Redfern Legal Centre

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AUSTRALIAN HUMAN RIGHTS CENTRE

Senate Standing Committee on Legal and Constitutional Affairs
By email: legcon.sen@aph.gov.au
7 January 2013
Attention: Committee Secretary

Please find attached the joint submission of Redfern Legal Centre and the Australian Human Rights Centre in response to the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012.

This submission brings together Redfern Legal Centre's experience in advising and representing applicants in discrimination law at the NSW and Federal level, with the Australian Human Rights Centre's academic scholarship in domestic and international human rights standards, laws and procedures.

We would welcome the opportunity to appear before the Senate Standing Committee to further discuss our submission.

Yours faithfully,
Redfern Legal Centre and the Australian Human Rights Centre

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SUBMISSION: Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012

AUTHORS: Natalie Ross and Joanna Shulman (Redfern Legal Centre) and Rosemary Kayess (Australian Human Rights Centre.)

DATE: 7 January 2013

1. Introduction: Redfern Legal Centre and the Australian Human Rights Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal and human rights organization. RLC has a particular focus on human rights and social justice. Our specialist areas of work are discrimination, domestic violence, tenancy, credit and debt, employment, and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community. Contributing authors Joanna Shulman and Natalie Ross are both discrimination law practitioners with over 25 years experience in the area between them.

The Australian Human Rights Centre (AHRCentre) is an inter-disciplinary research and teaching institute based in the Faculty of Law at the University of New South Wales (UNSW). The AHRCentre aims to promote public awareness and academic scholarship about domestic and international human rights standards, laws and procedures through research projects, education programs and publications. The Centre brings together practitioners, research fellows and student interns from Australia and internationally to research, teach and debate contemporary human rights issues. Contributing author Rosemary Kayess is a Visiting Fellow at UNSW Law and co-directs the disability and human rights project. Her areas of expertise are: International law, Human rights law (disability), and Discrimination law.

Both Rosemary and Joanna teach discrimination law at the University of New South Wales**.**

2. RLC and AHRCentres' View in Summary

RLC and AHRCentre welcome the consolidation of federal human rights and discrimination laws into a single Act, with greater consistency and simplicity. We support the passage of the Bill, while submitting that some further improvements can be made in particular to the provisions relating reasonable adjustments, standing and protected attributes as detailed below**.**

3. Recommendations

Recommendation 1: The objects clause be redrafted to clearly establish substantive equality as an overarching principle and that the provision of a remedy be clearly stated as a central objective.

Recommendation 2: Section 8 relating to multiple reasons or purposes for the conduct be replaced by section 10 of the *Disability Discrimination Act 1992*.

Recommendation 3: Intersex be included as a separate protected attribute in s17.

Recommendation 4: Being a victim of domestic violence be added to the list of protected attributes.

Recommendation 5: Irrelevant criminal record be included as a protected attribute in all areas of public life. Failing this, at a minimum the current capacity to complain about discrimination on the basis of criminal record should be retained.

Recommendation 6: Delete clause 19(2)(b) and consider making the vilification provisions in clause 51 applicable to all attributes.

Recommendation 7: Replace the reasonable person test in 'Special Measures' with a requirement for consultation with the class of people the special measure is intended to benefit.

Recommendation 8: Move the requirement to make reasonable adjustments to section 22 and do not limit it to disability.

Recommendation 9: that discrimination on the basis of family responsibilities, industrial history, medical opinion, nationality or citizenship, political opinion, religion and social origin be unlawful in all areas of public life, not just work.

Recommendation 10: that "social origin" be defined to include being homeless, being in receipt of social security payments and being a public or community housing tenant.

Recommendation 11: Replace the phrase in clause 23(3)(b) that, ‘that aim is a legitimate aim ‘ with the phrase ‘that aim is consistent with achieving the objects of the Act.’

Recommendation 12: Delete the inherent requirements defence.

Recommendation 13: Delete the defence contained in section 26.

Recommendation 14: Expand s33(3)(a) to all Commonwealth funded services.

Recommendation 15: Clause 40 of the Bill relating to defence and peacekeeping exemption be deleted.

Recommendation 16: A new provision be introduced to allow for representative bodies to initiate legal proceedings with leave of the court.

Recommendation 17: The provisions relating to costs and burden of proof be retained.

