SUBMISSION BY THE HUMAN RIGHTS COUNCIL OF AUSTRALIA ON THE EXPOSURE DRAFT OF THE HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

Introduction

1. The Human Rights Council of Australia (HRCA)[1] is a small human rights non-government organisation which holds Special Consultative Status with the United Nations Economic Social and Cultural Council (ECOSOC). The HRCA was established in 1978 under the leadership of James Dunn with the primary objects of:

   (a) promoting, protecting and fulfilling human rights recognised in the *International Bill of Rights*[2] and other international human rights instruments; and

   (b) promoting understanding of and respect for human rights for all persons without discrimination.

2. The HRCA welcomes and strongly supports the enactment of a consolidated Human Rights and Anti-Discrimination Act. The exposure draft of the Bill to which this submission relates is a very good improvement on the current range of laws which suffer from a range of inconsistencies and omissions. The HRCA notes, for example, that the Bill includes discrimination on the ground of sexual orientation. This is a welcome addition to the list of protected attributes and long overdue at a federal level. The following comments are intended to draw attention to and suggest correction or improvement of a number of perceived deficiencies with the Bill.

Clause 6 Definition of human rights and prescribed international instruments

3. Clause 6 of the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (the Bill) defines human rights as 'the rights and freedoms recognised or declared by the human rights instruments'. The instruments prescribed at clause 3(2) include seven core human rights treaties and four International Labour Organization (ILO) conventions to which Australia is a party.[3]

---

[1] The members of the HRCA are: James Dunn AO (Convenor), Michael Curtotti (Vice-Chair), Mauro Di Nicola, Patrick Earle, Dr Roger Gurr, Dr Jeff Kildea, Professor David Kinley, Benjamin Lee (Secretary), Sanushka Mudaliar, Andrew Naylor (Chairperson), Sister Pat Pak Poy, Kathy Richards, Chris Sidoti (Executive Director), Harris van Beek (Treasurer) and Patrick Walsh.

[2] The *International Bill of Rights* comprises the Universal Declaration of Human Rights (adopted by the United Nations General Assembly in 1948), the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights* (both adopted by the United Nations General Assembly in 1966 and in force from 1976).

[3] *International Convention on the Elimination of All Forms of Racial Discrimination*, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights*, *Convention on the Elimination of All Forms of Discrimination Against Women*, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*, *ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*, *ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, *ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer*.

4. The Human Rights Council of Australia (HRCA) welcomes the inclusion of these instruments, and note the Bill's consistency with the human rights instruments prescribed in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).[4] However, it is submitted that the clause 3(2) list should be extended to better meet the Bill's object of 'eliminat[ing] discrimination, sexual harassment and racial vilification, consistently with Australia's obligations under the human rights instruments and the ILO instruments'. Specifically, the list should be extended to include the *Universal Declaration of Human Rights* (UDHR), the *Declaration on the Rights of Indigenous Peoples*, and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.*

5. The UDHR, together with the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR), comprises the International Bill of Rights. The principles of equality and non-discrimination are foundational to the UDHR (see paragraph 45 below). Further, the clause 151(1)(c) requirement that the Australian Human Rights Commission (AHRC) have regard to 'the principle that every person is free and equal in dignity and rights' in performing its functions and exercising its powers is in fact an extract from Article 1 of the UDHR. The UDHR's inclusion in clause 3(2) would therefore be instructive to the Bill's interpretation and – in line with the Bill's objects at clause 3(1)(b) – give 'effect to Australia's obligations under the human rights instruments'.

6. The *Declaration on the Rights of Indigenous Peoples* is an authoritative international instrument that is supported by Australia.[5] It is instructive to various segments of the Bill, including special measures (clause 21) and the roles of the Aboriginal and Torres Strait Islander Social Justice Commissioner in relation to the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders (per clauses 147 and 153).

7. The *Australian Human Rights Commission Act 1986* (Cth) gives the AHRC functions in relation to the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.* Given the Bill's retention of these functions and its treatment of religion as a 'protected attribute', the declaration should be prescribed.

8. Finally, the definition of human rights in clause 6 should provide for reference to *other relevant international instruments*. The *Australian Human Rights Commission Act* at section 3(1) defines human rights as 'the rights and freedoms recognised in the Covenant, declared by the Declarations *or recognised or declared by any relevant international instrument*' (our emphasis). This construction recognises the interrelatedness of different human rights instruments as well as the organic and dynamic development of human rights norms and principles as captured by such instruments. It also augments clause 151(1)(b) of the Bill, which provides that in

---

[4] At section 3.

