



Australian
Human Rights
Commission

Exposure draft

Human Rights and Anti- Discrimination Bill 2012

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE**

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1 Introduction

The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Committee in its Inquiry regarding the exposure draft of the Human Rights and Anti-Discrimination Bill 2012.

The Commission commends the Government for referring this draft legislation to the Senate Committee for review and public consultation prior to its formal introduction to Parliament. The Commission believes that such a referral process should be used for significant pieces of legislation on a more regular basis in order to enable better public participation in the development of laws.

2 Summary

The Commission welcomes the Bill and recommends that the Committee support its passage by the Parliament.

The Commission notes that the Bill

- would implement (substantially or in full) 43 of the 53 recommendations which the Commission made in response to the consultation paper released by the Attorney-General's Department in 2011
- would (in combination with other recent legislative measures) implement the majority of recommendations made by the Committee in its review of the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act).

The Commission recommends consideration by the Australian Government and the Parliament of whether a number of additional improvements to the current federal anti-discrimination legislative framework are able to be made, either through the Bill or through other and subsequent processes.

These additional recommendations are subordinate to the Commission's primary recommendation supporting passage of the Bill.

The Commission would be happy to assist in providing further clarification on any issues raised by this submission or other issues of interest to the Committee.

3 Recommendations

Recommendation 1: The Australian Human Rights Commission recommends that the Committee support the passage of the Bill.

Recommendation 2: The Commission recommends that the three year review of exceptions which is provided for in clause 47 of the Bill be expanded to include consideration of the desirability of adding further protected attributes to the legislation.

Recommendation 3: The Commission recommends:

- that the Australian Government provide clarification to the Parliament on how it intends to ensure that obligations assumed by Australia in relation to discrimination on the basis of criminal record under the International Labour Organisation *Discrimination (Employment and Occupation) Convention* (1958) are to be complied with
- that the Bill or supporting materials confirm the continued availability of the Commission's non-complaint functions, including preparation of guidelines and reporting on measures that should be taken by the Commonwealth, in relation to discrimination on the basis of criminal record
- that further consideration of appropriate means for protection against discrimination on the basis of criminal record be included in the review of the Human Rights Framework and in the three year review process provided for under the Bill.

Recommendation 4: The Commission recommends further consideration of possibilities for the Bill to cover discrimination on the basis of all protected attributes in all areas of public life, in the interests of simplicity and improved consistency with state and territory discrimination laws.

Recommendation 5: The Commission recommends further consideration of possibilities for the Bill to cover discrimination on the basis of carer responsibilities expressly, in the interests of improved consistency with the *Fair Work Act 2009* (Cth) and with state and territory discrimination laws.

Recommendation 6: The Commission recommends that, in addition to protection against discrimination based on gender identity, the Bill also provide protection more directly against discrimination on the basis of a person's sex characteristics and on the basis of gender expression.

Recommendation 7: The Commission recommends consideration of a clarifying statement to accompany introduction of the Bill, confirming that, in addition to the express provision of the Bill regarding reasonable adjustment for persons with disability, adjustments in policies and practices may also be necessary to avoid what has previously been referred to as "indirect" discrimination on the basis of other attributes.

Recommendation 8: The Commission recommends that

- introduction of the Bill into Parliament should be accompanied by a commitment to continuing review of needs and options for measures to eliminate discrimination based on experience of domestic violence
- if not addressed sooner, these issues should be included in the three year review provided by the Bill rather than this review being confined to review of exceptions.

Recommendation 9: The Commission recommends that if not addressed in the current Bill, further consideration of means for ensuring appropriate balance between freedom of religion and belief and other human rights, including in particular issues regarding services and facilities funded by the Commonwealth, be included in the three year review of the legislation provided for in the Bill.

Recommendation 10: The Commission recommends that introduction of the Bill into Parliament be accompanied by a commitment to regular review of the effectiveness of the legislation in achieving progress towards equality and elimination of discrimination, in particular within the public sector.

Recommendation 11: The Commission recommends further consideration of approaches to standing in federal discrimination law matters which might promote compliance with the legislation without imposition of undue regulatory burden. In particular the Commission suggests consideration of provision for initiation of matters by representative organisations and other bodies with a sufficient interest, but only by leave of the court with regard to appropriate criteria.

4 Advances on existing law

The Commission considers that the Bill would provide legislation which would

- be more efficient and effective, including being easier to understand and apply, and
- provide improved mechanisms for people seeking to assert their rights and for people seeking to comply with their responsibilities.

