

## Exposure Draft of the *Human Rights and Anti-discrimination Bill 2012*

### NSW Government Response

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#### A note on terminology

In this submission the abbreviations used in the Explanatory Notes to the *Human Rights and Anti-Discrimination Bill 2012* ('the Bill') have been adopted. The *Anti-Discrimination Act 1977* (NSW) is referred to as the 'NSW Act'.

#### Summary of Submission

The NSW Government strongly supports the consolidation of Commonwealth anti-discrimination laws to address inconsistencies and confusion about the operation of the current laws. However, the Government has significant concerns about the *Human Rights and Anti-Discrimination Bill 2012*. The Bill expands the ambit of existing Commonwealth anti-discrimination laws in ways that will significantly impact on the operation of NSW anti-discrimination laws and the nature of discrimination protections in NSW more generally.

The NSW Government is particularly concerned about the following issues:

1. the expansion of Commonwealth regulation in this area and its impact on the validity and practical operation of NSW anti-discrimination laws, in particular, on the exemptions that currently exist under those laws
2. the impact of Commonwealth regulation in this area on the validity and practical operation of other NSW laws
3. the impact of the expanded definition of discrimination and its impact on free speech
4. the impact of the Bill on freedom of religion
5. the impact of the expansion of protections in the Bill (including the changes to the onus of proof), and in particular, the increase in the regulatory burden on respondents to discrimination complaints
6. that the continuing existence of Commonwealth and State regimes dealing with similar matters, as well as the increased overlap between these regimes, will continue to impose unnecessary costs on business
7. that the expansion of the laws may have a significant impact on small business and voluntary organisations
8. additional matters regarding the scope of the protected attributes and the exemptions to the Bill.

These and other issues are detailed in **Attachment A**.

#### Recommendations

The NSW Government makes the following recommendations in relation to the Bill:

- A. Section 14, the savings provision for concurrent State anti-discrimination laws, should refer generally to these laws and should not require that these be prescribed by regulation.
- B. The Bill should include an exemption for State and Territory laws similar to section 26 of the Bill, which exempts Commonwealth legislative instruments that require discriminatory conduct.
- C. Section 29 of the Bill should be amended so that it exempts all Commonwealth, State and Territory laws that authorise discrimination on the basis of age, not just laws that authorise discrimination on the basis of being under a specified age.

- D. The provisions regarding compliance codes should be amended so that a compliance code can only affect State anti-discrimination laws where consent is given by the relevant State.
- E. Sub-section 19(2)(b) should be removed in the Bill, as it places unreasonable restrictions on freedom of speech by expanding the definition of direct discrimination to include 'conduct that offends, insults or intimidates'.
- F. The Bill should replicate the civil prohibition on racial vilification in the NSW Act.
- G. The Bill should preserve the religious exceptions under the NSW Act.
- H. The proper forum for resolution of issues relating to the overlap between Commonwealth, State and Territory anti-discrimination laws is the Standing Council on Law and Justice, and these issues should be further considered in that forum.
- I. The Bill should not make committee members of unincorporated associations liable for the conduct of others. The Bill should also include a general exemption for small, non-professionally managed organisations that fit the definition of a 'volunteer organisation' exempt under the newly harmonised work health and safety laws.
- J. The protected attribute 'social origin' should be defined in the Bill or, alternatively, removed altogether.
- K. A further specific exemption should be included in the Bill for conduct required for public health reasons.
- L. A further specific exemption should be included in the Bill for conduct required for reasons of public safety or authorised by work health and safety laws.
- M. An additional mechanism for recording and enforcing agreements reached as a result of conciliation should be included in the Bill.
- N. The Bill should retain the provision permitting the Australian Human Rights Commission ('AHRC') to perform functions conferred on it by a State enactment.

