Equal Opportunity Commission

SUBMISSION

THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012 – EXPOSURE DRAFT LEGISLATION

COMMISSIONER FOR EQUAL OPPORTUNITY

DECEMBER 2012

I welcome the opportunity to comment on the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* (the draft Bill). As a member of the Australian Council of Human Rights Agencies (ACHRA), I have had input into that organisation's submission, and for the most part agree with the commentary and recommendations therein. I am pleased that Bill reflects and resolves many of the issues raised by ACHRA, the Australian Human Rights Commission (AHRC), and the various State and Territory anti-discrimination agencies, in their submissions to the Attorney-General's *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (the Discussion Paper) earlier this year. I am using this opportunity to make further comments in respect to a number of issues, some not directly addressed by ACHRA.

INTERACTION WITH STATE AND TERRITORY LAWS

Clause 14 of the draft Bill is a simplification of equivalent operational provisions contained in existing Commonwealth discrimination legislation.[1] However, Clause 14(3) states that a "*State or Territory anti-discrimination law is a State law, or a Territory law, prescribed by the regulations for the purpose of this subsection*." Whilst it can be expected that regulations recognising all the State and Territory anti-discrimination laws will be approved, there is less certainty in clause 14(3) than exists at present, and no explanation has been given as to why a regulation is needed in the first place. In the absence of any explanation, clause 14(3) should be omitted.

MEANING OF DISCRIMINATION

Definition of unfavourable treatment

I generally support the proposed definition of discrimination in clause 19, but depart somewhat from ACHRA in its views regarding clause 19(3)[2]. ACHRA has expressed concern that clause 19(3) places undue emphasis on disadvantage to a group rather than to an individual. In my view, there has been little departure in substance in clause 19(3) from the existing definition of indirect discrimination found in most Australian jurisdictions. The emphasis in the existing definition has always been on the effect of a requirement or condition on an individual, as a member of a non-compliant group. The proposed definition is essentially the same in this respect.

Clause 19(2)(b) inserts words associated with racial vilification in the *Racial Discrimination Act* (RDA)[3] into the draft Bill's definition of discrimination. This is unnecessary, as the existing concept of less favourable, or unfavourable, treatment is already very broad and depends entirely on the facts of the case. In my experience of investigating discrimination complaints, allegations of less favourable treatment have ranged from claims of being avoided at work or overlooked for a job, through to insults and taunts, and at the extreme end, actual physical violence. Whilst clause 19(2)(b) has been inserted to "avoid doubt", the term "unfavourably" is sufficient to encompass all

[1] For example, *Disability Discrimination Act 1992*, s. 13
[2] ACHRA Response, at 12
[3] RDA, Part IIA

manner of discriminatory conduct. The clause can be omitted without any effect on the operation of clause 19(1).

PROTECTED ATTRIBUTES

1. Gender Identity

I am pleased that the new ground of 'gender identity' has been included as a protected attribute in the Bill. Aside from the Commonwealth, Western Australia is one of only two states or territories where people with different gender identities are not legally protected from discrimination. I have long sought to have the WA *Equal Opportunity Act* amended to include this ground. I support ACHRA's view[4], and that of the AHRC[5], that intersex persons need to be covered by the Bill, either in the definition of 'gender identity' or as a separate ground, and refer the Committee to the recent proposed amendments to the Tasmanian *Anti-Discrimination Act* as a guide regarding the inclusion of intersex.[6]

2. Criminal Record

I agree with the concern expressed by ACHRA and AHRC regarding the removal of the AHRC's existing jurisdiction to receive complaints of discrimination in employment and occupation on the ground of criminal record, under the *Australian Human Rights Commission Act*. Rather than removing the AHRC's role in investigating such complaints, the Bill should seek to strengthen Australia's commitment to eliminating discrimination on this ground, consistent with its obligation under ILO Convention 111.

3. Domestic Violence

I support ACHRA's position on this issue. If the Government does not consider the Bill the appropriate vehicle for addressing domestic violence and family violence, then it should declare its commitment to review measures, legislative or otherwise, aimed at doing so.