[5] Statement by the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP, 3 April 2009. See http://www.indigenousportal.com/World/Australia-Government-endorses-UN-Declaration-on-the-Rights-of-Indigenous-Peoples.html.

performing its functions and exercising its powers, the AHRC must have regard to 'the indivisibility and universality of human rights'.

9. The HRCA therefore recommends that the definition of human rights in clause 6 be amended to read:

> ***human rights*** means the rights and freedoms recognised or declared by the human rights instruments or recognised or declared by any relevant international instrument.

10. We also recommend the insertion of a provision mirroring section 47 of the *Australian Human Rights Commission Act*, allowing for the declaration of international instruments.[6]

Clause 17 Definition of "protected attribute" – criminal record

11. Clause 17 of the Bill removes the jurisdiction of the AHRC under the *Australian Human Rights Commission Act* to receive complaints of discrimination on the basis of criminal record in employment and occupation. The Bill does not replace this existing provision or otherwise include any other protection for persons who are discriminated against on the basis of their criminal record. As such, the Bill has omitted to provide any legal or other avenue of recourse for persons who experience discrimination on the basis of their criminal record.

12. The current provision allows the Commission to investigate, conciliate and report on complaints of discrimination in employment and occupation based on criminal record.[7] While the current provision does not give complainants a legally enforceable cause of action, on a practical level, it does provide them with an avenue in which to raise and address their concerns. For example, through negotiations some individuals are able to obtain a positive and mutually agreeable outcome, which may in turn ensure greater equality of opportunity in employment for those with criminal records.

13. The current provisions of the *Australian Human Rights Commission Act* satisfy

---

[6] 47 Declaration of international instruments
(1) The Minister may, after consulting the appropriate Minister of each State, by legislative instrument, declare an international instrument, being:
(a) an instrument ratified or acceded to by Australia; or
(b) a declaration that has been adopted by Australia;
to be an international instrument relating to human rights and freedoms for the purposes of this Act.
(2) The declaration must include:
(a) a copy of the international instrument; and
(b) a copy of whichever of the following is applicable:
(i) Australia's instrument of ratification of, or accession to, the international instrument;
(ii) the terms of any explanation given by Australia of its vote in respect of the international instrument.

[7] Part II- Division 4 (section 30, 31, 32) *Australian Human Rights Commission Act 1986* (Cth) and *Australian Human Rights Commission Regulations 1989* (Cth), reg 4 provides the AHRC with power and functions in relation to discrimination in employment on the ground of criminal record. The AHRC's jurisdiction to investigate complaints based on criminal record discrimination is underpinned by *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation,* which is scheduled to the *Australian Human Rights Commission Act*.

Australia's international legal obligations under the *ILO Discrimination (Employment and Occupation) Convention* (1958) ('ILO 111'). ILO 111, which Australia ratified in 1973, requires all parties to:

> declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

14. In 1989 Australia added a number of further grounds of discrimination, specifically including 'criminal record'.[8] Criminal record is the only ILO ground to have been omitted from the Bill (see the protected attributes in clause 17(1)).

15. As a result, the HRCA is concerned that Australia may no longer be in compliance with the ILO 111 Convention requirements with regard to the ground of criminal record discrimination.

16. The removal of the current criminal record protection will increase the vulnerability of people who have criminal records to discrimination. Persons with criminal records experience discrimination regularly, even where a long period of time has passed since the conviction was served and where the record is not relevant.[9] During 2011-12 the AHRC received 67 complaints based on allegations of criminal record discrimination, making up 13% of all ILO 111 complaints.[10]

17. Additionally, the Bill will disproportionately impact certain groups in society including Indigenous people, people with intellectual disabilities, young people and people from lower socio-economic backgrounds, who are more likely to have a criminal record.

18. Despite Australia's commitment to implement a policy to address criminal record discrimination, there are not sufficient or consistent protections against criminal record discrimination across jurisdictions. The *Australian Human Rights Commission Act* provides a mechanism to conciliate complaints on the basis of alleged criminal record discrimination. However, unlike other form of unlawful discrimination, such complaints are not enforceable through the judicial system. Protection from discrimination on the basis of criminal record is also inadequate and inconsistent at a state and territory level.

19. Therefore, the HRCA recommends that criminal record be included as a protected attribute in clause 17 of the Bill.

20. At the very least, the existing ILO 111 complaint stream should be maintained so as not to diminish the current level of protection afforded to persons with a criminal record and to ensure that Australia maintains its compliance with its international obligations.

