Chambers of the Hon. Diana Bryant AO
Chief Justice, Family Court of Australia

Submission to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Bill of the Human Rights and Anti-Discrimination Bill 2012

21 December 2012

Introduction

I welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's ("the Committee") Inquiry into the Bill of the Human Rights and Anti-Discrimination Bill 2012 ("the Bill"). I confirm the Bill was referred to the Committee on 21 November 2012 for inquiry and report by 18 February 2013.

This submission is made by me in my role as Chief Justice of the Family Court of Australia ("the Court"), in consultation with the Court's Law Reform Committee. I emphasise that the views contained in this submission are my own and may not necessarily reflect the views of all of the other members of the Court.

This submission discusses issues arising in the Bill that are of interest to me from a substantive legal perspective and as a result of the Court having rights and responsibilities as a duty holder under various anti-discrimination statutes. I intend to discuss issues in the order in which they appear in the Bill, which is not reflective of the importance I accord to them. Those matters that I consider to be the most significant arise in respect of the functions of the Australian Human Rights Commission ("the Commission"), particularly the mooted removal of the power of the Commission to appear as amicus curiae and of the requirement for the National Children's Commissioner to report on young people's enjoyment of human rights in Australia on an annual basis, and the complaints process with respect to the introduction of a shifting burden of proof.

Protected attributes – the inclusion of gender identity and sexual orientation and extension of the definition of marital status

Clause 17 of the Bill makes it unlawful to discriminate against a person on the basis of a 'protected attribute'. Protected attributes include aspects of an individual that cannot change (such as race or social origin) and attributes that may change over time (such as disability, age, marital status, or political opinion). Clause 17 includes the grounds covered by the four existing anti-discrimination Acts. It also includes the new grounds of gender identity (clause 17(1)(e)) and sexual orientation (clause 17(1)(q)), as well as extending the ground of marital status to marital or relationship status so as to include same-sex couples (clause 17(1)(h)).

Gender identity will cover people who are born as one sex but identify as another sex and people born intersex who identify as either sex.

According to the Explanatory Notes, the introduction of gender identity as a protected attribute matches the highest current standards in State and Territory anti-discrimination laws.

The Explanatory Notes state that sexual orientation is introduced in the Bill, subject to the religious exemptions in clauses 32 and 33. The Notes observe that sexual orientation is protected in all other Australian anti-discrimination laws and "[i]nclusion of the ground in the Bill will rectify the anomalous failure to protect this attribute fully at Commonwealth level." It implements recommendation 43 of the Senate Standing Committee on Legal and Constitutional Affairs' *Inquiry into the Sex Discrimination Act 1984* ("the SDA inquiry").

Marital or relationship status extends the purview of the attribute protected under the Sex Discrimination Act, namely discrimination on the basis of marital status, to prohibit discrimination against same-sex couples. The inclusion of same-sex couples implements recommendation 4 of the SDA inquiry.

I note that the Bill also covers discrimination on the basis of a combination of attributes, so that person alleging discrimination can seek to demonstrate it by reference to individual attributes (gender identity, sexual orientation, relationship status, age) or as a result of a combination of attributes.

The inclusion of gender identity and sexual orientation, and the extension of "marital status" to include "relationship status", is of relevance to the Court in a number of ways. The Court exercises a welfare jurisdiction under section 67ZC of the *Family Law Act 1975* ("the Family Law Act"), which vests it with jurisdiction to hear and determine applications by or on behalf of young people who identify as other than their birth sex seeking orders to undertake medical treatment (surgical or otherwise) that would enable them to live as their affirmed sex. Examples include *Re: Alex*: *Hormonal Treatment for Gender Identity Dysphoria* (2004) FLC 93-175; *Re: Brodie* [2008] FamCA 334 and *Re: Jamie (Special Medical Procedure)* [2011] FamCA 248. The Court also has jurisdiction to hear and determine applications by or in respect of young people born with an ambiguous or indeterminate sex to undertake medical treatment (surgical or otherwise) that would enable them to have the appearance of a particular sex. An example of such a case is *In the Matter of the Welfare of A: a Child* (1993) FLC 92-355. The Court has also heard and determined an application for a declaration of validity of marriage involving a female and a female to male post operative transsexual (see *In Re: Kevin: Validity of Marriage of Transsexual* (2001) FLC 93-087). Generally, the Court has jurisdiction to hear and determine applications for parenting and property orders between de facto same-sex former couples.

