Submission to the Senate Standing Committee on Legal and Constitutional Affairs: Exposure Draft of *Human Rights and Anti-Discrimination Bill 2012*

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The Disability Discrimination Legal Service (DDLS) and Villamanta Disability Rights Legal Service support the passage of this bill in principle and make further comment below. Due to resource constraints and our practices being limited to a specific stakeholder group, we have confined our input to those issues we feel most affect people with a disability.

We are of the view that further changes to the *Human Rights and Anti-Discrimination Bill 2012* ('HRAD Bill') are required in order to fully achieve its objectives. Hence, we welcome the opportunity to provide input on the HRAD Bill Exposure Draft. On occasion we refer to the Discrimination Law Experts Group submission dated December 2012.

Recommendation 1.

The attribute of criminal record to be included in clause 17 as a protected attribute.

Recommendation 2.

The inclusion of the requirement for reasonable adjustments in the definition of discrimination in clause 19.

Recommendation 3.

Ensuring that lower wages for people with disabilities is not subject to a special measure exemption through clause 21.

Recommendation 4.

No exceptions to discriminate against people with disabilities in the areas of insurance and superannuation (clause 39).

Recommendation 5.

No exceptions to discriminate against people with disabilities in the area of defence and peacekeeping (clause 40).

Recommendation 6.

No certification of compliance codes by the Australian Human Rights Commission (Clause 75-78). If certification of compliance codes is retained, restrictions on the ability of the AHRC to certify without strict requirements for consultation to be. Person affected by such codes to have the right to seek revocation.

Recommendation 7.

Complainants permitted to move their complaints to AHRC from other jurisdictions (clause 90).

Recommendation 8.

Applicants to be protected from costs orders, and to have their legal costs paid if successful (clause 133).

Recommendation 9.

A specialist division of the Federal Court to hear discrimination cases.

1. Protected Attributes (Clause 17)

We believe that criminal record should be included in the list of protected attributes.

2. Definition of Discrimination (clause 19)

We support the new definition however believe the removal of a reference to reasonable adjustments in the definition is unhelpful in relation to people with a disability. While the notion of reasonable adjustments appears in other parts of the bill, we believe that having the requirement to make reason adjustments for a person with a disability in the definition strengthens that definition for people with a disability and provides more clarity for readers of the proposed Act.

3. Lower wages for people with a disability (clause 21)

We do not support a special measure exemption applying to the wages of people with a disability. Currently it seems that such an act could be characterised as such, and therefore explicit reference in the bill should be made to the contrary.

We support the recommendation by the Discrimination Law Experts Group in relation to clause 21(2) in relation to the test for special measures being replaced with “sole or significant purpose”.

4. Insurance and Superannuation Exceptions (Clause 39)

We do not support these exceptions for people with a disability.

5. Defence and Peace Keeping Exceptions (Clause 40)

We do not support these exceptions for people with a disability.

6. Certification of Compliance Codes: Division 6 (clause 75-78)

We are opposed to the new provisions in the HRAD Bill that will allow the Commission to certify compliance codes, and for such certification to be a defence against discrimination.

While we appreciate the utility in voluntary compliance with the Act, the following matters are relevant.

a) Instruments such as Standards have not resulted in increased compliance with the DDA. An example are the Disability Standards for Accessible Public Transport. In Victoria, the Standards have not been complied with, as admitted by the relevant public transport organisations. A further example are the Disability Standards for Education - the Victorian Equal Opportunity and Human Rights

Commission found in their September 2012 "Held Back" Report that the Disability Standards for Education were not seen to be effective in combating discriminatory treatment of students with disabilities.

b) While the notion of "consultation" implies in and of itself that the appropriate stakeholders' views will be heard, as we have seen in the operation of the Disability Standards for Education, "consultation" does not mean that the views of stakeholders must be respected or included in any process or plan. The Legislative Instruments Act states that rule-makers "should" consult. We note that under that Act s19 '*The fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument*'.