4. The Objects Clause

RLC and AHRCentre support the inclusion of an objects clause in the draft legislation. The inclusion provides a strong basis for the interpretation of the provisions within the Bill.

However, the current formulation of the objects clause does not clearly establish substantive equality as an overarching principle. The current formulation is conflicting in its adoption of both formal and substantive equality as having equal status in terms of the objectives of the Act. It has long been recognised that formal equality is inadequate in achieving *de facto* equality but merely equal treatment. Hence RLC and AHRCentre support the recommendation put forward by the discrimination experts to address this.

The objects clause would also be strengthened if the provision of a remedy were clearly stated within the text as a central objective. The provision of a remedy is a core obligation under international law enshrined within the *International Bill of Human Rights* and the thematic conventions.

Recommendation 1: The objects clause be redrafted to clearly establish substantive equality as an overarching principle and that the provision of a remedy be clearly stated as a central objective.

5. Multiple Reasons or Purposes for the Conduct (s8)

Section 8 of the Bill outlines multiple reasons or purposes for the conduct. As the provision is currently formulated is unnecessarily wordy and potentially complicating. The previous formulation as contained in section 10 of the *Disability Discrimination Act 1992* was a much simpler construction.

Recommendation 2: Section 8 relating to multiple reasons or purposes for the conduct be replaced by section 10 of the *Disability Discrimination Act 1992.*

6. Protected Attributes (s17)

6.1 Sexual Orientation and Gender Identity

RLC and AHRCentre welcome the addition of sexual orientation and gender identity as protected attributes. This has great symbolic and practical importance for the many gay, lesbian, bisexual and transgender Australians, and their families. It is also important for consistency with the *Fair Work Act 2009* and State and Territory anti-discrimination laws.

However, RLC and AHRCentre suggest that there be a separate protected attribute of intersex or indeterminate sex. Intersex people may have hormones, chromosomes or sexual characteristics that are both male and female, or not wholly male or female. Their status is distinct from that of transgender people. The current definition of gender identity in the Bill does not adequately cover intersex people especially in the reference to "identification ….as a member of a particular sex". Discrimination on the ground of being intersex may not involve the person identifying as a particular sex.

Recommendation 3: That intersex be included as a separate protected attribute in s17.

6.2 Domestic Violence

RLC auspices the Sydney Women's Domestic Violence Court Advocacy Service (Sydney WDVCAS). This service supports women seeking Apprehended Violence Orders against partners, former partners and other family members at Downing Centre, Balmain, Newtown and Waverley local courts in Sydney.

In the 2009/10 financial year Sydney WDVCAS assisted 1212 women and consequently the service has significant experience in dealing with the flow-on effects domestic violence has on employment, housing and education.

In particular, Sydney WDVCAS clients dealing with family violence often report their workplaces are not supportive of their need to take time off work, and that their workplaces have little understanding of the impact of the violence on other aspects of their lives. Typically, Sydney WDVCAS clients dealing with family violence report they need to take time off work to attend medical appointments, provide statements to police, attend court (an average of three occasions), attend appointments to get legal advice, find alternative accommodation, move house, and settle children into new schools. Women also report workplace problems when their abusive partner or ex-partner begins interfering with their employment by making abusive phone calls to the workplace, or making unwelcome contact with work colleagues, or stalking or harassing her at her work.

Case study

Jenny is an accountant whose employment with a large commercial firm was initially undermined when her abusive partner, Paul, began phoning her workplace to speak to her work colleagues about his failing relationship with Jenny. When Jenny was badly assaulted by Paul in front of her two children, she and the children moved into her mother's small unit. Police charged Paul with assault and over the following months, Jenny was required on numerous occasions to take time off work to attend both the local court for the assault charges and related Apprehended Violence Order and the Family Court for parenting orders. Jenny also needed to take time off work to have maxillary surgery as a result of the injuries she sustained in the assault.

During the court process, Jenny described herself as desperate to attend counselling with her children, but was afraid to ask for any more time off work. When Jenny did request a day's leave to organise alternative accommodation, she was called to a formal meeting at her workplace and was accused by colleagues of 'not pulling her weight'. Jenny resigned and now has casual employment as a bookkeeper, and as a result has not been able to afford to move out of her mother's small unit.

