

## VECCI Submission – Human Rights and Anti-Discrimination Bill 2012 – Executive Summary

The *Human Rights and Anti-Discrimination Bill 2012* (“the Bill”) is designed to combine the five pieces of Commonwealth anti-discrimination and human rights legislation. VECCI supports the principle of harmonisation where it simplifies and removes unnecessary duplication, but there are a number of matters of significant concern for employers that arise from the proposed changes.

Principal among these is that the Bill doesn’t simply consolidate existing protections and duties, but seeks to extend and supplement the existing federal anti-discrimination framework in a number of ways. It establishes new concepts, new procedures, and vests the Australian Human Rights Commission (“AHRC”) with new powers.

Stated briefly, the changes are:

- A new test for discrimination, alongside new provisions which provide that a claim can be made where ‘offence’ is caused. Imposing liability where conduct simply offends, in particular, sets the bar for compliance far too high. VECCI is concerned this will trigger an increase in claims and put further regulatory pressure on employers at a time when the burdens of the workplace relations system and work health and safety regulation have already imposed considerable restraints on the productivity and efficiency of business.
- New legally protected attributes, including gender identity, sexual orientation and industrial history (a ground The Bill extends). While this may harmonise protected grounds across state and federal jurisdictions, it will not resolve the issue of jurisdiction shopping. This is discussed further below.
- Changes to the defences available to a respondent; in addition to the uncertainty associated with change, they will make it more complex to defend claims.
- The introduction of a reverse onus of proof. Employers’ experience of the reverse onus of proof in other jurisdictions – such as the *Fair Work Act’s* general protections – has proven costly and complex. Further, related comments are made on this below.
- A general presumption that each party bears its own legal costs – which, if the experience in other jurisdictions is to be used as a guide, will force employers into reaching costly out-of-session settlements and will certainly increase the costs of defending claims. It is VECCI’s experience that the possibility of costs orders being brought against parties where an unmeritorious claim is made is a useful deterrent. Furthermore, the presumption that each party bears its own legal costs, and the reverse onus of proof, means that employers will invariably have to bear the costs of responding to any and all claims brought against them – without a realistic prospect of having those costs recovered.
- The AHRC is able to ‘certify’ an organisation’s policies and procedures, as well as create industry-specific ‘voluntary codes’. While this may lead to a variety of documents provided and/or endorsed by the AHRC, it will not stop arguments about whether or not an employer has complied with them.

VECCI submits that the Bill will prove to be adverse to the interests of business and employers in a range of ways:

- The reversal of the onus of proof – despite the Government describing the new provisions as improving access to justice, they will simply increase the access to litigation without the deterrent of a costs order.
- The new legislation is likely to trigger an increase in federal claims – largely due to claims being easier to make and less costly, and because there are now multiple avenues for making claims. This is of particular concern given that claims brought against employers within the *Fair Work Act 2009*'s newly introduced general protections jurisdiction continue to grow quarter on quarter.
- Moreover, the Bill – despite consolidating a number of statutes – will not resolve the problem of 'jurisdiction shopping' by claimants. The proposed Act will add to existing employee protections in the *Fair Work Act 2009*, work health and safety laws and those provided by state or territory legislation. As the different jurisdictions have different tests, compensation thresholds and legal jurisprudence, claimants will continue to be able to shop for a legal remedy. The uncertainty and regulatory complexity makes it difficult for employers to effectively comply with multiple and overlapping laws.

There must be a robust, evidence-based policy rationale for extending the reach of anti-discrimination law, reversing the onus of proof, and making significant reforms to the role and powers of the federal AHRC. The Government has not established this. There will be a number of consequences of the proposed legislation for business and employers which will negatively impact on both management prerogative and business efficiency. The risk profile of businesses in respect to managing their legal obligations around anti-discrimination and human rights will broaden, and therefore increase.

While VECCI does not oppose the existence of anti-discrimination laws, the Bill will result in a kind of regulatory over-reach that is both unwarranted and unwelcome. We particularly urge the Committee to closely consider the content of the Bill in terms of the impact on SMEs.

## 1. The Human Rights and Anti-Discrimination Bill : background / analysis

The background to this attempt to harmonise anti-discrimination legislation commences in 2008.

