



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

**Submission to the Senate Committee on Legal and Constitutional Affairs**

December 2012

## **About the Equal Rights Trust**

The Equal Rights Trust (ERT) is an independent international human rights organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. ERT is the only international human rights organisation which focuses exclusively on the rights to equality and non-discrimination as such. Established as an advocacy organisation, resource centre, and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

## **Equal Rights Trust Submissions**

The Equal Rights Trust regularly makes submissions to ministers, governments, and parliaments on issues relating to the right to equality, its implementation and enforcement.

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## 1. Introduction

The Equal Rights Trust (ERT) is an independent international human rights organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. ERT is the only international human rights organisation which focuses exclusively on the rights to equality and non-discrimination as such. Established as an advocacy organisation, resource centre, and think tank, ERT focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice. In the exercise of this mission, we make submissions to governments and parliaments concerning the implementation and enforcement of these rights.

ERT welcomes the Draft Anti-Discrimination and Human Rights Bill (the Draft Bill) as a strong example of comprehensive anti-discrimination law, the adoption of which is a necessary step for all states in order to comply with their obligations under international human rights law. Subject to the comments and recommendations ERT has set out below, ERT believes that the adoption of this Draft Bill would provide Australia with one of the strongest and most comprehensive anti-discrimination Acts in the world.

Notwithstanding ERT's overall support for the Draft Bill, we nevertheless believe that there remain a number of provisions within the Draft Bill which do not fully comply with international human rights law on the right to equality, and which render the Draft Bill unnecessarily weaker as a result. By adopting the recommendations set out in this submission, the Senate Committee would significantly strengthen the Draft Bill and ensure that it is fully compliant with international human rights law. Furthermore, with Australia's recent election to serve on the United Nations Security Council for the years 2013 to 2014, Australia now has the opportunity to demonstrate to the world its commitment to human rights and provide a model of anti-discrimination legislation for other states to emulate.

Given that ERT is, in general, strongly supportive of the Draft Bill, and is of the opinion that much of it is already fully compliant with international human rights law, in this submission we have only included comments and recommendations on those provisions within the Draft Bill which believe does not fully comply with international human rights law and should be amended.

In analysing the Draft Bill, ERT has applied the standards contained in the Declaration of Principles on Equality.<sup>1</sup> The Declaration of Principles on Equality was drafted and signed by 128 human rights and equality experts from over 40 different nations and reflected a moral and professional consensus on the right to equality. The 27 principles of the Declaration take their starting point from the United Nations Declaration on Human Rights providing that "all human beings are born free and equal in dignity and rights."<sup>2</sup>

The principles are based on concepts and jurisprudence developed in international, regional and national contexts and are intended to assist the efforts of legislators, the judiciary, civil

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<sup>1</sup> *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

<sup>2</sup> Article 1 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

society organisations and anyone else involved in combating discrimination and promoting equality. The Declaration has been described as “the current international understanding of Principles on Equality”<sup>3</sup> and has also been endorsed by the Parliamentary Assembly of the Council of Europe.<sup>4</sup> It has also informed the development of anti-discrimination legislation in countries as diverse as Albania, the Czech Republic and Kenya.

## **2. The Protected Attributes: Clause 17**

### **2.1. The Specific Attributes Protected**

ERT welcomes the extensive list of attributes which are protected by virtue of clauses 17 and 6 of the Draft Bill. However, whilst these clauses provide protection for a significant number of groups of people, ERT is concerned that certain grounds requiring protection under international human rights law either receive only partial protection via similar, but not identical, protected grounds, or are omitted entirely from the Draft Bill.

Principle 5 of the Declaration of Principles on Equality requires that discrimination be prohibited on the following grounds: race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, and genetic or other predisposition toward illness.<sup>5</sup> All of the grounds recognised and protected under Principle 5 are to be found in international human rights law, either through express inclusion in treaties to which Australia is party, or by virtue of authoritative interpretations by the United Nations Treaty Bodies responsible for monitoring the implementation of these instruments.

#### *2.1.1. Attributes Fully Protected under the Draft Bill*

Many of the grounds in Principle 5 are fully protected under the Draft Bill either explicitly in the list of attributes in clause 17, or by virtue of the interpretation provisions in clause 6 of the Draft Bill. Specifically, the grounds so protected are:

- **Race** (explicitly under paragraph 17(1)(n));
- **Colour** (by virtue of the interpretation of race (paragraph 17(1)(n)) as including colour under clause 6);
- **Ethnicity** (by virtue of the interpretation of race (paragraph 17(1)(n)) as including ethnic origin under clause 6);
- **Descent** (by virtue of the interpretation of race (paragraph

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<sup>3</sup> *Naz Foundation v. Government of NCT of Delhi and Others* 160 Delhi Law Times 277 (2009), Para 93.

<sup>4</sup> Parliamentary Assembly of the Council of Europe, Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe, REC 1986 (2011), 25 November 2011.

<sup>5</sup> See above, note 1, Principle 5, p. 6.

- 17(1)(n)) as including descent under clause 6);
- **Sex** (explicitly under paragraph 17(1)(p));
- **Pregnancy** (explicitly under paragraph 17(1)(m));
- **Religion or belief** (explicitly under paragraph 17(1)(o));
- **Political or other opinion** (explicitly under paragraph 17(1)(k));
- **National or social origin** (national origin by virtue of the interpretation of race (paragraph 17(1)(n)) as including national origin under clause 6; social origin explicitly under paragraph 17(1)(r));
- **Nationality** (explicitly under paragraph 17(1)(j));
- **Sexual orientation** (explicitly under paragraph 17(1)(q));
- **Gender identity** (explicitly under paragraph 17(1)(e));
- **Age** (explicitly under paragraph 17(1)(a)); and
- **Disability** (explicitly under paragraph 17(1)(c)).

#### 2.1.2. *Attributes Partially Protected under the Draft Bill*

Other grounds listed in Principle 5 are protected to some extent under the Draft Bill by virtue of similar or overlapping attributes which are explicitly protected under clause 17. ERT nevertheless has concerns that there remains a gap between the grounds which are protected under international human rights law and those which would be protected under the Draft Bill. These are set out below.

##### 2.1.2.1. *Maternity*

Maternity is a protected ground under the Convention on the Elimination of All Forms of Discrimination against Women,<sup>6</sup> which Australia signed on 17 July 1980 and ratified on 28 July 1983. Article 11(2) of the Convention requires States to “prevent discrimination against women on the grounds of ... maternity” including by (a) prohibiting, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; and (b) introducing maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

Although Australia has a reservation from Article 11(2) of the Convention in respect of maternity leave with pay or with comparable social benefits throughout Australia,<sup>7</sup> Australia has no reservation from the general prohibition on discrimination against women on grounds of maternity. Australia is therefore required under the Convention to prohibit such discrimination.

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<sup>6</sup> G.A. Res. 34/180, 1979.

<sup>7</sup> Reservation of Australia to the Convention on the Elimination of All Forms of Discrimination against Women, United Nations Treaty Series, Vol. 1325, p. 378 (1983).

ERT notes that breastfeeding is a protected attribute under paragraph 17(1)(b) of the Draft Bill and that there may be some small overlap between breastfeeding and maternity; however, the definition of maternity is, evidently, much broader than breastfeeding alone. Discrimination on grounds of maternity *per se* should therefore be prohibited under the Draft Bill as a standalone protected attribute in clause 17.

**Recommendation 1:** The Draft Bill should be amended to include maternity as a protected attribute through amending subclause 17(1) to include “maternity” as a listed protected attribute.

#### 2.1.2.2. Civil, Family or Carer Status

Civil, family and carer status are protected characteristics under different provisions of international human rights law.

##### Civil status

ERT notes that marital and relationship status is a protected attribute under paragraph 17(1)(h) of the Draft Bill. “Marital or relationship status” is defined in clause 6 of the Draft Bill as including the following statuses: single; married or a de facto partner; married or a de facto partner but separated; divorced or a former de facto partner; and a surviving spouse or de facto partner of a person who has died. The definition therefore includes both legally recognised opposite-sex and same-sex couples by virtue of the definition of “de facto partner” in sections 2D and 2F of the Acts Interpretation Act 1901 and is therefore synonymous with the term “civil status” in Principle 5 of the Declaration of Principles on Equality.

##### Family Status

Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, which Australia signed on 18 December 1972 and ratified on 10 December 1975, prohibits discrimination “of any kind” in the enjoyment of the rights contained within the Covenant and includes a list of specifically prohibited grounds of discrimination as well as discrimination on “other status”. In its General Comment No. 20, the Committee on Economic, Social and Cultural Rights stated that “family status” is a prohibited ground falling within “other status” in Article 2(2) of the Covenant.<sup>8</sup> States are therefore required to prohibit discrimination on grounds of family status.

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<sup>8</sup> Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 31.

## Carer Status

ERT notes that family responsibilities is a protected attribute under paragraph 17(1)(d) of the Draft Bill. “Family responsibilities” is defined in clause 6 of the Draft Bill as “responsibilities of the person to care for or support: (a) a child of the person who is wholly or substantially dependent on the person; or (b) any other member of the person’s immediate family who is in need of care and support.” The definition is largely synonymous with that of carer status although it does exclude carers who care for persons who are neither their children or immediate family such as friends or more distant relatives.

While the protected grounds of “marital or relationship status” and “family responsibilities” overlap with the protected grounds of “civil, family or carer status”, ERT believes that there remain gaps in the level of protection offered to persons in these groups as against the protection provided by international human rights law. Specifically, we are concerned by the lack of protection on grounds of “family status”, and a restrictive definition of “family responsibilities”. ERT therefore believes that the Draft Bill should be amended so as to ensure that these groups are fully protected, including through the replacement of the term “family responsibilities” in paragraph 17(1)(d) with “carer responsibilities”, and the amendment of the corresponding definition in clause 6 so as to include carers who care for persons who are not their children or immediate family members.

