

Submission by
YOUTH ADVOCACY CENTRE INC
to the
SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
in relation to the exposure draft of the
THE HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012
December 2012



The Youth Advocacy Centre (YAC) thanks the Committee for the opportunity to provide comment to the Committee on the exposure draft of the Human Rights and Anti-Discrimination Bill 2012.

YAC has been operating for over 30 years and offers free, legal services, youth support and family support assistance and services to young people 10 years and over who are in, or are at risk of being in, the youth justice system or the child protection system, and who live in or around Brisbane. It provides support on a limited basis to those under 10 years of age and to young people outside of Brisbane via telephone, website and publications.

All services offered are voluntary and confidential. This means that YAC staff only work with a young person if they want to work with YAC staff and no contact is made with anyone (eg families, teachers, police, other adults) without the young person's permission (unless there is a risk of serious, immediate harm to the young person or someone else).

In any dealings with a young person, YAC is guided by the Convention on the Rights of the Child, in particular:

- the right of young people to be treated equally irrespective of “colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”;
- the right of a young person to have an opinion and to be heard in all matters affecting the young person; and
- the best interests principle to include consideration of the views of the young person.

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In general

YAC notes the submissions by a number of agencies who specialise in human rights and anti-discrimination legislation, particularly the Discrimination Law Experts' Group's report of March 2011 and its submission to the consolidated bill discussion paper of December 2011. It also supports the matters raised to the Discussion paper by:

- Australian Lawyers' for Human Rights
- Human Rights Law Centre
- Cairns Community Legal Centre's
- Law Council of Australia
- Australian Human Rights Commission
- Anti-Discrimination Commission of Queensland
- National Association of Community Legal Centres

YAC is supportive of the consolidation as providing greater clarity and consistency in relation to human rights and their enforcement, which should thereby assist greater understanding and conformity with the law. It is also supportive of:

- inclusion of the additional protected attributes
- Inclusion of discrimination on the basis of a number of attributes
- Coverage of discrimination or sexual harassment in any area of public life
- A streamlined approach to exceptions
- A clear and strong objects clause, which references Australia's human rights obligations, to which the courts must have regard when making decisions
- Once the complainant has established a prima facie case of unfavourable treatment due to an attribute, there is a rebuttable presumption that the treatment was based on the attribute and it is for the respondent to rebut it. (This is a preferable way to viewing it than a reversal of the onus of proof.)

YAC suggests that the Bill should also:

- "recognise the systemic nature of discrimination, which requires a proactive/capacity-based approach to enforcement rather than one that is merely reactive and rests on those aggrieved, who may have very little capacity to enforce the law" (DLEG December submission) and "recognise that there is a broader public interest at stake than merely compensating the individual." Therefore include:
 - the court having the power to order actions/require desist generally for the future to address behaviour systemically (thus also providing for contempt of court if this is breached)
 - Creation and maintenance of a complaints register by the AHRC to allow for the identification of people or organisations that are the subject of discrimination complaints on multiple occasions (Young Workers Legal Service, Victoria) and then increase the resources of the AHRC to enable such people or organisations to be assessed for compliance with anti-discrimination laws.
- Include "social status" as an attribute as people often make judgments based on whether people are in receipt of social security benefits etc.

Specific issue -irrelevant criminal record and vulnerable people

YAC would support the Law Council of Australia in relation to including "irrelevant criminal record" in the list of protected attributes. The following is taken from its submission:

Irrelevant criminal record

163. The LIV [Law Institute of Victoria] specifically notes that at the international level, Australia has ratified the International Labor Organization (ILO) *Convention 111, the Discrimination (Employment and Occupation) Convention 1958* (Convention 111). This

Convention is scheduled to the AHRC Act and therefore forms part of the AHRC's jurisdiction in addition to its jurisdiction under the ADA, DDA, RDA and SDA. Complaints under these Acts can be taken to court if not settled through conciliation but complaints on the Convention 111 grounds can not be taken to court.

164. Convention 111 specifies certain grounds of non-discrimination, including race, colour, sex, religion, political opinion, nationality and social origin. It also leaves room for parties to add further grounds of non-discrimination. In 1989, Australia added "criminal record" to these grounds.

165. At the federal level, the AHRC's regulations now extend the grounds of discrimination in the AHRC Act to include criminal record in employment (except when it is necessary to take into account the criminal record of a person because of the inherent requirements of a particular job).

166. The LIV suggests that the Tasmanian *Anti Discrimination Act 1998* ("the Tasmanian Act") provides a good model for an additional attribute relating to irrelevant criminal record in a consolidated Act, which would mean that complaints of discrimination on the basis of this attribute would be able to proceed to court in the same way as complaints under the ADA, DDA, RDA and SDA.

167. Under the Tasmanian Act discrimination on the basis of an irrelevant criminal record is unlawful and is defined as: *In relation to a person, this means a record relating to arrest, interrogation or criminal proceedings where:*

- *further action was not taken in relation to the arrest, interrogation or charge of the person;*
- or*
- *a charge has not been laid; or*
- *the charge was dismissed; or*
- *the prosecution was withdrawn; or*
- *the person was discharged, whether or not on conviction; or*
- *the person was found not guilty; or*
- *the person's conviction was quashed or set aside; or*
- *the person was granted a pardon; or*
- *the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises.*

168. On this last point the LIV suggests that it would be necessary to provide some clear guidance for defining "directly relevant" in this situation. This would aim to avoid employers using a conviction as a justification for discrimination on the basis of a policy that determines that any conviction is "directly relevant" to the position.

Young people aged 17 years in Queensland are dealt with in the adult system and therefore the chances of a conviction, even though they are minors, is relatively high. Additionally, young people dealt with under the *Youth Justice Act 1992* can also have convictions recorded which become part of their criminal record when they turn 17. Although they may become "spent" after 5 years if the young person does not commit a further indictable offence, this is still at a critical time in terms of gaining employment and establishing themselves in society. Any additional barriers are likely to result in long-term unemployment – or never commencing meaningful employment.

YAC also supports the following comments, also taken from the Law Council's submission:

171. The LIV places particular emphasis on the grounds of discrimination on the basis of irrelevant criminal record and homelessness because it recognises that they are inextricably linked to other attributes. Thus someone experiencing homelessness or an irrelevant criminal record is more likely to experience intersectional discrimination. Homelessness and irrelevant criminal record are often linked to each other and to mental illness and other disabilities....

172. People who are homeless and have an irrelevant criminal record are also recognised in international jurisprudence as a definable group who should be protected against discrimination on the ground of 'other status'. Articles 2(1) and 26 of the ICCPR enshrine the right to non-discrimination on the basis of a list of attributes including "other status".

173. The special measures provision in the ADA also recognises the link between homelessness and age, providing the following example to explain a special measure taken because of the age of the group of persons:

Young people often have a greater need for welfare services (including information, support and referral) than other people. This paragraph would therefore cover the provision of welfare services to young homeless people, because such services are intended to meet a need arising out of the age of such people.