

Master Builders Australia

Submission to Senate Legal and Constitutional  
Affairs Committee

on

*Human Rights and Anti-Discrimination Bill 2012*

21 December 2012



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## Recommendations

<b>Recommendation 1</b>	That only Commonwealth legislation should regulate discrimination law given the compliance burden represented by multiple statutes.
<b>Recommendation 2</b>	Insert the disjunctive “or” between subclause 19(2)(a) and (b).
<b>Recommendation 3</b>	That the term “other conduct that offends” be removed from subclause 19(2).
<b>Recommendation 4</b>	That the Bill use the “less favourable” discrimination test rather than the “unfavourable” test.
<b>Recommendation 5</b>	That the Bill retain the use of the terms “direct” and “indirect” discrimination.
<b>Recommendation 6</b>	That there is a clear distinction between the discrimination provisions of the FW Act and the Bill. If the Government wishes for certain concepts from the FW Act to be inserted into the Bill, those parts of the FW Act should be removed so that a crossover of discrimination claims do not occur.
<b>Recommendation 7</b>	That the terms “public life” and “an area of public life” be clarified.
<b>Recommendation 8</b>	That the exceptions in subclause 53(2) be expanded to encompass situations where the inherent requirements of work require consideration.
<b>Recommendation 9</b>	That the exception for justifiable conduct be amended, with a more defined and certain focus, so that persons will clearly understand whether their conduct is indeed justifiable.
<b>Recommendation 10</b>	That the statutory provision for the inherent requirements of work reflect the High Court test in <i>Qantas Airways v Christie</i> , and the notion of an “essential element”.
<b>Recommendation 11</b>	That the Bill retain the DDA definition of disability.
<b>Recommendation 12</b>	That concepts such as “reasonable steps” and “due diligence” be clarified.
<b>Recommendation 13</b>	That the reverse onus of proof be removed from the Bill, with the onus placed on the complainant.
<b>Recommendation 14</b>	That the unsuccessful party pay the costs of the successful party.

## Executive summary

Master Builders supports endeavours to simplify existing discrimination laws. However, Master Builders does have concerns that the Bill will increase uncertainty and the regulatory burden on business without achieving its other aims. The Bill has major consequences for all employers and the Australian community, as it changes the way discrimination law is regulated. It introduces novel concepts, most of which Master Builders contends do not have sufficient clarity and thus offend the rule of law.

The Bill proposes a single test for discrimination, based on the term “unfavourable treatment”. The inclusion of offensive or insulting conduct as “unfavourable” will have wide ranging ramifications. Under the new law, employees would appear to have a prima facie discrimination case if they are offended or have had their feelings hurt by certain words or conduct. Employers would then have to disprove this offensive conduct allegation, a concept which is founded on subjective notions. As the freedom to offend is also an integral component of the freedom of speech, Australia may possibly be breaching international treaty obligations through the insertion of this provision. In order to avoid these negative repercussions, Master Builders argues that the “less favourable” discrimination test be retained, especially as there is no indication that this test is failing in practice.

The Regulation Impact Statement highlights that the discrimination provisions in the Fair Work Act (FW Act) are different to the five discrimination Acts which are being consolidated. However, to ensure “consistency” between the two Acts, there are concepts inserted into the Bill which are based on definitions from the FW Act. Master Builders contends that the disjunction between the discrimination provisions of the FW Act and the Bill should be retained to ensure that a crossover of discrimination claims does not occur. Alternatively, if the Government wishes for certain provisions from the FW Act to remain in the Bill, they should be removed from the FW Act.

Whilst Master Builders supports the additional mechanisms that aim to give the Bill certainty, (such as, guidelines, compliance codes, action plans etc) the Government appears to be delegating the responsibility for creating such provisions, which in turn creates uncertainty. Instead, if concepts such as “due diligence” were clarified in the Bill, all stakeholders would be able to understand the scope of each provision, without having to create multiple, industry specific explanatory materials.

Master Builders also argues that the Bill's reverse onus of proof will only increase the regulatory burden on our members and increase vexatious claims. Under the proposed law, employees would only have to establish a prima facie case that unlawful discrimination occurred, and the respondent (most likely employers) will face the burden of demonstrating a non-discriminatory reason for their action, that their conduct was justifiable or that another exception applies. As the threshold for establishing that unlawful discrimination occurred is reduced under the Bill (for example, conduct that offends is discrimination and persons are able to plead a combination of attributes to make a claim) a disgruntled employee may be able to make a prima facie case against their employer. As the losing party would not have to pay the costs of the successful party, employees will not be deterred by the risk of an adverse cost order against them. Consequently, employers are likely to be negatively affected in this situation as they will face additional costs in compiling evidence to defend their claim, or even perhaps settling an unmeritorious claim out of court if it proves to be the most cost effective solution.

In addition to these costs, employers will also need to update or develop new workplace policies to ensure that they meet their discrimination obligations under the applicable State or Territory law and the Bill. To do so, companies may have to spend between \$1,000 - \$5,000 to update their existing discrimination policies and between \$2,000 - \$20,000 in staff training. If there is a difference between the two laws, the employer will need to adopt the higher standard of behaviour in order to comply. Master Builders contends that only Commonwealth legislation should regulate discrimination law given the compliance burden of multiple statutes.

## **Recommendations**

Master Builders submits that more needs to be done to clarify the provisions of the Bill. The introduction of the recommendations set out in tabular form above and as appear throughout the text of this submission will assist to restore some certainty in the Bill.

## 1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 122 years the movement has grown to 33,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.
- 1.2 Master Builders estimates that the cumulative construction task over the next decade will require work done to the value of \$2.4 trillion. The residential and non-residential building sectors combined will require \$1.25 trillion worth of work and the engineering construction sector \$1.15 trillion worth. The construction workforce currently represents over 9 per cent of the total Australian workforce with the number of jobs expected to increase by 300,000 to around 1.3 million employees by 2021.

## 2 Purpose of the submission

- 2.1 This submission provides comments on the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* (the Bill). We use the designator "Bill" even though it is an exposure draft. The referral to a parliamentary Committee of the exposure draft before the Bill is before Parliament is premature as it is only a Departmental proposal. Nevertheless we provide comments that address the terms of reference before the Committee.
- 2.2 Master Builders supports endeavours to simplify and clarify existing discrimination laws. However, Master Builders has concerns that the Bill will increase the regulatory burden on business without achieving its aims. In this submission, Master Builders first provides an overview of the Bill and then

discusses how the major changes stemming from the Bill will have negative ramifications.