In December 2008, the Senate Standing Committee on Legal and Constitutional Affairs presented its report on the Effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality. The Committee made 43 recommendations relating to the Sex Discrimination Act (SDA). The findings of the Report are contained as an annexure to the Explanatory Notes for the HRAD bill.

In May 2010, the Government tabled its response to the Committee's report. Nine recommendations were accepted, in part or in full, for immediate implementation through amendments to the SDA.

On 24 May 2011, Parliament passed the Sex and Age Discrimination Legislation Amendment Act 2011 (SADLA Act) to implement the nine accepted recommendations.

A number of the remaining recommendations have been adopted in the Bill.

In April 2010, the Federal Government announced its intention to streamline federal anti-discrimination legislation into one single comprehensive Act. Currently, Commonwealth anti-discrimination legislation is located in five separate and distinct statutes: the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992*, the *Age Discrimination Act 2004*, and the *Australian Human Rights Commission Act 1986*.

The Government's media release expressed the Government's intentions to reform the anti-discrimination and human rights framework in the following terms:

*A single Act will address current inconsistencies and make the system more user-friendly by clarifying relevant rights and obligations. It will also provide the opportunity to review the complaints handling process and the related role and functions of the Australian Human Rights Commission. Importantly, there will be no diminution of existing protections currently available at the federal level.<sup>1</sup>*

The Government also promised regulatory certainty would be delivered to business:

*Consolidating all Commonwealth anti-discrimination legislation into one Act will reduce the regulatory burden and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and business, particularly small business.<sup>2</sup>*

Regulatory certainty is most important to VECCI, VECCI's members, customers and clients. As such, this submission seeks to foreshadow the regulatory impact of the Bill, which, despite the high-level Government rhetoric that insists otherwise, is likely to be detrimental to business.

VECCI's analysis of the Bill is made with a focus on the relevance of the Bill to the operation of SMEs, and on the efficiency and appropriateness of the regulatory framework. In so doing, this submission adopts a range of principles. These are that:

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<sup>1</sup> See <http://www.alp.org.au/federal-government/news/reform-anti-discrimination-legislation/>

<sup>2</sup> *Ibid.*

- Any consolidation of existing federal anti-discrimination laws should result in a net improvement to the existing regulatory framework, including the capacity of employers to comply with it; furthermore, the framework must be fair, reasonable and balanced.
- The consolidation of legislation should result in the clearer prescription of legal duties for all duty holders.
- A culture should be created in Australia wherein resilience and education is encouraged, and litigation is a 'last resort' measure. This cultural shift is contingent upon the character of the statutory/regulatory framework ultimately adopted.
- A cost-benefit analysis and a RIS should form part of the analysis undertaken by Government.
- Government must consider the practical implications of legislative consolidation and/or change for business, and particularly, for SMEs who do not have adequate resources to support full-time in-house technical experts to assist them to make the necessary adjustments to policy and procedure. As such, the Government should seek to reduce the administrative burden on business that arises from complex regulation by ensuring that responding to the regulatory framework is straightforward and does not increase the cost of doing business.
- Similarly, regulatory frameworks should appropriately balance rights and duties, and should not shift administrative and costs burdens to business. As such, 'access to justice' must be balanced against the compliance costs of business.

## 2. The HRAD Bill 2012 – key issues

There are a number of aspects of the HRAD Bill that are of concern to business, as noted in the Executive Summary to this document. These will be considered in closer detail in this section.

The HRAD Bill proposes a number of changes which will have significant impact for employers across both procedure and policy at the workplace level, as well as changing the context in which claims are made and responded to. The Bill:

- Adopts the highest current standard of anti-discrimination law;
- Proposes a streamlined complaint system including changes to costs principles and the burden of proof;
- Enhances existing protections – including expanding protected grounds; *and*
- Reconfigures the role of the AHRC – including its capacity to provide services to business on a fee for service basis by certifying policies and procedures, issuing temporary exemptions, and making special measure determinations. Further, the Bill empowers the AHRC to dismiss unmeritorious claims, and create voluntary industry-specific compliance codes.

The Fact Sheet provided by the Attorney – General Department states that the Bill follows five principles –

- Lift differing levels of protection to the highest current standard, to resolve gaps and inconsistencies without diminishing protections;
- Clearer and more efficient laws provide greater flexibility in their operation, with no substantial change in practical outcome;
- Enhance protections where the benefits outweigh any regulatory impact;

- Voluntary measures that business can take to assist their understanding of obligations and reduce occurrences of discrimination.

