



Law Council
OF AUSTRALIA

Review of the Australian Human Rights Commission Regulations 1989 and the Disability Discrimination Regulations 1996

Attorney-General's Department

17 April 2019

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
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- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Human Rights Committee, its Military Law Committee, its Equal Opportunity Committee and the New South Wales Bar Association in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to respond to the Attorney-General's Department (**AGD**) regarding its review of the *Australian Human Rights Commission Regulations 1989* (Cth) (**the AHRC Regulations**) and the *Disability Discrimination Regulations 1996* (Cth) (**the DD Regulations**), both of which will sunset in October 2019. As noted in the AGD's consultation paper¹ (**the Consultation Paper**), the review is intended to determine these regulations' currency and fitness for purpose prior to them being remade.
2. The Consultation Paper proposes reforms in three areas:
 - a) replacing the three separate disability-related grounds with a single ground of 'disability' in the AHRC Regulations;
 - b) amending 'criminal record' to 'irrelevant criminal record' in the AHRC Regulations; and
 - c) ensuring the DD Regulations (in particular, those regulations relating to the definition of 'combat duties' and the prescribed laws) are still appropriate and in line with community and stakeholder expectations.
3. The Law Council supports the AGD's proposal that the three separate disability-related grounds be replaced with a single ground of 'disability' in the AHRC Regulations. To avoid confusion and ensure this ground is interpreted as intended, it considers that the new 'disability' attribute in the AHRC Regulations should be defined by reference to the definition of disability in section 4 of the *Disability Discrimination Act 1992* (Cth) (**DDA**).
4. The Law Council considers that any proposals to amend the 'criminal record' declared attribute in the AHRC Regulations should have careful and detailed regard to recent caselaw in this area, the context and rationale surrounding the declared attribute - including its important role in ensuring rehabilitation of persons with a criminal record, while ensuring that their employment does not pose a risk to the community - and key differences between relevant Commonwealth, state and territory legislation. It recommends that, should the 'criminal record' declared attribute be amended to 'irrelevant criminal record', that:
 - clarification be included requiring that 'the circumstances relating to the criminal record are not directly relevant to the particular job'; and
 - consideration be given to a deeming provision stating that a criminal record will be deemed to be irrelevant unless it is shown that the criminal record is directly relevant to the circumstances in which the discrimination arises.
5. With respect to the prescription of combat duties and combat-related duties from the operation of the DDA, the Law Council agrees that it is important to strike an appropriate balance between the Australian Defence Force's (**ADF's**) operational requirements regarding employees who are, or who may be, undertaking such duties, and the rights of all people to be free from discrimination. It notes that the current review would be assisted by a more detailed understanding of the ADF's operational requirements, and how it currently accommodates employees with disability. It recommends that careful consideration be given, in consultation with the ADF, to the

¹ Australian Government Attorney-General's Department, *Review of the Australian Human Rights Commission Regulations 1989 and the Disability Discrimination Regulations 1996*: Public Consultation Paper (February 2019), 1.

justification, necessity and proportionality of including ‘duties which require, or which are likely to require, a person to work in support of a person performing combat duties’ in the definition of ‘combat-related duties’ in the DD Regulations.

6. With respect to the DD Regulations’ prescription of certain Commonwealth, New South Wales (**NSW**) and South Australian (**SA**) laws from the operation of the DDA, the Law Council notes with respect to the Commonwealth laws that these involve complex interactions between different laws, and a core question is whether the prescription mechanism presents the most appropriate and effective mechanism of balancing these interactions. The Law Council further notes that certain prescribed NSW legislation is out-of-date, and references to the newer provisions should be considered. More generally, any decisions to continue prescribing these laws should be informed by:
 - an analysis of their scope, the original rationale for their exclusion from the DDA, and the justification, necessity and proportionality of their future prescription;
 - the views of stakeholders, particularly people with disability themselves; and
 - Australia’s obligations to realise the rights of disability contained in the *Convention on the Rights of People with Disabilities*² (**CRPD**), particularly those rights concerning non-discrimination and equality.
7. While the Consultation Paper does not discuss the existing ‘sexual orientation’ declared attribute in the AHRC Regulations, the Law Council notes that it is unclear why this ground does not include other LGBTI+ attributes such as gender identity and intersex status. It supports consideration being given to adding ‘gender identity’ and ‘intersex status’ as declared attributes, in addition to the existing sexual orientation attribute.

Introduction

Background

AHRC Act and Regulations

8. Division 4 of Part II of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) confers functions on the Australian Human Rights Commission (**AHRC**) to undertake its equal opportunity in employment functions in relation to the declared grounds of discrimination. These functions include publishing guidelines, research and education examining enactments and promoting public awareness.³ Most importantly, the AHRC may inquire into, and attempt to settle by conciliation, complaints of discrimination in employment on these declared grounds.
9. However, unlike other mechanisms available to resolve workplace discrimination, such as complaints to the AHRC under federal anti-discrimination legislation and actions under the *Fair Work Act 2009* (Cth) (**the FWA**), no enforceable remedies are available for such complaints. If conciliation is unsuccessful and the AHRC considers that discrimination has occurred, it may report to the Attorney-General and include non-

² Opened for signature 30 March 2007, A/RES/61/106 (entered into force 3 May 2008).

³ AHRC Act, s 31.

enforceable recommendations.⁴ However, the complainant may not pursue his or her complaint in the Federal Court or Federal Circuit Court.

10. These functions give effect, in part, to Australia's obligations under the International Labour Organisation (ILO) *Convention concerning Discrimination in Respect of Employment and Occupation*⁵ (the ILO Convention).

11. Subsection 3(1) of the AHRC defines 'discrimination' for the purposes of the Commission's equal opportunity in employment functions as:

- a) *any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment or occupation;⁶ and*
- b) *any other distinction, exclusion or preference that:*
 - (i) *has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and*
 - (ii) *has been declared by the regulations to constitute discrimination for the purposes of this Act;⁷*

but does not include any distinction, exclusion or preference:

- c) *in respect of a particular job based on the inherent requirements of the job.⁸*

12. Regulation 4 of the AHRC Regulations declares an additional ten attributes for the purposes of subparagraph 3(1)(b)(ii) of the AHRC Act. These (undefined) attributes are: age, medical record, criminal record, impairment, marital or relationship status, mental, intellectual or psychiatric disability, nationality, physical disability, sexual orientation, and trade union activity. Regulation 4 was made in 1989 and has subsequently been amended only once.⁹

Disability Convention and Disability Discrimination legislation

13. Australia has also assumed obligations under the CRPD, which requires countries, inter alia, to:

⁴ AHRC Act, s 32A.

