required to produce annual reports giving an account of their activities during the previous financial year. The HRC's report outlines the Commission's powers and functions and major tasks undertaken. Case summaries and complaint-handling statistics are also included, with brief analyses of developments, for example, identifying areas from which most complaints arise and the most common kinds of respondents and complainants. This analysis suggests improvements in certain areas, including a drop in complaints against government organisations. The document also provides an

example of the Chief Minister's reporting requirements (discussed in Part 3) in action, as applied to a specific organisation.

Human Rights and Equal Opportunities Commission submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality (2008)

This report to the Senate Committee sets out a comprehensive plan for reform of the Commonwealth *Sex Discrimination Act*. The submission considers many of the existing positive duties included in this report. The two-staged approach to recommendations and the presentation of alternative recommendations provided a model for this report. At the time of writing, this inquiry was the most recent consideration of positive duties for Commonwealth legislation and the views of the AHRC in particular carry considerable weight in this area.

Minister for Multicultural Affairs, *Multicultural Strategy 2006-2009* (2006)

The *Multicultural Strategy* was developed to address concerns raised in consultations with the ACT community. The report outlines the disadvantages and barriers to equal participation in society faced by Indigenous Australians, migrants and their descendants. The strategy is particularly useful to this report in its specific attention to the ACT and provides an example of both the equality goals that must be addressed by a positive duty and the means by which they might be achieved.

Public Service & Merit Protection Commission, *Diversity Guidelines* (2001)

Australian Public Service Commission

<<http://www.apsc.gov.au/publications01/diversityguidelines.htm>> at 2 October 2008

This online guide essentially summarises existing directions from the Public Service Commissioner detailing what is required to comply with the obligation to create a workplace diversity program. The guide is designed to assist Agency Heads, who bear the duty to 'promote equality' under the *Public Service Act 1999* and other APS employees responsible for the development, implementation and monitoring of workplace diversity programs. This document therefore, not only provides an insight into the level of assistance and detail available to APS duty-bearers but also an example of the kind of guidance that would need to be attached to any positive duty introduced in the ACT.

Ramutloa, Lloyd, 'Department says equity floating employers to face the music' (Press Release, 16 July 2008) Accessed at Labour Department of the Republic of South Africa <<http://www.labour.gov.za/media-desk/media-statements/2008/department-says-equity-flouting-employers-to-face-the-music>> at 13 September 2008

This press release from the South African Labour Department briefly outlines a number of the problems associated with translating the statistical analysis undertaken in developing employment equity plans into equality outcomes. Flaws in current approaches to the consultation requirement are also criticised. This report was included in a news-feed on the Labour Department website and demonstrates that brief, contemporaneous reports like this can provide a useful supplement to larger, less-frequent legislative reviews.

Standing Committee on Human Resources Development and the Status of Persons with Disabilities, Parliament of Canada, *Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act* (2002) Accessed at <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1032138&Language=E&Mode=1&Parl=37&Ses=1&File=9>> at 13 October 2008

The *Employment Equity Act* requires a report reviewing the effectiveness of the Act to be prepared every five years. This is the first of the required reports, a second was due to be commenced in 2006 but has not yet been published and attempted correspondence with the Canadian Human Rights Commission did not reveal whether a new report could be expected soon. The 2002 report considered the Act's impact, noting that Aboriginal people and people with a disability had not benefited as much as other protected groups. It was also recommended that the Act be expanded to cover private entities with government contracts over a certain value and that the core duty to reasonably accommodate the needs of designated groups be changed to a duty to 'accommodate up to the point of undue hardship'. The review provides a useful summary of the Canadian experience during the early years of the statute's operation but seven years on, its findings may be out-of-date and do not take account of any changes made since the review.

UK Government, *The Equality Bill – Government Response to the Consultation* (2008)

This report responds to the above proposal for an *Equality Bill*. The response evaluates submissions from stakeholders and provides some additional details, agreeing to most of the proposals. However, the report is preliminary and remains short on detail, most significantly, enforcement measures, the most controversial and important element of any positive duty, will not be decided till 2010/2011.

