DRAFT HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

Legal Aid NSW submission to the

Senate Legal and Constitutional Affairs Committee Inquiry

January 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 women's domestic violence court advocacy services.

Legal Aid NSW has significant expertise in the area of discrimination law. Grants of legal aid are available for discrimination matters pursuant to Legal Aid NSW Policy.[1] In addition to civil law litigation, discrimination law issues regularly arise in the provision of civil law advice and outreach services. Legal Aid NSW also provides a number of specialist programs addressing discrimination law.

Legal Aid NSW welcomes the opportunity to provide these comments. For further discussion of any of the issues raised in this paper, please contact Alex Grosart, Senior Solicitor, Human Rights, Civil Law Division on or at or Annmarie Lumsden, Executive Director, Strategic Policy, Planning and Management Reporting Division on or at .

[1] Legal Aid NSW policy online 6.8. Legal Aid NSW policy online is available at < http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies>

Background

Legal Aid NSW welcomes the Federal Government commitment to consolidating the current Commonwealth anti-discrimination framework[2] into a single, comprehensive law and recognises that the Human Rights and Anti-Discrimination Bill 2012 is a significant step in Australia's Human Rights Action Plan.[3]

Legal Aid NSW considers the Human Rights and Anti-Discrimination Bill 2012 as a significant opportunity for the Government to:

- clarify ambiguities in the current framework;
- promote consistency;
- enhance protections where needs are identified;
- address identified deficiencies with the current complaints-based model; and
- improve compliance with Australia's international human rights obligations.

The Legal Aid NSW submission is informed by our experience of providing information, community legal education, advice, minor assistance and representation to disadvantaged people across New South Wales.

The Legal Aid NSW response is predicated on the following underlying principles:

- The Human Rights and Anti-Discrimination Bill 2012 should incorporate Australia's international human rights obligations into domestic law;
- The Government's stated commitment to no diminution of protections at the federal level should be observed;[4]
- The Human Rights and Anti-Discrimination Bill 2012 should ensure consistency of outcome with those best practice features identified in the current Acts, State and Territory anti-discrimination laws, and the *Fair Work Act 2009* (Cth);
- The Human Rights and Anti-Discrimination Bill 2012 should reduce complexity of concepts and processes and improve accessibility of the law for people affected by discrimination.

[2] *Racial Discrimination Act 1975* (Cth) (RDA), *Disability Discrimination Act 1992* (Cth) (DDA), *Sex Discrimination Act 1984* (Cth) (SDA), *Age Discrimination Act 2004* (Cth) (ADA), and *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
[3] See Attorney-General's Department http://www.ag.gov.au/nhrap accessed January 2012 (particularly item 18).
[4] Attorney General, Robert McClelland and Minister for Finance and Deregulation, Lindsay Tanner, 'Reform of anti-discrimination legislation', (Joint media release, 21 April 2010).

Submissions by Victoria Legal Aid

Legal Aid NSW endorses the submission made by Victoria Legal Aid, and raises the following additional issues.

Criminal record

The removal of coverage of criminal record as a protected attribute is a diminution in protection. Existing spent conviction and privacy legislation does not provide adequate protection for persons with a criminal history. An aim of the consolidation of Commonwealth Anti-Discrimination laws was to address gaps and inconsistencies in the operation of Federal anti-discrimination legislation. Through removing coverage on the ground of criminal record, the Bill effectively creates a new gap in the anti-discrimination regime. This gap will have a significant impact on some of the most marginalised members of society and be an impediment to their participation in the workforce and ability to support themselves and their families.

Legal Aid NSW recommends that criminal record be included as a protected attribute and discrimination on this ground made unlawful in the new Bill in line with Australia's obligations under International Labour Organisation Convention No. 111.

Religious exemptions

Clause 33 of the Bill limits religious exemptions for the provision of services in aged care by religious organisations in receipt of Commonwealth funding.

This is a welcome development however it should apply to all services and not just to the provision of aged care. Religious organisations that provide services funded by the taxpayer should not be permitted to discriminate in the provision of these services. This is an issue that is particularly relevant to the education, health and adoption services provided by religious organisations.

Equality before the law

Clause 60(2) of the Bill makes clear that equality before the law for race does not apply to a law that is a special measure to achieve equality. This is a notable departure from section 10 of the *Racial Discrimination Act 1975*. Clause 60(2) effectively limits the operation of the equality before the law for race provision by precluding any challenge to legislation which is framed as a special measure, but in practise limits the rights of a certain race.

Section 10 of the *Racial Discrimination Act 1975* is an established protective measure and there is no compelling policy reason for limiting or qualifying its operation.

Legal Aid NSW recommends that the Bill include an equality before the law provision that applies to all protected attributes in the Bill, in order to comply with Australia's international human rights law obligations.

Representative actions

Clause 89 of the Bill allows representative actions to be brought by 'another person' or 'industrial association' to the Australian Human Rights Commission. However, the Bill does not allow for representative actions in either the Federal Court or the Federal Magistrates Court.

Legal Aid recommends that organisations and advocacy groups with a sufficient connection to the subject matter should have standing to bring complaints in their own right to AHRC and the courts in order to address systemic discrimination, which they are in a unique position to identify.

No cost jurisdiction

Legal Aid NSW strongly supports the introduction of a no cost jurisdiction under Clause 133 in the Bill.

Through its advice clinics and litigation practice Legal Aid NSW is aware of many clients who have not pursed meritorious discrimination complaints in the federal jurisdiction and who have been deterred by the risk of an adverse costs order.

Enforceability of conciliation agreements

Under the current federal anti-discrimination regime, there is no mechanism to provide for the registration and enforcement of conciliation agreements. A complainant will have to commence fresh proceedings if there is a need to enforce a conciliation agreement. This often causes problems for Legal Aid NSW clients when respondents fail to comply with conciliation agreements. Clients are faced with undue delay and difficulty in effectively pursuing what was agreed at settlement.

Legal Aid NSW recommends that the new Bill should enable conciliation agreements to be enforceable by registration with the Federal Court.