⁵ Opened for signature 25 June 1958, C111, (entered into force 15 June 1960).

⁶ Reflecting the terms of the ILO Convention, art 1(1)(a).

⁷ Reflecting the terms of the ILO Convention, art 1(1)(b), which refers to 'such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.'

⁸ Reflecting the terms of the ILO Convention, art 2. The definition of discrimination at s 3(1) further excludes (d) any distinction, exclusion or preference in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

⁹ By the *Australian Human Rights Commission Amendment (Grounds of Discrimination) Regulation 2013* (Cth), which replaced the then-existing declared attributes of 'marital status' and 'sexual preference' with 'marital or relationship status' and 'sexual orientation' respectively.

- ensure and promote the full realisation of all human rights and fundamental freedoms for all people with disability without discrimination of any kind on the basis of their disability;¹⁰
- adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the CRPD;¹¹
- take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disability;¹²
- provide 'reasonable accommodation' to ensure that people with disability can enjoy their rights on an equal basis with others.¹³ This means providing necessary and appropriate modifications and adjustments, which do not impose a disproportionate or undue burden, where needed;
- recognise the right of people with disability to live independently and take part in all aspects of life;¹⁴
- ensure that people with disability are entitled to the equal protection and equal benefit of the law. This includes prohibiting all discrimination on the basis of disability and guaranteeing to persons with disabilities equal and effective legal protection against discrimination on all grounds;¹⁵ and
- recognise the right of persons with disabilities to work on an equal basis with others. This includes prohibiting discrimination on the basis of disability with regard to all matters concerning all forms of employment, and ensuring that reasonable accommodation is provided to persons with disabilities in the workplace.¹⁶

14. At the domestic level, amongst its other prohibitions on unlawful discrimination based on disability in key areas of public life, the DDA relevantly prohibits such discrimination in work, including employment.¹⁷ It further requires employers to make 'reasonable adjustments' to enable an employee to perform essential activities of the job.¹⁸ However, it is not discrimination if:

- a person would be unable to carry out the inherent requirements of the particular work, even if reasonable adjustments were made;¹⁹ or
- if avoiding the discrimination would impose an unjustifiable hardship on the employer.²⁰

15. The DDA contains certain exemptions which are elaborated upon by the DD Regulations. These are discussed further below.

¹⁰ CRPD, art 4.1

¹¹ CRPD, art 4.1(a).

¹² CRPD, art 4.1(b).

¹³ CRPD, art 5.2.

¹⁴ CRPD, art 9.

¹⁵ CRPD, art 5.

¹⁶ CRPD, art 27(1).

¹⁷ DDA, Pt 2, Div 1.

¹⁸ DDA, ss 5(2); 6(2).

¹⁹ DDA, s 21.

²⁰ DDA, ss 21B; 11.

Consultation Paper proposals

Replacing the three separate disability-related grounds with a single ground of 'disability' in the AHRC Regulations

16. As noted in the Consultation Paper,²¹ regulation 4 of the AHRC Regulations declares three separate attributes relevant to disability: impairment; mental, intellectual or psychiatric disability; and physical disability. These disability-related declared attributes, which are undefined, were legislated prior to the DDA and the DD Regulations. They also do not align with the central definitions in the latter legislation.

17. Under section 4 of the DDA, 'disability', in relation to a person, means:

- a) *total or partial loss of the person's bodily or mental functions; or*
- b) *total or partial loss of a part of the body; or*
- c) *the presence in the body of organisms causing disease or illness; or*
- d) *the presence in the body of organisms capable of causing disease or illness; or*
- e) *the malfunction, malformation or disfigurement of a part of the person's body; or*
- f) *a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*
- g) *a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;*

and includes a disability that:

- h) *presently exists; or*
- i) *previously existed but no longer exists; or*
- j) *may exist in the future (including because of a genetic predisposition to that disability); or*
- k) *is imputed to a person.*

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

18. Significantly, this definition does not seek to categorise disability by reference to manifestations, such as physical, mental, intellectual or psychiatric disability, or impairment, as appear in the disability-related declared attributes in regulation 4 of the AHRC Regulations. Indeed, the definition of disability in section 4 of the DDA is significantly broader than regulation 4 of the AHRC Regulations, including – perhaps most importantly – an imputed disability.

²¹ Consultation Paper, 3-4.

19. As the Consultation Paper observes, the three separate disability-related declared attributes in the AHRC Regulations create unnecessary complexity in determining whether the AHRC's functions are enlivened.²²
20. For that reason, the AGD proposes replacing the three disability-related grounds in the AHRC Regulations with a single ground of 'disability', stating that:

*This would align the treatment of disability discrimination issues with the more contemporary concepts and terminology adopted in the DDA and the DD Regulations, and with community and stakeholder expectations that appropriate and inclusive disability-related concepts are reflected in legislation.*²³

21. The Law Council supports this proposed reform. It is important that the Commission's equal opportunity in employment functions in relation to disability discrimination,²⁴ including its important inquiry and conciliation functions,²⁵ reflect the scope of disability recognised by the DDA and DD Regulations. To avoid confusion and ensure that the scope is as wide as intended, the new 'disability' attribute in the AHRC Regulations should be defined by reference to the definition of disability in section 4 of the DDA.

