National Farmers' Federation

Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth)

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

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NFF Member Organisations

AGFORCE

Australian Dairy Farmers

Australian Livestock Exporters' Council ALEC

ALPA

AUSTRALIAN Pork

AUSTRALIAN VETERINARY ASSOCIATION

PURE BEECHWORTH HONEY 100% Pure Australian Honey

CANEGROWERS

CATTLE COUNCIL OF AUSTRALIA

CORPORATE AGRICULTURAL GROUP

COTTON AUSTRALIA

driedfruits australia

Goat Industry Council of Australia inc.

GrainCorp

Grain Growers Real benefits. Real results.

nsw FARMERS

NORTHERN TERRITORY CATTLEMEN'S ASSOCIATION N.T.C.A

AGRICULTURAL EXCELLENCE & SUSTAINABILITY RGA RICEGROWERS' ASSOCIATION OF AUSTRALIA INC

RIDLEY

Ruralco HOLDINGS LIMITED

SHEEPMEAT COUNCIL OF AUSTRALIA

Agriculture's Future TFGA Your Future ↔ Our Future

The Pastoralists' Association of West Darling

Victorian Farmers Federation

WAFARMERS THE WESTERN AUSTRALIAN FARMERS FEDERATION

WOOLPRODUCERS AUSTRALIA

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1. Executive Summary

The proposed Human Rights and Anti – Discrimination Bill 2012 consolidates a number of pieces of discrimination legislation, including the Age Discrimination Act, the Disability Discrimination Act, and the Racial and the Sex Discrimination Acts. It's a significant reform several years in the preparation. What remains outstanding is the harmonisation of state anti-discrimination laws; the plethora of laws and differing legislation requirements can be red tape burden for agriculture employers and encourage forum shopping.

The National Farmers' Federation (NFF) is of the view that the proposed changes deserve rigorous scrutiny before they are proceeded with, as Agriculture employers are understandably concerned as what may be couched as a win for fairness, may be inherently unfair on respondents. Moving from a cost-free jurisdiction and altering the burden of proof removes what were important bulwarks against vexatious claims and shifts the law sharply in favour of complainants and can be seen as the proposed laws have "lowered the bar" for the complaint.

NFF is concerned with the potential for increased cost associated with defending claims against disgruntled employees "shopping" to get the best legal payout either under the consolidated legislation, the Fair Work Act's 'adverse action' provisions or under state and territory anti discrimination laws. All of which have different tests, compensation thresholds and legislative jurisprudence, which makes it difficult for agriculture employers to effectively comply with multiple and overlapping sets of laws.

Expanding the scope of the regime to include industrial history (which is defined to encompass industrial activities and union membership) is particularly concerning, as it seems to enshrine in legislation the trend of convergence between adverse action and discrimination claims.

Furthermore, while the exposure draft says that generally a discrimination claim cannot be brought if a complaint has already been made under the Fair Work Act in relation to the conduct, a claim can still go ahead in the Commission if it is satisfied that there are "exceptional circumstances that warrant permitting the person to make the complaint." This raises the possibility of concurrent claims in Fair Work Australia and the Commission

NFF is of the view that the proposed changes are another example of Government reversing the onus of proof and placing the burden on business because it is administratively convenient to do so. By way of example, if the exposure draft is adopted in its present form it has the potential to significantly affect agriculture employers by:-

- Impacting the manner in which they seek to achieve compliance with discrimination law; and
- Increasing their exposure to discrimination claims in the federal jurisdiction, which will be more difficult and costly to successfully defend.

NFF recognises that the Human Rights and Anti – Discrimination Bill 2012 shifts the burden of proof, so that complaints only have to prove the facts of their case, while respondents must justify the reason for their actions, with discrimination unlawful if it is proportionate to a legitimate aim. NFF is of the view that such a public policy initiative is likely to add costs in the form of fee for service certified compliance through the Australian Human Rights Commission (AHRC). Agriculture employers will be faced with the need to assess costs of guidance, which will take the form of Commission-issued guidelines, voluntary action plans and Commission reviews of policies and/or practices against 'risk managing' a jurisdiction which will be easier to access.

