



**21 December 2012**

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

Dear Sir/Madam,

### **Submission in relation to the Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012**

The New South Wales Council for Civil Liberties (NSWCCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. To this end, the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies.

NSWCCL is a non-government organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

NSWCCL thanks the Committee for the opportunity to make this submission.

#### **Summary**

NSWCCL supports Australia's continuing commitment to international human rights instruments, and regards the consolidation of legislation within this Bill as an attempt to meet such obligations.

NSWCCL notes that the operation of the legislation will allow exceptions within areas such as social security, migration and marriage policy. Discrimination in these areas is as arbitrary as anywhere else. NSWCCL opposes these exceptions.

In short, the NSWCCL supports:

- ▶ Simplification of the definition of discrimination;
- ▶ Addition of gender identity as a protected attribute, albeit requiring further expansion in order to afford protection to intersex individuals;
- ▶ Addition of sexual orientation as a protected attribute, albeit requiring further expansion in order to afford protection to intersex individuals; and
- ▶ A shifting evidentiary burden of proof.

Further, the NSWCCL opposes:

- ▶ Failure to include criminal record within the prescribed protected attributes;
- ▶ Exceptions within areas such as social security, migration and marriage policy; and
- ▶ Inclusion of the term 'offends' and 'insults' within clause 19, contravening the right to freedom of expression espoused within Article 19 of the International Covenant on Civil and Political Rights 1966.



## Submission

The NSWCCL welcomes the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 as a piece of legislation which addresses numerous existing voids within Australian anti-discrimination legislation. The consolidation of existing legislation promotes an ease of understanding and applicability, both of which are essential in facilitating adherence to the law.

Nonetheless, several aspects of the draft legislation present as cause for concern for the NSWCCL. Such concerns prompt further informed drafting to ensure that vulnerable individuals do not fall foul of narrow legislative interpretation.

Furthermore, in the NSWCCL's view, the considerations that justify restricting discriminatory action are different in substance to those have application to unacceptable speech. Matters of speech which insult or humiliate another on the basis of a protected attribute should be dealt as a matter apart from unlawful discrimination. Speech which merely offends should not be declared unlawful. In light of Australia's international human rights obligations under Article 19 of the International Covenant on Civil and Political Rights 1966, sub-clause 19(2) should be amended.

### THE PROTECTED ATTRIBUTES (CLAUSE 17)

The history and present practice of denial of rights, both worldwide and within Australia, to individuals who possess a protected attribute, alongside the extent to which the person is able to, and can be expected to, change the attribute are both considerations which should be evaluated when considering the extent to which protection is offered for each protected attribute.

Such considerations provide reasons for the special treatment of race, an attribute an individual cannot change, and sex, which a person should not be expected to change. They also provide reason for the introduction into federal law of protections against discrimination on the grounds of sexual orientation and gender identity, additions which the NSWCCL welcomes.<sup>1</sup>

However, in order for all individuals falling within a particular protected attribute to be afforded protection under legislation, the terminology contained within provisions must include language which is broadly inclusive. Terminology within a number of the protected attributes raises issues of inapplicability, with the potential to create additional barriers for those suffering from unfair discrimination.

### Family responsibilities

The NSWCCL notes the concerns expressed in the Australian Human Rights Commission's submission to this inquiry, and supports legislative amendment in order to remedy such concerns. As not all carers owe family responsibilities to those that they care for, the protected attribute of family responsibility should be expanded.

Such expansion should encompass individuals who assume the role of carer in a multitude of relationship capacities as opposed to relationships occurring solely within the domain of the immediate family.

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<sup>1</sup> A million and a half people were murdered in Nazi controlled countries during the Second World War because they were homosexuals. Homosexual activity is punishable by death in some Middle Eastern countries, and Uganda is considering similar legislation. Gay males in Australia are subject to harassment and physical attack, and a number have been killed in recent times. Yet persons cannot change these characteristics; and if they were able to change such characteristics, they should not be expected to do so.



## Gender identity and sexual orientation

The NSWCCL endorses comments made by the Australian Human Rights Commission alongside those of the Anti-Discrimination Board of NSW with regard to treatment of intersex persons within the Bill.

Although explicit reference is made to intersex individuals within the definition of gender identity, the requisite identification with 'either sex' excludes intersex individuals who do not associate with either gender or identify as a member of either sex. Whilst the Bill's introduction of the ground of gender identity is applauded as an initial step to protect intersex persons against discrimination, the language of the provision must be suitably broad in order to adequately protect intersex persons.