Recommendation:

- **The three separate disability-related grounds should be replaced with a single ground of 'disability' in the AHRC Regulations. This should be defined by reference to the definition of disability in section 4 of the DDA.**

Amending 'criminal record' to 'irrelevant criminal record' in the AHRC Regulations

22. Regulation 4 of the AHRC Regulations declares 'criminal record' as an attribute for which the AHRC's equal opportunity in employment functions can be exercised.
23. The Consultation Paper states that the AGD has been unable to source any information on why the National Committee on Discrimination in Employment and Occupation recommended that 'criminal record' be declared as an additional attribute under the AHRC Regulations.²⁶ On this issue, the Law Council notes the current clarification of the AHRC President, Emeritus Professor Rosalind Croucher AM, that:

It was the 1987 report (No 37) of the Australian Law Reform Commission (ALRC), Spent Convictions, that prompted express inclusion of criminal records in the grounds of discrimination. The ALRC identified the difficulties faced by former offenders resulting from the mere fact of having criminal records, and concluded that 'there is a strong case for doing something about the problems faced by former offenders' ... balancing the offender's need to return to full citizenship against the public interest in the prevention and

²² Consultation Paper, 4. A similar issue arises in the context of the operation of s 351 of the *Fair Work Act 2009* (Cth), which refers only to 'physical or mental disability', and not disability as defined in the DDA. As to the issues which arise from such language see, eg, *RailPro Services Pty Ltd v Flavel* [2015] FCA 504; (2015) 242 FCR 424 at [123]-[124]; *Shizas v Commissioner of Police* [2017] FCA 61 at [124].

²³ Consultation Paper, 4.

²⁴ AHRC Act, s 31.

²⁵ AHRC Act, s 31(b).

²⁶ Consultation Paper, 6.

detection of crime, and in appropriate decision making in judicial and other contexts.

The ALRC concluded that the difficulties faced by former offenders 'may be appropriately reduced, if not avoided', by (i) minimising the negative consequences that attach to old (spent) convictions; and (ii) making it unlawful to discriminate unreasonably against a person on the basis of his or her criminal record.²⁷

24. The Consultation Paper proposes to amend 'criminal record' to 'irrelevant criminal record' in the AHRC Regulations. This is intended to clarify that, while employers can discriminate on the basis of a 'relevant criminal record', they will not be able to discriminate if the conviction is 'irrelevant' to the role for which the person is applying.²⁸
25. The meaning of 'criminal record' is not defined in the Regulations. However, it has been interpreted broadly to include not only what actually exists on a police record, but also the circumstances of the conviction.²⁹

Suncorp decision

26. The AGD states that this amendment is necessary to respond to concerns raised by *BE v Suncorp Group Ltd*,³⁰ which was the subject of a report to the Attorney-General by the AHRC President (**Suncorp**). This decision related to a complaint made by Mr BE alleging that Suncorp's rescission of a conditional offer of employment constituted discrimination on the basis of his criminal record. The AHRC found that Suncorp's decision to rescind Mr BE's offer of employment, based on his criminal record, constituted discrimination because the decision was not based on the inherent requirements of the job. The Law Council notes further that:

- the conditional offer rescinded was made in 2015 and involved a work-from-home consultant role in Suncorp's insurance business. It did not involve contact with children;
- Mr BE had previously worked for seven years as a caseworker at the Telecommunications Industry Ombudsman between 2008-2015;
- Mr BE's employment offer was conditional upon a satisfactory background check including a criminal history check;
- The criminal history check identified two 2008 convictions for: possession of child pornography, resulting in a \$5000 fine, and use of a carriage service to access child pornography material, resulting in a suspended sentence of 12 months, and a further \$5000 payment. A further 2015 conviction for failure to comply with reporting obligations was not taken into account by the AHRC;³¹
- Suncorp rescinded the job offer on the basis that, given the serious nature of Mr BE's criminal record, it had serious concerns whether he could demonstrate and fulfil its values including respect, honesty, fairness, caring and trust, as well as whether he could provide an empathetic service.³²

²⁷ Rosalind Croucher, 'Righting the relic: towards effective protections for criminal record discrimination' (September 2018) 48 *Law Society Journal* 73, 74.

²⁸ Consultation Paper, 5.

²⁹ Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-discrimination & Equal Opportunity Law* (The Federation Press, 3rd ed, 2018), 519, citing *Hall v NSW Thoroughbred Racing Board* (2002, HREOC Report No 19).

³⁰ [2018] AusHRC 121.

³¹ As Mr BE was seeking to appeal it: 20 [56].

³² *Suncorp*, 16 [39].

27. The President determined that she was required to consider whether:

- there was a relevant act or practice;³³
- the act or practice involved a distinction, exclusion or preference that was made on the basis of the complainant's criminal record;
- the distinction, exclusion or preference had the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- that distinction, exclusion, or preference was based on the inherent requirements of the job.³⁴

28. The President found that the first three of these points were met. She then considered whether the exclusion was based on the inherent requirements of the job, noting that, as this formed an exception to the prohibition against discrimination, it should be interpreted strictly so as not to result in the undue limitation of the protection conferred.³⁵ In approaching this question, she had regard to previous findings that:

- an 'inherent requirement' is something that is 'essential to the position'³⁶ and not 'peripheral'.³⁷ It is an 'essential feature' or 'defining characteristic'.³⁸ The fact that certain statements appeared in a position description was insufficient to establish that they were inherent requirements of a particular job.³⁹
- the AHRC had previously found good character to be an inherent requirement of particular roles.⁴⁰ However, a criminal record alone could not be a basis upon which to impute bad character.⁴¹ Therefore, it was also necessary to consider the nature of the record, the context in which it came into existence and relevant aspects of the personal circumstances of the applicant.⁴²
- to ensure that the objectives of anti-discrimination legislation were not defeated, a sufficiently tight or close connection between the inherent requirements of the job and the relevant 'distinction', 'exclusion or preference' was required.⁴³

29. The President concluded that Mr BE's convictions were 'undoubtedly very serious'⁴⁴ and that 'the law and the community appropriately respond to such offences with censure'.⁴⁵ Further, aspects of his role required him to be trustworthy and of good character: particularly the requirement that he be able to deal appropriately with confidential information.⁴⁶

30. However, based on the material before the Commission, including his work experience and training, the President considered that it was not apparent that he was unable to

³³ Within the meaning of section 30(1) of the AHRC Act.

³⁴ *Suncorp*, 11 [17].

³⁵ *Suncorp*, 13 [30].

³⁶ *Suncorp*, 13 [32], citing *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).

³⁷ *Ibid*, citing *X v Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).

³⁸ *Ibid*, citing *X v Commonwealth v* (1999) 200 CLR 177, 191 [43] (McHugh J).

³⁹ *Suncorp*, 13 [34], citing *Qantas Airways v Christie* (1998) 193 CLR 280, 284 [1] (Brennan J).