---

[8] Additional non-discrimination grounds were added to the *Human Rights and Equal Opportunity Act 1986* (Cth) with the *Human Rights and Equal Opportunity Regulations 1989* (Cth).

[9] Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform* at http://www.jobwatch.org.au/uploaded_files/144623crvp0706.pdf.

[10] Australian Human Rights Commission, Annual Report 2011-12. At www.humanrights.gov.au/about/publications/annual_reports/index.html.

Clause 19 Definition of 'unfavourable treatment'

21. Clause 19 of the Bill replaces current definitions of 'discrimination' with a definition that removes the comparator and refers generally to 'unfavourable treatment'. The HRCA supports the removal of the comparator, a concept that has caused significant complexity and difficulty in the interpretation and implementation of existing legislation. The HRCA is concerned, however, at the approach towards 'unfavourable treatment' adopted in the clause. Sub-clause (2) provides that

> ***unfavourable*** treatment of the other person includes (but is not limited to) the following:
>
> (a) harassing the other person;
> (b) other conduct that offends, insults or intimidates the other person.

22. The traditional approach to discrimination focuses on harm to the person discriminated against. The harm need not be tangible, that is, physical or financial; it can also be intangible, that is, psychological or emotional. But there has been a need to establish some form of harm that goes beyond mere offence or insult. Treatment that is offensive or insulting can be harmful but it need not be. The HRCA considers that the replacement of any concept of harm with mere offense or insult makes the scope of unfavourable treatment too broad and risks trivialising the whole concept of discrimination.

23. The HRCA recommends that sub-clause (2) be replaced by the following:

> To avoid doubt ***unfavourable*** treatment of the other person includes (but is not limited to) the following:
>
> (a) harassing or intimidating the other person;
> (b) other conduct that causes tangible or intangible harm or damage to the other person.

Clause 21 Special measures

24. Clause 21 of the Bill provides the definition of special measures. The definition is new and applies a common definition across protected attributes.

25. The HRCA is concerned that the Bill does not explicitly recognise the need to consult the affected group when considering the legitimacy of a special measure. The UN Committee on the Elimination of Racial Discrimination ('CERD Committee') is also instructive on this point, requiring special measures to be designed and implemented in consultation with the affected communities on demonstrated evidence of 'need'.[11]

---

[11] UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation no 32, The meaning and scope of special measures in the International Convention on the Elimination of all Forms of Racial Discrimination,* 24 September 2009, CERD/C/GC/32 at http://www.unhcr.org/refworld/docid/4adc30382.html.

26. In addition to the need for consultation, the HRCA is also concerned that clause 21 does not require the consent of those for whom the special measure has been instituted. Consent should be incorporated into the requirements laid down in clause 21, consistent with the comments of Brennan J in *Gerhardy v Brown*:

> The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.[12]

27. The requirement of consent with regard to Indigenous peoples is clear in international human rights law. General Recommendations numbers 23[13] and 32[14] of the CERD Committee require decisions relating to Indigenous peoples and their interests to be taken only with their informed consent.

28. The *Declaration on the Rights of Indigenous Peoples*, accepted by Australia in 2009, is more specific and includes the requirement to obtain the free, prior and informed consent of Indigenous peoples who are subject to a special measure. This is a fundamental requirement of the Declaration and should be explicitly included in clause 21 of the Bill.

29. The requirement of free, prior and informed consent was included in the drafting of the Declaration to ensure Indigenous people can exercise a measure of control over their economic, social and cultural development. Each element of 'free, prior and informed consent' is an active requirement, which in the context of special measures would ensure Indigenous people support and approve the initiatives concerning them. In addition, free, prior and informed consent is necessary to ensure special measures address inequality suffered by a section or group within society and are taken for the sole purpose of securing their 'advancement'.[15]

30. Where special measures are punitive or restrict the rights of a group, free prior and informed consent is particularly important to the legitimacy of the special measure. For example, criminalising alcohol possession in specific Indigenous communities could be considered punitive, with severe consequences for people in breach of these special measures. This issue is currently under consideration by the High Court of Australia in *Maloney v the Queen* (HCA B57/12). The HRCA believes that by ensuring the requirement of free, prior and informed consent, the meaning of special measures can be clarified consistently with the requirements of international law.

31. The HRCA recommends that clause 21 include a provision requiring consultation with persons affected by special measures.

32. The HCRA further recommends that free, prior and informed consent is included in

---

[12] (1985) 159 CLR 70 at 135.

[13] UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation no 23, Indigenous People,* 18 august 1997, CERD/A/52/18, annex V at http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c.

