The Senate

Legal and Constitutional Affairs Legislation Committee

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

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RECOMMENDATIONS

Recommendation 1

7.20 The committee recommends that the definition of 'gender identity' in clause 6 of the Draft Bill be amended to read:

> ***gender identity*** **means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and includes transsexualism and transgenderism.**

Recommendation 2

7.21 The committee recommends that subclause 17(1) of the Draft Bill be amended to include 'intersex status' as a protected attribute. 'Intersex' should be defined in clause 6 of the Draft Bill as follows:

> ***intersex*** **means 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.**

Recommendation 3

7.30 The committee recommends that subclause 17(1) of the Draft Bill be amended to include 'domestic violence' as a protected attribute, and that clause 6 of the Draft Bill be amended to include an appropriate definition of this attribute.

Recommendation 4

7.35 The committee recommends that subclause 17(1) of the Draft Bill be amended to include 'irrelevant criminal record' as a protected attribute.

Recommendation 5

7.36 The committee recommends that a definition of 'irrelevant criminal record' be included in the Draft Bill and be modelled on that contained in the Tasmanian *Anti-Discrimination Act 1998*.

Recommendation 6

7.43 The committee recommends that paragraph 19(2)(b) be removed from the Draft Bill.

Recommendation 7

7.49 The committee recommends that 'voluntary or unpaid work' be specifically listed as an area of public life and be added to subclause 22(2) of the Draft Bill.

Recommendation 8

7.50 The committee recommends that the definition of 'employment' in clause 6 of the Draft Bill be amended to remove paragraph (c) relating to voluntary or unpaid work, and that a new definition of 'voluntary or unpaid work' be included in clause 6.

Recommendation 9

7.51 The committee recommends that, in defining 'voluntary or unpaid work', regard be had to the legal differences between employees and volunteers.

Recommendation 10

7.59 The committee recommends that the Australian Government develop amendments to clause 23 of the Draft Bill to address concerns raised in submissions to the committee's inquiry. In particular, consideration should be given to:

- **replacing the words 'a legitimate aim' in paragraph 23(3)(b) with the words 'an aim that is consistent with achieving the objects of the Act'; or**
- **replacing subclause 23(3) with a test based on the concept of 'reasonableness'.**

Recommendation 11

7.80 The committee recommends that the Draft Bill be amended to remove exceptions allowing religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful. The committee considers that the Australian Government should develop specific amendments to implement this recommendation, using the approach taken in the Tasmanian *Anti-Discrimination Act 1998* as a model.

Recommendation 12

7.81 The committee recommends that clause 33 of the Draft Bill be amended to require that any organisation providing services to the public, and which intends to rely on the exceptions in that clause, must:

- **make publicly available a document outlining their intention to utilise the exceptions in clause 33;**
- **provide a copy of that document to any prospective employees; and**
- **provide access to that document, free of charge, to any other users of their service or member of the public who requests it.**

CHAPTER 1

INTRODUCTION AND BACKGROUND

Referral of the inquiry

1.1 On 20 November 2012, the then Attorney-General, the Hon Nicola Roxon MP, and the Minister for Finance and Deregulation, Senator the Hon Penny Wong (Minister), released the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Draft Bill).[1] On 21 November 2012, the Senate referred the Draft Bill to the Senate Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 18 February 2013.[2] The reporting date was subsequently extended to 21 February 2013.[3]

Purpose of the proposed consolidation

1.2 The Draft Bill consolidates into a single Act the five existing Commonwealth Acts which deal with human rights and anti-discrimination laws. The five Acts to be consolidated are:

- the *Racial Discrimination Act 1975* (Racial Discrimination Act);
- the *Sex Discrimination Act 1984* (Sex Discrimination Act);
- the *Disability Discrimination Act 1992* (Disability Discrimination Act);
- the *Age Discrimination Act 2004* (Age Discrimination Act); and
- the *Australian Human Rights Commission Act 1986* (AHRC Act).

1.3 In announcing the release of the Draft Bill, the then Attorney-General and the Minister explained that the current Commonwealth anti-discrimination regime is 'unnecessarily complex and difficult to navigate'.[4] Further, the consolidation of anti-discrimination legislation would provide better protection against discrimination, with a clearer and simpler regulatory framework for business, organisations and individuals.[5]

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1 The Hon Nicola Roxon MP, Attorney-General, and Senator the Hon Penny Wong, Minister for Finance and Deregulation, 'Clearer, simpler, stronger anti-discrimination laws', *Joint Media Release*, 20 November 2012, http://pandora.nla.gov.au/pan/132822/20130204-0704/www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/20November2012-Clearersimplerstrongerantidiscriminationlaws.html (accessed 20 February 2013).

2 *Journals of the Senate*, 21 November 2012, p. 3344.

3 *Journals of the Senate*, 7 February 2013, p. 3613.

4 'Clearer, simpler, stronger anti-discrimination laws', *Joint Media Release*, 20 November 2012.

5 'Clearer, simpler, stronger anti-discrimination laws', *Joint Media Release*, 20 November 2012.

1.4 According to the Attorney-General's Department (Department), there are significant differences in the drafting and coverage of protections under each piece of Commonwealth legislation dealing with anti-discrimination matters, many of which add to the complexity facing organisations and individuals attempting to comply with the law.[6] Each of the four core anti-discrimination Acts deal with different protected attributes, namely:

- race and immigrant status (Racial Discrimination Act);
- sex, marital status, pregnancy, potential pregnancy, breastfeeding and family responsibilities (Sex Discrimination Act);
- disability (Disability Discrimination Act); and
- age (Age Discrimination Act).

1.5 Each of these Acts takes a different approach to how the attributes are defined and covered, and the areas of public life in which they are protected. For example, the Racial Discrimination Act prohibits discrimination in any area of public life, while the Age Discrimination Act, the Disability Discrimination Act and the Sex Discrimination Act only prohibit discrimination in specified areas of public life.[7] Other areas of inconsistency between the current Commonwealth Acts include: the approaches to the test for discrimination; provisions relating to vicarious liability; and the exceptions and exemptions under the Acts.[8]

1.6 The Explanatory Notes to the Draft Bill (Explanatory Notes) state:

> Little of this complexity is necessary to achieve the policy aims of the legislation. Rather, the difficult and inconsistent drafting of the Acts has made compliance unnecessarily burdensome and has diminished the laws' potential to promote attitudinal change.[9]

Background to the proposed reforms

1.7 The proposal to consolidate the Commonwealth anti-discrimination framework into a single Act has been suggested for a number of years, and has been the subject of considerable public consultation prior to the release of the exposure draft legislation.

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6 Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, pp 5-6, http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx (accessed 13 February 2013).

7 Explanatory Notes to the Draft Bill (EN), p. 32.

8 Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, pp 5 and 37.

9 EN, p. 1.

Previous committee inquiry

1.8 The Senate Legal and Constitutional Affairs Committee's 2008 inquiry into the effectiveness of the Sex Discrimination Act touched on the question of whether the Commonwealth anti-discrimination laws should be consolidated. The committee received evidence detailing the opportunities and challenges associated with such a change, and recommended that the Australian Human Rights Commission conduct an extensive public inquiry to examine the merits of replacing the existing Commonwealth anti-discrimination Acts with a single Act.[10]

Government announcement and consultation

1.9 On 21 April 2010, the former Attorney-General, the Hon Robert McClelland MP, released Australia's Human Rights Framework, an initiative outlining a range of measures intended to further protect and promote human rights in Australia. One of the key measures announced as part of the Human Rights Framework was the consolidation of Commonwealth anti-discrimination laws into a single Act.[11]

1.10 On 22 September 2011, the government released a discussion paper to seek community views on the consolidation of Commonwealth anti-discrimination laws.[12] The discussion paper received 240 public submissions from a wide range of stakeholders, covering many issues relating to the consolidation project. The release of this paper was followed by a four-month consultation process, which included three public stakeholder forums as well as individual meetings between the Department and key stakeholders.[13] This consultation process has guided the development of the exposure draft legislation.[14]

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10 Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008, pp 164-165.

11 Attorney-General's Department, *Australia's Human Rights Framework*, http://www.ag.gov.au/RightsAndProtections/HumanRights/HumanRightsFramework/Pages/default.aspx (accessed 13 February 2013).

12 The Hon Robert McClelland MP, and Senator the Hon Penny Wong, 'Launch of discussion paper on new anti-discrimination law', *Joint Media Release*, 22 September 2011, http://www.robertmcclelland.com.au/2011/09/22/launch-of-discussion-paper-on-new-anti-discrimination-law/ (accessed 12 November 2012).

13 Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Regulation Impact Statement*, November 2012, p. 84, http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx (accessed 20 February 2013).

14 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 2.

Approach taken in the consolidation project

1.11 The Explanatory Notes state that, in consolidating five Commonwealth Acts into a single Act, the Draft Bill is not intended to significantly change what conduct is currently unlawful. The Draft Bill will, however, make a number of changes to the existing anti-discrimination framework with the aim of producing a simpler and clearer law.[15]

1.12 The Explanatory Notes explain that the Draft Bill aims to:

- lift differing levels of protections to the highest current standard, in order to resolve gaps and inconsistencies without diminishing protections;[16]
- ensure that clearer and more efficient laws provide greater flexibility in their operation, with no substantial change in practical outcomes;
- enhance protections where the benefits outweigh any regulatory impact;
- encourage voluntary measures that business can take to assist their understanding of obligations and reduce occurrences of discrimination; and
- establish a streamlined complaints process, to make it more efficient to resolve disputes that do arise.[17]

New policy positions adopted in the Draft Bill

1.13 Despite being primarily a consolidation exercise, the Draft Bill contains several changes from existing Commonwealth anti-discrimination law, including:

- a single, simplified test for discrimination applying to all attributes;
- introduction of new protected attributes of sexual orientation and gender identity,[18] and recognition of discrimination on the basis of a combination of attributes;
- a streamlined approach to exceptions, including a new general exception for justifiable conduct and the preservation of religious exceptions (with some limitations applying to Commonwealth-funded aged care services provided by religious organisations);

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15 EN, p. 1.

16 For example, the current anti-discrimination Acts differ in the approach to coverage of protected attributes. The Draft Bill adopts the approach in the Racial Discrimination Act – which offers the broadest protection of the current Acts – by providing that discrimination is unlawful in connection with any area of public life. See: EN, pp 32-33.

17 EN, p. 1.

18 Introducing protection for these two attributes implements a 2010 election commitment made by the government. See: Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, p. 21.

- additional measures to promote voluntary compliance with the Draft Bill, including certification by the Australian Human Rights Commission (AHRC) of organisation or industry-specific compliance codes; and
- changes to the complaints process, including:
  - a shifting burden of proof once an applicant has established a prima facie case of discrimination;
  - an enhanced ability for the AHRC to dismiss clearly unmeritorious complaints; and
  - provision that parties should generally bear their own costs in legal proceedings.[19]

Conduct of the inquiry

1.14 The committee advertised its inquiry in *The Australian* on 5 December 2012. Details of the inquiry, including links to the Draft Bill and the Explanatory Notes, were placed on the committee's website at www.aph.gov.au/senate_legalcon. The committee also wrote to over 500 organisations and individuals, inviting submissions by 21 December 2012.

1.15 The committee received 3,464 submissions to the inquiry. For administrative purposes, approximately 1,300 of these submissions were categorised as 'form letters' (or variations of form letters).[20] Approximately 1,200 of these submissions opposed the Draft Bill, while around 100 supported it.

1.16 Most of the form letters appeared to result from 'campaign-style' emails. Some of the form letters referred to specific clauses in the Draft Bill, calling for the removal or amendment of clauses, or supporting particular clauses. The majority of form letters, however, did not contain substantive commentary on these clauses.

1.17 A further approximately 1,550 submissions were categorised as submissions expressing general support for, or opposition to, the Draft Bill. Many of these general statements did not refer to the provisions in the Draft Bill at all, nor did they address or provide commentary on substantive issues. Of these submissions, approximately 1,480 opposed the Draft Bill and 70 expressed support for it.

1.18 The committee decided to publish all submissions received from organisations on its website, as well as a selection of submissions from individuals that were indicative of the types of views presented. Examples of each type of form letter received were also published on the committee's website. A total of 595 submissions

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19 EN, pp 2-3.

20 A submission was categorised as a form letter where it contained a specific, or easily identifiable, template of words. A submission was included as a variation to a particular form letter where the template of words was modified but could still be identified as having derived from a form letter, or where the template was supplemented with additional material.

were published on the committee website. The submissions published on the committee's website are listed at Appendix 1 to this report.

1.19 The committee held three public hearings for the inquiry: in Melbourne on 23 January 2013; in Sydney on 24 January 2013; and in Canberra on 4 February 2013. A list of the witnesses who appeared at the hearings is at Appendix 2 to this report, and copies of the *Hansard* transcripts are available through the committee's website.

Scope of the report

1.20 Due to the short timeframe given to the committee to conduct this inquiry, the committee has necessarily been required to limit its analysis and consideration to key areas. It has simply not been possible for the committee to fully investigate the range of matters raised by stakeholders during the course of the inquiry. Accordingly, the committee's report focusses on the major issues raised in submissions and at the public hearings. The committee recognises, however, that many submissions made extensive recommendations relating to specific policy areas, as well as technical aspects of the Draft Bill, and the committee considers that these issues are worthy of examination by the Department.

1.21 In that context, the committee notes the commitment given by the Secretary of the Department at the public hearing in Canberra:

> [T]he department welcomes the views of those many stakeholders who have constructively engaged in this process to highlight where the wording of the draft bill may not match the policy intentions. Indeed, consultation has been a major part of this project and a valuable tool in finding out what is working, what is not and how things could be done better to improve the federal anti-discrimination system…We should be clear that we do not want to be defensive about anything in this legislation, so if people have ideas and the committee has ideas, [we] should listen carefully and take that on board.[21]

1.22 Given this undertaking, the committee expects that the Department will review all submissions received by the committee and address relevant policy and drafting issues prior to the introduction into the parliament of the legislation in its final form.

Structure of the report

1.23 This report is divided into seven chapters:

- chapter 2 outlines the key provisions of the Draft Bill;

21 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, pp 1-2.

- chapter 3 examines the protected attributes covered under the Draft Bill, as well as discussing additional attributes that have not been included in the Draft Bill as protected attributes;
- chapter 4 discusses the Draft Bill's definition of discrimination, and the coverage of discrimination protections in public life;
- chapter 5 discusses the exceptions to unlawful discrimination, focussing on the general exception for justifiable conduct, the 'inherent requirements for work' exception, and the exceptions relating to religious organisations;
- chapter 6 examines the complaints and courts processes established under the Draft Bill for discrimination cases, focussing on the burden of proof and the costs model for court cases; and
- chapter 7 sets out the committee's views and recommendations.

Note on references

1.24 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official Hansard transcript.

Acknowledgement

1.25 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

CHAPTER 2

KEY PROVISIONS OF THE BILL

2.1 The Draft Bill comprises seven chapters as follows:

- Chapter 1 – Introduction;
- Chapter 2 – Unlawful conduct and equality before the law;
- Chapter 3 – Measures to assist compliance;
- Chapter 4 – Complaints;
- Chapter 5 – Inquiries;
- Chapter 6 – Australian Human Rights Commission; and
- Chapter 7 – Miscellaneous.

2.2 The evidence received by the committee focussed on Chapters 2, 3, 4 and 6 of the Draft Bill; for that reason, this chapter of the report will briefly describe the key provisions in those Chapters only.

Chapter 2 – Unlawful conduct and equality before the law

2.3 Chapter 2 of the Draft Bill deals with unlawful conduct and equality before the law. It contains proposed provisions in relation to:

- 'protected attributes', including the new attributes of gender identity and sexual orientation (clause 17);
- unlawful discrimination (clauses 18 to 47);
- other kinds of unlawful conduct, including sexual harassment, racial vilification and victimisation (clauses 48 to 54);
- extensions of liability for unlawful conduct (clauses 55 to 58); and
- equality before the law (clauses 59 and 60).

Protected attributes

2.4 Clause 17 lists the protected attributes to be covered under the Draft Bill. Ten of these attributes are currently covered by the existing Commonwealth anti-discrimination Acts, six are attributes currently covered under the 'equal opportunity in employment' (EOE) complaints scheme in the AHRC Act, and two are entirely new protected attributes.

Attributes covered under existing Commonwealth anti-discrimination laws

2.5 The ten attributes currently covered by the existing four Commonwealth anti-discrimination Acts are: age; breastfeeding; disability; family responsibilities; immigration status; marital status; potential pregnancy; pregnancy; race; and sex. The attribute of 'marital status', currently found in the Sex Discrimination Act, has been expanded in the Draft Bill to cover 'marital or relationship status'.

'Equal opportunity in employment' complaints scheme attributes

2.6 Under the EOE scheme in Division 4 of Part II of the AHRC Act, the AHRC is able to conciliate complaints of discrimination in work-related areas on the basis of protected attributes, including:

- medical record (incorporated in the Draft Bill as 'medical history');
- nationality (incorporated in the Draft Bill as 'nationality or citizenship');
- trade union activity (incorporated in the Draft Bill as 'industrial history');
- political opinion;
- religion;
- social origin; and
- criminal record.[1]

2.7 Discrimination on the basis of these attributes under the EOE complaints scheme is not declared unlawful, and complaints are not able to proceed to the Federal Court of Australia (Federal Court) or the Federal Magistrates Court.[2]

2.8 The Draft Bill introduces six of these attributes to the list of protected attributes in clause 17,[3] meaning that discrimination on the basis of these attributes will be unlawful for the first time in Commonwealth legislation.

2.9 The Department has argued that the separate EOE complaints scheme has created confusion and led to significant regulatory overlap.[4] According to the Explanatory Notes, including the EOE complaints scheme attributes (with the exception of 'criminal record') as protected attributes in clause 17 of the Draft Bill will provide clear legal remedies and will allow individuals to take binding action if they consider they have been discriminated against.[5]

2.10 The six attributes from the EOE complaints scheme will be covered under the Draft Bill only in relation to work-related discrimination, and will not be covered in other areas of public life.

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1 'Political opinion', 'social origin' and 'religion' are explicitly included in the definition of 'discrimination' in section 3 of the *Australian Human Rights Commission Act 1986*, while 'trade union activity', 'medical record', 'nationality', and 'criminal record' are prescribed as protected grounds in the *Australian Human Rights Commission Regulations 1989*.

2 Attorney-General's Department, *Submission 130*, p. 4. The committee notes that the *Federal Circuit Court of Australia Legislation Amendment Act 2012* was assented to on 28 November 2012, and provides that the Federal Magistrates Court will continue in existence as the renamed Federal Circuit Court of Australia from 28 May 2013 (unless proclaimed earlier).

3 'Criminal record' is the only attribute from the 'equal opportunity in employment' complaints scheme not included in the Draft Bill.

4 *Submission 130*, p. 4.

5 EN, p. 22.

New protected attributes

2.11 The two new attributes introduced in the Draft Bill, 'sexual orientation' and 'gender identity', are defined in clause 6. 'Sexual orientation' is defined as a person's sexual orientation towards persons of the same sex, the opposite sex or either sex. 'Gender identity' is defined as follows:

> ***gender identity*** means:
>
> (a) the identification, on a genuine basis, by a person of one sex as a member of the other sex (whether or not the person is recognised as such):
>
> (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or
>
> (ii) by living, or seeking to live, as a member of the other sex; or
>
> (b) the identification, on a genuine basis, by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such):
>
> (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or
>
> (ii) by living, or seeking to live, as a member of that sex.

Definition of unlawful discrimination

2.12 Clause 19 sets out the key definition of 'discrimination' for the purposes of the Draft Bill:

> *Discrimination by unfavourable treatment*
>
> (1) A person (the first person) discriminates against another person if the first person treats, or proposes to treat, the other person unfavourably because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes.
>
> Note: This subsection has effect subject to section 21 [which exempts special measures to achieve equality].
>
> (2) To avoid doubt, unfavourable treatment of the other person includes (but is not limited to) the following:
>
> (a) harassing the other person;
>
> (b) other conduct that offends, insults or intimidates the other person.
>
> *Discrimination by imposition of policies*
>
> (3) A person (the first person) discriminates against another person if:
>
> (a) the first person imposes, or proposes to impose, a policy; and
>
> (b) the policy has, or is likely to have, the effect of disadvantaging people who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and
>
> (c) the other person has that attribute or combination of attributes.
>
> Note: This subsection has effect subject to section 21.

2.13 The Explanatory Notes state that the proposed new definition of 'discrimination' is not intended to change the underlying policy in existing Commonwealth anti-discrimination legislation:

> [T]he existing definitions of discrimination are inconsistent, difficult to understand and apply, and have been widely criticised. The Bill introduces a simplified and streamlined definition of discrimination to make it as easy as possible for duty holders to understand what is required to comply with the Bill.[6]

Areas of public life covered

2.14 Discrimination will be unlawful if it occurs in connection with any 'area of public life' (as defined in subclause 22(2)), as well as in relation to a number of attributes in the area of work only (subclause 22(3)).[7] According to the Explanatory Notes:

> The Bill will simplify the approach to specifying when discrimination is unlawful by prohibiting any discrimination that is connected with any area of public life. This will lead to some expansion of the coverage of anti-discrimination protections. However, there are expected to be relatively few areas of public life that are not already covered, primarily areas such as small partnerships and volunteer work. To balance any unintended consequences for the broader coverage, the Bill includes a general exception for any conduct that is justified.[8]

Exceptions to unlawful discrimination provisions

2.15 A wide range of streamlined exceptions are set out in Division 4 of Part 2-2 of Chapter 2, including:

- a new general exception for 'justifiable conduct' (clause 23);
- an exception for the inherent requirements of particular work (clause 24);[9] and
- the preservation of exceptions related to religion (clauses 32 and 33).

Exceptions for religious organisations

2.16 The exceptions for religious organisations relate to:

- the appointment of priests, ministers or members of religious orders (clause 32);[10] and

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6 EN, p. 28.

7 The 'work-only' attributes are: 'family responsibilities' (which under the Sex Discrimination Act only applies to work-related discrimination) and the six attributes from the 'equal opportunity in employment' complaints scheme.

8 EN, p. 33.

9 An 'inherent requirements for work' exemption is currently in both the Age Discrimination Act and the Disability Discrimination Act. The Sex Discrimination Act provides an exemption for 'genuine occupational qualification', while the Racial Discrimination Act has provision for prohibiting discrimination in employment and refers to work 'for which [the] person is qualified': EN, pp 35-36.

- conduct engaged in in good faith by religious bodies and educational institutions, that: conforms to the doctrines, tenets or beliefs of a religion; or is necessary to avoid injury to the religious sensitivities of adherents of that religion (clause 33).[11]

2.17 The Explanatory Notes state that 'given the importance of freedom of religion, it is important to maintain explicit religious exemptions, particularly for matters fundamental to the practice of the religion'.[12] Further, the exception provided in clause 32 is a narrow exception, while the exception for religious bodies and educational institutions in clause 33 relates to a broader range of conduct, with the only limitation being in respect of Commonwealth-funded aged care.[13]

2.18 The exceptions in clauses 32 and 33 apply in relation to different protected attributes. The exceptions in clause 32 apply to the new attributes of sexual orientation, gender identity and religion, in addition to the attributes previously covered by the Age Discrimination Act and the Sex Discrimination Act (that is, age, breastfeeding, family responsibilities, marital or relationship status, pregnancy or potential pregnancy, and sex).[14]

2.19 The exception in clause 33, however, which relates to religious bodies and religious educational institutions applies to a more limited range of attributes, namely: gender identity; marital or relationship status; potential pregnancy; pregnancy; religion; and sexual orientation.[15]

Review of exceptions

2.20 Clause 47 requires all the exceptions in the Draft Bill to be reviewed by the Minister, with the review to begin within three years of commencement of the legislation. The Explanatory Notes state that this review is to be conducted 'to enable consideration of whether these exceptions are necessary, taking into account the operation of the new justifiable conduct exception'.[16]

Chapter 3 – Measures to assist compliance

2.21 Chapter 3 of the Draft Bill deals with measures to assist people to comply with the consolidated laws, including proposed provisions in relation to:

- guidelines which the AHRC may make to assist people to avoid engaging in conduct which is unlawful or is contrary to human rights (clauses 62 and 63);

---

10 The exception in clause 32 of the Draft Bill is currently found in the Sex Discrimination Act.

11 The exceptions in subclause 33 of the Draft Bill are currently found in section 35 of the Age Discrimination Act, and in paragraph 37(d) and section 38 of the Sex Discrimination Act.

12 EN, p. 41.

13 EN, pp 41-42.

14 EN, p. 41.

15 EN, p. 42.

16 EN, p. 49.

- review of a person's or body's policies or programs by the AHRC, on application, to determine whether they constitute, or may give rise to, unlawful conduct, or conduct engaged in by the Commonwealth that is contrary to human rights (clauses 64 to 66);
- voluntary development and implementation of action plans by persons or bodies, to assist them and their employees to avoid engaging in unlawful conduct (clauses 67 to 69);
- binding disability standards which the Minister may make (clauses 70 to 74);
- compliance codes which the AHRC may make in order to provide additional certainty for specific industries in relation to their obligations (clauses 75 to 78);
- special measure determinations which the AHRC may make (clauses 79 to 82); and
- temporary exemptions which the AHRC may grant (clauses 83 to 86).[17]

Chapter 4 – Complaints

2.22 Chapter 4 deals with complaints to the AHRC, and contains proposed provisions which deal with:

- making complaints about unlawful conduct, or Commonwealth conduct that is contrary to human rights (clauses 87 to 99);
- how the AHRC deals with complaints, including the circumstances in which a complaint can be closed (clauses 100 to 117); and
- when an application may be made to the Federal Court or the Federal Magistrates Court in relation to unlawful conduct (clauses 118 to 133).

2.23 The Explanatory Notes state that the Draft Bill will enable improvements to be made to the complaints process, with the aim of enhancing access to justice.[18] These aims will be achieved through streamlining the complaints process in clause 88.

2.24 Clause 117 provides a streamlined process for the closing of complaints.[19] It sets out the circumstances in which the AHRC is able to close a complaint and the AHRC's obligations to provide written notice in such circumstances.[20]

2.25 Clause 117 is generally consistent with the current complaints policy and, in those instances where a complaint is closed pursuant to subclause 117(2), an application that the conduct was discriminatory can be made to the Federal Court or the Federal Magistrates Court. It is important to note, however, that an application can

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17 'Disability standards', 'compliance codes', 'special measure determinations' and 'temporary exemptions' are defined terms: see clause 6 of the Draft Bill.