**Recommendation 2:** The Draft Bill should be amended to include family status as a protected attribute through amending subclause 17(1) to include “family status” as a listed protected attribute.

**Recommendation 3:** The Draft Bill should be amended as follows:

In paragraph 17(1)(d), and wherever else it appears in the Draft Bill, replace the word “family” with “carer”.

In clause 6, *family responsibilities*, replace the word “family” with “carer”.

In clause 6, *family responsibilities*, delete from “care for or support” to the end of sentence and replace with “care for or support another person who is wholly or substantially dependent on the person or who is in need of care and support.”

### 2.1.2.3. Health Status and Genetic or Other Predisposition Towards Illness

In its General Comment No. 20, the Committee on Economic, Social and Cultural Rights has stated that health status is a prohibited ground falling within “other status” in Article 2(2) of the Covenant.<sup>9</sup> States are therefore required to prohibit discrimination on grounds of health status.

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<sup>9</sup> Ibid., Para 33.



ERT notes that two of the protected attributes under subclause 17(1) of the Draft Bill are disability and medical history. “Disability” is given a broad definition in clause 6 of the Draft Bill to include impairments to both physical and mental health as well as the presence in the body of organisms capable of causing disease, thereby including HIV status and other conditions. Although medical history is a protected attribute under subclause 17(1) of the Draft Bill, there is no definition of “medical history” in clause 6 of the Draft Bill. ERT understands that the term “medical history” replaces the previous term “medical record” used in legislation and, as such, is a new protected attribute.<sup>10</sup> The Explanatory Notes to the Draft Bill suggest that, whilst medical history and disability overlap significantly, the inclusion of the term “medical history” is intended to cover discrimination based on “highly sensitive medical information that does not constitute a disability (eg relationship counselling)”.<sup>11</sup>

ERT accepts that, as defined in the Bill, the inclusion of these two grounds is likely to afford protection comparable to the inclusion of a specific ground of “health status”, but nevertheless has concerns that although the terms overlap, they are not identical, and that there may therefore be gaps in the protection offered which could be safely mitigated by slight amendments to the Draft Bill. In addition, we believe that inclusion of characteristics similar in nature to “health status” within the definition of “disability” may be misleading, giving rise to unnecessary confusion. ERT can conceive of a situation whereby a person is subject to discrimination on the basis of their health status but where the basis cannot be described as forming part of the person’s medical history, for example, where the person has never informed a medical professional of a condition and, as such, there is arguably no medical history e.g. at the onset of alcoholism or some other dependency, or a perceived mental illness which either does not exist or has never been diagnosed by a medical professional.

In order to ensure that the level of protection offered is that required by international human rights law, discrimination on grounds of health status *per se* should therefore be prohibited under the Draft Bill as a standalone protected attribute in clause 17.

**Recommendation 4:** The Draft Bill should be amended to include health status as a protected attribute through amending subclause 17(1) to include “health status” as a listed protected attribute.

### 2.1.3. Attributes Not Protected under the Draft Bill

Four attributes recognised under the Declaration of Principles on Equality and international human rights law instruments are not protected under the Draft Bill at all. Although there may be some overlap between these attributes and others which are protected under the Draft Bill, in each case there remains a significant gap which necessitates explicit protection for these

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<sup>10</sup> Attorney General’s Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes*, p. 24.

<sup>11</sup> *Ibid.*

grounds under the Draft Bill in order for Australia to meet its obligations under international human rights law.

#### 2.1.3.1. Language

Language is a prohibited ground explicitly protected under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights<sup>12</sup> and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.<sup>13</sup> Whilst ERT recognises that discrimination on grounds of language is often connected or related to discrimination on the basis of nationality, national origin or ethnic origin – grounds which are protected under the Draft Bill – the terms are not synonymous. States are under a legal duty to specifically and explicitly prohibit discrimination based on language.

**Recommendation 5:** The Draft Bill should be amended to include language as a protected attribute through amending subclause 17(1) to include “language” as a listed protected attribute.

#### 2.1.3.2. Birth

Birth is a prohibited ground explicitly protected under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights<sup>14</sup> and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.<sup>15</sup> As with language, states are therefore under a legal duty to prohibit discrimination based on birth.

**Recommendation 6:** The Draft Bill should be amended to include birth as a protected attribute through amending subclause 17(1) to include “birth” as a listed protected attribute.

#### 2.1.3.3. Economic Status

The Committee on Economic, Social and Cultural Rights has stated that the ground of economic situation falls under “other status” in Article 2(2) in the International Covenant on Economic, Social and Cultural Rights.<sup>16</sup> This ground, as with the others noted in section 2.1.3 of this submission, is also listed in the Declaration of Principles on Equality, which also recognises that

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<sup>12</sup> G.A. Res. 2200A (XXI), 1966.

<sup>13</sup> G.A. Res. 2200A (XXI), 1966.

<sup>14</sup> See above, note 12.

<sup>15</sup> See above, note 13.

<sup>16</sup> See above, note 8, Para 35.

poverty “may be both a cause and a consequence of discrimination” and calls on states to ensure that “measures to alleviate poverty [are] coordinated with measures to combat discrimination”.

In its General Comment No. 20, the Committee on Economic, Social and Cultural Rights recognised the link between poverty and discrimination:

A person’s social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.<sup>17</sup>

Recognition of economic status as an explicitly protected ground of discrimination is therefore a necessary component of ensuring that such poverty-alleviation efforts are coordinated with efforts to combat discrimination; and, indeed, as with other grounds discussed here, states are under a legal duty to prohibit discrimination based on economic situation or status.

Secondly, there are numerous situations where economic status is an irrelevant attribute in the context of certain offensive treatment, such as a teacher discussing the personal hygiene, clothes, or poor performance of a student in class makes derogatory remarks about the poverty or lower class of their families. In this case, the less favourable treatment is based on the irrelevant attribute of economic status.

**Recommendation 7:** The Draft Bill should be amended to include economic status as a protected attribute through amending subclause 17(1) to include “economic status” as a listed protected attribute.

#### 2.1.3.4. Association with a National Minority

The protected characteristic of “association with a national minority” derives from the European Convention of Human Rights and reflects the need to protect members of national minorities in Europe in situations where the related grounds of race, religion or language would not be a better description for various reasons. Whilst Australia is diverse in terms of ethnicity, race, national origin, and nationality, ERT is satisfied that the protection of all of these characteristics through clauses 17 and 6 is sufficient to ensure adequate protection equivalent to that on grounds of “association with a national minority” in the particular context of Australia.

## 2.2. *The Closed List of Protected Attributes*

National law or provisions prohibiting discrimination invariably sets out the grounds protected from discrimination in one of three ways:

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<sup>17</sup> Ibid.

- **A closed list:** a closed list sets out a finite and specific set of grounds which are protected and restricts protection to those grounds only. A closed list provides the advantage of certainty of which grounds are protected, but is inflexible and risks leaving further groups of persons vulnerable to discrimination in the future.
- **An open list:** an open list contains a set of grounds which are explicitly protected but will also allow for protection on additional grounds through the inclusion of a term such as “other status” or by providing that the grounds protected are only indicative examples of grounds protected under a general prohibition on discrimination. A completely open list will not set down criteria by which further grounds are to be recognised as protected from discrimination and will leave this to judicial interpretation. An open list has the advantage that further groups of vulnerable people may be protected from discrimination in the future, but is weakened by the lack of certainty as to which further groups are likely to be recognised and protected by the courts. This runs the risk of litigation being brought seeking protection on grounds not needing or deserving protection and, conversely, of groups or individuals being unclear of the scope and whether they will enjoy protection.
- **A conditionally open list:** A conditionally open list is similar to an open list save that it includes specific criteria upon which further grounds are to be recognised by the courts. This has the advantage of flexibility for further groups to be recognised and protected in the future and minimises the risk of unnecessary litigation or unfettered judicial discretion. Where properly constructed, a conditionally open list can be considered the best practice approach, providing the greatest likelihood of future compliance with international law.

Having examined and analysed legislation prohibiting discrimination in a significant number of states, the drafters of the Declaration of Principles on Equality were of the view that the conditionally open list provides the best model for establishing the grounds to be protected. The criteria which the Declaration states should be used in legislation for establishing which further grounds should receive recognition and protection are:

- (i) where discrimination on those grounds causes or perpetuates systemic disadvantage;
- (ii) where discrimination on those grounds undermines human dignity; or
- (iii) where discrimination on those grounds adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the explicitly protected grounds.<sup>18</sup>

These criteria were first established by the Constitutional Court of South Africa in *Hoffman v. South African Airways* (2000)<sup>19</sup> in its interpretation of the constitutional prohibition on discrimination. The criteria were later given statutory footing via the Promotion of Equality and

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<sup>18</sup> See above, note 1, Principle 5, p. 6.

<sup>19</sup> (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000). See, in particular, paras 28 and 29.

Prevention of Unfair Discrimination Act,<sup>20</sup> which provides both a list of explicitly prohibited grounds and a condition that further grounds are to be prohibited if one of the three criteria listed above is met. ERT believes that the South African legislation represents the best example of a conditionally open list of grounds and should be a model to other states, including Australia, which are seeking to provide the highest standard of protection in line with international human rights law.

**Recommendation 8:** The Draft Bill should be amended as follows:

In subclause 17(1), after “(r) social origin”, insert “(s) other attribute”.

Insert a new interpretation in clause 6, *or*, after subclause 17(1), insert new subclause “‘Other attribute’ means any attribute whereby

- (i) discrimination on the attribute causes or perpetuates systemic disadvantage;
- (ii) discrimination on the attribute undermines human dignity; or
- (iii) discrimination on the attribute adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the explicitly protected attributes in section 17(1)(a) to (r).”