[14] Above, n 8.

[15] UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation no 32, The meaning and scope of special measures in the International Convention on the Elimination of all Forms of Racial Discrimination,* 24 September 2009, CERD/C/GC/32 at http://www.unhcr.org/refwrold/docid/4adc30382.html.

clause 21 with regard to special measures affecting Indigenous peoples. This will represent a small but positive step towards Australia's implementation of the Declaration.

Clause 22(3) When discrimination is unlawful

33. Clause 22(1) makes it unlawful for a person to discriminate against another person if the discrimination is connected with any area of public life. This prohibition is not limited and applies in relation to all of the protected attributes. Clause 22(3) limits the operation of the prohibition in clause 22(1) by restricting it to discrimination with work and work-related areas for specified protected attributes.

34. Clause 22(3) significantly and unfairly curtails the operation of clause 22(1) of the Bill. It is not apparent why, as a matter of policy or sound principle, discrimination on the ground of the protected attributes specified in clause 22(3), should be restricted to discrimination connected with work and work-related areas.

35. The effect of clause 22(3) is to allow, for example, discriminatory conduct in the provision of accommodation and provision of goods and services to persons with particular political opinions, social origins or religious belief. This represents a very significant incursion into the way in which anti-discrimination laws have operated for many years.

36. Clause 22(3) limits the protection accorded in respect of discrimination on a number of grounds including nationality or citizenship. In respect of non-nationals in Australia who may be lawfully in the country including for purposes of work, study or tourism, clause 22(3) would deny them the benefits of protection from discrimination on the basis of nationality or citizenship in a number of relevant fields. The child of a migrant worker lawfully in the country should not be discriminated against in respect of education for example (noting that this principle applies to the permanent as well as temporary visa holder). A tourist ought not face discrimination in the provision of goods and services or access to public places. A non-citizen ought not face discrimination in respect of admission to clubs and societies or sporting activities. Such observations can be readily made with respect to the other protected grounds of discrimination.

37. In so far as it may be necessary to allow for limited discriminatory conduct in the ground of nationality, citizenship or immigration status, any such exemptions should be developed having careful regard to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (one of the nine core international human rights treaties, and the principal one dealing with the situation of non-citizens beyond national borders). Although Australia is not a party to this Convention, many of the provisions of the Convention repeat, reiterate or reinforce principles of human rights law that already apply by virtue of Australia's ratification of the other major human rights treaties, for example, the ICCPR and/or the ICESCR.

38. Clause 22(3) should be deleted. In so far as it may be necessary, for sound policy reasons consistent with Australia's international legal obligations, to provide exemption from the operation of the prohibition on discriminatory conduct in clause 22(1), this can

be achieved by specific exemptions that are based on the protected attributes (see Division 4 of Part 2-2 of the Bill).

Clause 23 General exception

39. Clause 23 introduces a general exception to unlawful discrimination for 'justifiable conduct'. This is a novel concept in anti-discrimination legislation in Australia that undermines traditional and international definitions of discrimination and deprives it of its substance.

40. In international law, discrimination focuses on the impact of conduct on the victim. If a victim is harmed by conduct based on a prohibited ground or attribute, then there is discrimination. Discrimination is never justifiable; it is always unacceptable. If some conduct is justifiable, then it is not discriminatory. This issue goes to the very nature and definition of discrimination, not to the question of exceptions.

41. Under Australian law, discrimination has been a civil wrong, not a crime, and so the focus of the law has been on the impact on the victim, not the subjective intention of the perpetrator. Clause 23 fundamentally changes the approach to discrimination found in all current laws at Federal, State and Territory levels. It provides a general exception that tolerates discriminatory conduct provided it is 'justifiable'. It says:

> conduct of a person (the ***first person***) is ***justifiable*** if:
>
> (a) the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim; and
> (b) that aim is a legitimate aim; and
> (c) the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and
> (d) the conduct is a proportionate means of achieving that aim.

42. Sub-clauses 23(3) and (4) do not provide for any effective constraints on the kinds of discriminatory conduct that will be justifiable and therefore lawful. This is because the exposure draft of the Bill does not attempt to define when an aim will be 'legitimate' (para (b)). Sub-clause (3) has the effect that the discriminatory conduct must be engaged in 'in good faith', it must be proportionate and an objective standard must be applied to whether the conduct is effective in achieving the aim. None of these factors, however, limit the nature or kind of the aim of the conduct; they only limit the extent of the conduct and prevent conduct that is mala fides. The absence of any definition of the concept of 'legitimacy' is fundamental to the lack of effectiveness of the Bill. It will be productive of great uncertainty and much litigation. It is tantamount to ceding legislative power to the courts. The courts perform an enormously valuable and important function but it is not the role of the courts to 'fill the gap' regarding the kinds of discriminatory conduct that should be lawful; this is properly the role of the legislature. The Bill should prescribe the circumstances in which conduct that would otherwise be discriminatory should be legitimate or justifiable and therefore permissible. The Bill should not provide a basis for any and all kinds of unspecified discriminatory conduct to be made lawful.