18 EN, p. 3.

19 EN, p. 85.

20 EN, p. 85.

only be made to the Federal Court or the Federal Magistrates Court if the court has granted leave to the applicant where a complaint was closed by the AHRC in the following circumstances:

- where the AHRC is satisfied that the conduct is not unlawful or is not conduct by the Commonwealth that is contrary to human rights;[21]
- the complaint was made more than 12 months after the alleged conduct occurred;[22]
- the AHRC is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance;[23]
- if some other more appropriate remedy has been sought in relation to the subject matter of the complaint and the AHRC is satisfied the subject matter of the complaint has been adequately dealt with;[24] or
- the AHRC is satisfied that some other more appropriate remedy is reasonably available.[25]

2.26 The Explanatory Notes explain:

> The rationale for limiting access to the courts is to provide the [AHRC] with an increased ability to dismiss clearly unmeritorious complaints and to focus resources on meritorious complaints; this in turn should limit the number of unmeritorious complaints being brought before the courts. With the early dismissal of unmeritorious complaints comes the potential deregulatory benefit of only involving respondents in the matter when there is an arguable matter to be dealt with.[26]

Burden of proof

2.27 Clause 124 provides for a shifting burden of proof in relation to the reason for, or purpose of, the alleged unlawful conduct.

2.28 Under existing Commonwealth anti-discrimination legislation, the burden of proof for claims of direct discrimination falls on the applicant – that is, it is the applicant who is required to prove that the respondent treated them less favourably.[27] In contrast, the burden of proof for claims of indirect discrimination requires that the applicant establish the discriminatory impact of a condition, requirement or practice

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21 Paragraph 117(2)(a).

22 Paragraph 117(2)(b).

23 Paragraph 117(2)(c).

24 Paragraph 117(2)(d).

25 Paragraph 117(2)(e).

26 EN, p. 86. Also see EN, p. 87.

27 EN, p. 89.

and, once this is established, it is then for the respondent to prove that the condition, requirement or practice was reasonable.[28]

2.29 The proposed shifting of the burden of proof applies after the core elements of unlawful conduct have been established by the applicant – it will only be after the applicant has established a prima facie case that unlawful discrimination has occurred that the burden will shift to the respondent. The respondent will then be required to explain the reasons for the treatment or justify their conduct.[29]

2.30 The Explanatory Notes state that an applicant will still be required to prove the core elements of each form of alleged unlawful conduct:

> In practice, this will require the applicant to first establish a prima facie case that the unlawful discrimination occurred before the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action, that the conduct is justifiable or that another exception applies. The applicant will not be required to disprove the application of defences and exceptions. The policy rationale behind this is that the respondent is in the best position to know the reason for the discriminatory action and to have access to the relevant evidence.[30]

2.31 The Department illustrated the proposed changes as follows:[31]

	Which party has the burden of proof?	
Elements of discrimination	**Current position in anti-discrimination law**	**Proposed position in exposure draft**
Has the attribute(s)	Complainant	Complainant
Unfavourable treatment	Complainant	Complainant
Area of public life	Complainant	Complainant
Attribute was reason for unfavourable treatment	Complainant	Complainant establishes *prima facie* case, then burden shifts to respondent
Defences, exemptions and exceptions	Respondent	Respondent

Costs

2.32 Clause 133 is a costs provision, whereby each party will be required to bear their own costs in relation to complaints proceedings, subject to the court's discretion to award costs, or security for costs, in justifiable circumstances. The effect of clause 133 is that costs will not follow the event, as is the case currently.[32]

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28 EN, p. 89.

29 EN, p. 89.

30 EN, p. 89.

31 *Submission 130*, p. 2.

32 EN, p. 94.

Chapter 6 – Australian Human Rights Commission

2.33 Chapter 6 sets out proposed provisions relating to the AHRC, including providing for its continuation following the repeal of the AHRC Act (clause 145).

CHAPTER 3

PROTECTED ATTRIBUTES

3.1 Submitters and witnesses raised various issues relating to the list of protected attributes included in clause 17 of the Draft Bill. In particular, stakeholders focussed on the new protected attributes of 'sexual orientation' and 'gender identity', as well as 'political opinion', 'social origin' and 'family responsibilities'. Submitters also commented on the omission of certain attributes, which they considered should also be included as protected attributes in the Draft Bill.

New protected attributes of 'sexual orientation' and 'gender identity'

3.2 Many submitters welcomed the addition of 'sexual orientation' and 'gender identity' as protected attributes.[1] Other submitters opposed the introduction of these new protected attributes.[2]

3.3 Some submitters who supported the introduction of these attributes expressed concern that the wording of the relevant provisions in the Draft Bill does not go far enough to protect some sex or gender diverse individuals and groups against discrimination.

Definition of 'sexual orientation'

3.4 Some submitters suggested that refinements should be made to improve the definition of 'sexual orientation' found in clause 6 of the Draft Bill. The Discrimination Law Experts Group and the ANU College of Law 'Equality Project' (ANU Equality Project) both advocated replacing the term 'sexual orientation' with the term 'sexuality'.[3] The Discrimination Law Experts Group argued that 'sexuality' is 'a more inclusive term that allows for a sexual identity not dependent on a specific orientation' and proposed that 'sexuality' should be defined in the Draft Bill to include 'sexual attraction, sexual identity and sexual behaviour'.[4]

3.5 The Victorian Gay and Lesbian Rights Lobby (VGLRL), argued that the term 'sexual orientation' should be retained, as it 'reflects international and Australian best practice and is a practical, workable definition that will provide clarity for users of

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1 See, for example, Dr Tiffany Jones, *Submission 3*, p. 11; Australian Human Rights Commission, *Submission 9*, p. 5; Anti-Discrimination Board of NSW, *Submission 21*, p. 1; Australian Domestic and Family Violence Clearinghouse, *Submission 24*, p. 1; beyondblue, *Submission 217*, p. 1; ACON, *Submission 244*, p. 3; UnitingJustice Australia, *Submission 466*, p. 5; Victorian Gay and Lesbian Rights Lobby (VGLRL), *Submission 534*, pp 14 and 17.

2 See, for example, Australian Association of Christian Schools, *Submission 359*, p. 24; Australian Catholic Bishops Conference, *Submission 360*, p. 5; Ambrose Centre for Religious Liberty, *Submission 409*, p. 5.

3 Discrimination Law Experts Group, *Submission 207*, pp 12-13; ANU College of Law 'Equality Project', *Submission 446*, pp 3-4.

4 *Submission 207*, p. 12. See also ANU College of Law 'Equality Project', *Submission 446*, pp 4-6.

anti-discrimination legislation'.[5] Despite this view, VGLRL agreed with the Discrimination Law Experts Group that the definition should include sexual behaviour, identity and feelings or attraction. VGLRL also recommended that the references to 'opposite sex' in the definition should be replaced with the term 'different sex', arguing that sex and gender are not binary issues and the 'imposition of a sex binary therefore inappropriately and unnecessarily confines the definition'.[6]

Definition of 'gender identity'

3.6 Submitters raised concerns that the definition of 'gender identity' in clause 6 is unnecessarily restrictive and does not provide adequate protection for individuals in a range of circumstances.[7] In particular, submitters expressed concern that the definition limits protection against discrimination for this attribute to an individual of one sex who identifies as a member of the opposite sex.[8]

3.7 For example, Dr Tiffany Jones proposed extending the definition of 'gender identity' to include non-traditional expressions of gender which are not necessarily related to an 'opposite sex' (or transgender) gender identity.[9] The ANU Equality Project submitted that the definition should be extended to cover the gender presentation and mannerisms of a person as well as their gender identity (for example, a person who looks male but whose biological sex is female, or a person who does not present as either male or female, regardless of whether they identify themselves as male or female).[10]

3.8 The requirement in the definition of 'gender identity' that an individual must identify as a member of a particular sex 'on a genuine basis' was also criticised by some submitters. For example, VGLRL noted that this qualification does not apply to any of the other protected attributes, and argued that it will simply cause confusion about the coverage of the definition of gender identity, particularly given that the phrase 'on a genuine basis' is not defined in the Draft Bill.[11]

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5 *Submission 534*, p. 14.

6 *Submission 534*, p. 15.

7 See, for example, Discrimination Law Experts Group, *Submission 207*, pp 12-13; A Gender Agenda, *Submission 322*, p. 9; Liberty Victoria, *Submission 379*, p. 5; Australian Lawyers for Human Rights, *Submission 406*, p. 6; VGLRL, *Submission 534*, pp 17-19.

8 See, for example, Anti-Discrimination Board of NSW, *Submission 21*, pp 3-4; National Association of Community Legal Centres and Kingsford Legal Centre, *Submission 334*, p. 30; LGBTI Legal Service, *Submission 368*, p. 4.

9 *Submission 3*, p. 9.

10 *Submission 446*, p. 8. See also: Discrimination Law Experts Group, *Submission 207*, p. 12.

11 *Submission 534*, pp 17-18. See also: Androgen Insensitivity Syndrome Support Group Australia, *Submission 298*, p. 6; LGBTI Legal Service, *Submission 368*, p. 4; Public Interest Advocacy Centre, *Submission 421*, p. 21.

3.9 Ms Sally Goldner from VGLRL argued:

> The test of genuine basis adds complexity and unnecessary detail. Its retention in the bill would result in courts and commissions intruding unnecessarily in the lives of transgender people at a time of stress and may even run to counter the aim of reducing discrimination and its impact.[12]

3.10 Ms Anna Brown from the Human Rights Law Centre argued that the inclusion of the 'on a genuine basis' qualification appears to be at odds with the assurance in paragraph 19(4)(d) that conduct may be unlawful discrimination if it occurs on the basis of a person's assumption that a person has a protected attribute:

> [I]t does not make sense that someone can be protected even if they are perceived to be transgender or perceived to be of a particular gender identity and yet the definition of gender identity has this [genuine basis] requirement. It is offensive to transgender people and it is simply not necessary.[13]

3.11 Some submitters[14] recommended that the definition of gender identity in the Draft Bill should be amended to follow a form of words proposed in legislation currently before the Tasmanian Parliament, as follows:

> ***gender identity*** means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individuals designated sex at birth, and includes transsexualism and transgenderism.[15]

Coverage of individuals who are intersex

3.12 Several submitters commented on whether intersex individuals would be sufficiently protected under the definition of gender identity in the Draft Bill.[16] According to the Explanatory Notes, paragraph (b) of the definition of 'gender identity' in clause 6 will cover individuals born intersex who identify as either sex (that is, intersex individuals who identify as male or female).[17] The Explanatory Notes

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12 *Committee Hansard*, 23 January 2013, p. 1.

13 *Committee Hansard*, 23 January 2013, p. 60.

14 See, for example, National LGBTI Health Alliance, *Submission 320*, p. 2; Liberty Victoria, *Submission 379*, p. 5; Anti-Discrimination Commissioner of Tasmania, *Submission 429*, p. 4.

15 Item 4 of Part 2 of the Anti-Discrimination Amendment Bill 45 of 2012 (Tasmania), which proposes amendments to the definitions in section 3 of the *Anti-Discrimination Act 1998* (Tasmania). See: http://www.parliament.tas.gov.au/bills/Bills2012/45_of_2012.htm (accessed 18 December 2012).

16 See, for example, Organisation Intersex International Australia, *Submission 12*, pp 5-6; Cr Tony Briffa, *Submission 203*, pp 1-3; Discrimination Law Experts Group, *Submission 207*, p. 13; Androgen Insensitivity Syndrome Support Group Australia, *Submission 298*, pp 4-5; Human Rights Law Centre, *Submission 402*, pp 27-28.

17 Explanatory Notes (EN), p. 23.

explicitly state that this definition 'does not require recognition of, or provision of facilities for, people who do not identify as either sex'.[18]

3.13 Organisation Intersex International Australia (OII) raised several issues concerning the scope of this coverage for intersex individuals. In relation to the scope of the term 'intersex', OII observed:

> Intersex is a term which relates to a range of natural biological traits or variations that lie between 'male' and 'female'. An intersex person may have the biological attributes of both sexes, or lack some of the biological attributes considered necessary to be clearly defined as one or the other sex. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations. In many cases, intersex variations can be determined prenatally, via amniocentesis.[19]

3.14 Accordingly, OII argued that by seeking to cover intersex status under the definition of gender identity, the Draft Bill fails 'to accurately define intersex as a matter of biology, rather than gender identity'.[20] As Gina Wilson from OII explained:

> It is not a matter of our behaviour; it is a matter of how we are born. We are not behaving like anything. It is not a matter of sexual orientation. We have the same range of sexual orientations as the rest of the community. It is not about our gender identity. We have the same range of gender identities as the rest of the community. It is about how we are physically born…It is not a choice. It is not an orientation. It is not an identity.[21]

3.15 OII argued that state and territory anti-discrimination legislation defining gender identity in similar terms to the Draft Bill 'has not been effective' in protecting intersex individuals from discrimination.[22] Gina Wilson told the committee:

> The wording in the draft bill is roughly the same as the wording in the Victorian, New South Wales, Queensland and South Australian legislation. We have attempted to use the legislation in New South Wales on several occasions to address intersex issues where the discrimination was in fact because of biological difference…We have been unable to successfully run any case on the basis of our biological differences.[23]

3.16 Councillor Tony Briffa argued that the Draft Bill should provide legal recognition for individuals who are born with both male and female biological characteristics.[24] The Anti-Discrimination Board of NSW agreed that definitions in the Draft Bill relating to sex and gender identity 'should be wide and inclusive enough

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18 EN, p. 23.

19 *Submission 12*, p. 1.

20 *Submission 12*, p. 6.

21 *Committee Hansard*, 24 January 2013, p. 4.

22 *Submission 12*, p. 14.

23 *Committee Hansard*, 24 January 2013, p. 7.

24 *Submission 203*, p. 2.

to cover people who are intersex, without a requirement that any person should identify as either male or female'.[25]

3.17 Ms Karen Toohey, representing the Australian Council of Human Rights Agencies (ACHRA), informed the committee that intersex status is included in 'a number of definitions' in state legislation, and that all state human rights commissions within ACHRA are supportive of intersex being included in the Draft Bill as a separate attribute to gender identity.[26]

3.18 Ms Robin Banks, the Tasmanian Anti-Discrimination Commissioner, expressed the view that listing intersex status as a separate attribute would also help raise awareness of intersex issues in the community:

> There is a public benefit in actually naming intersex as a protected attribute because it increases community understanding that people exist in our community who are intersex—quite a significant number of people. Subsuming it within gender identity loses that educative benefit and I think that is a very significant part of what we are seeking to achieve—awareness in the community that this is a reality for many people and they do experience discrimination because of it.[27]

3.19 OII recommended that intersex status should be listed as a protected attribute separate to gender identity, and defined as follows:

> ***intersex*** means 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. [28]

3.20 This form of words matches that found in legislation currently before the Tasmanian Parliament,[29] and was supported by many other submitters and witnesses.[30] For example, Ms Sally Goldner from the Victorian Gay and Lesbian Rights Lobby

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25 *Submission 21*, p. 3, quoting from the Anti-Discrimination Board of NSW's submission to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper. See also: beyondblue, *Submission 217*, p. 2; Australian Psychological Society, *Submission 308*, p. 4.

26 *Committee Hansard*, 23 January 2013, p. 48.

27 *Committee Hansard*, 23 January 2013, p. 49.

28 *Submission 12*, pp 9, 17-18.

29 See Item 4 of Part 2 of the Anti-Discrimination Amendment Bill 45 of 2012 (Tasmania), http://www.parliament.tas.gov.au/bills/Bills2012/45_of_2012.htm (accessed 18 December 2012).

30 See, for example, Dr Tiffany Jones, *Submission 3*, p. 16; Androgen Insensitivity Syndrome Support Group Australia, *Submission 298*, p. 6; VGLRL, *Submission 534*, pp 20-22; Ms Robin Banks, Tasmanian Anti-Discrimination Commissioner, *Committee Hansard*, 23 January 2013, pp 47-48; Ms Frieda Lee, National Association of Community Legal Centres, *Committee Hansard*, 24 January 2013, p. 10; Professor Simon Rice OAM, Discrimination Law Experts Group, *Committee Hansard*, 24 January 2013, p. 57.

contended that using the 'explicit and easy-to-understand' definition from the Tasmanian bill would reduce any regulatory burden arising from the inclusion of 'intersex' as a protected attribute.[31]

3.21 The Australian Human Rights Commission (AHRC) submitted that, in order to increase certainty and clarity in this area, the Draft Bill should provide express protection against discrimination on the basis of a person's sex characteristics, intersex status, or gender expression.[32] The AHRC commented that 'there is potential for uncertainty, including expenditure on litigation, through issues of sex characteristics and gender expression being covered only as part of the concept of gender identity'.[33]

Departmental response

3.22 The Department made the following comments with regard to the definition of 'gender identity' in the Draft Bill:

> This definition reflects the most expansive standard of protection in the States and Territories at the time the Bill was settled. Since that time, the Government has become aware of the proposed definitions for 'gender identity' and 'intersex' in the Tasmanian Anti-Discrimination Amendment Bill 2012.
>
> Expanding the definition in the Bill beyond existing standards in State and Territory anti-discrimination law to include 'gender expression or presentation' and 'intersex' may raise regulatory issues, which the Government would need to consider further.[34]

3.23 The Department also explained that the inclusion of the 'genuine basis' qualification is consistent with wording in anti-discrimination legislation in Victoria and the Australian Capital Territory, and is not intended to set a particular threshold that must be met:

> [It] merely requires genuine identification by the person. That is, the definition is intended to cover any person who identifies as a particular gender identity on a day-to-day basis.[35]

3.24 The Secretary of the Department confirmed in evidence to the committee that the government would be open to examining the possibility of adopting different definitions for 'gender identity' and 'intersex status'.[36]

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31 *Committee Hansard*, 23 January 2013, pp 1-2.

32 *Submission 9*, p. 10.

33 *Submission 9*, p. 10.

34 *Supplementary Submission 130*, p. 2.

35 *Supplementary Submission 130*, p. 2.

36 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 9.

Other protected attributes included in the Draft Bill

3.25 The committee also received evidence concerning the likely practical effect and operation of a number of other protected attributes.

Definition of 'family responsibilities'

3.26 The definition in clause 6 of the protected attribute of 'family responsibilities' applies with respect to responsibilities towards a person's dependent child or any other member of the person's immediate family who is in need of care and support.

3.27 Several submitters and witnesses called for this definition to be broadened to cover a wider range of care arrangements. For example, the Discrimination Law Experts Group argued:

> This is a narrow definition that focuses more on the relationship between people than their caring obligations. It also excludes the network of relationships and care obligations of specific groups including, but not limited to, Aboriginal and Torres Strait Islander communities.
>
> In the context of a Bill that covers race and age discrimination as well as discrimination on the grounds of disability, sex, gender identity and sexual orientation, it is important that the definition of family responsibilities is an inclusive one, capable of recognising the variety of different family, caring and kinship relationships of all those groups specifically protected by the Bill.[37]

3.28 Submitters also argued that inconsistency between this definition and similar terms in other legislation could result in 'confusion and uncertainty' for duty holders.[38] The Australian Council of Trade Unions (ACTU) observed:

> There is inconsistency across Federal, State and Territory anti-discrimination legislation, each protecting variously those with 'family and caring responsibilities', 'family responsibilities' or 'caring responsibilities'. The [Draft Bill] should at least be drafted consistently with other recent federal legislation including the *Workplace Gender Equality Act 2012* and section 351(1) of the *Fair Work Act 2009*, which refer to 'family and caring responsibilities' with a view to ultimately achieving consistency across both state and federal legislation.[39]

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37 *Submission 207*, pp 16-17. See also: Australian Human Rights Commission, *Submission 9*, p. 9; Australian Education Union, *Submission 343*, p. 4; Cairns Community Legal Centre, *Submission 385*, p. 8; Mr Tim Lyons, Australian Council of Trade Unions, *Committee Hansard*, 23 January 2013, p. 8; Ms Rachel O'Brien, National Aboriginal and Torres Strait Islander Legal Services, *Committee Hansard*, 24 January 2013, p. 48.

38 See, for example, Australian Human Rights Commission, *Submission 9*, p. 9; National Tertiary Education Union, *Submission 317*, p. 56.

39 *Submission 310*, p. 5.

Departmental response

3.29 In response to these concerns, the Department stated:

> [A]part from the Government's commitment to introduce sexual orientation and gender identity as protected attributes, the Bill is not expansionary in nature. The definition of 'family responsibilities' was therefore not expanded to include caring responsibilities more broadly due to the potential regulatory impact.[40]

'Political opinion'

3.30 The Draft Bill includes 'political opinion' as a protected attribute in subclause 17(k). Under subclause 22(3), discrimination on the grounds of political opinion is only unlawful in relation to work and work-related areas.

3.31 'Political opinion' is not defined in the Draft Bill; however, the Explanatory Notes state that it will take its 'ordinary meaning'.[41]

3.32 Several stakeholders commented that the lack of definition would result in an increase in litigation. For example, the Australian Chamber of Commerce and Industry indicated that the lack of a clear definition would 'result in uncertainty and potential unnecessary litigation to clarify what policy makers intended'.[42]

3.33 Ms Robin Banks, the Tasmanian Anti-Discrimination Commissioner, advised the committee that 'political opinion' is a protected attribute in Tasmania:

> It has not been the basis of very much complaint at all—I can think of one or two complaints in my [two and a half years] as the commissioner. Again, it has not been an area where we see a lot of people exercising claims. It is always important to keep in mind what the experience is of those jurisdictions that have the protection already: how is that protection being exercised?[43]

3.34 Professor Simon Rice OAM, representing the Discrimination Law Experts Group, expressed the view that the protection of 'political opinion' is 'unremarkable' as it already exists in state and territory anti-discrimination legislation.[44]

Departmental response

3.35 Regarding the lack of a statutory definition for the term 'political opinion', the Department noted:

> Political opinion is…covered by the Fair Work Act [2009] and most of the State and Territory jurisdictions (variously described as political

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40 *Supplementary Submission 130*, p. 5.

41 EN, p. 25.

42 *Submission 411*, p. 3. See also: Mr Robert Johnston, Australian Association of Christian Schools, *Committee Hansard*, 23 January 2013, p. 62; Mr Simon Breheny, Institute of Public Affairs, *Committee Hansard*, 23 January 2013, pp 37 and 40.

43 *Committee Hansard*, 23 January 2013, p. 47.

44 *Committee Hansard*, 24 January 2013, p. 54.

> 'affiliation', 'activity', 'belief' or 'conviction'). Further definition of the term is not considered necessary. The term political opinion is also undefined in the Fair Work Act, enabling consistent jurisprudence to develop between the two regimes.[45]

3.36 Further, since 'political opinion' (along with 'religion', 'social origin' and 'industrial history') is already covered under the Fair Work Act, including it (and the other protected attributes) in the Draft Bill 'will have limited regulatory impact on employers as they already must comply with the Fair Work Act'.[46]

'Social origin'

3.37 The Draft Bill includes 'social origin' as a protected attribute in clause 17. According to the Department, 'social origin' as a protected attribute is limited to work and work-related areas to maintain the status quo and minimise regulatory impact.[47] Like the protected attribute of 'political opinion', the Draft Bill does not contain a definition of 'social origin'; however, the Explanatory Notes state that the term will take its 'ordinary meaning'.[48]

3.38 Some stakeholders raised concerns over the lack of a clear definition of the concept of 'social origin'. Mr Tim Wilson from the Institute of Public Affairs suggested that, as 'social origin' is an amorphous concept, it could be interpreted in many different ways. Mr Wilson concluded that 'it becomes almost impossible to know what you can and cannot say, and as a consequence people will have no choice but to say nothing'.[49]

3.39 The Anti-Discrimination Board of NSW argued that the inclusion of the term 'social origin' is 'contrary to the Australian concept of an egalitarian and meritorious society' and 'would appear to codify an acceptance that a class system exists in Australia'.[50]

3.40 Some witnesses suggested that the term would cover situations where a person considered that they had been discriminated against on the basis of where they live.[51]

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45 *Supplementary Submission 130*, p. 3.

46 Attorney-General's Department, *Submission 130*, p. 4. See also: Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 3.

47 *Submission 130*, p. 4.

48 EN, p. 25.

49 *Committee Hansard*, 23 January 2013, p. 40.

50 *Submission 21*, p. 4.

51 See, for example, Ms Karen Toohey, Australian Council of Human Rights Agencies, *Committee Hansard*, 23 January 2013, p. 54; Ms Tracey Raymond, Australian Human Rights Commission, *Committee Hansard*, 24 January 2013, p. 66.

3.41 Ms Robin Banks, the Tasmanian Anti-Discrimination Commissioner, provided the following example of how discrimination may occur in this context:

> [O]ne of the issues that is regularly raised with me in Tasmania is of people who, because of where they live and because they live in an area that is…a bad suburb…and a suburb that is dominated by people on Social Security benefits, [they] just cannot put their postal address on a job application; they are overlooked automatically. People in some of those suburbs in Tasmania will get a post office box in a nice suburb in order to avoid the problem of being discriminated against because of, in this case, a combination of where they live and the reputation of that suburb in terms of its social origin.[52]

3.42 Mr Edward Santow from the Public Interest Advocacy Centre (PIAC) noted that, while the term is not defined, the intention would seem to be to protect people being discriminated against because of their poverty or other social status. Accordingly, Mr Santow suggested in evidence that the term should be replaced with 'social status' and should specifically include housing status, citing examples from PIAC's submission of people being treated unfairly regarding their homelessness, in turn trapping them into a cycle of poverty.[53]

3.43 Ms Rachel O'Brien of the National Aboriginal and Torres Strait Islander Legal Service (NATSILS) took a different view, explaining that NATSILS would prefer to keep 'social origin' and 'social status' separate. Ms O'Brien did, however, suggest that since there is apparent confusion about the meaning of 'social origin', the Draft Bill should be amended to clarify whether the attribute of 'social origin' includes the concept of 'social status'.[54]

Departmental response

3.44 The Department advised that the inclusion of 'social origin' as a protected attribute in the Draft Bill will have a limited regulatory burden for duty holders as it is already unlawful to discriminate on the basis of 'social origin'.[55] The Department confirmed that 'social origin' is undefined in both the *Fair Work Act 2009* (Fair Work Act) and the Draft Bill 'to enable consistent jurisprudence to develop'.[56]

3.45 The Department advised the committee that the government is unaware of any issues arising to date in the Fair Work Act context by having 'social origin' as an undefined term.[57] Further, since the 2006-07 reporting period, the AHRC has received only two complaints on the ground of 'social origin'.[58]

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52 *Committee Hansard*, 23 January 2013, p. 54.

53 *Committee Hansard*, 24 January 2013, p. 10.

54 *Committee Hansard*, 24 January 2013, p. 48.

55 *Supplementary Submission 130*, p. 2.

56 *Supplementary Submission 130*, p. 3.

57 *Supplementary Submission 130*, p. 4.

58 *Supplementary Submission 130*, p. 4.

Inclusion of 'religion' as a protected attribute

3.46 The Draft Bill includes 'religion' as a protected attribute in clause 17. However, subclause 22(3) provides that discrimination on the ground of 'religion' is only unlawful in connection with work and work-related areas.