## Attachment A

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### 1. Expansion of Commonwealth regulation

#### Constitutional issues – Impact on State anti-discrimination laws

There is already significant overlap between existing Commonwealth, State and Territory anti-discrimination laws. This is an existing problem with anti-discrimination laws that raises the possibility of section 109 inconsistency between Commonwealth and State laws under the Australian Constitution.

Section 109 inconsistency may occur where a Commonwealth law is intended to comprehensively regulate a particular area, where a State law removes a right conferred by a Commonwealth law, or where simultaneous compliance with a State law and a Commonwealth law is not possible. Whether inconsistency arises is a matter of statutory interpretation, although express statements of a legislative intention not to exclude or limit the concurrent operation of certain State laws will assist in the process of statutory interpretation.<sup>1</sup>

The existing problem with the current regime is intensified because the Bill now covers discrimination on the basis of attributes previously only protected under State laws. This will increase the possibility of s.109 inconsistency between Commonwealth and State anti-discrimination laws. Specifically, where Commonwealth and State laws protect the same or similar attributes, but State laws provide for wider or different exemptions (that is, where the State law purports to remove a right conferred by the Commonwealth law), the State laws may be inconsistent with the Commonwealth laws. The changes included in the Bill thus significantly increase the likelihood that State and Territory laws may be found to be constitutionally invalid.

Including in the Bill a savings provision intended to prevent the possibility of s.109 inconsistency between Commonwealth and State anti-discrimination laws may assist but does not guarantee the continued validity of State anti-discrimination laws.

Additionally, the NSW Government is concerned about the form of the savings provision in the Bill, which states that the 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'<sup>2</sup>, and defines a 'State or Territory anti-discrimination law' as a law prescribed by regulation. While the existing Commonwealth laws legislate a general protection for State and Territory anti-discrimination laws, the new provision gives the Commonwealth power to alter which laws are subject to the provision by regulation. There is no need to introduce such flexibility into the provision, as the general savings provisions in the existing laws already apply generally to State or Territory legislation affecting discrimination. There is no legitimate purpose for this change and it should be removed. The savings provision should be in general terms similar to that in the existing legislation.

#### Practical impact on NSW anti-discrimination laws

Even where State and Commonwealth anti-discrimination laws are able to operate concurrently, the expansion of the Commonwealth laws (in particular, the expansion of the protected attributes) will have a significant impact on the practical utility of the exemptions to State discrimination laws. Where Commonwealth protections are broader, as a matter of practicality, complainants are likely to lodge their complaints in the more favourable jurisdiction, so avoiding the State law.

For example, in NSW the exemptions for religious bodies and educational institutions, are broader than the Commonwealth exceptions under both the existing *Sex Discrimination Act 1984* (Cth) ('SDA') and under the Bill, in the following ways:

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<sup>1</sup> *Momcilovic v The Queen* [2011] HCA 34 at [266] - [272].

<sup>2</sup> Section 14(1)

- While the SDA includes an exemption for religious bodies relating to appointments of people to perform functions related to religious observance or practice, the exception for religious bodies in the NSW Act<sup>3</sup> extends to the appointment of any person in *any* capacity by a body established to propagate religion.
- While the SDA creates an exception for religious educational institutions where an otherwise discriminatory act would injure the religious susceptibilities of adherents of that religion or creed, the NSW Act provides a much broader exception for all private educational authorities, which applies to both employment and education (students) and does not include any requirement that the exempt discriminatory conduct be consistent with any religious doctrine.

If the Bill is enacted in its current form, complainants in NSW will be able to avoid the NSW exemptions by lodging their complaint under the Commonwealth Act.

Other changes in the Bill that remove some of the current disincentives to lodging a complaint under the Commonwealth laws (including changes to the costs provisions and onus of proof provisions) will also increase the likelihood of complainants choosing to lodge complaints under the Commonwealth, rather than the NSW, anti-discrimination laws.

## 2. Impact of the Bill on other NSW laws

### General exemptions for State laws

The potential for constitutional inconsistency between Commonwealth and State anti-discrimination laws apply equally to the general laws of a State. Consequently the Bill may operate to invalidate other State laws that permit conduct that would be unlawful under the Bill.