### 3. Prohibited Conduct: Clause 19

ERT welcomes the distinction made in clause 19 between discrimination by unfavourable treatment and discrimination by the imposition of policies, but regrets the terminology used to describe these two forms of discrimination and, instead, strongly recommends the terms “direct discrimination” and “indirect discrimination”. These two terms have been recognised and used by UN Treaty Bodies and are the terms used in the European Union Equality Directives, the Declaration of Principles on Equality<sup>21</sup> and national anti-discrimination legislation, such as the United Kingdom’s Equality Act 2010.<sup>22</sup>

The distinction between direct and indirect discrimination is particularly important when analysing exceptions. The Declaration of Principles on Equality provides for two distinct approaches to apply when determining whether an exception is justified or not, depending on whether the discrimination is direct or indirect. Direct discrimination will be permitted “only very exceptionally, when it can be justified against strictly defined criteria”.<sup>23</sup> Any exceptions must be explicit in the legislation. The reasoning behind this is that direct discrimination on grounds such as race or sex is inherently suspect and, as such, exceptions must be examined with the utmost scrutiny.

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<sup>20</sup> Act 4 of 2000.

<sup>21</sup> See above, note 2, Principle 5, p. 6. See also above, note 8, Para 10.

<sup>22</sup> See sections 13 and 19 of the Equality Act 2010 (c. 15).

<sup>23</sup> *Ibid.*

Exceptions to indirect discrimination must be “objectively justified by a legitimate aim, and the means of that aim [must be] appropriate and necessary”.<sup>24</sup> This general justification test reflects the recognition that indirect discrimination may stem from otherwise neutral provisions, criteria or practices which are difficult to assess for their impact outside the context of each particular case.

The separate concept of “indirect discrimination” further reflects the need to shed light on forms of conduct that perpetuate systemic disadvantage, while being less visible than direct discrimination, and therefore a more challenging obstacle to substantive equality. The use of the term “indirect” acknowledges the less obvious nature of the disadvantaging conduct and plays a public education role, encouraging state and non-state actors, including victims of discrimination, to be aware of, and better understand and identify such conduct.

Finally, the terms “discrimination by unfavourable treatment” and “discrimination by the imposition of policies” are unnecessarily verbose and clumsy to refer to.

So as for the Draft Bill to be better aligned with well-established concepts and terminology in international human rights and equality law, and better reflect the particular form and nature of the two forms of discrimination, ERT believes the terms should be amended accordingly.

**Recommendation 9:** The Draft Bill should be amended as follows:

In subclause 19(1), replace “*Discrimination by unfavourable treatment*” with “*Direct discrimination*”.

In subclause 19(3), replace “*Discrimination by imposition of policies*” with “*Indirect discrimination*”.

#### **4. Positive Action and Special Measures: Clause 21**

Principle 3 of the Declaration of Principles on Equality provides that:

To be effective, the right to equality requires positive action.

Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.<sup>25</sup>

International human rights law recognises that in order to be effective, the right to equality requires States not only to prohibit certain forms of conduct that amount to discrimination, but

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<sup>24</sup> Ibid.

<sup>25</sup> See above, note 1, Principle 3, p. 5.

also to take positive action (referred to in Australia as special measures) in order to achieve full and effective equality. As has been noted by Dimitrina Petrova in her legal commentary on the Declaration of Principles on Equality:

The concept of positive action in Principle 3 goes further towards substantive equality than the concepts of special measures related to specific categories of persons found in international and regional human rights instruments, but it should be noted that the Declaration captures the growing tendency of interpreting “special measures” as part of, rather than an exception to equal treatment.<sup>26</sup>

In respect of racial equality, the International Convention on the Elimination of All Forms of Racial Discrimination in Article 4 requires states to:

... adopt immediate and positive measures designed to eradicate all incitement to, or acts of, [racial] discrimination...<sup>27</sup>

The Human Rights Committee has stated that positive action is a necessary element of the right to equality in its General Comments:

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the [International Covenant on Civil and Political Rights]...<sup>28</sup>

Similarly, the Committee on Economic, Social and Cultural Rights has stated:

In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination.<sup>29</sup>

In respect of equality between men and women, the Convention on the Elimination of All Forms of Discrimination Against Women provides at Article 4 that:

(1) Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be

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<sup>26</sup> Petrova, D., “The Declaration of Principles on Equality: A Contribution to International Human Rights”, in *Declaration of Principles on Equality*, above note 1, pp. 30-31

<sup>27</sup> G.A. Res. 2106 (XX), 1965.

<sup>28</sup> Human Rights Committee, *General Comment No. 18: Non-discrimination*, U.N. Doc. HRI/GEN/1/Rev.1 at 26, 1994, Para 10.

<sup>29</sup> See above, note 8, Para 9.

discontinued when the objectives of equality of opportunity and treatment have been achieved.

- (2) Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.<sup>30</sup>

The Convention was adopted in 1979 and reflected an earlier understanding of the nature of special measures whereby they were considered an exception to the prohibition against discrimination. Today, the Committee on the Elimination of Discrimination against Women is clear that special measures are to be considered not as an exception to the prohibition against discrimination, but an integral element of the right to equality and non-discrimination. In its General Comment No. 17 in 2004, the Committee stated that:

...[T]he application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.<sup>31</sup>

Similarly, the Human Rights Committee has stated in its General Comment No. 28 that:

The obligation to ensure to all individuals the rights recognized in the Covenant, established in articles 2 and 3 of the Covenant, requires that States parties take all necessary steps to enable every person to enjoy those rights... The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.<sup>32</sup>

ERT is therefore disappointed that the approach taken in the Draft Bill reflects a dated and anachronistic approach towards special measures, out of step with current understanding of the right to equality. Although paragraph 3(1)(e) of the Draft Bill provides that one of the objects of the Act is “to recognise that achieving substantive equality may require the taking of special measures...”, clause 21 of the Draft Bill, which provides for special measures, treats such measures as an exception to the right to non-discrimination and not an integral element of the right to equality. Thus, the Draft Bill remains largely committed to formal equality and the stated objective of achieving substantive equality is not supported by adequate normative conceptualisation.

Subclause 21(1) provides that special measures and conduct engaged in accordance with special measures are not discrimination. Under subclause 21(2), special measures are laws, policies and programmes made, developed or adapted (a) in good faith for the sole or dominant

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<sup>30</sup> See above, note 6.

<sup>31</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25: On article 4, paragraph 1, on temporary special measures*, U.N. Doc. HRI/GEN/1/Rev.7 at 282, 2004, Para 14.

<sup>32</sup> Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (article 3)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10, 2000, Para 3.



purpose of advancing or achieving substantive equality for people with one or more protected attributes and (b) which a reasonable person in the circumstances of the maker of the special measures would have considered that making, developing or adopting the law, policy or program was necessary in order to advance or achieve substantive equality.

ERT has two significant concerns about clause 21: the treatment of special measures as exceptions to the right to non-discrimination as opposed to positive obligations to advance and achieve full equality through positive action; and the test of objective necessity.

#### **4.1. *The Treatment of Special Measures as Exceptions***

International human rights law is clear that special measures are mandatory and not optional if without them there would not be substantive equality. As can be seen above, there has been an evolution in the understanding of the nature of special measures in international human rights law as they relate to the rights to equality and non-discrimination. ERT believes that the current legal position, under international human rights law, can be stated as follows:

- (i) States are under an obligation to introduce temporary special measures (also known as positive action etc) in relation to any prohibited ground or characteristic where statistically significant inequality exists between those who share that characteristic and those who do not, unless no such measures as meet the criteria in (ii) are possible.
- (ii) States are free to decide which special measures should be introduced provided that they are (a) reasonable, (b) proportionate to the aim of reducing or eliminating the inequality, and (c) do not create further inequalities between different groups. Special measures should be real and effective and not illusory.
- (iii) Taking no special measures where the criterion in (i) is satisfied, and where taking potential measures satisfying the criteria in (ii) are possible, constitutes a violation of the right to equality.
- (iv) Certain special measures are not time-bound but will need to be in place indefinitely, so as to reflect the fact that the disadvantage suffered by particular groups is permanent, as is the case with discrimination on grounds of age or disability.
- (v) All other special measures should be terminated once substantive equality is achieved between those who share the characteristic and those who do not.

The treatment of special measures in clause 21 as exceptions to the right to equality, rather than as integral element to the right to equality does not represent this current understanding. A failure to take special measures where there is statistically significant inequality between different groups is increasingly seen as a violation of the right to equality. It is, of course, up to individual states as to which special measures are taken and, as such, ERT does not seek to prescribe the precise form of words used in clause 21; however, ERT believes that, as currently worded, clause 21 does not meet the modern understanding of special measures under

international human rights law. We believe clause 21 should be amended so as to fully comply with that understanding.

**Recommendation 10:** Clause 21 of the Draft Bill should be amended so as to ensure that – in principle and in practice – special measures are understood as an integral element to the right to equality under the Draft Bill, and not an exception to it. ERT makes no recommendation as to the precise form of words used in the Draft Bill but insists that the formulation of this clause should reflect the current concept of positive action as an essential and therefore obligatory element of realising the right to equality.

#### **4.2. *The Test of Objective Necessity***

Subclause 21(2) provides that in order for a law, policy, program, or conduct to be considered a special measure, one of the criteria is that a reasonable person in the circumstances of the person or body would have considered the law, policy, program or conduct to be “necessary in order to advance or achieve substantive equality”. ERT has strong concerns that this requirement of objective necessity places too high a threshold on those persons and bodies seeking to advance equality.

A test of the law, policy, program or conduct being “necessary” implies that no greater action could have been taken. This places too great a burden on persons and bodies when developing special measures to decide what is the least favouring action that can be taken in order to achieve equality. Our concern is that this would encourage a ‘race to the bottom’ whereby persons and bodies will only introduce special measures which are the bare minimum to advance equality for fear that anything greater would be considered ‘more than necessary’. For example, an organisation which wishes to introduce a quota to ensure equal representation of men and women on its executive board may be put off from doing so by the test of “necessity”. Would a quota of 50% representation of women be ‘necessary’, or would 40% representation of women be sufficient to establish “substantive equality”, in which case a requirement of 50% would not be necessary? Or would 35% representation of women be sufficient? In which case a requirement of 40% would not be necessary.