Taken together, the principles underpinning the Bill, along with the institutional and legislative changes it will introduce when enacted, will significantly change the human rights and anti-discrimination framework in Australia. By moving to the highest standards, the Bill increases the potential liability of employers beyond current legal obligations. This can hardly be couched in positive terms. In its current form, the Bill further restricts management prerogative and the operational autonomy of business, and more critically, the basis upon which a claim will be established.

Stated plainly, the biggest game changer for business arising from the Bill is the combination of what is effectively a reverse onus of proof and the proposed changes around the defence against claims and costs. These facets of the Bill will dramatically change the way in which employers will be compelled to meet their duties/obligations at the workplace level, along with changing the way that claims brought against employers must be responded to.

It is these aspects – along with many others – that the Committee must attend to. This is particularly important when the terms these changes are couched in promise relief to business, operational efficiency, and simplification and/or harmonisation of the regulatory framework. The Committee must understand that the concerns of business and employers are grounded in experience of the shifts occurring at the workplace level already as a consequence of new and emerging workplace rights, employee protections, and employer duties. The regulatory burden and attendant pressures are already operating at odds with business interests. The proposed legislation will only amplify these pressures.

## **2.1 Definitional issues – discrimination and related concepts and changes to the Defence**

The HRAD Bill adopts a new test for discrimination that establishes a subjective measure of discrimination that will be difficult to defend.

The definition is set out at clause 19(2)(b) of the Bill, which reads:

### ***When a person discriminates against another person, and related concepts***

#### *Discrimination by unfavourable treatment*

*(1) A person (the **first person**) **discriminates** against another person if the first person treats, or proposes to treat, the other person unfavourably because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes.*

*Note: This subsection has effect subject to section 21.*

*(2) To avoid doubt, **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. [emphasis added]*

If the HRAD Bill is to achieve an enduring effect such as described in the Bill's objects – as stated at sub-clause 3(1)(g) – as being “to encourage and facilitate compliance with the Act”, then the Act

must impose robust and objective tests. The legislation must enable business and employers to eliminate discrimination at the workplace level - rather than simply create a very broad jurisdiction, in which the jurisdictional barriers to the making of claims of discrimination are subjective. The Government has not explained the basis upon which it has extended the definition of 'unfavourable treatment' to include conduct that 'offends'. The Explanatory Notes for the Bill are silent as to the policy justification for such an enormous shift. This change alone could stimulate a significant increase in claims with quite unintended consequences, particularly in the area of freedom of speech.

This is particularly of concern where, as outlined at 2.2, this appears to be a jurisdiction where the onus of proof will operate not as a 'shifting' onus, but a positive one borne by the employer. In this way, it is difficult to imagine how an employer might successfully defend a claim that it has an obligation to prevent behaviour occurring at a workplace level that *might* offend, insult or intimidate another person, even if it can afford the expense that defending such litigation would require.

It is conceded in the Explanatory Notes that replacing the notion of reasonableness as a defence with the notion that conduct must be justifiable is new. As such, employers face fresh uncertainty until it becomes clear what will be considered to be justifiable conduct. The terms of Clause 23 clearly indicate that a high standard will be imposed when it comes to assessing whether conduct is justifiable. Not only will the conduct need to have been for the purpose of achieving an aim that is "legitimate", it will also need to be considered a "proportionate means of achieving that aim".

These are new notions and appear to impose an even higher standard on employers. In order to successfully defend the conduct which is the subject of complaint, employers will now be required to satisfy a greater number of considerations that stretch beyond what is currently required in establishing the defence of "reasonableness".

## **2.2 Onus of proof**

As noted above, a number of aspects of the HRAD Bill are underpinned by the recommendations made in 2008 by the Senate Standing Committee on Legal and Constitutional Affairs' report on the Effectiveness of the Sex Discrimination Act 1984. Among the 43 recommendations, recommendation 23 was referred to the consolidation project, and stated:

*The committee recommends that a provision be inserted in the Act in similar terms to section 63A of the Sex Discrimination Act 1975 (UK) so that, where the complainant proves facts from which the court could conclude, in the absence of an adequate explanation, that the respondent discriminated against the complainant, the court must uphold the complaint unless the respondent proves that he or she did not discriminate.*

This concept will replace the comparator test.

