



One Company
Many Brands



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20 December 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: - legcon.sen@aph.gov.au

Dear Ms Dennett

Exposure Draft Human Rights and Anti Discrimination Bill 2012

I refer to the Inquiry into the *Exposure Draft Human Rights and Anti Discrimination Bill 2012* (the Bill) being conducted by the Senate Legal and Constitutional Affairs Committee. Suncorp welcomes the opportunity to contribute to this Inquiry.

The Suncorp Group

Suncorp Group Limited and its related bodies corporate and subsidiaries (collectively 'Suncorp') offer a range of financial products and services in banking (Suncorp Bank) life insurance and superannuation (Suncorp Life) and general insurance across Australia and New Zealand. Suncorp has more than 15,000 employees nationally and relationships with over nine million customers.

Nationally, Suncorp is the largest general insurance group in Australia and second largest in New Zealand. Suncorp Bank is Australia's leading regional bank with customer satisfaction levels greater than the big four. Suncorp Life specialises in life insurance and is a leading superannuation and investment business.

This submission is made on behalf of Suncorp Life, Commercial and Personal Insurance Divisions and Suncorp Human Resources.

The Bill

Suncorp commends the overarching objectives of the Bill to consolidate, simplify and replace five (5) existing Commonwealth anti-discrimination laws into a single anti-discrimination law, without significant changes to what is unlawful and what is not. Suncorp notes key changes to the current law, specifically:

- the introduction of new 'protected attributes';
- the burden of proof;
- a consolidated single, simplified test for discrimination for all 'protected attributes';
- available exemptions and defences; and
- other key provisions.

Suncorp continues to rely on submissions lodged in response to the *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*¹ and confines its comments to specific aspects of the proposed changes in the Bill.

The Introduction of New ‘Protected Attributes’

Suncorp supports the additional protected attributes of:

- sexual orientation;
- gender identity;
- extension of the relationship status to include same sex couples; and
- a combination of one or more ‘protected attributes.’

Further attributes are protected when connected with work and work-related areas have been harmonised with attributes protected under the *Fair Work Act 2009* and State/Territory anti-discrimination laws and include:

- family responsibilities;
- industrial history;
- medical history;
- nationality or citizenship;
- political opinion;
- religion; and
- social origin.

Suncorp welcomes a consistent approach in enshrining protected attributes into law, to promote seamless interaction of all relevant laws. Further, consistent with Suncorp’s submission to the earlier Discussion Paper, we support not including irrelevant criminal records as a ground of discrimination, due to the uncertain nature of this concept, and the differences in understanding of what constitutes a relevant or irrelevant criminal record.

Burden of Proof

The Bill shifts the burden of proof once the applicant has established a prima facie case of discrimination. The change in the burden of proof is based on the view that the respondent is best placed to know the reason for an action and to have access to the relevant information. Arguably, the introduction of the reverse burden of proof is balanced by the enhanced ability of the Human Rights Commission (the Commission) to dismiss unmeritorious complaints, adopting the provision from the *Australian Human Rights Commission Act 1986* (AHRCA). Matters dismissed this way may only proceed to court by leave of the court.²

A new provision³, which may act as a further disincentive for the lodgement of unmeritorious claims, is in respect to litigation costs. The new clause provides a default position where each party bears its own costs, with the court retaining discretion to award costs in the interests of justice.

As stated in our previous submission, Suncorp prefers the approach of the complainant bearing the burden of proof in disproving the reason for the alleged conduct in any allegation of discrimination. Suncorp is not aware of any compelling evidence that supports a change to the existing burden of proof approach.

Proving one’s innocence is inherently unfair. It means resources have to be expended defending even vexatious claims. Further, the laws should sit together coherently. It would not make sense to require a respondent to prove its innocence regarding the reason for the alleged conduct in discrimination cases, where the applicant would have to prove the respondent’s liability in most other cases, such as state anti-discrimination cases and unfair dismissal cases.

While Suncorp prefers the current approach of the complainant bearing the burden of proof in any allegation of discrimination, Suncorp will work with the overall approach adopted in the Bill. However, Suncorp suggests that these provisions be reviewed to ensure no unintended consequences resulting from the application of

¹ Suncorp Submission, 1 February 2012 - [http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/Consolidation%20-%20Discussion%20Paper%20-%20195%20-%20Suncorp%20-%20202%20Feb%202012%20\(pdf\).PDF](http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/Consolidation%20-%20Discussion%20Paper%20-%20195%20-%20Suncorp%20-%20202%20Feb%202012%20(pdf).PDF)

² *Exposure Draft Human Rights and Anti Discrimination Bill 2012* – Clauses 117, 121 - http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/anti_discrimination_2012/info/index.htm

³ *Ibid* – Clause 133

these provisions. We suggest review of these provisions when the exemption clauses are reviewed, in three (3) years' time.