Victorian Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008)

The recent Victorian review provided an important framework for this report as well as an example of how a positive duty might be introduced in a legal system very similar to that in the ACT. Victoria is the only Australian jurisdiction, other than the ACT, with a bill of rights and the ACT is in the process of adopting a civil and administrative tribunal similar to VCAT. This review provides the best available example of what a review of the ACT *Discrimination Act* might include and recommend. The review also recommends the inclusion of new protected attributes in the proposed *Equality Act* that the HRC is keen to add to our *Discrimination Act*.

Texts, books and journals

Bailey, Peter and Devereux, Annemarie, 'Operation of anti-discrimination laws in Australia' in Kinley, David (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (1998)

Bailey and Devereux's article is rare in its focus on the practical operation of discrimination law. The article details the conciliation process and the burden that complaints-led models impose on the complainant. The article is considered in Part 1 of this report.

Bailey, Peter, *The Human Rights Enterprise* (2008) Prospective book—unpublished draft

This unpublished draft forms the basis for a proposed textbook on human rights law in Australia. With respect to discrimination law, the book overlaps considerably with Lindsay, Rees and Rice's *Australian Anti-Discrimination Law* text. Bailey's book will however, be more up-to-date and adopts a more theoretical approach. The discrimination chapters considered in this report provide a history of discrimination law in Australia and importantly, a discussion of constitutional issues arising from the interaction of Commonwealth and state and territory legislative efforts.

Bamforth, Nicholas 'Setting the Limits of Anti-Discrimination Law: Some Legal and Social Concepts' in Dine, Janet and Watt, Bob (eds) *Discrimination Law: Concepts, Limitations and Justifications* (1996)

This chapter focuses on the liberal theories of Joseph Raz. Bamforth argues that discrimination legislation justifies discriminatory behaviour that falls outside the law by creating a dichotomy between unlawful and justified lawful discrimination. His discussion provides a useful theoretical background to typically individualist discrimination law and the limitations of law as a means of controlling people.

Borelli, Silvia, 'Positive Obligations of States and the Protection of Human Rights' (2006) 15.3 *Interights Bulletin*, 101—; Hepple, Bob, 'Positive Obligations to Ensure Equality' (2006) 15.3 *Interights Bulletin*, 117—

Borelli's article introduce an edition of the *Interights Bulletin* entirely devoted to positive duties. Borelli defines positive obligations, summarises the articles in the bulletin and describes the growing momentum towards acceptance of positive duties as a standard element of discrimination legislation in the European context. Hepple considers two types of positive duty (i) 'protecting the right to equality' and (ii) 'realising social and economic equality' and discusses obligations under international covenants and the South African enforcement scheme for its positive duties.

Braithwaite, John and Drahos, Peter, *Global Business Regulation* (2001)

Braithwaite and Drahos's substantial book is a theoretical analysis of business regulation throughout the world. Despite the impact and apparent dominance of deregulation and free-trade globalisation, Drahos and Braithwaite present evidence of a global economy that remains widely regulated. They represent deregulation and different forms of regulation as contesting principles, some of which, for example transparency have improved with increased globalisation. This book provided some theoretical basis for understanding Australia's apparent reluctance to impose equality obligations on private entities.

Burchill, Richard., Conte, Alex and Davidson, Scott, *Defining Civil and Political Rights: The Jurisprudence of the UN Human Rights Committee* (2004)

This book provides a useful overview of international jurisprudence on a number of matters, including general comments from the UN Human Rights Committee which administers the International Covenant on Civil and Political Rights (*ICCPR*). Jurisprudence on the *ICCPR* is particularly relevant to the ACT which incorporates the rights recognised in the treaty into our *HRA*. International jurisprudence is also 'relevant' to the interpretation of the *HRA*.