However, there are many circumstances in which State laws legitimately require discrimination in relation to attributes protected by the Bill, including the following:

- NSW laws that legitimately discriminate on the basis of gender identity include laws that require a record to be kept of an individual's gender for driver licences.<sup>4</sup> The *Births, Deaths and Marriages Registration Act 1985* (NSW) ('BDMR Act') would also be affected. In order to register a change of sex under that Act a person is required to undergo a 'sex affirmation procedure' (i.e. a surgical procedure), which would be inconsistent with the definition of gender identity under the Bill. Under the same Act, a person cannot register a change of sex if they are married (which would be inconsistent with the marital or relationship status attribute under the Bill).
- There are also NSW laws that legitimately discriminate on the basis of nationality and citizenship. Under the *Public Sector Employment and Management Act 2002* officers of the NSW public service are required to be Australian citizens or permanent residents.<sup>5</sup> This is similar to the situation for Commonwealth public servants, for which an exemption is provided by the Bill. Other NSW laws that legitimately discriminate on the basis of nationality and citizenship include the *Transport Administration Act 1988* (NSW), which provides a statutory exemption from the NSW Act, so as to permit regulations prescribing that certain classes of people (such as international students) are required to pay full fares on public transport.
- Other laws legitimately discriminate on the basis of disability, such as laws regarding institutional accommodation or decision-making. As stated by the Productivity Commission in its 2004 review of the *Disability Discrimination Act 1992* (Cth) ('DDA'):

... it is generally accepted that some restrictions on the rights of involuntary patients are justified; that some people with mental illness should not be permitted to own

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<sup>3</sup> Section 56

<sup>4</sup> Section 103 *Road Transport (Driver Licensing) Regulation 2008* (NSW); section 14(2)(c) *Photo Card Act 2005* (NSW)

<sup>5</sup> Section 54(1)

firearms; and that there are limits on the ability of some people with cognitive disabilities to make legally binding contracts.<sup>6</sup>

There are likely to be other NSW laws that legitimately require discrimination on the basis of an attribute protected by the Bill. However, in the limited consultation period provided, it has not been possible for the NSW Government to comprehensively identify the range of NSW laws that legitimately require discrimination and which should be exempt under the Bill.

The Bill does not establish an adequate regime to preserve the operation of State laws that discriminate on the basis of one of the protected attributes for a legitimate purpose.

The general position under the Bill is that, subject to some specific exemptions, State and Territory laws are only exempt if they are covered by the general justifiable conduct exception<sup>7</sup> or, in relation to employment, the inherent requirements exception.<sup>8</sup> Alternatively, State laws that permit discrimination in relation to any protected attribute except race or sex can be prescribed by the regulations.<sup>9</sup>

This approach is too uncertain. It is not appropriate that the determination of whether State laws validly permit discriminatory conduct be left to whether the conduct can fit into the general defence of 'justification'. This will lead to substantial regulatory uncertainty, as the validity of action otherwise permitted by some State laws would be uncertain unless and until tested in proceedings before the AHRC or the Federal Court. It is vital that State and Territory laws that validly discriminate for a legitimate purpose are clearly identifiable.

While prescribing exempt State laws by regulation would provide certainty, it is inappropriate. Relying on Commonwealth regulation to prescribe exempt NSW legislation would effectively cede to the Commonwealth the final say on the validity of NSW legislation that authorises or requires conduct that may be discriminatory under the Bill. State and Territory Parliaments are democratically elected and, as such, legitimately determine the content of their own legislation. They should be able to determine that specific kinds of discriminatory conduct are required for purposes determined by the legislature.

Additionally, in a practical sense, State and Territory governments are the primary government providers of major service sectors, including health, education and transport. Given the Commonwealth Government's more limited role in these areas, it is appropriate that, where embodied in legislation, State and Territory governments should be left to determine the appropriate policy for the delivery of such services.