I have had the benefit of reading the submission of the Organisation Intersex International Australia Limited to the Committee's inquiry and was interested in that

organisation's comments about the definition of "gender identity" and the requirement, as currently contained in the Bill, that a person identify as a member of the other sex on a genuine basis. I consider that there is some force in their argument that this requirement should be removed because that it is not one that applies to any other protected attribute and it does not appear in state legislation in New South Wales and Queensland. I appreciate that some jurisdictions such as Victoria have introduced a 'bona fide' requirement in identifying as a member of another sex but if the Bill is intended to be reflective of the current highest standards of State and Territory law, in my view the 'genuineness' requirement should be removed.

Subject to my comments above, I generally support this amendment.

Exceptions to unlawful discrimination

Exception related to other laws, court orders etc.

I observe that clause 26 of the Bill contains an exception for conduct necessary to comply with Commonwealth Acts and instruments subject to disallowance. Clause 29 contains an exception for conduct in accordance with laws that treat young people differently because of their vulnerability. Clause 31 contains an exception for court orders, determinations and industrial instruments.

Clauses 26 and 31 remake exceptions that currently appear in anti-discrimination statutes. Clause 29 is a new provision.

The Explanatory Notes state that conduct necessary to comply with Commonwealth Acts and instruments subject to disallowance would also cover conduct that is necessary to comply with the definition of marriage under the *Marriage Act 1961* (Cth). The exception is designed only to cover conduct that a person is required by law to engage in. As the Committee is aware, the Court exercises jurisdiction under the Marriage Act.

Clause 29 is a new provision that provides an exception for conduct in accordance with laws that treat young people differently because of their vulnerability. Certain provisions of the Family Law Act could arguably fall within this exception. These could include for example section 100B, which prevents a child from swearing an affidavit, being called as a witness in proceedings or being present at court unless the court makes an order permitting the child to swear an affidavit, being called as a witness or being present at court; sub-paragraph 68LA(4)(b), which provides that an independent children's lawyer is not obliged to act on the child's instructions in relation to the proceedings; and subsection 69Z(2), which states that a medical procedure or other act associated with parentage testing must not be carried out in relation to a child under the age of 18 without the consent of the child's parent or guardian.

Somewhat curiously, there is no discussion of clause 31 in the Explanatory Notes.

I observe however that it replaces existing provisions in the Age, Disability and Sex Discrimination Acts.

I support these three exceptions.

Exceptions related to religion

I note that clauses 32 and 33 maintain the existing exceptions for the discriminatory conduct of religious bodies and religious educational institutions, and the exceptions for specific activities such as the ordination of priests. The newly protected attributes of gender identity and sexual orientation would be subject to these exceptions, as would that of "relationship status". I believe there is the potential for these exceptions to detract from the purpose of preventing discrimination on the grounds of gender identity, sexual orientation and same-sex relationship status but I do not propose to comment further.

Requesting or requiring information for a discriminatory purpose

I observe that clause 52 provides that it is unlawful to request information for the purpose of unlawfully discriminating, or deciding whether to unlawfully discriminate, against the person who provides that information. The example used in the Explanatory Notes is that an employer cannot ask an applicant's age for the purpose of determining whether or not they are close to retirement before deciding whether they should participate in a particular course of training, but can ask an employee their age for the purpose of collecting statistical information about the composition of their workforce.

Clause 52 is consistent with existing provisions in anti-discrimination legislation, with one exception. That is, what is described in the Explanatory Notes as the "comparator element" has been removed. Currently, proof is required that information would not have been requested of people without the protected attribute in circumstances that were the same or not materially different. The Explanatory Notes state that, practically, this requirement would be very difficult to satisfy. Clause 52 now requires that the person requesting the information requested it for the purpose of discriminating or deciding whether or not to discriminate. The shifting burden of proof, discussed later in this memorandum, applies to clause 52.