Welcome features of the Bill, consistent with the Commission's previous recommendations, include:

- improved links between discrimination law and Australia's international obligations
- a more transparent and consistent approach to which human rights are covered
- simpler provisions on which areas of public life are covered
- removal of inconsistencies and lack of clarity in coverage of harassment and work-related discrimination
- a clearer approach to definition of discrimination
- a simpler provision on inappropriate requests for information
- a consistent definition of special measures
- implementation of cross-party election commitments for federal discrimination law protection regarding sexual orientation, gender identity and same sex relationship status
- a simpler and more consistent approach to exceptions
- improved substantive criteria and procedural requirements regarding temporary exemptions
- balanced provisions on burden of proof, with the complainant (appropriately) remaining responsible for establishing that the conduct complained of actually occurred, but the respondent then being required to provide evidence, where relevant, on the reason for that conduct, and to demonstrate the applicability of any exceptions or defences relied on (ensuring that the person in the best

position to produce evidence is expected to do so, consistent with procedure in other areas of civil law)

- improved capacity for the Commission to terminate unmeritorious complaints, and protection for respondents against having to defend such complaints in court, with complaints terminated by the Commission on merit based grounds being able to proceed to court only with the leave of the court
- for the small proportion of matters which proceed to court, an approach to costs which is more consistent with that in other Australian discrimination law jurisdictions, and which facilitates access to justice while providing continuing capacity for courts to make costs orders appropriate to the conduct of the parties and the merits of the matter
- new mechanisms for promoting compliance and clarity of rights and responsibilities, comprising provision for:
 - (non-compulsory) certification of special measures
 - voluntary action plans in relation to all attributes rather than only in relation to disability
 - a voluntary audit function, and
 - development and certification of compliance codes.

The Commission notes that, in the interests of certainty, the Bill reflects the Commission's recommended approach in adopting best practice features of existing legislation wherever possible, rather than applying approaches which are entirely new or which are untested in Australia.

The Commission acknowledges that this approach may mean that in some respects the Bill provides more limited improvements in effectiveness and efficiency than are sought by a range of community organisations and experts, or than have been recommended in principle by the Commission itself for consideration in other contexts.

The Commission accordingly welcomes provision in the Bill for a review of exceptions provided in the Bill following three years of experience, and recommends that this review be expanded to include consideration of inclusion of additional protected attributes.

Recommendation 2:

The Commission recommends that the three year review of exceptions which is provided for in clause 47 of the Bill be expanded to include consideration of the desirability of adding further protected attributes to the legislation.

5 Maintenance of features of existing laws

5.1 Racial hatred

The Commission notes that the effect of sections 18C and 18D of the *Racial Discrimination Act 1975 (Cth)* is maintained in the Bill.

These provisions were not the subject of extensive or detailed discussion of any proposals for amendment in submissions in response to the Attorney-General's Department Discussion Paper.

The Commission considers accordingly that any amendments in this respect which might now be proposed would require separate and subsequent processes for specific consultation and detailed consideration.

5.2 Specialist Commissioner positions

The Commission welcomes the continuation in the Bill, consistent with the Commission's recommendations, of the existing specialist Commissioner positions. The Commission does not oppose the removal of the Human Rights Commissioner position.

6 Complaints to the Commission regarding criminal record

The Commission notes that the Bill would remove and not replace the existing jurisdiction of the Commission under the Australian Human Rights Commission Act to receive complaints of discrimination in employment and occupation regarding discrimination on the ground of criminal record.

The Commission acknowledges that this removal of complaint jurisdiction would not remove or diminish existing substantive legal rights, since the Australian Human Rights Commission Act does not render discrimination on the ground of criminal record unlawful. The Commission also notes the view indicated in the Regulation Impact Statement that the current complaint jurisdiction involves significant uncertainty for business and other relevant parties. However, the Commission is concerned that as a practical matter the absence of this avenue of recourse will clearly have adverse impact on people affected by discrimination who presently are able to bring and seek resolution of complaints and in some cases negotiate a remedy.

Further, the Commission is concerned that the removal of this jurisdiction would leave unclear by what means Australia will comply with the obligations which were assumed in the declaration by the Australian Government of criminal record as an additional ground for the purposes of the International Labour Organisation *Discrimination (Employment and Occupation) Convention (1958)*.

While spent convictions schemes, both at Commonwealth and at state and territory level, provide some protection against discrimination for people who have a criminal record, this protection is incomplete. For example, spent convictions schemes differ between jurisdictions, convictions only become spent after a certain period of time, and some convictions are exempt from spent convictions schemes. In some

situations and for some purposes it may be unfair to base discrimination on a conviction that is not spent.

The Commission believes that further action should be taken by the Australian Government to ensure that the obligations assumed by Australia in relation to discrimination on the basis of criminal record are complied with.