- 2.3 The Bill has major consequences for all employers and the Australian community. It will result in a paradigm shift in the administration of discrimination law in Australia. Less than one month to comment is manifestly inadequate and has not permitted depth of consultations with members. Accordingly, this submission is representative only of Master Builders' preliminary view.
- 2.4 In this submission, Master Builders points out the novel concepts which do not have sufficient boundaries and thus offend the basis of the rule of law. The Law Council of Australia has outlined a number of key principles that underpin the rule of law in Australian society. The first and founding proposition is that "[t]he law must be both readily known and available, and certain and clear".<sup>1</sup> Master Builders' initial reaction to the Bill is that it creates obligations which are uncertain using language which is so broad as to be inherently unclear. In this sense, the Bill is confusing.
- 2.5 If enacted the Bill will require employers to develop policies to meet their discrimination obligations under the applicable State or Territory laws and the new Bill. If there is a difference between the two laws, the employer would obviously need to adopt the higher standard of behaviour in order to comply. Master Builders contends that only the Commonwealth legislation should cover the field in discrimination law given the compliance burden represented by multiple statutes.

<b>Recommendation 1</b>	That only Commonwealth legislation should regulate discrimination law given the compliance burden represented by multiple statutes.
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### 3 Overview of the Bill

- 3.1 On Wednesday 21 November 2012, the Senate referred the exposure draft of the Bill to the Senate Legal and Constitutional Affairs Committee (the

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<sup>1</sup> <http://www.lawcouncil.asn.au/programs/international/rule-of-law.cfm>.

Committee) for inquiry and report. The Bill, with accompanying Explanatory Notes and the Regulation Impact Statement, was released by the Attorney-General, the Hon Nicola Roxon MP, and the Minister for Finance and Deregulation, the Hon Penny Wong.

- 3.2 Due to the complexities and inconsistencies of the current discrimination laws, the Bill aims to consolidate the five existing Commonwealth Anti-Discrimination Acts into a single law. The Bill will replace the *Age Discrimination Act 2004* (ADA), the *Disability Discrimination Act 1992* (DDA), the *Racial Discrimination Act 1975* (RDA), the *Sex Discrimination Act 1984* (SDA) and the *Australian Human Rights Commission Act 1986* (AHRC Act).
- 3.3 There are also provisions regarding discrimination in employment in the *Fair Work Act 2009* (FW Act) in relation to adverse action or termination of employment based on specified protected attributes. However, as “these attributes are not consistent with those protected under other Commonwealth legislation” they are not included in the consolidated Bill.<sup>2</sup> Master Builders supports this necessary disjunction, as conduct which contravenes a discrimination Act, does not by reason of that contravention also contravene the FW Act.<sup>3</sup> Consequently, this difference will be explored in this submission, during the consideration of the Bill’s most significant changes compared to current anti-discrimination law.
- 3.4 The major changes introduced by the Bill include:
- a single test for discrimination;
  - coverage of additional protected attributes, i.e. beyond those in the FW Act;
  - coverage of discrimination and sexual harassment in any area of public life;
  - changes to the exceptions to conduct that might otherwise be discriminatory;

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<sup>2</sup> *Regulation Impact Statement*, page 2.

<sup>3</sup> *Hodkinson v The Commonwealth* [2011] FMCA 171, Cameron FM at 143; as cited in *Cugura v Frankston City Council* [2012] FMCA 340 at 128.

- additional voluntary compliance measures;
- changes to the complaints process; and
- the rationalisation of some functions of the Australian Human Rights Commission.

3.5 In the balance of this submission, Master Builders considers how these changes would have an impact on the building and construction industry.

## 4 Definition of discrimination – single test

4.1 The Bill proposes a single definition of discrimination. Subclause 19(1) states that:

*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.*

4.2 The breadth of the protected attributes provisions will be outlined in section 5 of this submission.

4.3 Paragraph 105 of the Explanatory Notes states that the Bill “intentionally does not preserve the terms ‘direct’ and ‘indirect’ discrimination”. However, the Bill recognises that discrimination may take different forms, but both are prohibited by the Bill.<sup>4</sup>

4.4 Subclause 19(2) of the Bill provides an expansive definition of the term “unfavourable treatment”.

*[U]nfavourable 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.*

4.5 Instead of using the current term, “less favourable” treatment,<sup>5</sup> subclause 19(1)-(2) proposes that discrimination occurs if a person is treated

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<sup>4</sup><http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx>.

<sup>5</sup> *Disability Discrimination Act 1992* (Cth) s5, *Age Discrimination Act 2004* (Cth) s14, *Racial Discrimination Act 1975* (Cth) s9(1) and the *Sex Discrimination Act 1984* (Cth) s5(1), 6(1), 7(1), 7AA(1) and 7A(1).

“unfavourably” or receives “unfavourable treatment”. This test appears to assimilate the notion of indirect discrimination. As an example of the expression of the current test, s5(1) of the DDA states that:

*a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.*

- 4.6 The proposed change appears to place a lower threshold on determining whether behaviour would be classed as (direct) discrimination as persons may be discriminated against for a combination of attributes not a singular “ground of a disability”. For example, paragraph 121 of the Explanatory Notes highlights this new test by providing the example of:

*an Asian woman who may not be able to demonstrate unfavourable treatment of Asians generally or women generally, but that an employer based a decision on being an Asian woman.*

- 4.7 Paragraph 115 of the Explanatory Notes states that the “existing definitions of discrimination are inconsistent, difficult to understand and apply, and have been widely criticised”. Purportedly at the crux of this difficulty is the “comparator element”.<sup>6</sup>

*The comparator element requires the identification of a person in the same circumstances as the complainant, but for the protected attribute. This person is always hypothetical. The complainant’s treatment is then compared against the treatment of the comparator to determine whether discrimination has occurred.*

- 4.8 This comparator element, evident in s5(1) of the DDA expressed as “less favourably than the discriminator would treat a person without the disability” is removed from Bill. The Explanatory Notes state, however, that the test may still be “useful” to determine “unfavourable treatment”.<sup>7</sup> We question the rationale for this proposition, as the new definition of discrimination does not include this comparator element and appears to contradict its criticism. Meeting the current test would not be the required legal element our members will face in proving that they did not discriminate against another person and how this proposition seeks to enliven the new law is confounding.

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<sup>6</sup> Explanatory Notes, paragraph 116.

<sup>7</sup> Paragraph 117.

- 4.9 The latter proposition in paragraph 4.8 is reinforced when considering that although subclause 19(2) is introduced “[f]or the avoidance of doubt” the definition is so expansive that it does not give any certainty about what conduct is “unfavourable treatment”. Whilst the subclause states that harassment and “other conduct that offends, insults or intimidates the other person” is unfavourable treatment, these are all subjective terms that cannot be objectively identified by employers.
- 4.10 Additional confusion lies in the fact that there is no conjunctive or disjunctive expression used between “harassing the other person; other conduct that offends, insults or intimidates the other person”. Although it would appear that the disjunctive “or” should be between the two parts of the subclause so that the behaviours are independent of each other, paragraph 107 of the Explanatory Notes states that “subclause 19(2) provides that unfavourable treatment includes harassment, and other conduct that offends, humiliates, insults or intimidates the other person”. It seems clear that unfavourable treatment is only able to be proved if a person is able to produce evidence that harassment or other conduct that offends, insults or intimidates occurs and this should be made clear.