The test of the law, policy, program or conduct being “necessary” is also problematic in terms of modality as well as degree. There will usually be a range of alternative options in front of a person or body when they seek to advance equality, none of which alone may be considered “necessary” but any of which would be proportionate and reasonable. If there are two alternatives, one of which would establish substantive equality in five years, and another, less intrusive option, within ten years, they cannot both be considered necessary and so the question is raised as to which is the “necessary” one available to the person or body. It is plain that the concept of necessity, in its strict meaning of inevitability, is not applicable to achieving substantive equality in a way it is applicable to substantiate exceptions to equal treatment.

Persons and bodies with appropriate authority should be given greater discretion in deciding what special measures to take, based on their knowledge of the specific inequality to be addressed and the means available to address it, provided that such measures are a reasonable

and proportionate method of advancing or achieving substantive equality. They should not be forced to decide between competing alternatives to determine which one – and one alone – is the “necessary” one, nor should they be forced to do the bare minimum required for fear that anything greater would be considered more than necessary.

ERT understands that the existing provisions for positive discrimination, special measures and other exceptions in existing legislation differ widely and supports the intention behind the Draft Bill to harmonise the provisions on special measures such that there is a single test. Nevertheless, ERT believes that the test of objective necessity is not adequate and risks denying efforts made to advance and achieve substantive equality. ERT believes that a requirement that the measures be reasonable and proportionate to the aim of advancing or achieving substantive equality would ensure that persons and bodies would more readily take advantage of special measures – thereby accelerating progress towards substantive equality – whilst also ensuring that the provision is “not abused to justify discrimination or measures that are intended to disadvantage particular groups”.<sup>33</sup>

A similar test to that proposed is currently applied in the United Kingdom through section 158 of the Equality Act 2010 which provides:

**158 Positive action: general**

- (1) This section applies if a person (P) reasonably thinks that—
  - (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic,
  - (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or
  - (c) participation in an activity by persons who share a protected characteristic is disproportionately low.
  
- (2) This Act does not prohibit P from taking any action which is a proportionate means of achieving the aim of—
  - (a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage,
  - (b) meeting those needs, or
  - (c) enabling or encouraging persons who share the protected characteristic to participate in that activity.<sup>34</sup>

ERT recommends that the Draft Bill be amended so as to replace the test of “necessity” in subclause 21(2) with one of “reasonableness and proportionality”.

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<sup>33</sup> See above, note 10, p. 30.

<sup>34</sup> Section 158 of the Equality Act 2010 (c. 15).

**Recommendation 11:** The Draft Bill should be amended as follows:

In subclause 21(2), replace “necessary in order to advance or achieve” with “reasonable and proportionate to the aim of advancing or achieving”.

## 5. Scope: Clause 22

International law requires anti-discrimination legislation to be broad in its scope although different instruments differ in their precise delineation of the scope.

The two anti-discrimination Articles in the International Covenant on Civil and Political Rights differ in their scope. Article 2(1) prohibits discrimination in the enjoyment of the rights contained within the Covenant, whereas Article 26 states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination...

The Human Rights Committee has interpreted Article 26 as “prohibit[ing] discrimination in law or in fact in any field regulated and protected by public authorities”.<sup>35</sup> Unlike Article 2(1), which applies only to discrimination in the enjoyment of Covenant rights, Article 26 enshrines a freestanding right with a much broader scope.

The Committee on the Elimination of Discrimination against Women has taken an even broader approach in regards to the interpretation of the Convention on the Elimination of All Forms of Discrimination against Women. In its General Recommendation No. 28 it has stated that:

[States] must also enact legislation that prohibits discrimination in all fields of women’s lives under the Convention and throughout their lifespan.<sup>36</sup>

Reflecting the increasingly broad scope of the right to equality as recognised under international human rights law, Principle 8 of the Declaration of Principles on Equality provides that:

The right to equality applies in all areas of activity regulated by law.<sup>37</sup>

ERT therefore strongly believes that the scope of the right to equality in subclause 22(1) of the Draft Bill as “any area of public life” insufficiently reflects the obligations of Australia under

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<sup>35</sup> See above, note 22, Para 12.

<sup>36</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28: On the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/2010/47/GC.2 (2010), Para 31.

<sup>37</sup> See above, note 1, Principle 8, p. 8.

international human rights law. The crude and somewhat arbitrary distinction between “public life” and “private life” fails to reflect the nature of discrimination as an occurrence in all areas of life, as has been noted by the Human Rights Committee which has stated that:

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.<sup>38</sup>

The more limited scope of “public life” as used in the Draft Bill would exclude protection, for example, from those who suffer gender- or racially-based violence, and should be replaced with the broader term “areas regulated by law” so as to fully comply with the state’s international human rights law obligations.

**Recommendation 12:** The Draft Bill should be amended as follows:

In subclauses 22(1), 22(2), and wherever else it appears in the Draft Bill, replace “public life” with “activity regulated by law”.

ERT is particularly disappointed and concerned by the limitation in subclause 22(3) of protection of a number of attributes to work and work-related areas. By virtue of subclause 22(3), discrimination which is based – whether solely or partly – on the family responsibilities; industrial history; medical history; nationality or citizenship; political opinion; religion; or social origin of a person will only be prohibited in work and work-related areas, defined in clause 6 as (a) employment, (b) membership of partnerships, (c) membership of industrial relations, (d) the provision of services by employment agencies, and (e) the conferral, renewal, extension, revocation or withdrawal of qualifications by occupational authorities.

ERT takes a holistic approach to the right to equality in which all grounds of discrimination are treated equally with no hierarchy of protection Principle 6 of the Declaration of Principles on Equality provides that:

Legislation must provide for equal protection from discrimination regardless of the ground or combination of grounds concerned.<sup>39</sup>

This approach is itself consistent with the well-established principles of universality and indivisibility of human rights in general and with the – implicit – equal level of protection discrimination regardless of the grounds on which the discrimination occurred. This approach is conferred by both the International Covenant on Civil and Political Rights and the

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<sup>38</sup> Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Para 8.

<sup>39</sup> See above, note 1, Principle 6, p. 8.

International Covenant on Economic and Social Rights and is reasserted powerfully in the 1993 Vienna Declaration and Programme of Action. While both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, in their General Comments and Concluding Observations, have provided extensive and detailed interpretations of the right to non-discrimination, neither has indicated the existence of a hierarchy of grounds in respect of the level of protection.

The Explanatory Notes for the Draft Bill provide no indication of the reasoning behind the decision to distinguish between attributes in this way save that the Notes explain that the attributes receiving lesser protection are “primarily the attributes that were previously only protected by the AHRC Act equal employment opportunity grounds.”<sup>40</sup> ERT is entirely unconvinced that solely because the attributes have received lesser protection in the past justifies their continuing to receive lesser protection in the future. ERT believes that this approach runs directly counter to the Draft Bill’s purported aim of “[lifting] differing levels of protections to the highest current standard, to resolve gaps and inconsistencies without diminishing protections”.<sup>41</sup> The two tier level of protection created by subclause 22(3) will establish a hierarchy of rights suggesting some groups of people are more worthy of protection than others. Furthermore, it will force those who experience discrimination based on the lesser protected attributes to attempt to bring claims under one of the attributes receiving greater protection instead (such as race instead of religion, or disability instead of medical history) which is wholly unsatisfactory.

ERT can conceive of a number of very real situations in which a victim will be entirely unprotected if the current tiered protection in the Draft Bill is adopted:

- A woman who is refused entry into a shop because she is a Muslim will not be protected as the discrimination is on grounds of religion, in the area of access to goods and services;
- A man who is not allowed to join a cricket club because he is a New Zealander will not be protected as the discrimination is on grounds of nationality or citizenship, in the area of membership of clubs ;
- A young woman who cares for a relative who is indirectly discriminated by her school or university by their setting timetables which prevent her from attending due to her need to care for her relative will not be protected as the discrimination is on grounds of family responsibilities, in the area of education.

ERT strongly urges amendment of clause 22 of the Draft Bill to ensure that persons with all protected attributes receive equal protection from discrimination and to avoid the creation of a two-tier system of anti-discrimination protections in which some attributes receive greater protection than others, and in which many victims of discrimination will be left without redress. It is our view that without such an amendment, the Draft Bill will be both contrary to international law and inconsistent with its own stated aims and objectives.

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<sup>40</sup> See above, note 10 Para 135.

<sup>41</sup> Ibid., p. 1.

**Recommendation 13:** The Draft Bill should be amended as follows:

In clause 22, delete subclause (3).

## 6. Exceptions: Clauses 23 to 44

It is a well-established principle that not every act of less favourable treatment constitutes discrimination. There are occasions when what would otherwise be unlawful discrimination can be justified. This is recognised by international human rights law and by Principle 5 of the Declaration of Principles on Equality which provides that “direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria”.<sup>42</sup> For indirect discrimination, a general justification is applied: it will be justified where it is “objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”<sup>43</sup>

In relation to the right to equality under the International Covenant on Civil and Political Rights, the Human Rights Committee has stated in its General Comment No. 18 that:

...[N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are **reasonable and objective** and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>44</sup>

The Committee on Economic, Social and Cultural Rights has also adopted this “reasonable and objective test”, and elaborated on its practical meaning in its General Comment No. 20:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is **reasonable and objective**. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority.<sup>45</sup>

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<sup>42</sup> See above, note 1, Principle 5, p. 6.

<sup>43</sup> *Ibid.*

<sup>44</sup> See above, note 28, Para 13.