Described in the Explanatory Memo as an 'improvement to the complaints process', clause 124 of the Bill describes the change to a 'shifting burden of proof' that results from the 2008 recommendation. The burden of proof 'shifts' to the employer once an applicant has established a prime facie case, 'to recognise that the respondent is best placed to know the reason for an action and to have access to relevant evidence'. This provision will be enacted where a complaint is made under clause 120, wherein an applicant makes an application to court alleging unlawful conduct.

As recommended by the Senate Standing Committee, under this rule, the complainant must provide evidence from which the court could decide, in the absence of any other explanation, that the alleged reason is the reason the respondent engaged in the conduct. Once the complainant has discharged this burden, the reason for the conduct will be presumed unless proven otherwise by the respondent.

Relatedly, Clause 124 provides that the respondent bears the burden of establishing defences, which may include that the conduct is a special measure to achieve equality, or that it is justifiable or covered by another exception or exemption or that a compliance code or a disability standard applies.

With this low jurisdictional hurdle for claimants to clear, the burden of proof is likely to, in most cases, 'shift' to the employer – and as such, operate as a reverse onus of proof in the same way as in the general protections jurisdiction under the *Fair Work Act 2009*. As cases such as *Barclay* have demonstrated, decision makers can drift into an exploration of an employer's 'unconscious' rationale, as opposed to their 'conscious' rationale. The complexity of responding to a claim in a jurisdiction where the onus of proof is so constructed has proved costly and time consuming for employers in actions brought under the *Fair Work Act 2009* – and so the process of responding to claims made under the HRAD legislation, once enacted, can be predicted to lead to similar, negative outcomes for employers.

This will certainly be tested when the test of discrimination is considered in relation to the provisions of clauses 124 and 126, as with requests for information, and other aspects of the Bill. The Explanatory Notes outline the likely realisation of the 'shifting' burden of proof in such a way that it is difficult to imagine a scenario whereby a court would ever find that the applicant was better equipped to respond to the claim:

*.... in considering a complaint alleging a discriminatory request for information, the complainant would need to establish they were asked for information and would need to lead evidence from which it could be concluded that the information sought was for a discriminatory purpose, or for the person requesting the information to decide whether to engage in discriminatory conduct (eg whether or not to hire a person because of their attribute). The burden would then shift to the respondent to explain the legitimate reason for requesting the information, including if the purpose to which it would be put would not be unlawful because it was justifiable or was otherwise covered by an exception under the Act.*

As such, it is clear that once the applicant can establish a *prima facie* case that they were discriminated against, the matter will proceed. If the new role of the AHRC as educator and regulator proves to be similar to that of the VEOHRC, then it is reasonable to anticipate that the AHRC will assist claimants in putting together a case. This in turn means an employer will have the onus shifted to them and the claim will proceed. In this way, it is clear that rather than being a *shifting* onus of proof, it will become a system where a reverse onus of proof operates – so long as, in the first instance, the AHRC is satisfied that the applicant has satisfactorily made out a *prima facie* case against the respondent. In this way, the Senate Committee should reject the structure of the regime of proof, as well as its descriptor, because of the implications for employers if it remains as outlined by the Bill.

### 2.3 The new costs regime

When the reverse onus of proof is combined with the new regime of costs prescribed by the Bill, the significance of the burden the Bill would impose on employers is made explicit. The revised costs regime and the reverse onus of proof are described as “improvements” to the complaints process by virtue of improving access to justice. On closer inspection, they appear to be nothing more than administratively convenient for Government and a way to impose a philosophical outcome unsupported by sound policy justification and rationale.