Adding domestic violence as a protected attribute could assist women to overcome these difficulties and re-establish themselves.

Recommendation 4: Being a victim of domestic violence be added to the list of protected attributes.

6.3 Criminal Record

RLC and AHRCentre submit that irrelevant criminal record should be included as a protected attribute. Currently, although discrimination on the ground of criminal record is not unlawful, complaints can be made to the Australian Human Rights Commission, these complaints can be investigated and conciliated, and a report can be made to parliament. This right to lodge a complaint now appears to have been removed at a time when criminal record checks in employment have become far more common.

Case Study

Mr R was a cleaner at a government agency. He was a migrant to Australia and was not a fluent English speaker. He had been in the position for two years and had an excellent employment record. After separating from his wife she applied for an Apprehended Violence Order against him. He did not have legal representation and consented without admissions to the making of the order, although he denied being violent to his wife. He was later charged with breaching the order when he telephoned his wife's home to speak to his adult son. He was convicted when he entered a guilty plea, again without legal representation. He has no other criminal or traffic offences on his record, but was dismissed when his employers introduced a new policy of criminal record checks for all employees.

Recommendation 5: Irrelevant criminal record be included as a protected attribute in all areas of public life. Failing this, at a minimum the current capacity to complain about discrimination on the basis of criminal record should be retained.

7. The new definition of discrimination (s19)

RLC and AHRCentre strongly support the new, simpler and clearer definition of discrimination. The removal of reference to a comparator group allows the focus to be on unfavourable treatment and policies or conditions that unfairly disadvantage people with a particular attribute.

RLC and AHRCentre also support the inclusion of “intersectional” discrimination in the definition with the reference to a “combination of 2 or more protected attributes”.

7.1 Vilification

RLC and AHRCentre note that the current formulation includes an acknowledgment that unfavourable treatment includes harassment. While this is to be supported, the inclusion of clause 19(2)(b) frames the provision along the lines of vilification as defined in clause 51. If it is the intention to cover vilification within the definition of discrimination then clause 51 would be redundant, and vilification would apply across all attributes. Whilst we support the inclusion of provisions for vilification for all attributes, the inclusion of this wording within the definition as it pertains to harassment is confusing and misleading.

Recommendation 6: Delete clause 19(2)(b) and consider making the vilification provisions in clause 51 applicable to all attributes.

7.2 Special Measures

RLC and AHRCentre support the construction of a special measures clause that gives clarity to duty holders in relation to what a special measure consists of. Special measures have been a central element of international human rights law. Australian case law through *Gerhardy v Brown* has formed the basis of determining the elements of a special measure at both domestic and international law.

However, we note the Bill proposes inclusion of a reasonable person test, as

opposed to the agreement with the group to be benefited by the special measure. The latter test is mandated by case law. This new formulation introduces a weak and unprecedented test into the determination of a special measure. It is an inherent element of human dignity to recognise and engage with the class of people with whom a special measure is to benefit. As such RLC and AHRCentre would oppose the inclusion of a reasonable person test in the formulation of determining a special measure.

Recommendation 7: Replace the reasonable person test in 'Special Measures' with a requirement for consultation with the class of people the special measure is intended to benefit.

7.3 Reasonable Adjustments

The provision for reasonable adjustments (or reasonable accommodation as it is formulated in other jurisdictions) is a core element of disability discrimination law in Australia and internationally. The requirement to make reasonable adjustments is a fundamental link in the achievement of substantive equality. The incorporation of the failure to make adjustments within the definition of disability discrimination is currently part of our domestic law with similar formulations internationally. Both the *Convention on the Rights of Persons with Disabilities* and the *European Union Employment Equality Directive* 78/2000 contains reasonable accommodation within the definition of discrimination.

This is a crucial substantive equality measure. Recognition of the failure to make reasonable adjustments as a discriminatory act places an obligation on duty holders to take reasonable steps to make adjustments for disability related needs. It is this requirement that is fundamental in achieving substantive equality. It requires duty holders to recognise difference and to adjust their policies and practice to meet the diverse needs of all members of our community. It clearly differentiates from formal equality which denotes equal treatment.