<sup>45</sup> See above, note 8, Para. 13.

The Committee on the Elimination of Racial Discrimination uses a slightly different test, as set out in its General Recommendation No. 14:

...[A] differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are **legitimate** or fall within the scope of article 1, paragraph 4, of the Convention.<sup>46</sup>

In view of the foregoing, ERT has concerns that some of the exceptions provided for in clauses 23 to 44 of the Draft Bill would not be justified under the criteria developed in international human rights and equality law, and would therefore permit discrimination which should in fact be prohibited. As is stated in the introduction, we have only included comments and recommendations in this submission on those provisions within the Draft Bill which we believe do not fully comply with international human rights and equality law standards and should be amended. Where, therefore, an exception contained within clauses 23 to 41 is arguably compliant with these standards, we have made no comment.<sup>47</sup>

### **6.1. Justifiable Conduct: Clause 23**

Clause 23 would permit discrimination where this is (a) made in good faith for the purpose of achieving a particular aim; (b) that aim is a legitimate aim; (c) the justification is objective; and (d) the differential treatment is a proportionate means of achieving that aim. Where the relevant attribute is disability, clause 23 will not permit discrimination under the clause if reasonable adjustments could have been made.

According to the Explanatory Notes, the language of clause 23 “aligns it with the international human rights law concept of ‘legitimate differential treatment’”. However, ERT is concerned that this introduction of a general rule on exceptions is too broad. While it is appropriate in respect to indirect discrimination (termed “discrimination by imposition of policies” in the Draft Bill), it allows too much scope for exceptions in respect to direct discrimination for the reasons set out at section 3 of this submission. In respect of direct discrimination, exceptions should therefore be permitted not as part of a general justification test but should be explicitly listed in the legislation itself.

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<sup>46</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 14: Definition of Racial Discrimination*, U.N. Doc. A/48/18 at 114 (1994), Para 2.

<sup>47</sup> Specifically, ERT has no objection to the exceptions within clause 24 (inherent requirements of work); clause 29 (young people); clause 31 (court orders, determinations and industrial instruments); clause 35 (clubs and member-based associations); clause 36 (competitive sporting activities); clause 38 (single sex accommodation for students); clause 39 (insurance, superannuation and credit); subclause 40(4) (defence combat duties and combat-related duties: women); and clause 44 (shared accommodation).



**Recommendation 14:** The Draft Bill should be amended as follows:

After subclause 23(1), insert new subclause,

*“Prohibited conduct to which this exception applies*

*The exception in this section applies in relation to discrimination under section 19(3) only.”*

## **6.2. Commonwealth Acts and Instruments Subject to Disallowance: Clause 26**

Clause 25 would permit discrimination if the conduct constituting discrimination is necessary to comply with a Commonwealth Act, or an instrument made under a Commonwealth Act subject to disallowance, for all protected attributes except race. Clause 25 would therefore exclude huge swathes of legislation from its scope. The justification for this clause, according to the Explanatory Notes, is “to make it clear that some public policy issues are for Parliaments, not courts, to determine”.<sup>48</sup>

ERT is unconvinced by this justification. Section 51 of the Constitution of Australia sets out the competences of the Federal Parliament of Australia and includes a vast and diverse range of fields. Thus, without further clarification or qualification, exclusion of Commonwealth Acts from the provisions on anti-discrimination is tantamount to excluding all of these fields from the protection of the Draft Bill. International human rights law is clear that discriminatory treatment cannot be justified merely by the sole fact that the discrimination stems from legislation.

ERT believes that clause 26 gives too much power to the Federal Parliament knowingly to pass discriminatory legislation and leaves no recourse for victims of that discrimination. This exception falls far outside that which is acceptable under international human rights law: there is not even a requirement that the discrimination necessary to comply with the Commonwealth Act or instrument be reasonable and objective, let alone that the discriminatory nature of the Act itself be so. As such, ERT recommends that this exception be removed from the Draft Bill.

**Recommendation 15:** The Draft Bill should be amended as follows:

Delete clause 26.

## **6.3. Migration Act 1958: Subclause 27(2)**

Subclause 27(2) would permit discrimination if the relevant conduct is in accordance with the Migration Act 1958 (or secondary legislation made under that Act) and on grounds of age, disability, or marital or relationship status. The Migration Act 1958 regulates the coming into,

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<sup>48</sup> See above, note 10, Para 170.

and presence in, Australia of non-citizens.<sup>49</sup> The Explanatory Notes seek to justify the clause by stating that the exceptions in subclause 27(2) “recognise that a person’s age, disability or marital or relationship status can be inherently relevant to a migration decision, such as whether the person is eligible for a particular visa (for example, Aged Parent or Spouse visas).”<sup>50</sup>

ERT accepts that there may be a concern over the effective regulation of migration into a state. Indeed, ERT accepts that, in principle, certain information on an individual’s personal status may be relevant to reaching a decision on the appropriate visa for them. ERT does not, however, believe that this concern justifies the existence of a blanket exception from the right to non-discrimination for the entire field of migration on certain important grounds. There is no precedent in international human rights law for the field of migration *per se* to be exempt from the right to equality.

ERT believes that subclause 27(2) should be more narrowly worded.

**Recommendation 16:** The blanket exception in subclause 27(2) should be replaced with more narrowly worded exceptions related to the field of migration.

#### **6.4. Health Laws: Subclause 27(3)**

Subclause 27(3) would permit discrimination if the conduct was in accordance with the Health Insurance Act 1973, the National Health Act 1953, the Private Health Insurance Act 2007, or the Therapeutic Goods Act 1989 (or secondary legislation made under any of the Acts) on grounds of age, disability, or sex. The Explanatory Notes attempt to justify the subclause by stating that the exception in subclause 27(3) recognises that “a person’s age, sex or disability can be relevant to whether they can obtain financial support for particular medical treatments or therapeutic goods (for example, some drugs are only tested, and therefore approved under the Pharmaceutical Benefits Scheme, for a subset of people who may be defined by sex and age, such as females over the age of 65).”<sup>51</sup>

As with the effective regulation of migration, ERT accepts that there may be concerns over the effective management of, and resource allocation, within public and private healthcare. ERT does not, however, believe that this concern justifies the existence of a specific and blanket exception from the right to non-discrimination for the entire field of laws relating to health. There is no precedent in international human rights for the field of health *per se* to be exempt from the right to equality.

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<sup>49</sup> Section 4 of the Migration Act 1958.

<sup>50</sup> See above, note 10, Para 177.

<sup>51</sup> *Ibid.*

ERT believes that subclause 27(3) should be more narrowly worded. As an example, the Senate Committee may wish to examine Part 3 of Schedule 3 to the United Kingdom's Equality Act 2010 which provides for three specific and narrow exceptions in the field of health and care:

- **Blood services:** A person operating a blood service does not discriminate by refusing to accept a donation of an individual's blood if (a) the refusal is because of an assessment of the risk to the public, or to the individual, based on clinical, epidemiological or other data obtained from a source on which it is reasonable to rely, and (b) the refusal is reasonable;<sup>52</sup>
- **Health and safety:** A service-provider (A) who refuses to provide the service to a pregnant woman does not discriminate against her because she is pregnant if (a) A reasonably believes that providing her with the service would, because she is pregnant, create a risk to her health or safety, (b) A refuses to provide the service to persons with other physical conditions, and (c) the reason for that refusal is that A reasonably believes that providing the service to such persons would create a risk to their health or safety;<sup>53</sup>
- **Health and safety:** A service-provider (A) who provides, or offers to provide, the service to a pregnant woman on conditions does not discriminate against her because she is pregnant if (a) the conditions are intended to remove or reduce a risk to her health or safety, (b) A reasonably believes that the provision of the service without the conditions would create a risk to her health or safety, (c) A imposes conditions on the provision of the service to persons with other physical conditions, and (d) the reason for the imposition of those conditions is that A reasonably believes that the provision of the service to such persons without those conditions would create a risk to their health or safety;<sup>54</sup>
- **Care within the family:** A person (A) does not discriminate by participating in arrangements under which (whether or not for reward) A takes into A's home, and treats as members of A's family, persons requiring particular care and attention.<sup>55</sup>

**Recommendation 17:** The blanket exception in clause 27(3) should be replaced with more narrowly worded exceptions related to the field of health.

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<sup>52</sup> Paragraph 13 of Part 3 of Schedule 3 to the Equality Act 2010 (c. 15).

<sup>53</sup> Paragraph 14(1) of Part 3 of Schedule 3 to the Equality Act 2010 (c. 15).

<sup>54</sup> Paragraph 14(2) of Part 3 of Schedule 3 to the Equality Act 2010 (c. 15).

<sup>55</sup> Paragraph 15 of Part 3 of Schedule 3 to the Equality Act 2010 (c. 15).

### 6.5. *Commonwealth Laws: Clause 28*

Clause 28 would permit discrimination in relation to conduct in accordance with a Commonwealth law on grounds of nationality or citizenship. The Explanatory Notes states that, “a number of Commonwealth laws treat citizens and non-citizens differently (such as employment in the public service or Defence Force) ... this exception is intended to clarify that this conduct is not unlawful discrimination.”<sup>56</sup>

ERT accepts that there may be certain circumstances where it would be justifiable for legislation to make a distinction between citizens and non-citizens of a state, and therefore accepts the principle behind clause 28. However, clause 28 is worded far more broadly than is necessary and would permit discrimination beyond the purported intention of the Government. For example:

- Clause 28 would permit discrimination between citizens and non-citizens in *all* Commonwealth law, not merely those circumstances – such as in the Defence Force – where differentiation between citizens and non-citizens could be justified. It would make possible the violation of fundamental rights, such as the provision of emergency health services, to non-citizens;
- Clause 28 would also permit discrimination between persons of different nationalities (for example between South Africans and New Zealanders) in Commonwealth law.