**Recommendation 2**      Insert the disjunctive “or” between subclause 19(2)(a) and (b).

- 4.11 The inclusion of offensive or insulting conduct as “unfavourable” will have wide ranging ramifications. Unlike the majority of other provisions which form the terms of the Bill, “[n]one of the other pre-existing Commonwealth Acts – covering sex, disability and age discrimination – extends the concept of discrimination to conduct which only offends”.<sup>8</sup> However, under this subclause, employees would appear to have a prima facie discrimination case if they were offended or had their feelings hurt by certain words or conduct. It would then be up to the respondent to disprove this allegation. Consequently, employees will have an additional cause of action against their employer which is founded on subjective notions.
- 4.12 Former NSW Chief Justice James Spigelman has also highlighted that this provision will have consequences for the fundamental legal concept of

<sup>8</sup> [http://humanrights.gov.au/about/media/audio\\_grab/spigelman\\_hate\\_speech\\_free\\_speech.pdf](http://humanrights.gov.au/about/media/audio_grab/spigelman_hate_speech_free_speech.pdf), page 7.

freedom of speech. He has stated that “freedom to offend is an integral component of the freedom of speech”.<sup>9</sup> He warns that “[w]e should take care not to put ourselves in a position where others could reasonably assert that we are in breach of our international treaty obligations to protect freedom of speech”.<sup>10</sup> Thus if this provision were to be enacted, Australia may be breaching international legal obligations. Consequently, Master Builders submits that the term “other conduct that offends” be removed from the Bill.

<b>Recommendation 3</b>	That the term “other conduct that offends” be removed from subclause 19(2).
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4.13 Subclause 19(3) is similar to the discrimination definition in subclause 19(1); however it deals with discrimination by the imposition of policies. The subclause provides that discrimination occurs if a person imposes, or proposes to impose a policy, that has, or is likely to have the effect of, disadvantaging people who have a protected attribute, or a combination of protected attributes, and that person has that attribute or attributes. The term “policy” is defined in clause 6 of the Bill to include “a condition, requirement or practice”. Although this definition would appear to limit the boundaries of what may constitute a policy, the Explanatory Notes state that the term “should be interpreted broadly to include any conduct that has the potential to disadvantage the position of a person with a protected attribute.” The breadth of this provision will cause uncertainty to our members as it is so wide ranging the Explanatory Notes appear to encompass the idea that a “policy” is any form of conduct.

4.14 Master Builders contends that there is no indication that the current “less favourable” discrimination test is failing in practice or how its proposed continued use is vindicated. The introduction of a new amorphous test will only increase confusion at a time when members are increasingly becoming familiar with the current test. Master Builders recommends that the current “less favourable” test be retained so that confusion is minimised and the Bill is not contrary to the rule of law. Furthermore, it is recommended that the Bill preserve the terms “direct” and “indirect” discrimination.

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<sup>9</sup> Ibid, page 6.

<sup>10</sup> Ibid, page 9.

<b>Recommendation 4</b>	That the Bill use the “less favourable” discrimination test rather than the “unfavourable” test.
<b>Recommendation 5</b>	That the Bill retain the use of the terms “direct” and “indirect” discrimination.

- 4.15 The idea encapsulated by “unfavourable treatment” is also per se poor. This is because it implies that in order to avoid discrimination, a person would need to be favourably treated and hence receive positive discrimination or some form of affirmative action. However, it appears from the terms of the Bill that this implication is not manifest.

## 5 Protected attributes

- 5.1 Although the majority of the protected attributes are covered by existing discrimination legislation, a number of new grounds have been added by subclause 17(1). These include sexual orientation, gender identity and an extension of marital or relationship status to include same-sex relationships. Other grounds such as industrial history, medical history, nationality or citizenship, political opinion, religion or social origin, that are currently covered by the equal opportunity in employment complaints scheme in the AHRC Act or prescribed by the *Australian Human Rights Commission Regulations 1989* (AHRC Regulations) were also added, but in relation to work only.<sup>11</sup>

- 5.2 Subclause 17(2) of the Bill increases the breadth of each protected attribute by stating that:

*Each protected attribute is taken to include:*

*(a) characteristics that people who have the attribute generally have or are generally assumed to have; and*

*(b) in relation to a particular person – characteristics that the person has because he or she has the attribute.*

- 5.3 Paragraph 68 of the Explanatory Notes aims to clarify this provision by providing examples of what characteristics would fall under subclause 17(2). The examples state that subclause 17(2) would include the characteristic that women of working age may become pregnant or that a person undergoing

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<sup>11</sup> *Human Rights and Anti-Discrimination Bill 2012* (Cth) s22(3).

cancer treatment may lose their hair. Consequently, the pregnant women would be discriminated against on the basis of sex and potential pregnancy, whilst the cancer patient would be discriminated against on the basis of disability. Although the examples are useful, the provision is so broadly expressed that employers do not have any certainty as to where to draw the line in regard to protected attributes, especially as the test involves the requirement for employers to make an assumption about the applicable generally held characteristics.

5.4 This ambiguity is only reinforced by subclause 19(4) of the Bill which further extends the meaning of having a protected attribute to:

- (a) an associate of the person having the protected attribute;*
- (b) the person, or an associate of the person, having in the past had the protected attribute;*
- (c) the possibility that the person, or an associate of the person, may in the future have the protected attribute;*
- (d) the first person referred to in subsection (1) or (3) assuming that the person, or associate of the person:*
  - (i) has the protected attribute;*
  - (ii) has in the past had the protected attribute; or*
  - (iii) may in the future have the protected attribute.*

5.5 This subclause appears to indicate that any person may be discriminated against because they or their associate has a protected attribute, had a protected attribute or may have a protected attribute in the future. The unintelligible scope of this provision is underlined by the examples in paragraph 112 of the Explanatory Notes. A notable example, in which the Government wishes to prohibit discrimination, is where a person is “refused entry to a club because they are with someone who is Asian”. Master Builders raises the question, for example, of whether a potential employee would be able to allege that they were discriminated against if the person was not given a job because the person that transported them to the job interview was Asian. This analogy seems awry but is a practical extension of the breadth of the proposed provision. We note that the construction industry employs workers from a variety of ethnic backgrounds.