NFF is of the view that the proposed Bill will add to the growing regulatory burden on agriculture businesses and require all employees to be trained in the new or amended discrimination policies so they understand their responsibilities under the legislation. A cost which agriculture employers will be unable to pass onto consumers.

2. Introduction

On 21 November 2012, the Senate referred the Exposure Draft legislation for the Human Rights and Anti-Discrimination Bill 2012 (Exposure Draft Bill) to the Legal and Constitutional Affairs Legislation Committee (Committee) for inquiry and report.

The Exposure Draft Bill seeks to consolidate existing Commonwealth anti discrimination law into a single Act, replacing the Age Discrimination Act 2004, the Disability Discrimination Act 1992, the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 and the Australian Human Rights Commission Act 1986. The Exposure Draft Bill proposes a number of reforms to Commonwealth anti-discrimination law, including:-

- introduction of a single, simplified, test for discrimination applying to all protected attributes;
- coverage of additional protected attributes including sexual orientation and gender identity;
- coverage of discrimination and sexual harassment in any area of public life;
- a streamlined approach to exceptions, including a new general exception for justifiable conduct;
- additional measures to assist and promote voluntary compliance;
- improvements to the complaints process to improve access to justice; and
- some adjustments to the functions of the Australian Human Rights Commission.

The Committee is due to report on 18 February 2013, and has invited written submissions to its inquiry by 21 December 2012.

The NFF is pleased to make this submission to the Legal and Constitutional Affairs Legislation Committee into the Exposure Draft legislation for the Human Rights and Anti-Discrimination Bill 2012.

3. Profile of the Agriculture Sectors

The National Farmers' Federation (NFF) was established in 1979 and is the peak national body representing farmers, and more broadly, agriculture across Australia. The general profile[1] of the industry is as follows:-

- Australia's Agrifood industry comprises five (5) major sectors: agriculture, horticulture and conservation land management; food, beverage and pharmaceutical manufacturing; meat processing and retail; seafood and racing.
- 880,000 people are employed in Agrifood whereas Agriculture, Forestry and Fishing is a relatively small industry, employing approximately 332,000 full time and part time workers, which is around 2.9 per cent of the total workforce (August 2011).[2]
- The largest contributor to employment in the industry is the Sheep, Beef Cattle and Grain Farming sector, employing 117,600 workers (or 43.3 per cent of industry employment). Fruit and Tree Nut Growing employed a further 32,700 (12.0 per cent), followed by Dairy Cattle Farming (25,600 or 9.4 per cent).
- The number of Australian farmers has fallen by over 100,000 in the three decades since 1981, yet the value of Australian agricultural exports in this time has grown from $8.2 to $32.5 billion.
- Employment in the Agriculture, Forestry and Fishing industry is concentrated in regional Australia, with the largest employment in Northern and Western NSW (30,300 workers), Darling Downs-South West (21,200), and Remainder-Balance WA (20,700).
- Employment in the industry overall has decreased 27.2 per cent in the last ten years, the largest decline of any industries in Australia over this period.
- In the medium term (over the past five years) employment has declined in nine of the 15 sectors, at a rate of 1.2 per cent per annum. The largest decline was recorded in the Fruit and Tree Nut Growing sector followed by the Sheep, Beef Cattle and Grain Farming and Mushroom and Vegetable Growing sectors.
- While overall employment in the industry has declined, some sectors have recorded employment gains. The largest growth was recorded in the Dairy Cattle sector (up by 54.6 per cent) followed by Poultry Farming (25.9 per cent).
- In 2011-12, the average Australian consumed 104 litres of milk, 32 kilograms of beef, 25 kilograms of pork and ham and 9 kilograms of lamb.

[1] AgriFood Skills Australia, *Environmental Scan*, 2012.
[2] DEEWR, Industry Report Agriculture, Forestry and Fishing, August 2011.

Employers

- The Agrifood industry comprises over 130,000 enterprises, ranging from large multinational companies through to small family owned enterprises, the majority of whom are located in regional Australia.
- The number of farms in Australia fell by more than 100,000 between 1981 and 2011 which is a 40 per cent decrease over the last 30 years.
- Half of all farmers work more than 49 hours per week and more than half (56 percent) are self-employed owner managers.
- The ownership structures in the agriculture sector range from owner operators, family farms to sovereign wealth funds and multinationals.