Chaney, Paul, 'New and Unexplored Possibilities—The Welsh Legislature's Statutory Duty to Promote Equality of Opportunity (2002) 21.1 *Equal Opportunities International*, 19—

Chaney provides an insight into the political context that led to the development of the Welsh duty, its early history and impact. Interestingly, Chaney notes that the duty's influence has stretched beyond administration and representation within the assembly to political platforms and language across party barriers.

Charlesworth, Hilary, *Writing in Rights: Australia and the Protection of Human Rights* (2002)

Charlesworth is a leading, ACT-based academic in the field of Australian human rights law. Her book describes the various historical attempts to create a national bill or charter of rights in Australia and seeks to explain the country and its legislatures' apparent reluctance to recognise and enact international human rights law. Although political considerations were beyond the scope of this report, Charlesworth's text provides some insight as to why the recognition of human rights law in Australia has been and continues to be such a gradual process and the kinds of arguments typically made against extending legislative rights that might be made in response to attempts to introduce a positive duty in the ACT.

Cooper, Carole and Lagrange, Robert, 'The Application of the Promotion of Equality and Prevention of Unfair Discrimination Act and the Employment Equity Act' (2001) 22 *Industrial LJ Juta*, 1532—

This article is a comprehensive though value-neutral evaluation of the interaction of the South African *PEPUDA* and *Employment Equity Act*. Cooper and Lagrange provide a close analysis of the legislation and discuss potential problems arising from jurisdictional overlap.

Evans, Carolyn and Evans, Simon, *Australian Bills of Rights: The Law of the Victorian Charter and ACT HRA* (2008)

This book contains annotated versions of the *Victorian Charter of Rights* and ACT *HRA*, which allow for easy comparison and provide some clarification as to the provisions of each bill of rights. Chapters on the *HRA* also include extracts from an influential article by Butler, who suggests that public authorities are bound by the *HRA* by virtue of the ACT *Legislation Act*, even without new provisions creating a specific obligation that come into force in January 2009. The book goes on to provide a useful comparison of the new obligation on public authorities under the *HRA* with that under the Victorian Charter.

Fredman, Sandra, *Discrimination Law* (2002)

Fredman is arguably the leading writer on positive duties. Having worked in many countries that have now adopted positive duties, she has influenced the formulation and enactment of many of the world's existing positive duties. Although many of the examples considered in this seminal work are now outdated, Fredman's outline of the necessary elements of a positive duty continue to provide the framework for all positive duties based on the mainstreaming model. Her framework for the formulation of positive duty was relied on in this report to develop a recommended model for the ACT.

Fredman, Sandra and Spencer, Sarah. 'Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes' (2006) 6 *European Human Rights Law Review* 598—

Spencer and Fredman's article is a more recent account of the theory behind positive duties presented in Fredman's older work (above). This article assesses

the shortcomings of complaints-led legislation and the different qualitative and quantitative goals possible under a proactive framework. Spencer and Fredman develop a broadly framed generally applicable model for positive duties. Despite their focus on duties in Northern Ireland and the UK, Spencer and Fredman's analysis provided a useful comparison and model for the duty proposed in this report.

Gaze, Beth. 'Context and Interpretation in Anti-Discrimination Law' (2002) 26 *Melbourne University Law Review* 326—

Gaze's article centres on the decision in *Schou v Victoria*, which she presents as the last in a long line of cases favouring narrow interpretations and economic efficiency over individual rights against discrimination. Her discussion of traditional principles of interpretation in discrimination law demonstrate the deterioration of protections considered in Part 1 of this report.

Human Rights and Equal Opportunity Commission, *Federal Discrimination Law* (2008)

The AHRC publishes a new edition of this book each year. The text only considers federal discrimination legislation but includes discussion of cases and provides a clear outline of how the laws operate, that is applicable to all jurisdictions. Importantly, considering the rate of change in this area of law, the book is kept up-to-date by the ongoing publication of new entries on the AHRC's website.

Human Rights Law Resource Centre, *Human Rights Law Resource Manual* (2006)

This publication is essentially an annotated reproduction of the *Victorian Charter of Rights* including cases and international jurisprudence to aid interpretation. It is a practical guide and much of the analysis of the Victorian Charter is relevant to the ACT as our *HRA* closely resembles the Victorian equivalent.