Arguments in favour of extending coverage to all areas of public life

3.47 Several submitters argued that discrimination protection on the basis of 'religion' should be extended to all areas of public life.[59] For example, the Australian Bahá'í Community contended that there is a clear basis for making discrimination on the basis of 'religion' unlawful in work-related areas, yet providing that discrimination on this basis should still be lawful in other areas of public life, such as in the provision of goods, services or facilities.[60]

3.48 The Australian Christian Lobby expressed disappointment at the limited coverage of religion as a protected attribute, asserting that such an approach:

> [C]onveys the message that in all other aspects connected with an area of public life protection against discrimination on the basis of religion is unwarranted, despite the fact that protection against other kinds of discrimination is seen as necessary…The very limited scope of protection against religious discrimination is a powerfully negative statement that cannot have been intended. Australians of all faiths will be disappointed at the message this conveys.[61]

Arguments in favour of removing 'religion' as a protected attribute

3.49 On the other hand, the Australian Catholic Bishops Conference argued that including 'religion' as a protected attribute would risk creating a 'religious freedom litigation culture' in Australia:

> [T]he Exposure Draft…risks propelling matters of religious practice and belief from being matters of public discourse to being matters for litigation…Listing religion as a new protected attribute would introduce uncertainty into the law, including the risk of legal actions hostile to religion. Religion has never itself been a justiciable ground of action under any Commonwealth legislation and so its addition is an untested addition to the law.[62]

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59 Australian Bahá'í Community, *Submission 246*, pp 2-3; Australian Christian Lobby, *Submission 419*, p. 11; Ad Hoc Interfaith Committee, *Submission 476*, p. 10. Other submitters argued that all of the attributes in the AHRC's 'equal opportunity in employment' complaints scheme, including 'religion', should be protected in any area of public life. See, for example, Castan Centre for Human Rights Law, *Submission 249*, p. 6; Australian Lawyers for Human Rights, *Submission 406*, p. 5.

60 *Submission 246*, p. 2.

61 *Submission 419*, p. 11.

62 *Submission 360*, p. 4. See also: Christian Schools Australia, *Submission 237*, p. 4; HammondCare, *Submission 388*, pp 28-29.

Attributes not covered in the Draft Bill

3.50 Some submitters expressed disappointment that certain other attributes have not been included as protected attributes in the Draft Bill, namely: 'domestic and family violence'; and 'criminal record'.

'Domestic and family violence'

3.51 Several submitters advocated for the inclusion of 'status as a victim of domestic violence' as a protected attribute under the Draft Bill,[63] noting in particular that discrimination against victims of domestic violence is a significant issue in the area of employment. Queensland Working Women's Service commented:

> [I]n many cases workers still experience discriminatory actions including termination of their employment, inability to secure permanent and stable jobs or are subject to derogatory comments or other prejudices at work coinciding with their experience of domestic violence.[64]

3.52 Ms Shabnam Hameed from the Australian Domestic and Family Violence Clearinghouse cited an instance in which a person lost their job due to their status as a victim of domestic violence:

> A club dismissed someone on the basis that a patron, who was also the ex of the person being dismissed, was harassing them at the club. Had it been any other patron, the club already has processes in place to remove that member from the club, to bar them from the club et cetera if the same or similar behaviour—unpleasant behaviour, behaviour that was disrupting the club or whoever—was taking place. In one instance the prejudice of being a victim of domestic violence led to that person being terminated. In the instance that just a rowdy person was engaging in exactly the same behaviour, the bar attendant would not have lost her job.[65]

3.53 The Australian Domestic and Family Violence Clearinghouse also expressed the view that including domestic violence as a protected attribute is necessary to give effect to Australia's international human rights treaty obligations, including the Convention on Elimination of All Forms of Discrimination Against Women and the ILO Discrimination (Employment and Occupation) Convention 1958 (ILO 111).[66]

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63 See, for example, Australian Domestic and Family Violence Clearinghouse, *Submission 24*, p. 1; Working Women's Centre SA, *Submission 26*, p. 1; Queensland Working Women's Service, *Submission 28*, p. 1; Women's Health Victoria, *Submission 36*, p. 1; Victorian Trade Halls Council, *Submission 104*, pp 1-2; Discrimination Law Experts Group, *Submission 207*, p. 18; National Tertiary Education Union, *Submission 317*, p. 7; Australian Council of Trade Unions, *Submission 310*, p. 7; Australian Education Union, *Submission 343*, p. 3; Australian Services Union, *Submission 351*, p. 1.

64 *Submission 28*, p. 1.

65 *Committee Hansard*, 23 January 2013, p. 34.

66 *Submission 24*, p. 1.

Inadequacies of the existing law

3.54 Ms Hameed explained how current employment legislation does not adequately protect employees from discrimination on the basis of their status as a victim of domestic violence:

> Employment legislation does not and cannot adequately protect employees from discrimination on the grounds of domestic violence as the status of victim of domestic violence is not listed as a protected attribute in the Fair Work Act…[and] protected attributes are limited to those in federal, state and territory antidiscrimination laws. This means that employees who are victims of domestic violence who are dismissed, injured in their employment, had their positions altered to their prejudice or discriminated against have no redress under this section of the [A]ct. Similarly, prospective employees who are refused employment or who are discriminated against by the prospective employer in the terms or conditions offered have no redress under section 351 of the Fair Work Act. Unfair dismissal protections and adverse action protections are currently available under the Fair Work Act but are limited in their scope.[67]

3.55 Ms Hameed identified that, although specific legislative protections are not available, the industrial protections that do exist cover 'fewer than 20,000 employees Australia wide'. Further, less 'than one in 10 employees have domestic violence workplace rights and these employees are only protected against adverse action by the employer in relation to that workplace right':

> For instance, an employee with a right to domestic violence leave in their [Enterprise Bargaining Agreement] would be able to bring an adverse action claim in the instance that the employer discriminates against them because they applied for or took [domestic violence] leave. However, that same employee would not be protected in any way should the employer discriminate against them on the basis of being a victim of domestic violence and not in relation to domestic violence leave.[68]

3.56 Ms Belinda Tkalcevic from the Australian Council of Trade Unions also cited the need for more to be done to support victims of domestic and family violence in the workplace explaining that, although some progress has been made in recent years, further reform is needed:

> [T]he push to achieve the leave entitlements is fairly recent; it has been mostly over the last year and I think it is at the point now where it is almost a million workers who are now able to access some form of leave for domestic violence. But the provisions require someone to actually identify themselves as experiencing or having experienced domestic violence which leaves them vulnerable to discrimination. So I think that the key here is that, if you are going to extend the application of domestic violence leave to employees, then you have also got to offer some protection if you are going

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67 *Committee Hansard*, 23 January 2013, p. 28.

68 *Committee Hansard*, 23 January 2013, p. 28. See also Ms Frieda Lee, National Association of Community Legal Centres, *Committee Hansard*, 24 January 2013, p. 10.

> to require, as I think is quite reasonable, some sort of evidence or acknowledgement from the employee to someone in the organisation that they are going through this.[69]

3.57 The Australian Domestic and Family Violence Law Clearinghouse maintained that 'for all Australian employees to be protected against discrimination on the basis of being a victim of domestic violence', changes should be made to both the Fair Work Act and anti-discrimination legislation:

> [A]ntidiscrimination law [should] be amended to include the status of the victim of domestic violence as a protected attribute, as the antidiscrimination legislation underpins the Fair Work Act [and] [c]hanges to the Fair Work Act alone will not adequately protect victims of domestic violence.[70]

3.58 Many submitters expressed the view that social benefits, such as reducing homelessness and enabling economic participation, could be achieved by extending protections from discrimination to victims of domestic violence.[71]

Departmental response

3.59 The Department noted that including 'domestic and family violence status' as a protected attribute had been considered in detail during the consultation process; however:

- there is no specific protection of domestic violence as a ground of discrimination under Commonwealth or state or territory law, although certain aspects of this form of violence may be currently covered;
- anti-discrimination law may not be the best mechanism to address challenges faced by victims of domestic violence; and
- introducing an additional regulatory burden on employers potentially risks undermining positive action currently being undertaken by employers in relation to protecting workers experiencing domestic violence.[72]

3.60 At the committee's hearing in Canberra, however, the Secretary of the Department conceded that inclusion of domestic violence as a protected attribute could be considered by the government:

> As far as the department are concerned, we are not going to proffer a view on that except to say that…this is pretty much a codifying exercise, not

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69 *Committee Hansard*, 23 January 2013, p. 9.

70 *Committee Hansard*, 23 January 2013, p. 28.

71 See, for example, Discrimination Law Experts Group, *Submission 207*, pp 17-18; Australian Council of Trade Unions, *Submission 310*, pp 6-7; National Association of Community Legal Centres and Kingsford Legal Centre, *Submission 334*, pp 25-27; Public Interest Advocacy Centre, *Submission 421*, p. 21.

72 *Supplementary Submission 130*, p. 5.

> including new grounds, but it is open to the committee and to the government to embrace [domestic violence] as an additional ground.[73]

'Criminal record'

3.61 Some submitters were critical of the exclusion from the Draft Bill of 'criminal record' (or 'irrelevant criminal record') as a protected attribute, particularly since the AHRC currently has jurisdiction to hear complaints based on discrimination relating to criminal history in its 'equal opportunity in employment' (EOE) complaints scheme.[74]

3.62 For example, the Human Rights Council of Australia (HRCA) observed:

> [T]he Bill removes the jurisdiction of the AHRC under the Australian Human Rights Commission Act to receive complaints of discrimination on the basis of criminal record in employment and occupation. The Bill does not replace this existing provision or otherwise include any other protection for persons who are discriminated against on the basis of their criminal record.[75]

3.63 The HRCA noted that, although the existing provisions which provide for the EOE complaints scheme do not provide a legally enforceable remedy, they do provide an avenue in which aggrieved persons can raise and address their concerns. The HRCA submitted that, as a result of the exclusion of 'criminal record' as a protected attribute, and the changes to the EOE complaints scheme 'Australia may no longer be in compliance with the ILO 111 Convention requirements with regard to the ground of 'criminal record' discrimination'.[76]

3.64 The AHRC informed the committee that, although the Regulatory Impact Statement for the Draft Bill identifies that the separate complaints scheme 'involves significant uncertainty for business and other relevant parties', not replacing the jurisdiction for the AHRC to receive complaints of discrimination in employment and

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73 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 16.

74 See, for example, Australian Council of Trade Unions, *Submission 310*, p. 8; The National Association of Community Legal Centres and Kingsford Legal Centre, *Submission 334*, pp 31-34; Australian Council of Human Rights Agencies, *Submission 358*, pp 9-10; Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service, *Submission 366*, pp 2-3; Maurice Blackburn Lawyers, *Submission 374*, p. 1; Human Rights Law Centre, *Submission 402*, pp 28-29; Australian Lawyers for Human Rights, *Submission 406*, p. 7; Public Interest Advocacy Group, *Submission 421*, pp 12-14; Public Interest Law Clearing House, *Submission 425*, pp 12-14; Anti-Discrimination Commissioner of Tasmania, *Submission 429*, pp 9-10.

75 *Submission 475*, p. 3.

76 *Submission 475*, pp 3-4. In 2011-2012, the Australian Human Rights Commission received 290 enquiries and 67 complaints of discrimination in employment on the basis of a criminal record. This was the most common complaint made under ILO 111, and represented 13 per cent of all human rights complaints under the Australian Human Rights Commission Act: Discrimination Law Experts Group, *Submission 207*, p. 16, citing figures from the Australian Human Rights Commission's annual report 2011-2012.

occupation in relation to criminal record 'will clearly have [an] adverse impact on people who presently are able to seek assistance'.[77] The AHRC also pointed out that, although some protection against discrimination on the ground of 'criminal record' is provided by the Commonwealth and state and territory spent convictions schemes, this protection is incomplete due to differences between the various schemes.[78]

3.65 The Discrimination Law Experts Group raised similar concerns:

> We do not support the exclusion of 'criminal record' from the list of protected attributes in [clause] 17 of the Bill. A complaint can currently be made to the [AHRC] of discrimination in employment on the basis of a criminal record, so this omission represents a reduction in existing human rights protections in Australia.
>
> The obligations assumed by Australia in relation to discrimination on the basis of criminal record under the International Labour Organisation Discrimination (Employment and Occupation) Convention (1958) should be met by including this attribute in the Bill.[79]

3.66 Other submitters also supported the inclusion of 'irrelevant criminal record' as a protected attribute.[80] Job Watch suggested that any uncertainty relating to the concept of 'irrelevant criminal record' could be dealt with by way of a clear definition. Job Watch noted that there are already legislative precedents for such a definition, including in the Tasmanian *Anti-Discrimination Act 1998*.[81]

3.67 Although many submitters expressed concern with the exclusion of 'criminal record' from the list of protected attributes in clause 17 of the Draft Bill, not all submitters were of that view. Suncorp Group supported the position taken in the Draft Bill and welcomed the decision to exclude 'criminal record' as a protected attribute due to the uncertain nature of the concept and differences in understanding what constitutes a relevant or irrelevant criminal record.[82]

Departmental response

3.68 The Department explained the reasons for the exclusion of 'irrelevant criminal record' from the list of protected attributes:

> ['I]rrelevant criminal record' is not included as a protected attribute in the Bill as it may have a significant regulatory impact. It is not currently covered by the majority of the State and Territory anti-discrimination laws

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77 *Submission 9*, p. 7.

78 *Submission 9*, pp 7-8.

79 *Submission 207*, p. 15.

80 See, for example, Catholic Prison Ministry, *Submission 247*, p. 1; National Association of Community Legal Centres and Kingsford Legal Centre, *Submission 334*, p. 34; Law Council of Australia, *Submission 435*, pp 21-22.

81 *Submission 275*, p. 6.

82 *Submission 279*, p. 2. See also Australian Chamber of Commerce and Industry, *Submission 411*, p. 3.

or the Fair Work Act. There is also uncertainty as to when a criminal record is relevant or irrelevant in employment (for example, in submissions on the Discussion Paper, the business sector raised concerns about the ability to use criminal record to establish 'general character'). It is therefore difficult to assess what regulatory impact would result from including irrelevant criminal record as a protected attribute. The Regulation Impact Statement notes that the costs to business and other duty-holders of implementing the introduction of criminal record into the unlawful discrimination regime would likely outweigh the benefits.[83]

3.69 Further:

There may be more appropriate models for dealing with this important issue which will not impose significant costs (such as existing privacy and spent convictions schemes).[84]

83 *Supplementary Submission 130*, p. 5.

84 *Supplementary Submission 130*, pp 5-6, quoting from the Draft Bill's Regulatory Impact Statement.

CHAPTER 4

MEANING OF DISCRIMINATION AND CIRCUMSTANCES IN WHICH DISCRIMINATION IS UNLAWFUL

4.1 Divisions 2 and 3 of Part 2-2 of the Draft Bill provide for the meaning of discrimination and the circumstances in which discrimination is unlawful. These provisions, along with the exceptions clauses in Division 4 of Part 2-2 (discussed in more detail in chapter 5 of this report), provide the framework for the operation of the unified Commonwealth anti-discrimination law. Submitters and witnesses commented extensively on the general approach in these provisions, as well as making specific suggestions regarding the wording of these clauses.

Definition of discrimination in the Draft Bill

4.2 Numerous submitters raised concerns regarding the new simplified definition of discrimination in clause 19 of the Draft Bill, and particularly paragraph 19(2)(b).[1] Subclause 19(2) states that discrimination by one person treating another unfavourably includes the person:

(a) harassing the other person;

(b) other conduct that offends, insults or intimidates the other person.

4.3 In public comments cited by many submitters and witnesses to the inquiry, former NSW Chief Justice the Hon James Spigelman AC QC has argued that the inclusion of the terms 'offends, insults or intimidates' in the Draft Bill would have the effect of broadening the scope of conduct which can be considered unlawful discrimination beyond the current standards in the Sex Discrimination Act, the Disability Discrimination Act or the Age Discrimination Act, with adverse implications for the right to free speech in Australia. In particular, the committee notes the following comments by the Hon Mr Spigelman:

> [D]eclaring conduct, relevantly speech, to be unlawful, because it causes offence, goes too far. The freedom to offend is an integral component of freedom of speech. There is no right not to be offended…
>
> The new Bill proposes a significant redrawing of the line between permissible and unlawful speech...Words such as 'offend' and 'insult', impinge on freedom of speech in a way that words such as 'humiliate',

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1 See, for example, Discrimination Law Experts Group, *Submission 207*, p. 18; Institute of Public Affairs, *Submission 331*, pp 4-5; Australian Chamber of Commerce and Industry, *Submission 411*, p. 4; Law Council of Australia, *Submission 435*, pp 26-27; Freedom 4 Faith, *Submission 447*, p. 10; NSW Government, *Submission 467*, pp 2 and 7; Human Rights Council of Australia, *Submission 475*, p. 5.

> 'denigrate', 'intimidate', 'incite hostility' or 'hatred' or 'contempt', do not. To go beyond language of the latter character, in my opinion, goes too far.[2]

4.4 Stakeholders argued that the inclusion of paragraph 19(2)(b) sets a standard for discriminatory conduct which would curtail freedom of speech in Australia.[3] For example, Mr Robert Johnston from the Australian Association of Christian Schools told the committee:

> This is an extraordinarily low threshold to be embedding in law, especially when coupled with [the] proposed new onus of proof being placed on the respondent rather than the complainant. This is an alarming and dangerous innovation…Far from strengthening the human rights of freedom of speech and expression, this innovation inevitably silences constructive and robust debate on any issue on which one might choose to be offended.[4]

Introduction of a subjective test for discrimination

4.5 Concerns were expressed that the wording of paragraph 19(2)(b) means that the test for discriminatory conduct would be a subjective test, rather than an objective one. Submitters to the inquiry noted that the definition of racial vilification currently in section 18C of the Racial Discrimination Act, and replicated in clause 51 of the Draft Bill, is framed by the 'objective standard' of conduct that is 'reasonably likely, in all the circumstances, to offend'; however, there is no similar objective standard in clause 19 of the Draft Bill.[5]

4.6 In its submission, the Law Council of Australia (Law Council) observed:

> [B]y inquiring into whether conduct 'insults, offends or intimidates', paragraph 19(2)(b) focuses on how the conduct is *received* by the aggrieved party and on how that party *feels*, rather than on the nature of the conduct or the reason or purpose for which it was undertaken. This has the potential to confuse the adverse or detrimental impact of the conduct with the way in which the conduct was received.[6]

4.7 The submission from Joint Media Organisations contended that the lack of an objective standard for discriminatory material which 'offends' would have a significant impact on the type of material media organisations would publish:

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2 The Hon James Spigelman AC QC, 'Hate Speech and Free Speech: Drawing the Line', Human Rights Day Oration, 10 December 2012, http://humanrights.gov.au/about/media/news/2012/132_12.html (accessed 11 December 2012).

3 See, for example, Institute of Public Affairs, *Submission 331*, pp 4-5; Master Builders Australia, *Submission 353*, pp 6-7; Law Council of Australia, *Submission 435*, p. 26; Seventh-day Adventist Church Australia, *Submission 496*, p. 5; Queensland Council for Civil Liberties, *Submission 554*, p. 3.

4 *Committee Hansard*, 23 January 2013, p. 62.

5 See, for example, Institute of Public Affairs, *Submission 331*, p. 5; Australian Christian Lobby, *Submission 419*, pp 12-13; Freedom 4 Faith, *Submission 447*, p. 10; Law Society of South Australia, *Submission 248*, p. 2.

6 *Submission 435*, p. 26, (emphasis in original).

> The inability of organisations to foresee what standard will be set is likely to have a 'chilling effect' on the publication or broadcast of potentially contentious material. This will most directly affect consumers, whose access to the range of content they are currently able to read, hear and see, may be limited as a result.[7]

4.8 The Institute of Public Affairs argued that, even if an objective test were included in clause 19, determining what conduct or speech is unreasonably offensive would still be a difficult matter for the courts to determine:

> No amount of judicial hypothesising about what an ordinary person might feel will be able to simulate social standards. But legislation that transforms the shifting, amorphous and socially contingent concept of offense into a legal doctrine requires the judiciary to do so.[8]

Departmental response and suggested changes to clause 19

4.9 The Explanatory Notes state that clause 19 is intended to preserve existing policy found in current Commonwealth anti-discrimination legislation, and that the harassment component in the definition of unfavourable treatment in subclause 19(2) largely reflects existing law, as brought out in the relevant case law.[9]

4.10 In its submissions and evidence to the committee, the Department discussed at length the concerns raised regarding paragraph 19(2)(b). The Department reiterated that it 'is not the Government's intention to broaden the prohibition against racial vilification to other attributes'[10] or to make any conduct which a person finds offensive unlawful:

> The intention of subsection 19(2) of the Bill is to clarify what courts have already found—that 'discrimination' (treating a person less favourably because of their attributes such as race, sex, disability or age) can include harassment on that basis. The relevant provisions of the Bill (paragraphs 19(2)(a) and (b)) are intended to be read together to provide greater guidance on the types of conduct that may constitute harassment, without limiting the definition of that concept. While not expressly including an objective test, the surrounding context of this provision is intended to require objective analysis.
>
> The objections [in submissions] appear to relate to the possible unintended consequences of the wording used rather than the central idea that 'harassment' falls within the scope of 'unfavourable treatment'. Clarifying that harassing behaviour can fall within the scope (including conduct such as verbal abuse based on a protected attribute) remains important. There is a

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7 *Submission 484*, p. 4. See also: Free TV Australia, *Submission 330*, pp 2-3.

8 *Submission 331*, p. 5.

9 Explanatory Notes (EN), pp 27-28.

10 *Supplementary Submission 130*, p. 6.

> difference between expressing an opinion, even in strong language, and subjecting another person to harassment.[11]

4.11 In a document tabled at the public hearing in Canberra, the Department elaborated on the meaning of 'harassment' as part of the definition of 'unfavourable treatment':

> There was no intention to attempt to comprehensively define 'harassment', which can take many different forms. However, the inclusion of paragraph 19(2)(b) sought to provide guidance on the type of conduct that might constitute harassment. For example, harassment could include conduct which was offensive, insulting or intimidating towards another person (such as offensive remarks based on the person's race or insulting language about that person's disability). Ultimately, the concepts of harassment and discrimination are limited by the requirement that such treatment be based on another person's protected attributes.[12]

4.12 The Secretary of the Department conceded that, given the concerns raised about the interpretation of paragraph 19(2)(b), the provision should not remain in its current form.[13] The Department outlined four possible options in relation to this provision:

- remove paragraph 19(2)(b), leaving subclause 19(2) to state simply that unfavourable treatment can include harassment, without giving any guidance as to what might constitute harassment;
- remove subclause 19(2) in its entirety, leaving the legislation silent on the question of whether discrimination can include harassment;
- use alternative words in paragraph 19(2)(b), such as 'degrade', 'denigrate', 'humiliate' or 'intimidate'; and/or
- expressly clarify that the test for harassment is an objective test.[14]

4.13 Stakeholders also put forward their views on possible changes to clause 19, which roughly accord with the options outlined by the Department, as discussed below.

Removing paragraph 19(2)(b) or subclause 19(2) in its entirety

4.14 Many submitters and witnesses suggested that paragraph 19(2)(b) should be deleted from the definition of discrimination altogether. For example, the Law Council noted that the unfavourable treatment test contained in subclause 19(1) of the

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11 *Supplementary Submission 130*, pp 6-7.

12 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 1.

13 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, pp. 2 and 5.

14 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', pp 1-4.

Draft Bill 'would appear to offer sufficient protection against harassment on the grounds of any protected attribute regardless of whether paragraph 19(2)(b) is included'.[15] The Department agreed: '[a]s courts have found that discrimination can include harassment without express reference in legislation to this effect, [removing subclause 19(2)] should not alter this interpretation'.[16]

4.15 Some submitters welcomed the intent of explicitly clarifying in the Draft Bill that discrimination includes harassment. Associate Professor Anna Cody from the National Association of Community Legal Centres argued that the concept of harassment should be retained within the definition of unlawful discrimination, even if paragraph 19(2)(b) is removed.[17] Liberty Victoria commended the Draft Bill for including references to harassment as part of unlawful discrimination, and recommended that paragraph 19(2)(b) should be removed or amended, without also removing paragraph 19(2)(a).[18]

Strengthening the wording of paragraph 19(2)(b) and including an objective standard

4.16 Other submitters advocated amending paragraph 19(2)(b) rather than removing it altogether. For example, the Public Interest Advocacy Centre recommended that paragraph 19(2)(b) should be redrafted to provide that unfavourable treatment includes, but is not limited to, 'conduct that humiliates or intimidates the other person, or has the intent or effect of nullifying or impairing the other person's enjoyment of human rights on an equal footing'.[19] The Human Rights Council of Australia proposed amending paragraph 19(2)(b) to read 'other conduct that causes tangible or intangible harm or damage to the other person'.[20]

4.17 Liberty Victoria argued that '[m]ixing subjective, and potentially trivial, terms like 'offends' and 'insults' with objective, and serious, words like 'intimidates' leads to uncertainty and potential interpretations quite at odds with the intent of the Bill'.[21] Liberty Victoria recommended that, if paragraph 19(2)(b) is not omitted, it should be 'at least replaced with words of objective harm and sufficient seriousness'.[22] Further:

> The notion of objective harm has to involve not subjective words like 'offend' and 'insult' but where conduct, including words, spoken and written, are known to cause harm, in particular on the basis of an attribute. It has to

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15 *Submission 435*, p. 27. See also: Ms Rachel Ball, Human Rights Law Centre, *Committee Hansard*, 23 January 2013, p. 58.

16 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 2.

17 *Committee Hansard*, 24 January 2013, pp 9 and 11.

18 *Submission 379*, p. 6.

19 *Submission 421*, p. 4.

20 *Submission 475*, p. 5.

21 *Submission 379*, p. 6.

22 *Submission 379*, p. 6.

> take into account not just what is done or said but the attribute and the history of discrimination suffered by people of that attribute.[23]

4.18 The Department warned that using alternative words in paragraph 19(2)(b) such as 'degrade', 'denigrate', 'humiliate' or 'intimidate', would 'likely set a standard of conduct which would be considered unacceptable in society'.[24] It cautioned, however, that the introduction of such words into discrimination law could have uncertain implications:

> '[D]egrade' and 'denigrate' in particular would be new concepts in anti-discrimination law. The use of these new phrases could create further uncertainty, undermining the purpose of including any further guidance in addition to 'harassment'. In particular, such new concepts may have the effect of inadvertently expanding the operation of the provision, as these have not previously been the subject of jurisprudence in this context.[25]

4.19 The Department stated that, whichever option is chosen for amending clause 19, it should be expressly clear that an objective standard should apply in relation to harassment:

> [This] would remove any doubt that the standard to be met is to be objectively determined, rather than whether an individual merely *felt* offended or insulted. This would clarify the Government's policy intention and maintain existing jurisprudence on the meaning of harassment.[26]

4.20 The Department commented, however, that including an objective standard in relation to harassment 'could inadvertently create further confusion about other aspects of the meaning of discrimination, which do not have express objective tests'.[27]

Other options

4.21 Several other suggested changes were also put forward by submitters. The Law Council proposed that, as an alternative to removing paragraph 19(2)(b), subclauses 19(1) and (2) could be replaced in their entirety with a provision modelled on the *Equal Opportunity Act 2010* (Vic), which provides that discrimination occurs 'if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute'.[28]

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23 Mr Jamie Gardiner, Liberty Victoria, *Committee Hansard*, 23 January 2013, p. 4.

