

21 December 2012

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary,

Senate Legal and Constitutional Affairs Committee – Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (“the Bill”)

The Australian Institute of Company Directors welcomes the opportunity to comment on the above-mentioned Bill, which was referred on 21 November 2012 by the Senate to the Senate Legal and Constitutional Affairs Committee (the “Committee”) for inquiry and report.

The Australian Institute of Company Directors (“Company Directors”) is the second largest member-based director association worldwide, with individual members from a wide range of corporations: publicly listed companies, private companies, not-for-profit organisations, charities, and government and semi-government bodies. As the principal professional body representing a diverse membership of directors, we offer world-class education services and provide a broad-based director perspective to current director issues in the policy debate.

In this submission, we do not address the diverse issues that the Bill raises. We focus on the burden of proof (clause 124) and costs (clause 133) in proceedings under Part 4-3 of the Bill in the Federal Court or Federal Magistrates Court (together, “the Courts”) in relation to “unlawful conduct”.¹

Company Directors supports the Bill to the extent that it seeks to increase diversity in the workplace and streamline regulation. However, we make the following comments – set out in more detail below – regarding the burden of proof and costs in unlawful conduct proceedings:

- We are opposed to the introduction of a shifting burden of proof (clause 124) and a “no-costs” jurisdiction (clause 133) in unlawful conduct proceedings in the Courts.
- The reasons for shifting the burden of proof to the respondent (eg as outlined in the Regulation Impact Statement on the Consolidation of Commonwealth Anti-Discrimination Laws (“the RIS”)) are inadequate. This is particularly so given the seriousness with which courts have treated allegations of discrimination, and the potential damage to respondents’ reputations, brands and businesses.

¹ Unlawful conduct means “unlawful discrimination”, “sexual harassment”, “racial vilification”, “requesting or requiring information that could be used to discriminate”, “publishing etc. intention to engage in unlawful conduct”, “victimisation”, and “contravention of a disability standard”: Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 6.

- A shifting burden of proof and “no-costs” jurisdiction will substantially increase the costs that any respondent (including small business and not-for-profit organisations) has to bear in defending its conduct in the Courts, even if the respondent is ultimately successful.
- The changes may lead to a substantial increase in the number of unmeritorious discrimination applications to the Courts. There may be an overloading of the court system, creating delays and thereby discouraging individuals with genuine complaints from commencing proceedings and/or delaying the hearing of genuine complaints.

1. Burden of proof

Under existing anti-discrimination laws, an applicant bears the burden of proving that the respondent treated them less favourably because of their protected attribute (for example, race, sex, disability, or age). The Bill introduces in clause 124 a shifting burden of proof in proceedings in the Courts alleging “unlawful conduct” (which includes “unlawful discrimination” etc). The applicant must establish, *prima facie*, a discriminatory reason or purpose for certain conduct, and then the burden shifts to the respondent to explain the non-discriminatory reason(s) or purpose(s) for that conduct, that the conduct is justifiable, or that another exception applies.

We do not support shifting the burden of proof to the respondent.

In seeking to justify a shifting burden of proof, the RIS highlights concerns that have been raised in relation to the burden of proof under existing anti-discrimination laws. In particular, the RIS draws attention to the difficulties applicants face in establishing a causal link between their protected attribute and the respondent’s actions, as these facts are predominantly in the knowledge of the respondent.² The changes to the burden of proof are intended to ensure that the burden of proving facts (ie the reason for a respondent’s actions) is on the person who is in the best position to know those facts.³

Ordinarily, in causes of action created by statute, if the issue in dispute constitutes a necessary ingredient of the plaintiff’s cause of action, then the burden will be upon the plaintiff.⁴ The elements referred to in clause 124 of the Bill (ie the reason(s) for/purpose(s) of the relevant conduct) would (where relevant) be a necessary ingredient of an applicant’s unlawful conduct complaint.

We agree with the statement that, “[I]n the absence of reasons to the contrary, the party who invoked the judicial process and compelled the defendant’s involvement in that process, should run the risk of having decided against her or him any issue as to which the tribunal of fact is, at the end of the day, undecided”.⁵ In our view, the stated reasons for shifting the burden of proof to the respondent are not sufficiently compelling. For example, if a complainant does not have “ready access to evidence, which is usually held by the respondent”,⁶ he or she can obtain relevant documents through ordinary court processes (eg an order for discovery or notice to produce).

We also note that courts and tribunals have consistently treated accusations of discrimination as serious matters, and have regularly subject the evidence adduced in discrimination complaints to the higher standard referred to in *Briginshaw v*

² Regulation Impact statement, Human Rights and Anti-Discrimination Bill 2012 (Cth) 27, 86. See also 11.

³ *Ibid* 33.