This formulation is critical for achieving the objective of substantive equality and was the intent behind the 2009 *Disability Discrimination Act* amendments. These amendments quite specifically clarified the requirement to make adjustments to

accommodate impairment and disability related needs. Removing reasonable adjustment from the definition of discrimination will have the effect of reverting to the pre 2009 amendments situation.

Whilst the obligation to provide reasonable adjustments is explicitly stated within the *Disability Discrimination Act 1992*, duty holders also bear an implicit obligation to provide reasonable adjustments under the other 3 areas of Australian discrimination law. The current formulation of indirect discrimination requires that all terms, conditions and requirements are reasonable. As such there is an obligation on duty holders to make adjustments to ensure that the terms, conditions and requirements are reasonable in the circumstances. RLC and AHRCentre recommend the provision of reasonable adjustments be made explicit for all protected attributes.

Failing to make the requirement explicit provides an opportunity to duty holders to argue that the requirement is not there. Making reasonable adjustments explicit has a rhetorical value in making the obligation for reasonable adjustments more clearly understood.

Recommendation 8: Move the requirement to make reasonable adjustments to section 22 and do not limit it to disability.

8. Making discrimination unlawful in "any area of public life" (s22(1))

RLC and AHRCentre welcome the inclusion of this clause as it provides much greater certainty for both respondents and complainants. Under the current collection of anti-discrimination laws there are many situations where it is unclear if anti-discrimination laws apply. For example, in the interactions between members of the community and police, private security guards, and council rangers it is open to argument as to whether a service is being provided, and to whom. Other examples from decided cases have involved disputes as to whether a government department arranging adoptions is providing a service to prospective adoptive parents, and whether a council deciding a development application is providing a service to the proponent of the development.

8.1 Discrimination on the grounds of industrial history, medical opinion, nationality or citizenship, political opinion, religion and social origin unlawful in the area of work (s22(3))

This provides consistency with the provisions of the *Fair Work Act 2009*, and gives an enforceable remedy for people subject to discrimination at work on these grounds.

However RLC and AHRCentre submit that despite this improvement, there is no reason why discrimination on these grounds, and on the ground of family responsibilities, should be confined to the area of work. Although these provisions are aimed at implementing Australia's obligations under the *ILO Convention*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights* can provide the basis for extending protection against discrimination to all areas of public life.

Having all protected attributes covered in all areas of public life has the advantage of clarity and simplicity. It would also make the new definition of discrimination, with its reference to discrimination on the basis of a combination of two or more protected attributes, work more effectively.

The experience of the RLC tenancy service is that people are often discriminated against in their attempts to find housing because they are or have been homeless, or they are receiving Centrelink payments. Clients also report that they are subject to discrimination because they are public housing tenants. RLC and AHRCentre submit that "social origin" be defined to include being homeless, being in receipt of social security payments and being a public or community housing tenant.

Recommendation 9: that discrimination on the basis of family responsibilities, industrial history, medical opinion, nationality or citizenship, political opinion, religion and social origin be unlawful in all areas of public life, not just work.

Recommendation 10: that "social origin" be defined to include being homeless, being in receipt of social security payments and being a public or community housing tenant.

9. Justifiable Conduct

It is our position the defence of justifiable conduct requires amendment.

The test replaces the defence of ‘unjustifiable hardship’, from the *Disability Discrimination Act 1992*. However, this proposed defence adds extra layers to the unjustifiable hardship defence, in the form of requiring a consideration of a duty holder’s aim in engaging in the conduct. This is irrelevant to the question of whether discrimination is unlawful and has the potential to send judges down a path of inquiry that deviates from the objects of the act.

In relation to this point RLC and AHRCentre support recommendation in the submission of the discrimination experts, that in clause 23(3)(b) the phrase, ‘that aim is a legitimate aim’ be replaced with the phrase ‘that aim is consistent with achieving the objects of the Act.’

Recommendation 11: Replace the phrase in clause 23(3)(b) that, ‘that aim is a legitimate aim ‘ with the phrase ‘that aim is consistent with achieving the objects of the Act.’

10. Additional Defences

RLC and AHRCentre support the inclusion of a single defence but strongly suggest that it means that some of the additional defences are not warranted. Arguably including these defences dilute the protections provided by exisiting discrimination laws, particularly in relation to sex and race discrimination where no unjustifiable hardship or inherent requirements of the job defence existed, and is a departure from the principle of the consolidation exercise, that the existing protections would not be eroded.

