ANTI DISCRIMINATION COMMISSION QUEENSLAND

Submission

to

Senate Legal and Constitutional Affairs Committee

Exposure Draft - *Human Rights And Anti-Discrimination Bill 2012*

21 December 2012

Introduction

1. The Anti-Discrimination Commission Queensland (Commission) welcomes the release of the Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* consolidating and reforming Commonwealth anti-discrimination legislation and making a number of reforms.

2. The Commission has contributed to the joint submission of the Australian Council of Human Rights Agencies (ACHRA). This submission is in addition to the ACHRA submission, and rather than repeating the content of the ACHRA submission, the Commission comments on key issues arising specifically from the Commission's observations in Queensland, and from its consultation with stakeholders in December 2012.[1] As noted in the ACHRA submission, the Commission takes a different view, set out in this submission, about the justifiable conduct exception in the Bill.

Summary

3. The Commission notes and commends the primary objective of the Bill of producing a clearer and simpler law. The five key principles are set out in the Explanatory Note as:

   (i) Lift differing levels of protections to the highest current standard, to resolve gaps and inconsistencies without diminishing protections;

   (ii) Clearer and more efficient laws provide greater flexibility in their operation, with no substantial change in practical outcome;

   (iii) Enhance protections where benefits outweigh any regulatory impact;

   (iv) Voluntary measures that business can take to assist their understanding of obligations and reduce occurrences of discrimination; and

[1] The Anti-Discrimination Commission Queensland hosted a forum at its Brisbane office on 7 December 2012 to hear stakeholder and community views on the Exposure Draft *Human Rights and Anti-Discrimination Bill 2012.*

(v) A streamlined complaints process, to make it more efficient to resolve disputes that do arise.

4. The Commission welcomes and supports the Bill, and recommends the Committee support the passing of the Bill, subject to the recommendations in this submission and the ACHRA submission.

5. The Commission commends the improvements provided for in the Bill, in particular:

- the inclusion of an objects clause;
- extending protections to the attributes of gender identity and sexual orientation across all areas of public life;
- improvements to the definition of discrimination;
- the sharing of the burden of proof, particularly in relation to elements involving purpose or reason and establishing exceptions;
- the general layout and drafting of the Bill.

Recommendations

6. In this submission, the Commission outlines and makes the following recommendations:

I. That the objects clause and the definition of human rights be amended to specifically include the UN *Declaration on the Rights of Indigenous Peoples,* and to allow for the inclusion of any new instruments that Australia might ratify without amendment of the Act.

II. That clause 19(2)(b) be amended or removed.

III. That the definition of discrimination in clause 19(3)(b) be amended to include the effect of disadvantaging an

individual because of the attribute (or combination of attributes) as well as people with the attribute (or combination of attributes).

IV. That the coverage of the additional attributes be extended to all areas of public life.

V. That the justifiable conduct exception be removed.

VI. That if the justifiable conduct exception is not removed, the scope and application of the exception should be made more clear and specific, including defining the meaning of legitimate aims, and the exception should be limited so as not to apply to direct discrimination.

VII. That the exceptions for bodies established for religious purposes and educational institutions be limited so as not to diminish the current highest standard under State and Territory anti-discrimination laws.

VIII. That exceptions that diminish the current highest standard under State and Territory anti-discrimination laws be limited so that they conform to the current highest standard.

IX. That clause 52 be re-framed based on the Queensland provision (*Anti-Discrimination Act 1991,* section 124).

X. That the right to equality before the law be extended to all attributes.

Objects clause and definition of 'human rights'

7. The Commission welcomes the inclusion of an objects clause consistent with Australia's obligations under the international human rights instruments and international labour rights instruments.

8. The objects clause specifies the human rights instruments as the seven core agreements[2], and specifies the International Labour Organisation (ILO) instruments as the four ILO instruments[3].

9. The term 'human rights' is defined in clause 6 to mean the rights and freedoms recognised or declared in the seven core international agreements to which Australia is a party and listed in the objects clause.

10. As well as the core international human rights treaties, there are many other universal instruments dealing with human rights. Notably for Australia, is the UN *Declaration on the Rights of Indigenous Peoples* (the Declaration). This declaration is significant for Australia in the role it has in protecting and improving conditions for our Aboriginal and Torres Strait Islander Peoples.