43. In relation to the 'good faith' requirement in clause 23(a), this is an entirely ineffective form of control on the kind of discriminatory conduct that should be made lawful by the Bill. There are many statutory provisions that make conduct lawful where it would otherwise be unlawful if it is performed in good faith. For example, s 26V of the *Civil Liability Act 2002* (NSW) protects a public official in the performance of statutory functions under Division 6 of Part 2A of the Act where the statutory function is performed in good faith. Where a public official performs his or her statutory functions without malice, he or she will be immunised from civil liability even if the performance of a statutory function breaches a civil duty of care (for example, the duty is performed negligently). It is reasonable that there be protection from civil liability where a statutory function is performed in good faith. It is not reasonable that the good faith protection should be applied where, as in clause 23, the conduct is left undefined.

44. An example illustrates the problem. Making as much money as possible within the law is a legitimate aim in Australian society. A shopkeeper aims legitimately to make as much money as possible. The shopkeeper might consider, in good faith, that the achievement of that aim will be enhanced in a prejudiced community if only Anglo Australians are employed as salespersons. Because the community is prejudiced, it is reasonable to consider that employing only Anglo Australians would achieve the legitimate aim of making as much money as possible. So the conduct is discriminatory but justifiable under the clause. There are as many other examples as there are discriminatory activities. The effect of the general exception would be to gut the whole concept of unlawful conduct and make the legislation nothing more than aspirational. It would ensure an explosion of litigation as respondents to discrimination complaints argued, without doubt with great success, that their conduct was justifiable.

45. The HRCA notes from the Explanatory Notes that "clause 23 is intended to align the international human rights law concept of 'legitimate differential treatment'". Whether anti-discrimination legislation should provide for specific exceptions to unlawful discrimination or whether, on the other hand, more open-ended legitimate justification provisions should be used, has the been the subject of much debate and a variety of legislative approaches for many years (see, for example, C O'Cinneide, "Comparative European Perspectives on Age Discrimination Legislation", 22 August 2002). Without attempting to summarise this debate, there has been significant criticism of open-ended legitimate justification defences. They result in legal uncertainty and inconsistency in the application of discrimination standards. Clause 23 will institutionalise reliance upon the Federal Court as an arbiter of discrimination standards. It is perhaps understandable that there might be a preference for open-ended legitimate justification defences with new anti-discrimination legislation in a jurisdiction that does not have a history of such legislation. By contrast, Australia has had anti-discrimination legislation in place for more than 35 years. The jurisprudence is significant and well-established. In so far as it may be felt that additional exceptions are needed, the appropriate approach is for a careful analysis of the jurisprudence in combination with consultation of those likely to be affected and then, where justified, the enactment of an additional specific exception. Clause 23 is the antithesis of this kind of approach to law-making. It will be a significantly retrograde step in the history of anti-discrimination legislation in Australia. It will be inconsistent with the approach taken in other Australian jurisdictions, which depend upon specific exceptions (for example,

Anti-Discrimination Act 1977 (NSW)). This inconsistency between State/Territory and Commonwealth legislation is highly undesirable.

46. The HRCA recommends that clause 23, the general exception of 'justifiable conduct', be deleted from the draft Bill.

Clause 28 Exception for conduct on ground of nationality or citizenship

47. Clause 28 exempts from coverage of the Bill any action undertaken in performance of a Commonwealth law. Such a broad ranging exemption requires careful validation both at the time of enactment and on a continuing basis.

48. A basic precept of human rights and anti-discrimination law is the principle of equality. It is provided for by Article 7 of the UDHR, which relevantly states:

> All are equal before the law and entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration ….

49. Laws that deny a non-citizen equal protection of the law offend against this fundamental principle of equality.

50. International human rights law recognises discrimination on limited grounds on the basis of citizenship (for example, in respect of residency or participation in electoral processes). Without necessarily endorsing the validity of such discrimination, the HRCA supports exemptions from the principle of non-discrimination only where they are consistent with currently accepted international human rights law. Any such exclusions should be subject to careful review by the Parliament and kept under review over time.