24 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 3.

25 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 3.

26 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 4 (emphasis in original).

27 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 4.

28 *Submission 435*, pp 26-27.

4.22 The Centre for Comparative Constitutional Studies recommended that, if paragraph 19(2)(b) is to be retained in some form, there should be an explicit exception for the attribute of 'political opinion' so that unfavourable treatment does not include conduct that offends or insults a person on the ground of political opinion.[29]

Circumstances in which discrimination is unlawful

4.23 The committee received evidence on several issues relating to the circumstances in which discrimination is unlawful under clause 22, namely:

- the general provision in subclause 22(1) that discrimination is unlawful if it is connected with any area of public life;
- the limitation in subclause 22(3) which provides that discrimination on the grounds of seven specific protected attributes is only unlawful in connection with work or work-related areas; and
- the coverage of voluntary and unpaid work under the definition of 'employment' for the purposes of the Draft Bill.

Discrimination to be unlawful in 'any area of public life'

4.24 Subclause 22(1) provides that discrimination against a person is unlawful if it is 'connected with any area of public life', and subclause 22(2) includes a non-exhaustive list of areas of public life covered by the legislation. The Explanatory Notes explain that existing Commonwealth anti-discrimination laws are inconsistent in relation to the coverage of unlawful discrimination.[30] According to the Department:

> The Bill simplifies the approach to specifying when discrimination is unlawful by prohibiting discrimination that is connected with any area of public life. This raises protections to the current highest standard, reflected in the [Racial Discrimination Act]. The specific areas of public life set out in [sub]clause 22(2) are consistent with the areas regulated by existing Commonwealth anti-discrimination law and are provided for additional guidance.[31]

Concerns about making discrimination unlawful in 'any area of public life'

4.25 Some stakeholders argued that covering 'any area of public life' constitutes a radical expansion of the reach of discrimination law in relation to attributes other than race. For example, Professor Nicholas Aroney and Professor Patrick Parkinson AM asserted:

> The Commonwealth's existing anti-discrimination laws, like the anti-discrimination laws of the States, are limited to prohibiting discriminatory conduct by persons possessing responsibility, authority or power in particular areas of public life…[such] as employers, managers,

29 *Submission 350*, p. 2.

30 EN, p. 32.

31 *Supplementary Submission 130*, p. 8.

> administrators, providers of accommodation, goods or services, public authorities, and so on…
>
> If enacted in these terms, the prohibition contained in the [Draft Bill] would extend to the conduct of *any* person provided that conduct was in some way 'connected with' an area of 'public life'…In practice, the proposed clause 22(1) would prohibit *any* employee of a company, *any* student at a school, *any* client of a business, *any* customer of a department store, *any* patron of a restaurant, *any* member of a club, *any* spectator of a sporting activity, *and so on*, from engaging in conduct that is in any way unfavourable to another person connected with that area of 'public life', so long as the unfavourable treatment is in relation to one of the relevant protected attributes.[32]

4.26 Professors Aroney and Parkinson argued that, while current discrimination laws are designed to regulate 'vertical relationships of responsibility, authority or power', the Draft Bill extends regulation to 'horizontal relationships of all kinds':

> It is in horizontal relationships that offensive and insulting conduct most often occurs. This kind of conduct is best responded to at a community level, without the distant and heavy hand of Commonwealth law and regulation intruding into such matters. People sometimes behave badly in their social relations with others; but the best way to encourage good behaviour is by modelling it, and by reinforcing standards of right conduct and courtesy, not by running off to court to engage in protracted and expensive legal disputes.[33]

4.27 Freedom 4 Faith argued that the extension of coverage to any area of public life is likely to lead to a greatly increased number of complaints, and in particular nuisance or vexatious complaints, meaning that more time would be spent 'sifting between the few meritorious and the many unmeritorious complaints'.[34]

Support for making discrimination unlawful in 'any area of public life'

4.28 Conversely, Professor Simon Rice OAM from the Discrimination Law Experts Group welcomed the approach taken in clause 22:

> There has been discussion about the breadth of the [Draft Bill] to encompass public life. It has been put in terms of extending the [Draft Bill] horizontally as well as vertically and that certainly seems to be the case. In our view, that is as remarkable as criminal law applying to all areas of life, and I mean all—public and private and not simply selected areas of life—or tort law applying to all areas of life and not selected areas of life. If discrimination law is supposed to represent values in Australia then we support a move that does not privilege some areas of life and exclude other areas of life, but extends to all.[35]

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32 *Submission 558*, p. 3 (emphasis in original).

33 *Submission 558*, p. 4.

34 *Submission 447*, p. 11.

35 *Committee Hansard*, 24 January 2013, p. 50.

4.29 The Human Rights Law Centre also applauded the expansion of coverage to all areas of public life. It argued that this level of protection is consistent with international human rights law, and 'provides a much clearer, simpler framework for duty-holders and complainants to understand and operate within' than the existing framework of Commonwealth anti-discrimination law.[36]

4.30 The Explanatory Notes state that, while covering discrimination in connection with any area of public life will lead to 'some expansion' of the coverage of anti-discrimination protections, 'there are expected to be relatively few areas of public life that are not already covered, primarily areas such as small partnerships and volunteer work'.[37] A departmental official also confirmed in evidence to the committee that none of the specific areas of public life listed in subclause 22(2) are new to Commonwealth anti-discrimination law.[38]

Protected attributes covered only in work and work-related areas

4.31 Subclause 22(3) provides that discrimination related to seven attributes (family responsibilities, industrial history, medical history, nationality or citizenship, political opinion, religion and social origin) is unlawful only if it is connected to work and work-related areas.[39]

Arguments for extending coverage for these attributes to 'all areas of public life'

4.32 The AHRC expressed concern that providing narrower coverage for these attributes than the other attributes protected under the Draft Bill could result in complexity and confusion, with particular implications for:

- matters of intersectional discrimination (for example, where a matter which is not work-related raises issues of both race and religion); and
- consistency between the Draft Bill and state and territory laws, which 'provide more general coverage on a number of these grounds'.[40]

4.33 Accordingly, the AHRC recommended further consideration of extending the coverage for these attributes to all areas of public life, 'in the interests of simplicity and improved consistency'.[41] Several other stakeholders agreed with this position. For example, academics from the University of Adelaide Law School argued that limiting the application of some attributes will undermine the effect of the legislation as a whole:

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36 *Submission 402*, p. 42.

37 EN, p. 33.

38 Mr Greg Manning, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 8.

39 All of these attributes, except 'family responsibilities', are part of the Australian Human Rights Commission's 'equal opportunity in employment' complaints scheme, while 'family responsibilities' is a protected attribute in work-related areas only under section 7A of the *Sex Discrimination Act 1984*. See: EN, pp 20-21.

40 *Submission 9*, pp 8-9.

41 *Submission 9*, p. 9.

> Enacting prohibitions of discrimination only in the context of work will inevitably inspire questions as to why the prohibitions are not extended into other areas of public life. Not only does this have the potential to undermine public confidence in the scope and operation of protections against discrimination offered at federal level, it will also limit the utility of the federal legislation to effect real change in discriminatory attitudes and beliefs in society. Limiting the prohibitions to the context of work effectively states that discrimination on the basis of religion in education (for example) is not serious because it is not prohibited. Such limitations on the regulation of discrimination also have the potential to undermine perceptions of the government's commitment to principles of equality and a broad human rights agenda.[42]

4.34 The Discrimination Law Experts Group agreed that all attributes should be covered in all areas of public life, stating that limiting protection for these attributes to work-related areas 'creates an irrational disparity between the status accorded to these attributes and that accorded to other attributes protected by the [Draft Bill]'.[43]

Arguments for reducing or eliminating coverage of these attributes

4.35 Conversely, several submitters argued that covering these attributes in work-related areas goes too far. For example, the Australian Chamber of Commerce and Industry (ACCI) asserted that making discrimination on the basis of the six attributes which are currently part of the AHRC's 'equal opportunity in employment' (EOE) complaints scheme 'creates a new and additional layer of regulation which subjects employers to litigation which does not currently exist under federal anti-discrimination law'.[44]

4.36 The ACCI also noted that the inclusion of these attributes as unlawful protected attributes creates overlap with similar provisions in the Fair Work Act, which protect employees from adverse action on the basis of, among other things, political opinion, social origin or industrial activities.[45]

Departmental response

4.37 The Secretary of the Department indicated that including these attributes in work-related areas will achieve greater consistency with the Fair Work Act and state and territory anti-discrimination regimes.[46] The Department advised that the '[i]nclusion of these grounds in the Draft Bill should not increase the regulatory

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42 Ms Anne Hewitt, Professor Andrew Stewart, Professor Rosemary Owens, Ms Gabrielle Appleby and Ms Beth Nosworthy, University of Adelaide Law School, *Submission 204*, pp 3-4.

43 *Submission 207*, p. 14. See also: Australian Lawyers for Human Rights, *Submission 406*, p. 5.

44 *Submission 411*, p. 3. See also: Clubs Australia Industrial, *Submission 314*, pp 8-9.

45 *Submission 411*, p. 3.

46 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 3.

burden for duty holders because in most cases it is already unlawful to discriminate on these bases' under either the Fair Work Act or under state and territory laws.[47]

4.38 The Department also highlighted that clause 90 of the Draft Bill prevents 'double-dipping' between different complaints regimes by making it clear that a complaint may not be lodged with the AHRC by an individual if the same complaint has already been lodged under the Fair Work Act or under state or territory anti-discrimination legislation.[48]

Coverage of voluntary or unpaid work in the definition of 'employment'

4.39 Clause 6 defines 'employment' to include 'voluntary or unpaid work'. The inclusion of voluntary work in the definition of employment received significant attention, with stakeholders divided as to whether or not volunteers should be covered under the legislation.

Arguments supporting the inclusion of 'voluntary or unpaid work' in some form

4.40 The National Association of Community Legal Centres (NACLC) and Kingsford Legal Centre (KLC) expressed support for the expansion of the definition to cover volunteers:

> NACLC and KLC welcome the inclusion of 'voluntary or unpaid work' in the definition of employment in section 6 of the [Draft Bill]. We strongly support the inclusion of voluntary workers as protected under discrimination law and believe that all employers and organisations utilising voluntary workers have a responsibility to ensure a discrimination free workplace.[49]

4.41 Similarly, the Human Rights Law Centre supported the inclusion of volunteers in the definition of employment, arguing that current protections for volunteers are ad-hoc and insufficient to meet Australia's international obligations. The Human Rights Law Centre emphasised that the Draft Bill would only cover volunteers in 'public life':

> We note that 'public life' would include, for example, volunteers who perform work in the not-for-profit organisations, government bodies, schools and emergency services. By contrast, we expect that volunteering outside 'public life' would include volunteering to co-ordinate a book club for a group of friends or help a neighbour tend their garden.
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> …[V]olunteering also provides people with engagement and participation opportunities. For example, a person with a disability or parental responsibilities may engage in voluntary work to assist their transition into paid employment. In that sense, protection for volunteers is important for achieving overall substantive equality.[50]

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47 *Supplementary Submission 130*, p. 2.

48 *Supplementary Submission 130*, p. 2.

49 *Submission 334*, p. 12.

50 *Submission 402*, p. 42.

4.42 The Public Interest Law Clearing House (PILCH), although supportive of extending discrimination protections to volunteers, expressed concern at the approach taken in the Draft Bill. At the public hearing in Melbourne, Ms Simone Ball from PILCH contended that 'imposing vicarious liability on community organisations for acts done by volunteers…is too broad and may lead to [a] reluctance by not-for-profits to involve volunteers'.[51] In its submission, PILCH suggested that 'liability should only attach where a community organisation exerts a certain level of direction, control and supervision over its volunteers'.[52] Further, there are 'key legal differences between an employee and a volunteer':

> Defining a 'volunteer' as a type of 'employee' disregards important distinctions between these two different types of workers and would be very confusing for [not-for-profit organisations] and volunteers...Different legal obligations are owed by an organisation to their employees, as opposed to their volunteers (for example, remuneration, leave entitlements, superannuation and statutory insurance obligations for employees). The terms 'employment' and 'employee' have always had a well-known, ordinary meaning at law (and been the subject of much judicial consideration), as have the factors…which distinguish employment from volunteering.[53]

4.43 PILCH suggested that the Draft Bill should be amended to include volunteering as a specifically listed area of public life in subclause 22(2). This would 'provide clarity for the [not-for-profit] sector and assist organisations in interpreting the Federal anti-discrimination laws'.[54] If this approach is not taken, however, PILCH suggested the following as an alternative:

> [T]he Draft Bill should at a minimum be re-drafted to include 'voluntary and unpaid work' as part of the definition of 'work and work related areas' in its own right, rather than as part of the definition of 'employment'.[55]

Arguments opposing the inclusion of 'voluntary or unpaid work'

4.44 Professors Aroney and Parkinson suggested that extending the definition of employment to include volunteer work may pose constitutional difficulties:

> [I]t is likely that the constitutional basis for this extension must rest, if anywhere, upon the International Labour Organization (ILO) conventions, in particular, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Notably, that Convention uses the terms 'employment' or 'occupation' rather than 'work', and there is no indication whatsoever in [that] Convention that it is intended to go beyond paid employment…While the ILO may have an interest in volunteer work for statistical purposes, there is no reason to believe that volunteers are within the scope of ILO Convention 111. Indeed, the ILO makes it clear that its

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51 *Committee Hansard*, 23 January 2013, p. 57.

52 *Submission 425*, p. 19.

53 *Submission 425*, p. 19.

54 *Submission 425*, p. 19.

55 *Submission 425*, p. 19.

> own definition of volunteer work for statistical purposes seeks to capture activity which is quite unrelated to the world of paid employment. Examples…include buying groceries for an elderly neighbour or driving a neighbour to a medical appointment.
>
> We find it difficult to see where in the federal Constitution the Commonwealth is authorised to regulate such activity (and nor can we see any sensible reason to do so).[56]

4.45 Religious organisations raised concerns about the broadening of the definition of employment to include volunteers, citing the potential administrative burden it may introduce. For example, Freedom 4 Faith stated:

> [T]he adverse regulatory impact of this proposed legislation is greatly increased by the inclusion of volunteers within its scope…One of the major interpretative questions is where the boundaries of work, leisure and community service lie. Does the woman who runs the Church playgroup as a volunteer engage in 'unpaid work'? What about the pastoral care team who faithfully visit those who are housebound or in hospital? Is running a youth group considered volunteer 'work'? What if the local church is run by elders who, on a voluntary basis, take turns to preach and carry out other leadership activities?[57]

4.46 Freedom 4 Faith acknowledged that the government may wish to provide protections from discrimination for volunteers, but questioned why such provisions are required:

> [T]here is no evidence of any problem with discrimination against volunteers in faith-based communities that warrants legislative intervention. Even if one or two examples could be produced, there are likely to be issues concerning freedom of religion and association that need to be balanced against whatever claim of discrimination is being advanced. In practice, if people do not feel welcome in offering their assistance in such contexts, then they will simply go elsewhere.[58]

4.47 The Australian Catholic Bishops Conference (ACBC) agreed:

> Volunteers are the backbone of the Church, much of which is a collection of small enterprises with limited resources…Across the Church nationally, tens of thousands of volunteers are involved in the activities of the Church in Australia. Legislation that diverts resources away from service delivery to managing risk, litigation and developing protocols to serve new anti-discrimination laws, risks jeopardising the services provided by Church agencies and volunteers. Imposing a duty not to discriminate would significantly increase compliance costs, be disruptive and a disincentive to engage volunteers. Therefore, the ACBC does not support the application of

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56 *Submission 558*, pp 7-8.

57 *Submission 447*, pp 7-8.

58 *Submission 447*, pp 8-9. See also Presbyterian Church of Australia's General Assembly, *Submission 465*, p. 3; The Salvation Army Australia, *Submission 499*, p. 5.

> anti-discrimination regulation to the acceptance of and treatment of volunteers in the same way as applied to employees.
>
> A regulatory or financial burden placed on Churches or charities should not be so high as to hinder the recruitment and retention of volunteers, as the costs will fall on those people the organisations care for.[59]

'Special measures' and 'reasonable adjustments' clauses

4.48 Some submitters commented on the provisions in the Draft Bill relating to 'special measures' and 'reasonable adjustments', which are aimed at promoting equality for protected groups to prevent discrimination.

'Special measures' provisions

4.49 Clause 21 provides that policies, programs or conduct which are designed to achieve substantive equality for people who have a particular protected attribute are designated 'special measures' and are not unlawful discrimination. Under clause 80, the AHRC may make 'special measures determinations' to state that a particular policy, program or conduct is a special measure. These determinations are legislative instruments and are in effect for such period as stated in the determination.

4.50 Several submitters commented on these provisions, expressing concern that there is no requirement in the Draft Bill for the AHRC to undertake consultations with the group that would be affected by a special measures determination during its development. In relation to special measures affecting Indigenous Australians, the National Congress of Australia's First Peoples commented:

> [T]he Bill adopts a uniform definition for special measures, but does not include a specific requirement for free, prior and informed consent of First Peoples in the making of laws and policies which affect Aboriginal and Torres Strait Islander Peoples, as required in the United Nations Declaration on the Rights of Indigenous Peoples…
>
> Special measures are [currently] used across Australia to enact laws for the 'advancement' of First Peoples without any yard stick for their effectiveness, duration or community support and acceptance…
>
> [W]here laws and policies are being created that affect First Peoples, these peoples should be properly informed and there should be honest and open negotiation so that affected peoples are able to give their free and prior informed consent.[60]

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59 *Submission 360*, p. 3. See also: Anglicare Sydney, *Submission 329*, pp 4-5; HammondCare, *Submission 388*, p. 17.

60 *Submission 238*, p. 6. See also: Human Rights Law Centre, *Submission 402*, pp 21-22; National Aboriginal and Torres Strait Islander Legal Services, *Submission 255*, pp 11-12.

4.51 The Discrimination Law Experts Group agreed that there should be more extensive requirements for consultation regarding special measures determinations, in a process that 'must be transparent, and must guarantee that active and appropriate measures are taken to seek the views of persons likely to be affected'.[61]

4.52 While supportive of the inclusion of special measures provisions in the Draft Bill, the Law Council expressed concern that the current drafting constitutes a 'significant departure' from how the term 'special measures' is understood at international law.[62] In particular, the Law Council advocated a form of drafting which would ensure that special measures are formulated:

- after appraisal of the need for the measure based on accurate data on the socio-economic and cultural status of the group; and
- through prior consultation with the affected group and with their active participation.[63]

4.53 Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service expressed concern that, under the current drafting of the special measures provisions, a special measure exemption could be granted to allow an employer to pay workers with a disability lower wages than other workers. They argued that the Draft Bill should explicitly clarify that this cannot constitute a special measure.[64]

'Reasonable adjustments' provisions

4.54 Several submitters commented on the way the 'reasonable adjustments' provisions, currently found in the Disability Discrimination Act in relation to the protected attribute of disability, have been included in the Draft Bill.

4.55 In the Disability Discrimination Act, the concept of 'reasonable adjustments' is incorporated into the definition of discrimination itself, providing that a person's conduct is discriminatory if they do not make reasonable adjustments to accommodate a person's disability. The Draft Bill retains the concept of 'reasonable adjustments' in relation to disability only, but rather than including it in the clauses defining discrimination, it is included in the 'justifiable conduct' exception in clause 23. Subclause 23(6) provides that, in relation to disability, conduct is not 'justifiable' if a reasonable adjustment could have been made but was not.

4.56 The Discrimination Law Experts Group argued that not including the reasonable adjustments concept in the definition of discrimination is a reduction of protection against disability discrimination, by making the reasonable adjustments

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61 *Submission 207*, p. 33. The Discrimination Law Experts Group also made this argument in relation to Disability Standards, Compliance Codes and Temporary Exemptions.

62 *Submission 435*, p. 29.

63 *Submission 435*, p. 30.

64 *Submission 366*, p. 3.

obligation 'less explicit and thus weaker in effect'. In addition, the placement of this provision with the exceptions in the Draft Bill is problematic:

> [It] arguably creates the misleading impression that reasonable adjustments are relevant only at the stage of defending a claim, rather than being an element that is essential to consider in determining whether discrimination occurred.[65]

4.57 Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service agreed that placing the reasonable adjustments provision in the definition of discrimination would strengthen the definition for people with a disability and would provide more clarity.[66] Conversely, National Disability Services expressed support for the way the 'reasonable adjustments' provisions have been included in the Draft Bill.[67]

4.58 The Discrimination Law Experts Group also argued that the reasonable adjustments provisions should be extended to all protected attributes since there is an implicit obligation under the Sex Discrimination Act, the Age Discrimination Act and the Racial Discrimination Act to make reasonable adjustments in relation to other attributes:

> [I]n the Bill the explicit obligation to provide reasonable adjustments operates only in respect of disability. This results in inconsistency across attributes, and may incorrectly suggest that adjustments are not required in respect of other attributes.[68]

4.59 The Department did not explain why the reasonable adjustments provisions have not been included as part of clause 19, but did provide a rationale for not extending the provisions to all protected attributes:

> The Government is not proposing to extend the duty to make reasonable adjustments to other attributes in the Bill due to the regulatory aims of the project, and a concern that extending the requirement to other attributes may diminish the prominence of the duty to make reasonable adjustments in relation to disability.
>
> For attributes other than disability, a requirement to be flexible and consider alternative arrangements is a key component in the exception for justifiable conduct… In circumstances where an adjustment could readily be made to avoid discrimination, it would be difficult to establish that not modifying a policy or practice to adopt the adjustment is justifiable. [69]

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65 *Submission 207*, p. 19.

66 *Submission 366*, p. 3.

67 *Submission 323*, p. 2.

68 *Submission 207*, p. 19.

69 *Supplementary Submission 130*, p. 11.

CHAPTER 5

EXCEPTIONS TO UNLAWFUL DISCRIMINATION

5.1 Division 4 of Part 2-2 of the Draft Bill contains exceptions to the unlawful discrimination provisions, which exempt activities in a range of scenarios that would otherwise be unlawful discrimination. Submitters and witnesses raised various issues in relation to these exceptions, with a particular focus on the general 'justifiable conduct' exception, the 'inherent requirements of work' exception, and the exceptions for religious organisations.

General exception for 'justifiable conduct'

5.2 Clause 23 introduces an exception to unlawful discrimination for 'justifiable conduct', which applies in relation to all protected attributes.

5.3 Subclause 23(3) provides that conduct of a person is 'justifiable' if:

- it is engaged in, in good faith, for the purpose of achieving 'a legitimate aim' (paragraphs 23(3)(a)-(b)); and
- a reasonable person in those circumstances would consider that engaging in the conduct would achieve that aim (paragraph 23(3)(c)); and
- the conduct is a proportionate means of achieving the aim (paragraph 23(3)(d)).

5.4 Subclause 23(4) provides that several matters must be taken into account when considering if subclause 23(3) has been satisfied, including: the objects of the Draft Bill; the nature and extent of the discriminatory effect of the conduct; and whether the person could have engaged in other conduct with less or no discriminatory effect.

General views on clause 23

5.5 A number of stakeholders expressed in-principle support for the introduction of a general exception for 'justifiable conduct': for example, the Discrimination Law Experts Group stated that this single exception is preferable 'in place of the confusing array of singular and inconsistent exceptions that exist in the current laws'.[1] Concerns were raised, however, that the current wording of clause 23 needs improvement.[2]

5.6 Suncorp argued that the drafting of this exception is too broad, and that without further guidance from the government significant judicial interpretation of key

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1 *Submission 207*, p. 23. See also: Australian Council of Human Rights Agencies, *Submission 358*, pp 11-12; Human Rights Law Centre, *Submission 402*, p. 44; Australian Chamber of Commerce and Industry, *Submission 411*, p. 4; Public Interest Advocacy Centre, *Submission 421*, pp 27-28; Law Council of Australia, *Submission 435*, p. 33.

2 See, for example, Victoria Legal Aid, *Submission 346*, pp 17-19; Australian Chamber of Commerce and Industry, *Submission 411*, pp 4-5; Law Council of Australia, *Submission 435*, pp 33-36; Ms Katherine Eastman SC, *Submission 452*, pp 6-8.

phrases in clause 23 will be required, possibly leading to unnecessary disputes and complaints being brought.[3] Other stakeholders agreed that this exception has been too broadly drafted, and could therefore diminish protections against discrimination if it is not reworded.[4]

5.7 Job Watch argued that clause 23 should be removed from the Bill altogether because this exception 'will be ambiguous, complex and uncertain and create an abundance of case law leading to further complexity'.[5]

Possible changes to clause 23

5.8 Several amendments to clause 23 were proposed by submitters. For example, the Discrimination Law Experts Group argued that the reference to an aim that is 'a legitimate aim' in paragraph 23(3)(b) should be replaced by an aim that 'is consistent with achieving the objects of the Act', in order to ensure that there is a clear connection between the justifiable nature of the conduct and the human rights objectives of the Draft Bill.[6] The Human Rights Law Centre agreed that, unless these principles are applied, 'there is a real risk that duty-holders will seek to defend discriminatory conduct on the basis of a profit motive or administrative efficiency'.[7]

5.9 The Australian Council of Human Rights Agencies recommended that clause 23 should define 'legitimate' and 'proportionate', and should also 'clarify that purely financial or commercial imperatives cannot justify discriminatory conduct'.[8]

5.10 Ms Kate Eastman SC argued that, from a practical perspective, the current wording of subclause 23(3) poses an unworkable test because it cannot apply to a person who acts without any particular purpose or unintentionally treats another person unfavourably. Ms Eastman also noted the 'onerous evidentiary burden placed on anyone seeking to rely on this defence' and the fact that 'there is no guidance on how concepts such as proportionality should be assessed'.[9]

5.11 Ms Eastman suggested that subclause 23(3) should be replaced with a simpler test based on the concept of 'reasonableness', so as to provide that conduct is justifiable 'if the conduct was reasonable in the circumstances of the particular case'.[10]

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3 *Submission 279*, p. 3.

4 See, for example, The Equal Rights Trust, *Submission 367*, pp 24-25; Human Rights Law Centre, *Submission 402*, p. 44; Mr Tim Lyons, Australian Council of Trade Unions, *Committee Hansard*, 23 January 2013, p. 9.