11. Australia has been called upon to fully and effectively implement the Declaration, including closing the gap between the life expectancy of Indigenous and non-Indigenous Australians, and addressing socio-economic inequalities and the overrepresentation of Aboriginal and Torres Strait Islander people in prison.[4]

12. The Commission recommends including the Declaration in the list of human rights instruments. The human rights instruments should also be defined in an

[2] CERD (Convention on the Elimination of all forms of Racial Discrimination), ICESCR (International Covenant on Economic, Social & Cultural Rights), ICCPR (International Covenant on Civil & Political Rights), CEDAW (Convention on the Elimination of all forms of Discrimination Against Women), CAT (Convention against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment), CROC (Convention on the Rights of the Child) and CRPD (Convention on the Rights of Persons with Disabilities).
[3] ILO Convention (No. 100) concerning Equal Remuneration for Men & Women Workers for Work of Equal Value, ILO (No. 111) concerning Discrimination in respect of Employment & Occupation, ILO Convention (No. 156) concerning Equal Opportunities & Equal Treatment for Men & Women Workers: Workers with family responsibilities, and ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer.
[4] Australian Human Rights Commission, *Australia's Universal Periodic Review 2012 Progress Report*

inclusive way so that any instruments ratified subsequently are included without having to amend the Act.

Recommendation I: That the objects clause and the definition of human rights be amended to specifically include the UN *Declaration on the Rights of Indigenous Peoples,* and to allow for the inclusion of any new instruments that Australia might ratify without amendment of the Act.

Meaning of discrimination

13. The Commission welcomes the simplified test for discrimination applying to all attributes set out in a single provision. The Commission considers this format will aid understanding, as will the removal of the comparator element for direct discrimination and removal of the ability to comply element for indirect discrimination. It is also appropriate to expressly provide that discrimination can happen on the basis of a combination of 2 or more attributes. The Commission suggests minor amendments to further enhance clarity and understanding.

Direct discrimination

14. The Commission notes that clause 19(2) of the Bill is intended to clarify existing discrimination law rather than expand on existing law. Harassment and offensive conduct because of or in relation to a protected attribute is unlawful under existing State and Commonwealth anti-discrimination legislation.

15. The Commission considers provisions that clarify how particular sections have been interpreted are helpful. However, it is apparent that some commentators consider that clause 19(2) expands rather than clarifies existing law. This would suggest possible confusion and lack of clarity if the provision is not changed. In order to better achieve the purpose of clarifying existing law, the Commission suggests that clause 19(2)(b) be modified by either:

    - confining the effect of the conduct by reference to an element of objectivity, for example, so that it reads ‘other conduct that a

reasonable person would consider to offend, insult or intimidate the other person in the circumstances'; or

- using different wording, for example, 'other conduct that denigrates, humiliates or intimidates the other person'; or
- removing clause 19(2)(b).

Recommendation II: That clause 19(2)(b) be amended or removed.

Indirect discrimination

16. Although the version of indirect discrimination in the Bill is much improved in terms of simplicity and understanding, it still focuses on disadvantage to a group rather than disadvantage to an individual with an attribute or combination of attributes.

17. The distinction between direct discrimination as affecting an individual, and indirect discrimination as affecting a group of people, is inconsistent with the objectives of protecting against and eliminating discrimination.

18. The Commission considers clause 19(3)(b) should be amendment to provide:

    (b) the policy has, or is likely to have, the effect of disadvantaging the person because of, or people who have, a particular protected attribute, or a particular combination of 2 or more protected attributes; and

Recommendation III: That the definition of discrimination in clause 19(3)(b) be amended to include the effect of disadvantaging an individual because of the attribute (or combination of attributes) as well as people with the attribute (or combination of attributes).

Protected attributes

19. The Bill removes the separate complaints regime for the equal opportunity in employment attributes (ILO attributes). This regime allowed for complaints of discrimination based on these attributes in employment to be made and

conciliation attempted, however unresolved complaints could not be taken to the Court as the discrimination was not unlawful. AHRC could report to the Minister and make recommendations, however the recommendations were not enforceable.

20. Under the Bill, the ILO attributes (other than criminal record) become protected attributes, but only in the work and work-related areas. Discrimination on the basis of these attributes will now be unlawful where the discrimination occurs in the work and work-related areas. There are six attributes in this category, namely:

    - Industrial history (previously 'trade union activity');
    - Medical history (previously 'medical record');
    - Nationality or citizenship (previously 'nationality');
    - Political opinion;
    - Religion; and
    - Social origin.