Available Exemptions and Defences

The available exemptions have been streamlined and Suncorp confines its comments to the relevant points below.

- New general defence for justifiable conduct⁴
Conduct is justifiable (not unlawful), if the person has engaged in the conduct in good faith, for a legitimate aim and in a manner proportionate to that aim. Although this exemption does not apply on the basis of disability if reasonable adjustments could be made,⁵ the defence is otherwise drafted in a very broad fashion. In one subsection, subclause 23(3), there are no less than four adjectives that will require interpretation: “*Justifiable*”; “*good faith*”; “*legitimate*” and “*proportionate*”. Without further guidance from Government, this may encourage disputation.

Suncorp notes that the ‘adverse’ provisions of the general protections in the *Fair Work Act 2009* (Cth) were also drafted very broadly. A view was taken from Government that these provisions merely reflected existing protections, being the “*freedom of association, unlawful termination and other provisions*” in previous legislation.⁶ However, experience has shown that, following the introduction of that legislation, those provisions have required a high degree of interpretation and have generated significant litigation. This is perhaps due in large part to the breadth of the wording adopted.

It is in this context that Suncorp is of the view that further guidance should be provided (perhaps in-text or from the Commissioner) as to what amounts to justifiable conduct, to avoid unnecessary disputes.

- Exemption for insurance, superannuation and credit⁷
This clause, as well as the exemptions listed in Subdivisions C and D, is included to define the scope of areas of public and private life and to provide greater guidance than is given by the justifiable conduct exemption. The insurance, superannuation and credit exemption consolidates the existing approach into a single exemption.

Conditions must be met before the exemption can apply. Subclause 39(5) sets out the conditions that must be met before the exemption can apply. This includes basing the discrimination on:

- reasonable actuarial or statistical data; or
- in the absence of such data, any other reasonable factors.

It also requires the provider of the insurance, superannuation or credit to provide reasonable access to the data if requested to do so. This can be done by either providing a copy of the data or making it available at a reasonable time and place.

This exemption is based on subsection 41(1)(e) of the *Sex Discrimination Act 1984* (SDA). The specific powers for the Commission to request such data, and the offence for failing to comply with such a request⁸ have not been retained; however the Commission retains its general powers to require the production of information during a complaint or inquiry.⁹

⁴ *Exposure Draft Human Rights and Anti Discrimination Bill 2012* – Clause 23 -

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/anti_discrimination_2012/info/index.htm

⁵ Ibid – Subclause 23(6)

⁶ See paragraph 1384 - *Fair Work Bill 2008 Explanatory Memorandum*

<http://www.comlaw.gov.au/Details/C2008B00262/Explanatory%20Memorandum/Text>

⁷ Op.cit – Subdivision D - Clause 39

⁸ Section 87, *Sex Discrimination Act 1984*; Section 107 *Disability Discrimination Act 1992*; Sections 52 and 54 *Age Discrimination Act 2004*

⁹ Op.cit - Clauses 107 and 140 respectively

The general and specific exemption clauses go a long way in addressing the insurance industry's significant concerns of limiting lawful discrimination during the underwriting process.¹⁰ It almost, but not quite, mirrors Suncorp's preferred exemption clause in section 47 of the *Equal Opportunity Act 2010* (Vic) which states inter alia:

An insurer may discriminate against another person by refusing to provide an insurance policy to the other person, or in the terms on which an insurance policy is provided, if –

- the discrimination is permitted under the:
 - SDA; or
 - *Disability Discrimination Act 1992* (Cth); or
 - *Age Discrimination Act 2004* (Cth); or
- the discrimination
 - is based on actuarial or statistical data on which it is reasonable for the insurer to rely; and
 - is reasonable having regard to that data and any other relevant factors; or
- in a case where no such actuarial or statistical data is available and cannot reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors.

Suncorp will work with the scope of the insurance, superannuation and credit exemption but considers that thought needs to be given to the requirement to provide data upon request. Underwriting data is intellectual property, which is commercially sensitive and as such should be afforded due commercial protection. In protecting our intellectual property, the data provided would need to be generic or in an aggregated form and it is questionable whether such data would be of assistance to the consumer.