5.6 The inclusion of industrial history as a protected attribute is of particular relevance to the building and construction industry, as “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 refused to join a union.”<sup>12</sup> This definition of “industrial history” is based on the concept of “engaging in industrial activity” in s347 of the FW Act in order “to ensure consistency between the protections afforded by the two Acts”. However, this proposition it is at odds with the assertion in the Regulation Impact Statement that the discrimination provisions in the FW Act are different to the five discrimination Acts which are being consolidated into the Bill.<sup>13</sup> The distinction between the Acts has been judicially recognised. As Cameron FM in *Hodkinson v The Commonwealth*<sup>14</sup> stated:

*Allegations that adverse action has been taken because of a person’s disability should be made and particularised clearly. In proceedings under the [Disability Discrimination Act](#), it has been held that the precise identification of the alleged disability is critical to an allegation of disability discrimination: [Qantas Airways Ltd v Gama \[2008\] FCAFC 69; \(2008\) 167 FCR 537](#) at 567 [89] per French and Jacobson JJ; [Stevenson v Murdoch Community Services Inc \[2010\] FCA 648](#) at [87]. The same requirement should apply to allegations under the FWA that adverse action has been taken because of an employee’s disability.*

- 5.7 This passage highlights the difference between a person with a disability who is covered by the DDA and an employee with a disability who is covered by the FW Act, a distinction which should be retained.
- 5.8 However, if the Government wishes for the industrial history protected attribute to remain in the Bill, this provision should be removed from the FW Act to ensure that a cross over of discrimination claims do not occur. The Bill and the FW Act should stand alone, without provisions which impinge on each other. Master Builders emphasises this proposition, as this overlap will be unnecessarily burdensome on our members, and therefore is inconsistent with what the Bill is attempting to achieve, which is “to produce a clearer and simpler law”.<sup>15</sup>

**Recommendation 6**

That there is a clear distinction between the discrimination provisions of the FW Act and the Bill. If the Government wishes for certain concepts from the FW Act to be inserted into the Bill, those parts of the FW Act should be removed so that a cross over of discrimination claims do not occur.

<sup>12</sup> *Explanatory Notes*, paragraph 89.

<sup>13</sup> page 2.

<sup>14</sup> [2011] FMCA 171.

<sup>15</sup> *Explanatory Notes*, page 1.

## 6 Coverage of discrimination and sexual harassment in any area of public life

- 6.1 Subclause 22(1) provides that it is unlawful to discriminate against another person if the discrimination is connected with “any area of public life”. Clause 7 of the Bill defines “[t]he meaning of connected with an area of public life etc” as:

*Conduct engaged in by a person (the first person) in relation to another person is connected with a particular area of public life or other activity if the conduct is engaged in:*

- (a) in the course of, for the purpose of, or in relation to, that area of public life or other activity; or*
- (b) without limiting paragraph (a) – while the first person or the other person (or while each of them) is involved in an activity or undertaking in the course of, for the purpose of, or that is otherwise related to, that area of public life or other activity.*

- 6.2 Although this subclause is labelled in paragraph 32 of the Explanatory Notes as an “interpretative tool,” the phrase “area of public life” is an extremely opaque expression and poor terminology. The concept is not clarified by the non-exhaustive definition in clause 22(2) which states that:

*The areas of public life include (but are not limited to) the following:*

- (a) work and work-related areas;*
- (b) education or training;*
- (c) the provision of goods, services or facilities;*
- (d) access to public places;*
- (e) provision of accommodation;*
- (f) dealings in estates or interests in land (otherwise than by, or to give effect to, a will or a gift);*
- (g) membership and activities of clubs or member-based associations;*
- (h) participation in sporting activities (including umpiring, coaching and administration of sporting activities);*
- (i) the administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs.*

- 6.3 Subclause 22(2)(a) of the Bill - Work and work-related areas, is intended to have broad application to any work done in public life.<sup>16</sup> It is supported by inclusive definitions of the following terms: work and work-related areas,

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<sup>16</sup> Explanatory Notes, paragraph 134.

employment, employment agency and industrial association.<sup>17</sup> “Industrial association” has the same meaning as s12 of the FW Act, a provision which purports to limit the disjunction between the Bill and the FW Act.

6.4 Subclause 22(2)(d) also provides that areas of public life may include access to public places. Whilst the DDA specifically deals with discrimination about access to premises, the Bill regulates access to public places in a general sense.<sup>18</sup> Clause 6 of the Bill defines “public places” to mean “a place, or part of a place to which the public, or a section of the public, ordinarily has access, whether or not by payment or by invitation”. The Bill also defines place as “any place or premises (whether enclosed or built on or not), and includes a structure, building, aircraft, vehicle or vessel”.<sup>19</sup> Whilst the majority of the premises definition from the DDA is encapsulated in the definition of a place, subclause (c) which included “a part of premises” is disregarded. However, the term “part of a place” is included in the definition of a “public place”.

6.5 Clause 50 provides that:

*It is unlawful for a person (the first person) to sexually harass another person if the harassment is connected with any area of public life.*

6.6 Under clause 50, “sexual harassment need not actually occur in a public place provided that there is a clear connection to an area of public life”.<sup>20</sup> Paragraph 227 of the Explanatory Notes provides that:

*if sexual harassment occurred in dormitories provided by the employer to its employees at the work site, the conduct may be sufficiently connected to public life because of the relationship to the people residing on the premises and their employment relationship.*

6.7 Another example states that:

*if an office Christmas party were held in the CEO’s private home, sexual harassment that occurred at that party would be connected to public life because it occurred in the course of a work function that was directly related to an employment relationship.<sup>21</sup>*

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<sup>17</sup> Explanatory Notes, paragraph 134.

<sup>18</sup> Explanatory Notes, paragraph 134.

<sup>19</sup> Clause 6.

<sup>20</sup> Explanatory Notes, paragraph 225.

<sup>21</sup> Explanatory Notes, paragraph 226.

- 6.8 As the second example highlights, sexual harassment may still be connected with “public life” even if it occurs in a private residence. Therefore, we apprehend that even if sexual harassment occurred in dormitories off site that were provided by a construction company, the relevant conduct would fall under clause 50.
- 6.9 Whilst sexual harassment is unlawful under the SDA,<sup>22</sup> “sexual harassment is only unlawful in relation to specific activities and relationships within specified areas of public life”.<sup>23</sup> Although this current definition is confusing, it is not as expansive as the proposed clause 50 which broadens the prohibition of sexual harassment to “any area of public life”. Even though Master Builders supports measures which prohibit sexual harassment, we cannot support the proposed law as the parameters regarding the term “public life” are not clear and the boundaries around its limits are not able to be assessed. This provision thus further emphasises that the Bill is at odds with the rule of law because it is shrouded in uncertainty.

**Recommendation 7** That the terms “public life” and “an area of public life” be clarified.

## 7 Other unlawful conduct

- 7.1 Clause 52 and 53 of the Bill regulates other unlawful conduct such as, requesting or requiring information for a discriminatory purpose and publishing etc. material indicating an intention to engage in unlawful conduct.

- 7.2 Clause 52 provides that:

*It is unlawful for a person (the first person) to request or require another person to provide information if the first person requests or requires the information:*

*(a) for the purpose of engaging in conduct in relation to the other person that would constitute unlawful discrimination; or*

*(b) for the purpose of deciding whether to engage in such conduct.*

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<sup>22</sup> Section 28B-L.

<sup>23</sup> *Explanatory Notes*, paragraph 228.