Prescribing exempt State and Territory legislation by Commonwealth regulation would also require an onerous task, first to identify and then to keep up-to-date, all State laws that should be prescribed. The experience of the DDA, in which a similar provision is included, suggests that the regulation would be under-utilised and would not adequately reflect State laws that legitimately discriminate.

Consequently, the Bill should include an exemption for State and Territory laws similar to section 26 of the Bill, which exempts Commonwealth legislative instruments that require discriminatory conduct (except race discrimination).

### **Exemption for laws permitting age discrimination**

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<sup>6</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report No. 30 (2004), at 9.3, p. 245.

<sup>7</sup> See Explanatory Notes to the Bill, paragraph 180

<sup>8</sup> Section 24

<sup>9</sup> Section 30: This is consistent with the existing Commonwealth anti-discrimination laws, in that acts done in direct compliance with State laws are unlawful if they breach the SDA or RDA and there is no provision for exemptions for these protected attributes. However, exemptions are allowable under the DDA by regulation. Although in practice, the NSW laws included in the regulation under the DDA are now out of date.

The NSW Government considers that the specific exemption at section 29 of the Bill for age discrimination permitted by a Commonwealth, State or Territory law needs some amendment.

Section 29 exempts age discrimination that is in accordance with a Commonwealth, State and Territory law that treats people *under* a specified age differently because of the vulnerability or lack of maturity or development of people under that age. Section 29 applies only to laws affecting people *under* a certain age, not laws that discriminate on the basis of age generally.

NSW laws include numerous provisions that legitimately discriminate on the ground of age, including in relation to older people, affecting, for example, driver licensing. In NSW, age is a factor in determining the manner in which fitness to control a motor vehicle is assessed, the terms and conditions on which a licence is provided and the period for which it is available. These conditions are imposed in order to meet safety considerations that are reasonable in the circumstances. A specific exemption is provided under the NSW Act for these purposes.<sup>10</sup>

To exempt these laws, section 29 of the Bill must cover not only discrimination in relation to people *under* a certain age, but in relation to all age-related issues. This would be consistent with the NSW Anti-Discrimination Act, which currently includes a general exemption for acts done in direct compliance with State laws, subject to specific application of the Anti-Discrimination Act to State laws by regulation.<sup>11</sup>

### **Compliance Codes**

The Bill provides for the AHRC, either on the application of a person or body or on its own initiative, to make a compliance code.<sup>12</sup> A compliance code is a voluntary mechanism that determines that if specified people or organisations undertake specified conduct, that conduct is not unlawful under the Bill and/or is sufficient to constitute 'reasonable precautions' against others engaging in unlawful conduct under the Bill. Compliance codes have the force of law under the Bill<sup>13</sup> and are a complete defence to a complaint of unlawful discrimination.

The NSW Government considers that the provisions for compliance codes in the Bill may allow for greater clarity about anti-discrimination obligations without creating additional mandatory requirements for action. As such, they have the capacity to assist in reducing the compliance costs to business and other respondents to discrimination complaints over time.

However, the NSW Government is very concerned that compliance codes can be used in a way that establishes further exemptions from NSW anti-discrimination laws without NSW Government consent. The Bill provides that a compliance code can determine, in its terms, whether or not it affects the operation of State or Territory laws.<sup>14</sup> While the AHRC may only make a compliance code that affects the operation of State laws where the Commonwealth Minister has consulted with the relevant State Ministers about the proposed code,<sup>15</sup> there is no requirement that the relevant State Minister consent to the terms of a compliance code.

It is not appropriate that the AHRC be permitted to determine the exemptions to State anti-discrimination laws. The Bill should provide that a compliance code should only affect State anti-discrimination laws where consent is given by the relevant State or States.