51. The HRCA recommends:

    (a) that clause 28 be supplemented by a provision requiring parliamentary inquiry and review of laws that discriminate on the basis of nationality or citizenship on a five year cycle, enabling members of the public (particularly individuals affected by such laws) to make public submissions on their review or elimination and

    (b) that immediately on enactment the Government undertake an inquiry to fully review discrimination on the grounds of nationality in law and government practice.

Clauses 26-31 Other Provisions Dealing with Exclusions Grounded in Law

52. Clauses 26 to 31 all allow for discrimination if the conduct in question is in pursuit of law or a court order. The notion that compliance with a law or lawful order should provide a proper basis for excusing what would otherwise be discriminatory conduct is not of itself objectionable, but it does create tensions and difficulties in practice. It also

gives rise to a need for continuing review of laws that permit discriminatory conduct. Laws should be periodically reviewed to ensure that value judgments or societal standards that may be reflected in the laws are assessed against contemporary discrimination standards and re-assessed against the general principles of equality and equal protection before the law.

53. For example, the need under work health and safety legislation for an employer to ensure, so far as reasonably practicable, that the health and safety of persons is not put at risk from work carried out at the employer's business undertaking, often conflicts with the rights of employees with disabilities not to be discriminated against. Whether conduct of the employer in preventing a disabled employee from accessing benefits enjoyed by able-bodied employees is discriminatory will depend upon whether reasonable adjustment can be made. Such questions are not always productive of easy answers.

54. The HRCA recommends that clauses 26-31 be supplemented by a provision requiring parliamentary inquiry and review of laws that permit discrimination on a five-year cycle. Members of the public (particularly individuals affected by such laws) should be permitted to make public submissions to these inquiries.

Clause 33 Religious exception

55. Clause 33 provides an exception relating to six protected attributes for bodies established for religious purposes and for educational institutions conducted in accordance with the tenets of a religion. The existence of such an exemption raises the harmonisation of underlying values informing human rights in a situation where they may conflict: the first is the inherent equality of all human beings (hence, non-discrimination); the second is the inherent freedom of the individual (in this context in matters of religion, belief and conscience). The latter reflects an understanding that has emerged over centuries of the inadvisability of the State intruding on matters of belief. This understanding is embodied in the constitutional requirement that the Commonwealth may not make any law, among other things, "prohibiting the free exercise of any religion".

56. Whether a religious exception is justifiable in respect of any of the unlawful grounds of discrimination is a matter that needs to be carefully approached.

57. First, if any religious exception is justifiable, there is no logical reason why it should single out some particular protected attributes and not others. There is no logical reason why a body established for religious purposes should be allowed to discriminate on the ground of sex or sexual orientation but not on the ground of race. Historically, including in very recent history, some religious groups now considered mainstream have discriminated on the ground of race. Many other, smaller groups continue to discriminate on many grounds that are not covered by the exception. The only attribute that is distinguishable logically for religious purposes is religion.

58. The HRCA recommends that sub-clause (1) be amended by deleting all protected attributes except "religion".

59. Second, the formulation of the exception in clause 33 significantly expands the religious exemption under present law. The test to be applied under sub-clauses (2) and (4) (the proposed test) is:

> the discrimination consists of conduct, engaged in in good faith, that:
>
> (i) conforms to the doctrines, tenets or beliefs of that religion; or
> (ii) is necessary to avoid injury to the religious sensitivities of adherents of that religion.

60. This is consistent with the formulation in section 37 of the *Sex Discrimination Act 1984* but it is far broader than that provided for in section 3 of the later *Australian Human Rights Commission Act*. The current comparable test under the *Australian Human Rights Commission Act* (the current test) is:

> an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

61. The current test applies 'doctrines, tenets, beliefs or teachings' to the way the institution is conducted, not as a test of discrimination. The only justifiable basis for the conduct under the current test is that it is necessary 'to avoid injury to the religious susceptibilities of adherents'. So conduct that does not offend adherents is not exempt under the current test, even if it accords with religious tenets.

62. The proposed test is much broader permitting both discrimination that conforms to religious tenets and discrimination that offends adherents. It means, for example, that conduct that is consistent with some esoteric tenet that not even believers take seriously is still permissible. And it means that conduct that simply offends believers is permissible even if it is not required by the tenets of the belief. The proposed test is a reversion to the earlier test found in the *Sex Discrimination Act* and substantially reduces the standard found in the more recent *Australian Human Rights Commission Act*.