5 *Submission 275*, p. 9, quoting from Job Watch's submission to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper. See also: Civil Contractors Federation, *Submission 307*, p. 12.

6 *Submission 207*, pp 24-25.

7 *Submission 402*, p. 45.

8 *Submission 358*, p. 13.

9 *Submission 452*, pp 6-7.

10 *Submission 452*, pp 7-8. Ms Eastman noted that the concept of 'reasonableness' has been used for many years in federal anti-discrimination law, and is familiar to the Australian courts.

5.12 The Law Council of Australia also preferred a 'reasonableness' test, as opposed to the current drafting of subclause 23(3). Such a test would avoid the need 'to identify a legitimate aim behind the conduct in every case' and reduce the potential for 'subjective considerations to be determinative' in complaints cases.[11]

5.13 The Department provided the following comments in relation to the formulation of the 'justifiable conduct' exception:

> Clause 23 is intended to align with the international human rights law concept of 'legitimate differential treatment'. Although a new concept to Commonwealth anti-discrimination law, it requires similar analysis to the defence of reasonableness in existing indirect discrimination provisions in the anti-discrimination Acts, and reflects the policy rationale underpinning existing exceptions and exemptions.[12]

Exception for inherent requirements of work

5.14 Some submitters opposed the inclusion of the 'inherent requirements of work' exception in clause 24. The Australian Council of Trade Unions contended that, since clause 24 will apply to all protected attributes under the Draft Bill, it represents a significant expansion from the current legislation:

> Current legislation provides an exception allowing employers to discriminate on the grounds of the inherent requirements of the job only in the areas of Disability, Age and Sex Discrimination in more restrictive terms than the provisions in the exposure draft. Expanding the exception to all areas of discrimination and expanding the terms of the exception will mean that it will be easier for employers to discriminate on the basis of any of the protected attributes by claiming the employee is unable to meet an 'inherent requirement' of the job.[13]

5.15 The ACTU argued that under the Draft Bill:

> The only protection available to employees will be becoming involved in lengthy arguments as to whether the requirement is an 'essential element' of the position, the results of which would be very uncertain. In these scenarios the onus is on the employee who is in a vulnerable situation, to be informed of their rights, and to argue for their retention at the workplace, when it should be clear in the legislation that these scenarios would constitute discrimination.[14]

5.16 The Discrimination Law Experts Group agreed that extending this exception to all protected attributes represents a 'potentially substantial broadening of its application and a reduction in protection against discrimination'.[15] In addition, the 'inherent requirements of work' defence would already reasonably be covered under

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11 *Submission 435*, pp 35-36.

12 *Supplementary Submission 130*, p. 9.

13 *Submission 310*, p. 9.

14 *Submission 310*, p. 9.

15 *Submission 207*, p. 26.

the general defence provisions in clause 23, and the inclusion of clause 24 would have the effect of significantly undermining the protective role of clause 23:

> The primary purpose of introducing a general justification defence (cl 23) is to ensure that organisations have sufficient scope to achieve their legitimate aims (such as appropriate recruitment and performance management of employees), subject to appropriate constraints…Under the inherent requirements provision in cl 24, duty bearers can determine what a job entails and how it is to be carried out (that is, its inherent requirements) without any obligation to examine the availability and feasibility of less discriminatory alternatives as is required under cl 23.[16]

Departmental response

5.17 The Department made several points in its supplementary submission relating to clause 24. It explained that clause 24 'is not intended to set a lower threshold than the existing exceptions' and that, according to jurisprudence on the meaning of 'inherent requirements', employers are not permitted to organise or define their business to permit discriminatory conduct.[17] The Department explained that the question of whether a condition is an inherent requirement of the job is 'an objective element that is not simply a matter of employer discretion':

> Inherent requirements are those which are permanent and inseparable from the nature of the particular work—that is, no adjustment could be made. If an adjustment to work practices can easily be identified that would allow discrimination to be avoided it is very unlikely that a specific policy will be an inherent requirement of a job.[18]

5.18 The Department also pointed out that the burden of proving that a condition is an inherent requirement of the job will be borne by the employer, as is the case currently.[19]

Exceptions for religious organisations under the Draft Bill

5.19 The committee received submissions from a wide variety of individuals, academics and organisations with differing views regarding the exceptions for religious organisations contained in clauses 32 and 33. Clause 32 outlines exceptions for the appointment of priests, ministers or members of religious orders, while clause 33 provides broader exceptions for religious bodies and educational institutions.

Balancing freedom of religion with the right to equality and non-discrimination

5.20 In commenting on the religious exceptions, submitters and witnesses discussed how anti-discrimination legislation should deal with the interaction between

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16 *Submission 207*, p. 26.

17 *Supplementary Submission 130*, p. 10.

18 *Supplementary Submission 130*, p. 10.

19 *Supplementary Submission 130*, p. 10.

the right to religious freedom and expression, and the right of individuals to equality and non-discrimination.

Arguments for more explicitly referencing the right to religious freedom

5.21 Many religious organisations pointed out that freedom of religion is acknowledged as a fundamental human right under Article 18 of the International Covenant on Civil and Political Rights (ICCPR), as well as being recognised under other provisions of the ICCPR and other international treaties.[20] These groups asserted that, by dealing with religious practice and education through 'exceptions' to anti-discrimination provisions, the Draft Bill inherently undermines the value of religious freedom as a right in and of itself. For example, the Australian Association of Christian Schools remarked:

> [T]here is a misconception held by many that religious freedom is a lesser right, an *'exceptional'* right, rather than a concept which should be included within the very definition of unlawful discrimination itself. It is therefore both misleading and unhelpful to deal with the issue of *'religious freedom'* by way of *'exceptions'*.[21]

5.22 Submitters suggested amendments to the Draft Bill relating to recognition of religious freedom, including:

- incorporating a recognition of the right to religious freedom in the definition of unlawful discrimination;[22] or
- amending the heading of Part 2–2, Division 4 – currently 'Exceptions to unlawful discrimination' – to read 'When discrimination is not unlawful', and the heading of Subdivision A – currently 'Main exceptions' – to read 'Reasonable grounds for different treatment' and then deleting the word 'exception' throughout the Division, in order to avoid treating religious freedom as an 'exception';[23] or
- adding a paragraph to the 'justifiable conduct' exception in clause 23 to explicitly provide that the 'protection, advancement or exercise of another human right protected by the [ICCPR] is justifiable conduct'.[24]

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20 Australian Association of Christian Schools, *Submission 359*, p. 11; Australian Catholic Bishops Conference, *Submission 360*, pp 2-3; Ambrose Centre for Religious Liberty, *Submission 409*, p. 5; Australian Christian Lobby, *Submission 419*, pp 4-5; Freedom 4 Faith, *Submission 447*, p. 19.

21 *Submission 359*, p. 12 (emphasis in original). See also: Australian Christian Lobby, *Submission 419*, pp 4-5; The Salvation Army Australia, *Submission 499*, p. 6.

22 Professor Nicholas Aroney and Professor Patrick Parkinson AM, *Submission 558*, Attachment 1, pp 5 and 7. See also: Australian Association of Christian Schools, *Submission 359*, p. 13.

23 Freedom 4 Faith, *Submission 447*, pp 20-21.

24 Freedom 4 Faith, *Submission 447*, p. 22.

5.23 Religious organisations also asserted that they are not claiming to be 'above the law' with regards to anti-discrimination provisions, but rather that the law should be designed to adequately protect freedom of religion in specific circumstances. Bishop Robert Forsyth from Freedom 4 Faith contended that religious bodies are still subject to the law, but are the beneficiaries of specified exemptions within the law, 'as, indeed, are social clubs and political parties and a whole range of things':

> The law does apply to us all. It is just that it applies in different ways to us. And in terms of implying that we have the right to just arbitrarily pick on people, I would regard it as unlawful, for example, for the Anglican church to withhold emergency relief services to someone on the basis of their sexual orientation. There is no doctrine in our church that holds that; in fact, to withhold such relief is contrary to our doctrines…[I]t may happen, but it is indefensible, and it is not protected by this law.[25]

Arguments for limiting religious freedom in justified circumstances

5.24 Some submitters argued that the broad exceptions granted to religious organisations give too much weight to the right to religious freedom, compared to the competing rights of equality and non-discrimination.[26] For example, the Human Rights Law Centre argued that, in cases of competing rights, neither should automatically prevail:

> If a discriminatory policy or practice is explained and shown to be reasonable and proportionate then the discrimination should be allowed…[W]hile [the proposed exceptions] may allow for justifiable discrimination in some circumstances, they may also allow for discrimination that is not reasonable and proportionate. Importantly, these broad permanent exceptions leave no scope for analysis or consideration of either the merit or the effect of the discrimination in question.
>
> Currently, the religious exceptions set up a regime whereby religious freedom cannot ever be curtailed in the name of equality. This regime perpetuates a false and unjustified hierarchy of rights, entrenches systemic discrimination and generally restrains society's pursuit of equality.[27]

General arguments that religious exceptions are not needed

5.25 UnitingJustice Australia did not support broad exceptions for religious organisations, except in relation to the ordination or appointment of religious leaders:

> We acknowledge…that the exercise of religious freedom is subject to the regulatory norms that govern Australian society…
>
> We do not believe that [clause 33] is necessary, in light of the need to balance the rights of the wider community with the freedoms to be afforded to religious groups…When religious bodies are provided [with] what

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25 *Committee Hansard*, 24 January 2013, p. 26.

26 See, for example, The Humanist Society of Victoria, *Submission 153*, p. 2; The Equal Rights Trust, *Submission 367*, pp 30-31; Australian Lawyers for Human Rights, *Submission 406*, p. 11.

27 *Submission 402*, p. 47.

> amounts to a 'blanket exception', there is no incentive for that body to ensure that it does not discriminate, and no incentive to promote equality and inclusion in areas of employment and representation other than those leadership positions necessary to maintain the integrity of the religious organisation.[28]

5.26 Some submitters and witnesses contended that the religious exceptions in clause 33 are unnecessary due to the justifiable conduct exception in clause 23. For example, Ms Lucy Adams from the Public Interest Law Clearing House Homeless Persons' Legal Clinic told the committee:

> [W]e are often working in tandem with a number of faith-based organisations that provide really excellent services to vulnerable members of our community. I guess our concern with the blanket exception is that it is not needed. Those organisations can rely on the general exception of justified conduct…Another thing we raise is that in our experience dealing with these faith-based organisations, this exception is antithetical, I guess, to the approach that they take to providing services, which is inclusive, compassionate and non-discriminatory. On that basis our argument is that the blanket exception is not needed.[29]

Protected attributes to which religious exceptions apply

5.27 The Discrimination Law Experts Group argued that, if religious exceptions are to be retained in the Draft Bill, 'pregnancy' and 'potential pregnancy' should be removed from the list of attributes to which the exceptions in clause 33 will apply. In particular, potential pregnancy 'can operate as a proxy for sex discrimination in relation to all women before menopause, and may enable discrimination on the basis of sex in a covert way'.[30] The Reverend Brian Lucas from the Australian Catholic Bishops Conference agreed that the protected attribute of potential pregnancy could be removed from the religious exceptions, stating that 'the doctrinal position of the Catholic Church would be fully supportive of not discriminating against people on the basis of potential pregnancy'.[31]

5.28 The Human Rights Council of Australia went further, arguing that there is 'no logical reason' for religious exceptions to apply to some attributes, such as sexual orientation and gender identity, and not to others such as race. It contended that 'the only attribute that is distinguishable logically for religious purposes is religion', and recommended that religious exceptions apply only to the attribute of 'religion'.[32]

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28 *Submission 466*, pp 7-8.

29 *Committee Hansard*, 23 January 2013, p. 60. See also: Australian GLBTIQ Multicultural Council, *Submission 383*, pp 7-8; Public Interest Advocacy Centre, *Submission 421*, p. 30; Victorian Gay and Lesbian Rights Lobby, *Submission 534*, p. 30.

30 *Submission 207*, p. 27. See also: Australian Council of Trade Unions, *Submission 310*, p. 11; Independent Education Union of Australia, *Submission 356*, pp 1-2; UnitingJustice Australia, *Submission 466*, p. 8.

31 *Committee Hansard*, 24 January 2013, p. 29.

32 *Submission 475*, p. 11.

Exceptions for religious organisations in relation to employment

5.29 Submitters commented on the exceptions contained in paragraphs 33(3)(b) and 33(4)(b), which permit religious bodies and educational institutions to discriminate in matters relating to the employment of individuals by those organisations. Several submitters welcomed these exceptions, asserting that it is important that educational institutions and other bodies established for religious purposes be allowed to make employment decisions in accordance with those purposes. For example, Freedom 4 Faith stated:

> No faith-based organisation seeks to discriminate against anyone else but many choose staff, or at least prefer staff, who adhere to the beliefs of the organisation, because such beliefs are central to the expression of the organisation's work and purpose.[33]

5.30 Mr Robert Johnston from the Australian Association of Christian Schools explained how this process can work in practice:

> In matters of faith…when a person comes to make [an] application for a position in our schools we would want to be sure not only that they share that faith but they are able to articulate that and demonstrate it in lifestyle choices and so forth. So all of our staff in our school—a gardener in the school in which I was principal for 27 years, for example, was also there for 27 years and was a very significant player in terms of some of the pastoral work [at the school]...Obviously we want a person there who will be consistent with the values and beliefs of the school, so a discrimination is made even in the employment of people who are not teachers because of the fact that they model their faith in these sorts of contexts…So not just teaching but in fact for all positions in the school we are making a discrimination on the basis of faith—not an unlawful discrimination but we are making a discrimination there.[34]

5.31 The Anglican Church Diocese of Sydney contended that organisations hiring employees in accordance with their founding values and identity is necessary for religious and non-religious organisations:

> The staff of an organisation determine its culture and identity, particularly over time. Many of the Christian charities that have maintained their Christian identity over time have done so because they have strict recruitment practices.
>
> This is uncontroversial in other areas of society. An environmental group would not be expected to employ people who do not believe in climate change and a political party would not be expected to employ staff who do not share its ideology, whether in a frontline position or otherwise.[35]

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33 *Submission 447*, p. 23.

34 *Committee Hansard*, 23 January 2013, p. 64.

35 *Submission 380*, p. 13.

5.32 Other submitters argued that the exceptions for religious organisations in relation to employment are unjustified and should be removed from the Draft Bill. For example, Job Watch contended that the list of attributes that can be the subject of discrimination by religious organisations does not bear any relationship to a person's ability to successfully undertake the duties or responsibilities of a particular job:

> [T]he relationship status or sexual orientation of a person who is employed to perform cleaning duties at a church or a person who is employed as a mathematics teacher at a religious school are irrelevant as those attributes do not provide any meaningful information in relation to determining how well they can perform their respective jobs. Likewise, a person who is employed to perform cleaning duties at a church or a person who is employed as a mathematics teacher at a religious school does not need to '[conform] to the doctrines, tenets, or beliefs of that religion' to be able to adequately perform their duties.[36]

5.33 The Independent Education Union of Australia agreed that there should be a 'readily ascertainable relationship between the position an employee holds and an employer's ability to rely on the proposed exceptions'.[37] The Queensland Independent Education Union argued that the more limited employment-related exceptions for religious employers under Queensland anti-discrimination legislation should be adopted in the Draft Bill.[38]

Conduct which 'conforms to the doctrines, tenets or beliefs of a religion'

5.34 Subparagraph 33(2)(b)(i) and subparagraph 33(4)(c)(i) provide for, in relation to religious bodies and religious educational institutions respectively, an exception for discriminatory conduct engaged in, in good faith, that 'conforms to the doctrines, tenets or beliefs' of a religion.

5.35 The Discrimination Law Experts Group expressed concern that, with respect to religious educational institutions, paragraph 33(4)(c) expands the limits of discrimination previously allowed:

> Under s38 of the [Sex Discrimination Act] discrimination by religious educational institutions was allowed only when it was necessary in good faith to avoid injuries to religious susceptibilities of adherents of the religion or creed. But under cl 33(4)(c) of the Draft Bill, discrimination is allowed also in the alternative, when it conforms to the doctrines, tenets or beliefs of the religion. No case has been made to justify this expansion of the exception[.][39]

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36 *Submission 275*, p. 8.

37 *Submission 356*, p. 2.

38 *Submission 342*, pp 3-5. Under section 25 of the *Anti-Discrimination Act 1991* (Qld), the religious exception related to employment is limited to discrimination where a person openly acts in a way that is contrary to the employer's religious beliefs and it is a genuine occupational requirement that the person acts in a way consistent with the employer's religious beliefs in the course of work.

39 *Submission 207*, p. 28. See also: Equality Rights Alliance, *Submission 352*, pp 11-12.

5.36 Several religious organisations contended that the inclusion of these subparagraphs will ultimately require the courts to make rulings on whether certain activity is in conformity with religious doctrine or belief, matters which are not easily established and which judicial bodies may not have appropriate expertise to determine. Freedom 4 Faith argued that wording religious exemptions in this way can lead to 'complex and fruitless arguments about what is and is not required by the doctrines of the religion or a group within a religious tradition'.[40] UnitingJustice Australia submitted that such concepts are often unhelpful in law:

> This language is contested even within religious communities themselves, and so to require participants in court proceedings to present and decide on a definitive definition of any of these terms is problematic.[41]

5.37 The Australian Association of Christian Schools argued that the courts 'must not be called on to arbitrate on what is, or is not, a Christian community's doctrine, tenet, belief or teaching…[They] will almost always lack the competence to do so'.[42]

Limited exception for Commonwealth-funded aged care services

5.38 The committee received extensive commentary on the issue of the limitation on religious exceptions in relation to Commonwealth-funded aged care services, in subclause 33(3). Many stakeholders opposed the introduction of these limitations, while others expressed strong support for their inclusion.

Arguments supporting the inclusion of subclause 33(3)

5.39 A number of submitters and witnesses applauded the limitations provided in the Draft Bill in relation to Commonwealth-funded aged care provision.[43] COTA Australia submitted that it was supportive of the approach of the Draft Bill in ensuring that 'the particular needs of older [LGBTI][44] people are recognised and that aged care facilities will not be able to take advantage of the religious exceptions'.[45]

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40 *Submission 447*, p. 22.

41 *Submission 466*, p. 8.

42 *Submission 359*, p. 14. See also: HammondCare, *Submission 388*, p. 13.

43 See, for example, Australian Association of Social Workers, *Submission 227*, p. 6; Australian Federation of AIDS Organisations, *Submission 239*, p. 6; Australian Psychological Society, *Submission 308*, p. 6; Equality Rights Alliance, *Submission 352*, p. 13; Diversity Council Australia, *Submission 378*, p. 6; Australian GLBTIQ Multicultural Council, *Submission 383*, p. 7; Ms Jessie Taylor, Liberty Victoria, *Committee Hansard*, 23 January 2013, p. 7; Dr Justin Koonin, NSW Gay and Lesbian Rights Lobby, *Committee Hansard*, 24 January 2013, p. 2; Associate Professor Mark Hughes, *Committee Hansard*, 24 January 2013, p. 40.

44 'LGBTI' is a term used to describe lesbian, gay, bisexual, trans, intersex and other sex and gender diverse communities.

45 *Submission 430*, p. 5.

5.40 The National LGBTI Health Alliance argued:

> Health service delivery in Australia is a universal good, and the provisions in the exposure draft will provide helpful relief to older LGBTI people when their overall health and well-being is beginning to decline. Admission to an aged care facility can be stressful in the best of circumstances, and thus this limit on exemptions is welcome.[46]

5.41 Associate Professor Mark Hughes told the committee that discriminatory conduct against LGBTI individuals in aged care settings is a significant problem, and cited the findings of a research survey of LGBTI persons in aged care in Queensland. Results from the survey show that 'approximately 40 per cent of those who had received aged-care services reported a negative experience in relation to the treatment of their sexual orientation or gender identity':[47]

> [T]he evidence from my own and others' research both Australian and international indicates that LGBTI seniors do experience discrimination accessing and receiving health and aged care services. I have had relayed to me stories of discrimination including physical abuse by residential care staff, hospital staff failing to involve same-sex partners in decision-making and counsellors and social workers making inappropriate assumptions about people's lifestyle…Just as significant, though, as people's experience of actual discrimination is their fear or expectation of discrimination and the consequent harm this produces. LGBTI seniors, as we know, grew up in an era when homosexuality was criminalised and mythologised, and this message that discrimination of LGBTI people is acceptable has been reinforced by the longstanding exemptions for religious bodies in our anti-discriminatory laws.[48]

5.42 Dr Jo Harrison, a researcher into LGBTI aged care issues, agreed that it is essential for these groups to be protected from discrimination in the area of aged care:

> Those currently requiring aged care support at a formal level, or approaching this point, must be protected completely from any form of discrimination so that despite the likelihood that they may be 'invisible' by virtue of lifetimes of hiding and fear, their safety and human rights are guaranteed.
>
> …Arguments relating to the matters of 'sensitivity of other residents' in a residential facility or 'protecting religious freedoms by denying same sex couples shared facilities' are not sensible, given evidence that residents of aged care facilities have been shown to have responded positively to sensitive processes of education and communication in relation to fellow LGBTI residents.[49]

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46 *Submission 320*, p. 2.

47 *Committee Hansard*, 24 January 2013, p. 40.

48 *Committee Hansard*, 24 January 2013, p. 40.

49 *Submission 413*, pp 1 and 2.

5.43 Associate Professor Hughes argued that taxpayer-funded aged care services must be provided on a non-discriminatory basis:

> If we do not want discrimination happening in age care settings then I think we need to make that very clear to all providers. If people are prepared to completely fund their own care and if…organisations were prepared to raise funding in other ways that would be fine but the concern for a lot of people, myself included, is that taxpayers' money will be used to actively discriminate against older, vulnerable people solely on the basis of their sexual orientation or gender identity. I think most Australians would be quite shocked if they realised that was the case.[50]

Arguments opposing the inclusion of subclause 33(3)

5.44 In contrast, many submitters and witnesses expressed the view that the limitations to the exception for religious bodies in respect of Commonwealth-funded aged care in subclause 33(3) should be removed. The Australian Catholic Bishops Conference submitted:

> People considering a move into a church aged care residential facility have an expectation that the particular ethos of that church will be upheld at the facility. If a resident is not prepared to abide by that ethos, the Church aged care facility should have the freedom to refuse to accept that person. To deny this is to deny religious freedom and, among other matters, would require religious communities whose charism is to live in communion with the aged and share a home with them to act contrary to their callings.[51]

5.45 Catholic Health Australia (CHA) argued that it should be lawful for religious aged care providers to decline to provide a specific service where to do so would contravene religious beliefs. It argued that making this unlawful may breach Australia's obligations under the ICCPR and expose the Draft Bill to possible legal challenge on these grounds. CHA proposed that subclause 33(3) could be amended rather than removed entirely to provide that the section not apply when a decision of an aged care provider is made 'reasonably and in good faith'.[52]

5.46 Mr David Martin from HammondCare, a non-denominational Christian aged care service provider, told the committee that while HammondCare itself does not discriminate on any grounds in the provision of services:

> [F]aith-based organisations should continue to operate under internationally recognised religious freedoms to run services and employ staff in alignment with the openly and honestly held views of the organisation…[T]his will ensure that faith based organisations can continue to freely make the best possible care based decisions for their people and for the people in need whom they care for.[53]

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50 *Committee Hansard*, 24 January 2013, p. 42.

51 *Submission 360*, pp 6-7.

52 *Submission 386*, p. 4.

53 *Committee Hansard*, 24 January 2013, p. 35.

Removing of religious exceptions in relation to the provision of services

5.47 The committee heard evidence from many stakeholders that the limitations imposed on religious exceptions in relation to aged care should be extended to other areas.[54] For example, Dr Justin Koonin of the NSW Gay and Lesbian Rights Lobby told the committee:

> Over the past few weeks we have heard hundreds of stories…of bullying, vilification, physical assault and harassment on the basis of sexual orientation and gender identity from teachers, cafe workers, patients seeking health care, schoolchildren and members of the Australian community accessing essential services funded by the government, often in organisations that would be exempt from the law under the current exposure draft. It is difficult to see how this kind of treatment can be justified by the rhetoric of avoiding injury to religious sensibility. Moreover, it is difficult to see how LGBTI people accessing these services could feel safe if employees are subject to discriminatory practices and policies. Therefore, limitations need to apply to employment in these areas as well.[55]

5.48 In relation to educational institutions, Dr Tiffany Jones noted research findings showing significant levels of discrimination, bullying and harassment against individuals on the basis of sexual orientation and gender identity in religious educational institutions in Australia. Accordingly, Dr Jones argued that it is inappropriate for these institutions to retain broad exceptions from anti-discrimination provisions.[56]

5.49 The Discrimination Law Experts Group applauded the limitation on the religious exception in subclause 33(3) in relation to Commonwealth-funded aged care, but argued:

> [A]s a matter of principle…public funding should not be spent on *any* activities that are discriminatory. Allowing religious-based discrimination in publicly funded schools has the potential to undermine community harmony by allowing children to be isolated from the experiences of other groups in society, and confined to a narrower range of experiences. This is not an effective way for a society to prepare the next generation to work together harmoniously with people who have different customs and beliefs. A religious group that operates an organisation or school with public funding should not be excused from complying with a basic human rights

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54 See, for example, Castan Centre for Human Rights Law, *Submission 249*, pp 6-7; North Melbourne Legal Service, *Submission 327*, pp 4-5; Diversity Council Australia, *Submission 378*, p. 6; Australian GLBTIQ Multicultural Council, *Submission 383*, p. 7; Legal Aid New South Wales, *Submission 498*, p. 3; Victorian Gay and Lesbian Rights Lobby, *Submission 534*, p. 32.

55 *Committee Hansard*, 24 January 2013, p. 2.

56 *Submission 3*, pp 20-23.

> guarantee of non-discrimination. The same argument is made for public funding of services generally, and for health services in particular.[57]

5.50 The Discrimination Law Experts Group recommended that the exclusion of publicly funded aged care from religious exceptions should be extended to apply to 'all Commonwealth-funded services in the educational, health, social, community, commercial and other sectors'.[58] This position was supported by other submitters to the inquiry, such as the Human Rights Council of Australia:

> [A]ny religious exception [should] not apply to any activity which is partially or wholly funded by public funds. In such cases no question of expression of religious freedom arises. Rather it is reasonable for the State to require public funds to be expended and applied wholly in accordance with principles of non-discrimination.[59]

5.51 Dr Koonin from the NSW Gay and Lesbian Rights Lobby argued that a clear distinction should be drawn between an organisation's religious functions and other service it provides on behalf of the government:

> There is an important distinction between functions of an organisation that are inherently religion, such as the selection of priests, and those where the organisation is essentially acting as an extension of government in the provision of goods and services, particularly where they are funded by the government to do so. Internationally, anti-discrimination law in countries including the UK, South Africa and New Zealand makes this distinction clear.[60]

Maintaining the integrity of religious organisations

5.52 Mr Dominic Cudmore, a legal adviser to HammondCare, raised concerns that limiting the exceptions for religious organisations in receipt of public funds in areas other than aged care could result in unacceptable government interference in such organisations:

> The government can dictate the mission, the values, the principles that a private entity, be it faith based or not, [if] receipt of public subsidies is to follow. A number of years ago the Human Rights Commission, under its previous name, issued guidelines on employment for faith based organisations in receipt of government subsidies, and there was a significant public debate and eventually those guidelines were withdrawn because of public concern about the government's attempt, at least in

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57 *Submission 207*, pp 28-29 (emphasis in original).

