LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTTEE

Human Rights and Anti-Discrimination Bill 2012

QUESTIONS ON NOTICE

Senator Louise Pratt asked on Wednesday, 23 January, 2013, (proof) Hansard page 18-19.

Question

Senator PRATT: Just very briefly, I note that your submission says that you are pleased that representative actions are not included in the exposure draft, but your submission before us on that was probably before the government's inquiry. But it does not articulate why that is the case.

Mr Mammone: Sorry—why we support—

Senator PRATT: Why you oppose representative actions. It is not articulated in your submission before us.

Mr Mammone: Yes, I understand. It is because it is not part of the existing framework of anti-discrimination laws. If it were to be included, the Attorney-General's own strategic framework has pointed out—and we have provided input—that changing those sorts of provisions would have the potential to increase litigation. So that is something we did not support in terms of this consolidated exercise. Obviously there are others that have views contrary to that; their view is that there should be representative actions. But we did not feel the need to further explain it in this committee inquiry. But those are the main reasons why.

Senator PRATT: So the only reason you can give is that you believe it would increase the amount of litigation? There is no intrinsic reason in relation to the nature of the cases themselves that that should be the case?

Mr Mammone: I could go into further detail, and I am happy to take that on notice, but there are issues associated with the objectives of, perhaps, the person that is not the complainant in a particular matter in representative actions. So there are a whole range of issues and associated policy reasons why we would oppose representative actions.

Answer

Page 36 of ACCI's written submission to the Attorney-General's Department Discussion Paper – Consolidation of Commonwealth Anti-Discrimination Laws (February 2012) (Attached to ACCI's submission to this Committee's Inquiry) outlines ACCI's position on proposals to include representative action provisions in a consolidated Bill as follows:

3.1.25 Representative Actions

142. ACCI does not support amending the existing legislation to allow representative actions (or similar actions) and believes that the current framework strikes an appropriate balance for all parties. If representative organisations are able to commence proceedings before the courts, this may lead to a culture of interest based litigation, whereby organisations are not acting in the interests of the individual but for a wider group and possibly for social-political purposes. Once again, business would be forced to fund its own defence in such proceedings and may lead to settlements out of court to avoid costs, notwithstanding the claim may be frivolous, vexatious or without merit.

The *Australian Human Rights Commission Act 1986* (Cth) provides for representative complaints under ss.46PB and 46PC. There are no explicit provisions allowing representative actions before the Federal Magistrates' Court or Federal Court. A mechanism under Part IVA of the *Federal Court Act 1976* (Cth) allows for the commencement of *"representative proceedings"* (as defined) in the Federal Court if certain pre-conditions are met.

An analysis of existing state and territory laws illustrates that most state/territory jurisdictions do not expressly allow representative actions (ie. allow a third person or organisation to take action on an aggrieved person's behalf before the relevant courts or tribunals).

The Australian Government considered recommendation number 20 of the Senate Standing Committee on Legal and Constitutional Affairs report on the *Sex Discrimination Act 1984* (Cth) and explicitly rejected the Committee's recommendation to amend subsection 46PO(1) of the *Australian Human Rights Commission Act 1986.* See *"Exposure Draft Explanatory Notes"* (November 2012), Appendix A, at p.136.

To reiterate, ACCI would not support this Committee recommending that representative actions be included in a consolidated anti-discrimination Bill.