63. A subjective test of sentiments of 'offence to religious susceptibilities' is far too low. Apart from anything else, it treats religious individuals and institutions as less able to apply principle and reason as a test of the appropriateness of any given 'sentiment', including whether the sentiment actually reflects the tenets of the particular religion. For example, an attitude of hostility towards the followers of a particular creed that might exist within a certain religious community or practice ought not justify unlawful discrimination.

64. Another issue that arises in respect of the scope of any exemption is the appropriateness of such an exemption where activities undertaken by a religious body are wholly or partially funded by the State. Acceptance of public funding legitimately engages the interests of taxpayers in the use of those funds in accordance with the general law. As no religious body is compelled to accept public funding in respect of its activities, it does not infringe on religious freedom for conditionality of non-discrimination to apply.

65. Accordingly, the following is suggested:

(a) **Public funding**. Exemptions from discrimination on the grounds of religious tenets ought not apply in relation to activities partially or wholly funded by the State.

(b) **Conscientious objection**. Rather than the vague and dubious proposition of 'religious susceptibility' a more robust test is required, which relates to the subjective motivation of a particular act or decision by a religious body (and perhaps individual). In this respect the concept of 'conscientious objection' may be useful. To require an individual to act contrary to conscientiously held religious beliefs goes to the very heart of the concept of religious freedom. However, by itself (in the context where the human rights of other individuals are also concerned) such a subjective test is insufficient and would appropriately be coupled with the existing objective test of the actual doctrines, tenets or beliefs of the religion concerned.

66. The HRCA recommends that, regardless of the number of protected attributes it is to cover, the formulation of the two prongs of the test should be cumulative rather than alternative, that is, sub-clauses (2) and (4) should be amended to read:

the discrimination consists of conduct, engaged in in good faith, that:

(i) conforms to generally held doctrines, tenets or beliefs of that religion or denomination; **and**
(ii) was undertaken in conscientious performance of or compliance with those doctrines, tenets or beliefs.

67. The HRCA further recommends that any religious exception not apply to any activity which is partially or wholly funded by public funds. In such cases no question of expression of religious freedom arises. Rather it is reasonable for the State to require public funds to be expended and applied wholly in accordance with principles of non-discrimination.

Clause 51 Vilification

68. Division 3 and its sole clause, clause 51, provide partial prohibition of vilification, that is, racial vilification only. Vilification is a human rights violation. There is no reason in law or logic why it should be prohibited only for one protected attribute and not them all.

69. The HRCA recommends that clause 51 should be amended to extend to all protected attributes in the Bill.

70. The HRCA refers to its comments above on the definition of 'unfavourable treatment' in clause 19. Similar concerns apply here in that the conduct should be harmful in some way and not merely offensive or insulting. Sub-clause (2) presently reads:

> the conduct is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people.

71. The HRCA recommends, consistently with its recommendation in relation to clause 19, that sub-clause (2) be amended to read:

> the conduct is reasonably likely, in all the circumstances, to harass, intimidate or cause tangible or intangible harm or damage to another person or a group of people.

Clause 60 Right to equality before the law

72. Clause 60 of the Bill creates a lawful protection for equality before the law for people of all races. The HRCA supports the provision but it is inadequate; the protection for equality before the law for people of all races should be extended to all persons whatever their protected attribute. There is no sound policy reason for the protection to be confined to race. To the extent that it is necessary for some persons to have a special status before the law (for example, children or mentally ill persons), then appropriate and specific exceptions can easily be provided for that limit to the operation of the general principle of equality.

73. The principle of equality is fundamental to anti-discrimination laws as well as Australia's international human rights legal obligations. In its current terms, clause 60 detracts very significantly from the operation of this principle and is in breach of international law, for example, Article 26 of the ICCPR which provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

74. Consistent with Article 26 of the ICCPR, clause 60 of the Bill should provide lawful protection for equality before the law for all persons in relation to all of the protected attributes.

Clause 88 ICESCR

75. The HRCA is concerned that clause 88 of the Bill prevents a complaint being made in relation to Commonwealth conduct that is contrary to rights or freedoms provided for by the ICESCR. Not only is Australia legally obliged at international law to ensure compliance with the provisions of this instrument but ICESCR makes provision for fundamental rights that are not provided for all persons among the other treaties referred to in clause 3(2) of the Bill.

76. For example, Article 12 of the ICESCR recognises the right of everyone to enjoyment of the highest attainable standard of mental health. Article 24 of the *Convention on the Rights of the Child* makes general provision in similar terms for every child to enjoy the

highest attainable standard of health. There is no equivalent provision for other members of the community in the other treaties provided for in clause 3(2) of the Bill. There is no logic in protecting children's right to health and not the right to health of other persons.