Intersex attributes/status, as defined within the Anti-Discrimination Amendment Act 2012 (Tas), should be inserted into the legislation as an additional attribution ground under which intersex persons may be afforded protection. Incorporation of intersex specific terminology was recommended by Organisation Intersex International and is supported by the NSWCCL. The inclusion of an unequivocal definition, such as that within Tasmanian legislation, would allow intersex individuals to be afforded full protection under the law. As the legislation currently stands, intersex persons would not adequately be protected.

## Social origin

The definition of social origin is not defined within the legislation and is said to take its 'ordinary meaning'. Failure to provide an explicit definition of social origin is somewhat problematic as the scope for definition of social origin is exceptionally broad.

As suggested in the Anti-Discrimination Board of NSW's submission, divorcing the phrase from 'national and social origin', as found within the International Covenant on Civil and Political Rights, removes meaning from the phrase. Instead, social origin becomes a phrase suggestive of a hierarchical class system. Substitution of terminology or addition of an explicit definition is required to give effect to the intended meaning of social origin within the legislation.

## Reasonable adjustments

Clause 25 imposes a duty to make reasonable adjustments with regard to addressing disadvantage experienced by individuals with a disability. However, there is no explicit provision for reasonable adjustments with respect to the remaining protected attributes.

The NSWCCL endorses the Australian Human Rights Commission's remarks on this matter. Inclusion of a clarifying sub-clause, to the effect that reasonable adjustments in policies and practices may be required in regards to other attributes, would assist in the avoidance of indirect discrimination.

## THE UNPROTECTED ATTRIBUTES

### Criminal record

Failure to include criminal record within the protected attributes raises concern for the NSWCCL. Australia is compelled under the International Labour Organisation Discrimination (Employment and Occupation) Convention 1958 to provide protection from unfair discrimination on the grounds of criminal record. At present, this obligation has not been integrated within domestic legislation and individuals who have been subjected to discrimination on the basis of criminal record may lodge a complaint to the Australian Human Rights Commission and obtain a remedy through such an avenue.

Whilst the force of the Commission's involvement has undoubtedly had an educative effect on employers, inclusion of criminal record as a protected attribute would ensure that individuals with a



criminal record would be afforded enhanced protection from acts of discrimination. Such protection is particularly significant upon consideration of the barriers individuals presently face when asserting that discrimination has occurred on the basis of a criminal record. Furthermore, lack of opportunity as a direct consequence of repeated discrimination is likely to lead to recidivism.

It is noted within the Explanatory Memorandum that inclusion of criminal record as a ground of discrimination is eschewed by the Government as a result of uncertainty stemming from the concept and constitution of a criminal record, and the associated costs of inclusion. Although such apprehension is somewhat prudent, the NSWCCL recommends that criminal record be maintained as a ground of discrimination in spite of its difficulties.

If the attribute is not to be included, the NSWCCL recommends inclusion of unprotected attributes within the review of exceptions proposed in clause 47.

## THE EXCEPTIONS

### Religion (clause 33)

Rather than providing religious organisations a blanket exemption, NSWCCL submits that the legislation should limit the exemptions to positions or circumstances where possession of a protected attribute is relevant to the service or the employment position being offered.

It is noted that clause 33(3) restricts the exception in the case of aged services. The legislation should similarly limit the exception to employment, so that religious organisations may discriminate in whom they employ, but not otherwise. Further, the legislation should at the very least exclude services or other functions which are provided by the organisation on behalf of the government, or which are paid or partially paid for by government at local, state and federal levels. The Government has an obligation under human rights instruments not to discriminate, and cannot absolve itself of this obligation by outsourcing its activities to others.

A religious organisation which contracts with Government to provide services should not be able to discriminate between those it is obliged to help on the grounds listed in clause 33(1), namely sexual orientation, gender identity, religion, marital or relationship status, pregnancy and potential pregnancy.

Clause 33(2)(ii) permits discrimination that is necessary to avoid injury to the religious sensitivities of adherents to a religion. This is entirely subjective, and such injury to sensitivities does not have to be reasonable. It is recommended that this sub-clause be repealed.

While not accepting the desirability of a religious exception other than for the employment of clergy, the NSWCCL supports an arrangement that Liberty Victoria proposed within its submission. The arrangement proposed that religious bodies be able to apply for and receive, as of right, a formal licence to discriminate, time limited by renewable, conditional only on it specifying precisely on what attributes and in what areas it is required, and on what doctrines, tenants, beliefs or teachings require it. The limits of the licence would be clear and public, and outside such limits, the ordinary law would apply.