### **3. Free Speech, the definition of discrimination and racial vilification**

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<sup>10</sup> Section 49ZYV

<sup>11</sup> Section 39(4)

<sup>12</sup> Sections 75-78

<sup>13</sup> Section 78

<sup>14</sup> Section 75(4)

<sup>15</sup> Section 76(7)

## **Definition of discrimination**

As has been noted by a number of commentators,<sup>16</sup> changes to the definition of direct discrimination ('unfavourable treatment') in the Bill have the potential to significantly extend the range of conduct that is unlawful in ways that inappropriately undermine freedom of speech.

Specifically, sub-section 19(2)(b), which states that discrimination includes 'conduct that offends, insults or intimidates the other person' extends the concept of discrimination to even relatively insignificant behaviour. The words 'offend' and 'insult', in particular, incorporate a very low threshold of unfavourable treatment.

While these words partially reflect the existing definition of racial vilification in the *Racial Discrimination Act 1975* (Cth) ('RDA'), they fail to import the existing qualifications on the racial vilification offence, which include an objective (rather than a subjective) assessment that the conduct is likely to offend or insult, and a number of public interest exceptions. The inclusion of these words in the discrimination definition also means that such conduct may be unlawful in relation to all protected attributes (not just race).

The NSW Government considers that this extension to the definition of discrimination places unreasonable restrictions on freedom of speech and should be removed from the Bill.

## **Racial Vilification**

The NSW Government has concerns about preserving the existing prohibition on racial vilification from the RDA in the Bill.<sup>17</sup> While this maintains the status quo in relation to Commonwealth racial vilification laws, the NSW Government considers that the existing provision is too broad and an inappropriate limit on freedom of speech.

The NSW Government considers that the civil prohibition on racial vilification in the NSW Act provides a better model for such laws. The civil vilification provisions under the NSW Act apply to public acts that 'incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons' on the relevant ground. The impact of the conduct is measured from the perspective of an ordinary, reasonable member of the community. Exceptions to the prohibition on vilification under the NSW Act are similar to the RDA and include 'a fair report of a public act', acts attracting absolute privilege under defamation laws and acts done 'reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter'.

## **4. Freedom of Religion**

The NSW Government is concerned that changes to the treatment of religion by the Bill, including the introduction of religion as a protected attribute and the nature of exemptions from the Bill for religious bodies and educational institutions, may adversely affect freedom of religion.

Discrimination against people on the basis of religious belief will often entail judgement on matters of morality or where a person has a conscientious objection to participation in some practice on religious grounds. Adopting religion as a protected attribute may assist in protecting individuals who experience religious discrimination.

However, adopting religion as a protected attribute also has the potential to limit freedom of religion by preventing bodies constituted to give effect to religious beliefs and values from acting in accordance with those values. For example, religious bodies may be prohibited from selecting staff who share their beliefs and values. Religious bodies should be able to

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<sup>16</sup> Most notably by the former Chief Justice of the NSW Supreme Court, James Spigelman in "Hate Speech and Free Speech: Drawing the Line" Human Rights Day Oration, Australian Human Rights Commission, Sydney, 10 December 2012, as reported in the Australian and the Australian Financial Review.

<sup>17</sup> Section 51

discriminate in their employment practices in relation to religious values. To ensure that the proposed protections against religious discrimination do not inhibit the capacity of religious organisations to discriminate on other grounds where required by religious values, appropriate exemptions for religious bodies, including in relation to the scope of the 'inherent requirements' of a job are necessary.

The NSW Government considers that the Bill should preserve the religious exceptions under the NSW Act which exempt religious bodies from compliance with anti-discrimination laws in a range of circumstances.

## **5. Impact on respondents to discrimination complaints**

The NSW Government is concerned that the Bill incorporates a large number of changes to anti-discrimination laws that, cumulatively, will significantly increase the number of complaints and hence may increase the burden on respondents in responding to complaints that are later held to be vexatious or unfounded. These include changes that greatly expand the range of discriminatory conduct prohibited, including:

- the removal of the comparator test in the definition of direct discrimination
- the expansion of the attributes protected, including protection where a person or their associate has, or is assumed to have, or may at some time have, a protected attribute
- that the protections apply where merely 'connected' to any area of public life.