Although I understand the rationale for the change and I am supportive of it, as I discuss later in the submission, the concept of a shifting burden of proof is something about which I have some reservations.

Complaints process

There are three issues arising in the discussion of the complaints process that I will discuss in this section. They are:

- dismissal of applications (closing complaints)

- shifting burden of proof
- costs

Closing complaints

Clause 117 is described as streamlining the provisions for closing complaints, covering both closure of complaints requiring no further action and other circumstances in which the Commission may close complaints.

Under subclause 117(1), the Commission may close a complaint if the Commission is satisfied that the complaint has been settled, or if it is satisfied that the affected person does not want the Commission to deal with a complaint or continue to deal with it. This also covers circumstances of deemed withdrawal. If the Commission closes a complaint under this subsection, an aggrieved person is not able to make a complaint to the Federal Court or Federal Magistrates Court.

Under subclause 117(2), if a complaint alleging unlawful conduct is closed under this subclause, application may be made to the Federal Magistrates Court or Federal Court, with some exceptions. However, if a complaint is closed for reasons contained in subclauses 117(2)(a) to (e), an application cannot be made to the Federal Magistrates Court or Federal Court unless leave is granted.

Those reasons are:

- the Commission is satisfied that the conduct to which the complaint relates is not unlawful conduct;
- the complaint was made more than 12 months after the alleged conduct occurred;
- the Commission is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance;
- if some other remedy has been sought, the Commission is satisfied that the subject matter of the complaint has been adequately dealt with;
- the Commission is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to the affected parties.

According to the Explanatory Notes, the rationale for reducing access to the courts is to provide the Commission with an increased ability to limit clearly unmeritorious complaints and focus resources on meritorious complaints. Further, according to the Explanatory Notes, "[w]ith the early dismissal of unmeritorious complaints comes the potentially deregulatory benefit of only involving respondents in the matter when there is an arguable matter to be dealt with."

I observe that the Explanatory Notes do not include reference to the fact that the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) has passed through Parliament and received Royal Assent on 2 December 2012. Schedule 3 of that Act contains provisions relating to vexatious proceedings that apply to the Federal Magistrates Court and Federal Court. I appreciate that vexatious complaints differ from vexatious proceedings per se but I nevertheless think that it would be appropriate to refer to the Access to Justice Act in the Explanatory Notes to the Bill.

Subclause 117(2)(h)(ii) of the Bill provides that if a complaint is closed under paragraph 117(2)(h) (if the complaint alleges that Commonwealth conduct is contrary to human rights), the Commission does not have to make a finding on the question of whether the conduct is Commonwealth conduct that is contrary to human rights and is not required to take any further action. The rationale for this provision is to give the Commission "greater flexibility" to use its resources to focus on complaints that raise the most significant human rights issues.

Although I acknowledge the need to allocate scarce resources to the most deserving cases, the circumstances in which a grant of leave is required is drawn broadly. There is no discussion in the Explanatory Notes as to the number of applications to the Federal Magistrates Court and Federal Court that are currently being made in respect of the Commission's decisions and thus it is difficult to obtain a sense of the extent to which the Courts are being burdened by inappropriate or ill-founded applications. I have difficulty in supporting provisions that reduced access to the Courts without this information. The extent to which the measures contained in Schedule 3 of the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) are likely to assist in alleviating any burden on the courts arising from defective or malicious applications may also require explication. I believe that similar considerations apply with respect to the proposal that the Commission does not have to make a finding as to whether Commonwealth conduct is contrary to human rights after a case has been closed.

Shifting burden of proof

Clause 124 provides for a shifting burden of proof for the reason or purpose when unlawful conduct is alleged. Unlawful conduct includes discrimination, sexual harassment, racial vilification, requesting or requiring material for a discriminatory purpose, publishing material indicating intention to engage in unlawful conduct, and victimisation.

