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Dear Sir /Madam

Submission on Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012

Please find enclosed a submission from the Victorian Government in relation to the exposure draft of the Human Rights and Anti-Discrimination Bill 2012.

Yours sincerely

ROBERT CLARK MP
Attorney-General

Encl 21/12/12

State Government Victoria

Victorian Government Submission on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012

The Victorian Government welcomes the opportunity to comment on the exposure draft of the Commonwealth's Human Rights and Anti-Discrimination Bill 2012 ("draft Bill").

However, the Victorian Government is concerned that the Commonwealth Government has allowed little time for interested parties to properly consider and comment on proposed legislation with such far-reaching consequences. This issue is particularly acute for the States and Territories, given the potential for the draft Bill to impact on State and Territory laws.

The Victorian Government considers that the Bill should not be introduced into the Commonwealth Parliament until authoritative legal advice has been obtained and considered by all relevant parties regarding the implications and consequences of the proposed legislation and until the draft Bill has been considered and discussed in detail by Commonwealth, State and Territory Attorneys-General at the next meeting of the Standing Council on Law and Justice.

Given the time constraints for the current review, this submission identifies a number of potential detrimental impacts of the draft Bill and raises questions about which further advice, consideration and discussion is necessary.

The three major concerns arising from the draft Bill are:

- the expansion of the definition of discrimination and its application to "any area of public life", together with lack of clarity about the scope and meaning of these provisions;
- the expansion of Commonwealth anti-discrimination jurisdiction, the concomitant displacement of State and Territory anti-discrimination jurisdiction, the unclear extent of that displacement, and the consequent uncertainties and costs for duty holders, complainants and regulators; and
- the significant increase in the regulatory burden imposed on duty holders.

These concerns are set out in more detail below.

Expanded definition of discrimination and the scope of unlawful discrimination

The Victorian Government is particularly concerned about the Commonwealth Government's proposal to expand the definition of discrimination and the scope of unlawful discrimination using very broad and vague language that will cause significant uncertainty and practical problems. These effects will also have more extensive application as a result of the increase to 18 of the list of protected attributes, including attributes of unclear meaning such as "social origin".[1]

Application to "any area of public life"

The Bill would apply to discrimination connected with any "area of public life", rather than specified areas such as employment, education, the provision of goods and services, accommodation, clubs and sport as currently provided for in almost all Commonwealth and Victorian anti-discrimination law.[2] The term "areas of public life" is not exhaustively defined and could include a very wide range of contexts.

The prohibition of discrimination in any "area of public life" on its face would appear to extend to a wide range of functions and roles of State and Territory governments.

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[1] clauses 22 and 17.

[2] The only existing Commonwealth anti-discrimination law which uses "public life" is section 9 of the Racial Discrimination Act, based on the terms of the International Convention on the elimination of all Forms of Racial discrimination.

Currently, State government conduct is covered by anti-discrimination law if it involves the provision of "services" by a government department or public authority. Many State government activities do not involve the provision of a "service" (because they are not "helpful or beneficial activities" to the relevant class of persons). Examples include the pursuit, arrest, transport and detention of a suspect by police[3], transport and accommodation of prisoners[4] and exercise of discretion by prosecutors[5]. By expanding the scope of anti-discrimination law to conduct connected with "any area of public life", the Bill may cover significant public administrative responsibilities of State and Territory government for the first time.

State government functions which could be regulated for the first time by broad anti-discrimination rules under this Bill could include in the fields of the administration of justice, the making and supervision of guardianship and administration orders, some licensing grants and cancellations, the compulsory removal from families of children at risk or the compulsory treatment of people with a mental illness and some aspects of policing and prisons and corrections.

Claims of discrimination against a State entity in these areas might be made for example on the basis of:

- age, including in relation to State policies for protection applications for young persons and at what age they can independently instruct counsel, age segregation in remand and prison facilities and age limits for judicial pensions (for which the Bill makes no exception similar to the exception for age discrimination by superannuation funds); and
- disability (defined to include a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment, or that results in disturbed behaviour), which would be relevant to the exercise of compulsory treatment powers for persons with mental illness and the management of a range of mental disorders common amongst young persons in State care, prisoners and the making of guardianship and administration orders.

State government actions are generally exempt from State equal opportunity legislation if they are necessary to comply with a State Act or instrument or State tribunal order. (See, for example, the *Equal Opportunity Act 2010* (Vic) ("EO Act").) This exemption is not, but should be, included in the Bill.

Differential exemptions for conduct required by Commonwealth vs State law.