Recommendation 3: The Commission recommends:

- that the Australian Government provide clarification on how it intends to ensure that obligations assumed by Australia in relation to discrimination on the basis of criminal record under the International Labour Organisation *Discrimination (Employment and Occupation) Convention* (1958) are to be complied with
- that the Bill or supporting materials confirm the continued availability of the Commission's non-complaint functions including preparation of guidelines and reporting on measures that should be taken by the Commonwealth in relation to discrimination on the basis of criminal record
- that protection against discrimination on the basis of criminal record be included in the review of the Human Rights Framework and in the three year review process provided for under the Bill.

7 Possibilities for further simplification and promotion of consistency

7.1 Grounds covered only in work related areas

The Commission notes that the Bill would make discrimination on the following grounds unlawful only in connection with work and work related areas:

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

The Commission welcomes:

- the expansion of existing express protection under the Sex Discrimination Act regarding family responsibilities
- the enhancement of federal discrimination law protection regarding discrimination on the other grounds listed above which the Bill would provide.

However, the Commission has some concern that providing narrower coverage for some attributes than others could result in some complexity and confusion.

In particular the Commission notes implications for:

- intersectional matters (for example where a matter which is not work related raises issues both of race and religion; or of disability and medical record)
- consistency between federal law and state and territory discrimination laws (which provide more general coverage on a number of these grounds).

Recommendation 4: The Commission recommends further consideration of possibilities for the Bill to cover discrimination on the basis of all protected attributes in all areas of public life, in the interests of simplicity and improved consistency with state and territory discrimination laws.

This recommendation would not appear to raise significant issues of:

- regulatory burden, having regard to the extent of existing coverage in state and territory discrimination laws
- constitutionally valid application, having regard to the breadth of the non-discrimination provisions of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights*.

7.2 Express coverage of carer responsibilities

The Commission notes that the Bill would cover carer responsibilities implicitly to a considerable extent:

- by reference to family responsibilities, and
- by reference to a carer's status as an associate of children, or of older people, or of people with a disability.

However, this coverage is not clearly and expressly stated. The Commission submits that confusion and uncertainty may result from apparent differences between the Bill and the *Fair Work Act 2009* (Cth) (Fair Work Act) in this respect.

The Commission notes for example that express coverage of carers who are not immediate family members could assist in dealing with situations, including in Indigenous communities, where children are cared for by extended family members, which would not appear to be covered by the definition of family responsibilities in the Bill.

Recommendation 5: The Commission recommends further consideration of possibilities for the Bill to cover discrimination on the basis of carer responsibilities expressly, in the interests of improved clarity, and consistency with the *Fair Work Act 2009* (Cth) and with state and territory discrimination laws.

7.3 Sex characteristics and gender expression

The Commission notes and welcomes that the Bill provides a degree of protection against discrimination based on a person being of 'indeterminate sex' or based on a person's gender expression, through its coverage of discrimination on the basis of gender identity.

The Commission notes that the approach in the Bill in this respect closely resembles that in the most recently revised state equal opportunity law, the *Victorian Equal Opportunity Act 2010* (Vic).

The Commission notes, however, that there is potential for uncertainty, including expenditure on litigation, through issues of sex characteristics and gender expression being covered only as part of the concept of gender identity.

The Commission submits that express coverage of sex characteristics and gender expression would provide increased certainty and clarity in this area for all parties, and notes that, subsequent to the drafting of the Bill, the *Anti-Discrimination Amendment Bill 2012* (Tas), which would include express coverage of discrimination based on intersex status, has been released.

Recommendation 6: The Commission recommends that, in addition to protection against discrimination based on gender identity, the Bill also provide protection more directly against discrimination on the basis of a person's sex characteristics, intersex status, or gender expression.

7.4 Approach to reasonable adjustment

The Commission notes that, consistent with the existing federal discrimination Acts, the Bill makes express provision for reasonable adjustment only in relation to disability.

While the Commission understands the need to avoid creating a misleading appearance of increased regulatory burden in this area, it is also appropriate to ensure that no unintended reduction in existing rights and responsibilities occurs, either in law or in community understanding of the law.

Adjustments in policies and practices which unreasonably disadvantage people with a particular attribute clearly may be required by existing indirect discrimination provisions, for example under the Sex Discrimination Act, notwithstanding the absence of a distinct reasonable adjustment section in that Act.

The Commission is concerned that in the context of a consolidated Act there may be inferences drawn that express provision in relation to one attribute should be taken as limiting currently implied coverage regarding other attributes.

Recommendation 7: The Commission recommends consideration of a clarifying statement to accompany introduction of the Bill confirming that in addition to the express provision of the Bill regarding reasonable adjustment for persons with disability, adjustments in policies and practices may also be necessary to avoid discrimination on the basis of other attributes.