The Explanatory Notes state that currently under Commonwealth anti-discrimination law, the burden of proving that the respondent treated the applicant less favourably falls on the complainant. Under indirect discrimination tests, once an applicant has established the discriminatory impact of a condition, requirement or practice, anti discrimination legislation shifts the burden of proving that the discriminatory condition was reasonable to the respondent.

It appears to me that clause 124 seeks to extend the reach of the shifting burden of proof so that it applies to all types of unlawful conduct. What this means in practice is that the applicant will be required to establish a prima facie case that the unlawful discrimination occurred. After doing so, the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action, that the conduct is justifiable or that another exception applies. According to the Explanatory Notes, the policy rationale for this change is that the respondent is in the position to best know the reason for the discriminatory action and to have access to the relevant evidence.

Although I recognise that the concept of a shifting burden of proof is currently provided for in Commonwealth anti discrimination statutes, albeit on a limited basis, the policy rationale for its extension to various other forms of unlawful behaviour ie: that the respondent is in the best position to know the reason for the discriminatory behaviour and have the best access to relevant evidence is in my view tenuous. There are processes by which relevant evidence can be elicited without disturbing the principle that a person making allegations, of discrimination or otherwise, bears the burden of proving those to the requisite standard. This proposal represents a significant departure from the current approach of applying the full burden of proof to the complainant and I observe it is not consistent with the approach taken in State and Territory anti-discrimination legislation.

Costs

Currently under Commonwealth anti-discrimination legislation, the costs of proceedings in the Federal Magistrates Court and the Federal Court follow the event. Clause 133 of the Bill changes the policy so that, as a default, each party is to bear their own costs. This is the same position as that which applies in courts exercising jurisdiction under the Family Law Act and indeed the terms of subclause 133(3) are very similar to those of section 117(2A) of that Act.

The Explanatory Notes state that the change in policy has been made in part to remove a "significant barrier" to commencing litigation.

If this change is seen as necessary as an access to justice issue, on the assumption that the developing jurisprudence will provide for costs orders in appropriate cases (as has occurred under the Family Law Act), I have no difficulty with the proposal.

Functions of the Commission

This section contains what I consider to be the two of the most significant changes proposed by the Bill: removal of the power to act as amicus curiae and the reporting obligations of the National Children's Commissioner.

Removal of the power to appear as amicus curiae

Clause 146 sets out the functions of the Commission.

Currently, under section 46PV of the *Australian Human Rights Commission Act 1986* (Cth), a special purpose Commissioner has the function of assisting the Federal Magistrates Court and the Federal Court, as amicus curiae, with certain types of proceedings. These include proceedings in which the orders sought affect, or may affect to a significant extent, the human rights of a person who is not a party to the proceedings, and proceedings in which a special purpose Commissioner is satisfied that it would be in the public interest for the Commissioner to assist the court. I note that section 46PV applies to proceedings in the Federal Magistrates Court and Federal Court only.

According to the Explanatory Notes to the Bill, the power of the Commissioner to appear as amicus curiae has been removed. This is described as being consistent with modern practice in the federal courts which, it is claimed, does not distinguish the concept of amicus curiae from the general concept of intervention. Subclause 146(f) preserves a right of intervention, in the following terms:

> *The Commission has the following functions:*
> …
> *(f) to intervene in:*
> *(i) any proceedings before a court under this Act (including an appeal from a decision made in such proceedings); or*
> *(ii) any other proceedings before a court that involve human rights issues (including an appeal that involves such issues);*
> *if:*
> *(iii) the Commission considers it appropriate to intervene; and*
> *(iv) the intervention is with the leave of the court.*

The Commission has intervened in proceedings before the Family Court in the past (see for example *P & P & Legal Aid Commission of New South Wales & Human Rights and Equal Opportunity Commission* (1995) FLC 92-615 and *Re: Jamie* (2012) 46 Fam LR 439) pursuant to section 92 of the Family Law Act. Conceivably, the establishment of the position of National Children's Commissioner, once that position is filled, may result in that special purpose Commissioner being involved in proceedings that previously did not include a representative of the Australian Human Rights Commission.

As I discuss below, the Family Court at appellate and trial level has explored the roles of amicus curiae and intervener and as such I take issue with the statement that the "modern practice in the federal courts", of which the Family Court is one, is to fail to distinguish between the two roles.