Huscroft, Grant., Mahony, Richard., Optican, Scott and Rishworth, Paul, *The New Zealand Bill of Rights* (2004)

This book provides a right-by-right guide to the New Zealand Bill of Rights and its discrimination provisions. The New Zealand Bill of Rights does not include a positive duty so discussion specifically relating to the Act was of little assistance to this report. The more general discussion of positive and negative duties did however provide useful background information.

Interights, *Internal Discrimination Law: A Handbook for Practitioners* (2005)

This publication provides background information essential to understanding positive duties in any jurisdiction. The handbook outlines issues of formal and substantive equality, positive and negative rights and, group and individual rights. Unlike most writing on positive duties, the handbook includes lists of practical measures taken under positive duties.

Lee Adams, K. 'Defining Away Discrimination' (2006) 19.3 *Australian Journal of Labour Law*, 263—

This article is a comprehensive discussion of Australian Courts' recent treatment of discrimination law. Lee Adams argues that increasingly narrow judicial interpretations of discrimination law are 'defining away' protections against discrimination. The article focuses on indirect discrimination and the trend away from beneficial decisions recognising the remedial purpose of anti-discrimination legislation toward decisions betraying a preference for economic efficiency. The article clearly demonstrates the need for a positive duty in a country where individual complaints are increasingly likely to fail.

Lindsay, Katherine., Rees, Neil and Rice, Simon, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008)

This very recent textbook is already out-of-date in relation to elements of the ACT *Discrimination Act* and illustrates the speed with which Australian discrimination legislation and positive duties in particular, are changing. The text does however include useful historical and theoretical background for our discrimination law framework and a clear overview of the federal legislative framework.

McColgan, Aileen, *Discrimination Law: Text, Cases and Materials*, (2nd Ed, 2005)

McColgan's textbook primarily considers anti-discrimination legislation in Northern Ireland and the UK more generally. The book includes cases taken from different European jurisdictions but unfortunately, the speed of developments in the areas of discrimination law and positive duties means that much of the discussion of legislation is out-of-date.

Moon, Gay, 'From equal treatment to appropriate treatment: What lessons can Canadian equality law on reasonable accommodation teach the UK?' (2006) 6 *European Human Rights Law Review*, 695—

Moon suggests that the UK might follow the Canadian example and expand the concept of 'reasonable adjustment' (traditionally used in disability discrimination legislation) to create a general positive duty. She further explores the use of 'human dignity' as a means of clarifying the meaning of 'reasonable adjustment' and resolving clashes between competing rights. This discussion is now outdated in the context of the UK but can still inform jurisdictions like the ACT, looking to develop a positive duty. Moon's discussion of the use of 'human dignity' as a clarifying standard is however, unconvincing, the analysis she envisages would be better suited to judicial decision-making than the more cooperative, outcomes-based approaches favoured for most positive duties.

O'Cinneide, Colm, *Thinking about positive duties and positive action* (2007) Equality Commission for Northern Ireland

<www.equalityni.org/archive/event_resources/OCinneideECNIpaper.doc> at 13 October 2008

(Sections of this paper form part of a previous paper, 'Fumbling Towards Coherence: The Slow Evolution of Equality Law in England and Wales' (2006) *Northern Ireland Legal Quarterly* 57-102).

This article supports the recommendations made in the recent review of UK discrimination law but is somewhat critical of positive duties. Most writing on positive duties avoids criticism in an effort to encourage their enactment, O'Cinneide however, acknowledges that positive duties are often created without proper enforcement measures and are, as a result burdensome yet ineffective. O'Cinneide recognises the important educative role of positive duties and their ability to promote cultural change. Thus, although the article specifically addresses the Northern Irish duty, its findings have a much wider application.