Other changes, including the presumption that each party bears their own costs in discrimination matters heard before the courts, remove existing disincentives to lodging a complaint and may lead to a significant increase in weak or speculative claims. The fact that complaints may be made to the AHRC by industrial bodies may also lead to an increase in complaints.

Further changes significantly increase the burden on respondents in responding to complaints. These include:

- expanding the range of people who may be legally responsible for the discriminatory conduct of others (including in relation to trusts, unincorporated associations and partnerships) and who are, consequently, required to take action to prevent discriminatory conduct by others
- shifting the burden of proof to the respondent once a prima facie case is made out by a complainant
- replacing the existing targeted exemptions with an untested, general, defence of 'justifiable conduct', which will require many cases before its' scope is well-understood.

The generality and untested nature of the 'justifiable conduct' defence may also lead to the AHRC being unwilling to terminate complaints on the basis of the defence. It will thus remain open to complainants to make applications to the courts regarding such cases, even where the defence can be made out by a respondent.

The NSW Government considers that, cumulatively, these provisions are likely to lead to an increase in discrimination complaints and will significantly increase the burden of compliance with anti-discrimination laws for respondents.

## **6. Costs to business of continuing overlap between Commonwealth and State regimes**

Current Commonwealth anti-discrimination laws are complex. This complexity is both a barrier to the effective operation of the laws and a burden on complainants and respondents. While the Bill reduces the inconsistency between the four existing anti-discrimination laws and the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act'), it has not resolved the burden for business because significant overlaps and inconsistencies remain with the *Fair Work Act 2009* and with State and Territory laws. These include:

- the inclusion in the Bill of industrial history as a protected attribute (in an employment context), which in practice may be similar to the protections for engaging in industrial activities under the *Fair Work Act 2009* and the freedom of association and anti-victimisation provisions of the *Industrial Relations Act 1996* (NSW)
- the definition of discrimination as ‘unfavourable treatment’ in the Bill, which reflects the adverse action provisions in relation to discrimination under the *Fair Work Act 2009*
- the coverage of anti-discrimination protections under the Bill, which is similar to that under State anti-discrimination laws, including the NSW Act.

These significant overlaps create potential for confusion and duplication of regulation where workers (in particular) have alternative access to multiple jurisdictions. This will continue to impose unnecessary costs on business.

The NSW Government considers that the proper forum for resolution of issues related to the overlap between Commonwealth, State and Territory anti-discrimination laws is the Standing Council on Law and Justice, and that these issues should be further considered in that forum.

## **7. Impact on small and voluntary organisations**

The NSW Government is particularly concerned about the impact of the changes on small business and small, non-professional organisations, which have limited capacity to manage regulatory requirements. The following matters are of particular concern:

- The Bill extends liability for the conduct of others to a wide range of people, including, for example, committee members of an unincorporated association, who are made liable for any discriminatory conduct of the association (subject to the defence of taking reasonable precautions and exercising due diligence to avoid the conduct). Unincorporated associations are typically small, non-professional entities. In many cases, the people controlling such entities do so in a voluntary or non-professional capacity. Imposing liability on committee members imposes an overly high regulatory burden.
- The Bill extends the prohibition on discrimination to discrimination against volunteers. The NSW Government is concerned that, because the volunteer sector includes a significant number of smaller or non-professional organisations run solely or primarily by volunteers, the burden of complying with new regulatory requirements for such organisations may be significant.