- 7.3 This provision differs from the existing provisions of the ADA, DDA and SDA as the comparator element, as discussed in paragraph 4.7, is not used.<sup>24</sup> Paragraph 238 of the Explanatory Notes states that:

*Clause 52 now requires that the person requesting the information requested it for the purpose of discriminating or deciding whether to discriminate. For example, an employer cannot ask an employee their age, if the purpose for doing so is determining whether or not they are close to retirement before determining whether the employee should be eligible for a training opportunity. However, an employer could ask an employee their age if the purpose is to collect statistical information about the composition of their workforce.*

- 7.4 Although the comparator test is, in some instances, difficult to apply, Master Builders contends that the proposed subjective test is so uncertain, that it will be difficult to apply in practice.

- 7.5 The proposed clause 52 places the burden of proof on the respondent to show that they did not seek the information so as to discriminate against the complainant. As employers will be the likely respondent in these matters, our members will face unnecessary additional costs in defending any allegations which would seem to require the establishment of elaborate and precise records of all dealings with employees.

- 7.6 Clause 53 regulates “when publishing etc material is unlawful”:

*(1) It is unlawful for a person to publish or display material if:*

*(a) the material indicates, or could reasonably be understood as indicating, that the person, or one or more other persons, intends to engage in conduct; and*

*(b) the conduct would be unlawful conduct.*

*Exception*

*(2) Subsection (1) does not make it unlawful for a person, reasonably and in good faith, to publish or display material:*

*(a) for the purpose of discouraging unlawful conduct; or*

*(b) in making or publishing:*

*(i) a fair and accurate report of any event or matter of public interest; or*

*(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.*

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<sup>24</sup> Explanatory Notes, paragraph 237-238.

- 7.7 An example of the proscription established by this clause is “advertisements indicating that only men will be accepted for a particular position ... indicate an intention to engage in unlawful conduct and would ... be unlawful”.<sup>25</sup> Master Builders believes that the exceptions to subclause 53(2) should be expanded to encompass the situation where the inherent requirements of work, which will be discussed in section 10, require the gender to be either male or female e.g. where advertising for employees at a female only gymnasium.

**Recommendation 8** That the exceptions in subclause 53(2) be expanded to encompass situations where the inherent requirements of work require consideration.

- 7.8 Subclause 53(2) also appears to raise the question of the application of the proposition *generalia specialibus non derogant* – where there is a conflict between the general and specific provisions, the specific provisions prevail. Although the Bill seeks to introduce general exceptions to unlawful discrimination, which are discussed in sections 8 – 11 of this submission, Master Builders contends that if any of these general provisions were in conflict with the specific provisions, the specific provisions in subclause 53(2) would prevail or it may be read down because it is the only articulated exception where the broader defences are excluded.

## 8 Exceptions to unlawful discrimination

- 8.1 Currently the discrimination Acts contain a range of exceptions to unlawful discrimination and exemptions from prohibitions on discrimination.<sup>26</sup> The Bill proposes a move towards a more general exception approach by replacing some current specific exceptions.<sup>27</sup> However, the Bill retains the “inherent requirements of work” and “reasonable” adjustments for disability exceptions, but sets out a new exception of justifiable conduct.
- 8.2 Each of these exceptions do not apply in relation to discrimination on the ground of disability if a reasonable adjustment could have been made. These

<sup>25</sup> *Explanatory Notes*, paragraph 241.

<sup>26</sup> *Explanatory Notes*, paragraph 139.

<sup>27</sup> *Explanatory Notes*, paragraph 140.

exceptions will be reviewed after three years, as a means to consider whether they are still necessary.<sup>28</sup>

8.3 Sections 9-11 of this submission compare and contrast the general exceptions to unlawful discrimination.

## 9 Exception for justifiable conduct

9.1 Subclause 23(2) provides that “[i]t is not unlawful for a person to discriminate against another person if the conduct constituting the discrimination is justifiable.”

9.2 Subclause 23(3) states that conduct will be justifiable if:

- (a) the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim; and*
- (b) that aim is a legitimate aim; and*
- (c) the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and*
- (d) the conduct is a proportionate means of achieving that aim.*

9.3 In determining whether subsection (3), discussed in paragraph 9.2, is satisfied, the following matters must be taken into account:

- (a) the objects of the Act;*
- (b) the nature and extent of the discriminatory effect of the conduct;*
- (c) whether the first person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect; and*
- (d) the cost and feasibility of engaging in other conduct as mentioned in paragraph (c).<sup>29</sup>*

9.4 Any other matter that is reasonable may also be taken into account.<sup>30</sup>

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<sup>28</sup> *Human Rights and Anti-Discrimination Bill 2012* (Cth) s47(2).

<sup>29</sup> *Human Rights and Anti-Discrimination Bill 2012* (Cth) s23(4).

<sup>30</sup> *Human Rights and Anti-Discrimination Bill 2012* (Cth) s23(5).

- 9.5 Subclause 23(6) provides that the exception for justifiable conduct does not apply to discrimination on the basis of disability if a reasonable adjustment may have been made: see paragraph 11.5 of this submission.
- 9.6 Clause 23 sets out a new concept in anti-discrimination law which purports to allow “for a more flexible, case-specific approach giving people and organisations more assistance in determining whether a practice or action was the most appropriate method of achieving an objective”.<sup>31</sup> Master Builders submits that rather the contrary will occur, as the broad nature of the clause will give our members no certainty in ascertaining whether their actions or practices are justifiable.
- 9.7 This proposition is highlighted when considering subclause 23(3)(b), as the concept “legitimate aim” is not defined. As a result, the ordinary meaning of a “legitimate aim” will apply. The Macquarie Dictionary defines legitimate as “according to law, lawful” and aim as “the act of aiming or directing anything at or towards a particular point or object”. Therefore, legitimate aim may be defined as the act of aiming or directing anything at or towards a lawful activity. As this definition is broad and, in the context of the Bill, circular, it would provide no certainty to businesses in determining whether their conduct is justifiable.
- 9.8 Conversely, as clause 23 is not specific it has the potential to adapt as standards and community expectations change,<sup>32</sup> but this is not a feature that advances the concerns of business where certainty is at a premium. As with a number of the tests in the Bill, the loosely framed wording does not provide sufficient practical guidance on that which is proscribed. Consequently, Master Builders recommends that the exception for justifiable conduct be clarified.

**Recommendation 9**

That the exception for justifiable conduct be amended, with a more defined and certain focus, so that persons will clearly understand whether their conduct is indeed justifiable.

<sup>31</sup> *Explanatory Notes*, paragraph 143.

<sup>32</sup> *Explanatory Notes*, paragraph 143.

## 10 Exception for inherent requirements of work

10.1 Clause 24(2) states that it is not unlawful for a person to discriminate against another person on the ground of a particular protected attribute, or a combination of attributes, if:

- (a) *the discrimination is connected with work and work-related areas;*
- (b) *the other person is unable to carry out the inherent requirements of the work because he or she has a protected attribute or a combination of protected attributes; and*
- (c) *the discrimination is necessary because the other person is unable to carry out those inherent requirements.*

10.2 In determining whether the other person is unable to carry out the inherent requirements of the work, the following matters are taken into account:

- (a) *the other person's past training, qualifications and experience relevant to the particular work;*
- (b) *the other person's previous performance (if any) in working for the first person;*
- (c) *any other factor that is reasonable to take into account.*<sup>33</sup>

10.3 Subclause 23(4) provides that the exception for inherent requirements of work does not apply to discrimination on the basis of disability if a reasonable adjustment may have been made: see paragraph 11.5 of this submission.