c) We submit that there are already a significant number of explicit and implicit defences and exceptions to discrimination in the proposed HRAD Bill. The certification of compliance codes provides an opportunity for further defences. We do not endorse the Australian Human Rights Commission having the power to certify compliance codes.

d) If it is decided to proceed with such codes we believe it should be mandatory for the AHRC to establish a Working Group comprised of representatives of people with disabilities endorsed by the sector and for that group to be involved in any certification. We also support Recommendations 46-49 and 56 made by the Discrimination Law Experts Group, particularly Recommendation 48 which allows a person affected by such Compliance Code to seek amendment or revocation of that code. This is an important safeguard.

7. Making a Complaint to the Commission (Clause 90)

We support Recommendations 60 and 61 of the Disability Law Experts Group submission in relation to broadening the circumstances in which a complainant may make a complaint to the Australian Human Rights Commission having made a complaint in another jurisdiction previously.

There are a number of reasons as to why complainants may choose one jurisdiction, for example a state discrimination jurisdiction, and then decide to make a complaint to the AHRC prior to that matter running its course. These include but are not limited to:

- Complainants lodging complaints themselves without legal advice and therefore not being aware of the implications of their actions;
- Complaints not resolving at the Commission (state) level and therefore new perspectives being acquired in relation to how litigation should proceed;
- Changes in legislation occurring at the time of the complaint;
- The ability to organise legal representation for litigation in a particular jurisdiction.

The changing of jurisdictions, without replicating procedures should be of no consequence to a respondent.

8. Costs (clause 133)

Background

As stated in the previous DDLS submission, our experience is that legal costs are a significant barrier to individual complainants bringing discrimination complaints in Australia. This is due to potential complainants' concerns about the threat of costs being awarded against them if their application is unsuccessful, as well as the inability of many individuals to afford legal representation if pro bono assistance (which is often unavailable) cannot be secured.

The previous DDLS submission recommended against each party bearing their own costs. While some complainants may be fortunate enough to receive pro bono assistance, this is rare in matters such as employment and education discrimination where the alleged discriminatory conduct can take place over a number of years and trials may run from one to four weeks. The lack of available legal assistance immediately precludes complainants from proceeding with their action. As such, the DDLS recommended in its previous submission that the respondent bear the applicant's costs where the applicant's claim is successful.

Specifically, the DDLS endorsed the recommendation of the Discrimination Law Experts' Group Consolidation Submission (p 25-26). The Experts Group recommended that in the case of successful applicants where "*respondents that have financial capacity to contribute to their costs, there should be power to award costs against such a respondent.*"

Our view continues to be that this would assist in the enforcement of anti-discrimination rights as it would encourage law firms and barristers to take on discrimination matters, knowing that they will be paid when applicants are successful.

Cl 133

Concern: Clause 133 of the HRAD Bill only partially addresses complainants' concerns about litigation costs.

<u>Clause 133(1)</u>

Clause 133(1) establishes a new default position that each party will bear their own costs.

This is an improvement from existing legislation as this reduces the risk of costs being awarded against an unsuccessful applicant. However, it is likely to continue to prevent individuals who lack adequate financial resources from protecting their rights, as many

potential applicants cannot afford even their own legal costs. Thus, it is likely that only individuals with pro bono representation (which can be rarely secured) or with adequate private financial resources will be able to enforce their rights under the HRAD Bill.

As such, we believe that the HRAD Bill should go further in order to enable all individuals to protect their rights under the legislation. Our view is essentially that a presumption should exist in favour of successful applicants being granted costs where:

- the respondent has the financial capacity to contribute partially or fully to those costs;
- awarding costs is warranted by the financial circumstances of the applicant (ie the applicant lacks adequate financial resources); and
- the award of costs is not precluded by other relevant circumstances.

