Jeremy Gordon

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Parliament House
Canberra ACT 2600
Australia

18 December 2012

Dear Sir/Madam

Submission on the exposure draft
Human Rights and Anti-Discrimination Bill

Here is my submission in respect of the above.

My interest in this matter arises from sitting on a sessional basis as an Employment Judge in London Central Employment Tribunal in England, and in the Queensland Civil and Administrative Tribunal in Australia.

In my role as Employment Judge in England (from 2001 and continuing to the present day), I have heard numerous discrimination claims. These discrimination claims have all arisen in an employment context.

In my role as sessional member of the Queensland Civil and Administrative Tribunal, I hear discrimination cases brought under the Queensland Anti-Discrimination laws.

I am a practising barrister in Queensland and in England and Wales.

I regard the draft of the Human Rights and Anti-Discrimination Bill as comprehensive and workable.

I have only two comments on the draft in relation to these matters:-

(a) the definition of indirect discrimination in Clause 19(3);
(b) what complaints the Federal courts are able to hear.

Definition of indirect discrimination

Clause 19(3) reads:-

*19(3) 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 a particular combination of 2 or more protected attributes; and

(c) the other person has that attribute or combination of attributes.

This definition omits any requirement that the complainant is unable to comply with the policy, and I agree with that.

However, contrary to the Australian Human Rights Commission submission[1], **it does not require the complainant personally to be disadvantaged by the policy either actually or prospectively**.

By Clause 89 a complaint can be made by "person aggrieved" who is the "affected party", and by Clause 122 an application to the Court may be made by the affected party.

So these scenarios are possible:-

Samantha, a human rights campaigner, makes a complaint of discrimination to the Commission each time she sees a job advertised in Australia as a full-time post only, with no opportunity of flexible working. She is aggrieved by these advertisements, and therefore is able to bring and continue with her complaints despite (for other reasons) having no intention of applying for any of the jobs.

Simon, who has a protected characteristic, applies for a job as in-house legal counsel which he has no chance of getting because he is not legally qualified at all. The job profile requires lawyers with at least 10 years' legal experience in a large commercial organisation. Upon being rejected for the job, he complains to the Commission on the grounds that those with his protected characteristics are less likely to be lawyers and less likely to have the experience required. He also argues that the qualification requirement was unnecessary and therefore not proportionate (and therefore not justified under section 23) bearing in mind it was discriminatory. On the face of it, he

[1] The Commission's recommendation 11 (submission December 2011) was that the law should require only "that a condition, requirement or practice has the effect of disadvantaging people with a protected attribute or attributes, **and of disadvantaging the particular person affected**, without the further requirement that the person does not comply or is not able to comply".

is able to pursue this complaint despite not being at a disadvantage when applying for the job because he is not legally qualified (and so would not have been offered the job anyway).

Stephanie, who is disabled, objects to all her employer's policies which put disabled persons at a disadvantage. However she is only adversely affected by one of the policies.

From these examples, it can be seen that the current wording of Clause 91(3) could:-

(a) allow the right to complain to the Commission and to bring a claim in the Federal courts to be abused by complainants;
(b) result in a lack of focus on the issues in cases where there is no actual or prospective adverse effect on the complainant;
(c) result in respondents being found to have discriminated against someone despite that person not suffering a disadvantage - this could bring the law into disrepute.

These concerns would need to be balanced against the additional burden upon a complainant if the requirement is added, making it more difficult to succeed in a complaint. It can be seen for example, that from the above scenarios if the requirement of actual or prospective disadvantage were added:-

- Samantha could only complain about those jobs which she would have applied for if they had given the opportunity of flexible working
- Simon would fail in his complaint unless he could show that he had a chance of being offered the post in the absence of discrimination
- Stephanie could only complain about the policy which adversely affected her

<u>What complaints the Federal courts are able to hear</u>

Clause 120 provides that a person may apply to the Federal courts alleging unlawful conduct. Then subclause (2) provides:-

120(2) The unlawful conduct alleged in the application:

(a) must be the same as (or the same in substance as) the unlawful conduct to which the complaint related; or
(b) must arise out of the same (or substantially the same) conduct to which the complaint related.

There is no provision which permits the Federal courts to hear any other connected claims. My concern is that often complainants will wish to make further complaints in court which (if allowed) ought to be dealt with at the same time.

For example:-

Hermione a black woman, suffers sexual harassment from A. After her complaint to the Commission is closed and she applies to the Federal Magistrates court, she alleges further sexual harassment and also racial discrimination by harassment from A. Both Hermione and A wish the court to deal with this fresh allegation, but in order to give the court jurisdiction Hermione will need to go back to the Commission with a second complaint.

Henry makes a complaint to the Commission about a failure of his employer to make reasonable adjustments at work. Upon the closure of his complaint he applies to the Federal court. But meanwhile, because he made the complaint to the Commission, he is dismissed from his employment. His claim for victimisation does not come within Clause 120(2)(b) because the unlawful conduct arises from his complaint to the Commission rather than from the failure to make reasonable adjustments. He must complain about the victimisation to the Commission before he can try to add it to his court claim.

I would suggest that the Federal Courts are given a general power to hear other claims under the Act between the same parties, made either in the original application or by amendment. It would be expected that this power would be exercised in accordance with the objects of the Act, in particular Clause 3(1)(f).

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