⁴ CR Williams, ‘Burdens and Standards in Civil Litigation’, (2003) 25(2) *Sydney Law Review* 165, 177.

⁵ *Ibid* 172.

⁶ Above n 2, 11.

Briginshaw.⁷ This test is applied where a civil case involves an allegation of fraud, or an allegation of criminal or moral wrongdoing.⁸ In these cases, proof of an issue to the “reasonable satisfaction” of the tribunal of fact should not be produced by “inexact proofs, indefinite testimony, or indirect inferences”.⁹ We believe that the introduction of a shifting burden of proof is particularly problematic given the serious nature of discrimination allegations.

Further, in criminal law, legislation that reverses the onus of proof is contrary to the general presumption of innocence.¹⁰ Although criminal liability will not accrue if a respondent is found to have engaged in unlawful discrimination under the Bill, the respondent may nevertheless be subject to findings and orders¹¹ that are extremely damaging to its reputation, brand and business. Accordingly, and consistent with the presumption of innocence, we believe that respondents should be presumed to have non-discriminatory reasons or purposes, unless the contrary is proved by the applicant.

We also note that a shifting burden of proof will cause a substantial increase in the legal costs that a respondent will bear in defending its conduct.¹² These costs will directly affect the profitability of respondent businesses and the returns to their security holders. The change may also cause greater distraction for management from day-to-day business operations.

Importantly, a large proportion of Australia’s employment is in small and medium enterprises and not-for-profit organisations, which do not have the resources to prove that they have non-discriminatory reasons or purposes for their conduct without serious disruption to their businesses or missions and, in some cases, income and opportunity losses. In many cases, the financial resources available to an applicant (who may, for example, be funded by a trade union) will be greater than the resources available to a small business or not-for-profit organisation.

These burdens on business and not-for-profit organisations help to demonstrate why, from a productivity and economic perspective, allegations of unlawful conduct should be proved by applicants, as is the usual course in civil proceedings. We consider that the Bill is unbalanced, significantly and inappropriately favouring the interests of applicants over the interests of respondents.

The change may also lead to an increased number of complaints within the anti-discrimination regime.¹³

2. Costs

Under clause 133(1) of the Bill, each party to proceedings in the Courts under Part 4-3 of the Bill is to bear that party’s own costs. This represents a change to the “loser pays” principle, which generally applies in anti-discrimination proceedings and the majority of other civil proceedings in Australia.

The introduction of a “no-costs” jurisdiction will substantially increase the legal costs that a successful respondent will bear in defending its lawful conduct. This is likely to cause particular difficulties for smaller businesses and not-for-profit organisations.

⁷ See, eg, Fullagar J said in *Department of Health v Arumugam* [1988] VR 319, 331 that an accusation of race discrimination was a “serious matter, which is not lightly to be inferred”. This was approved by the Full Federal Court in *Sharma v Legal Aid (Qld)* [2002] FCAFC 196, [40].

⁸ *G v H* (1994) 181 CLR 387, 399.

⁹ *Briginshaw v. Briginshaw* (1938) 60 CLR 336, 362.

¹⁰ See, eg, Corporations and Markets Advisory Committee (CAMAC), ‘Personal Liability for Corporate Fault’, (CAMAC Report, September 2006) 34.

¹¹ Above n 1, cl 125.

¹² Above n 2, 48, 53, 56.

¹³ *Ibid* 48.

While clause 133(2) of the Bill provides for judicial discretion to award costs in the interests of justice, the Courts may seldom be able to justify making a costs order in favour of a successful respondent since one of the matters the Courts are to have regard to is the financial circumstances of the applicant.¹⁴ It seems particularly unfair and inappropriate to impose these additional costs on businesses that have been found *not* to have engaged in unlawful conduct.

We are also concerned that there will be a significant increase in the number of unmeritorious discrimination applications. The risk that a court will make a substantial costs order against an applicant is an important mechanism to deter unmeritorious complaints, and helps to prevent excessive litigation. There will no longer be any real disincentive to making an unmeritorious complaint, particularly where others (eg trade unions) are funding the litigation.

We do not consider that the enhanced ability for the Commission to dismiss complaints that are “frivolous, vexatious, misconceived or lacking in substance”¹⁵ is sufficient protection. Many complaints are likely to fall short of these descriptors but ultimately prove unmeritorious. We are concerned that there will be an overloading of the court system, creating delays and thereby discouraging individuals with genuine complaints from commencing proceedings and/or delaying individuals with genuine complaints from having their cases heard.

We hope that our comments will be of assistance to the Committee. Please do not hesitate to contact us if you would like to discuss our submission.

Yours sincerely

John H C Colvin

CEO & Managing Director

¹⁴ Above n 1, cl 133(3)(a).

¹⁵ Ibid cl 117(2)(c). Such complaints may only proceed to the Courts with leave: *ibid* cl 121(1).