The NSW Government suggests the Bill not make committee members of an unincorporated association liable for the conduct of others. In addition, a general exemption from Commonwealth anti-discrimination laws should be considered for small, non-professionally managed organisations that fit the definition of a ‘volunteer organisation’ that is exempt under work health and safety laws.<sup>18</sup>

## **8. Additional matters regarding the scope of unlawful conduct under the Bill**

### **The expansion of the protected attributes**

The NSW Government is concerned that the policy basis for adopting some of the new protected attributes has not been articulated. While the policy basis for introducing new grounds of gender identity and sexual orientation is well documented, this is not the case for the new protected attributes in relation to employment (including medical history, social origin, political opinion, trade union activity, religion). No particular need has been identified that the introduction of these grounds is intended to address. The NSW Government

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<sup>18</sup> The *Work Health and Safety Act 2011* (NSW) imposes a duty of care on a person conducting a business or undertaking to ensure, so far as is reasonably practicable, the health and safety of workers (including volunteers) and others while they are at work [section 19]. However, the duty does not apply to a volunteer association where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association [section 5].

considers that the Commonwealth should establish the regulatory need for protecting these attributes.

The NSW Government is particularly concerned that a number of these protected attributes are not defined in the Bill. This unnecessarily creates uncertainty about the nature and extent of the prohibited conduct, which is inappropriate in a Bill expressly intended to create greater certainty in this area.

For example, the Bill prohibits discrimination on the basis of 'social origin' in relation to employment. However, there is no definition of this attribute in the Bill. While the term 'social origin' is included in Article 2 of the *International Covenant on Civil and Political Rights* (ICCPR), there it is part of a composite phrase 'national or social origin'. In that context, the meaning is likely to relate to nationality, ethnicity or country of origin, that is, a subset of nationality or race. However, the words 'social origin' on their own, as they are in the Bill, may suggest an altogether different meaning (e.g. social class). This creates considerable uncertainty as to the intended meaning of this attribute. Given the uncertainty of this term, it should be either removed from the Bill or a definition provided.

### **General and specific exemptions**

The major change regarding exceptions under the Bill is the introduction of a general defence of 'justification, which applies to conduct that would otherwise be discriminatory in relation to any protected attribute.<sup>19</sup> While this "catch-all" provision may cover many circumstances, there will be significant uncertainty about when it applies while the case law develops.

The NSW Government considers that greater certainty is required. In particular, the NSW Government considers that the significant expansion of protected attributes under the Bill creates a need for further specific exemptions from the Bill.

### **Public health**

The NSW Government considers that a further exemption should be included in the Bill for conduct required for public health reasons. A similar exemption exists under the NSW Act in relation to discrimination on the ground of disability that is reasonably necessary to protect public health.<sup>20</sup> The circumstances for which such an exemption is needed include the following:

- The Bill prohibits discrimination on the basis of medical history in relation to employment. However, some NSW Government policies legitimately require discrimination on this ground. For example NSW Health requires that before any person works in a NSW Health facility (or is offered a student placement), they must be assessed, screened and vaccinated against certain diseases.<sup>21</sup>
- The Bill prohibits discrimination on the basis of disability, which is defined to include the presence in the body of organisms causing or capable of causing disease or illness. However, some NSW Government policies legitimately require discrimination on this ground. For example, NSW Health prohibits people who are carriers of certain blood-borne diseases from participating in employment where there is a higher risk of transmission of disease.

### **Occupational health and safety**

The NSW Government considers that a further exemption should also be included for occupational health and safety.

In some circumstances safety issues may necessitate discrimination on the basis of disability. For example, the definition of disability in the Bill includes 'behaviour that is a

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<sup>19</sup> Section 23

<sup>20</sup> Section 49P

<sup>21</sup> [http://www.health.nsw.gov.au/policies/pd/2011/pdf/PD2011\\_005.pdf](http://www.health.nsw.gov.au/policies/pd/2011/pdf/PD2011_005.pdf)

symptom or manifestation of a disability'.<sup>22</sup> This reflects the current definition of disability under the DDA. However, where the symptoms of a disability include violence or extreme anti-social behaviour, and this leads to genuine safety concerns for employees or clients, occupational health and safety laws may require action which would have the effect of discriminating against a disabled person.