21. The Commission welcomes the elevation of these grounds under the equal opportunity in employment scheme as protected attributes.

22. As these attributes are generally also included in the State and Territory anti-discrimination laws, it would be simpler for business and the community if they were protected in all areas of public life and not just in the work and work-related area. There would not appear to be any constitutional limitation to doing this.

23. If the protection is to continue to be restricted to the work and work-related areas, the Explanatory Note should set out the reasons for this limitation.

Recommendation IV: That the coverage of the additional attributes be extended to all areas of public life.

Exception for 'justifiable conduct'

24. The Commission is concerned that the Bill provides for both specific exceptions and a general exception: the 'justifiable conduct' provision in clause 23. In its submission to the consolidation project the Commission outlined arguments against a general limitations provision.[5]

25. General limitations provisions, such as that proposed in the Bill, are generally found in Constitutions and Bills or Charters of Rights.[6] Human rights in international and constitutional type instruments are generally considered to bind only the State. At the constitutional level they apply to the making of legislation.

26. The concept of limitation provisions is recognition that there will be competing priorities and circumstances in which discrimination is excused or justified. Excuse or justification is formulated or based on proportionality, which involves close scrutiny of the stated aims and the extent to which derogation from rights and freedoms is justified. It is entirely appropriate for general limitations provisions to be found in constitutional type instruments, as it is incumbent on the legislature and the courts to conduct the necessary high level scrutiny.

27. It is the obligation of a State to translate obligations under constitutional type instruments into legislation binding on private parties. In the Australian context, the Commonwealth is obliged, under the international instruments, to incorporate the objectives and principles of the various rights and freedoms into legislation. It is for the Commonwealth, as the State party, to scrutinise and apply a stringent standard of justification to determine the circumstances in which limitation of rights and freedoms is justified. These are determinations for the legislature rather than the users of the legislation.

28. Good legislative principles require that legislation promotes clarity for users. Indeed the Commonwealth Parliamentary Counsel is required under the *Legislative Instruments Act 2003* to 'cause steps to be taken to promote the

[5] Increased uncertainty, application dependent on interpretation by courts, vagueness.
[6] For example, in the Canadian Charter of Rights and Freedoms, the South African Constitution

legal effectiveness, clarity, and intelligibility to anticipated users of legislative instruments'.[7] The principles for clearer laws include that 'Legislation should enable those affected to understand how the law applies to them'.[8]

29. The Explanatory Note confirms that clause 23 is a new concept for Australian anti-discrimination law, and will allow for a more flexible case-specific approach.[9] It also states that clause 23 is intended to align with the international human rights law concept of 'legitimate differential treatment'.[10]

30. The Commission considers, consistent with the manner in which this international law has developed, that decisions as to what type of conduct is 'legitimate' and what is or is not consistent with the objects of the Act should be decided by the legislature rather than the duty-holder. The current provision abrogates to the courts the legislature's responsibility for determining what might be legitimate and whether decisions are appropriate. Courts can only consider the issues and develop a body of law if people make complaints and take them through to the courts. This means the development of a body of law is dependent on complainants who might be in a position to take a complaint to court. Complainants are not usually the people in a position of power in the context where discrimination occurs. Many people in this context would simply accept the explanation from the discriminator that the conduct was necessary proportionate to achieve a legitimate aim. The provision has the potential to allow practices born of ignorance to flourish, and to further empower people who are in the positions of power.

31. Advocates and proponents of a general limitations clause for the consolidated anti-discrimination legislation generally envisaged and argued for a general limitations provision in place of specific exception provisions. Instead what has occurred with the Bill is a combination of numerous specified exceptions as well as a general limitations provision. In combining a general limitations provision

[7] *Legislative Instruments Act 2003*, section 16
[8] Clearer Laws Committee, *Causes of complex legislation and strategies to address these,* 6 May 2011
[9] Explanatory Note at [143]
[10] Explanatory Note at [144]

with specific exception, there is a danger that this scheme will be interpreted as implying a much wider range of lawful exceptions, as a 'catch-all' type provision.

32. The rationale for specifying exceptions is largely to provide clarity and aid understanding.[11] The Commission acknowledges the complexity of the task to clarify, simply and standardise the anomalous range of exceptions across the five Acts into the consolidated Act. The new legislation does however need to achieve clarity so that people know and understand their rights and responsibilities with as much certainty as possible. The need for certainty is recognised in the Bill by retaining, with specificity, existing exemptions.