⁴⁰ *Suncorp*, 18 [45], citing *Ms Renai Christensen v Adelaide Casino Pty Ltd* [2002] AusHRC 20.

⁴¹ *Suncorp*, 18 [45], citing *Z v Director General, Department of Transport* [2002] NSWADT 67 [30]-[32]; *Saadieh v Director General, Department of Transport* [1999] NSWADT 68 [14]-[15].

⁴² *Suncorp*, 19 [48].

⁴³ *Suncorp*, 19 [50], citing *Commonwealth v Human Rights and Equal Opportunity Commission and Others* (1998) 158 ALR 468, 482 (Wilcox J), affirmed *Commonwealth v Bradley* (1999) 95 FCR 218, 235-236 (Black CJ).

⁴⁴ *Suncorp*, 25 [76].

⁴⁵ *Ibid*.

⁴⁶ *Ibid*.

fulfil the requirement to be trustworthy and of good character.⁴⁷ In particular, Mr BE's criminal record alone did not suggest that he was unable to:

- *deal appropriately with confidential customer information*⁴⁸ - there was not a sufficiently tight connection between his criminal record and the requirement to treat personal information confidentially.⁴⁹ Mr BE's prior experience in client-facing roles in which he had had access to personal information was also relevant;⁵⁰ or
- *perform duties involving the use of technology and the internet, unsupervised through Suncorp's systems*⁵¹ - Suncorp's policies in monitoring remote staff's internet usage and capacity to restrict access to inappropriate website suggested that there was no reasonable prospect of his being able to use those systems in the way that led to his conviction.⁵² While his 2008 offences related to serious misuse of the internet, he had not been convicted of any similar offences in the nine years since and had worked without close supervision.⁵³

31. Further, the President was not satisfied that Suncorp's corporate social responsibility programs were sufficiently connected to the particular job of consultant for this to be a relevant factor in assessing Mr BE's suitability for employment in that role.⁵⁴ She also remarked that there was a lack of evidence to suggest that Mr BE's criminal record would become more broadly known to people outside the recruitment process, and that it would not threaten Suncorp's reputation.

32. On this basis, she found that the rescission of his offer was not based on the inherent requirements of the job and that Suncorp had discriminated against Mr BE on the basis of his criminal record.

33. Subsequently, Suncorp indicated that it would not comply with the AHRC's findings, resulting in the AHRC's report to the Attorney-General. The Attorney-General, responding to strong media concerns expressed regarding the *Suncorp* decision,⁵⁵ indicated that he would seek to clarify the law, stating that:

*A criminal record shouldn't rule you out of all future employment ... but employers have got to be able to decide whether someone's criminal record means they're suitable for the inherent requirements of the job.*⁵⁶

Broader context

34. The Law Council considers that any amendments to the AHRC Regulations on this issue should be considered in their broader context, as follows.

- a) The 'criminal record' ground in the AHRC Regulations has operated for over 30 years. The AHRC regularly receives complaints on the basis of criminal

⁴⁷ Ibid.

⁴⁸ Ibid, 25 [77].

⁴⁹ Ibid, 20 [56].

⁵⁰ Ibid, 21 [57].

⁵¹ Ibid, 25 [77].

⁵² Ibid, 22 [65].

⁵³ Ibid, 23 [67].

⁵⁴ Ibid, 25 [77].

⁵⁵ Eg, Miranda Devine, 'Miranda Live: Attorney-General disagrees with Suncorp decision', *The Daily Telegraph* (online), 2 July 2018.

⁵⁶ Ibid.

record discrimination (95 in 2017-2018, a significant increase from the 71 complaints received in 2016-2017).⁵⁷ It reports that the number of complaints received is similar to the numbers alleging age discrimination in employment.⁵⁸

- b) The AHRC further reports that of the 95 complaints received in 2017-2018, many of these were resolved by being declined or closed (including because the AHRC was satisfied that no discrimination had occurred or that the complaint was trivial, vexatious etc. or the complainant did not wish to pursue it). Nearly one-third of the complaints were conciliated successfully. Of the three that were referred to the President to consider reporting, only one concerned a complaint that could not be resolved by conciliation (Suncorp).⁵⁹
- c) As at January 2012, there had been just six cases where the AHRC had made a finding of discrimination on the basis of criminal record. In these cases, the AHRC's recommendations were either not followed by the employer or it was unclear whether action had been taken by the employer.⁶⁰
- d) While the level of protection at the federal level against discrimination on the basis of criminal record is relatively weak, as it is unenforceable, for Australians in several states and territories it nevertheless provides an important safeguard. Only Tasmania, the Northern Territory and the Australian Capital Territory (**ACT**) include such an attribute in their anti-discrimination law frameworks, as discussed below.
- e) There are established links between employment and reduced rates of re-offending. For example, a United Kingdom review found that employment can reduce re-offending by between a third and a half.⁶¹ It also found that a criminal record can seriously diminish employment opportunities.⁶² This has a flow-on effect to the broader community's safety⁶³ and underlines an important rationale for ensuring that individuals who have served their criminal justice punishment are able to work again. Should the legislative protection against discrimination based on criminal record be drafted too narrowly, its rehabilitative objects will be defeated. As the Consultation Paper states, 'those with a criminal record should not be excluded from all employment for the rest of their lives'.⁶⁴
- f) At the same time, it is essential that employers are able to refuse certain jobs to employees with particular kinds of criminal records who are unable to perform the inherent requirements of a job. This includes situations where an individual's safety or an employer's business may be put at risk. For example, legislative schemes in Australia disqualify persons with convictions for child sex offences from working with children. A person with multiple drink driving convictions may be precluded from driving public transport. A person with a recent fraud conviction may be unable to perform the inherent requirements of

⁵⁷ Rosalind Croucher, 'Righting the relic: towards effective protections for criminal record discrimination' (September 2018) 48 *Law Society Journal* 73, 75.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, 74.

⁶⁰ Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (2012), 41.

⁶¹ Victorian Government Department of Justice, *An Equality Act for a Fairer Victoria, Equal Opportunity Review Final Report*, June 2008, 99, citing United Kingdom Home Office 2002, *Breaking the Circle – a report of the review of the Rehabilitation of Offenders Act*, United Kingdom Home Office, *Sentencing and Offences Unit, London*.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Consultation Paper, 6.

a job as a bank teller. These are all important scenarios in which employers must have the ability to exclude a person from employment in a particular position.