Employees

- 72 percent of Aussie farmers are male, 89 percent of farmers were born in Australia, and the average farmer is 53 years old.
- More than two thirds of the Agriculture, Forestry and Fishing industry are male.
- Part-time employment for males in the industry has increased by 9.7 per cent over the last five years whereas full-time male employment has decreased by 5.2 per cent.
- Female part-time employment decreased by 7.3 per cent over the same period, while full-time employment decreased by 1.6 per cent.
- The median age for workers in this industry is 48 years; the oldest of any industry (compared with the median of 39 years for all industries) and median earnings are around $878 per week (before tax) for full-time employees considerably lower than the average for all industries ($1050).

Accordingly, NFF is of the view that the importance of the sector should be recognised and elevated. Agriculture and food are essential aspects of the day to day lives of the Australian community. It is our view that issues such as the ongoing capacity of the nation to continue to producing food and fibre for not only Australians but the global community needs to be linked with other key government priorities such as the state of the economy, health and anti discrimination.

4. NFF Comments on the Key Provisions of the Draft Bill

Key Provisions of Draft Bill	National Farmers' Federation Comments
Objects of the Act Clause 3	The draft bill clearly implements international obligations; however it has significant limitations in relation to the cost impost on agricultural employers. The public policy considerations of the bill should be assessed within the employment context and needs to be assessed against the cost imposed on farm employers.
Dictionary of key terms Clause 6	The term 'employment' includes paid and unpaid volunteer work. As a result, the protection in the draft bill now applies to volunteers and work related activities. The terms 'gender identity', 'sexual orientation' and work-related areas' appeared to be sufficiently broadly expressed. No distinction is made in relation to the size of an entity that being sole trader, partnership or corporation, and as a result, all employers, of varying sizes is now covered by the protections in the draft bill, (see clause 58). 'Human rights' is defined to mean those rights in the conventions listed in the objects clause
Clause 14	The bill is not intended to exclude or limit the operations of State or Territory anti-discrimination laws. It provides that such laws can be described by regulation. NFF is of the view that the harmonisation of anti discrimination laws would assist with regulatory burden and cost impost of compliance. Such an approach would greatly alleviate the perception of red tape being applicable in this area.

Protective Attributes Clause 17	The protected attributes are age; breastfeeding; disability; family responsibilities; gender identity; immigration status; industrial history; marital or relationship status; medical history; nationality of citizenship; political opinion; potential pregnancy; pregnancy; race; religion; sex; sexual orientation; social origin. NFF is supportive of the each of these attributes within the proposed bill.
Meaning of discrimination Clause 19	Clause 19 (1) relates to discrimination by unfavourable treatment and provide that A person (the first person) discriminates against another person if the first person treats, or proposes to treat, the other person unfavorably because the other person has a particular protected attribute, or a particular combination of two or more attributes. ‘Unfavorable treatment’ includes but is not limited to harassing the other person or other conduct that offends, insults, intimidates the other person. NFF recognises the above replaces the comparator test with the ACT’s unfavourable treatment test and applies single test of direct discrimination to all protected attributes. NFF is of the view that there was no justification for including the notion of "offending" in the definition of discrimination. The freedom to offend was an integral component of freedom of speech. There is no right not to be offended. There is no international human rights instrument or national anti-discrimination statute in another liberal democracy that extends to conduct which is merely offensive. Unlike the existing racial discrimination law, there is no element of objectivity, as presently found in the words 'reasonably likely to offend". The new bill appeared to contain a subjective test of being offended. NFF doesn’t support the insertion of a subjective test. Clause 19 (2) relates to discrimination by imposition of policies and provide that: A person (the first person) discriminates against another person if: (a) the first person imposes, or proposes to impose, a policy; and (b) the policy has, or is likely to have, the effect of disadvantaging people who