Such a claim would be lodged with the Australian Human Rights Commission in writing, and be displayed on the claimant religious body's website and within promotional material. Such transparency would allow any potential employee, recipient of services or other persons interacting with the body to be duly alerted to the body's intended discrimination.

In order to remain consistent with the Government's stated position on religious exemptions, the Australian Human Rights Commission would not be required to approve, vet or reject the claims for



exception, but would record and hold them, and could display them on the Commission website. It could include, if it wished, its own assessment of the validity of the exception, but would have to inform the body if it did so.

The Court or Commission dealing with a complaint of unlawful discrimination would be able to decide whether the doctrine cited in the licence in fact necessitated the discrimination complained of. It would not be able to question the doctrine itself.

### **Further exceptions**

Existing exceptions are proposed to remain in place to 'aid understanding in relation to specific issues' within the spheres of migration, marriage policy and social security. Such exceptions remain in place to ensure that other areas of Government policy cannot be challenged under anti-discrimination law.

It is acknowledged that such exceptions remain in place to restrict action brought in respect of legislation currently in operation. Yet, refusal to recognise certain conduct or treatment imposed upon a prescribed class of individuals as discriminatory in the eyes of the law remains abhorrently inequitable in spite of such considerations.

### **RACIAL VILIFICATION AND FREEDOM OF SPEECH**

Article 19 of the International Covenant on Civil and Political Rights 1966 espouses the right to freedom of expression, limited only by way of protection of the rights of others.<sup>2</sup> It would be unreasonable to suggest that the right to remain free from offence or insult is a fundamental human right. As such, the terminology pertaining to insult and offence should be repealed, due to the subjective nature of the phrases.

Perhaps appropriate substitution for the terminology may be derived from the Honourable James Spigelman's Human Rights Day Oration speech. 'Words such as offend and insult impinge on freedom of speech in a way that words such as humiliate, denigrate, intimidate, incite hostility or hatred or contempt do not'.<sup>3</sup>

Clause 52(4) of the legislation places limitations upon actions or dialogue being deemed unlawful in a number of circumstances. NSWCCL supports such restrictions, which are essential for the preservation of free speech, the pursuit of truth, and the functioning of democracy.<sup>4</sup>

### **THE SHIFTING BURDEN OF PROOF (CLAUSE 124)**

The proposed shifting burden of proof has been termed, incorrectly, a mechanism skewed in favour of claimants. The shifting burden of proof in fact allows a complainant to establish a prima facie case, with a non-discriminatory justification for conduct falling on the respondent once such a case has been established, producing an equally distributed burden.

At present, the complainant is faced with the prospect of ascertaining the reason unfavourable treatment amounting to discriminatory conduct has occurred. Such a reason can be deduced although is undoubtedly difficult to establish conclusively. Therefore, the proposed shifting burden

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<sup>2</sup> The NSWCCL accepts that speech is appropriately limited in relation to the incitement of violence and actions of defamation.

<sup>3</sup> Human Rights Day Oration, 'Where do we draw the line between hate speech and free speech?', 10 December 2012 (The Honourable James Spigelman AC QC)

<sup>4</sup> As means of illustration, some individuals notoriously believe that mere questioning of their beliefs is offensive. Catholic Christians sometimes find Protestant denials of the virgin birth offensive; some Muslims



of proof merely allows for the individual in the best position to provide reasons for discriminatory conduct with the opportunity to provide the purpose for the unfavourable treatment.

Such a shift in the burden, allowing for equal distribution of the burden between the individual complaining and the person whose conduct is being complained of, alleviates the difficulty faced by claimants in pursuing discrimination action. Such a reform is greatly necessitated in the view of the NSWCCL.

### REVIEW MECHANISMS

The NSWCCL applauds the requirement that exceptions be reviewed after three years, and presses for the clause 17 protected attributes to be reviewed also, both with the aim of considering whether further attributes should be added, existing attributes modified or repealed.

It is recommended that particular attention be focused on the use of the religious exemption, and reports should be furnished to the review panel accordingly, providing information regarding frequency of use, circumstances of use and the basis on which such exemption is considered necessary.

### JUDICIAL REVIEW PROCESSES AND CONCILIATION

It is submitted that the legislation should make provision for public interest and representative bodies to bring discrimination matters before the Federal Court, with leave of the Court.

The NSWCCL endorses the Anti-Discrimination Board of NSW's suggestion regarding incorporation of a mechanism under which parties to a conciliation process can sign an enforceable written record of agreement, similar to that operating under the *Anti-Discrimination Act 1977* (NSW).

Yours faithfully,

**Stephen Blanks**

Secretary, New South Wales Council for Civil Liberties

**Dr. Martin Bibby**

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