58 *Submission 207*, p. 29.

59 *Submission 475*, p. 13. See also: Australian Association of Social Workers, *Submission 227*, p. 2; Castan Centre for Human Rights Law, *Submission 249*, pp 6-7; National LGBTI Health Alliance, *Submission 320*, p. 3; Human Rights Law Centre, *Submission 402*, pp 48-49.

60 *Committee Hansard*, 24 January 2013, pp 1-2.

> respect of the guidelines, to dictate to private organisations how they were to run and what their mission was to be. So that is a problem for us.[61]

5.53 The Reverend Lucas from the Australian Catholic Bishops Conference made a similar point about whether religious educational institutions should retain their current ability to discriminate in relation to whom they provide education. The Reverend Lucas argued that, as a matter of principle, religious schools should be allowed to determine their own enrolment policies to uphold the ethos of the school, even if this may favour applicants of a particular religious background, or exclude applicants on other specified grounds.[62]

Facilitating choice between different service providers

5.54 Religious groups emphasised that enabling choice between service providers in areas such as education is crucial. The Reverend Lucas contended that in a multicultural society such as Australia, the need for diversity in the types of service providers available should be upheld:

> The default position…in Australian society is not secularism; the default position is pluralism. So, when the government contracts for services, it does it within the context of a plurality of applicants, who will express a range of different cultural and ethical positions. Likewise, when organisations tender for those services, they do so clearly on the basis of what they will and not do, and it will be only on the rarest of occasions that services that cannot be provided because of some religious position of an organisation are unavailable from some other organisation.[63]

5.55 Mr Corey Irlam from the Victorian Gay and Lesbian Rights Lobby told the committee that this is not always practical for same-sex couples, and that in many areas there are only limited options for access to services from non faith-based providers:

> Given that, for example, in Alice Springs in the Northern Territory, 100 per cent of aged care services are run by a religious organisation, given that a number of public hospitals are run as a public hospital by a faith based organisation in regional and rural areas around Australia and given the multitude of billions of dollars put into government funded services, this is a distinct problem not only from a geographical area but also from a capacity area, where you may not be able to access anybody other than a faith based service.[64]

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61 *Committee Hansard*, 24 January 2013, p. 37.

62 *Committee Hansard*, 24 January 2013, p. 28.

63 *Committee Hansard*, 24 January 2013, p. 28.

64 *Committee Hansard*, 23 January 2013, p. 5. See also: Associate Professor Mark Hughes, *Committee Hansard*, 24 January 2013, p. 41.

Tasmanian model for limited religious exceptions

5.56 Several stakeholders raised the example of the current anti-discrimination regime in Tasmania, where religious exceptions are much narrower than those proposed in the Draft Bill. Under the *Anti-Discrimination Act 1998* (Tasmania), the legislative exceptions for religious organisations extend only to the protected grounds of 'religious belief or affiliation' and 'religious activity', and not to other attributes such as 'sexual orientation' or 'gender identity'.[65] Ms Robin Banks, the Tasmanian Anti-Discrimination Commissioner, informed the committee that this legislative model has operated in Tasmania for over a decade with few problems:

> Tasmania does have exceptions, but they are the narrowest of any state or territory. They have been in place for the entirety of the legislation's history—12 years of legislation. I am not aware of complaints during my period as commissioner—and I deal with all of the complaints—where a religious body has sought to rely on one of those exceptions...In the main, what I see are organisations, including religious bodies, relying on an argument that in fact what they did was not discriminatory...
>
> I think that what it has meant in Tasmania is that religious bodies have perhaps turned their minds in different ways to how they ensure that their religious practice does respect the rights of others to the greatest extent possible without interfering with their doctrinal approach. They have done that, and I think they have done that very effectively. I know that I have had very open and honest conversations with religious bodies in Tasmania about some issues for schools, and those are very respectful conversations…I think that we are proof that you can do it; you can have very constrained exceptions, and that can work for the faith based organisations.[66]

Transparency in the operation of exceptions for religious service providers

5.57 Several stakeholders also argued that, if religious exceptions are to be maintained in the Draft Bill, greater transparency is required in the way those exceptions are exercised by organisations. For example, Dr Koonin from the NSW Gay and Lesbian Rights Lobby told the committee:

> Where it is proposed that exemptions be relied upon, they need to be transparent and publicly available, as members of the public are entitled to know that there is a risk of discrimination if they engage with the organisation in any capacity.[67]

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65 Sections 51-52, *Anti-Discrimination Act 1998* (Tasmania).

66 *Committee Hansard*, 23 January 2013, p. 47.

67 *Committee Hansard*, 24 January 2013, p. 2.

5.58 The Discrimination Law Experts Group suggested that religious organisations intending to rely on the exceptions in clause 33 should be required to notify prospective employees and students of that intention in writing prior to employment or enrolment:

> Without a notice provision, individuals may choose an employer or school with no knowledge or warning that they are thereby sacrificing their right to protection from discrimination. This can be a serious matter for a teacher choosing in which education system to pursue their career, or a student making a choice of school and hence education system.[68]

5.59 Academics from the University of Adelaide Law School argued that religious exceptions in the Draft Bill should operate in a similar manner to those found in the South Australian *Equal Opportunity Act 1984*. Under that legislation, religious educational institutions must have a written policy regarding any discrimination practices, and must give a copy to any prospective employees as well as any other members of the public who request it.[69]

5.60 The Human Rights Law Centre agreed that religious institutions should be required to provide notice of discriminatory practices, and suggested that, in addition, or as an alternative, a religious organisation relying on the exceptions in the Draft Bill should be required to lodge a notice with the Australian Human Rights Commission (AHRC) which specifies the exempted policy or practice:

> [T]his requirement for notice would ensure accountability to the wider community. When the body that wishes to discriminate receives public funds or where the discrimination in question has some other public impact, there exists a greater need for accountability.
>
> Such a requirement may also encourage religious bodies to assess whether the discrimination is necessary and appropriate in each case.[70]

5.61 In this regard, the AHRC informed the committee that it does not support any mechanism 'requiring religious organisations to apply to the [AHRC] for temporary exemptions or other certification, having regard in particular to the regulatory impacts of such an approach'.[71]

5.62 The Reverend Lucas noted that, in relation to Catholic health and aged care services, there are already publicly available materials outlining the services that will be provided by Catholic operators:

> [T]he code of ethical standards for Catholic health and aged care services is a publicly available document. It runs to 81 pages and goes into a great deal of detail as to what services are and are not provided in Catholic health and

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68 *Submission 207*, p. 28.

69 Ms Anne Hewitt, Professor Andrew Stewart, Professor Rosemary Owens, Ms Gabrielle Appleby and Ms Beth Nosworthy, University of Adelaide Law School, *Submission 204*, p. 6.

70 *Submission 402*, p. 50.

71 *Submission 9*, p. 11.

> aged care...The whole world knows that there are certain services that are not available at [a Catholic] hospital and to suggest that that hospital in order to be a publicly funded public hospital should provide those services cuts right across one of those fundamental issues of religious freedom. But on the question of transparency that was referred to, that document on ethical standards is freely available.[72]

5.63 Mr Robert Johnston from the Australian Association of Christian Schools told the committee that his organisation would be comfortable for the publication of notices by schools regarding discrimination policies if the Draft Bill went further to protect religious freedom:

> [I]n the objects of association of each of our organisations, nearly all of our schools would have a statement of faith and in that statement of faith they would identify the authority on which they rely for making such discriminations or judgements or choices. I am certainly not opposed to nor do I think our schools would be opposed to the need for clarification, if the law required it, to declare those bases upon which they were making discriminations or judgements of choice…If you [amend the Draft Bill] with religious freedom being declared upfront, then it actually takes away the need for exceptions and exemptions. In that context, I think it would be quite reasonable for us to then actually require our schools to declare those bases upon which they were making choices and judgements so that people could be well-informed.[73]

Departmental response

5.64 In a supplementary submission to the committee, the Department noted that throughout the consultation process the government had stated its intent not to alter the current religious exceptions, apart from considering how they may apply to discrimination on the new grounds of sexual orientation and gender identity. The Department explained that the Draft Bill therefore 'replicates the wording of the existing exceptions in the [Sex Discrimination Act] and [the Age Discrimination Act] and applies to the attributes covered in those Acts (with the addition of sexual orientation and gender identity)'.[74]

5.65 In relation to Commonwealth-funded aged care services, the Department noted that a range of views were presented during the consultation process, and that three options were considered in the Regulatory Impact Statement to the Draft Bill, namely: maintaining the status quo (option one); stating that religious exceptions do not apply to religious organisations providing aged care services with Commonwealth funding (option two); and stating that exceptions do not apply to religious organisations providing any services with Commonwealth funding, but permitting discrimination in employment (option three):

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72 *Committee Hansard*, 24 January 2013, p. 27.

73 *Committee Hansard*, 23 January 2013, p. 63.

74 *Supplementary Submission 130*, p. 12.

> The Government chose Option Two given the need to ensure people are not discriminated against in the receipt of aged care paid for, at least in part, by Commonwealth funding. In this case, the benefits to older [LGBTI] people of improved wellbeing and emotional support by living as a same-sex couple outweighed any cost to aged-care institutions. As set out in the Regulation Impact Statement, this would better balance the rights to freedom of religion and freedom from discrimination and provide greater accountability and transparency for the use of Commonwealth funding.[75]

75 *Supplementary Submission 130*, p. 13.

CHAPTER 6

COMPLAINTS AND COURT PROCESSES

6.1 The committee received a significant volume of evidence on clause 124 of the Draft Bill, which would introduce a shifting burden of proof for proceedings alleging unlawful conduct before the Federal Court of Australia (Federal Court) or the Federal Magistrates Court. Stakeholders also provided extensive submissions in relation to new costs provisions in clause 133, which introduces a default position that parties should bear their own costs for litigation for unlawful conduct.

6.2 In addition, there was also considerable commentary by stakeholders on:

- clause 122, which deals with standing to make an application to the Federal Court or Federal Magistrates Court; and
- the provisions in clause 117 which enable the Australian Human Rights Commission (AHRC) to dismiss unmeritorious complaints.

Shifting burden of proof

6.3 As a result of the changes proposed in clause 124, an applicant in proceedings before the Federal Court or Federal Magistrates Court alleging unlawful conduct will be required to first establish a prima facie case that unlawful discrimination occurred. Once that prima facie case has been established, the burden will shift to the respondent to demonstrate a non-discriminatory reason for the conduct, that conduct in question was justifiable or that another exception applies.[1]

6.4 The Department emphasised that the change proposed is not a significant departure from the existing burden of proof requirements:

> This proposed shifting burden of proof reflects a change from only one element of unlawful discrimination claims under the current anti-discrimination law regime: the reason or purpose why a person engaged in the conduct…This burden only shifts once the complainant has first established a *prima facie* case.[2]

6.5 Although the Department identified that the proposed changes do not represent a significant departure from the existing burden of proof requirements, a number of stakeholders raised concerns in relation to the introduction of a shifting burden of proof. For example, Master Builders Australia contended that the changes

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1 EN, p. 89.

2 *Submission 130*, p. 2.

would increase both the regulatory burden for employers and the occurrence of vexatious claims.[3]

Support for the proposal

6.6 The concerns raised by these stakeholders were not shared by others.[4] For example, the Discrimination Law Experts Group argued:

> The applicant's obligation to adduce probative evidence is a genuine burden which will deter frivolous claims. The shifting onus will operate so as not to exclude claims that cannot be proven for want of evidence that is known only to the respondent, and at the same time will enable the respondent to volunteer what only they know: the reason for their conduct.[5]

6.7 Professor Simon Rice OAM, representing the Discrimination Law Experts Group at the Sydney hearing, pointed out that the approach of clause 124 is 'unremarkable' and consistent with international practice:

> [T]he proposition that the person who acts is the best person to tell you why they acted is in my experience a very sound proposition. On being satisfied of a prima facie case, to then turn to the person against whom the allegation is made and say, 'Explain why you did it,' in my experience makes sense in the shifting burden of proof…[B]orrowing from industrial law simply goes down that path and we do not think it is accurate or constructive to refer to it as a presumption of guilt as some commentators have done.[6]

6.8 Mr Nicholas Cowdery QC from the Law Council of Australia echoed these views and contended that the arguments being made in relation to the proposed shifting burden of proof are 'alarmist':

> If this were a proposal in relation to a criminal statute then we would probably have a different view about things. But there is well-established practice in this area of shifting burdens of proof…[T]he person who conducts themselves in a particular way is in the best position to explain

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3 Master Builders Australia, *Submission 353*, p. 27. See also: Mr Daniel Mammone, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 January 2013, pp 14-15; Civil Contractors Federations, *Submission 307*, pp 15-16; Chartered Secretaries Australia, *Submission 321*, pp 3-4; Institute of Public Affairs, *Submission 331*, pp 9-10; The Hon Diana Bryant AO, Chief Justice, Family Court of Australia, *Submission 345*, pp 6-7; Australian Catholic Bishops Conference, *Submission 360*, pp 7-8; Freedom 4 Faith, *Submission 447*, pp 14-16.

4 See, for example, Ms Anne Hewitt, Professor Andrew Stewart, Professor Rosemary Owens, Ms Gabrielle Appleby and Ms Beth Nosworthy, University of Adelaide Law School, *Submission 204*, p. 7; National Aboriginal and Torres Strait Islander Legal Services, *Submission 255*, p. 15; Australian Council of Trade Unions, *Submission 310*, pp 12-13; National Association of Community Legal Centres and Kingsford Legal Centre, *Submission 334*, p. 14; Australian Council of Human Rights Agencies, *Submission 358*, p. 17; Human Rights Law Centre, *Submission 402*, pp 13-17; Australian Centre for Disability Law, *Submission 556*, pp 1-2.

5 *Submission 207*, p. 31.

6 *Committee Hansard*, 24 January 2013, p. 50.

> why that was done. It is quite an unexceptional provision that is being proposed.[7]

6.9 Professor Gillian Triggs, President of the AHRC, explained that the proposed shifting of the burden of proof does not result in the 'key persuasive burden lying with the person against whom the complaint is made':

> When somebody uses the phrase 'reversing the burden of proof' the implication is that they have to prove the essential ingredients or *actus reus* of a crime, or the essential ingredients of…the particular cause of action… Here…there appears to be an intended shift in the burden once certain elements of proof have been established, so that, at minimum, some prima facie evidence must be adduced…that the act occurred and that, without any other explanation, the reason for that act was for a prohibited purpose.[8]

6.10 In the context of the current AHRC complaints process, Professor Triggs submitted that, after an initial and substantial 'level of evidence' is produced, it is 'entirely appropriate' that an employer be asked to provide evidence to defend their actions:

> Quite substantial matters must be determined, and it will obviously depend upon the particular complaint and the particular circumstances…You have got to produce a very significant level of evidence before the [AHRC] to demonstrate these facts. In order to determine what is in the mind of the employer in making that decision, it is entirely appropriate that that employer would have evidence to show: 'On the face of it, it doesn't look very good, but in reality we can adduce other evidence that suggests [that we] had an extremely good reason and the person actually had particular attributes in terms of skills that we wanted'.[9]

Departmental response

6.11 In response to the debate concerning the shifting burden of proof, the Secretary of the Department advised the committee:

> As a preliminary point the draft bill only imposes civil and not criminal liability. Statements that the draft bill removes the presumption of innocence, which only apply to the criminal rather than the civil context, are probably a little misleading. It should also be clarified that the burden only shifts in relation to establishing the reason for the conduct. It is not correct to say that a person must prove a negative or prove that something did not happen. The burden will not shift until [an applicant] has established that unlawful treatment actually occurred and that he or she has a relevant attribute.[10]

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7 *Committee Hansard*, 24 January 2013, p. 59.

8 *Committee Hansard*, 24 January 2013, p. 71.

9 *Committee Hansard*, 24 January 2013, p. 71.

10 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 3.

Costs in cases brought before the courts

6.12 The Draft Bill introduces a change in policy in relation to costs. Clause 133 provides for a default position where each party will bear their own costs in proceedings in the Federal Court or the Federal Magistrates Court.[11]

6.13 The Explanatory Notes explain that the risk of an adverse costs order is a 'significant barrier to commencing litigation, even for cases with relative merit'.[12]

6.14 The committee received evidence suggesting that the change to costs introduced by clause 133 would improve access to justice.

6.15 For example, the National Association of Community Legal Centres (NACLC) and Kingsford Legal Centre (KLC) stated that they welcomed the change:

> As a result of the risk of an adverse costs order, many complainants are reluctant to even lodge complaints at the AHRC, preferring state-based tribunals where parties bear their own costs. Where matters are contested at a federal level, NACLC and KLC's experience is that most cases settle – even very strong discrimination complaints.[13]

6.16 At the public hearing in Sydney, Associate Professor Anna Cody representing the NACLC stated:

> We also welcome that, generally in the proposed draft, each party should bear their own costs and recommend that [applicants], who are generally more disadvantaged, should only have costs awarded against them for frivolous, vexatious complaints or those lacking in substance.[14]

6.17 Mr Edward Santow from the Public Interest Advocacy Centre (PIAC) conveyed PIAC's support for the proposed costs provisions on the basis of the benefits it will have in terms of access to justice:

> We have found that the risk of an adverse costs order has discouraged a number of our clients who have a strong case from pursuing and vindicating their right not to be discriminated against. Fundamentally, there is not a lot of money at stake if [an applicant] wins a discrimination case in court – and, frankly, nor should there be. But when [an applicant] is up against a much more wealthy opponent, the risk that they face in bringing their case can be far too great. Making this a no-costs jurisdiction also brings this area into line with, again, the Fair Work Act and some state and territory laws.[15]

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11 EN, p. 94.

12 EN, p. 94.

13 *Submission 334*, p. 15.

14 *Committee Hansard*, 24 January 2013, p. 9.

15 *Committee Hansard*, 24 January 2013, p. 10.

6.18 Although many submitters were generally supportive of the changes to costs orders that will be introduced by clause 133,[16] not all submitters shared this view.

6.19 Maurice Blackburn Lawyers argued that the move to a 'no-costs' jurisdiction would in fact reduce access to justice for the following reasons:

- as damages in these claims are traditionally low, claims would be uneconomic for applicants who risk being out of pocket even if successful;
- discrimination claims generally involve a comparative power imbalance and the applicant often has less power than the respondent. In this situation, the applicant may face costs of self-representation and even in the event of success may be left out of pocket; and
- orders for costs enable law firms and barristers who pursue complaints on a pro-bono basis to recover at least some of their costs.[17]

6.20 The Australian Institute of Company Directors also opposed the changes to costs:

> 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.[18]

Departmental response

6.21 The Department commented on the issues raised in relation to costs, advising that clause 133 responds to concerns raised during the consultation process that many applicants are reluctant to pursue genuine claims of discrimination because of the risk of an adverse costs order if they are unsuccessful.[19]

6.22 The Department submitted that strengthening the ability of the AHRC to close vexatious or unmeritorious complaints would also help to address concerns that have been raised by some stakeholders in relation to costs:

> Some submissions [to the current inquiry] argue that changes to the current costs or standing arrangements could lead to an increase in complaints without merit…[T]he Bill will strengthen the [AHRC's] powers to close unmeritorious complaints, and require leave of the Court to proceed where a complaint has been closed on that basis.[20]

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16 See, for example, Australian Lawyers for Human Rights, *Submission 406*, pp 2-3; Australian Industry Group, *Submission 415*, p. 19; Public Interest Advocacy Centre, *Submission 421*, p. 50; Public Interest Law Clearing House, *Submission 425*, p. 9; Ms Anna Brown, Human Rights Law Centre, *Committee Hansard*, 23 January 2013, p. 56.

17 *Submission 374*, pp 4-7.

18 *Submission 361*, p. 3.

19 *Supplementary Submission 130*, p. 17.

20 *Supplementary Submission 130*, p. 17.

Standing to apply to the Federal Court of the Federal Magistrates Court

6.23 Clause 122 provides that a person making an application to the Federal Court or the Federal Magistrates Court alleging unlawful conduct, must be 'an affected party in relation to the complaint'.

6.24 Some submitters were critical of this requirement that applications to the Federal Court and Federal Magistrates Court must be made by the affected party. Criticisms were made on the basis that, in many circumstances, the affected party may not have the means or ability to pursue their claim without assistance from a representative. For example, Ms Julie Phillips from the Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service explained the important role that representative actions would play in enabling those who have disabilities to successfully pursue claims of discrimination:

> We particularly support an organisation being able to do these things on behalf of people with disabilities…There are a whole lot of reasons why some people with disabilities are not equipped in many ways to run these sorts of complaints. One that comes to mind is somebody who is unwell with a mental illness. The stress and strain and the behaviour of some respondents are significant. It really is a huge burden that goes on sometimes for a number of years. It is obviously going to benefit people with disabilities and allow them to use the law, which they may not have felt they can use themselves, if an organisation can act on their behalf. If there is a systemic problem in relation to policies that are discriminatory or practices that are affecting a lot of people, to be honest, it just makes sense, for a number of reasons, for a group to be able to run one case rather than have to rely on 20 people to run a case—economically as well.[21]

6.25 Ms Hall from the Australian Federation of Disability Organisations noted that, in her view, individual claims which are settled have no effect in preventing discriminatory practices from continuing:

> There are numerous cases, for example, around education where individuals have taken out complaints but the practice still continues in the overall system. It is just not the way to achieve structural change. We believe that this legislation has a role to play in structural change, and that should be done through [representative actions and through not limiting claims to individuals].[22]

6.26 Stakeholders also informed the committee that allowing representative actions to be made pursuant to clause 122 would enable systemic discrimination to be

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21 *Committee Hansard*, 23 January 2013, p. 22.

22 *Committee Hansard*, 23 January 2013, p. 22.

targeted.[23] The Public Interest Law Clearing House (PILCH) explained how this could be achieved:

> [The] Draft Bill should allow representative actions to be brought on behalf of multiple [applicants] affected by a particular course of conduct, as is currently possible in the Victorian jurisdiction under section 113 of the [*Equal Opportunity Act 2010* (Vic)]. This would give advocacy groups and human rights organisations standing in their own right and allow them to use their expertise and resources to pursue matters involving systemic disadvantage, rather than requiring individuals to mount their own legal challenges to discriminatory practices.[24]

6.27 Ms Rachel O'Brien of the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) echoed the views of other submitters concerning systemic discrimination. Ms O'Brien explained that allowing representative complaints would go some way in addressing systemic discrimination that is often experienced by the Indigenous community:

> [Individual] complaints to the Federal Court are also self prohibitive. This is of particular concern for NATSILS, given that Aboriginal and Torres Strait Islander peoples experience disproportionate levels of disadvantage and multiple factors of discrimination, and yet have low levels of engagement with the antidiscrimination system. Allowing representative complaints to proceed to court could go a long way to addressing some of the systemic issues facing Aboriginal and Torres Strait Islander peoples.[25]

6.28 Although many submitters were in favour of amending the Draft Bill to provide for representative claims,[26] Mr Daniel Mammone from the Australian Chamber of Commerce and Industry did not support the position that the Draft Bill be amended to provide for representative complaints.

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23 See, for example, Australian Council of Trade Unions, *Submission 310*, pp 13-14; Public Interest Law Clearing House, *Submission 425*, pp 27-28; Mr Tim Lyons, Australian Council of Trade Unions, *Committee Hansard*, 23 January 2013, p. 8; Ms Rachel O'Brien, National Aboriginal and Torres Strait Islander Legal Services (NATSILS), *Committee Hansard*, 24 January 2013, p. 44.

24 *Submission 425*, pp 27-28.

25 *Committee Hansard*, 24 January 2013, p. 44. See also: Ms Rachel O'Brien, NATSILS, *Committee Hansard*, 24 January 2013, p. 49.

26 See, for example, Australian Human Rights Commission, *Submission 9*, p. 13; Vision Australia, *Submission 324*, p. 10; Equality Rights Alliance, *Submission 352*, pp 15-16; Human Rights Law Centre, *Submission 402*, pp 54-55; Australian Lawyers for Human Rights, *Submission 406*, pp 14-15; Queensland Advocacy Incorporated, *Submission 412*, p. 2; Anti-Discrimination Commissioner of Tasmania, *Submission 429*, pp 26-27; COTA Australia, *Submission 430*, p. 5; Law Council of Australia, *Submission 435*, p. 54; National Council on Intellectual Disability, *Submission 448*, p. 7.

6.29 Mr Mammone argued that such an amendment would be a broadening of existing anti-discrimination provisions and lead, in his view, to more litigation:

> [I]t is not part of the existing framework of anti-discrimination laws. If it were to be included, the Attorney-General's own strategic framework has pointed out—and we have provided input—that changing those sorts of provisions would have the potential to increase litigation. So that is something we did not support in terms of this consolidated exercise…[T]here are issues associated with the objectives of, perhaps, the person that is not the complainant in a particular matter in representative actions. So there are a whole range of issues and associated policy reasons why we would oppose representative actions.[27]

Power to dismiss complaints

6.30 Clause 117 identifies the circumstances in which the AHRC can close complaints of unlawful conduct which are lodged with the AHRC. These circumstances include the ability of the AHRC to close a complaint if it is satisfied that the complaint is 'frivolous, vexatious, misconceived or lacking in substance' (paragraph 117(2)(c)).

6.31 Submitters were generally supportive of the ability of the AHRC to close complaints on the basis that they are frivolous, vexatious, misconceived or lacking in substance.[28] There was some concern, however, that even in these cases the 'preliminary assessment process' could cause respondents unnecessary angst. For example, Freedom 4 Faith noted:

> While the power to dismiss frivolous or vexatious claims is useful, experience suggests that courts, tribunals and commissions are very reluctant to exercise such a power, and if they do so, it tends to be only after the complaint has gone some way through the complaints process and it has become clear that it has no prospect of success. Before that can happen, a complaint must go through a preliminary assessment process, causing respondents unnecessary angst, inconvenience and cost.[29]

6.32 Professor Triggs from the AHRC discounted such concerns and explained that, in practice, the proposed provisions that will empower the AHRC to dismiss frivolous and vexatious complaints will put a 'strong brake' on complaints that are unable to be substantiated:

> [The Draft Bill] provides Australians and the business community with clarity and with cost-effective processes…[The AHRC's] role in handling the complaints…[is] an important gate-keeper role, for no matter arising under the bill can progress to the federal courts without first coming to the commission. The [AHRC], under current law, can close matters that are of

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27 *Committee Hansard*, 23 January 2013, pp 18-19.