	have a particular protected attribute, or particular combination of two or more to protect attributes; and (c) the person has the attribute a combination of attributes. This provision protects against indirect discrimination and appears to address many of the complexities of the pre-existing tests. NFF is of the view that removing the distinction between direct and indirect discrimination in favour of a single definition would assist with understanding and compliance of the legislation.
Special Measures Clause 21	Clause 21 provides that special measures to achieve equity are not discrimination. NFF is of the view that the definition of special measures is required to assist with understanding and implementation. NFF notes that the definition set out in clause 21(2)(b) relies on a reasonableness standard to allow a Court to find that a matter is a special measure. The NFF's view is that such a definition is too vague and uncertain and raises the possibility that measures that should not be found to be special measures would be so found. The NFF notes that the content and meaning of "special measures" under the Racial Discrimination Act 1975 is currently under consideration in the High Court proceedings in the matter of *Maloney v the Queen* (HCA B57/12). It is not clear how the AHRC could affect the jurisdiction of a Court to determine what a special measure is by making a determination that something is a special measure. Division 7 of Chapter 3 may in fact be invalid because it provides for the exercise of judicial power by an administrative body in a way similar to the arrangements invalidated by the High Court in *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10.

When discrimination is unlawful Clause 22	Clause 22 provides that it is unlawful for a person to discriminate against another person. If the discrimination is connected with any area of public life. 'Areas of public life' are broadly defined to include work and work related areas; education and training; the provision of goods, services, services or facilities; access to public places; provision of accommodation; dealings in estates or interest in land; membership and activities of clubs or a member-based associations; participation sporting activities and the administration of Commonwealth laws an Territory laws, and the administration or delivery of Commonwealth programs and territory programs. However, clause 22(3) provides that discrimination on grounds of religion, political opinion, nationality, trade union activity, medical history, religion, social origin will only be unlawful discrimination if the dissemination is connected with worker work related activities.
Exemption from justifiable conduct Clause 23	NFF notes that clause 23 provides a general exemption for justifiable conduct. The NFF notes that while the intent was clearly to remove the plethora of specific exceptions and make the Draft Bill simpler, the clause is drafted too vaguely. Clause 23 provides a general exemption for 'justifiable conduct', which is defined as conduct, engaged in good faith, for the purpose of achieving a legitimate aim; and that the person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in conduct would achieve that aim; and the conduct is a proportionate means of achieving that aim. Clause 23 also contains a range of factors to be taken into account when determining whether conduct is justifiable. Clause 23 also clarifies that in relation to discrimination on grounds of disability, conduct will not be justified if a reasonable adjustment could have been made. The streamline approach to include general exemption for justifiable conduct is generally supported by NFF. Although further consideration needs to be given to the meaning of 'justifiable conduct' and the inclusion of the proportionality test in this provision.

Exemption for in her requirements of work Clause 24	The exemption of inherent requirements of work applies to all protect attributes and clarifies the pre-existing 'inherent requirements' exemption regarding employment. NFF is of the view that the inherent requirements exemption should be accompanied by examples. Clause 24 also makes clear that, in relation to discrimination on the grounds of disability, the exemption does not apply if a reasonable adjustment could be made. The NFF again calls upon government to consider accompanying examples to assist with farm employers understanding of the proposed regime.
Meaning of reasonable adjustments in relation to disability discrimination Clause 25	Clause 25 outlines the duty to make reasonable adjustments that limits this duty to preventing discrimination on the grounds of disability. The retention of the duty to make reasonable adjustments in relation to disability discrimination is generally supported. NFF has the view that guidance material is required in regards to the scope of the duty to make reasonable adjustments and to assist with an outline of the type of factors to be taken into account, such as the such as a provision based on section 17 of the Equal Opportunity Act 2010 (Vic).
Prescribing exceptions by regulation Clause 30	Clause 30 provides an exemption for unlawful conduct in accordance with laws prescribed by the regulations, but makes an exemption for unlawful conduct on the grounds of race and sex. The NFF notes that clause 30(2)(c) appears to allow for the Executive to exclude provisions of the Draft Bill by regulation. The NFF submits that this clause allows certain elements to be excluded if they are found to be wanting. This exemption is supported due to the growing regulatory burden on agriculture businesses
An exemption for clubs and member-based associations Clause 35	The exemption in this clause applies in relation to all protected attributes in relation to a club member-based association: (a) if membership of the club or Association is restrictive wholly or primary to people (the target group) who have particular protected attributes, or a particular combination of two or more protected attributes; and (b) restricted membership to the target group is consistent with the objects of this Act. This clarifies the scope and application of this exemption. NFF is supportive of a provision mirroring section 27 of the Disability Discrimination Act 1992.