10.4 The proposed clause 24 retains the inherent requirements of work exception. Although the term “inherent requirements” is not defined in the Bill, paragraph 158 of the Explanatory Notes states that the:

*High Court has held that the ‘inherent requirements’ of particular employment depends on whether the requirement is ‘something essential’ to or an ‘essential element’ of a particular position. This question must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer’s undertaking and the organisation of that undertaking (Qantas Airways Ltd v Christie (1998) 193 CLR 280).*

10.5 This exception will apply to discrimination in all work and work-related activities and work relationships covered by the Bill, including:

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<sup>33</sup> Human Rights and Anti-Discrimination Bill 2012 (Cth) s23(5).

- *offering and terminating employment*
- *determining or applying terms or conditions of employment (including determining who should be offered benefits or opportunities such as promotion or transfer), and*
- *membership of partnerships.*

10.6 Master Builders submits that the statutory provision should reflect the test as articulated by the High Court – and the notion of an “essential element” should be present in the legislative prescription.

<b>Recommendation 10</b>	That the statutory provision for the inherent requirements of work reflect the High Court test in <i>Qantas Airways v Christie</i> , and the notion of an “essential element”.
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## 11 Discrimination on ground of disability

11.1 The definition of discrimination in clause 6 of the Bill retains subclause (a)-(g) as expressed in the DDA:

- (a) *total or partial loss of bodily or mental functions;*
- (b) *total or partial loss of a part of the body;*
- (c) *the presence in the body of organisms causing disease or illness;*
- (d) *the presence in the body of organisms capable of causing disease or illness;*
- (e) *the malfunction, malformation or disfigurement of a part of the body;*
- (f) *a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction;*
- (g) *a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgement, or that results in disturbed behaviour;*

11.2 However, the second part of the definition differs between the Bill and the DDA. The second part of the definition used in the Bill states:

*and includes:*

- (h) *behaviour that is a symptom or manifestation of a disability referred to in any of the above paragraphs; and*

(i) *having any of the following because of having a disability referred to in any of the above paragraphs:*

(i) *a carer, assistant, interpreter or reader;*

(ii) *an assistance animal or disability aid.*

11.3 Whereas the DDA definition provides:

*and includes a disability that:*

(h) *presently exists; or*

(i) *previously existed but no longer exists; or*

(j) *may exist in the future (including because of a genetic predisposition to that disability); or*

(k) *is imputed to a person.*

*To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.*

11.4 Paragraph (h) of the Bill's definition is so expansive that employers will have difficulty in determining whether behaviour established by an employee means that an employee falls within the definition of someone who is disabled. The phrase is unacceptably broad in the manner in which it captures the generic term "behaviour". Whilst the DDA provision that extends the definition of disability to a past, future and imputed disability is not incorporated into the new definition, employers will face problems in determining when an employee's minor or transitory disability traits no longer exist. We prefer the extant DDA definition.

**Recommendation 11** That the Bill retain the DDA definition of disability.

11.5 Once an employee has been classified as disabled, an employer must gauge whether they could make relevant adjustments to allow a disabled person to carry out the work without an unjustifiable hardship occurring.<sup>34</sup> In determining whether making an adjustment would cause unjustifiable hardship the following factors, set out in subclause 25(3) must be taken into account:

<sup>34</sup> *Human Rights and Anti-Discrimination Bill 2012 (Cth) s25(2).*

- (a) *the nature of any benefit or detriment likely to accrue to, or to be suffered by, any person concerned;*
- (b) *the effect of disability of any person concerned;*
- (c) *the financial circumstances of the first person, and the estimated amount of expenditure that the first person would have to incur in order to make the adjustment;*
- (d) *the availability of financial and other assistance to the first person;*
- (e) *any relevant guidelines prepared by the Commission under section 62; and*
- (f) *any relevant action plans given to the Commission under section 68.*

11.6 This provision, apart from subclause (e), is in substance the same as s11(1) of the DDA. Master Builders has no objection to retaining this list of factors for determining unjustifiable hardship as they are all objective indicators but argues against elevating the guidelines to statutory status.

## 12 Disability standards and compliance codes

12.1 Part 3, Division 5 of the Bill regulates disability standards. Subclause 71(1) states that:

- (1) *The Minister may, in writing:*
  - (a) *make one or more disability standards; and*
  - (b) *amend or revoke disability standards.*

12.2 Clause 72 of the Bill provides that conduct in accordance with a disability standard is not unlawful discrimination on the ground of a disability:

*If, while a disability standard has effect, a person who is covered by a requirement in the standard engages in conduct in accordance with the requirement, then the conduct is taken not to be unlawful discrimination on the ground of a disability that is covered by the requirement.*

12.3 Furthermore, clause 73 states that it is unlawful for a person to contravene a requirement in a disability standard. However, the Bill provides that a person does not have to comply with an enforcement or dispute resolution mechanism under the standard but must comply with those in the Act.<sup>35</sup>

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<sup>35</sup> *Human Rights and Anti-Discrimination Bill 2012 (Cth) s72.*

- 12.4 Subclause 71(2) and clause 73 are in similar terms to sections 31(1) and 32 of the DDA. Section 31(1) of the DDA gives the Attorney-General the power to formulate disability standards under that name, whilst s32 states that it is unlawful for a person not to comply with a disability standard.
- 12.5 As the Bill essentially vindicates the use of disability standards as now set out in the DDA, employers will only have to be made aware of a few changes. One change is that persons will now not have to comply with the enforcement mechanisms, or dispute resolution mechanisms, included in a standard.<sup>36</sup> Accordingly to the Explanatory Notes the current standard which affects the building and construction industry is the Disability (Access to Premises-Buildings) Standards which will continue to operate under the Bill.<sup>37</sup>
- 12.6 One significant addition in regard to both disability standards and compliance codes is subclause 14(2):
- (1) This Act is not intended to exclude or limit the operation of a State or Territory anti-discrimination law, to the extent that that law is capable of operating concurrently with this Act.*
- (2) Subsection (1) does not apply in relation to the provisions of this Act relating to disability standards and compliance codes.*
- 12.7 This provision provides that disability standards and compliance codes may provide a complete defence to Commonwealth, State and Territory anti-discrimination law. Master Builders supports this measure insofar as it provides our members with a complete defence if they comply with any relevant standards and codes but we do not support continued operation of State laws as the current legislation should cover the field, as expressed earlier in this submission.
- 12.8 Division 6 of the Bill introduces new provisions which regulate compliance codes. Subclause 75(1) states that:
- (1) A compliance code is a code, made by the Commission in accordance with this Division, that includes provisions of either or both of the following kinds:*
- (a) provisions to the effect that is specified persons or bodies engage in specified conduct (whether or not the provisions require the persons or bodies to engage in the conduct), that conduct is taken,*

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<sup>36</sup> Human Rights and Anti-Discrimination Bill 2012 (Cth) s70(5) & 70(3)(c).