Where an award of costs against the respondent is unwarranted, the default position of parties paying their own costs should generally apply.

Clauses 133(2) and (3)

Our concern is only partially addressed by cl 133(2) and (3). This allows the court to make an order as to costs where the court considers this to be justified. In considering whether circumstances exist to justify making such an order, the court must have regard to the matters listed in s 133(3). In essence, these include:

a) the parties' financial circumstances
b) whether any party is receiving assistance under s 130 or legal aid (and the nature and terms of that assistance)
c) the conduct of the parties
d) whether any party has been wholly unsuccessful in the proceedings
e) any offers of settlement made in writing made by one party to another
f) any other matters the court considers relevant.

Under cl 133(2) and (3), successful complainants (including those with limited financial resources) should be able to request that the court award costs against the respondent.

While this is an improvement, our view is that this section is insufficient in certain respects. Chiefly, it will be uncertain as to whether or not a successful applicant will be awarded costs. There will be a significant risk that the default situation of each party bearing their own costs will apply. We believe that uncertainty about whether or not a successful applicant is likely to be awarded costs will continue to make litigation unattractive to many applicants and will continue to make it difficult for applicants to obtain paid legal representation. As such the full potential of the HRAD to protect individuals from discrimination is unlikely to be achieved.

A further concern is that, it their current form, cl 133(2) and (3) create the risk that costs could be awarded against applicants who do have some financial resources. Our

experience is that many individuals, who, for example, have a financial interest in their own house, are unlikely to proceed with litigation in the Federal Courts.
In our experience, the legal system is already heavily weighted against individuals seeking to enforce their rights under anti-discrimination law. Whereas individuals are putting their personal assets at risk by undertaking litigation, respondents in matters such as education and employment are often statutory authorities or large organisations with significant financial and legal resources at their disposal. We believe that it would generally be unfair to award costs against the applicant (even those with some financial resources) except in circumstances where he or she has acted wrongfully or unreasonably (as is envisaged by clauses 133(3)(c), (d) and (e)).

DDLS Proposed Amendments:

Example clause:

S 133

(1) Where an applicant is successful in proceedings under this Part in the Federal Court or the Federal Magistrates Court, costs shall be awarded, in full or in part, against the respondent if:

   a. the respondent has the financial capacity to contribute, in full or in part, to the applicant's costs;

   b. the court considers that awarding costs, in full or in part, is warranted by the financial circumstances of the applicant; and

   c. the court considers that there is no other relevant reason not to award costs, in full or in part, having considered the matters in subsections (4) and (5).

(2) In considering the financial circumstances under s 133(1)(b) the court must consider whether any party to the proceedings is receiving assistance under section 130, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance).

(3) Where the court determines that it is not appropriate to award costs against the respondent on the basis of the Parties' financial circumstances under subsection (1), each party shall bear that party's own costs, subject to subsection (4).

In summary, we believe that without more certainty that the successful applicant will be awarded costs, it will be unlikely that law firms who run discrimination cases at the Federal Court on a speculative basis will continue to do so, and this will result in a greater number of applicants being self represented, as is currently the case the Victorian state jurisdiction.

We maintain our views in relation to the AHRC having greater powers to instigate proceedings as per the previous submission of the DDLS under its response to Question 27. Persons with disabilities conducting litigation present numerous difficulties and challenges, depending on that disability. Even with improvements to the Act the burden of initiating complaints and conducting litigation for people with, for example, cognitive impairment or mental illness can be overwhelming, to the extent that many choose not to proceed after the process at the Commission is terminated.

9. Not included in the current bill

We endorse Recommendations 42 and 43 of the National Association of Community Legal Centre submission below.

42. A specialist division of the Federal Court and the Federal Magistrates Court should be established to hear discrimination law matters. Judicial members should have ongoing training in discrimination issues.

43. The specialist division should develop rules and procedures that increase the ability of self represented litigants to conduct their own cases.