Review of exemptions Clause 47	Clause 47 provides that the Minister must arrange for a review of the range of exemptions in Division 4 of the draft bill within three (3) years and provide a copy of a written report of the review to Parliament. NFF is supportive of regular and systematic reviews of legislation that apply to agricultural businesses.
Sexual harassment Part 2.3 Division Two	Part 2.3, Division 2 deals with sexual harassment. The inclusion of this protection is supported by NFF. While this provision is limited to sexual harassment, it is noted that 'unfavourable treatment' test in clause 19(1) includes harassing the other person, which means that harassment on the basis of other grounds will be prohibited under the Draft Bill. However, there are limitations to this protection when the harassment occurs in relation to the attributes of religion, political opinion, nationality, trade union activity, medical history, religion and social origin, as it will only be unlawful if connected with work and related activities. This appears to establish a two tier harassment mechanism. NFF is of the view that work and work related activities should be generally regulated in the same way as non-work-related activities.
Publishing material indicating intention to engage in all unlawful conduct Clause 53	Clause 53 makes it unlawful for a person to publish or display material if (a) the material indicates that the person, or one or more other person, intends to engage in conduct; and (b) the conduct would be unlawful conduct. An exemption applies when publication occurs in good faith for the purpose of discouraging unlawful conduct or for making or publishing a fair and accurate report of any event matter of public interest if the comment is an expression of a genuine belief held by a person making the comment. A criminal liability provision under existing anti discrimination legislation has also been removed. NFF is supportive of such a provision.
Victimisation Part 2.3 Division 6	Part 2.3 Division 6 deals with victimisation. NFF is supportive of protections against victimisation. Although the proposal in relation to the burden of proof could possibly lead to unjustifiable claims.

	NFF recognises that the draft bill removes criminal liability provision under existing anti discrimination legislation. NFF is of the view that the changes to the burden of proof need realignment and mechanisms need to be inserted into the bill to overcome the possibility of vexatious claims.
Extension of liability for unlawful conduct Part 2.4	This part deals with situations in which one person is liable for the unlawful conduct of another person. Division 2 deals with liability for causing unlawful conduct; liability for unlawful conduct of directors, officers, employees and agents; and the liability of partnerships, unincorporated associations and trusts. These provisions seem to streamline the vicarious liability provisions and apply them equally regardless of attribute. NFF recognises such a approach is in line with the vicarious liability provisions of the Racial Discrimination Act 1975 (Cth) the Sex Discrimination Act 1984 (Cth). These provisions refer to appropriate policies, training and complaints processes and the use of industry best practice guidelines as examples of "all reasonable steps" that could be taken by the employer or principle to prevent the unlawful act. NFF is of the view that policies, training and complaints mechanisms within a business entity should not require an assessment/audit by the Commission. Although farm employers will be able to voluntarily receive an AHRC certification, on a fee for service basis. NFF is of the view that this proposed mechanism will be a cost impost on employers who are seeking to risk manage the regime by seeking a “complete defence” against discrimination claims. It will do nothing to address best practice and hence NFF recommends that AHRC be tasked with developing template policies, training and complaints mechanisms which can be made available to agriculture employers without charge.
Equity before the law Part 2.5	Part 2.5 reserves the equity before the law provisions that were previously contained in section 10 of the Racial Discrimination Act 1975 (Cth) although a slightly different form