28 See, for example, Australian Council of Human Rights Agencies, *Submission 358*, p. 17; Public Interest Advocacy Centre, *Submission 421*, p. 52; Law Council of Australia, *Submission 435*, p. 49.

29 *Submission 447*, p. 12.

> no legal substance, that are frivolous or where there is a more appropriate remedy…Under the [Draft Bill], the parties cannot go to the courts if we have closed a matter—that is, if we have terminated it or declined it on the grounds that it is without substance or frivolous. An exception is that the parties can go to the courts only if they have leave of the court itself.[30]

6.33 Professor Triggs explained that, at present, just over a third of the cases that come before the AHRC are in fact closed for these reasons:

> At the moment, the [AHRC] terminates or declines an average of 34 per cent of the claims that we receive; we conciliate 48 per cent of them. If there is no successful conciliation, the parties can then bring proceedings as a right in the Federal Court.[31]

6.34 Professor Triggs also observed:

> [T]o a significant extent the [Draft Bill] reflects existing state and Commonwealth laws and provides a foundation on which to embark on more extensive reform over the coming years through the three-year review process.[32]

30 *Committee Hansard*, 24 January 2013, p. 62.

31 *Committee Hansard*, 24 January 2013, p. 62.

32 *Committee Hansard*, 24 January 2013, p. 62.

CHAPTER 7

COMMITTEE VIEWS AND RECOMMENDATIONS

7.1 The goal of consolidating five Commonwealth anti-discrimination laws into a single Act is one which has been suggested for several years. The Senate Legal and Constitutional Affairs Committee recommended in its 2008 report into the *Sex Discrimination Act 1984* (Sex Discrimination Act) that public consultation should be undertaken on the issue of whether Australia's anti-discrimination laws should be consolidated.[1] The government announced in 2010 that it would proceed to consolidate these laws, as part of its Human Rights Framework.

7.2 The stated aim of this project – producing a clearer and simpler anti-discrimination law for consumers, employers and the general public – is a worthwhile one. Anti-discrimination law is a key mechanism for promoting equality and protecting vulnerable or marginalised groups in Australia, and the parliament must do its utmost to ensure that the law in this area is fair and balanced.

7.3 Consolidating five Acts into one is not a simple task, and the committee acknowledges the consultation process undertaken by the Attorney-General's Department (Department) during the process of developing the Draft Bill. Releasing the legislation as an Exposure Draft Bill has allowed the public further opportunity to comment on these proposed reforms before they are brought before the parliament in their final legislative form.

7.4 Over the course of the committee's inquiry, significant issues have been brought to light regarding the drafting of some sections of the Draft Bill. It is clear that substantial amendments are necessary if the consolidated legislation is to fulfil its stated intent of providing a clearer, simpler law. The committee takes very seriously its responsibility to ensure the best possible outcome for this proposed legislation.

7.5 In addition, the committee is of the view that some of the policy decisions made in the process of consolidating the Acts should be reconsidered. The committee notes the Department's commitment to closely consider the changes suggested by this committee in formulating the final version of the legislation. The committee looks forward to seeing its recommendations implemented when the legislation comes before the parliament in its final form.

7.6 This inquiry generated a high level of interest from submitters and witnesses, the media and the general public. The receipt of 3,464 submissions and form letters from individuals, despite the short timeframe set by the Senate for the inquiry, is an

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1 Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008, pp 164-165.

indication of the strength of the views evoked by the proposals in the Draft Bill among certain sections of the Australian community.

7.7 The committee has carefully considered the key issues raised over the course of this inquiry. For some of the more contentious provisions in the Draft Bill, including the definition of unlawful discrimination, the committee has recommended amendments, as it considers there is a legitimate drafting or policy justification for change.

7.8 For other aspects of the Draft Bill which attracted criticism during the inquiry, including provisions relating to changes to court processes for discrimination cases, the committee has decided that there is not an appropriate justification for change to the provisions in the Draft Bill, and hence has not recommended amendments. In each case, the policy justification for the relevant proposal has been the primary factor considered by the committee.

7.9 The committee's specific comments and recommendations in relation to the Draft Bill are set out below.

Protected attributes

7.10 The committee received evidence regarding many of the protected attributes included in the Draft Bill. The committee has specific comments in relation to several of these, namely: sexual orientation, gender identity, political opinion, social origin, family responsibilities, domestic violence and criminal record.

Sexual orientation and gender identity

7.11 The committee welcomes the introduction of protections for individuals on the basis of sexual orientation and gender identity for the first time in Commonwealth anti-discrimination legislation. This is an historic reform that is long overdue, and will provide significant benefits to sex and gender diverse Australians.

7.12 In relation to the formulation of the definition of 'gender identity' in the Draft Bill, the committee considers that some improvements are necessary in order to provide comprehensive protection on the basis of this attribute. Many submitters and witnesses expressed concern that the current definition is too restrictive and does not go far enough to cover gender-related identity, appearance or mannerisms. The committee concurs that the definition of gender identity should be drafted so as to provide the maximum possible protection for gender diverse individuals.

7.13 The committee also considers that the 'genuine basis' qualification provided in the Draft Bill's definition of gender identity is unnecessary, and in no way enhances the effectiveness of the definition; instead, it has the potential to cause confusion about when an individual will be covered by this protected attribute.

7.14 The committee notes comments from the Department that the definition of gender identity in the Draft Bill reflects the most expansive standard of protection in the states and territories at the time of drafting, and that since that time a more expansive definition has been proposed in the Tasmanian Anti-Discrimination

Amendment Bill 2012.[2] The committee considers that the proposed Tasmanian definition provides broad coverage for the attribute of gender identity, and notes that there was widespread support among stakeholders to this inquiry for the adoption of this definition in the Draft Bill.

7.15 Accordingly, the committee is recommending that the definition of 'gender identity' in clause 6 of the Draft Bill be replaced with the definition in the proposed Tasmanian legislation.

Intersex status

7.16 The committee received considerable evidence regarding the coverage of intersex status in the Draft Bill. The committee recognises that intersex individuals are often the subject of discrimination in public life, and that as such there is a need for protection on the basis of intersex status in Commonwealth anti-discrimination law.

7.17 The committee agrees with the evidence presented by Organisation Intersex International Australia, and other submitters, that intersex status is a matter of biology rather than gender identity, and as such should not be covered within the definition of gender identity in the Draft Bill. Further, the committee considers that the current requirement in the Draft Bill that intersex individuals identify as either male or female is misguided, and is unhelpful for intersex individuals whose biological characteristics do not necessarily accord with a male or female identification.

7.18 The committee considers, therefore, that intersex status should be listed as a separate protected attribute under the Draft Bill. The committee notes comprehensive evidence from witnesses that the definition of 'intersex' found in the Tasmanian Anti-Discrimination Amendment Bill 2012 most accurately provides coverage for intersex individuals. The committee supports this definition as the preferred option for inclusion in the final form of the Commonwealth legislation.

7.19 As a concluding point, the committee is of the view that since intersex status is a condition related to the innate biological characteristics of an individual, it should not be an attribute to which any religious exceptions apply.

Recommendation 1

7.20 The committee recommends that the definition of 'gender identity' in clause 6 of the Draft Bill be amended to read:

> ***gender identity* means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and includes transsexualism and transgenderism.**

2 *Supplementary Submission 130*, p. 2.

Recommendation 2

7.21 The committee recommends that subclause 17(1) of the Draft Bill be amended to include 'intersex status' as a protected attribute. 'Intersex' should be defined in clause 6 of the Draft Bill as follows:

> ***intersex* means 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.**

Political opinion

7.22 The committee does not consider that the Draft Bill requires amendments in regards to the definition of the protected attribute of 'political opinion'. The committee is satisfied that the holding of a 'political opinion' is already protected in the workplace by the *Fair Work Act 2009* (Fair Work Act) and various state and territory legislation. The term 'political opinion' is also undefined in the Fair Work Act, which will allow consistent jurisprudence to develop between the two regimes.

7.23 The committee notes that, since the reporting year 2006–07, the Australian Human Rights Commission (AHRC) has received only 15 complaints on the ground of 'political opinion' under the 'equal opportunity in employment' complaints scheme. Therefore, the committee is satisfied that the inclusion of 'political opinion' as a protected attribute will not lead to a surge of complaints in regards to discrimination on this ground. The committee takes the view that the inclusion of 'political opinion' as a protected attribute which takes its ordinary meaning will not place an onerous burden on duty holders or result in a significant increase in litigation.

Social origin

7.24 The committee is satisfied that reliance on the ordinary meaning of the term 'social origin' in the Draft Bill will not cause problems as an undefined term. The committee takes this view on the basis of the evidence provided to it, coupled with the fact that, in those jurisdictions where it is already unlawful to discriminate on the basis of 'social origin', the law is operating as intended.

7.25 The committee is satisfied that the inclusion of 'social origin' as a protected attribute which takes its ordinary meaning will not increase the regulatory burden for duty holders.

Family responsibilities

7.26 The committee does not consider that the Draft Bill requires amendment to extend the definition of 'family responsibilities'. The committee is satisfied that the protections provided for family responsibilities, including carers and kinship relationships in existing industrial laws, are sufficient.

Domestic and family violence

7.27 During the inquiry, the committee heard examples of situations in which discrimination has occurred on the basis of being a victim of domestic violence. As the law currently stands, there is no recourse available in these circumstances. The committee also heard that the key to enabling a victim of domestic violence to break free from the abusive situation is financial independence and security – which is primarily achieved through secure employment.

7.28 The committee acknowledges the advice of the Department that the regulatory impacts of introducing 'domestic violence' as a protected attribute are unknown. The committee takes the view however that the social cost of domestic violence on victims and families, especially children, is such that any additional regulatory impost is outweighed by the benefits of providing protection from discrimination and thereby enabling victims of domestic violence to achieve financial independence and secure a better future for themselves and their families.

7.29 The committee notes the Department's advice that there is no precedent for protecting victims of domestic violence from discrimination within the existing anti-discrimination Acts. The committee however considers that this is an area where the Commonwealth must lead the way, and is encouraged by the Australian Government's recent commitment to amend the Fair Work Act to provide more flexible working conditions for victims of domestic violence in places of employment. The committee considers that this action, together with a further amendment to the Draft Bill, will assist victims of domestic violence to increasingly participate in the workforce and broader community.

Recommendation 3

7.30 The committee recommends that subclause 17(1) of the Draft Bill be amended to include 'domestic violence' as a protected attribute, and that clause 6 of the Draft Bill be amended to include an appropriate definition of this attribute.

Irrelevant criminal record

7.31 Throughout the inquiry, the exclusion of 'criminal record' from the list of protected attributes in clause 17, together with the removal of the separate complaints scheme for 'equal opportunity in employment' matters, drew much attention. These changes remove recourse for persons who consider they have suffered discrimination in relation to work as a result of a criminal record.

7.32 The committee notes that the strongest concerns were raised by disability groups and community legal centres, both of whom represent some of the most marginalised and vulnerable people within society. The committee acknowledges the concerns of these stakeholders and agrees that discrimination in employment on the basis of a criminal record that is clearly irrelevant should not be tolerated.

7.33 In this context, the committee notes the Tasmanian *Anti-Discrimination Act 1998* which provides protection against discrimination on the basis of 'irrelevant criminal record'. The committee considers that the definition of 'irrelevant criminal record' set out in the Tasmanian Act is appropriate, and strongly supports that

approach to include protection against discrimination on the basis of a criminal record that pertains to arrest, interrogation or criminal proceedings where, for example:

- the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises;
- a person was found not guilty;
- charges have been dismissed; or
- a conviction has been quashed or set aside.

7.34 The committee considers that including 'irrelevant criminal record' as a protected attribute, particularly as a result of the removal of the 'equal opportunity in employment' complaints scheme, is an important step that must be taken to provide protection against discrimination on this basis.

Recommendation 4

7.35 The committee recommends that subclause 17(1) of the Draft Bill be amended to include 'irrelevant criminal record' as a protected attribute.

Recommendation 5

7.36 The committee recommends that a definition of 'irrelevant criminal record' be included in the Draft Bill and be modelled on that contained in the Tasmanian *Anti-Discrimination Act 1998*.

Definition of discrimination

7.37 The committee notes the significant interest generated by the definition of discrimination in clause 19, and that this provision has been the subject of extensive commentary in the media as well as in submissions and oral evidence to the inquiry. A large majority of the submissions and form letters received by the committee expressed views on the definition of discrimination adopted in the Draft Bill. Almost all of these submitters voiced strong concern that the inclusion of paragraph 19(2)(b), which states that discrimination can include 'conduct which offends, insults or intimidates' another person, would have a negative impact on freedom of expression in Australia.

7.38 In its evidence to the committee, the Department explained that paragraph 19(2)(b) is intended to be read alongside paragraph 19(2)(a), to clarify the types of conduct which have been found to constitute harassment in anti-discrimination case law.[3] The committee accepts that this is the intent of the provision, however the drafting of paragraphs 19(2)(a) and (b) does not convey this intent clearly. On a plain reading of these provisions, it is arguable that they could have the effect of making offensive conduct unlawful, contrary to the government's stated intention.

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3 *Supplementary Submission 130*, p. 6; Additional Information tabled by the Attorney-General's Department at public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 1.

7.39 For that reason, the committee considers that changes are necessary to this clause to preserve the intent of the drafters and avoid the unintended consequences foreseen as a result of the current drafting. The main options presented to the committee by the Department and other stakeholders were: removing paragraph 19(2)(b) from the Draft Bill; removing both paragraphs 19(2)(a) and (b) from the Draft Bill; or replacing the words 'offends, insults or intimidates' with stronger words such as 'denigrate', 'degrade' or 'humiliate'. The committee considers that each of these options would represent an improvement on the current wording.

7.40 Strengthening the wording with terms such as 'denigrate' and 'humiliate' would create a higher threshold test for harassment, and would avoid making unlawful conduct which merely offends. However, the committee considers salient the evidence from the Department that these alternate words would introduce new concepts in anti-discrimination law, and hence could create further uncertainty within the law and inadvertently expand the operation of the provision.[4] With this in mind, the committee is of the view that the preferable option is simply to remove paragraph 19(2)(b) from the Draft Bill in its entirety.

7.41 With paragraph 19(2)(b) removed, the committee considers that it is acceptable to retain paragraph 19(2)(a), in order to clarify that discriminatory treatment can include harassment. This is consistent with case law in which the courts have held that harassment of a person can constitute unlawful discrimination. The committee believes that stating this explicitly in legislation merely upholds what the courts have already found, rather than dramatically expanding the meaning of discrimination. The committee does not consider that further clarification of the scope of the term 'harassment' is necessary in the Draft Bill, noting the following comments by the Department:

> 'Harass' would have its ordinary dictionary meaning. The Oxford English Dictionary defines 'harass' as 'trouble by repeated attacks;…subject to constant molesting or persecution'...
>
> [T]he dictionary definition [of harassment] is one that would be reasonably clear, as most people would understand harassment as having this meaning. Further, it would be generally agreed that such behaviour is not acceptable and is already unlawful.[5]

7.42 As an additional point, the committee notes that removing paragraph 19(2)(b) from the Draft Bill will not affect protections against racial vilification which are provided for in clause 51. The committee strongly supports the provisions set out in clause 51 of the Draft Bill, which are based on the existing racial vilification provisions in section 18C of the *Racial Discrimination Act 1975*.

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4 Additional Information tabled by the Attorney-General's Department at public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 3.

5 Additional Information tabled by the Attorney-General's Department at public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 2.

Recommendation 6

7.43 The committee recommends that paragraph 19(2)(b) be removed from the Draft Bill.

Areas of public life covered by the Draft Bill

7.44 The committee is satisfied with the approach taken in clause 22, which provides that discrimination is unlawful in connection with 'any area of public life' and sets out a non-exhaustive list of the areas of public life in which the legislation would apply. This approach is already taken in the *Racial Discrimination Act 1975*, and the committee considers that lifting coverage for the remaining attributes to this standard will not have an excessively expansionary effect.

7.45 In relation to the seven protected attributes covered only in work-related areas, the committee considers that this is an appropriate position for the Draft Bill to adopt. While some submitters presented reasonable arguments for extending coverage for these attributes to all areas of public life in the interests of simplicity and consistency across all protected attributes, these seven attributes are currently only covered in work-related areas, either through the AHRC's equal opportunity in employment complaints scheme or under the Sex Discrimination Act.

7.46 As such, the committee is of the view that it is reasonable to cover these seven attributes in work-related areas only, so as to avoid significantly expanding the scope of the Commonwealth anti-discrimination regime. The committee considers that, if the legislation is enacted, the operation of these provisions should be monitored by the Department with a view to ascertaining whether or not it would be prudent to achieve greater consistency across the attributes by extending protection to these seven attributes in all areas of public life.

Voluntary or unpaid work

7.47 Throughout the committee's inquiry, evidence was received suggesting that the inclusion of 'voluntary or unpaid' work in the definition of employment in clause 6 would have unintended administrative consequences for community and not-for-profit organisations, and may divert funds away from service provision.

7.48 Community and not-for-profit organisations clearly play an important role in society. The committee takes the view, however, that organisations utilising volunteer services, such as places of business more generally, have an obligation to provide a discrimination-free workplace. While the committee supports the government's approach to extend anti-discrimination protections to volunteers, the current wording in the legislation does not adequately reflect the important legal differences between employees and volunteers. An employer has different legal obligations for their employees than they do for their volunteers in relation to, for example, terms of remuneration, and leave and superannuation entitlements. Employers also generally exert different levels of direction, control and supervision over volunteers as opposed to their employees. The current form of the Draft Bill does not adequately reflect these important differences.

Recommendation 7

7.49 The committee recommends that 'voluntary or unpaid work' be specifically listed as an area of public life and be added to subclause 22(2) of the Draft Bill.

Recommendation 8

7.50 The committee recommends that the definition of 'employment' in clause 6 of the Draft Bill be amended to remove paragraph (c) relating to voluntary or unpaid work, and that a new definition of 'voluntary or unpaid work' be included in clause 6.

Recommendation 9

7.51 The committee recommends that, in defining 'voluntary or unpaid work', regard be had to the legal differences between employees and volunteers.

Exceptions

7.52 The committee received a large volume of evidence regarding the statutory exceptions to unlawful discrimination contained in the Draft Bill, and notes that some of these exceptions are among the most contentious aspects of this proposed legislation.

7.53 As a preliminary comment, the committee welcomes the guarantee that all the exceptions contained in the legislation will be reviewed, with that review required to start within three years of the legislation's commencement. As anti-discrimination law is designed to protect vulnerable groups within society, it is essential that any statutory exceptions are properly constructed and specifically targeted to provide the greatest possible protection against discrimination for marginalised groups and individuals. Therefore, the three-year review is an important mechanism to ensure that all exceptions in the legislation are necessary and operating in an appropriate manner.

General exception for 'justifiable conduct'

7.54 The committee considers that the approach of including a general exception for 'justifiable conduct' in the Draft Bill is a suitable one, and believes that replacing many of the existing exceptions in current legislation with this justifiable conduct exception will produce a simpler law than that found in the existing statutes.

7.55 The committee considers it important to ensure that the operation of the new justifiable conduct exception is monitored closely in the three-year review, as there may be potential to simplify the exceptions further by removing some of the specific exceptions if the operation of the legislation shows that they could be effectively covered by the justifiable conduct exception.

7.56 While supporting the general approach of including a justifiable conduct exception, the committee considers that the drafting of clause 23 could be improved. Submitters raised concerns that: the test for justifiable conduct in subclause 23(3) cannot apply to a person who unintentionally treats another person unfavourably; there is no guidance on how concepts such as 'legitimate' and 'proportionate' in subclause 23(3) should be assessed; and the use of a 'proportionality' test in this

context is inconsistent with other uses of such a test in international human rights law.[6]

7.57 The committee notes two main suggestions from submitters for improving the wording of clause 23, namely:

- replacing the term 'legitimate aim' in paragraph 23(3)(b) with a reference to an aim that 'is consistent with achieving the objects of the Act', to provide a clear link between the justifiable nature of the conduct and the human rights objectives of the Draft Bill;[7] and
- replacing subclause 23(3) with an exception based on the concept of 'reasonableness', to provide that conduct is justifiable 'if the conduct was reasonable in the circumstances of the particular case'.[8]

7.58 Accordingly, the committee is recommending that amendments be made to clarify the operation of this provision, but leaves it to the Department to consider which form of words should be adopted in the final version of the legislation.

Recommendation 10

7.59 The committee recommends that the Australian Government develop amendments to clause 23 of the Draft Bill to address concerns raised in submissions to the committee's inquiry. In particular, consideration should be given to:

- **replacing the words 'a legitimate aim' in paragraph 23(3)(b) with the words 'an aim that is consistent with achieving the objects of the Act'; or**
- **replacing subclause 23(3) with a test based on the concept of 'reasonableness'.**

Exception for 'inherent requirements of work'

7.60 The committee notes concerns from stakeholders that the exception for 'inherent requirements of work' is overly broad and could reduce discrimination protections. The committee also notes the rationale provided by the Department for the wording of this provision, including that existing jurisprudence on the meaning of 'inherent requirements' clarifies that this term is 'an objective element that is not simply a matter of employer discretion'.[9]

7.61 The committee also notes that several stakeholders argued that the 'inherent requirements of work' exception is unnecessary, as it would already be covered under

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6 See Ms Kate Eastman SC, *Submission 452*, pp 6-7; Australian Council of Human Rights Agencies, *Submission 358*, pp 12-13.

7 See Discrimination Law Experts Group, *Submission 207*, pp 24-25; Human Rights Law Centre, *Submission 402*, p. 45.

8 See Law Council of Australia, *Submission 435*, p. 36; Ms Kate Eastman SC, *Submission 452*, pp 7-8.

9 *Supplementary Submission 130*, p. 10.

the new exception for justifiable conduct in the legislation. The committee considers that the issue of whether the inherent requirements of work exception could be removed in deference to the justifiable conduct exception should be thoroughly considered in the three-year review of the exceptions in the Draft Bill.

Exceptions for religious organisations

7.62 The committee received much commentary on the exceptions in clauses 32 and 33 of the Draft Bill relating to religious organisations. Many stakeholders expressed the view that religious freedoms have not been adequately protected, and that the exceptions in clauses 32 and 33 are inadequate. Other stakeholders expressed the view that the exceptions for religious organisations undermine the very principles of non-discrimination the legislation is designed to protect, and argued that these exceptions should be tightened or removed.

7.63 At the outset, the committee acknowledges the strongly held views about the role of religious organisations in the community, and recognises the significant contribution of religious service providers to Australian society in areas such as education, health services and aged care.

7.64 The committee agrees that religious freedom is a fundamental human right, as acknowledged in the International Covenant on Civil and Political Rights (ICCPR) and other international treaties, and that this right should be acknowledged in any discussion of religious exceptions to anti-discrimination laws. The committee notes that many religious organisations which provided input to the inquiry argued that the right to religious freedom has not been properly recognised in the Draft Bill, and proposed amendments to this effect.[10]

7.65 The committee also acknowledges that a tension can sometimes exist between the competing right to freedom of religious expression and the right to non-discrimination. In the committee's view, discrimination on religious grounds is justifiable if it is reasonable and proportionate in all the circumstances. This does not mean, however, that discriminatory conduct by religious organisations should always be lawful. The law should not provide broad statutory exceptions allowing disproportionate or unreasonable discrimination on religious grounds. The committee considers that the potential impact of any discriminatory conduct on the individual concerned is a crucial issue when determining the reasonableness of such action.

7.66 In this regard, the committee notes comments from the Parliamentary Joint Committee on Human Rights that, without further explanation from the government about how the broad religious exceptions in the Draft Bill are consistent with other human rights, 'these provisions are likely to be incompatible with the right to non-discrimination'.[11]

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10 See, for example, Australian Association of Christian Schools, *Submission 359*, p. 14; Australian Catholic Bishops Conference, *Submission 360*, pp 2-3; Ambrose Centre for Religious Liberty, *Submission 409*, p. 5; Australian Christian Lobby, *Submission 419*, pp 4-5; Freedom 4 Faith, *Submission 447*, pp 20-23.

11 *Submission 595*, p. 5.

7.67 Turning to more specific issues relating to the religious exceptions, the committee has comments on several matters.

Exceptions for religious organisations in relation to employment

7.68 The committee considers that religious bodies and institutions should maintain the right to employ staff in accordance with their founding ethos and values, and notes evidence from submitters and witnesses that staff members' faith can be relevant to their appropriateness for employment even if they are not being employed in a specifically religious role.[12] The committee believes that religious organisations and educational institutions should retain this right, subject to the notification requirement discussed in more detail below.

Limited exception for Commonwealth-funded aged care

7.69 The committee agrees with the policy approach taken by the government in deciding to limit the religious exception for Commonwealth-funded aged care. The committee heard evidence, in particular, on the negative effects of discrimination against older LGBTI Australians in aged care settings,[13] and considers that it is fundamentally important that all older Australians maintain the right to access aged care services on an equal basis. The committee notes that in some areas of Australia there is very limited choice of aged care service providers, and hence does not agree with the argument that individuals will always be able to choose a non-religious service provider should they so wish.

Service provision delivered by religious organisations

7.70 More generally, while the committee is of the view that religious organisations should retain their statutory exceptions in relation to employment, it can see no reason why individuals should automatically lose their right to non-discrimination in the provision of services because a particular service is being provided by a religious organisation. The committee is of the view that no organisation should enjoy a blanket exception from anti-discrimination law when they are involved in service delivery to the general community. It is vitally important that the rights of minority groups are upheld when they are receiving help from service providers, particularly in cases where the service provision is Commonwealth-funded.

7.71 The committee notes that, in other jurisdictions in Australia and internationally, much tighter exceptions apply in relation to service delivery by religious organisations than proposed in the current wording of the Draft Bill. The committee heard evidence that, under the Tasmanian Anti-Discrimination Act, there are no statutory exceptions for religious organisations from anti-discrimination requirements in relation to the delivery of services to the public. The Tasmanian Anti-Discrimination Commissioner told the committee that these provisions have

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12 See, for example, Freedom 4 Faith, *Submission 447*, p. 23; Mr Robert Johnston, Australian Association of Christian Schools, *Committee Hansard*, 23 January 2013, p. 64.

13 See, for example, Associate Professor Mark Hughes, *Committee Hansard*, 24 January 2013, p. 40.

operated in Tasmania for over a decade without serious concerns being raised about the erosion of freedom of religion.[14]

7.72 Accordingly, the committee is recommending that the Draft Bill be amended in order to remove exceptions that allow religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful. The committee strongly supports the Tasmanian model for religious exceptions to anti-discrimination law in this regard, and considers that this model should be implemented nationally through the consolidated Commonwealth Act. With regards to the specific amendments that would be required to implement this recommendation, the committee leaves it to the Department to develop appropriate drafting for clause 33 in order to meet this policy goal, undertaking further consultation if necessary.