The Bill contains the provision at clause 133 that parties should bear their own costs for litigation as a default position, with the court retaining a discretion to award costs “in the interests of justice”. The clause reads:

*(1) Subject to subsection (2), in proceedings under this Part in the Federal Court or the Federal Magistrates Court, each party is to bear that party’s own costs.*

*(2) If the court concerned considers that there are circumstances that justify it in doing so, the court may make such order as to costs, and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.*

*(3) In considering whether there are circumstances justifying the making of an order under subsection (2), the court must have regard to the following matters:*

*(a) the financial circumstances of each of the parties to the proceedings;*

*(b) whether any party to the proceedings is receiving assistance under section 130, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance);*

*(c) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission);*

*(d) whether any party to the proceedings has been wholly unsuccessful in the proceedings;*

*(e) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings and the terms of any such offer;*

*(f) any other matters that the court considers relevant.*

The Bill’s provisions for awarding costs are narrow and, on a close reading, appear to suggest that it is unlikely that costs orders will be awarded unless in the most extreme of circumstances. This is a substantive shift away from similar provisions provided by the *Fair Work Act 2009* and differs also from the provisions in the predecessor anti-discrimination statutes. The Bill must bring the provisions around costs orders into line with others available in relevant State and territory jurisdictions. This is particularly the case because employers will be expected to respond to claims while bearing the onus of proof. As the experience of employers with adverse action claims under the *Fair Work Act 2009* has shown, it is reasonable to expect claims to skyrocket where an applicant does not bear the ultimate burden of proof.

The existing costs mechanism proposed in the Bill is not likely to give employers appropriate assurance that they will not be left bearing the cost of defending unmeritorious claims, or be compelled to respond to claims that in another jurisdiction would have been dismissed on findings of fact. Accordingly, VECCI will – along with levelling critique of the proposed costs regime – continue to agitate for more stringent provisions around the dismissal of claims by the AHRC. This is discussed further in 3.2

Stated plainly, what employers need is a system in which costs follow the event and the unsuccessful party bears the costs burden in all bar exceptional circumstances. Further, the provisions of the proposed legislation around the dismissal of claims must be robust.

### **3.2 Dismissal of claims**

One of the purported improvements to be introduced by the proposed legislation is the ability of the AHRC to dismiss clearly unmeritorious complaints. These must be kept in perspective however because matters dismissed in this way will still be able to be pursued further by leave of the Court.

While the Explanatory Notes use the terminology ‘dismiss’, the Bill uses the term ‘closed’. A dismissal of a complaint is just one of the ways a complaint may be ‘closed’. The provisions around the closing of a complaint, at clauses 117 and 121 of the Bill, are apparently intended to provide a limit on access to the Court where a claim is closed on one of the grounds, including where a claim is without merit or is vexatious. The Explanatory Notes explain the consequences of what is described as an expanded capacity to dismiss unmeritorious complaints:

*The rationale for limiting access to the courts is to provide the Commission with an increased ability to dismiss clearly unmeritorious complaints and to focus resources on meritorious complaints; this in turn should limit the number of unmeritorious complaints being brought before the courts. With the early dismissal of unmeritorious complaints comes the potential deregulatory benefit of only involving respondents in the matter when there is an arguable matter to be dealt with.*

While this may prevent some claims eventually proceeding to court, it does not provide meaningful relief to employers, who will nonetheless still have to contend with the unmeritorious complaint in the first place. The new regime of a ‘shifting’ onus of proof will require the grounds for dismissal to be strongly made out at all stages of a complaint being heard and/or investigated.

Given this is the case, VECCI has reservations about the drafting of clause 117(2). This clause provides that the AHRC may close a complaint if:

- (a) *the Commission is satisfied that the conduct to which the complaint relates is not unlawful conduct, or is not Commonwealth conduct that is contrary to human rights; or*
- (b) *the complaint was made more than 12 months after the alleged conduct occurred (or most recently occurred); or*
- (c) *the Commission is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance; or*
- (d) *if some other remedy has been sought in relation to the subject matter of the complaint— the Commission is satisfied that the subject matter of the complaint has been adequately dealt with; or*

- (e) *the Commission is satisfied that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to the affected parties; or*
- (f) *if the complaint alleges unlawful conduct—the Commission is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Magistrates Court; or*
- (g) *if the complaint alleges unlawful conduct—the Commission is satisfied that there is no reasonable prospect of the complaint being settled by conciliation; or*
- (h) *if the complaint alleges that Commonwealth conduct is contrary to human rights—the Commission is satisfied that:*
  - (i) *there is no reasonable prospect of the complaint being settled by conciliation; and*
  - (ii) *having regard to all the circumstances, no action, or further action, is warranted in relation to the complaint.*

As things currently stand, the matters in sub-clauses 117 (2) (a), (b), (d) and (e) are arguably capable of falling within the definitions of “misconceived” or “lacking in substance” in sub-clause 117(2)(c). The clause could be re-drafted to reflect this. As regards the other elements raised in sub-clause 117(2)(c), namely consideration of whether complaints are “frivolous” or “vexatious”, VECCI does not share the optimism of the policy makers who seem to contend that the streamlining of the provisions for closing complaints in Clause 117 will have benefits for employers responding to allegations and claims. It should not be concluded that the task of satisfying the AHRC that a claim is either frivolous or vexatious (or both) will be straightforward. Our experience from other jurisdictions is that a very high hurdle must be cleared in order to satisfy a decision-maker that a claim is of such a nature. Significantly, it remains the case that even if the AHRC closes a claim pursuant to Clause 117, an applicant can still seek to pursue it by way of application to either the Federal Court or Federal Magistrates’ Court.

Claims will increase because there are broader grounds upon which to base them, a reversal of the onus of proof and a presumption that parties will bear their own costs. Having regard to the terms of Clause 117, we cannot assume that satisfying the AHRC that they should be closed at an early stage will be straightforward. An increase in claims will mean an increase in the cost of doing business for employers, as well as putting pressure on the relevant machinery of government. As it stands, the proposed legislation will invite an increase in claims, expense for employers, and administrative inefficiencies for the AHRC. These matters should concern the Committee.

### **3.2 The AHRC – educator or regulator or both?**

The HRAD Bill proposes a new role for the regulator, the AHRC.

This stated intention makes explicit two current regulatory trends. Firstly, it is clear that the role of regulators (and in this case the AHRC) is extending from the established adjudicative function to an educative and advisory function. The most recent example of this is the way in which the Office of the Fair Work Ombudsman’s regulatory function sits alongside an advisory function. In the past these functions were split.

As with other reforms of regulatory bodies under the Government, it is not clear beyond the rhetoric around the Bill as to how these broadened functions, duties and powers of the regulator will deliver better outcomes for business.

A number of aspects of the proposed character of the revamped and empowered AHRC should be reviewed, particularly where new capacities and powers are concerned.

The Bill proposes that the AHRC will be able to:

- Issue guidelines to enhance compliance and educate right and duty-holders;
- Create voluntary action plans for business;
- Offer a review of business/organisation policies and/or practices on a fee for service basis;
- Make special measure exemptions;
- Grant temporary exemptions.

These measures are one of the aspects of the Bill that makes it clear that harmonisation is not a neutral policy exercise, and can result in unintended and adverse outcomes. In this case, the intended harmonisation of the five pieces of existing legislation will require a confusing array of guidelines, action plans, and exemptions that appear likely to duplicate one another in important respects, and as such, will only add to regulatory complexity.

Furthermore, the issuing of these will not prevent arguments about whether or not a business has then complied with them, as well as with the duties prescribed by the legislation. As such, they are still likely to give rise to lengthy and complex and in turn, increase the cost and regulatory pressure of compliance on business. In another sense, these may be another way that costs are shifted to a business under the guise of 'administrative efficiency'.

Accordingly, VECCI submits that the Committee must attend to this aspect of the Bill, and seek to ascertain whether the range of documents and guidelines the AHRC can produce/endorse/certify, will in fact reduce the prospect of claims being made in a system of expanded rights.

### **3.3 Enhanced protections**

The Government's policy intention in harmonising the anti-discrimination and human rights laws to 'lift differing levels of protection to the highest current standard, to resolve gaps and inconsistencies without diminishing protections' is most clear when the protections – and accompanying legal obligations and duties – afforded by the Bill are considered. What is also clear here is that doing so explicitly expands and extends the regulatory effect of the Bill.

The Bill's more expansive range of protections extends to:

- Protections against sexual orientation and gender identity discrimination, and extension of protections against relationship discrimination to same-sex couples in any area of public life (clause 17);
- Protections for a number of other attributes in the area of work only, to harmonise with protections in the *Fair Work Act 2009* and State and Territory anti-discrimination laws (subclause 22(3));
- Recognition of discrimination on the basis of a combination of attributes (clause 19); *and*
- Coverage of discrimination and sexual harassment in any area of public life.

There are two key changes or extensions in the grounds protected by the Bill. Both extend the level of exposure of employers. These are:

- discrimination on the basis of sexual orientation or gender identity will be unlawful in any area of public life (subclause 22(1); and
- discrimination on the basis of industrial history, medical history, and nationality or citizenship will become unlawful in the area of work (subclause 22(3)).