33. The Explanatory Note also recognises deficiencies in introducing a general limitations provision. Some exceptions have been retained from the current Commonwealth anti-discrimination laws 'to provide greater guidance than is given by the justifiable conduct exception',[12] including the exception for insurance, superannuation and credit which has been retained 'to provide certainty to industry while a body of law develops in relation to the concept of justifiable discrimination'[13].

34. The Commission provides training and information for members of the public on their rights and responsibilities under anti-discrimination laws. The exemptions that apply to both specific areas and all areas are understood well, because the exemptions themselves are mostly common sense. The Commission is concerned that with a justifiable conduct general exception, trainers and information officers will be unable to explain, either with certainty or at all, what conduct is and is not lawful.

35. In the context of human rights legislation, principles of statutory interpretation require exceptions and limitations to be interpreted narrowly. Consistent with this principle, legislation should specify with as much clarity as possible the

[11] See for example Explanatory Note at [141] - 'to aid understanding', [169] – 'to provide further certainty, [170] – 'to make it clear', [194] – 'to further define…or provide guidance'
[12] Explanatory Note, at [194]
[13] Explanatory Note, at [208]

conduct and circumstances which are excused or justified notwithstanding that it would otherwise violate the rights or freedoms which are protected in the legislation. Making a general and potentially broad exception in human rights legislation is antithetic to this principle.

36. The Commission prefers abandoning a general limitations provision in this legislation, and acknowledges that to do so would require re-instatement of some of the existing exceptions, such as reasonableness and unjustifiable hardship for discrimination by imposition of a policy, as well as exceptions for 'work health and safety' and 'public health and safety'. Benefits of adopting this course include the preservation of the jurisprudence that has developed. As it stands, the provision has the potential to undo much of what has been achieved in working towards a society that respects and embraces human rights and the dignity of individuals.

37. If the clause is not removed, it should be limited so that it does not apply to a discrimination by unfavourable treatment (clause 19(1)) and the term 'legitimate' should be defined as fully and clearly as possible, consistently with the objects of the Act.

Recommendation V: That the justifiable conduct exception be removed.

Recommendation VI: That if the justifiable conduct exception is not removed, the scope and application of the exception should be made more clear and specific, including defining the meaning of legitimate aims, and the exception should be limited so as not to apply to direct discrimination.

Exceptions related to religion

38. The Commission is concerned that the exceptions for religious bodies and educational institutions[14] broaden the current exceptions and thus lower the current level of protections rather than lifting protections to the highest standard.

[14] Clause 33 of the Bill

39. In Queensland, bodies established for religious purposes can avail themselves of specific exemptions in areas of work, education, accommodation and the provision of goods and services, as well as a general exemption across all of the public areas of life covered by the legislation.[15]

40. In areas other than work and education, bodies established for religious purposes are exempt in relation to acts done in accordance with the doctrines of the religion where the act is necessary to avoid offending the religious sensitivities of people of the religion.[16] Educational institutions which operate wholly or mainly for students of a particular sex or religion may exclude students not of that sex or religion.[17] In the work area, discrimination is only permitted in relation to overt conduct contrary to the employer's religious beliefs if it is a genuine occupational requirement of the employer that the person act consistently with the employer's religious beliefs in the course of or in connection with work.[18] Access to land or premises of religious significance and accommodation may be restricted where it is in accordance with the doctrines of the religion concerned and is necessary to avoid offending the religious sensitivities of people of that religion.[19] Discrimination is also permitted in the ordination and training of priests, ministers etc, and the selection of people to perform functions in relation to religious observance.[20]

41. It is unclear why the limitation on the exception provided for in the Bill for bodies established for religious purposes is confined to the provision aged care services. The basis for the limitation is the receipt of Commonwealth funding, however the Commonwealth provides funding for a range of services, including education. It is also unclear why the limitation applies to aged care service providers who receive Commonwealth funding in the provision of services only, but not in employment of their staff. The Explanatory Note states that this recognises that organisations should be able to engage staff who share their

[15] *Anti-Discrimination Act 1991* (Qld), sections 25, 41, 46(2), 48, 90 & 109.
[16] *Anti-Discrimination Act 1991* (Qld), section 109
[17] *Anti-Discrimination Act 1991* (Qld), section 41
[18] *Anti-Discrimination Act 1991* (Qld), section 25
[19] *Anti-Discrimination Act 1991* (Qld), sections 48 & 90
[20] *Anti-Discrimination Act 1991* (Qld), section 109

values and organisational ethos. This explanation is inconsistent with both the objects of the legislation and the limitation to the exception.