35. Having regard to the above factors, the Law Council agrees that an appropriate balance is struck in the AHRC Regulations regarding discrimination on the basis of criminal record.

'Irrelevant criminal record'

36. Should the AHRC Regulations be amended to 'irrelevant criminal record', following the *Suncorp* reasoning, the AHRC would have regard to whether:

- there was a relevant act or practice;⁶⁵
- the act or practice involved a distinction, exclusion or preference that was made on the basis of the complainant's **irrelevant** criminal record;
- the distinction, exclusion or preference had the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- whether that distinction, exclusion, or preference was based on the inherent requirements of the job.⁶⁶

37. The Law Council notes that this would involve twice assessing the nexus between the criminal record and the situation in which the discrimination arises – first, with respect to the 'relevance' of the criminal record, and second, regarding the 'inherent requirements' test. However, if an applicant failed to demonstrate that his or her criminal record was 'irrelevant', other elements of the discrimination test, including the 'inherent requirements' limb, would not come into play.

38. The Law Council further notes that the Consultation Paper does not define 'irrelevant criminal record'. As such, there may be some uncertainty regarding how an 'irrelevant' criminal record may be interpreted in practice, having regard to:

- a) *the text's ordinary meaning* – in this light, the Australian Oxford Dictionary defines 'irrelevant' as 'not relevant, not applicable to'.⁶⁷ Meanwhile, 'relevant' means 'bearing on or having reference to the matter at hand'.⁶⁸ The existence of a criminal record may frequently be considered to 'bear on or have reference to' a person's employment. As such, the interpretation of what is a 'relevant' criminal record may encompass broader and more general factors than for the 'inherent requirement' test. This may in turn narrow the scope of an 'irrelevant' criminal record.
- b) *its legislative context* – the interpretation of an 'irrelevant' criminal record would be considered in light of the existing test of whether a distinction, exclusion or preference was based on the 'inherent requirements' of the job. Noting that an inherent requirement is something that is 'essential to the position'⁶⁹ and not 'peripheral',⁷⁰ a conclusion may be drawn that the two concepts were not intended to mean the same thing. Interpretation of a criminal record's 'relevance' may therefore have regard to different and wider

⁶⁵ Within the meaning of section 30(1) of the AHRC Act.

⁶⁶ *Suncorp*, 11 [17].

⁶⁷ *Australian Oxford Dictionary* (Oxford University Press, 1999).

⁶⁸ *Ibid.*

⁶⁹ *Suncorp*, 13 [32], citing *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).

⁷⁰ *Ibid.*, citing *X v Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).

factors, which in turn may narrow what constitutes an 'irrelevant' criminal record.

- c) *the underlying purpose* – in interpreting an Act, and legislative instruments made under it, the interpretation that would best achieve the purpose or object of the Act is to be preferred.⁷¹ The purpose of the AHRC Act and Regulations is clearly beneficial, to protect individuals against discrimination on the basis of certain attributes. An overly narrow interpretation of an 'irrelevant' criminal record would undermine these objectives.

39. It appears likely that an 'irrelevant' criminal record would enable employers to take into account broader considerations than is currently the case with respect to determining how a person's criminal record affects their current or prospective employment. However, it is uncertain how broad these would be, noting that a key purpose of the amendment is to provide greater clarity to employers on these issues.⁷²
40. While a purposive, beneficial construction is likely, there may nevertheless be value in defining a 'irrelevant criminal record' so that a direct connection is required between the circumstances relating to the criminal record and the particular job. This may increase employer certainty as to how to approach the issue, and avoid an overly narrow interpretation of 'irrelevant criminal record' which excludes many individuals with reasonable complaints. This is discussed further below in light of state and territory examples.

Relevant State and Territory legislation

41. The Consultation Paper states that the relevant attribute for similar prohibitions of discrimination at state and territory level is 'irrelevant criminal record'.⁷³ The Law Council recognises that, in the Northern Territory, Tasmania and the ACT, anti-discrimination law provides protection against discrimination on the basis of a person's 'irrelevant criminal record'.⁷⁴
42. It notes, however, that the different structure of the relevant legislation should be taken into account in comparing the federal, state and territory approaches.
43. For example, the ACT Act applies to discrimination on the ground of listed attributes including irrelevant criminal record.⁷⁵ 'Irrelevant criminal record' is defined, in relation to a person, as a record relating to an offence, or an alleged offence, if:
- (a) the person has been charged with the offence but—
 - (i) a proceeding for the alleged offence is not finalised; or
 - (ii) the charge has lapsed, been withdrawn or discharged, or struck out;or
 - (b) the person has been acquitted of the alleged offence; or

⁷¹ *Acts Interpretation Act 1901* (Cth), s 15AA; *Legislation Act 2003* (Cth), s 13(1)(a).

⁷² Consultation Paper, 5-6.

⁷³ Consultation Paper, 5.

⁷⁴ *Anti-Discrimination Act 1992* (NT) (**the NT Act**), s 19(1)(q); *Anti-Discrimination Act 1998* (Tas) (**the Tasmanian Act**), s 16(q); *Discrimination Act 1991* (ACT) (**the ACT Act**) the s 7(1)(l).

⁷⁵ ACT Act, para 7(1)(l).

- (c) the person has had a conviction for the alleged offence quashed or set aside; or
- (d) the person has been served with an infringement notice for the alleged offence; or
- (e) the person has a conviction for the offence, but the circumstances of the offence are not *directly relevant* to the situation in which discrimination arises; or
- (f) the person has a spent conviction or an extinguished conviction, within the meaning of the *Spent Convictions Act 2000*, for the offence.⁷⁶