Measures to assist compliance Part 3.1	This part deals with various measures to assist people to comply with this act provides for: • The AHRC to make guidelines to assist people provide engaging in lawful contact conduct, or in Commonwealth conduct that is contrary to human rights. • NFF proposes that the AHRC be tasked with develop template policies, training and complaints mechanisms and only then on application review organisation policies and procedure should they seek to deviate for the 'established standard'. • Persons and bodies to develop action plans to assist them, and others provide engaging in law on in unlawful conduct. • The Minister to make disability standards. • The AHRC to make compliance cords. • The AHRC to make special measure determinations. • The AHRC to grant temporary exemptions from conduct being unlawful discrimination. NFF is generally supportive of the introduction of these mechanisms, many of which are focused upon best practice. Hence NFF recommends that the AHRC be tasked with developing template policies, training and complaints mechanisms which can be utilised by employers. NFF is of the view that a fee-for-service approach will impose unnecessary costs on agriculture employers who seek to comply with the regime. For example, clause 207 allows the AHRC to charge fees for reviewing policies and programs, developing compliance cords and making special measures determinations. NFF is of the view that this will have a cost impost on business and as farming organisations are generally 'price takers' such a cost impost will be unable to be passed on to consumers. NFF is of the view that template policies, training and complaints mechanisms developed by the AHRC are balanced and appropriate and will assist with the uptake of best practice and adherence to anti discrimination legislation.

The conduct that may be the subject of a complaint Clause 88	Clause 88 provides that complaints can be made to the AHRC about conduct that is either unlawful conduct or Commonwealth conduct contrary to human rights or both but not about Commonwealth conduct contrary to economic, social and cultural rights. The NFF notes that this is consistent with the current approach on the Australian Human Rights Commission Act 1986 (Cth).
Who can make a complaint Clause 89	Clause 89 outlines who has standing to make a complaint to the AHRC, and this includes a person or industry association and allows representatives complaints to be made by people other than the complainant. NFF is of the view that all complaint should be subject to alternative dispute resolution (ADR) mechanisms before formal processes are undertaken.
Restriction on multiple complaints about the same conduct Clause 90	Clause 90 generally prohibits a person from making a complaint to the AHRC if another complaint has already been made in relation to the same conduct under the AHRC Act, or the Fair Work Act 2009 (Cth). Exemptions apply in limited circumstances. NFF is concerned in relation to the interaction of anti discrimination legislation and the Fair Work Act. NFF notes the unfair dismissal code for small businesses is generally recognised to be working appropriately as a defence to unfair dismissal claim. It’s NFF's view that a similar mechanism/document should be developed that would assist with agricultural employers understand their obligations in relation to a discrimination legislation.
Preparation of complaints Clause 95 and 96	Clause 95 provides that if the AHRC is aware that A person wishes to make a complaint; and the person need assistance to put the complaint in writing; the Commission must take reasonable steps to provide appropriate assistance to the person. Clause 96, outlines the type of assistance that should be provided to a person who is seeks to make a complaint. These provisions generally replicate existing provisions.

	NFF is of the view that applicants and respondents should be provided with appropriate assistance during the preparation and reply to complaints. In the explanatory notes to the draft bill, the government rejects recommendations for increased funding for community legal Centres, which is made by a Senate committee enquiry into the Sex Discrimination Act. NFF is of the view that if increase funding is provided to organisation to assist parties access to the regime. It is provided on the basis that applicants and respondents can equally access such funding.
How the AHRC deals complaints Part 4.2	This part provides that: • The AHRC can refer complaints to bodies such as industrial bodies, Inspector General of intelligence and Security, and the information Commissioner (clause 102 to 104) • The AHRC is a general discretion to deal with complaints as it considers appropriate, as well as the power to investigate and/or attempt to conciliate complaints (clauses 152106) • The AHRC has powers to request information, inspect documents and hold conferences (clauses 17 to 111) • If complaints about Commonwealth conduct contrary to human rights cannot be settled by the AHRC, it must make finding and <u>may</u> report to the Minister (clauses 112-115). • The AHRC must 'close' a complaint in accordance with the circumstances outlined in clause 117 such as if the complaint has been settled; or the AHRC satisfy the affected parties do not want it to deal with the complaint, or if the AHRC is of the view that the complaint relates to an issue of public importance and should be dealt with in court. NFF is of the view that the consolidated act should include provisions for:- All complaints should be subject to alternative dispute resolution before proceeding to the AHRC Conciliation process or directly to court. The provision of assistance provided to complaints should be equally applicable to respondents.