42. If the consolidated legislation is to be the benchmark for harmonisation of State and Commonwealth laws, there will be a diminution of the current protections in Queensland and other States.

Recommendation VII: That the exceptions for bodies established for religious purposes and educational institutions be limited so as not to diminish the current highest standard under State and Territory anti-discrimination laws.

Other exceptions that diminish the current level of protections

43. The Bill purports to adopt the current highest standard, however other exceptions in the Bill also result in a standard lower than the current standard. These include:

- **Employment to perform domestic duties** – in the Bill, this exception applies in relation to all protected attributes.[21] In Queensland, discrimination on the basis of race in this area is unlawful.[22] In its submission to the consolidation project the Commission urged caution with this exception due to the growth in this industry.[23] It is also an industry that attracts migrants seeking work.

- **Superannuation** – in the Bill, this exception applies in relation to the attributes of age, disability, family responsibilities, marital or relationship status, and sex.[24] In Queensland, the comparable exceptions do not apply to the attribute of family responsibilities.[25] The Commission questions the inclusion of family responsibilities as one of the attributes to which the exception applies.

[21] Clause 43
[22] *Anti-Discrimination Act 1991* (Qld), section 26
[23] Paragraphs 52 & 53
[24] Clause 39
[25] *Anti-Discrimination Act 1991* (Qld), sections 58 to 65

Recommendation VIII: That exceptions that diminish the current highest standard under State and Territory anti-discrimination laws be limited so that they conform to the current highest standard.

Requesting information

44. Clause 52 provides that it is unlawful to request information for the purpose of unlawfully discriminating, or deciding whether to unlawfully discriminate, against the person from whom the information is sought. The Commission welcomes simplifying the test in existing provisions by removing the comparator element.

45. The Commission considers that although the shifting burden of proof applies to this provision, in practice it may be extremely difficult for a complainant to establish a prima facie case that the purpose of the request was to unlawfully discriminate, or decide whether to unlawfully discriminate against the person. In the Commission's experience, unlawful requests for information most commonly occur in selection processes for employment. In those circumstances there is usually no relationship, surrounding circumstances or other aspect from which the applicant could draw evidence to show the purpose of the request for information.

46. Framing the provision in this way is also not likely to encourage people to refrain from asking for unnecessary information.

47. The Queensland provision is framed in a way that encourages people not to ask for unnecessary information by simply providing that a person must not ask for information upon which unlawful discrimination might be based. If there is another reason for requesting the information, it is for the person making the request to establish that purpose. Framed in this way, the provision also encourages people to be clearer and more transparent about the reason for the information and what is to be done with it. For example, private employment agencies in Queensland are required by regulation to keep a register of people

looking for work and the register is to include the name, age and gender of the person.[26]

Recommendation IX: That clause 52 be re-framed based on the Queensland provision (*Anti-Discrimination Act 1991,* section 124).

Equality before the law

48. The Explanatory Note states that clause 60 will have the same effect as section 10 of the *Racial Discrimination Act 1975.*

49. Rights to equality before the law are included in international human rights instruments such as the *Convention on the Elimination of all forms of Radical Discrimination* (article 5) and the *International Covenant on Civil and Political Rights* (article 26). Having signed and ratified the ICCPR, Australia has undertaken to respect and ensure to all individuals the rights recognised in the Covenant without distinction of any kind. Article 26 of the ICCPR provides:

> Article 26.
> 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, language, religion, political or other opinion, national or social origin, property, birth or other status.

50. Paragraph 20 of the Explanatory Note states that the objects clause (paragraph 3(1)(d)) 'reflects the core human rights underpinning anti-discrimination law as the right to equality and the inherent dignity of all people'.

51. To properly reflect the right to equality, clause 60 of the Bill should be amended so as to extend the right to equality before the law to all attributes.

[26] *Private Employment Agents (Code of Conduct) Regulation 2005,* clause 21 of the Code, under the *Private Employment Agents Act 2005*

Recommendation X: That the right to equality before the law be extended to all attributes.

Concluding remarks

52. As noted previously, the consolidation of the Commonwealth anti-discrimination laws is an opportunity to improve the effectiveness of the legislation and to make it clearer and easier to understand and implement.

53. The new legislation should not detract from existing protections, not only in the Commonwealth legislation, but also in the legislation of the States and Territories.