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Reference

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### **Submission on the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012***

Thank you for the opportunity to comment on the exposure draft of this Bill.

Overall, I appreciate that this Bill is an excellent step towards consistent, consolidated Commonwealth Human Rights and Anti-Discrimination law in Australia, replacing a patchwork of Acts that sought to address different facets of discriminatory behaviour.

I am particularly supportive of the definition of unfavourable treatment including conduct that offends, insults or intimidates a person because I believe the use of these words will go far to protect Australian workers, students and others from bullying.

I am also in favour of the general application of an exception for justifiable conduct, as expressed in clauses 23 – 25. I submit however, that this exception ought to be the only exception in the Bill, as it is a well drafted provision that successfully covers the field, rendering other specific exceptions such as those related to conduct on the basis of State or Commonwealth laws, religion, clubs or sporting activities unnecessary.

Any conduct that should be excepted from the Act should be justifiable. Please see also my further comments on the subject of the change in the definition of 'reasonable adjustment' in the context of disability, and the broad exception for faith based schools.

Please find some specific comments on certain provision below:

#### **Interaction of State and Commonwealth Acts**

I am quite concerned about the ramifications of proposed clause 14(3). I note that 14(1) and 14(2) are very similar to the current provisions. However, despite cl.14(1) noting that the Bill is not intended to limit the operation of State or Territory laws, the operation of cl.14(3) has the capacity to do just that. That subsection gives the Commonwealth the capacity to choose not to prescribe a States anti-discrimination law, effectively excluding it from operation and indeed from the assurances of cl.14(1).

#### **Compliance codes**

On a related subject, the provisions in Division 6 of Part 3-I dealing with compliance codes concerns me in a similar way. The provisions appear to indicate that the Commission has the power to make or alter compliance codes that will affect the operation of State laws only requiring a period of consultation with the relevant State Minister. I believe the States should be permitted to opt in or out of the effects of compliance codes, and that not only the State Ministers but also the State Anti-Discrimination Commissioners should be invited to contribute. The Bill appears to suggest that the delegated power of the Commission could be used to affect the sovereign States.

### **Gender Identity and the status of intersex**

Whilst I applaud the efforts to appropriately and realistically cover the field of gender identity and sex for the purposes of the Bill, I feel that there has been an omission. The Bill does not include specific reference to the status of 'intersex', that is, being and potentially identifying as neither one sex nor the other.

In the Bill currently before the Legislative Council in Tasmania, intersex is defined as:

- 'the status of having physical, hormonal or genetic features that are –
- (a) neither wholly female nor wholly male; or
  - (b) a combination of female and male; or
  - (c) neither female nor male'

During the drafting of our Bill, it came to my attention that intersex constitutes an attribute that should be protected in its own right. The people holding this status should not be expected to artificially nominate a gender or sex for themselves and should be actively protected from discrimination. Upon reading the Explanatory Notes accompanying the Bill, there seems to be a suggestion that to recognise people who do not wish to identify themselves as either sex would be to require the 'provision of facilities' for those people. I respectfully submit that recognising the attribute of 'intersex' would not require any such measures.

### **Exceptions**

Disability: Upon comparing the definition of 'reasonable adjustment' in the Bill to that currently in the *Disability Discrimination Act 1992*, it appears that the well-established principles contained in both case law and indirectly in the current legislation are being weakened, this is at odds with the purpose of the consolidation Bill - I suggest that the current intent should be reflected in this Bill.

Reasonable adjustment refers to the administrative, environmental, or procedural alterations required to enable a person with disability to work effectively and enjoy equal opportunity with others. In the current circumstances created by the DDA and case law, employers are required to provide reasonable adjustments whenever it is necessary, reasonable, and possible to do so (i.e., when a reasonable adjustment does not constitute an unjustifiable hardship for the employer).

Unjustifiable hardship is generally determined by considering two factors, the cost of the adjustment required in light of the organisation's financial situation, and the extent to which the adjustment will result in substantial benefits or detriments to other employees, including those who do not have disability.

It is my reading of clause 25(3) that it is introducing additional aspects to the test of unjustifiable hardship which are not aspects of the current test. In doing so the Bill lowers the benchmark on unjustifiable hardship which will result in it being used as a defence to reasonable adjustment in a broader range of situations.

Educational institutions: I do not support the inclusion of an exception at clause 33 of the Bill allowing discrimination against students by an educational institution conducted in accordance with

a religion. The proposed provision extends the current law to include more attributes. It is interesting to note that this exception is limited where the discrimination takes place in relation to Commonwealth funded aged care services.

I would submit that this leads to a lack of consistency as the majority of faith based schools are supported by both State and Commonwealth Government funding and in the main are administered in most other respects by state law. I note that the discrimination law varies from state to state.

Current Tasmanian law does not allow discrimination in admission or enrolment of students in faith-based schools, but does provide an exception in very limited circumstances in relation to employment in faith based schools. In reviewing the issue the Tasmanian Government, recently attempted to introduce a very limited exemption for admission in circumstances where faith based schools are oversubscribed in a particular year. This very limited exemption was supported by the Catholic Arch-Diocese of Hobart, the largest non-government education provider in Tasmania. Unfortunately the State Opposition opposed the exemption put forward by me.

The Exception proposed in your Bill will creates a situation, for instance, where a young Australian will be happily admitted to a School perhaps at age 5 and remain at the same school and then excluded due to his or her developing sexual orientation – this is at odds with the concept of protecting our young and vulnerable citizens at the very time they are needing the acceptance of our society – I cannot see the sense in this exception.

The tests in Clause 23 to 25 should be sufficient and this particular exception causes a series of abhorrent circumstances, only one of which I have described, which should be left out of the Bill as they are at odds with the intent of discrimination law.

Thank you again for the opportunity to comment.

Yours sincerely

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**Attorney-General**  
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