



Human Rights and Anti-Discrimination Bill 2012

Submission to the Senate Legal and Constitutional Affairs

Committee

by

Clubs Australia Industrial

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HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

SUBMISSION

1. INTRODUCTION

- 1.1 Clubs Australia Industrial are generally supportive of consolidating the legislation in the area of discrimination as there is a need of *“a reduction in complexity and inconsistency in regulation”* and *“ensuring simple, cost-effective mechanisms for resolving complaints of discrimination.”*¹
- 1.2 Having said this, we have a number of reservations in relation to whether this will be achieved in regard the proposed *Human Rights and Anti-Discrimination Bill 2012* (“Bill”).
- 1.3 This submission focuses on areas of remaining concern that we have identified as being problematic for clubs and employers in general.

2. The Likely Impact of the Proposals on Business

- 2.1 Whilst our industry supports principles of non-discrimination and equality and a simple legislative framework to support this, we are concerned that the Bill extends or duplicates the protections currently available under the numerous pieces of legislation that apply, in a manner which is unbalanced and prejudicial to employers, for example in the case of a person’s “industrial history” and the extension in areas of employment to cover volunteers and independent contractors. The latter has particular significance for small clubs who suffer

¹ Attorney General’s Department Discussion Paper, page 6, paragraph 10.

financial hardship and primarily rely on volunteer labour to enable trade to continue.

- 2.2 Whilst it is difficult to estimate a figure on the cost ramifications of the proposals to expand the categories of protected attributes, there is no doubt that by introducing additional statutory causes of actions and opening up the categories of persons eligible to make a complaint, greater incidence arise for litigation. What must then be considered are the likely costs that an employer will incur in simply obtaining legal advice and representation to defend these claims, not to mention the substantial indirect costs of litigation, including human/emotional cost, and time and resources spent. Regrettably, these significant impacts are inevitable even in cases lodged by unmeritorious applicants. Further, by increasing the scope of protected attributes, employers become exposed to a greater range of damages and penalties which may be awarded against them.
- 2.3 In NSW alone, Clubs have been exposed to an increasing number of discrimination based claims heard in the Administrative Decisions Tribunal, HREOC, the Federal Magistrates Court and the District Court. This spike commenced at the time the WorkChoices legislation was introduced, when access to unfair dismissals was significantly curtailed. In more recent times the trend continues, as applicants and solicitors have been testing creative ways in which to use the full scope of the law (not necessarily isolated to the heads of discrimination, but incorporating for example torts, common law, equity and breach of contract) to mount multi-million dollar claims, that is the *Fraser-Kirk v David Jones & Others* style applications.
- 2.4 The increase in this type of litigation has not been assisted by the creation of new anti-discrimination entitlements under the *Fair Work Act 2009* such as the provisions which prohibit termination of an employee on discriminatory grounds, or in the case of section 351 of the *Fair Work Act*, which prohibits an employer from taking adverse action against an employee for a discriminatory reason. There is clear duplicity across the various pieces of legislation which allows applicants to

shop for legal redress and choose depending on varying statutory time limitations, risk of costs and damages that can be awarded. Employers are burdened with additional layers of complexity in that there are many laws covering the same subject matter but with different detail regarding compliance and a wide range of alternative remedies that can be awarded.

- 2.5 The Bill must not extend beyond the existing heads of discrimination dealing with age, sex, disability and race and should address the significant difficulties arising with the multiple avenues of redress. This will be further discussed below.

3. The Onus of Proof

- 3.1 We strongly oppose any reversal of the onus of proof in discrimination complaints and submit that the standard burden of proof should be maintained.
- 3.2 It is the industry's experience via the new General Protections/Adverse Action claims under the *Fair Work Act* that the reverse onus of proof has increased the incidence of speculative claims by applicants whose main aim is to pressure Clubs to offer a substantial monetary settlement. These applicants, all which have been legally represented, are well advised that from an employers' perspective it is cheaper to pay them "go-away money" at conciliation rather than defend a claim to full hearing, in a jurisdiction which at best is generally no costs (even if the Club is successful in its defence). Alternatively, applicant's are in a superior bargaining position when the employer faces the additional hurdle of being considered guilty until proven innocent, because of the reverse onus.

4. Costs

4.1 With the rare exception, of all the discrimination matters that have settled in our industry, Clubs have parted with money in exchange for the claim being discontinued. As their representatives, we are constantly hearing from our members that a significant factor in deciding to settle the matter at conciliation was that as a question of economics, it was cheaper to pay the applicant and settle at conciliation than arbitrate.

4.2 Whilst we acknowledge that “go-away” money is often a feature of litigation generally, we believe that there may be a number of ways in which the unmeritorious claims can be reduced, which would in turn reduce the rate at which employers are rewarding opportunistic employees with monetary settlements. We submit that some initiatives which could be adopted to reduce the incidence of frivolous claims are as follows:

- a) If a matter is not settled at conciliation, the Australian Human Rights Commission (**the Commission**) member presiding over the conciliation must provide a written opinion to the parties regarding prospects of success. A certificate which simply states that no opinion can be expressed should not be permissible;
- b) Introduce a Notice of Election to proceed to hearing (similar to the former section 651 of the *Workplace Relations Act* for unfair dismissal) requiring an applicant to file such a Notice within 7 days of receiving the certificate noted in sub-paragraph (a) above;

- c) In the event that a Commission member has formed an opinion against one of the parties in their certificate and that party proceeds to hearing and is unsuccessful, the other party is entitled to lodge an application for costs and the Tribunal/Court is required to consider the certificate when determining this issue.