44. However, neither the general definition of discrimination, encompassing direct and indirect discrimination,⁷⁷ nor the ACT Act's prohibitions on discrimination in work,⁷⁸ include an 'inherent requirements of the job' test, unlike the federal definition of discrimination for the AHRC's equal opportunity in employment functions.⁷⁹
45. Therefore, assessment of the relevance of a criminal record and its circumstances to a particular job would occur once, under the 'irrelevant criminal record' test, rather than as part of a two stage process as envisaged under the AHRC Act and Regulations.
46. The NT Act defines 'irrelevant criminal record' in a substantially similar manner to the ACT Act.⁸⁰ Its discrimination definition also does not require assessment of whether a person can perform the 'inherent requirements' of a role.⁸¹ While its prohibitions on discrimination in work⁸² do provide an exemption where a person is unable 'to adequately perform the inherent requirements of the work even where their special need has been accommodated,⁸³ this does not appear to relate to when the key attribute is an irrelevant criminal record.
47. Notably, under both the ACT and NT Acts, the 'irrelevant criminal record' definition concerning a conviction limb is whether the circumstances relating to the offence are '*directly relevant*' to the situation in which the discrimination arises.⁸⁴
48. This may provide a model for ensuring an appropriately direct connection in the federal context. While the Law Council does not consider that an exhaustive definition of 'irrelevant criminal record' is necessary in the AHRC Regulations,⁸⁵ there may be value in clarifying that an 'irrelevant criminal record' means that the 'circumstances relating to the criminal record are *not directly relevant* to the particular job'.
49. The Law Council further notes that while onus of proof is not a concept generally favoured in anti-discrimination case law, the onus will fall, effectively, on the complainant to show that the criminal record is 'not directly relevant'. Consideration could further be given to including a deeming provision which states that 'where a

⁷⁶ ACT Act, s 2; Dictionary.

⁷⁷ ACT Act, s 8.

⁷⁸ ACT Act, Pt 3.1.

⁷⁹ AHRC Act, s 3(1).

⁸⁰ NT Act, s 4(1).

⁸¹ NT Act, s 20. An exemption to the 'irrelevant criminal ground' applies under the NT Act in the area of work if the discrimination involves the care, instruction or supervision of, and is reasonably necessary to protect 'vulnerable persons: s 37.

⁸² NT Act, Div 3.

⁸³ NT Act, s 35(1)(b).

⁸⁴ ACT Act, s 2; Dictionary; NT Act, s 4.

⁸⁵ Concerns are raised about an overly narrow and prescriptive approach to the definition of 'irrelevant criminal record' in Rees, Rice and Allen, above n29, 521, citing *Pereira v Commissioner of Police*, NT Anti-Discrimination Commission, 15 August 2012, [13.1]-[13.2].

complaint is made of discrimination on the grounds of irrelevant criminal record, a criminal record will be deemed to be irrelevant unless it is shown that the criminal record is directly relevant to the circumstances in which the discrimination arises.’

Recommendation:

- **Should the ‘criminal record’ declared attribute be amended to ‘irrelevant criminal record’ in the AHRC Regulations:**
 - **a clarification should also be included requiring that ‘the circumstances relating to the criminal record are not directly relevant to the particular job’; and**
 - **consideration should also be given to a deeming provision stating that a criminal record will be deemed to be irrelevant unless it is shown that the criminal record is directly relevant to the circumstances in which the discrimination arises.**

DD Regulations

Combat duties and combat-related duties

50. As noted in the Consultation Paper, the DD Regulations declare activities which are considered ‘combat duties’ for the purposes of subsection 53(2) of the DDA.

51. Subsection 53(1) of the DDA provides that Part 2 (prohibiting disability discrimination) does not render it unlawful for a person to discriminate against another person on the ground of the other person’s disability in connection with employment, engagement or appointment in the Defence Force:

- in a position involving the performance of combat duties, combat-related duties or peacekeeping service; or
- in prescribed circumstances in relation to combat duties, combat-related duties or peacekeeping service; or
- in a position involving the performance of duties as a chaplain or a medical support person in support of forces engaged or likely to be engaged in combat duties, combat-related duties or peacekeeping service.

52. Subsection 53(2) provides that ‘combat duties’ and ‘combat-related duties’ mean, respectively, such duties as are regulated by the regulations for such purposes.

53. Under the DD Regulations:

- ‘combat duties’ are declared to be ‘duties which require, or which are likely to require, a person to commit, or participate directly in the commission of, an act of violence in the event of armed conflict’;⁸⁶ and
- the following duties are declared as ‘combat-related duties’:

⁸⁶ DD Regulations, reg 3.

- ‘duties which require, or which are likely to require, a person to undertake training or preparation for, or in connection with, combat duties’; and
- duties which require, or which are likely to require, a person to work in support of a person performing combat duties.⁸⁷

54. The Consultation Paper seeks feedback on ‘whether the activities in the DD Regulations that are considered ‘combat duties’ and ‘combat-related duties’ are still appropriate, accurate and in line with community and stakeholder expectations’.⁸⁸ It further recognises that:

*The panel recognises the need to strike an appropriate balance between the nature of the work associated with the employment, engagement or appointment of people where they may be engaged in combat duties or combat-related duties and the rights of all people to be free from discrimination and to be able to participate in society regardless of their personal attributes.*⁸⁹

55. The Law Council agrees that it is important to strike an appropriate balance in this respect. It considers that a review of this legislation would be assisted by a more detailed public understanding of the ADF’s operational requirements, the kinds of positions encompassed and whether and how the ADF currently accommodates its employees with disability.

56. While it is clear that a baseline requirement for ADF jobs involves a reasonable level of fitness,⁹⁰ having regard to the fact that ‘many ADF roles involve outdoor activity’,⁹¹ this kind of information is not readily available to the public. ADF public diversity statements focus on gender, ethnic origin and cultural background, and do not appear to refer to people with disability.⁹² The Department of Defence’s diversity policy, while strongly promoting Defence APS (as distinct from the ADF) as a workplace that is supportive and welcoming of the employment of people with disability,⁹³ notes that:

*Although the ADF is exempt, to a certain extent, from the discrimination provisions in the Disability Discrimination Act 1992 due to the stringent requirements of employment required in the ADF, Defence also recognises their commitment to members of the ADF (and APS) who have developed a temporary or permanent disability whilst employed by Defence and must manage the employment of these personnel accordingly. Of note, the Support for Wounded Injured or Ill Program (SWIIP) provides support to wounded, injured or ill ADF members throughout their Service careers and after transition from the ADF.*⁹⁴

⁸⁷ DD Regulations, reg 4.

⁸⁸ Consultation Paper, 6.

⁸⁹ Ibid.

⁹⁰ ADF, ‘Defence Jobs – Health and Fitness’ (online, undated), <<https://www.defencejobs.gov.au/joining/can-i-join/health-and-fitness>>.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Australian Government Department of Defence, ‘Diversity: Defence Diversity and Inclusion Strategy’ (online, undated), <<http://www.defence.gov.au/Diversity/strategy/priorities.asp>>.