The draft Bill provides that conduct is not unlawful discrimination where the conduct was necessary to comply with a Commonwealth Act or instrument (clause 26) or a court order or some tribunal orders (clause 31). There is not but there should be a similar general exception for conduct that is necessary to comply with State or Territory Acts or instruments and State tribunal orders.[6] Such an exemption exists in sections 75 and 76 of the EO Act and a similar exception should be included in the Bill. There is no justification for this differential treatment of conduct in compliance with State and Territory laws and instruments and State tribunal orders.

Clause 30 of the Bill permits the Commonwealth to make regulations prescribing particular laws and particular protected attributes (other than race and sex) in respect of those laws, with the effect that conduct in accordance with the prescribed laws is not unlawful discrimination on the ground of the prescribed protected attributes. Clause 30 could be used to make regulations prescribing certain State and Territory laws in relation to certain protected attributes, but this will not provide the same level of protection of conduct required by State and Territory Acts and instruments that would apply to the Commonwealth in respect of its own Acts and instruments under clause 26. This is objectionable as a matter of principle. Protection of conduct under clause 30 will be

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[3] *Robinson v Commissioner of Police NSW* [2012] FCA 770.
[4] *Rainsford v Victoria* [2007] 167 FCR 1. (example queried but not overturned on appeal).
[5] *Secretary of Department of Justice v Anti-Discrimination Commissioner* [2003] 11 Tas R 324.
[6] Compliance with State court orders is exempted by clause 31.

piecemeal and depend on the Commonwealth Government agreeing to make and maintaining up-to-date regulations that specify relevant State and Territory laws. (In addition, the plethora of isolated instances where a State Act or instrument requires conduct that could constitute discriminatory conduct may necessitate so many applications for highly specific regulations as to make the proposed exemption by regulation system unworkable.) Finally, clause 30 cannot exempt conduct in compliance with State tribunal orders.

The Bill provides a further exception where the conduct constituting the discrimination is "justifiable".[7] However, in the absence of a clause 30 regulation exemption, would it therefore be necessary for a State government to justify to the Australian Human Rights Commission ("AHRC") or prove to a federal court that its prescribed qualification age for the judicial pension is "justifiable conduct" permitted by the Bill? Or that age or gender segregation in prisons is justifiable? Or that the scope of a guardian's powers as determined in a Victorian Civil and Administrative Tribunal order are justifiable? These issues appear not to have been considered adequately by the Commonwealth Government.

Defining unfavourable treatment to include conduct that offends or insults

The explanatory notes state that the draft Bill lifts differing levels of protection to the "highest current standard". In fact, the definition of unfavourable treatment goes well beyond any current law.

Discrimination is defined in clause 19 as treating a person unfavourably because the person has a protected attribute. "Unfavourable treatment" is defined in clause 19(2) to include conduct that offends, insults or intimidates the other person. The explanatory notes state that the breadth of this definition "largely reflects the existing law, as brought about by case law".[8] However, in the time available, no Australian case law has able to be identified that holds that single or sporadic instances of conduct a person subjectively finds offensive or insulting is considered to be "unfavourable treatment" for the purposes of current anti-discrimination law. If the Commonwealth Government continues to maintain that the draft Bill is consistent with an existing legislative standard, it should provide examples of any such Australian case law.

It appears that the scope of the new definition is adopted from the definition of conduct amounting to racial vilification under the *Racial Discrimination Act 1975* (Cth),[9] which is picked up in clause 51 of the draft Bill. Yet the racial vilification provisions, which themselves have been the subject of recent public debate, are far more confined than the proposed definition of "unfavourable treatment". Unlike the existing racial vilification provisions, the defining of unfavourable treatment in clause 19(2) of the draft Bill to include conduct that offends or insults:

- is based on the subjective feelings of offence or insult of the complainant, not an objective test;
- is not restricted to conduct in public places or public communications but can occur in any "area of public life" which includes private communications in work-related areas, education, clubs and sporting activities; and
- does not contain any defences designed to protect freedom of expression but relies on the general defence in clause 23 that the specific conduct (e.g. an offensive statement) be justifiable as a proportionate means of achieving a legitimate aim. This is likely to be an uncertain defence for those accused of making offensive statements to rely upon, as well as creating uncertainty for complainants and regulators.

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[7] clause 23.

[8] <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Documents/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Explanatory%20Notes%203.dot>, 27.

[9] sections 18C and 18D.

Many people may be subjectively offended or insulted by the simple expression or manifestation of views different to their own. To make such expressions of views in workplaces, schools, clubs and sports prima facie unfavourable treatment and hence discrimination and require the maker of the statement to justify the statement as a proportionate means of achieving a legitimate aim appears to substantially erode freedom of expression.

Freedom of expression is protected in Article 19 of the International Covenant on Civil and Political Rights ("ICCPR"), one of the core international treaties claimed as a basis for the external affairs power to support the Bill. However, the potential limitations on free expression proposed under the Bill go well beyond those permitted in ICCPR Article 19 and appear to contradict the Commonwealth's commitment to the ICCPR.