8 Further issues for consideration

8.1 Domestic violence

The Commission notes that the Bill does not implement previous recommendations made by the Commission and a number of other organisations for express coverage by federal discrimination law of discrimination against persons who have experienced domestic violence, and that the Attorney-General has publicly confirmed that the Australian Government at this point does not view this Bill as the appropriate vehicle to pursue issues in this area.

Recommendation 8: The Commission recommends that:

- introduction of the Bill into Parliament should be accompanied by a commitment to continuing review of needs and options for measures to eliminate discrimination based on experience of domestic violence
- if not addressed sooner, these issues should be included in the three year review provided by the Bill rather than this review being confined to review of exceptions.

8.2 Exceptions for religious organisations

The Commission notes that, other than in relation to provision of aged care services, the Bill provides exceptions for religious organisations which are similar to those provided in the Sex Discrimination Act, the *Age Discrimination Act 2004* (Cth) and existing state and territory discrimination and equal opportunity laws.

As acknowledged by the Commission in its submission responding to the Attorney-General's Department Discussion Paper on consolidation of federal discrimination laws, complex issues are presented by the need to ensure appropriate balancing of sometimes competing human rights, in particular rights to freedom of religion and belief and rights regarding equality and non-discrimination.

The Commission has not supported proposals for the balancing mechanism in this area to be provided by requiring religious organisations to apply to the Commission for temporary exemptions or other certification, having regard in particular to the regulatory impacts of such an approach.

The Commission considers, however, that further consideration remains needed regarding means for achieving appropriate balancing between freedom of religion and belief and other aspects of human rights.

The Commission notes for example that a number of organisations have referred to possibilities for:

- religious organisations seeking to rely on exceptions based on their doctrines being required to provide convenient public access to relevant points of such doctrines (without requiring approval of those doctrines, whether by the Commission or other government body)

- restrictions on applicability of exceptions for religious organisations not only in provision of aged care services (as proposed by the Bill) but in provision of services on behalf of, or substantially funded by, the Commonwealth more generally.

Recommendation 9: The Commission recommends that if not addressed in the current Bill, further consideration of means for ensuring appropriate balance between freedom of religion and belief and other human rights, including in particular issues regarding services and facilities funded by the Commonwealth, be included in the three year review of the legislation provided for in the Bill.

8.3 Positive duties and review of the effectiveness of the legislation

The Commission notes that the Bill does not include express provision for positive duties to promote equality and ensure non-discrimination, consideration of which has been recommended by the Commission and a range of human rights experts and advocates.

The Commission appreciates the need to ensure that the legislation does not impose undue regulatory burden, and notes the conclusions of the Regulation Impact Statement accompanying the Bill regarding imposition of positive duties through this Bill.

However, the Commission also notes and endorses the views indicated in the Regulation Impact Statement for the Bill on the positive economic impacts to be gained through more effective achievement of the objects of discrimination law in promoting equality and eliminating discrimination.

The Commission welcomes enhanced measures in this respect provided for in the *Workplace Gender Equality Act 2012* (Cth) but notes that there remains need for consideration of similar measures regarding other protected attributes beyond the scope of that Act.

Recommendation 10: The Commission recommends that introduction of the Bill into Parliament be accompanied by a commitment to regular review of the effectiveness of the legislation in achieving progress towards equality and elimination of discrimination, in particular within the public sector.

8.4 Standing

The Commission notes that the Bill does not implement the Commission's recommendation for reform of provisions regarding standing to bring discrimination matters before the Federal Court. The Commission recommended reform so as to provide consistency, between:

- who may bring complaints to the Commission and who may commence court proceedings

- standing in federal discrimination law matters (in brief, only persons affected by discrimination) and in general law matters (in brief, any person or body with a sufficient interest in the matter).

The Commission appreciates the need to ensure that procedural as well as substantive provisions avoid imposition of undue regulatory burden.

The Commission suggests however that there should be further consideration of approaches to standing in federal discrimination law matters which meet this objective while also enhancing access to justice and effective compliance with the legislation.

This might include consideration of:

- provision for representative and public interest bodies being able to bring proceedings only by leave of the court
- specification for this purpose of criteria to which courts should refer, including public interest criteria as well as the interests of justice in the matter concerned.

Recommendation 11: The Commission recommends further consideration of approaches to standing in federal discrimination law matters which might promote compliance with the legislation without imposition of undue regulatory burden. In particular the Commission suggests consideration of provision for initiation of matters by representative organisations and other bodies with a sufficient interest, but only by leave of the court with regard to appropriate criteria.