77. The human rights provided for by the major human rights treaties referred to in clause 3(2) of the Bill are universal, indivisible, interdependent and interrelated. Article 5 of the *Vienna Declaration and Programme of Action* adopted by the World Conference on Human Rights in Vienna on 25 June 1993, provides:

> All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

78. The HRCA recommends that clause 88(2) of the Bill be omitted. A person should be able to complain that Commonwealth conduct infringes a provision of ICESCR without the necessity for a provision of another human rights treaty to also be infringed.

Clauses 107ff AHRC complaint handling powers

79. The HRCA is concerned that the Bill provides inadequate machinery for the resolution of discrimination complaints by the AHRC. As a general principle, it is preferable that as many complaints as possible are resolved sooner rather than later and with as little formality as possible. Relatively few complaints should progress for determination to the Federal Court or Federal Magistrates Court. Leaving aside complaints that are obviously without merit and may be dismissed by the AHRC for lacking any substance, the only mechanisms available for resolving complaints made to the AHRC are investigation and conciliation. Investigation powers are limited to powers to obtain documents; there is no power to obtain oral testimony from witnesses. Accordingly, if there is no written record of a relevant piece of information, it cannot be obtained by the AHRC. Where there is a written record, it cannot be tested in any way.

80. There is much to be said for the focus of the AHRC's complaint handling functions to be on informal resolution in the form of conciliation or mediation. Without the power to obtain information from witnesses, however, it is likely that more complaints will progress to either the Federal Court or the Federal Magistrates Court than is likely otherwise to occur if the AHRC were to have expanded powers to resolve complaints. The HRCA recommends that the Bill be amended to provide the AHRC with power to summon witnesses to give evidence in relation to a complaint of discrimination. The AHRC should be consulted regarding any enhancement of its powers and appropriate additional funding provided.

Clauses 135ff AHRC inquiries powers

81. Clause 135(a) of the Bill provides for the AHRC to inquire into whether Commonwealth conduct is unlawful or contrary to human rights. The powers given to the AHRC to conduct such an inquiry are provided for by clause 140. In particular, the AHRC may require the production of a statement of information, documents or answers to oral questioning.

82. The HRCA recommends that the Bill enhance these powers by permitting the AHRC to enter, inspect and search premises owned or occupied by the Commonwealth. Such a power would enable the AHRC to, for example, conduct inspections of Commonwealth detention facilities to assess the extent to which the facilities and services provided therein comply with Australia's international human rights obligations. It currently makes these inspections only with the permission of the Commonwealth and so cannot make inspections as of right and cannot make unannounced inspections. The AHRC may be prevented from fulfilling its statutory obligation to inquire into Commonwealth conduct that is unlawful or contrary to human rights if its access to such facilities is made dependent upon permission being provided by other Commonwealth agencies.

Clause 145 AHRC – Paris Principles

83. The HRCA recommends that clause 145 of the Bill, which provides for the AHRC's establishment, include an express reference to the Paris Principles,[16] the United Nations minimum standards for national human rights institutions (NHRIs). The Paris Principles provide a broad framework for the status, structure, mandate, power, composition, and methods of operation of NHRIs.

84. The Bill should also be seized as an opportunity to address weaknesses in the *Australian Human Rights Commission Act* identified by the Sub-Committee on Accreditation (SCA) of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) during its accreditation reviews of the AHRC.

85. In 2011 the SCA urged the Australian Government to amend the *Australian Human Rights Commission Act* 'to clearly provide that the AHRC has the mandate to protect and promote economic, social and cultural rights'. This would meet Paris Principle A.2, which provides that a NHRI 'shall be given as broad a mandate as possible'. While the HRCA welcomes the inclusion of the ICESCR as a prescribed instrument in clause 3(2), the exclusion of ICESCR-based human rights complaints at clause 88(2) (as addressed above at paragraphs 72 to 75) reinforces the artificial and anachronistic distinction between types of rights, and runs counter to the clause 151(1)(b) requirement that the AHRC have regard to the 'indivisibility and universality of human rights' when performing its functions and exercising its powers.

86. The SCA has also listed the power to access and inspect public property and premises among the specific functions that NHRIs should have. This reinforces the HRCA's

[16] The 'Principles relating to the status of National Institutions for the Promotion and Protection of Human Rights', per General Assembly resolution 48/134 of 20 December 1993.

recommendation at paragraph 79 that the AHRC be given the power to enter, inspect and search Commonwealth premises.