⁹⁴ Ibid.

57. In 2017, it was announced that the ADF had launched a push for more diversity in the Australian military.⁹⁵ While the extent to which this strategy involved people with disability was unclear, the same article noted that the participation of people with disability amongst permanent ADF members was 3.5 per cent.⁹⁶ This compares to around 18 per cent of the Australian population who report having disability.⁹⁷
58. Bearing this context in mind, the Law Council notes that current definition of ‘combat-related duties’ in particular appears to be very broad, including:
- ‘duties which require, or which are likely to require, a person to undertake training or preparation for, or in connection with, combat duties’; [or]
 - duties which require, or which are likely to require, a person to work in support of a person performing combat duties.⁹⁸
59. It may be that that many, if not most, jobs in the ADF which do not themselves involve combat duties, nevertheless ‘require, or is likely to require, a person to work in support of a person performing combat duties’. This may include, for example, a caterer, a psychologist, a dentist, an environmental health manager, and a chaplain. It is not clear that all persons with disability - bearing in mind that a disability may encompass a wide range of conditions, including hearing loss, autism, arthritis and scoliosis - should be automatically precluded from ADF employment in such positions.
60. In this context, the Law Council refers to the full Federal Court decision of *Commonwealth v Williams*.⁹⁹ In this matter, the respondent had enlisted in the RAAF and had later been diagnosed with insulin-dependent diabetes. He was a communications and information systems controller in the RAAF stationed in Darwin. He was found to be medically unfit for further service on the basis that he would not be able to self-manage his condition in a long-term deployment when he would be subjected to irregular working hours and restricted diary intake. He contended that his discharge constituted unlawful discrimination under the DDA.¹⁰⁰
61. The full Federal Court held that section 53 of the DDA, read in conjunction with the DD Regulations, was the logical starting point for analysis.¹⁰¹ It found that:
- section 53 extended to duties which were likely to require (as distinct from actually require) the commission of an act of violence in the event of armed conflict;¹⁰²
 - a person may be employed in the ADF in a position to which paragraph 53(1)(a) applied even though there was no armed conflict at that moment;¹⁰³ and

⁹⁵ Tom McIlroy, ‘Australian Defence Force launches push for more diversity in Australian military,’ *Sydney Morning Herald* (online), 30 July 2017, <<https://www.smh.com.au/national/australian-defence-force-launches-push-for-more-diversity-in-australian-military-20170730-qxlkja.html>>.

⁹⁶ *Ibid.*

⁹⁷ Law Council of Australia, *Justice Project – Final Report* (August 2018), People with Disability Chapter, 8 citing Australian Bureau of Statistics, 4430.0 -Disability, Ageing and Carers, Australia: Summary of Findings, 2015 (18 October 2016).

⁹⁸ DD Regulations, reg 4.

⁹⁹ (2002) 72 ALD 369 (*Williams*).

¹⁰⁰ *Williams*, 369.

¹⁰¹ *Williams*, 376 [29].

¹⁰² *Williams*, 376 [32].

¹⁰³ *Williams*, 376 [32].

- accordingly, the respondent was employed in a position involving combat-related duties because he was likely to be required in support of a person performing combat duties, such as a fighter pilot or other air crew.¹⁰⁴

62. The Full Federal Court further found that section 53 was:

*...not to be read... in a way that would exempt all members of the ADF from the protection of the DD Act. On the contrary, the section provides a criterion for excluding only some members. No doubt since the change instituted by the MRU there will be fewer ADF members outside s 53, since the purpose of that policy is to have civilians carrying out tasks formerly done by ADF members in uniform. But that is not to say that there will not still be ADF members in uniform who nevertheless are not in positions involving the performance of combat duties or combat-related duties... **Although in one sense every member of the ADF works in support of those who are performing combat duties, s 53 and the regulations require an element of directness, so that perhaps some member in a recruiting office or in public relations would not be caught by the section. But the question where the line is to be drawn in a hypothetical case does not affect our conclusion that the respondent was within it.***¹⁰⁵ [emphasis added]

63. The Law Council suggests particular consideration be given to the justification, necessity and proportionality of excluding from the DDA's protections 'duties which require, or which are likely to require, a person to work in support of a person performing combat duties'. As noted above, the DDA's existing provisions require 'reasonable adjustments' to be made by employers to accommodate individual employees, but also provide that there will be no discrimination if a person cannot, nevertheless, carry out a job's 'inherent requirements', or if avoiding the discrimination would impose 'unjustifiable hardship' on an employer.¹⁰⁶ It is possible that these provisions may provide sufficient flexibility to respond appropriately and realistically to ADF operational needs with respect to support workers while progressing and upholding Australia's CRPD obligations.
64. As noted above, these CPRD obligations include ensuring that people with disability can live independently and take part in all aspects of life, and are entitled to the equal protection of the law, including its prohibitions on discrimination. They also require 'reasonable accommodation' to ensure that people with disability can enjoy their rights on an equal basis with others.
65. The Law Council recognises, however, that this may involve a considerable shift in ADF operations, and may require careful consideration as to their likely impact. It suggests that a further, more detailed review addressing these possibilities may be a valuable step forward. A staged approach by the ADF to increasing its diversity in this area could involve progressively listing certain occupations which could be excluded from the 'combat-related duties' definition in the DD Regulations. Alternatively, the DD Regulations may be better directed to balancing the operational needs of the ADF and the DDA's objectives with respect to specific tasks or postings, rather than at the higher level of a person's general duties which may (or may not) involve a posting.

¹⁰⁴ Williams, 376-7, [33].

¹⁰⁵ Williams, 377 [34].

¹⁰⁶ DDA, ss 21B; 11.