Smith, Belinda, 'Australian Anti-Discrimination Laws: Framework, Developments and Issues' in Takashi Araki and Hiroya Nakakabu (eds) *New Developments in Employment Discrimination Law* (2008—forthcoming)

Smith's article provides a useful critique of existing Australian anti-discrimination law. Her discussion of the difficulties associated with complaints-led discrimination legislation both in their reliance on vulnerable victims and incapacity to address entrenched discrimination inform the first part of this report. Smith's criticisms of the disability standards were also considered in Part 2.

Thornton, Margaret, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1991)

Thornton is a leading academic in the field of discrimination law and this influential work is a comprehensive critique of Australian legislation. Thornton gives particular attention to economic theory and inequalities between victims and perpetrators of discrimination as well as vested interests in the maintenance of discriminatory policies. Her discussion of the limits of complaints-led models was also relied on in writing the first part of this report.

Williams, Charlotte, 'Can Mainstreaming Deliver? The Equal Opportunities Agenda and the National Assembly for Wales' (2001) 14.1 *Contemporary Wales*, 57—

This article was written early in the history of the Welsh duty and considers both mainstreaming theory and its impact on the conduct of the National Assembly of Wales. Williams concludes that mainstreaming equality principles have become firmly entrenched in the conduct of the Assembly and that gains have been made, especially in improved representation of women in the legislature.

Other sources

***About the Global Compact: Overview of the UN Global Compact* (2008) United Nations Global Compact**

<<http://www.unglobalcompact.org/AboutTheGC/index.html>> at 25 October 2008.

The UN Global Compact is a 'strategic policy initiative' for businesses that allows them to voluntarily commit to policies and practices aimed at ensuring that globalisation benefits all economies and societies. The initiative is based on 'ten universally recognised principles' in the areas of human rights, labour standards, environment and anti-corruption. This project recognises and represents an international commitment to the concept of corporate citizenship and the role that private entities have to play in giving effect to equality goals. The Compact and the principles behind it were presented as supporting the expansion of an ACT equality duty to private entities. The Compact's membership of over 5500 entities from over 130 countries also demonstrates a willingness on the part of some private entities to play a greater role in pursuing fundamental social objectives.

ACT Human Rights Commission, *Human Rights & Discrimination Commissioner*

"About Us", ACT Human Rights Commission

<<http://www.hrc.act.gov.au/index.cfm?MasterTypeID=2&SectionTypeID=12&MainTypeID=12>> (Accessed 18 September, 2008)

The ACT Human Rights Commission's website is primarily designed to inform the public about the services the Commission provides. The existing powers and functions of the Human Rights & Discrimination Commissioner provided an important basis for the development of a positive duty for the ACT.

ACT Labor, *Australian Labor Party Australian Capital Territory Branch Platform 2008-2009* (2008) 128.

This document outlines the policy platform that the ALP's ACT branch took to the recent election. The platform includes a policy amending the *Discrimination Act* to include a positive duty on public bodies to prevent discrimination and promote equality. The policy was adopted earlier this year after a motion calling on the then Stanhope Government to amend the *Discrimination Act* to include

such a duty was unanimously adopted at an ALP conference. The motion was drafted by specialist in constitutional and human rights law, Professor George Williams. As a new ACT Labor government will probably be confirmed in the near future, the ALP's proposed amendments are likely to be adopted. The proposed model was therefore an important consideration throughout the report and the recommendations made both add to and make suggestions for improvement.

Director General of the International Labour Organisation, *Equality at work: Tackling the challenges* (2007) Accessed at

<http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6779> at 25 October 2008

This report was produced as a follow-up to the International Labour Organisation's ("ILO") *Declaration on Fundamental Principles and Rights at Work*. Most significantly for this report, the ILO Report outlines common challenges to rights at work and trends in regulation. The ILO Report's examples and chronology of regulation demonstrates a clear momentum towards the positive rather than negative rights against discrimination and vilification in the employment context.

Equality and Human Rights Commission, 'The Race Equality Duty', Equality and Human Rights Commission

<<http://www.equalityhumanrights.com/en/forbusinessesandorganisation/publicauthorities/raceequalityduty/Pages/default.aspx>> Accessed 6 October 2008.