<sup>37</sup> Explanatory Notes, page 7.

*for the purposes of this Act, not to be unlawful conduct of one or more specified kinds;*

*(b) provisions to the effect that if specified persons take specified steps or measures (whether or not the provisions require the persons to take the steps or measures), those steps or measures are taken, for the purpose of subsection 57(3) or 58(5), to constitute taking reasonable precautions, and exercising due diligence, to avoid specified other persons engaging in unlawful conduct of one or more specified kinds.*

12.9 Although the compliance code regulation is in similar terms to the standards provisions,<sup>38</sup> there are a few differences. One difference is about time frames. Although the standard has no time frame, subclause 70(4) requires that it must be reviewed every five years, whilst subclause 75(3) provides that a compliance code must express that it has effect for the time period specified, but there is no limit to that period. However, if the period specified in the code is more than 5 years, the code must be reviewed at least once in every five year period.<sup>39</sup> Clause 77 further provides that:

*(1) A compliance code continues to have effect (unless revoked earlier) until the end of the period specified in the code in accordance with subsection 75(3).*

*(2) Immediately after the end of the specified period, the code is taken to be revoked by the Commission (with effect from that time) under subsection 76(1)<sup>40</sup>.*

12.10 Subclause 76(4) also allows the Commission to make “a compliance code on application by one or more persons or bodies”. Therefore, the Bill will permit industry to develop codes which are specific to their sector.<sup>41</sup> The Explanatory Notes state that it could be desirable to provide greater guidance on what constitutes “reasonable steps” and “due diligence”, which if followed, should ensure that the employer is not liable for the actions of a rogue employee.<sup>42</sup> This is because if employers developed a code, with which they

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<sup>38</sup> For example, *Human Rights and Anti-Discrimination Bill 2012* (Cth) s70(5) & 75(6); 71(1) & 76(1), 71(6) & 76(8).

<sup>39</sup> *Human Rights and Anti-Discrimination Bill 2012* (Cth) s 75(5).

<sup>40</sup> Subsection 76(1)(b) states that the Commission may amend or revoke compliance codes.

<sup>41</sup> *Explanatory Notes*, page 7.

<sup>42</sup> Page 7.

could show compliance, they would have a complete defence against a claim of discrimination.<sup>43</sup>

- 12.11 Whilst Master Builders supports the certainty which would flow from the mechanisms outlined, the problem is that Government appears to be abrogating the responsibility for creating provisions which of themselves engender certainty. Concepts such as “reasonable steps” and “due diligence” should be clear from the terms of the Bill.

<b>Recommendation 12</b>	That concepts such as “reasonable steps” and “due diligence” be clarified.
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### 13 Guidelines and action plans

- 13.1 In addition to creating standards and compliance codes, the Bill permits the Commission to prepare guidelines and persons or bodies to develop and implement an action plan.

- 13.2 Subclause 62(1) states that:

*The Commission may:*

*(a) prepare written guidelines to assist people to avoid engaging in conduct that would be:*

*(i) unlawful conduct; or*

*(ii) Commonwealth conduct that is contrary to human rights; and*

*(b) amend or revoke guidelines.*

- 13.3 Clause 63 further regulates guidelines by providing that:

*(1) Nothing in this Act:*

*(a) makes guidelines prepared under section 62 binding; or*

*(b) causes guidelines to give rise to any right, defence, expectation, duty or obligation.*

*(2) A court hearing proceedings under this Act, or the Commission when dealing with a complaint, may have regard to a person’s compliance with the guidelines prepared under section 62 if the court, or the Commission, considers it appropriate to do so.*

<sup>43</sup> Explanatory Notes, paragraph 314.

- 13.4 Whilst clause 62, maintains the policy rationale for the Commission to prepare guidelines,<sup>44</sup> clause 63 is a new provision.<sup>45</sup> This provision is supported by Master Builders because it clarifies that the guidelines made under clause 62 are not binding, and that:

*the Commission or the court in dealing with a complaint may have regard a person's compliance with the guidelines, if they consider it appropriate to do so. Compliance with any guidelines should not be a complete defence to a complaint of unlawful conduct, but may be evidence of compliance.*<sup>46</sup>

- 13.5 This clause may consequently give our members another defence to a discrimination complaint. However, if they are non-binding they should not elsewhere be given statutory force – as discussed above.

- 13.6 The legislative provisions regarding action plans are in similar terms to the guidelines. Subclause 67(1) states that:

*A person or body may develop and implement a written plan (an action plan) to assist the person or body (and officers, employees, members or agents of the person or body) to avoid engaging in unlawful conduct.*

- 13.7 Furthermore, clause 69 provides that:

*(1) Nothing in this Act:*

*(a) makes an action plan binding; or*

*(b) causes an action plan to give rise to any right, defence, expectation, duty or obligation.*

*(2) A court hearing proceedings under this Act, or the Commission when dealing with a complaint, may have regard to an action plan if the court, or the Commission, considers it appropriate to do so.*

- 13.8 Whilst the ability to develop action plans is currently available under Part 3 of the DDA, the Bill has expanded its reach to cover all protected attributes. Clause 67 permits, but does not require, a person or body to develop or implement voluntary action plans. As highlighted in paragraph 12.10 in regard to compliance codes, Master Builders' members may benefit from action plans if they will provide guidance to our members about compliance with the Bill. Although compliance with an action plan will not be a complete defence

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<sup>44</sup> *Explanatory Notes*, paragraph 281.

<sup>45</sup> *Explanatory Notes*, paragraph 280.

<sup>46</sup> *Explanatory Notes*, paragraph 283.

to a complaint of unlawful conduct, members may still benefit from evidence of their compliance with the plan. Again, however, simplicity and appropriate compliance measures must be assured outside of these administrative arrangements.

## 14 Burden of proof

14.1 Current direct discrimination tests in Commonwealth anti-discrimination law,<sup>47</sup> place the burden of proving that the respondent discriminated against the applicant on the complainant.<sup>48</sup> However, some indirect discrimination tests<sup>49</sup> reverse this onus and require the respondent to prove that the discriminatory conduct was reasonable, once the applicant has established the discriminatory impact.<sup>50</sup> Clause 124 of the Bill is based on the indirect discrimination provisions:

*(1) If, in proceedings against a person under section 120, the applicant:*

*(a) alleges that another person engaged, or proposed to engage, in conduct for a particular reason or purpose (the alleged reason or purpose); and*

*(b) adduces evidence from which the court could decide, in the absence of any other explanation, that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct;*

*it is to be presumed in the proceedings that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct, unless the contrary is proved.*

*Burden of proof for exceptions etc.*

*(2) In proceedings against a person under section 120, the burden of proving that conduct is not unlawful conduct because of any of the following provisions lies on that person:*

*(a) subsection 21(1) (special measures to achieve equality are not discrimination);*

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<sup>47</sup> For example, s11(2) of the DDA explicitly states that the burden of providing unjustifiable hardship lies on the person claiming unjustifiable hardship,

<sup>48</sup> *Explanatory Notes*, paragraph 461.