For example, in NSW public schools, which have a duty not to discriminate against students with a disability, accommodating students whose disability includes violent and other forms of inappropriate conduct can raise serious safety concerns for other students and staff.

The exemption for conduct required by State laws, suggested above, would not, in itself, provide sufficient certainty in these circumstances. While the *Work Health and Safety Act 2011* (NSW) (and its equivalents in other jurisdictions) requires that a person conducting a business or undertaking ensure that the health and safety of other people (so far as is reasonably practicable), the legislation allows significant latitude as to how this is to be achieved. It will be difficult to determine that any particular conduct is *required* by the legislation so as to meet the exemption in the Bill for conduct *required* (as opposed to merely permitted) by law. Consequently, a separate exemption is needed for occupational safety purposes. Alternatively, an exemption could be included for action in accordance with the newly harmonised work, health and safety legislation.

While these circumstances might also fall within the Bill's general exemption for justifiable conduct, for certainty, it would be preferable that there be a clear legislative statement that conduct required for reasons of public safety or authorised by work health and safety laws should be exempt.

## **9. Complaints and Compliance Framework**

The NSW Government does not have significant concerns with the conciliation framework, which remains largely unchanged by the Bill. However, the Commonwealth should consider whether an additional mechanism for recording and enforcing agreements reached as a result of conciliation should be included in the Bill. Under the NSW Act if a party makes a request within 28 days of conciliation, the parties must sign a written record of any agreement reached between them. In certain circumstances the parties may apply to the Administrative Decisions Tribunal ('ADT') for registration of the agreement and the ADT may make enforceable orders in respect of certain provisions of the registered agreement. Including such a mechanism in the Bill would provide parties to conciliation with a greater degree of clarity and certainty upon reaching a conciliated agreement.

## **10. Cooperative arrangements – AHRC and State anti-discrimination bodies**

The existing Commonwealth anti-discrimination laws and the NSW Act already provide for the possibility that NSW and Commonwealth complaints bodies may perform functions of bodies in the other jurisdiction, either by arrangement between Ministers or by statutory conferral. For example:

- under the AHRC Act, where an arrangement is entered into between a State Minister and the Commonwealth Minister, the AHRC may perform functions of the Commission on a joint basis; the AHRC may perform functions on behalf of a State relating to human rights or to discrimination in employment or occupation; and a State may perform functions of the Commission.<sup>23</sup>
- the AHRC may perform functions conferred on the AHRC by a State enactment where the Commonwealth Minister has made a declaration under s.18 and published in the *Gazette*<sup>24</sup>

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<sup>22</sup> Section 6

<sup>23</sup> Sections 11(1)(b) and 16(c) AHRC Act

<sup>24</sup> Sections 11(1)(c) and 18 AHRC Act

- The State of NSW can exercise certain functions on behalf of the Commonwealth (including the AHRC) relating to the promotion of the observance of human rights, by arrangement between Commonwealth and NSW Ministers.<sup>25</sup>

Such arrangements have previously been used. Prior to 1991, the NSW Anti-Discrimination Board ('ADB') was appointed as an agent of the (then) Human Rights and Equal Opportunity Commission to receive and investigate complaints under the Commonwealth legislation.<sup>26</sup>

The Bill continues to permit cooperative arrangements for the administration of State and Commonwealth anti-discrimination laws. However, the section of the AHRC Act permitting the AHRC to perform functions conferred on the AHRC by a State enactment is not replicated in the Bill.<sup>27</sup> The NSW Government considers that this provision should be reinstated, as this would preserve greater flexibility for cooperative arrangements in the future.

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<sup>25</sup> Section 122U NSW Act

<sup>26</sup> See NSW Law Reform Commission, Report 92, Review of the Anti-Discrimination Act 1977 (NSW), November 1999, para. 2.54ff

<sup>27</sup> Section 18 AHRC Act