The UK Equality and Human Rights Commission's website provides information about all three existing equality duties, including compliance advice for duty-bearers. The site was an essential source for clarification, as the duties and their content are currently scattered throughout a complex combination of Acts, amendment Acts and subordinate legislation. The site, like many aimed at informing the public about their rights, unfortunately contains little specific information grounding the rights in legislation.

Federal Disability Commissioner, *Web Watch: Accessibility of government websites* (2008) Australian Human Rights Commission

<http://www.hreoc.gov.au/disability_rights/webaccess/webwatch.htm> at 25 October 2008

This site is still very much in its early stages but provides an example of 'naming and shaming' measures at work as well as an important reminder to service providers that issues of access for persons with a disability are not restricted to the physical world. The examples currently listed however, only identify failures to provide information in a non-PDF form and therefore do not illustrate access issues specifically relevant to persons with a disability.

HRO Fact Sheet on the Right to Recognition and Equality Before the Law (unpublished draft)

The Human Rights Office, now the HRC intends to produce 'fact sheets' for each of the rights under the HRA. This document was developed for the equality rights under s8. The draft sheet clearly outlines the meaning and content of the right with reference to international jurisprudence taken from cases and General Comments by the UN Human Rights Committee.

***S.I. bhnf C.C. v K.S. bhnf I.S.* (2005) ACTSC 125 in ACT Human Rights Office, *Humanity* (January 2006) 3**

This case considered the compatibility of the *Domestic Violence and Protection Orders Act 2001* ("DVPO Act") with the HRA. In this instance, the DVPO Act had allowed the imposition of an interim protection order against a child to be finalised without a hearing. The Human Rights Office (now the HRC) intervened

on the ground that the provision breached the rights of the child, in particular the right to a fair trial. In deciding the case, Higgins CJ also considered the application of the doctrine of separation of powers to the ACT. The judge's comments in this regard have significance beyond this case for the operation of the *HRA* and restrict the extent to which the bill of rights can impose conditions on the judiciary. This jurisprudence prevented the judiciary from being included as a public authority under the *HRA* and would prevent their being bound by a positive duty beyond their administrative functions.

Thornton, Margaret, lecture for ANU Law Course *Human Rights in Australia* (12 September 2008)

Thornton's speech primarily argued that the erosion of protections under discrimination law is a result of the influence of neo-liberal economic theories on judicial interpretations. Thornton provided a brief overview of recent cases in support of her argument. She further argued that increased casualisation of the workforce has led to a decline in workplace discrimination complaints and has left victims less secure in their employment and therefore less able to pursue successful complaints under a complaints-led model. Thornton spoke in support of a positive duty as a means of addressing some of these flaws in the existing system.

***Vienna Declaration and Program of Action* (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993)**

This declaration reaffirms fundamental human rights principles and commits to a number of practical measures aimed at better protecting human rights, including increased coordination between organisations and education. The declaration reaffirmed the universality, indivisibility and interdependence of human rights, a principle that underpins this report's commitment to a generally applicable positive duty.

Watkins-Singh, R (on the application of) v Aberdare Girls' High School & Anor (2008) EWHC 1865

This case was brought under the race equality duty in the UK *Race Relations Act 1976* (UK). The case considered whether school policy preventing a girl from wearing a Sikh bangle to school was a breach of the obligation to have 'due regard' to the race duty. The court found in favour of the complainant but the judge drew attention to the toll that the lengthy proceedings and complaints process had taken on the complainant and her studies. The case was included in the report both as an example of a successful claim under the enforcement scheme adopted by all three equality duties and as evidence that without assistance, direct judicial remedies under a positive duty are just as difficult for complainants to pursue as negative duties under more traditional complaints-led models.

Front cover image from PhotoBlogster (2006)

<http://www.photoblogster.com/images/20060211182945_marbles.jpg> at 20 October 2008 (image resized and printed in black and white).