As such, ERT believes that clause 28 should be worded more tightly to ensure that the exception remains proportionate to the legitimate aim by providing that it only applies to the attribute of citizenship (and not nationality), and specifies which Commonwealth laws it applies to, rather than a blanket application to all Commonwealth law.

**Recommendation 18:** The Draft Bill should be amended as follows:

In subclauses 28(1) and (2)(b), delete the words “nationality or”.

In paragraph 28(2)(a), delete the words “a Commonwealth law” and insert the specific laws which make a distinction between citizens and non-citizens of Australia.

### 6.6. *Laws Prescribed by Regulations: Clause 30*

Clause 30 would permit discrimination in accordance with a law that is prescribed by regulations on any ground save for race and sex. The Explanatory Notes to the Draft Bill attempt to justify the exception as follows:

The Draft Bill’s general approach is that where distinctions are justified, they will be covered by the justifiable conduct exception, with a range of laws relating to age also excluded by the above general provision about protecting the vulnerability of children.

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<sup>56</sup> Ibid., Para 178.

However, to provide for more certainty if desired, there is a general regulation-making power, such that conduct in accordance with a prescribed law is not unlawful. This permits Commonwealth, State and Territory laws to be prescribed. This is available to provide certainty in relation to the interaction between the Draft Bill and other Commonwealth, State and Territory laws. However, due to the inclusion of specific exceptions relating to laws which distinguish on the basis of age, as well as the general justifiable conduct exception, there is no requirement for jurisdictions to undertake a time consuming exercise to identify all laws which might distinguish on the basis of an attribute.<sup>57</sup>

ERT is unconvinced by this argument. Clause 30 provides an overly wide power to the Federal Government to earmark any Commonwealth, State or Territory law as exempt from the provisions of the Draft Bill with the only safeguard being that the clause does not apply to the protected grounds of sex and race. The risks are obvious. A future Government may choose to use clause 30 extensively to exempt significant numbers of laws from the Draft Bill so as to effectively block the protections the Draft Bill offers. Alternatively, a court judgment that a particular piece of legislation is discriminatory could lead to a future Government simply using clause 30 to exempt that legislation rather than amending it to ensure its compatibility with the right to equality.

International human rights law is clear that discriminatory legislation cannot be justified merely by the fact that the Government has earmarked that legislation as exempt from protection. Clause 30 of the Draft Bill appears to recognise this in part by excluding sex and race from the exception. However there should be no hierarchy of protected attributes. The principle that discriminatory legislation based on sex or race cannot be justified by the fact that the Federal Government has earmarked it should apply equally to all of the protected attributes.

Clause 30 represents a significant weakness within the Draft Bill and gives far too broad a power to the Federal Government to exempt legislation which is otherwise discriminatory from the protection the Draft Bill offers. Indeed, clause 30 defeats the purpose of the Bill, and places the Bill far below other statutes.

**Recommendation 19:** The Draft Bill should be amended as follows:

Delete clause 30.

### **6.7. *Appointment of Priests, Ministers etc. Clause 32***

Clause 32 would provide an exception where the discrimination is connected with the ordination or appointment of priests, minister of religion or members of any religious order; the training or education of persons seeking ordination or appointment for such positions; or the selection or appointment of persons to perform duties or functions for the purposes of, or connected with, or otherwise to participate in, any religious observance or practice. The

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<sup>57</sup> See above, note 10, Para 180.

exception applies to an extensive list of grounds: age; breastfeeding; family responsibilities; gender identity; marital or relationship status; potential pregnancy; pregnancy; religion; sex; and sexual orientation.

The right to freedom of religion, and to manifest that religion, is a fundamental human right. It is acceptable that religions should be permitted to only appoint persons of that religion as priests, ministers of religion or members of that religious order. To that extent, ERT accepts the need for an exception which applies to the ground of religion. However, ERT does not accept that the exception should apply to any other ground. Clause 24 would permit discrimination where a person is unable to fulfil the inherent requirements of the required work because of a protected attribute. It provides sufficient exceptions in the field of religious appointments, and a further specific exception can only be justified if it applies solely to the protected attribute of religion. ERT therefore recommends that clause 32 be amended accordingly.

**Recommendation 19:** The Draft Bill should be amended as follows:

In subclause 32(1), replace the entire subclause with “The exception in this section applies in relation to the protected attribute of religion.”

In paragraph 32(2)(b), replace “a protected attribute to which this exception applies, or a combination of 2 or more protected attributes to which this exception applies” with “religion”.

#### **6.8. Bodies Established for Religious Purposes: Subclause 33(2)**

Subclause 33(2) would provide an exception for bodies established for religious purposes (as well as officers, employees and agents of such bodies) where the discrimination is conduct, engaged in good faith, that (i) conforms to the doctrine, tenets or beliefs of that religion, or (ii) is necessary to avoid injury to the religious sensitivities of adherents of that religion. The exception applies to the grounds of gender identity, marital or relationship status, potential pregnancy, pregnancy, religion, and sexual orientation. Subclause 33(2) does not, however, apply to the provision of Commonwealth-funded aged care.

ERT has significant concerns about subclause 33(2) and believes that it would permit discrimination which has no justification under international human rights law. Subclause 33(2) would permit such acts as:

- Refusing to hire, or dismissing, the cleaner of a religious building because they were gay;
- Religious organisations refusing to hire, or dismissing, women on the basis that they might become pregnant;
- Religious organisations refusing to hire, or dismissing, transgendered persons;

It is not clear why it should be necessary or proportional, in a democratic society, to accept that compliance with a religious doctrine, tenets or beliefs overweighs in principle the fundamental right of all persons to be treated equally. For religious bodies to claim an exemption of their

conduct from the protection provided by anti-discrimination law, in respect to relevant attributes such as religion and perhaps other attributes that may be relevant from time to time, they should be invited to defend a narrowly defined exhaustive list of exceptions to direct discrimination under subclause 19(2). They also can differentiate between persons through justifying discrimination through policy, under subclause 19(3). ERT therefore recommends that subclause 33(2) of the Draft Bill should be deleted.

**Recommendation 20:** The Draft Bill should be amended as follows:

Delete subclause 33(2) and, by necessary implication, subclauses 33(1) and 33(3)

**6.9. *Educational Institutions Conducted in Accordance with the Doctrines etc. of a Particular Religion: Subclause 33(4)***

Subclause 33(4) would provide an exception for educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or an officer, employee or agent of such an institution where the discrimination is conduct connected with employment or education at that institution, and consists of conduct, engaged in good faith, that: (i) conforms to the doctrines, tenets or beliefs of that religion; or (ii) is necessary to avoid injury to the religious sensitivities of adherents of that religion. The exception applies to the grounds of gender identity, marital or relationship status, potential pregnancy, pregnancy, religion, and sexual orientation.

ERT has significant concerns about subclause 33(4) and believes that it would permit unfair discrimination which has no justification under international human rights and equality law. Subclause 33(4) would permit such acts as:

- Discriminating against gay students in the provision of personal, social, health, and sex education by teaching that same-sex sexual activity was sinful and wrong;
- Refusing to hire, or dismissing, members of staff – including administrative and clerical staff – because they were unmarried or pregnant;
- Providing different classes to male and female students (the latter being students who could potentially fall pregnant) or a lesser standard of education for female students, on the basis that the religion has different roles for men and women in adult life.

ERT therefore believes that subclause 33(4) of the Draft Bill should be deleted.

**Recommendation 21:** The Draft Bill should be amended as follows:

Delete subclause 33(4) and, by necessary implication, subclause 33(1).

### **6.10. Registered Charities: Clause 34**

Clause 34 provides an exception for registered charities where the discrimination consists of (a) a provision of the governing rules (within the meaning of the Australian Charities and Not-for-profits Commission Act 2012) of a registered charity, if the provision: (i) confers charitable benefits; or (ii) enables charitable benefits to be conferred; or (b) conduct engaged in to give effect to such a provision. The exception applies to all protected grounds.

ERT acknowledges that registered charities may wish to enable charitable benefits to be conferred on particular groups of persons in line with the charitable purposes for which they were set up. However, balanced against this is the public interest in a system of registered charities which are not discriminatory. Clause 34 applies to charities which have registered with the Australian Charities and Not-for-profits Commission which will grant them benefits and concessions under Commonwealth law. Given that these benefits and concessions will be provided by the state, the state has a legitimate interest in ensuring that the registered charities do not discriminate unfairly in conferring those charitable benefits.

In the United Kingdom, the balancing exercise is given statutory footing through section 193 of the Equality Act 2010 which provides:

#### **193 Charities**

- (1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if—
  - (a) the person acts in pursuance of a charitable instrument, and
  - (b) the provision of the benefits is within subsection (2).
- (2) The provision of benefits is within this subsection if it is—
  - (a) a proportionate means of achieving a legitimate aim, or
  - (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.
- (3) It is not a contravention of this Act for—
  - (a) a person who provides supported employment to treat persons who have the same disability or a disability of a prescribed description more favourably than those who do not have that disability or a disability of such a description in providing such employment;
  - (b) a Minister of the Crown to agree to arrangements for the provision of supported employment which will, or may, have that effect.
- (4) If a charitable instrument enables the provision of benefits to persons of a class defined by reference to colour, it has effect for all purposes as if it enabled the provision of such benefits—
  - (a) to persons of the class which results if the reference to colour is ignored, or
  - (b) if the original class is defined by reference only to colour, to persons generally.