The Victorian Government considers that the Commonwealth Government should publish a draft Statement of Compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) in respect of the draft Bill so that the implications of the draft Bill for freedom of expression can be fully set out and assessed.

Expanded Commonwealth jurisdiction unnecessarily overlaps and creates conflicts with State anti-discrimination laws

The explanatory notes for the draft Bill provide that the consolidation of existing anti-discrimination protections is achieved by following five principles, including to "lift differing levels of protection to the highest current standard".[10]

However, the effect of the draft Bill's approach is to impose a Commonwealth anti-discrimination regime as an added and greatly expanded layer of regulation on top of existing State and Territory regimes. The impact analysis in the RIS for this additional and expanded layer of regulation is inadequate and there is negligible analysis of how it would interact with State and Territory laws. The draft Bill could have harmonised the provisions of the Racial Discrimination Act, Sex Discrimination Act, Disability Discrimination Act and Age Discrimination Act to remove inconsistencies without creating a new law across a greatly broadened field of application that would extensively overlap with existing State and Territory anti-discrimination laws.

The substantial expansion in the scope of the Commonwealth's anti-discrimination legislation raises questions about inconsistency between the Commonwealth and State and Territory anti-discrimination laws that could render State and Territory laws inoperative under section 109 of the Commonwealth Constitution either because of a direct inconsistency, or because the Commonwealth laws "cover the field" of regulation of the relevant topic.

Direct constitutional inconsistency

There are a number of potential direct inconsistencies between the draft Bill and Victorian laws that arise from the expansive terms of the draft Bill. While the Victorian Government has not been able to consider all possible areas of inconsistency in the time available, some key areas of potential inconsistency are:

- the definition of discrimination;
- the different exceptions to unlawful discrimination, including greater reliance in the draft Bill on the broadly-worded exception for 'justifiable discrimination', which has an unclear meaning and will require elucidation in case law;
- the different exemptions granted by the AHRC and the Victorian Civil and Administrative Tribunal, and the interaction between these exemptions;

[10] Explanatory notes at <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Documents/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Explanatory%20Notes%203.dot>, 1.

- the effect of special measures determinations made by the AHRC on conduct which is unlawful under the EO Act;
- the broader definition of "club" under the Bill compared with that under the EO Act, which may result in Commonwealth regulation of certain associations that are currently regulated by Victoria, including sports clubs; and
- the broadened definition of "employment" to capture volunteers, which are currently excluded from the definition of employment in the EO Act, except in relation to sexual harassment[11].

"Cover the field" constitutional inconsistency and displacement of State law by codes

The breadth of the proposed new Commonwealth law as set out in the draft Bill may mean that it is taken to cover the field with respect to anti-discrimination protections.

Clause 14 states that the Bill is not intended to exclude or limit the concurrent operation of State and Territory anti-discrimination laws to the extent that those laws can operate concurrently with the Bill. However, there are a range of considerations that may offset the operation of this provision.

First, the High Court has held that a statement that State laws are not excluded or limited is relevant but not determinative of whether there is an inconsistency between a Commonwealth and a State law for the purposes of section 109 of the Commonwealth Constitution.[12]

Secondly, the clause states that it does not apply to compliance codes (nor disability standards) made under the Bill. Compliance codes are a new form of legislative instrument that are new to the draft Bill and have not been brought across from existing Commonwealth legislation. The codes are made by the AHRC, given the force of a legislative instrument, and can be voluntarily complied with by duty holders and used as a complete defence against discrimination claims.[13] The draft Bill permits the AHRC to "affect" (in practice, override) State and Territory legislation through the operation of compliance codes.[14] The AHRC is required to consult with the relevant State or Territory Minister in preparing the codes, but there is no requirement to obtain the concurrence of States and Territories. The Victorian Government is concerned that the new mechanism can and will displace State and Territory legislation in a wide range of industries and sectors and across a wide range of attributes.

Thirdly, clause 14 only applies to protect the concurrent operation of those State and Territory laws that are prescribed by way of regulation. A similar approach to prescribed State and Territory laws to that in the Bill was adopted in the current *Disability Discrimination Act 1992* (Cth), and States have found it difficult to ensure that relevant laws are prescribed by the Commonwealth government. The Victorian Government considers that there is no justification for the concurrent operation of State laws being protected only at the discretion of a Commonwealth government. The operation of existing State and Territory anti-discrimination laws should be recognised by the Bill with scope to add new laws by regulation.