<sup>49</sup> For example, ADA s15(2); DDA s6(4) & SDA s7C.

<sup>50</sup> *Explanatory Notes*, paragraph 461.

- (b) an exception in Part 2 2 or 2 3;*
- (c) section 72 (effect of disability standards);*
- (d) section 78 (effect of compliance codes);*
- (e) section 82 (effect of special measure determinations);*
- (f) section 86 (effect of temporary exemptions).*

*(3) In proceedings against a person under section 120, the burden of proving that the person is not taken to have engaged in conduct because of either of the following provisions lies on that person:*

- (a) subsection 57(3) (exception for principal who took reasonable precautions);*
- (b) section 78 (effect of compliance codes).*

*(4) In any proceedings against a person, the burden of proving that the person does not have a liability for conduct because of either of the following provisions lies on that person:*

- (a) subsection 58(5) (exception for partner etc. who took reasonable precautions);*
- (b) section 78 (effect of compliance codes).*

14.2 Although the applicant will first have to establish a prima facie case that unlawful discrimination occurred, the respondent (most likely employers) will face the burden of demonstrating a non-discriminatory reason for their action, that their conduct was justifiable or that another exception applies.<sup>51</sup> The policy rationale behind the insertion of this provision into the Bill is that “the respondent is in the best position to know the reason for the discriminatory action and to have access to the relevant evidence”.<sup>52</sup> However, Master Builders submits that this change will only increase the regulatory burden on our members and increase vexatious claims. It is the reverse of the usual rule about costs following the result. Master Builders recommends that the reverse onus be removed from the Bill, with the onus of proof placed on the complainant.

**Recommendation 13** That the reverse onus of proof be removed from the Bill, with the onus placed on the complainant.

<sup>51</sup> *Explanatory Notes*, paragraph 463.

<sup>52</sup> *Explanatory Notes*, paragraph 463.

## 15 Complaints process

- 15.1 The provisions regulating the closing of a complaint are largely in line with the existing provisions of the AHRC Act.<sup>53</sup> However rather than “terminating a complaint” the terminology has changed to “closing a complaint”. This is because clause 117 covers both provisions for closing complaints requiring no further action and also other circumstances in which the Commission may close complaints.<sup>54</sup>
- 15.2 The statutory note in subsection 117(2), which is in line with current policy, states that if a complaint alleging unlawful conduct is closed under subsection 117(2), the application may be made to the Federal Court or Federal Magistrates Court (with some exceptions).<sup>55</sup> However, “[i]f a complaint of unlawful conduct is closed under paragraphs (a) to (e), an application cannot be made to the Federal Court or Federal Magistrates Court, unless the court grants leave to make the application”.<sup>56</sup> The rationale for limiting court access is to provide the Commission with an increased ability to dismiss clearly unmeritorious complaints and to focus on those which are meritorious.<sup>57</sup> Whilst Master Builders supports this ideal, we do not believe that this sole provision “in turn should limit the number of unmeritorious claims being brought before the court”.<sup>58</sup> Rather, the fact that the respondent will now bear the burden of proof, is likely to increase the possibility that disgruntled employees will pursue their employer on the basis of discrimination under both the Bill and the FW Act, especially if the losing party does not bear the costs.
- 15.3 If an employee does pursue a discrimination claim, paragraph 72 of the Explanatory Notes provides that “[t]he separate equal opportunity in employment complaints regime creates confusion and leads to a significant regulatory overlap”. However, the Bill will only add to this confusion by introducing definitions and concepts from the FW Act. The Government

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<sup>53</sup> Subclause 117(1) – AHRC Act s46PF(5)(a)-(b), 20(2)(b) and 20(2)(c)(vii) & subclause 117(2) – AHRC Act s46PH(a)-(i) and 20(2)(c)(i)-(vi).

<sup>54</sup> *Explanatory Notes*, paragraph 438.

<sup>55</sup> *Explanatory Notes*, paragraph 441. Note that this requirement to seek leave is dealt with under subclause 121.

<sup>56</sup> *Explanatory Notes*, paragraph 441.

<sup>57</sup> *Explanatory Notes*, paragraph 441.

<sup>58</sup> *Explanatory Notes*, paragraph 441.

needs to either embrace the necessary disjunction between the two Acts or remove the overlapping provisions from the Bill or the FW Act.

## 16 Costs

16.1 Clause 133 is a new provision which means that each party to the proceedings under Part 4-3 will bear their own costs, rather than having the unsuccessful party pay the costs of the successful party.<sup>59</sup> Although “[t]he risk of an adverse cost order is a significant barrier to commencing litigation, even for cases with relative merit”,<sup>60</sup> under this regime the respondent may still have to pay their own costs even if the claim is unmeritorious. Although subclauses 133(2) and 133(3) provide the court with the ability to make orders to rectify this problem,<sup>61</sup> many cases could still bypass this provision if perhaps their financial circumstances do not allow individuals to pay the other party’s costs. Under this system, respondents (most likely, employers) will face additional costs in compiling evidence to defend their claim, or even to perhaps settle unmeritorious claims out of court if that is the most cost effective solution. Consequently, Master Builders recommends that the unsuccessful party pay the costs of the successful party.

**Recommendation 14** That the unsuccessful party pay the costs of the successful party.

16.2 In addition to the costs in resolving complaints, the Regulation Impact Statement states that where organisations have existing policies in place outlining anti-discrimination strategies they would need to be updated.<sup>62</sup> Companies may have to spend between \$1,000 - \$5,000 to update their existing discrimination policies, and between \$2,000 - \$20,000 in staff training.<sup>63</sup> This seems to be a conservative estimate and appears not to be elsewhere described as an aggregate cost across the economy.

<sup>59</sup> *Explanatory Notes*, paragraph 493.

<sup>60</sup> *Explanatory Notes*, paragraph 493.

<sup>61</sup> *Explanatory Notes*, paragraph 494.

<sup>62</sup> *Regulation Impact Statement*, page 41.

<sup>63</sup> *Regulation Impact Statement*, page 41.

## 17 Conclusion

- 17.1 Master Builders submits that more needs to be done to clarify the provisions of the Bill. The Bill aims to simplify the current complex and inconsistent anti-discrimination law in Australia; however many of the provisions are fraught with uncertainty. In this preliminary review of the Bill, Master Builders has made 14 recommendations which will assist in achieving this objective.
- 17.2 If required by the Committee, Master Builders would be happy to elaborate on any recommendation. We reiterate, however, that the time given to scrutinise the Bill has been manifestly inadequate.

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