Applying to the Federal Court of the Federal district Court in relation to unlawful conduct Part 4.3	Once a complaint has been closed in accordance with clause 117 a person may make an application to the Federal Court, the Federal Magistrates Court (the court), alleging unlawful conduct (as per the original complaint to the AHRC) by one or more of the respondents to the complaint. In many cases (these outlined in clause 117(2), leave of the court would be required. Application to the court need to be made within 60 days of the AHRC giving notice of the closing of the complaint. The NFF supports a mechanism for complainants to have the option to proceed directly to the court, such as the current practice in relation to the decision-making tribunals under the Victorian Equal Opportunity Act provided early conciliation has been undertaken. NFF considers this a prudent and measured approach.
Burden of proof in court proceedings Clause 124	Clause 124 introduces shifting burden of proof in court proceedings so that if the applicant establishes a prima facie case of unlawful discrimination, the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action. The clause also outlines the burden of proof in relation to exceptions to unlawful conduct. NFF support the including of a provision that's share of the burden of proof more equal between complaints of respondents in a consolidated act. On the existing Commonwealth acts, a direct discrimination claimant bears the burden of proving a basis for their less favourable treatment by the respondent, which requires the complainant to prove matters relating to the state of mind that respondent. In contrast, the shifting onus provision requires duty holders to provide evidence of why they took the particular action that has been challenged, so that the court can make an assessment of whether it was on unlawful basis. The approach in clause 124 is also supported on the basis that it promotes uniformed inconsistency between the Commonwealth anti discrimination regime and the Fair Work Act 2009 (Cth) and reflects international approaches, such as that the UK.

	NFF is of the view that the draft bill does not address the need for the standard of proof to be clarified - as the usual civil standard of the balance of probabilities.
Orders that court may make on application Clause 125	If satisfied that unlawful conduct has occurred, the court can make such orders (including a declaration of right) as it considers appropriate. These include orders for damages, along with a range of other orders outlines in clause 125. Certain interim injunctions can also be made pursuant to clauses 126 and 128. NFF recommends that the provisions in the consolidated act. • Relating to the remedies awarded by the courts be based on a review of the effectiveness of monetary and none monetary remedies for discrimination matters; • Relating to orders to be made by courts in discrimination matters, including legislative guidance those common law principles relevant to the termination employment be applied when discrimination involves such termination.
Access to legal representation Clauses 129 to 130	Clause 129 provides that parties are entitled to be self represented or represented by a lawyer, or by some other person (with certain limitations). Clause 130 provides a person involved in proceedings before the court can apply to the AG for the provision of financial assistance for a legal representation, the requires that reasonableness and financial hardship, be shown. These provisions generally replicate existing provisions. NFF is of the view that a complaint need not be a technical legal document, a poorly drafted complaint can impede the respondents reply due to the complainant not particularising the issues at hand. NFF is of the view that both claimants and respondents should have adequate access in the form of alternate dispute resolution mechanisms to refine and clarify the issues at hand.

Costs Clause 133	Clause 33 provides that each party is to bear their own costs, but also provides that if the court considers that there are circumstances they are justified it in doing so, it may make such orders as to costs as the court considers just. This is in line with recent amendments made to the Fair Work Act under the Fair Work Amendment Bill 2012. NFF supportive of such an approach and is of the view that vexatious claims could undermine the consolidated act.
Establishment, functions, powers and liabilities of the AHRC Part 6.1	Clause 140 outlines the functions of the AHRC, which includes intervening with leave in any proceedings before a court under this Act (including an appeal from a decision made in such proceedings) as well as a range of functions conferred by other Acts. The general powers available to the AHRC outlined in clause 155 include all things necessary or convenient to be done for or in connection with the performance of its functions. The membership of the AHRC is outlined in clause 160 as: the President; the Aboriginal and Torres Strait Island Social Justice Commissioner; the Age Discrimination Commissioner; Disabilities Commission Commissioner; the National Children's Commissioner; the Race, Discrimination Commissioner; sex Discrimination Commissioner. The maximum period a person can service as Commissioner is seven (7) years. NFF is generally supportive of the provisions. Although in relation to industry disputes, NFF would welcome the appointment of Commissioners that have the agricultural industry experience under the flexible working arrangements, such as a part-time appointment(s) from the agricultural industry.

Once again the NFF thanks the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to provide comment in relation to the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth).