MONASH University
Castan Centre for Human Rights Law

Human Rights and Anti-discrimination Bill 2012 – Exposure Draft

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Submission to Senate Legal and Constitutional Affairs Committee

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Introduction

The Castan Centre for Human Rights Law ('Centre') thanks the Committee for the opportunity to comment on this Exposure Draft of the Human Rights and Anti-discrimination Bill 2012. We welcome the practice of allowing comment on an Exposure Draft before a Bill like this is introduced, which gives more scope for improvement of individual provisions than a reference later in the legislative process.

The following comments should be read in light of our previous submission (in Janurary 2012) to the Attorney-General's Department ('Department') on its relevant consultation paper.[1] Of the five drafting recommendations we made in this submission, four have been implemented or partly implemented (details below), which is a pleasing result.

Background/Overview

This draft Bill represents the culmination of years of work by the Department. In the process of its development, Departmental representatives consulted widely – the Centre had the opportunity to attend one consultation session in Canberra which included representatives not only from the human rights community, but also from religious and employer groups. The Centre appreciates the Department's efforts to keep interested parties informed and accept feedback in this manner.

Human rights perspective

Every aspect of this Bill has been developed with the input of various interest groups in mind, and this is reflected in its drafting. From a human rights law perspective, many desirable features have been incorporated into the Bill, including:

- an objects clause indicating that the substantive provisions are to be interpreted in light of treaties;
- a definition of human rights in line with the recently-introduced Parliamentary human rights scrutiny regime;
- a simplified definition of discrimination;
- the addition of sexual orientation and gender identity as protected attributes;
- the addition of religion and political opinion as protected attributes (in a limited sense – see *Unlawful discrimination* below);
- protection against intersectional discrimination;

[1] Available at: <http://www.law.monash.edu.au/castancentre/publications/consolidation-of-ad-laws.pdf>.

- the ability to bring representative complaints to the Australian Human Rights Commission ('Commission');
- a shifting evidentiary burden, and
- the introduction of a 'no-cost jurisdiction' in the federal courts.

However, there are other features which could have been included, such as a general right to equality (with a corresponding duty to promote equality) and stronger enforcement measures, such as a power for the Commission to conduct involuntary compliance reviews of private organisations or to make compliance codes with enforceable provisions.

In addition, there are undesirable features of the present anti-discrimination regime which have been carried over, including overly broad permanent exceptions, and the Centre questions the logic behind the restriction of certain types of discrimination to the workplace.

There is also the question of expansion of the definition of discrimination into the realm of "insult" and "offence," which is unwarranted.

Comments on Specific Provisions

Chapter 1

The Castan Centre strongly supports the proposed objects clause (clause 3), which states that the law is intended to eliminate discrimination with regard to Australia's relevant international human rights obligations. As the premier legislative vehicle for promoting Australians' human rights and implementing the government's international obligations at the Commonwealth level, it is entirely appropriate that this law should have such an objects clause. This clause also implements a recommendation of the 2008 inquiry into the Sex Discrimination Act.[2] The Centre urges the Parliament to resist any attempt to weaken clause 3.

The Centre also welcomes the revised definition of human rights in Part 1-2, which accords with that in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Chapter 2

Protected attributes

The Castan Centre welcomes the expanded list of protected attributes in the draft Bill, which adds several attributes to the list of those protected by the current anti-discrimination Acts, including:

- industrial history;
- medical history;

[2] Ibid, Recommendation 3.

- nationality or citizenship;
- political opinion
- religion;
- marital or relationship status (including same-sex relationships);
- social origin;
- sexual orientation, and
- gender identity.

This brings the Australian law more into line with progressive anti-discrimination laws in the UK, Canada and New Zealand, which the Centre recommended in its submission to the Department.[3]

However, the explanatory material should give greater clarity to the meaning of the term "social origin," rather than to simply state that it has its ordinary meaning.[4] Does it mean "social class" or does it refer to particular groups such as the Roma or travellers? This should be made clearer in the relevant section of the Explanatory Notes.

There is at least one notable omission from the list – discrimination based on irrelevant criminal history. This does not appear to be covered anywhere in the Bill, even though it is currently covered under the Commission's 'ILO complaints jurisdiction.'[5] The Explanatory Notes cite the "uncertain nature of this concept, and the differences in understanding of what constitutes a relevant or irrelevant criminal record," along with the fact that only two states or territories currently protect this attribute, as justification for the omission. In the Centre's view, this is insufficient justification and irrelevant criminal history should be added as a protected attribute, at least with respect to employment.[6]

Definition of discrimination

It is commendable that the definition of discrimination has been simplified in clause 19.

However, clause 19(2)(b) is problematic, as has now been famously pointed out by James Spigelman in his address on Human Rights Day.[7] The section indicates that treatment which "offends" and "insults" is per se unfavourable and therefore within the purview of unlawful behaviour unless it can be saved by s 23. This extension of the scope of "unlawful discrimination" interferes too much with the

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[3] Ibid, [22].
[4] See Explanatory Notes, [102].
[5] See <http://humanrights.gov.au/human_rights/criminalrecord/index.html>.
[6] The Centre recognises that spent conviction schemes are relevant to the question of employment discrimination based on criminal history, but these schemes rarely treat a conviction as spent after less than 5 years (10 in many cases), and some exempt sex offences (however minor) entirely. Relevance of an offence which is not deemed spent to the position sought should be a consideration in judging the lawfulness of an employment decision.
[7] J Spigelman AC QC, Human Rights Day Oration, 10 December 2012, available at: <http://humanrights.gov.au/about/media/news/2012/132_12.html>.

human right to freedom of expression, recognised for example in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Certainly, under international human rights law, freedom of expression can be limited, including to protect "the rights of others". However, there is no human right per se not to be offended or insulted, even on the basis of a protected attribute.

Certainly, offensive and insulting treatment can escalate seriously so as to, for example, render a work environment extremely hostile for a person on the basis of his or her protected attribute. But such escalation will surely enter the realm of harassment, which is captured within clause 19(2)(a). Indeed, the Explanatory Notes (in paragraph 107) only explain the addition of "offensive" and "insulting" behaviour within clause 19(2)(b) by reference to an example of harassment. The Notes simply do not justify the extension of discrimination into the realm of mere offence and insults.

The Castan Centre strongly recommends the amendment of clause 19(2)(b) so that is is limited only to treatment that "intimidates" another: references to "offends" and "insults" should be deleted. Alternatively, "intimidation" could be captured within clause 19(2)(a) and 19(2)(b) could be deleted altogether.

The Centre also recommends the deletion of references to offence and insults in the racial vilification provision in clause 51(2). As this provision is not new, we will not go into detail. Briefly, the provision again interferes too much with freedom of speech with no counterbalancing right to be free from offence or insult. Our reasoning is explained further in an article by the Centre's director on *Eatock v Bolt*.[8]

We make no comment on the reference to "offence" and "insults" in the sexual harassment provision in clause 49 as we are not experts in the area of sexual harassment law.

Special measures

The Centre welcomes clause 21 addressing special measures, which were previously inconsistent across different areas of discrimination. This consolidated provision, based on the notion of substantive equality, will provide greater certainty for complainants and respondents alike.

However, the Centre recommended in January that this clause be accompanied by a requirement to develop special measures in consultation with the intended beneficiaries, to ensure that they agree the proposed measures are being taken "in good faith for the sole or dominant purpose of advancing or achieving substantive equality for people…." The Centre believes this is an important recommendation which should have been adopted.

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[8] See Joseph, 'Free speech, racial intolerance and the right to offend: Bolt before the court,' *Alternative Law Journal* Vol 36(4), December 2011, 225.

Unlawful discrimination

The restriction on seven protected attributes to work-related areas in subclause 22(3) of the Bill is not adequately explained in the Explanatory Notes, which merely state that this section reflects "attributes that were previously only protected by the AHRC Act equal employment opportunity grounds."

It is unclear, for example, why the right to be free from discrimination on the basis of religion should not be extended to other areas of public life. The Centre recommends that the policy logic behind 22(3) be reviewed as part of the three year review of the law.

Exceptions

The general exception for justifiable conduct, which is defined as "conduct which is undertaken in good faith for a legitimate aim, and in a manner proportionate to that aim," accords with tests applied under international law when considering the validity of limitations on human rights. In combination with the objects clause, this test should encourage the courts to consider relevant international law and lead to better implementation of Australia's international obligations. However, it should be made clear in the Bill that a 'legitimate aim' for the purposes of this clause may not be incompatible with the objects of the legislation. Subject to that caveat, the Centre supports this general exception.[9]

The exception in clause 27(2) for conduct "in accordance with the *Migration Act 1958*, or with regulations or another instrument of a legislative character made under that Act" is unnecessarily broad. The exception for conduct *necessary* to comply with Commonwealth Acts in clause 26 should be sufficient to serve immigration requirements. International law recognises a State's right to protect its borders, but not to the exclusion of fundamental human rights such as freedom from discrimination on protected grounds.

The exceptions related to religion in Part 2-2 largely preserve the lack of application of the current regime to religious bodies. However, the decision to exclude Commonwealth-funded aged-care homes from this exception is a positive step which should be taken further:

> **33**(3) The exception in subsection (2) does not apply if:
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> > (a) the discrimination is connected with the provision, by the first person, of Commonwealth-funded aged care; and
> >
> > (b) the discrimination is not connected with the employment of persons to provide that aged care.

[9] It also accords with our recommendation to the Department in January – see above n 1, [36].

In the Centre's view, it is incompatible with Australia's international obligations for any government-funded entity to be permitted to discriminate in a manner which would be unlawful but for the operation of the general exception for religious bodies.[10] As such, the Centre recommends that paragraph 33(3)(b) be deleted, and that subclause 33(3) be amended to cover all discrimination connected with the provision of government-funded services.

Positive duty

Part 2-5 provides for a general right of equality before the law for people of all races. The Centre recommends that, in accordance with articles 2, 3, 14(1) and 26 of the ICCPR, this Part be expanded to cover laws which discriminate on any prohibited basis (a general right of equality before the law). In addition, in line with recommendations made to the Department in response to the Discussion Paper,[11] there should be a positive duty to eliminate discrimination, harassment and vilification. Such a duty would complement the "negative duties" imposed by the current complaints system, which are insufficient to address systemic discrimination.[12] In addition, it would better fulfil Australia's multiple obligations to take effective measures to put an end to discrimination.[13]

In the Centre's view, a duty to eliminate discrimination should at least apply to Commonwealth Departments and other Commonwealth-funded bodies, and ideally should extend to major private employers as well. Such a duty could be linked to the compliance mechanisms in Chapter 3 – for example the law could require the development of action plans, regular review of policies and/or reporting to the Commission. There is precedent for a positive duty of this kind in Canadian, South African, Indian, EU, UK, Irish and even Victorian law.[14]

Chapter 3

The Centre welcomes the Bill's simplified and enhanced compliance mechanisms, in particular the ability in Division 3 of Chapter 3 for potential respondents to have their policies and procedures reviewed by the Commission to avoid unintentional breaches of the law. We also welcome provisions for the