- (5) It is not a contravention of this Act for a charity to require members, or persons wishing to become members, to make a statement which asserts or implies membership or acceptance of a religion or belief; and for this purpose restricting the access by members to a benefit, facility or service to those who make such a statement is to be treated as imposing such a requirement.
- (6) Subsection (5) applies only if—
  - (a) the charity, or an organisation of which it is part, first imposed such a requirement before 18 May 2005, and
  - (b) the charity or organisation has not ceased since that date to impose such a requirement.
- (7) It is not a contravention of section 29 for a person, in relation to an activity which is carried on for the purpose of promoting or supporting a charity, to restrict participation in the activity to persons of one sex.<sup>58</sup>

ERT believes that the more nuanced approach of section 193 of the Equality Act 2010 represents a more proportionate response to the competing interests involved in the issue. Section 193 explicitly states that racial discrimination will never be permitted, that certain acts of differential treatment based on sex and disability will be permitted, and introduces a good test that any differential treatment be (a) a proportionate means of achieving a legitimate aim, or (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.

While accepting the principle behind clause 34 of the Draft Bill, ERT believes the blanket exception will permit unjustified discrimination to take place, and, instead, would promote the language of section 193 of the Equality Act 2010 as a model replacement.

**Recommendation 22:** The Draft Bill should be amended as follows:

In subclause 34(1), insert at the end of the sentence “except race”.

In subclause 34(2), before “None” insert “Subject to subsection (3), “.

After subclause 34(2), insert new subclause (3) “The provision or conduct in subsection (2) is unlawful discrimination unless it is (a) a proportionate means of achieving a legitimate aim, or (b) for the purpose of preventing or compensating for a disadvantage linked to the protected attribute or attributes.”

### **6.11. Single Sex or Disability Educational Institutions: Clause 37**

Clause 37 would allow for educational institutions to admit only persons of a single sex, persons who have a particular disability, or persons of a single sex who have a particular disability. It would only apply where the discrimination was solely on grounds of sex and/or disability.

<sup>58</sup> Section 193 of the Equalities Act 2010 (c. 15).

While ERT understands the motivation behind this exception, ERT is concerned that the exception could lead to unlawful segregation on grounds of sex or disabilities in the education system which would run contrary to Australia's obligations under international human rights. ERT has in mind Australia's obligations under, *inter alia*:

- The UNESCO Convention on Discrimination in Education,<sup>59</sup> to which Australia acceded in November 1966. Articles 1 to 3 of the Convention prohibit establishing or maintaining separate educational systems, or institutions for persons or groups of persons on grounds of sex unless the systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;
- The Convention on the Rights of the Child,<sup>60</sup> which Australia ratified in December 1990. The Committee on the Rights of the Child, in its General Comment No. 9, has called for inclusive education for children with disabilities and requires states to “pay particular attention to children with disabilities providing them with the necessary protection while maintaining their inclusion into the mainstream education system”.<sup>61</sup>
- The Convention on the Rights of Persons with Disabilities,<sup>62</sup> which Australia ratified in July 2008. Article 24(2) provides that states must ensure that:
  - (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
  - (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
  - (c) Reasonable accommodation of the individual's requirements is provided;
  - (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education; and
  - (e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

ERT believes that the blanket exception in clause 37 risks encouraging discriminatory segregation of children in the education system on the basis of sex or disability. ERT therefore

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<sup>59</sup> United Nations Educational, Scientific and Cultural Organisation, Convention against Discrimination in Education. Paris, 14 December 1960.

<sup>60</sup> G.A. Res. A/RES/44/25, 1989.

<sup>61</sup> Committee on the Rights of the Child, *General Comment No. 9: The rights of children with disabilities*, UN Doc. CRC/C/GC/9, 2007, Para 44(e).

<sup>62</sup> G.A. Res. A/RES/61/106, 2006.

recommends that clause 37 be amended to ensure that any educational institutions which take advantage of the exception are run consistently with Australia's obligations under international human rights law and, in particular, that (a) the decision to educate a child in a single sex or disability educational institution is entirely voluntary, with no element of coercion, and that there is genuine choice between segregated and co-educational and inclusive educational institutions, and (b) that the quality of education in a single sex or disability educational institution is not lower than that provided in mainstream educational institutions.

**Recommendation 23:** The Draft Bill should be amended to ensure that it is consistent with Australia's obligations under international human rights law, particularly the UNESCO Convention on Discrimination in Education, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.

**6.12. *Defence Combat Duties and Australian Federal Police Peacekeeping Duties: Subclauses 40(2) and 40(3)***

Subclause 40(2) would allow the Defence Force to discriminate on grounds of disability in connection with employment, engagement or appointment in the Defence Force: (i) in a position involving the performance of Defence combat duties, Defence combat-related duties or Defence peacekeeping service; or (ii) in circumstances, prescribed by the regulations for the purpose of this subparagraph, relating to Defence combat duties, Defence combat-related duties or Defence peacekeeping service; or (iii) 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 Defence combat duties, Defence combat-related duties or Defence peacekeeping service.

Similarly, but not identically, subclause 40(3) would allow the Australian Federal Police (AFP) to discriminate on grounds of disability in connection with the selection for duties involved in the provision, by the AFP of police services and police support services in relation to establishing, developing and monitoring peace, stability and security in foreign countries

ERT accepts that the effective performance of combat duties, combat-related duties, and peacekeeping services and support services are all legitimate aims, and that, in certain circumstances, the specific disability of a person may inhibit them from carrying out such duties and services in as effective way as persons without that disability. In that respect, ERT understands the principle behind subclauses 40(2) and 40(3).

However, as worded, subclauses 40(2) and 40(3) would allow discrimination against persons with disabilities in these fields even where the disability had no impact whatsoever on their ability to carry out such duties as effectively as persons without those disabilities. The definition of "disability" in clause 6 of the Draft Bill is, rightly, very broad and includes a range of mental and physical impairments which may have no bearing on a person's ability to carry out their duties as effectively as others. ERT therefore believes that the blanket exception in subclauses 40(2) and 40(3) is unreasonably broad and should be tightened so as to provide an exception only where the disability impairs the person's ability to carry out the duties or services as effectively as persons without that disability.

**Recommendation 24:** The Draft Bill should be amended as follows:

In subclause 40(2), insert new paragraph “(c) the disability of the other person is such that it impairs (or could impair) their ability to carry out the duties or services required of them as effectively as persons without the disability.”

In subclause 40(3), insert new paragraph “(c) the disability of the other person is such that it impairs (or could impair) their ability to carry out the duties or services required of them as effectively as persons without the disability.”

### **6.13. Accommodation for Employees: Clause 41**

Clause 41 would allow an employer to provide different standards of accommodation to different groups of employees where it would not be reasonable to provide the same standard of accommodation for all employees. The exception only applies to grounds of sex, marital status, and family responsibilities. The Explanatory Notes give an example of the kind of conduct that would be exempted by clause 41: “a mining company with a large number of male employees may provide bunk bed dormitory accommodation for them but provide a single room for female employees.”<sup>63</sup>

ERT is not convinced by the argument put forward in the Explanatory Notes. While acknowledging that the exception is limited to the protected attributes of sex, marital status, and family responsibilities, ERT does not believe that providing a lower standard of accommodation for employees on these attributes can be justified, just as it could not be justified were it on the basis of race, religion, or any of the other protected attributes. ERT recommends that the clause be deleted from the Draft Bill.

**Recommendation 25:** The Draft Bill should be amended as follows:

Delete clause 41.

### **6.14. Junior Rates: Clause 42**

Clause 42 would allow (a) an employer to pay a person under 21 junior rates and (b) an employer to discriminate between persons 21 and over and persons under 21 in determining who they employ where junior rates are a significant factor. Junior rates are defined in section 6 as “remuneration payable in accordance with minimum wage entitlements, under a Commonwealth law, a State law or a Territory law, for people under the age of 21.”

ERT takes the view that differential pay based on age is *per se* discriminatory unless, because of the lack of physical or mental development, the person is unable to complete the work to the

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<sup>63</sup> See above, note 10, Para 212.

same standard as others. Where this is not the case, differential pay based solely on the protected attribute of age is no more justifiable than differential pay based on the sex or race of the person. ERT notes that the Explanatory Notes do not seek to justify this differential treatment. ERT therefore recommends that the clause be deleted from the Draft Bill.

**Recommendation 26:** The Draft Bill should be amended as follows:

Delete clause 42.

### **6.15. Employment to Perform Domestic Duties: Clause 43**

Clause 43 would allow a person to discriminate in who they choose to employ to perform domestic duties on premises in which they reside. Discrimination would be permitted on all grounds. The Explanatory Notes explain that clause 44 is intended “to clarify that engaging a person to perform domestic duties in an employer’s residence falls within the private sphere and is not regulated by the Draft Bill”.<sup>64</sup>

ERT does not necessarily agree that the employment of a person who works in the employer’s residence falls within the private sphere. Employment *per se* falls within the public sphere and the fact that the location of that employment is the employer’s residence does not extinguish this principle completely. ERT would argue that this is a field which does not fit neatly within either public or private life and that a certain degree of leeway should therefore be given to the employer.

ERT believes that there may be some situations whereby a person may reasonably prefer a person with certain attributes to be employed in their premises. For example, a single father with children may prefer to hire a woman to provide domestic duties in the home so as to provide the children with a female influence; a Christian family who hire a nanny may wish to hire a Christian nanny so as to ensure that the religious beliefs of the children are maintained. However, there will also be some situations where a preference for the person to have certain attributes may not be reasonable. An employer who refuses to hire a black person to perform domestic duties simply because of racial prejudice is not reasonably justified in discriminating.

ERT therefore believes that the blank exception provided by clause 43 is too broad and would allow discrimination which is unjustified under international human rights law. ERT recommends that clause 43 be reworded so that (a) it only applies to certain attributes such as sex, religion and language, which can be justified, and not others, such as race, which cannot, and (b) include a criterion that the differentiation be in pursuance of a legitimate aim and not on hostility or prejudice.

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<sup>64</sup> See above, note 10, Para 214.

**Recommendation 27:** The Draft Bill should be amended as follows:

Clause 43 should be reworded so that it (a) it only applies to certain attributes such as sex, religion and language, which can be justified, and not others, such as race, which cannot, and (b) include a criterion that the discrimination be in pursuance of a legitimate aim and not based on hostility or prejudice.