In dealing with an application for intervention or alternatively to appear as amicus curiae in an appeal from a decision involving a special medical procedure, the Full Court in *Re: Jamie* (supra) said the following:

35. A person accepted as an intervener becomes a party to the proceedings with all the rights, duties and liabilities of a party. Hence an intervener can appeal, tender evidence and participate fully in all aspects of the argument: *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 per Hutley J at 396; *Re Medical Assessment Panel; Ex Parte Symons* [2003] WASC 154 per EM Heenan J.

36. The right to appear before the Court as *amicus curiae* is not a statutory right as is intervention in the family law jurisdiction. In *Levy v Victoria* (supra) at 604 Brennan CJ said of the hearing of an *amicus curiae*:

> The hearing of an amicus curiae is entirely in the Court's discretion. That discretion is exercised on a different basis from that which governs the allowance of intervention. The footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted. … [Footnotes omitted]

37. In that case at 604-5 Brennan CJ went on to say:

> It is not possible to identify in advance the situations in which the Court will be assisted by submissions that will not or may not be presented by one of the parties nor to identify the requisite capacities of an amicus who is willing to offer assistance. All that can be said is that an amicus will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected.

38. In *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520 at 533-538, Davies, Wilcox and Gummow JJ undertook a detailed review of the authorities and extra-judicial writings on the subject while stressing that no fixed or inflexible practice about the scope and role of an *amicus curiae* had emerged from the authorities, and that the discretion of the Court remained a flexible one. Their Honours stressed that the conventional view was that an *amicus curiae* could not adduce evidence or make any contribution to the record, give discovery or inspect discovered documents.

39. In *Bropho v Tickner* (1993) 40 FCR 165 at 172-173, Wilcox J said:

> In Australia, as distinct from the position in the United States, the intervention of an amicus curiae is a relatively rare event; the amicus' role normally being confined to assisting the court in its task of resolving the issues tendered by the parties by

> drawing attention to some aspect of the case which might otherwise be overlooked. I do not dispute that it may sometimes be appropriate to allow an amicus curiae to complete the evidentiary mosaic by tendering an item of non-controversial evidence; although I would prefer to reserve my opinion whether this should be permitted to be done over the objection of one or more of the parties. But it is another matter where the proposed evidence would be complex and controversial. To allow the tender of that type of evidence may be to allow the amicus curiae effectively to hijack the parties' case, taking it off into new factual issues which may greatly extend its length and thereby impose significant additional costs and disadvantages upon the parties. Rarely, if ever, should this course be permitted.

40. In *Karam v Palmone Shoes Pty Ltd* [2010] VSCA 252, the Supreme Court of Victoria Court of Appeal (Mandie and Harper JJA, Beach AJA) said at paragraph 8 in relation to the comments by Wilcox J:

> Of course, this case is an appeal and not a trial and 'the facts being closed, hijacking is less likely'. Nevertheless the above observations by Wilcox J still have some resonance in a situation where a non-party seeks leave to lead fresh evidence over the objection of the appellant and where that very evidence is available to be relied upon by the appellant himself, if he so wishes (and if the Court so permits). [Footnote omitted]

41. In *Re Medical Assessment Panel; Ex Parte Symons* (supra), EM Heenan J said at paragraph 20:

> Without excluding the possibility that there may occasionally be a case which may justify the course, my reading of the authorities leads me to the conclusion that it will be a rare and exceptional case in which an amicus curiae is permitted to adduce evidence or raise a special defence. The disinclination of the court to allow such a role is consistent with the rule that, in litigation in which only the rights of the contesting parties are affected, the cause should be accepted and decided by the court on the issues and upon the evidence which the parties themselves present for decision.