Further, the data may include general information about health conditions and prognosis. While such data may be generic or in an aggregated form, for an insurer providing this type of data directly to the consumer that relates directly to the consumer's health may be inappropriate. Such data might be more appropriately given to a third party, such as the Commission.

If the requirement to produce data upon request is maintained, Suncorp is of the view that such a provision be reviewed in three (3) years' time to assess whether the provision is a meaningful cost effective method to deliver on its stated aims.

Other Key Provisions

Other key provisions adopted in the Bill are considered.

- The Bill preserves the existing policy of who may bring a complaint to the Commission. Clause 89 is wide in its scope of who may bring a complaint and includes an industrial association. Suncorp supports this general approach. Should a matter proceed to court, it is unclear to what extent the involvement of industrial associations is permitted. Suncorp prefers that only the person or persons aggrieved should be permitted to bring an action to the courts and this be specifically addressed in the Bill.
- The Commission's investigative powers extend to requiring a party to produce documents and failure to comply is an offence of strict liability.¹¹ Suncorp prefers the powers to be aligned with current provisions that afford similar powers to other federal agencies, such as the Australian Securities Investments Commission (including regulatory obligations on the provision of financial advice¹²), the Privacy Commissioner and the like, with provisions protecting sensitive, commercial and intellectual property information. There should also be a capacity to avoid or delay production upon reasonable excuse. This would create a consistent approach.

¹⁰ See arguments in *Suncorp Response - Australian Law Reform Commission - Grey Areas – Age Barriers to Work in Commonwealth Laws Discussion Paper* from page 10 - <http://www.alrc.gov.au/sites/default/files/subs/66.suncorp.pdf>

¹¹ *Exposure Draft Human Rights and Anti Discrimination Bill 2012 – Clauses 107 & 108-*

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/anti_discrimination_2012/info/index.htm

¹² *Corporations Act 2001 (Cth) – Chapter 7 -* <http://www.comlaw.gov.au/Details/C2012C00696>

Comments

Financial institutions are obliged to adhere to various obligations under the *Corporations Act 2001 (Cth)*¹³ and the supporting Regulatory Guides (RG) issued from the Australian Securities and Investment Commission (ASIC). These obligations include the dispute resolution process.

Financial institutions are required to have in place an internal dispute resolution (IDR) process and an external dispute (EDR) process. The IDR process is governed by ASIC - RG 165 whilst ASIC RG 139 governs the EDR process. Once Suncorp receives a complaint the IDR/EDR process is invoked. For Suncorp, the EDR process requires referral of the unresolved complaint to the Financial Ombudsman Service.

Suncorp complies with these obligations and has a dedicated dispute resolution process to address consumer complaints in respect to general and life insurance and banking products and services, including complaints involving protected attributes. These services are consumer friendly and offer support in resolving the dispute. They are also free of charge for the consumer and the consumer is kept informed once a complaint has been received.

It is unclear whether a complainant may lodge a complaint through the IDR/EDR process and the Commission simultaneously in respect to an alleged claim of discrimination. It is suggested that Clause 90 be amended to disallow the making a complaint whilst the complaint is proceeding through the IDR/EDR process. Further, it is suggested that once the complainant has chosen the IDR/EDR process, the complaint should be disallowed in another jurisdiction, unless the complaint failed for want of jurisdiction.

Conclusion

Suncorp commends the effort of the Attorney General's Department in drafting a Bill that consolidates and simplifies existing Commonwealth anti-discrimination laws into a single Bill. The Bill takes into account significant concerns expressed by Suncorp in response to the previous Discussion Paper. This submission offers further enhancements to address remaining concerns.

Suncorp is keen to work collaboratively with the Attorney General's Department to facilitate the consolidation of existing anti-discrimination laws. We seek to pursue the best policy settings for anti-discrimination obligations whilst reducing complexity and regulatory burden at every opportunity.

Suncorp would be pleased to discuss our submission or any other matter relating to the Bill with you. If you wish to do so, please contact me on [redacted] . Alternatively please contact Mike Thomas - Manager, Group Government and Stakeholder Relations on [redacted]

Yours faithfully

Annabelle Butler
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¹³ *Corporations Act 2001 (Cth)* – Chapter 7 - <http://www.comlaw.gov.au/Details/C2012C00696>