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[10] For a full explanation of the Centre's view on a blanket (or near-blanket) exception for religious organisations, please see our report to the Department, above n 1, [56-75].
[11] See eg submission from Oxford Pro Bono Publico, January 2012; or Law Council of Australia, February 2012, both available at: <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx>.
[12] See Oxford Pro Bono Publico submission, above, 5-6.
[13] See eg Human Rights Committee, General Comment 28 (on article 3), UN Doc CCPR/C/21/Rev.1/Add.10, (29 March 2000), paragraph 4; Convention on the Rights of Persons with Disabilities, article 4(1)(e); Convention on the Elimination of All Forms of Discrimination against Women, article 2(e), Convention on the Elimination of All Forms of Racial Discrimination, article 2(1)(d).
[14] See Oxford Pro Bono Publico submission, above n 17, 8-14. See also *Equal Opportunity Act 2010* (Vic), s 15.

development of guidelines, compliance codes, special measures determinations and action plans (in Divisions 2, 6, 7 and 4 respectively).

However, in our view Chapter 3 could be strengthened further without undue imposition on potential respondents.

Compliance codes

Clause 75(6), which provides that '[n]othing in this Act requires a person to comply with, or participate in, [enforcement or dispute resolution] mechanisms included in a compliance code,' appears to undermine the effectiveness of Division 6 generally, and should be deleted so that compliance codes made by the Commission have a similar status to that of disability standards made by the Minister (see clause 73). This would be balanced from a regulatory point of view by the fact that clause 76(8) makes compliance codes disallowable by Parliament.

The procedure in clause 76 for making compliance codes should also contain a requirement to consult state and/or territory Human Rights Commissions and those who may be affected by the code in question, in addition to relevant state government Ministers and applicants. The serious potential effect of a compliance code – that is, deeming certain conduct to be non-discriminatory – requires a comprehensive consultation process.

Temporary exemptions

The Centre notes that many other bodies made submissions to the Department on its Anti-discrimination Laws Discussion Paper, several of which dealt with the subject of temporary exemptions.[15]

The Commission's submission noted that the current legislation "does not specify any criteria or procedures for consideration of exemption applications."[16] Clause 84 of the Bill provides only slightly more guidance for decision-makers, providing that "[t]he Commission may, in writing, grant the temporary exemption if the Commission is satisfied that the exemption is consistent with the objects of this Act."

The Australian Council of Human Rights Agencies, along with the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), recommended that there be clear statutory criteria for granting temporary exemptions – including not only a requirement of consistency with the objects of the Act, but also a requirement for the decision-maker to set timetables for compliance and to

[15] These submissions are available at: <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx>.
[16] See Commission Submission, available at above address, 47.

consider all relevant human rights.[17] These recommendations have not been adopted, and no explanation for this decision appears in the Explanatory Notes.

Chapter 4

The Centre welcomes the detailed complaints procedures in Chapter 4 of the Bill. In particular, we welcome the expansion of assistance from the Commission for the preparation of complaints for people in custody (clause 97) and for those experiencing hardship to appeal to the courts (clause 130).

However, the Centre recommends deletion of clause 88(2), exempting the Commonwealth from discrimination complaints based on economic, social and cultural rights. Australia's obligations under the International Covenant on Economic, Social and Cultural Rights are no less binding or important than its other international human rights obligations.

Burden of proof

Critics of this Bill claim that the reduced evidentiary burden on complainants and the abolition of costs orders against them will lead to a significant increase in (unmeritorious) complaints.[18] This ignores the fact – highlighted in our submission to the Department earlier this year – that the present system is unduly weighted in favour of respondents, both because of the difficulty of proving discrimination in court, and the risk of potentially crippling adverse costs orders.[19] As such, the new Bill would merely assist in "levelling the playing field" between those suffering from discrimination and those discriminating. This is a vital reform which is necessary for the law to achieve its stated object of eliminating discrimination in Australia.[20]

As for unmeritorious complaints, the Bill increases the capacity of the Commission to dismiss them before they even reach the courts, which is a sensible and adequate precautionary measure.