10.1 Inherent Requirements Section 24

Where justified, the inherent requirements defence could be made out under the Justifiable Conduct defence and accordingly is not warranted.

Recommendation 12: Delete the inherent requirements defence.

10.2 Conduct Necessary to Comply with Commonwealth Acts and Instruments- s26

There is no precedent for this provision in any current federal discrimination statute. While arguably this provision is embodying the principle of statutory interpretation, that a specific law overrides a general one, RLC and AHRCentre are concerned about the effect of explicitly stating this as a defence.

A similar provision exists in section 54 of the *NSW Anti-Discrimination Act 1984.* In our experience that provision has been relied upon by duty-bearers as a complete defence and a reason not to conciliate from the outset. Due to the documented financial and other resource barriers faced by individuals in pursuing cases against large corporate and government respondents, often the case does not proceed any further, meaning that the question of whether an act was done in compliance with another law is not tested. Unfortunately in NSW, that provision has meant that many instances of discrimination, and in particular systemic discrimination, are left unchallenged.

Recommendation 13: Delete the defence contained in section 26

10.3 Exceptions for Religious Bodies and Educational Institutions

As a matter of principle, any organization obtaining government funding should not be exempt from discrimination legislation. RLC and AHRCentre support the exclusion of Commonwealth funded aged care programs from this provision, but see no reason why it cannot go further to any Commonwealth funded institution.

Recommendation 14: Expand s33(3)(a) to all Commonwealth funded services.

10.4 Defence and peacekeeping exceptions.

Clause 40 of the Bill creates a blanket exception that allows disability-based

discrimination in relation to combat and combat related duties, or peacekeeping service, and for selection of certain Australian Federal Police peacekeeping duties. RLC and AHRCentre support the position put forward by the discrimination experts in their submission who note recommendation 36 of the Senate Standing Committee on Legal and Constitutional Affairs 2008 report *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*. Dealing specifically with the attribute of sex, the Committee recommended that such exceptions be replaced with a general limitations clause. The same is true of all attributes.

As such it would be better served for consistency in application to rely on the inherent requirement provision. Those people with disabilities who can meet the inherent requirements of such defence related positions should not be denied the right to take up those positions based on an arbitrary blanket exception.

Recommendation 15: Clause 40 of the Bill relating to defence and peacekeeping exemption be deleted

11. Complaints

11.1 Standing for an Application to a Court- s122

Organisations that represent the interests of people with protected attributes will often be in a better position to pursue a complaint to the court level than individual complainants, particularly if the people represented lack capacity to make complaints themselves, such as children, people with intellectual disabilities, dementia or other cognitive impairments.

Even for people with capacity to make their own complaints, the complaint process can be a long and stressful one, and legal representation is not always available.

Representative groups are also likely to be aware of problems that affect significant numbers of their members or clients. Allowing complaints by representative organisations, without the requirement for them to be complaining on behalf of a specific individual or individuals will allow systemic problems to be addressed.

In order to address concerns about ‘opening the floodgates’, consideration could be given to allowing representative bodies the ability to initiate proceedings only with leave of the court.

Recommendation 16: A new provision be introduced to allow for representative bodies to initiate legal proceedings with leave of the court.

11.2 Introduction of the shifting burden of proof (s124)

RLC and AHRCentre strongly support this provision of the Bill. RLC and AHRCentre submit that it is an important development in making discrimination laws work more equitably. In our experience it is overwhelmingly respondents rather than complainants who have both the information and resources needed to put all the necessary evidence before the court. To place this burden completely on complainants, as with the current system, often puts complainants at considerable disadvantage.

11.3 Each party to bear their own costs in proceedings in the Federal Courts (s133)

RLC and AHRCentre also strongly support this provision of the Bill. In our experience the potential for an adverse costs order is a very common reason for complainants to use the State anti - discrimination laws instead of the Federal system, even in circumstances where the Federal laws provide better coverage or potential remedies in their circumstances.

The new provision in relation to costs means that the Federal anti-discrimination laws are consistent with the State and Territory laws and the *Fair Work Act 2009*. This means that choice of jurisdiction can now be made solely on the ground of which law is the most appropriate in the circumstances.

Recommendation 17: The provisions relating to costs and burden of proof be retained.