Recommendation:

- **Detailed consideration should be given, in consultation with the ADF, to the justification, necessity and proportionality of including ‘duties which require, or which are likely to require, a person to work in support of a person performing combat duties’ in the definition of ‘combat-related duties’ in the DD Regulations.**

Prescribed laws

66. Finally, the Consultation Paper notes that the DD Regulations prescribe a range of Commonwealth and State laws which, when a person acts in direct compliance with the prescribed law, are exempt from the protections against discrimination in Part 2 of the DDA. The prescribed laws relate to a broad range of issues, including laws addressing industrial relations and mental health, which intersect with issues relevant to the scope of the Commission’s equal opportunity in employment functions. It queries whether the prescribed laws are ‘still appropriate, accurate and in line with community and stakeholder expectations.’¹⁰⁷

67. The prescribed laws are:

- **Laws of the Commonwealth**
 - *Broadcasting Services Act 1992*, Part 9D; and
 - *Civil Aviation Order 20.16.3*.
- **Laws of NSW**
 - *Mental Health Act 1990*;
 - *Mental Health Regulations 1995*; and
 - *Motor Traffic Regulations 1935*, clauses 10(1)(c) and 11.
- **Laws of SA**
 - *Firearms Act 1977*, sections 20 and 20A;
 - *Motor Vehicles Act 1959*, sections 88 and 148;
 - *Education Act 1972*, sections 75(3) and 75A;
 - *Industrial and Employee Relations (General) Regulations 1994*, regulation 11; and
 - *Workers Rehabilitation and Compensation Act 1986*, section 30A and Schedule 3.¹⁰⁸

68. The Law Council regrets that it has been unable to review the continued prescription of each of these laws from the DDA’s operation. It recognises that prescribing certain laws may be warranted, such as provisions which govern the variation, cancellation and suspension of firearm licences, and the surrender of firearms.¹⁰⁹ Unfortunately,

¹⁰⁷ Consultation Paper, 6-7.

¹⁰⁸ DD Regulations, Sch 1.

¹⁰⁹ Such as the *Firearms Act 1977* (SA), ss 20 and 20A, which is a prescribed law under the DD Regulations.

however, the Consultation Paper does not outline their content nor provide an explanation for their original inclusion in the list of prescribed laws.

69. With respect to the Commonwealth laws prescribed, it notes first that the *Broadcasting Services Act 1992*, Part 9D, requires broadcasters to comply with certain rules and standards relating to captioning of television programs for people who are deaf and hearing impaired. The Part commenced in 2012.¹¹⁰ An underlying issue relates to the fact that there are two sets of Commonwealth laws regulating similar subject matter and imposing complex obligations – the DDA and Part 9D. The core question is whether the prescription of Part 9D is the most appropriate and effective mechanism of balancing the interaction between these laws. The AGD should seek the views of stakeholders, including people with disability, broadcasters, and the Australian Communications and Media Authority on this question.
70. Secondly, the *Civil Aviation Order 20.16.3 (the Order)* is also a prescribed Commonwealth law under the DD Regulations. This prescribes air service operational standards to all Australian registered aircraft regarding matters including:
- (a) seats, seat belts and safety harnesses;
 - (b) adjustment of seats;
 - (c) cabinet attendants;
 - (d) passenger service;
 - (e) passenger capacity;
 - (f) carriage of infants and children; and
 - (g) persons or passengers who require assistance due to sickness, injury or disability.
71. Again, there are complex interactions between different Commonwealth legislation on these issues, given the obligations imposed by broader civil aviation safety laws as well as under the DDA and the *Disability Standards for Accessible Public Transport 2002* (Cth). Again, the views of stakeholders should be sought as to whether prescription offers the most appropriate and effective mechanism of resolving these complex interactions. In this context, the views of the Aviation Access Forum, which provides advice to the Australian Government on the operational and administrative issues associated with access to air services for people with disability, should be sought, as well of those of the Civil Aviation Authority and aircraft operators.
72. The Law Council further suggests that given that the above Commonwealth laws raise complex questions, there may be a need for explanatory material which ensures that the rights and obligations of people and organisations affected are clearly outlined in an accessible manner.
73. With respect to the NSW legislation listed, the NSW Bar Association advises that the *Mental Health Regulations 1995* (NSW) have been replaced by the *Mental Health Regulation 2013* (NSW). Further, the *Motor Traffic Regulations 1935* (NSW) were repealed on 1 December 1999 by the *Road Transport Legislation Amendment Act 1999* (NSW).

¹¹⁰ Under the *Broadcasting Services Amendment (Improved Access to Television Services) Act 2012* (Cth).

74. While the Law Council has further not reviewed the prescribed NSW and SA laws listed above, it considers that seeking the specific views of informed stakeholders, particularly people with disability with lived experience of these laws and the relevant state and territory governments, will be essential. Further, any AGD decisions regarding the content of the DD Regulations with respect to these laws should be informed by an analysis of their scope, the original rationale for their exclusion from the DDA, and the justification, necessity and proportionality of their future prescription.
75. The importance of conducting such an analysis is reinforced by Australia's key obligations under the CPRD as listed above.

Recommendations:

- **References in the DD Regulations to the Mental Health Regulations 1995 (NSW) should be deleted, and the appropriateness of replacement references to the Mental Health Regulation 2013 (NSW) be considered.**
- **References in the DD Regulations to the Motor Traffic Regulations 1935 (NSW) should be deleted, and the appropriateness of replacement references to the Road Transport Legislation Amendment Act 1999 (NSW) be considered.**
- **More generally, any decisions to continue prescribing certain Commonwealth, NSW and SA laws in the DD Regulations should be informed by:**
 - **an analysis of their scope, the original rationale for their exclusion from the DDA, and the justification, necessity and proportionality of their future prescription;**
 - **the views of stakeholders, particularly people with disability themselves; and**
 - **Australia's obligations to realise the rights of disability contained in the CRPD, particularly those rights concerning non-discrimination and equality.**

Other issues

'Sexual orientation' declared attribute

76. As noted above, regulation 4 of the AHRC Regulations declares other attributes for the purposes of subparagraph 3(1)(b)(ii) of the AHRC Act. These include sexual orientation.
77. While this issue is not addressed in the Consultation Paper, the Law Council queries why this ground has been limited to 'sexual orientation' and does not include other LGBTI+ attributes protected under the *Sex Discrimination Act 1984* (Cth) (**the SDA**), such as gender identity and intersex status.¹¹¹ The rationale for this limitation is unclear.

¹¹¹ SDA, ss 5B and 5C.

Recommendation:

- **Consideration should be given to adding 'gender identity' and 'intersex status' as declared attributes, in addition to the existing sexual orientation attribute, under regulation 4 of the AHRC Regulations.**