4. Family Responsibilities

I note that the definition of 'family responsibilities' extends to the care or support of a dependent child of a person, or a member of a person's immediate family. 'Immediate family' is also defined. The definition does not take into account a person's caring obligations to persons other than to members of his or her immediate family, as defined. A restrictive definition may exclude Aboriginal people, and people from a range of ethnic backgrounds whose care relationships and obligations go beyond the immediate family. The definition in the draft Bill should be replaced with the definition in the WA *Equal Opportunity Act 1984*, which states that family responsibility means

[4] *ACHRA Response to the Exposure Draft Human Rights and Anti-Discrimination Bill 2012*, at 6
[5] *AHRC Submission to the Senate Legal and Constitutional Affairs Committee*, at 10
[6] See ACHRA submission, discussing the *Anti-Discrimination Amendment Bill 2012* (TAS), at 6-7

'having responsibility for the care of another person, whether or that person is a dependant, other than in the course of paid employment.[7] Following this definition, the ground should be renamed 'family and carer responsibility.'

5. Grounds in work-related areas

Clause 22(3) provides that discrimination on the grounds of family responsibilities, political opinion, religion, and several others, shall only be unlawful when in connection with work and work-related areas. The Explanatory Notes state that the listed attributes were previously protected under the Australian Human Rights Commission Act equal employment opportunity grounds. There is no explanation as to why these grounds should remain only applicable to work and work-related areas and not to other areas. They should apply to all areas covered by the draft Bill.

EXCEPTIONS AND EXEMPTIONS

1. General limitations clause

In my response to the Discussion Paper, I expressed my approval for a general limitations exception. I agree with ACHRA that the draft Bill has reverted to the usual unsatisfactory combination of general and specific exceptions, as is currently the case with discrimination legislation in all Australian jurisdictions. ACHRA has proposed that other than clauses 23 to 25, all exceptions should be removed and dealt with in explanatory material or guidelines. I would agree, except there are also grounds for considering whether clause 24 is even necessary, or at least that it should be confined to the ground of disability, given the broad reach of clause 23. It may also be necessary to retain the exception for court orders in clause 31(2)(a).

2. Religious exceptions

Should the draft Bill's approach to exceptions remain in its current form, or similar, then the grounds of 'pregnancy' and 'potential pregnancy' should be deleted from the list to which the exception for religious bodies and educational institutions applies – clause 33(1)(c) and (d). Further, I recommended in my response to the Discussion Paper that the exception relating to employment by educational institutions should apply only to employees or contract workers with teaching or pastoral responsibilities, and not to workers whose duties are not relevant to, or do not impact upon, another person's religious beliefs, for example, a gardener or clerical officer. Clauses 33 should be amended accordingly.

I support the exclusion of discrimination connected with Commonwealth-funded age care from the exception applying to religious bodies, however, the exclusion should extend to all Commonwealth-funded programs, including education, training, and social services.

[7] Equal Opportunity Act 1984, s. 4

COMPLIANCE CODES

I share ACHRA' s concerns about the potential for a compliance codes made by the AHRC to adversely impact on a person's right to lodge a complaint of discrimination under a State and Territory discrimination law. The concept of compliance codes was not raised by the Attorney General's Department in its Discussion Paper, yet the draft Bill expands the AHRC's regulatory powers considerably in this regard. Whilst it is currently the practice of the AHRC to invite input from State and Territory anti-discrimination bodies when considering whether or not to grant an exemption application under a Commonwealth discrimination law, the AHRC does not have the power to declare that State and Territory laws will (or will not) be affected by the grant of the exemption. The draft Bill, however, takes the AHRC's powers in respect to compliance codes to a new level. Under clause 75(4), the AHRC is able to draft a compliance code that states that it is intended to affect the operation of State and Territory laws generally, or particular State and Territory laws. Whilst the AHRC will have to comply with the *Legislative Instruments Act 2003*, and conduct reasonable and appropriate consultations when drafting a compliance code, there is no specific requirement to consult with the affected States or Territories, or their respective anti-discrimination agencies before the code becomes operational. Given the significant benefit that will flow to the person or body that complies with the code, and the potential impact on the operation of State and Territory laws, consultation with the affected States and Territories should be undertaken, as a minimum.

I support ACHRA's recommendation that the draft Bill should explicitly provide for consultation with State and Territory anti-discrimination bodies prior to certifying compliance codes.