The draft Bill does not contain the anti-overlap provisions which are common in the existing Commonwealth anti-discrimination laws such as providing that a complainant who brings a claim under a concurrent State anti-discrimination law cannot bring a claim arising from the same circumstances under the federal anti-discrimination law.[15]

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[11] The previous Victorian government initially included volunteers in the Bill for the EO Act, but subsequently amended the Bill to remove volunteers other than in relation to sexual harassment, due to concerns about the implications for volunteering.

[12] *Momcilovic v The Queen* (2011) 245 CLR 1 and *Dickson v The Queen* (2010) 241 CLR 491.

[13] sections 75–78.

[14] clause 76(7).

[15] Also missing is a double jeopardy provision such as s.6A of the Racial Discrimination Act

Validity of broader Commonwealth provisions

The draft Bill lists a number of constitutional bases for its validity and provides that the legislation would have application to the extent of any valid head of power.[16] However, this does not mean that the laws will be justified under those heads of power.

While detailed and authoritative advice will be needed on the point, it is not clear that a prohibition on discrimination on the basis of all of the protected attributes in the Bill in relevant areas of public life is supported by the external affairs power.

The reliance on the external affairs power for at least one key aspect of the draft Bill – the expanded definition of unfavourable treatment – is questionable. As the Honourable James Spigelman has said [17] "[n]one of Australia's international treaty obligations require us to protect any person or group from being offended." The expanded definition of unfavourable treatment appears to undercut the right to freedom of expression under the ICCPR, which Australia has an international obligation to uphold.

Constitutional bases for the legislation other than the external affairs power will not support the full range of the Bill. The corporations power could only extend to regulation of a constitutional corporation, trade or commerce must be across State, Territory or national borders, and banking and insurance and telecommunications powers are limited by subject matter.

There is also a question of intergovernmental immunities where the Bill impinges on the operations of State governments because of the broadened scope of "areas of public life" and because the Bill does not provide a standing exemption for conduct authorised by a State Act or instrument.

Increase in regulatory burden

The third main concern of the Victorian Government is the substantial increase in the regulatory burden imposed on duty holders. Another one of the five principles driving the Bill and set out in the explanatory notes is to "enhance protections where the benefits outweigh any regulatory impact".[18]

However, the draft Bill imposes significant additional red tape burdens on duty holders by:

- imposing an additional layer of regulation onto an already complex system of anti-discrimination law, creating duplication and inconsistencies, as discussed above;
- using a broad definition of discrimination that imposes new and broad compliance obligations on duty holders, as discussed above;[19]
- imposing vicarious liability on companies, employers and principals for this broadly defined discriminatory conduct of their directors, officers, employees or agents unless the company, employer or principal has taken reasonable precautions and exercised due diligence to avoid the conduct;[20] and
- reversing the onus of proof under clause 124 such that the duty holder must prove that his or her conduct was not engaged in for an alleged reason or purpose.[21]

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[16] clauses 11 – 13.

[17] Human Rights Day Oration 2012, 'Where do we draw the line between hate speech and free speech?' (10 December 2012) at < http://www.humanrights.gov.au/about/media/news/2012/132_12.html>.

[18] Explanatory notes at <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Documents/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Explanatory%20Notes%203.dot>, 1.

[19] clause 19.

[20] clause 57.

[21] clause 124.

The draft Bill envisages that duty holders could avoid uncertainty about the scope of their obligations under the draft Bill by choosing to comply with the "compliance codes" prepared by the AHRC, as described above, compliance with which provides a complete defence to discrimination claims.[22] Although the codes are voluntary, the sweeping and uncertain terms of the draft Bill and the proposed status of the codes as a complete defence mean that they are likely to be used widely. This is particularly likely given that the duty holder will have the burden, in all cases of alleged discrimination, of proving that they did not engage in conduct for an alleged reason or purpose once the applicant simply adduces prima facie evidence of that reason or purpose. This is a significant change in current anti-discrimination law that substantially disadvantages duty holders and is contrary to the general principle that the complainant bears the onus of proving the case they allege. By contrast, the EO Act shifts the burden of proof only in relation to exceptions and proving the reasonableness of a policy alleged to amount to indirect discrimination. (The Bill maintains this same reversal of the burden of proof.)

Many assertions in the RIS regarding the regulatory burdens that would result from the Bill are unsubstantiated and appear dubious (e.g. that expanding the definition of unfavourable treatment will have no significant costs, and that the costs of the reforms for the non-profit sector and organisations using volunteers will be minimal).

These impacts will be most significant for small and medium-sized businesses and for community organisations operating on small budgets.

Conclusion

The draft Bill raises a wide range of issues of concern. The Victorian Government submits that the Bill should not be introduced into the Parliament until States and Territories and all other affected parties have had adequate opportunity to properly consider how the draft Bill would operate, and until the draft Bill and its interaction with State and Territory laws have been considered at the next meeting of the Standing Council on Law and Justice.

[22] clauses 75 and 76(8).