## **7. Reasonable Accommodation: Clauses 23 to 25 and 70 to 74**

Principle 13 of the Declaration of Principles on Equality provides that:

To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.

Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.<sup>65</sup>

Principle 13 reflects the position in international human rights law that a denial of reasonable accommodation constitutes discrimination. Furthermore, reflecting an emerging international consensus on this issue, the concept of reasonable accommodation “is extrapolated to cover other forms of disadvantage beyond disability, as well as, more generally, differences which hamper the ability of individuals to participate in any area of economic, social, political, cultural or civil life”.<sup>66</sup> ERT believes that the duty of reasonable accommodation can therefore arise in respect of any ground.

The Convention on the Rights of Persons with Disabilities states in Article 5(3):

In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.<sup>67</sup>

The Convention defines “reasonable accommodation” as:

...[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to

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<sup>65</sup> See above, note 1, Principle 13, p. 10-11.

<sup>66</sup> See above, note 26, p. 39.

<sup>67</sup> G.A. Res. A/RES/61/106, 2006.

persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>68</sup>

The Convention makes explicit reference to the requirement of reasonable accommodation when securing particular rights of persons with disabilities including:

- The guarantee that if a person with a disability is deprived of their liberty, that they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the Convention (Article 14(2));
- The right to education including general tertiary education, vocational training, adult education and lifelong learning (Articles 24(2)(c) and (5));
- The right to work to work, on an equal basis with others, including includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities (Article 27(1)(i)).

While the International Covenant on Economic, Social and Cultural Rights does not refer to discrimination on grounds of disability, or to reasonable accommodation, the Committee on Economic, Social and Cultural Rights has stated that disability is a prohibited ground under “other status” in Article 2(2),<sup>69</sup> and in its General Comments has stated:

The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability. States parties should address discrimination, such as ... denial of reasonable accommodation in public places such as public health facilities and the workplace, as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.<sup>70</sup>

The Draft Bill seeks to implement the requirement that organisations provide reasonable accommodation through two sets of provisions.

The first (clauses 23 to 25) provide that a person (the first person) cannot rely on the exceptions to the prohibition of discrimination that the discrimination is justifiable or that the other person is unable to carry out the inherent requirements of the particular work because he or she has a protected attribute (or combination of protected attributes) if:

- (a) The discrimination is on grounds of disability (whether alone or in combination with one or more other attributes); and

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<sup>68</sup> Ibid. Article 2.

<sup>69</sup> See above, note 8, Para 28.

<sup>70</sup> See above, note 8, Para. 28, repeating, in part, Committee on Economic, Social and Cultural Rights, *General Comment 5: Persons with disabilities*, U.N. Doc E/1995/22 at 19 (1995), Para 15.

- (b) The first person could have made a reasonable adjustment and that they could have made the adjustment without unjustifiable hardship being caused to them.

In determining whether making an adjustment would cause the first person unjustifiable hardship, all relevant matters must be taken into account, including the following:

- (a) the nature of any benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- (b) the effect of any disability of any person concerned;
- (c) the financial circumstances of the first person, and the estimated amount of expenditure that the first person would have to incur in order to make the adjustment;
- (d) the availability of financial and other assistance to the first person;
- (e) any relevant guidelines prepared by the Australian Human Rights Commission; and
- (f) any relevant action plans given to the Australian Human Rights Commission.

The second (clauses 70 to 74) provide for the creation of disability standards. A disability standard is a standard, made by a Minister, to specify requirements to be complied with in relation to disability and one or more area of public life. It must make clear which persons are covered by the requirements and whether it only covers specified kinds of disability. Disability standards may (a) provide for exceptions, or for the Commission to grant exemptions, from requirements specified in the standard; (b) provide that the standard, in whole or in part, is or is not intended to affect the operation of State laws or Territory laws, or particular State laws or Territory laws; or (c) provide for enforcement mechanisms, or dispute resolution mechanisms, in relation to the requirements of the standard.

ERT does not believe that either of the two sets of provisions is satisfactory or fully compliant with international human rights law. The first (clauses 23 to 25) only provides that a person cannot rely on either of the exemptions in clauses 23 or 24 if they failed to make reasonable accommodation for a person with a disability. It imposes no obligation on the person to make any form of reasonable accommodation, but merely removes a defence available to them if proceedings are brought against them. This does not reflect – in principle or in practice – the obligatory nature to make reasonable accommodation as is clearly understood in international human rights law. Clauses 23 to 25 cannot in any meaningful way be said to include a *duty* to make reasonable accommodation. This is particularly disappointing given that the Disability Discrimination Act 1992 did impose a duty to make reasonable accommodation upon persons through subsections 5(2) and 6(2) which provided that a failure to make reasonable accommodation constituted discrimination on grounds of disability.

The second (clauses 70 to 74) is insufficient in that it relies on the Minister making sufficient, comprehensive disability standards, rather than providing for an automatic duty on the face of the Draft Bill, and provides that failure to observe a disability standard constitutes an act falling outside of the definition of discrimination with separate enforcement mechanisms and dispute resolution mechanisms. International human rights law is clear that failure to make reasonable accommodation is a form of discrimination itself, and not a distinct and separate act. The duty applies automatically and is not reliant on a Minister making a specific standard in relation to it.



ERT is deeply concerned that the failure to include a duty to make reasonable accommodation represents a significant step backwards in the protection of persons with disabilities. Clauses 23 to 25 and 70 to 75 of the Draft Bill represent a significant weakening of the level of protection offered. Principle 26 of the Declaration of Principles on Equality provides:

In adopting and implementing laws and policies to promote equality, there shall be no regression from the level of protection against discrimination that has already been achieved.<sup>71</sup>

ERT therefore urges the Senate Committee to reinstate the provisions contained within subsections 5 and 6 of the Disability Discrimination Act 1992 through amendments to the Draft Bill so as to ensure that the level of protection is maintained and not weakened. ERT also urges the Senate Committee to ensure that the duty to provide reasonable accommodation applies to all protected attributes and not solely to disability.

**Recommendation 28:** The Draft Bill should be amended as follows:

In clause 19, after subclause (3), insert new subclause,

“Discrimination by failure to make reasonable adjustments

( ) A person (the first person) discriminates against another person if, because of a protected attribute:

(a) the first person

- (i) does not make, or proposes not to make, reasonable adjustments for the other person, and
- (ii) the failure to make the reasonable adjustments has, or would have, the effect that the other person is treated unfavourably; or

(b) the first person

- (i) requires, or proposes to require, the other person to comply with a requirement or condition, and the other person would comply, or would be able to comply, with the requirement or condition only if the first person made reasonable adjustments for the person, but the first person does not do so or proposes not to do so; and
- (ii) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging the other person.”

## 8. Positive Duties

Principle 10 of the Declaration of Principles on Equality provides that:

States have a duty to respect, protect, promote and fulfil the right to equality for all persons present within their territory or subject to their jurisdiction.<sup>72</sup>

<sup>71</sup> See above, note 1, Principle 26, p. 14.

As the Vienna Declaration and Programme of Action in 1993 made clear, “it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” Whilst the Draft Bill undoubtedly *protects* the right to equality, there are no provisions within the Draft Bill which give effect to the state’s obligation to *promote* the right to equality. ERT regards this is a significant weakness in the Draft Bill and is concerned that Government chose to reject the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs’ *Report on the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* which called for positive duties for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment, and promote gender equality.<sup>73</sup> ERT supports the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs and supports its extension to all protected attributes though a single equality duty.

In the United Kingdom, the positive duties upon public authorities are found in sections 1 and 149 of the Equality Act 2010.

#### **1 Public sector duty regarding socio-economic inequalities**

- (1) An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.<sup>74</sup>

#### **149 Public sector equality duty**

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

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<sup>72</sup> See above, note 1, Principle 10, p. 9.

<sup>73</sup> Senate Standing Committee on Legal and Constitutional Affairs’ *Report on the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, Recommendation No. 40 at Para 11.102, available at: [http://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/completed\\_inquiries/2008-10/sex\\_discrim/report/index.htm](http://www.apf.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/sex_discrim/report/index.htm).

<sup>74</sup> Section 1 of the Equality Act 2010 (c.15).

- (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
  - (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
  - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
  - (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
  
- (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
  
- (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
  - (a) tackle prejudice, and
  - (b) promote understanding.<sup>75</sup>

ERT therefore urges the Senate Committee to insert provisions into the Draft Bill which would impose a duty on public sector organisations, employers, educational institutions and other service providers to eliminate discrimination and promote equality. ERT makes no specific recommendation as to the choice of words used in any public sector duty, but consider sections 1 and 149 of the Equality Act 2010 to be relevant examples of how such a duty can be phrased in legislation.

**Recommendation 29:** The Draft Bill should be amended so as to impose a duty on public sector organisations, employers, educational institutions and other service providers to eliminate discrimination and promote equality.

## 9. Reform of the Australian Human Rights Commission: Clauses 61 to 199

Principle 23 of the Declaration of Principles on Equality provides that:

States must establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. States must ensure the independent status and competences of such bodies in line with the UN Paris Principles, as well as

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<sup>75</sup> Section 149 of the Equality Act 2010 (c. 15).

adequate funding and transparent procedures for the appointment and removal of their members.<sup>76</sup>

ERT has had the benefit of being able to view the submission to the Senate Committee produced by the Australian Human Rights Commission and the Discrimination Law Experts Group. We concur with, and endorse, the comments and recommendations contained within these submissions. We urge the Senate Committee to ensure that the reforms made in clause 61 to 199 of the Draft Bill are consistent with the Paris Principles, strengthen the work of the Australian Human Rights Commission, and in no way weaken the Commission and its ability to protect and promote the right to equality in Australia.

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<sup>76</sup> See above, note 1, Principle 23, p. 13.