Having found that the Commission and the Independent Children's Lawyer may not fully present all the submissions the Court should have, the Full Court went on to decide whether to grant the application for intervention or permit involvement in the appeal as amicus curie. Involvement as amicus curiae was under real and active consideration by the Full Court. What was ultimately determinative was the terms of section 92 of the Family Law Act, which enables conditions to be imposed on

intervention. Thus, the Full Court permitted the applicant to intervene but only on the basis that the intervener was not permitted to call or tender any evidence, and that submissions were confined to the first ground of appeal only. This decision demonstrates that the role of amicus curiea in proceedings in federal courts is distinguishable in significant respects from that of intervener and that the two cannot and should not be conflated.

In *Re: Baby D* (2011) 45 Fam LR 313 Young J (at para 241) observed that:

> An amicus is not a party or an intervener. Usually they are not permitted to inspect documents, examine or cross examine witnesses or appeal from a decision. As they are not a party any decision of the court is not binding upon the amicus.

In this case, which involved an application to remove and not replace the endotracheal tube from the airway of a prematurely born baby, with the effect of the baby suffering respiratory collapse, the Office of the Public Advocate was granted permission to appear as amicus curiae without objection by the parties. This decision too reinforces my view that the role of amicus curiae remains a significant and relevant one.

In an article entitled 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' ((2011) 22 *Bond Law Review* 126), Ernst Willheim says the following (at pp. 135-6):

> Australian law distinguishes between an amicus and an intervener. The traditional view is that an applicant seeking to be joined as intervener must normally establish some legal interest. If the application to intervene is successful, the intervener becomes a full party and enjoys the benefits and burdens that entails, including the right to file pleadings, adduce evidence, call and cross-examine witnesses, and to appeal. As a party, an intervener is also exposed to costs orders. An intervener usually seeks to intervene in the interests of one or other of the principal parties. Indeed, the Court will commonly ask an applicant for leave to intervene to identify in whose interests the application is made. An amicus curiae, on the other hand, traditionally seeks to make submissions as a 'friend of the court' rather than in support of any particular party. The amicus seeks to be heard but is not technically a party to the proceedings. Traditionally, the amicus does not take a partisan position. Not being a party, an amicus has no right to file pleadings, lead evidence, examine witnesses or to appeal and is not normally subject to costs orders.

> The distinction may have significant practical and legal consequences. *Levy v Victoria* is a good illustration of the practical consequences. The interveners, being the Commonwealth, four States and the media proprietors, were able to make extensive oral submissions. They were also ordered to pay to both the plaintiff and to the defendants a proportion of the costs incurred by reference to the time by which the hearing was extended by their submissions. The journalists' union, which was refused leave to intervene but was granted amicus status, was confined to written submissions and was not made the subject of a costs order.
>
> The legal importance of the distinction can be illustrated by a case concerning access by single women to in vitro fertilisation treatment. The Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church sought and were given leave to be heard as amicus in the Federal Court. The parties to the proceedings in the Federal Court were content to accept the decision of the Court. The Bishops, however, were unhappy with the Federal Court's decision. As amicus, they were not a party to the Federal Court proceedings and had no right to appeal. They sought to bring certiorari to challenge the decision in the High Court but failed on a number of grounds including the lack of any justiciable issue between the Bishops and the parties or the judge and the Bishops' lack of legal interest. Had they sought and been given leave to make submissions in the Federal Court as interveners instead of as amicus, they would have had a right to appeal against the decision of that Court. The outcome may be contrasted with *Attorney-General (Cth) v Breckler*, where the Commonwealth Attorney-General, having intervened in the Federal Court, was able to appeal to the High Court (where he was ultimately successful). In *APLA Limited v Legal Services Commissioner (NSW*), Gummow J held that community organisations which sought and were given leave to make submissions as amici rather than as interveners were not parties and were therefore unable to seek declaratory relief. (footnotes omitted)

I do not believe it is accurate to state that intervention and appearance as amicus curiae are not able to be distinguished in modern federal practice. The foregoing quote illustrates the potential significance of the distinction and the consequences that can flow. As section 46PV of the Act is limited to the Federal Magistrates Court and the Federal Court, it would not be appropriate for me to oppose its excision but I nevertheless take exception to the purported rationale for so doing.