5. Third Parties Bringing Claims

- 5.1 We accept that aggrieved parties to discrimination claims have the right to be represented and to have their matters arbitrated if they are not able to be resolved through conciliation.
- 5.2 We are however, strongly opposed to any provisions in the Bill that allows third parties, such as trade unions or activist groups to become an actual party to proceedings on behalf of complainants. We consider this to be a conflict of interest as it increases the risk of such parties abusing the right to lodge claims on behalf of others out of self-interest or unrelated purposes, for example to increase membership, for campaigns, to target certain industries and so on.
- 5.3 These bodies may also be motivated to lodge claims if there is an ability for them to obtain a moiety out of any award of compensation or penalty against an employer. This is something we also strongly oppose.

6. Vicarious Liability

- 6.1 We support a uniform approach to vicarious liability in the Bill in addition to taking into consideration the fact that an employer cannot control every aspect of their employees' conduct.

- 6.2 The *Age Discrimination Act 2004 (ADA)* and the *Disability Discrimination Act 1992 (DDA)* provides that the unlawful act undertaken by a director, servant or agent of the body corporate must be committed within the scope of their *“actual or apparent authority.”*² We consider this to be the appropriate vicarious liability test as distinct from the tests in the *Sex Discrimination Act 1984 (SDA)* and the *Racial Discrimination Act 1975 (RDA)* which provides that the conduct must be *“in connection with the person’s employment or duties as an agent.”*³
- 6.3 The Bill provides at section 57(1) that the conduct must be *“connected with the first person’s duties as a director, officer or agent, or connected with the first person’s employment.”*
- 6.4 This test is too broad, increasing the risk that an employer will be found liable for acts that are completely outside their control. For example in the case of conduct by employees outside of working hours, outside the scope of their duties/authority and outside of the ordinary place of work. This cannot be considered a fair or balanced liability for employers to bear.
- 6.5 We support the incorporation of the defence under section 57(3) of the Bill which mirrors the provisions available under the ADA and DDA, providing that an employer will not be liable if it can establish that it *“took reasonable precautions and exercised due diligence to avoid the conduct.”*⁴

² Section 57(2) of the ADA and section 123(2) of the DDA.

³ Sections 106 of the SDA and subsection 18E of the RDA.

7. Expansion of Protected Attributes

- 7.1 We oppose any expansion of the protected attributes that have been long established in the existing framework of legislation. We believe that this aspect of the proposal is inconsistent with the principles outlined in the AGs Discussion Paper to consolidate the laws to simplify the system for business and create cost effective mechanisms for resolving discrimination complaints.
- 7.2 In particular we note that the Bill has expanded protected attributes to include a person's "industrial history". We submit that employees are already adequately protected under the *Fair Work Act 2009* in this regard, in particular with respect to the general protections, freedom of association and unlawful termination provisions.
- 7.3 It is obvious that if the types of protected attributes are expanded, this will lead to an increase in business costs from a compliance, training and education perspective, increased legal costs as the exposure to risk of a claim increases and then ultimately to the community who will be required to fund the justice system to support the additional claims.
- 7.4 The open ended range of remedies available must also be considered for small to medium Clubs many of which are already struggling to keep their doors open. Discrimination based claims are unique in the types of compensation sought by applicants as well as the lengthy conduct of cases. This is quite distinct from the traditional unfair dismissal claims where compensation is capped at six months pay, where solicitors and barristers are the exception rather than the norm and where matters are arbitrated relatively quickly and cheaply.

7.5 In 2011, the Yarra Bay 16 Skiff Sailing Club received judgment in its favour relating to a racial discrimination claim lodged with the Anti-Discrimination Board by its former General Manager⁵. This employee had been terminated four years earlier in early 2007 for serious misconduct after a history of similar behaviour at other small Clubs around NSW. The Club's legal costs in defending such a drawn-out claim was in excess of \$200,000 and this was with ClubsNSW preparing the majority of the evidentiary material at no cost. Without the Club's insurance, it could never have defended the claim which was so obviously frivolous that the ADT awarded partial costs in favour of the employer in what is normally a no costs jurisdiction. This applicant however, had fought the claim for free on legal aid and had liquidated all of her assets, so the award for costs was a pyrrhic victory as it is highly unlikely the costs will ever be recovered.

8. Uniformity in State and Federal Laws

8.1 We submit that when considering the multiple State and Federal laws which provide significant duplication of legal rights and obligations in the area of discrimination, muddled by conflicting and inconsistent tests in the various pieces of legislation, that the process of consolidating the legislation will be counter-productive if the State and Territory anti-discrimination laws continue to operate concurrently with the Federal bill.

8.2 We consider that one of the primary goals of the consolidation process to achieve the principles outlined in the AGs Discussion Paper must be to have one set of Federal anti-discrimination laws that 'cover the field'⁶, meaning that State or

⁵ *Avgoulla Hendrickson v Yarra Bay 16 Skiff Sailing Club* [2011] NSWADT 37.

⁶ Section 109 of the Australian Constitution.

Territory laws will have no application to the extent that they cover the same protected attribute as the Commonwealth law.

- 8.3 We also believe that to achieve true consolidation and simplification, that the new anti-discrimination provisions under the *Fair Work Act* which have created another layer of duplicated yet more onerous obligations, must be removed. Further, there should be one Tribunal or Court that has jurisdiction to hear these matters.

9. Conclusion

- 9.1 There is no doubt that reform is needed in the area of anti-discrimination legislation due to the overregulation that has become a feature of it. We support the concept of consolidation as it is clear that all stakeholders will be the beneficiaries of a truly unified, single national system. The challenge is that some of the reforms contemplated in the Bill incorporate provisions which on the face of it, appear to create further regulation and increase liabilities and obligations for employers without addressing the core problems within the existing framework.