The Shadow Attorney-General also claims that the shifting burden of proof "violates the principle on which our justice system has always operated" (ie that

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[17] See ACHRA Submission, 53-54 and VEOHRC Submission, 2-3.
[18] See eg Merritt, 'New-look statute fails on harmonious front,' *The Australian,* 20 November 2012 or Harrison, 'Change in discrimination laws will swamp courts with complaints: Brandis,' *The Age,* 20 November 2012.
[19] See eg Gaze, 'The Costs of Equal Opportunity: Will changes to HREOC solve the problem of anti-discrimination law enforcement,' 25 *Alternative Law Journal* 3 (2000) 125, 126-127.
[20] On the difficulty of bringing discrimination cases, see further eg Allen, 'Reducing the Burden of Proving Discrimination in Australia,' 31 *Sydney Law Review* (2009) 579, 580; Lee, 'Discrimination revamp removes victims' burden,' *The Age*, 22 November 2012, and Schulman, 'David and Goliath battle over disability discrimination,' *ABC The Drum,* 4 November 2011: <http://www.abc.net.au/unleashed/3625988.html>.

the onus of proof should rest on the party bringing the action).[21] In fact, the principle in question is the presumption of innocence, which is only applicable in criminal law. Furthermore, as the President of the Commission has noted, "[i]t means that those with the relevant information will be the ones who are required to supply it – this is consistent with other civil claims processes in Australia."[22]

The Shadow Attorney-General's criticism merely states a general rule without explaining why the Bill should not depart from it, when in fact the present system is unfair to complainants and requires reform. Under the proposed system, complainants would still have to make out a *prima facie* case of discrimination – enough to convince the court that the respondent has a case to answer. This is best characterised as a shared evidentiary burden, rather than a reverse onus.

Since in many discrimination cases the complainant will not have access to the necessary evidence (eg employment records), it is perfectly reasonable to require the respondent to produce it. In recognition of this fact, there is already some burden on the respondent for indirect discrimination claims under the Age, Sex and Disability Discrimination Acts and some State and Territory legislation,[23] not to mention claims in the UK, US, Canada and the EU.[24] Finally, the Senate Standing Committee on Legal and Constitutional Affairs itself recommended a change to a burden-shifting model in its review of the Sex Discrimination Act in 2008.[25]

In short, the evidentiary model adopted in the draft Bill is consistent with similar legislation and entirely appropriate, despite the Opposition's criticism.

Chapter 5

The Commission's inquiry power, which appears to carry over largely unchanged from the current legislation, is an important inclusion in the Bill, and its removal to a separate Chapter is a sensible step. However, provision should be made for credible allegations of systemic discrimination – even in the absence of a specific complaint – to be investigated by the Commission. Such a power would complement the positive duties to eliminate discrimination recommended above and constitute an example of an active "effective measure" for the purposes of Australia's relevant international obligations (provided the Commonwealth funded it adequately). This investigative power would still be subject to the

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[21] See Packham and Vasek, 'Change in proof discrimination laws worries opposition,' *The Australian*, 20 November 2012.
[22] See Harrison, above n 2.
[23] See eg *Anti-Discrimination Act 1991* (Qld) ss 204-205 or *Discrimination Act 1991* (ACT) s 8(3)(c).
[24] See Allen, above n 4, 587.
[25] See *Effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality*, December 2008, available at: <http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/report/report.pdf>, Recommendation 22.

requirement under clause 138 that inquiries should only be initiated in the public interest to further the objects of the Act.

Conclusion

Overall, this draft Bill is a great improvement on the five Acts which it would replace, and it should be passed as soon as possible. Most aspects are simpler than their existing equivalents, and it provides much-needed protection for those who face previously-unrecognised forms of discrimination. It meets the government's drafting goals and addresses many of the issues identified in the 2008 review of the Sex Discrimination Act. The shortcomings identified above should be understood in this context. If they can be addressed as recommended, this would become a comprehensive anti-discrimination law comparable to the best in the world.