The second of these will lead to further complexity for employers.

Subclause 22(3) of the Bill establishes the grounds protected in relation to ‘work and work-related areas’. These replace the grounds covered under the ‘equal opportunity in employment’ complaints scheme in the AHRC Act that applied only to work. The subclause reads:

*Discrimination on the ground of any of the following protected attributes (or a combination of protected attributes that includes any of the following protected attributes) is only unlawful if the discrimination is connected with work and work-related areas:*

- (a) Family responsibilities;*
- (b) Industrial history;*
- (c) Medical history;*
- (d) Nationality or citizenship;*
- (e) Political opinion;*
- (f) Religion;*
- (g) Social origin.*

As with other areas of the Bill that signal new rights or protections and accompanying duties and obligations, the policy justification of this expansion or extension is not provided in the Explanatory Notes. Instead, paragraph 75 of the Explanatory Notes simply states that this is a ‘significant policy change’.

While the Explanatory Notes do not provide a rationale for the ‘significant’ shift, or the evidence base for the shift, the Explanatory Notes do provide an explanation of their origin. Paragraph 95 explains that the source of the protection is the *Fair Work Act 2009*:

*This definition is based on the concept of ‘engaging in industrial activity’ in section 347 of the Fair Work Act 2009, to ensure consistency between the protections afforded by the two Acts in this regard. For example, it would be unlawful for an employer to discriminate against an employee who joined a union, or for an employee to harass other employees because they had refused to join a union.*

The protections around ‘industrial history’ created by the Bill are unnecessary duplication, and in the absence of appropriate justification, must be removed. By including the protection in the Bill, the Government provides another protected attribute for employees, but it is one that is not accompanied by the cost burden that exists under the *Fair Work Act 2009*. It is clear that doing so means the end result will be fewer impediments for employees making claims under the proposed legislation than under the *Fair Work Act 2009*, thereby providing an even more advantageous level of protection or privilege for anyone with an industrial history.

Furthermore, the acknowledgement of regulatory overlap on the one hand, and the implicit attempt at harmonisation at clause 22(3) on the other, raises the question of why the Government did not just opt for the *Fair Work Act 2009* to be the only location of work-related protections against discrimination. Alternatively, it should have imported the existing provisions of the *Fair Work Act 2009* into the Bill and removed them from the *Fair Work Act 2009* altogether. By not adopting either course of action, it is open to conclude that the Government's intention is to further enhance the extent of immunity enjoyed by trade union officials.

Regardless, it is likely that their inclusion in the Bill *and* the *Fair Work Act 2009* *and* in State or Territory statutes will inform applicants undertaking jurisdiction shopping – and equally, make the task of seeking to fulfil obligations and duties across all statutes more complex.

#### **4. Conclusions**

There must be a robust, evidence-based policy rationale for extending the reach of anti-discrimination law, reversing the onus of proof, and making significant reforms to the role and powers of the federal AHRC.

VECCI foreshadows that a number of aspects of the Bill will increase the administrative burden on business. Regulatory certainty is central to the capacity of business to operate efficiently and productively. The Senate Committee must respond to the concerns of business regarding the Bill, and in particular, scrutinise those aspects of the Bill that are likely to lead to an increase in the cost of defending claims brought against a business, or make it more difficult for business to fulfil the full range of duties prescribed by the consolidated legislation.

The Senate Committee should also consider the proposals put by business that consolidating of anti-discrimination provisions should extend to removing duplicated protections across work health and safety, as well as workplace relations, legislation. VECCI maintains that the general protections provisions of the *Fair Work Act 2009* should be repealed regardless because they were not foreshadowed by the Government as part of the Fair Work reforms, and have added to the regulatory burden faced by business in managing issues at the workplace level.

It would be prudent to defer the Bill until broader consultations with stakeholders are convened. The Bill is likely to have significant impact not only for employers, but a range of other organisations to which the Bill will extend by virtue of its 'public life' application. Ultimately however, as the Bill is likely to have significant business impact at a time when economic circumstances continue to be uneven, the best course of action would be to defer its passage indefinitely.

VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE AND INDUSTRY

21 DECEMBER 2012