Removal of reporting obligations and timelines as to young people's enjoyment of human rights

Currently, section 46MB(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth) requires the National Children's Commissioner to submit a report to the Minister dealing with such matters relating to the enjoyment and exercise of human rights by children in Australia as the National Children's Commissioner considers appropriate. Reports are due as soon as practicable after 30 June each year.

Clause 148 of the Bill provides for the Commission's functions to report on the enjoyment of human rights by children in Australia. Clause 148(1) states:

> *The Commission may at any time give the Minister a written report on the enjoyment and exercise of human rights by children in Australia (either generally or in relation to a particular matter or matters).*

Reports may also be prepared at the request of the Minister.

Clause 148 therefore a) dispenses with the requirement to submit a report on children's enjoyment of human rights, whether on an annual basis or at all, and b) does not impose any timelines with respect of the submission of reports.

The Explanatory Notes state that "[t]his change will allow the Commission greater flexibility in performing its functions and allocating its resources, while explicitly retaining these important reporting functions."

I must confess to some surprise at this proposal, given that the statutory office of the National Children's Commissioner was only created in 2012 and the appointment of the Commissioner is yet to be announced. Self evidently, no reports have yet been submitted pursuant to section 46MB(1)(a). It therefore seems to me to be premature to dilute the obligations imposed on the Children's Commissioner by reference to the need for flexibility in resource allocation, for there can be no experience of the resources required to produce a report on children's enjoyment of human rights in Australia on an annual basis. Preparing reports and making recommendations to the Minister is a core function of the National Children's Commissioner. I believe it should not be so interfered with so that the production of reports becomes discretionary rather than mandatory, or, at the very least, until there is evidence to suggest that a mandatory reporting requirement represents an inappropriate and unjustified allocation of scarce resources.

Other issues

Failure of the Bill to address discrimination arising from having experienced domestic violence

In its submission to the Senate inquiry, the Commission submits as follows:

8.1 Domestic violence

The Commission notes that the Bill does not implement previous recommendations made by the Commission and a number of other organisations for express coverage by federal discrimination law of discrimination against persons who have experienced domestic violence, and that the Attorney-General has publicly confirmed that the Australian Government at this point does not view this Bill as the appropriate vehicle to pursue issues in this area.

***Recommendation 8*:**

The Commission recommends that:

- introduction of the Bill into Parliament should be accompanied by a commitment to continuing review of needs and options for measures to eliminate discrimination based on experience of domestic violence
- if not addressed sooner, these issues should be included in the three year review provided by the Bill rather than this review being confined to review of exceptions.

In view of the significance family violence assumes in proceedings in the Family Court and particularly the recent changes to the Family Law Act to better protect children and families from the harm associated with experiencing or being exposed to violence and/or abuse (see the *Family Law Amendment (Family Violence and Other Measures Act 2011* (Cth)), I am supportive of the Commission's recommendation. I note that the Australian Domestic and Family Violence Clearinghouse has urged the inclusion of domestic violence as a protected ground of discrimination in the Bill.

<u>Review of the effectiveness of the legislation</u>

I understand that the government is proposing a review of the exceptions to prohibited discrimination in three years, with a view to assessing whether all existing exceptions are necessary in light of the operation of the new general justifiable conduct exception. As earlier noted, the Commission has submitted that the legislation as a whole, and not just the exceptions, should be the subject of regular and ongoing review. The Commission has recommended as follows:

***Recommendation 10*:**

The Commission recommends that introduction of the Bill into Parliament be accompanied by a commitment to regular review of the effectiveness of the legislation in achieving progress towards equality and elimination of discrimination, in particular within the public sector.

My experience as Head of Jurisdiction of both the Family Court and the Federal Magistrates Court, and having extensively practised in a jurisdiction as labile as family law, has informed my view that review of major legislative amendment is always of value. I have, in other submissions, congratulated the former government for commissioning a review of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) and the current government for also undertaking various reports and inquiries, which have resulted in important changes to the Family Law Act. I whole-heartedly support the Commission's recommendation, especially in light of the recent establishment of the office of National Children's Commissioner.

Conclusion

Please do not hesitate to let me know if the Committee requires clarification of any aspect of this submission.

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Diana Bryant AO
Chief Justice
Family Court of Australia