7.73 In making this recommendation, the committee notes that some of the religious organisations who presented evidence to the inquiry informed the committee that they provide services on a non-discriminatory basis.[15] Many other stakeholders made compelling arguments for the limitation or removal of religious exceptions in relation to service delivery, on the basis that all Australians should be able to access services equitably.[16]

7.74 In relation to government tender requirements for the provision of a service, the committee considers that the Australian Government should have the option of specifying in any public tender process that the service must be provided on a non-discriminatory basis, if that is appropriate in the particular case. The committee has heard evidence that amendments to the Draft Bill may be necessary to clarify that the government can make such specifications in public tender processes.[17] The committee considers that the Department should investigate if this is the case, and, if so, the Draft Bill should be amended to clarify that exceptions in the legislation do not limit the government's ability to require that a service contracted by the Commonwealth be provided on a non-discriminatory basis.

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14 Ms Robin Banks, Anti-Discrimination Commissioner of Tasmania, *Committee Hansard*, 23 January 2013, p. 47.

15 The Salvation Army Australia, *Submission 499*, pp 3 and 7; Mr David Martin, HammondCare, *Committee Hansard*, 24 January 2013, pp 34-35. These these stakeholders supported the retention of religious exceptions in anti-discrimination legislation. See also:
The Reverend Peter Sandeman, Anglicare SA, 'If we believe all people are equal we must live this', article tabled by Liberty Victoria at public hearing on 23 January 2013.

16 Discrimination Law Experts Group, *Submission 207*, pp 28-29; National LGBTI Health Alliance, *Submission 320*, p. 2; The Equal Rights Trust, *Submission 367*, pp 30-31; Human Rights Law Centre, *Submission 402*, pp 48-49; Human Rights Council of Australia, *Submission 475*, p. 13; Victorian Gay and Lesbian Rights Lobby, *Submission 534*, pp 27 and 31-36.

17 Mr Greg Manning and Mr Paul Pfitzner, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 17.

7.75 As a final point, the committee notes that religious freedom is protected under section 116 of the Australian Constitution, as well as under the ICCPR and other international treaties to which Australia is a signatory. In that context, the committee acknowledges comments from stakeholders that there may be a strong argument that reasonable and proportionate actions taken in line with religious freedoms are likely to be considered 'justifiable conduct' under the general exception in clause 23 of the Draft Bill.[18]

Notification requirements

7.76 A significant number of submitters and witnesses argued that, in the interests of transparency, religious organisations intending to rely on an exception in clause 33 should be required to notify prospective employees, students or other service users of that intention. The committee heard that a similar requirement exists with regards to religious educational institutions in South Australia. Subsection 34(3) of the *Equal Opportunity Act 1984* (SA) provides that these educational institutions must have a written policy regarding any discriminatory practices, and must give a copy of this policy to prospective employees, as well as to any students, parents or members of the public who request one.

7.77 The committee is of the view that there is considerable merit in this type of notification requirement for religious organisations intending to rely on an exception in clause 33. Such a measure would promote transparency and alert individuals ahead of time as to the practices of a particular organisation.

7.78 The committee notes evidence from the Australian Catholic Bishops Conference that Catholic health and aged care services in Australia already have a publicly available ethical standards document.[19] A representative from the Australian Association of Christian Schools also told the committee that, if religious freedoms were more adequately protected, it would be quite reasonable for schools to declare the basis on which they make decisions in such matters.[20]

7.79 The committee does not consider that such a requirement would impose an undue administrative burden on organisations, and believes that the public benefit in having such matters clearly stated on the public record by service providers justifies its inclusion in the Draft Bill.

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18 See, for example, Ms Lucy Adams, Public Interest Law Clearing House Homeless Persons' Legal Clinic, *Committee Hansard*, 23 January 2013, p. 60; Public Interest Advocacy Centre, *Submission 421*, p. 30.

19 The Reverend Brian Lucas, Australian Catholic Bishops Conference, *Committee Hansard*, 24 January 2013, p. 27.

20 Mr Robert Johnston, Australian Association of Christian Schools, *Committee Hansard*, 23 January 2013, p. 63.

Recommendation 11

7.80 The committee recommends that the Draft Bill be amended to remove exceptions allowing religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful. The committee considers that the Australian Government should develop specific amendments to implement this recommendation, using the approach taken in the Tasmanian *Anti-Discrimination Act 1998* as a model.

Recommendation 12

7.81 The committee recommends that clause 33 of the Draft Bill be amended to require that any organisation providing services to the public, and which intends to rely on the exceptions in that clause, must:

- **make publicly available a document outlining their intention to utilise the exceptions in clause 33;**
- **provide a copy of that document to any prospective employees; and**
- **provide access to that document, free of charge, to any other users of their service or member of the public who requests it.**

Complaints and court processes

7.82 The committee is of the view that the changes proposed in Chapter 4 of the Draft Bill which seek to improve access to justice will strike the right balance in enabling people with complaints to pursue claims of discrimination whilst minimising unmeritorious complaints and their costs to the broader community.

7.83 The committee considers that removing the separate complaints scheme for 'equal opportunity in employment' matters, and ensuring that those matters are provided for through their inclusion as protected attributes, will clarify the law and result in efficiencies.

Shifting burden of proof

7.84 The committee recognises that there has been considerable debate concerning the proposed shifting of the burden of proof in clause 124 of the Draft Bill, but considers that much of the public debate surrounding this provision has been misinformed. The Draft Bill only imposes a civil liability – not a criminal liability – so the suggestion that the Draft Bill removes the presumption of innocence is inaccurate and misleading.

7.85 The committee takes the view that the shifting burden of proof proposed in clause 124 is appropriate and will in fact reduce costs for respondents as they will only be required to produce evidence explaining that their conduct was justifiable after an applicant has established, through evidence, that unlawful treatment actually occurred. The committee considers that imposing this requirement on applicants will act as a deterrent against vexatious litigation.

7.86 Further, the committee notes the comments from the Parliamentary Joint Committee on Human Rights that 'it is a well-established practice in international and comparative human rights jurisprudence for the burden of proof to shift in discrimination cases once a prima facie case has been made'.[21]

Costs

7.87 The committee agrees with the approach set out in clause 133 of the Draft Bill, which provides that each party is to bear its own costs, but includes discretion in subclause 133(2) for the court to make orders as to costs. The committee notes that a number of stakeholders voiced support for this approach on the basis that it will markedly improve access to justice, particularly for vulnerable groups.[22]

Closing complaints

7.88 The committee supports the approach taken in clause 117 that streamlines and clarifies the AHRC's ability to close complaints, and provides an obligation to give notice of closure and the reasons for that closure. The committee commends the inclusion of paragraph 117(2)(c) that explicitly provides the AHRC with the authority to close complaints that it determines are frivolous, vexatious, unmeritorious or lacking in substance.

7.89 The committee acknowledges that it received evidence from submitters suggesting that, in those instances where leave is first required before a closed complaint can proceed to the Federal Court or the Federal Magistrates Court, provision should be made for representatives to initiate those applications on behalf of an applicant. The committee does not agree that such a provision is necessary, since clause 89 of the Draft Bill provides for representative actions in the first instance, and clause 129 provides a right of representation when applying to the Federal Court or Federal Magistrates Court in relation to unlawful conduct.

Other issues

7.90 Due to the complexity of the issues raised during the committee's inquiry, and the short timeframe in which it has been undertaken, the committee has necessarily focussed its attention on a limited number of key issues. In making its preceding comments and recommendations, the committee acknowledges that it has not been able to address all of the recommendations put forward in submissions and evidence to the inquiry.

7.91 Some of the issues raised by stakeholders – but in relation to which the committee has not been in a position to form extensive views – include:

- 'special measures' provisions in clause 21;

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21 *Submission 595*, p. 6.

22 See, for example, National Association of Community Legal Centres and Kingsford Legal Centre, *Submission 334*, p. 15; Australian Lawyers for Human Rights, *Submission 406*, pp 2-3; Mr Edward Santow, Public Interest Advocacy Centre, *Committee Hansard*, 24 January 2013, p. 10.

- 'reasonable adjustments' provision in subclause 23(6);
- the interaction between the proposed operation of the Draft Bill, and other state and territory laws provided for in clause 14, as well as the operation of the exception in clause 30 for conduct in accordance with prescribed laws; and
- the exception for insurance, superannuation and credit in clause 39.

7.92 In the circumstances, the committee considers that the Department is best placed to actively and thoroughly consider all evidence presented to this inquiry during the formulation of the final version of the legislation.

7.93 Further, and due to significant time limitations, the committee has not been in a position to closely consider certain recommendations proposed by submitters which relate to specific technical aspects of the Draft Bill. The committee therefore expects that, in addition to considering the recommendations set out in this report, the Department will analyse and address such suggestions prior to introduction into the parliament of the legislation in its final form.

7.94 In particular, the committee considers that recommendations that relate to improving the technical drafting of the legislation made by submitters such as the Australian Human Rights Commission (Submission 9), the Discrimination Law Experts Group (Submission 207), the Law Council of Australia (Submission 435), and the Parliamentary Joint Committee on Human Rights (Submission 595) should be closely examined by the Department.

Senator Trish Crossin

Chair

DISSENTING REPORT BY COALITION SENATORS

1.1 Coalition senators oppose the proposed *Human Rights and Anti-Discrimination Bill*. We do so for four main reasons:

- The provisions of the bill violate fundamental human rights;
- The scope of the bill is impossibly wide and dangerously vague;
- The bill is internally inconsistent and liable to produce unintended consequences;
- The bill would damage Australia's social fabric by encouraging a "culture of complaint".

1.2 We had considered the possibility of recommending a series of amendments to the Bill, in order to repair the serious flaws which we have identified. However, in our view the Bill is riddled with so many fundamental errors, of both a technical and substantive kind, that we have concluded that it would be better to abandon it altogether. As well, the Bill has become, in the relatively short time since its release last November, almost synonymous in the public mind with legislative over-reach and intrusive government – as the very strong reaction of so many commentators, opinion-leaders and ordinary citizens demonstrates.

1.3 In this Dissenting Report, we focus upon the main reasons why, in the view of Coalition senators, the Bill is, as a matter of principle, totally unacceptable in its current form. Nevertheless, we cannot refrain from observing that the "selling" of the Bill by the government, and in particular by the former Attorney-General, Ms Roxon, has been a master-class in political incompetence. Nothing could have been more calculated to destroy the prospects of reforming Australia's anti-discrimination laws than the high-handed, patronizing, politically correct approach of the former Attorney-General.

1.4 That is a shame, for we accept that Australia's existing suite of anti-discrimination laws – which have largely enjoyed bipartisan support – are imperfect and capable of improvement. In our recommendations, we identify one area in particular – discrimination on the grounds of sexuality – which is an obvious gap in the existing legislative scheme. However, that matter can be addressed by a simple amendment to the *Sex Discrimination Act*, rather than by the sweeping and intrusive changes to existing law which the Bill attempts.

The provisions of the bill violate fundamental human rights

1.5 Despite its misleading title, the draft bill is not a human rights bill at all, if by "human rights", we mean the principles declared, in particular, in Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Rather, important provisions of the Bill violate fundamental human rights recognized by those instruments. In particular:

- The definition of "unfavourable treatment" in cl. 19(2) of the Bill, by including "conduct that offends [or] insults", constitutes an impermissible limitation upon freedom of speech, freedom of expression and freedom of the press, protected by Article 19 of the Universal Declaration and Article 19 of the Covenant.
- The reversal of the burden of proof provided for by cl. 124 of the Bill, which casts the burden of proof upon a person against whom a complaint is made to establish that they did not act for an unlawful reason or purpose, is arguably inconsistent with the presumption of innocence provided for by Article 11 of the Universal Declaration and Article 14 (2) of the Covenant.

Freedom of expression

1.6 Article 19 of the Universal Declaration provides:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

1.7 Article 19 of the Covenant provides:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) for respect of the rights of reputations of others;
>
> (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

1.8 In a society in which respect for freedom of speech and expression is a fundamental value – and, in the view of coalition senators, Australia must always be such a society – the Parliament must be vigilant to ensure that those freedoms are not impinged upon by new laws – however well-meaning their purpose. If freedom of speech means anything, then that freedom cannot depend upon the popularity of those views. Indeed, it is the unpopular, unfashionable or eccentric view which is in most need of protection. We are in complete agreement with the wise observation of John Stuart Mill:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[1]

1.9 To categorize conduct (including speech) as "unlawful" because it might cause offence or insult to another person would impose a massive limitation of freedom of expression. Literally any controversial opinion would potentially be caught. It is difficult to imagine a measure more inimical to free public discussion than cl. 19(2) of this Bill. Not only would the proposal threaten Australia's proud tradition of free and robust political discussion, it would also, in the view of coalition senators, be a violation of Australia's obligations under Universal Declaration and the Charter, set out above.

1.10 Although, late in the day during the course of the last hearing on the Bill, the Secretary of the Attorney-General's Department indicated that the Government was likely to resile from the inclusion of "offends [or] insults" in the definition of unfavourable treatment, neither the previous Attorney-General, Ms Roxon, nor the new Attorney-General, Mr Dreyfus, have committed the government to that course. In any event, there is no indication that the similar words in cl. 51, taken from s. 18C of the existing *Racial Discrimination Act*, will be withdrawn.

Reversal of the burden of proof

1.11 Cl. 124 of the Bill creates a statutory presumption that a person against whom unlawful conduct is alleged that:

> the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct, unless the contrary is proved.

1.12 Article 11 of the Universal Declaration and Article 14 (2) of the Covenant recognize the presumption of innocence as a fundamental human right. While it is true that Arts. 11 and 14(2) deal specifically with criminal offences, they nevertheless give expression to a more general principle of procedural fairness: that a person accused of unlawful conduct should not have to prove their innocence. Cl. 124 violates that principle.

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1 Mill, *On Liberty* Ch. 2.

1.13 It is not to the point that an applicant must initially show a *prima facie* case before the burden shifts. That is merely a statement of the commonplace fact that the complainant, as the party seeking redress, must come to the court and put before it material on which it may act. In an ordinary civil case, the complainant will have the burden of proving each element of his cause of action on the balance of probabilities. Because of cl. 124, a complainant is doubly advantaged, because:

- he is only required to establish a *prima facie* case, not discharge the burden of proof on the higher standard (balance of probabilities); and
- on the critical issue in the case – the state of mind of the respondent – the burden of proof is reversed.

1.14 As well, a complainant is given a further significant forensic advantage as a result of cl. 8 of the Bill. This provides that a court may conclude that a person engaged in unlawful conduct for a reason or purpose if that reason or purpose "is one of the reasons [or] purposes" for the conduct. There is no requirement that it be the predominant reason or purpose, *or even a significant reason or purpose*. By contrast, other statutes which make culpability depend upon conduct being engaged in for an unlawful purpose or reason, usually require that the purpose or reason be a "substantial" purpose or reason.[2] So a complainant, while enjoying the significant forensic advantage of a reverse onus of proof, is given the additional (and unusual) advantage of being free of the "substantial purpose" requirement. No explanation is offered for the absence of a requirement of substantial purpose.[3]

1.15 A yet further consideration which illustrates how dangerous the reverse onus of proof would be is the fact that most commonly, complaints of unlawful discrimination are based on "indirect" discrimination rather than overt discrimination. Where indirect discrimination is alleged, the conclusion that the respondent has engaged in unlawful conduct is largely based on inferential evidence only. Conclusions based on inferential evidence are much harder to rebut, and even more so where the party against whom the complaint is brought has the burden of proof.

1.16 The effect of these four considerations, taken together, would be to make complaints almost impossible to defend.

1.17 Unlike cl. 19(2), the government has shown no inclination whatever to withdraw the reverse onus of proof provision in cl. 124.

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2 See, for instance, s. 4F of the *Competition and Consumer Act.*

3 *Explanatory Memorandum*, p. 13.

The scope of the bill is impossibly wide and dangerously vague

1.18 The violations of traditional rights and freedoms embodied in the Bill are not, however, our only serious concern. The entire approach of the Bill is to expand the categories of discriminatory conduct so widely as to make almost any grievance which one citizen might have against another capable of being brought within one or more of its categories. This is, in particular, to be seen in the extension of the number of "protected attributes" (cl. 17 of the Bill) to new attributes of almost limitless meaning. Two, in particular, which concern Coalition senators are "political opinion" and "social origin".[4] To make matters worse, no attempt is made in the Bill to define these two very wide categories.

1.19 In evidence from the Attorney-General's Department, it was indicated that the terms had their genesis in International Labour Organization Convention No. 111, which is one of the "ILO instruments" identified by the Bill.[5] This instrument does not, itself, define the terms, however the Departmental witness pointed to guidelines issued by the International Labour Organizations which suggest the meaning of the terms:

> **Senator BRANDIS:** Well, I am focusing on clause 17. What about social origins, Mr Wilkins? What does that mean? Mr Manning?
>
> **Mr Manning:** The International Labour Organization has put out some guidance in relation to the concept.
>
> **Senator BRANDIS:** Pausing there, Mr Manning, the International Labour Organization has given guidance to that term but not to the term 'political opinions', right?
>
> **Mr Manning:** It has also in relation to political opinion.
>
> **Senator BRANDIS:** It has?
>
> **Mr Manning:** They are not defined in the treaty, but to assist member states the ILO has put out its views about what they mean.
>
> **Senator BRANDIS:** Has that become part of the jurisprudence?
>
> **Mr Manning:** I do not think it is jurisprudence in the sense that it is just the body under the auspices of which the treaties have been developed to put them out.
>
> **Senator BRANDIS:** Would it be regarded as part of the opinio juris?
>
> **Mr Manning:** I think they would be, yes. It is guidance material. It would be influence, I would have thought, without necessarily being binding.
>
> ...

4 Sub-clauses 17(1)(k) and (r), respectively.

5 Sub-clause 3(3)(b).

> **Senator BRANDIS:** Why don't you just read them to us, please?
>
> **Mr Manning:** The ILO has suggested social origin is intended to include an individual's membership in a class, caste or socio-occupational category. That comes from its General Survey on Equality in Employment and Occupation of 1996 and the General Survey on Equality in Employment and Occupation of 1988.
>
> ...
>
> **Senator BRANDIS:** What about political opinion? Can you read that out to us, please?
>
> **Mr Manning:** This is taken from the ILO's systems for Business on International Labour Standards which talks about political opinion. I am not quoting but it includes membership in a political party, express political, sociopolitical or moral attitudes, or civic commitment. Workers should be protected against discrimination in employment based on activities expressing their political views. This protection does not extend to politically motivated acts of violence.[6]

1.20 Coalition senators record their deep concern at a proposal to introduce such fundamental changes to Australian law, which may have such a profound effect upon the way in which Australians deal with one another, on the basis of terms so vague that the only definitions to which the government can point are guidelines issued by the ILO.

1.21 The breadth of these two new categories illustrates the dangerous over-reach of the Bill. Although they are, in each case, limited to "work and work-related areas,"[7] they nevertheless extend what is ordinarily thought to be the scope of anti-discrimination law. In doing so, they remove the focus of such laws from where, in the opinion of Coalition senators, it ought to be: on members of social groups who, because of a personal attribute, are vulnerable to unfair treatment. These are not necessarily statistical minorities (women, for instance, have always been one of the social categories protected by anti-discrimination law), although they usually are. What they have in common is that, because of the identified attribute, they belong to a group of persons at risk of conduct which unfairly denies them equality of opportunity in certain key areas – such as the workplace, education, access to public facilities or everyday amenities. But this Bill goes much further, by seeking to assimilate any form of unfavourable treatment, alleged by virtually any member of society, within the reach of anti-discrimination law.

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6 *Committee Hansard*, 4 February 2013, p. 8.

7 Sub-clause 22(3).

1.22 Indeed, the key to grasping the philosophy of the Bill lies in its treatment of unlawful discrimination in terms of *unfavourable* treatment rather than *unfair* treatment. The concept of "unfavourable" treatment is much wider than "unfair" treatment. When the prohibited conduct is expressed in terms so wide, and then applied to categories to which every member of society belongs – for instance, everyone has a "social origin" – the reach of the legislation has, in our view, gone well beyond where anti-discrimination law should be. The effect of this Bill would be to replace the proper protection of vulnerable groups from unfair treatment, with an all-purpose grievance-settling machinery, in which the State arrogates to itself the role of settling the day-to-day differences between citizens, and, in doing so, defining the norms of everyday social behaviour. This is a nightmarish dystopia which only Kafka could have imagined.

1.23 It is for this reason that Coalition senators believe that this Bill is not, in truth, an anti-discrimination law at all. It is an attempt to use the guise of anti-discrimination to advance a much more ambitious and intrusive social agenda, in which the role of the state as the arbiter not just of legality, but of the norms of everyday conduct, would be massively expanded. Not only is this a horrendous result in itself; it also diverts attention away from the vulnerable Australians whom it ought to be the core purpose of anti-discrimination law to protect.

1.24 Lastly, Coalition senators point out that the expansion of the "protected attributes" is not the only dangerously vague area of the Bill. Clause 3 of the Bill includes among its objects:

> to promote recognition and respect within the community for...the principle of equality (including both formal and substantive equality)...[8]

No definition of the term "substantive equality" is offered. However the use of the adjective "substantive" does not suggest that the draftsman had in mind merely the notion of equality of opportunity.

1.25 Coalition senators do not support the adoption of language at once so treacherously vague and so ideologically-charged. Nor are we of the view that its presence in the objects clause is appropriate, or necessary for the efficacy of anti-discrimination law. We do not see any point in attempting a statutory definition of "equality". It is at least theoretically possible that the wisdom of the Gillard Government is so great that it is able to solve a profound problem that it has eluded philosophers since the time of Socrates. However, on recent performance, we think it unlikely.

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8 Subclause 3(1)(d)(i).

The bill is internally inconsistent and liable to produce unintended consequences

1.26 The inclusion of "political opinion" among the "protected attributes" gives rise to an unintended consequence. Clause 17 lists 18 such attributes, in alphabetical order, without distinction or preference between them. Hence, the Bill is as much about protecting political opinions as it is about protecting any other attribute. As no definition of "political opinion" is contained in the Bill, cl. 17(1)(k) can only be understood as an intended reference to all political opinions. This produces an internal inconsistency. The Bill protects people from forms of behaviour which is, for instance, racist or homophobic. Simultaneously, it protects racist or homophobic political opinions. The Secretary of the Attorney-General's Department, Mr Roger Wilkins, acknowledged that this was a problem, which he thought could be corrected by a drafting change.[9] Professor Simon Rice of the Australian National University, Chair of the Anti-Discrimination Law Experts Group, agreed that the Bill appeared to contain an "inconsistency" in this respect.[10]

1.27 Coalition senators do not regard this issue as merely a drafting error. It goes to a central aspect of the Bill. If "political opinion" is a protected attribute, then it cannot be confined to one type of political opinion only. Once that is accepted, then the inclusion of the attribute inevitably protects opinions which are hostile to the other purposes of the Bill. This is yet another example of the consequences of over-reach.

The bill would damage Australia's social fabric by encouraging a "culture of complaint"

1.28 As we observed in paragraph 20, the scope of the Bill goes well beyond protecting vulnerable people from unfair treatment, but seeks to create a comprehensive mechanism for the arbitration and settlement of virtually all social differences, wherein one citizen might feel aggrieved by his treatment at the hands of another. It is not the role of the state to do so; if it were, the intrusion of the state into the everyday lives of citizens would be almost without limit.

1.29 One consequence of such a significant realignment of the relationship between the citizen and the state is that, were it to occur, it would encourage the development of a more litigious society, dominated by what Robert Hughes once described, in a critique of contemporary America, as a "culture of complaint".[11] Both the current and former Attorneys-General regarded the ease with which access might

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9 *Committee Hansard*, 4 February 2013, p. 7.

10 *Committee Hansard*, 24 January 2013, p. 56.

11 R Hughes, *Culture of complaint: the fraying of America*, Harvill, London, 1995.

be had to the Bill's dispute-settlement mechanisms as one of its virtues.[12] Coalition senators are of a contrary view.

1.30 By introducing a quasi-litigious model for the settlement of disputes which are, today, resolved informally between citizens without the state's intervention, not only is the role of government massively expanded; resort to such governmental mechanisms, rather than informal resolution, will increasingly become the norm. That is not a characteristic of a healthy society; it is a description of a sick one. The Bill positively encourages this, by making the complaints procedure cost-free,[13] reversing the burden of proof,[14] and relieving complainants of the requirement of proof in accordance with the normal rules of evidence.[15]

1.31 Of course, each of those features of the Bill is also likely to have the effect of encouraging opportunistic complaints which it is not worth an employer's while to defend, and which he is more likely to pay off to go away.

An area for reform

1.32 For all of the foregoing reasons, Coalition senators are of the view that the Bill is so fundamentally flawed, in both conception and design, that it should proceed no further. Perhaps it may find a home in a cultural museum of the future, as an exhibit of how close Australians, in the Year of Our Lord 2013, came to being captured by "the Nanny State". But it has no place in a healthy liberal democracy. Nor would its enactment advance desirable reform of the existing suite of anti-discrimination laws.

1.33 Nevertheless, Coalition senators were impressed with one part of the evidence before the inquiry – that from the GLBTI community,[16] who pointed out that none of the Commonwealth Acts which deal with anti-discrimination law extend to sexuality-based discrimination. This is, in our view, an obvious gap, which should be addressed. People in that category are no doubt vulnerable to unfair discrimination. Discrimination against members of that community is unacceptable by modern community standards, and is reflected in the removal in 2008 – on a bipartisan basis – of all discriminatory treatment from Commonwealth legislation. It is also consistent with the policy which the Coalition took to the 2010 election. A simple amendment to the *Sex Discrimination Act*, which includes sexuality (or, for completeness, identity as a gay, lesbian, bisexual, transgender or intersex person) as a protected attribute, would overcome that lacuna.

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12 See, for instance, Nicola Roxon doorstop interview, 20 November 2012; and interview with Mark Dreyfus by Steve Austin, ABC 612 (Brisbane), 22 January 2013.

13 Cl. 133.

14 Cl. 124.

15 Cl. 131.

16 Acronym for Gay, Lesbian, Bisexual, Transgender and Intersex.

Recommendation 1

1.34 Coalition Senators recommend that the Bill not be passed.

Recommendation 2

1.35 Coalition Senators recommend that Part II of the *Sex Discrimination Act* 1984 be amended to include identity as a gay, lesbian, bisexual, transgender or intersex person as a protected attribute to which the Act extends.

Senator Gary Humphries
Deputy Chair

Senator Sue Boyce

Senator the Hon George Brandis SC

ADDITIONAL COMMENTS BY THE AUSTRALIAN GREENS

1.1 Equality is a cornerstone of our democracy; it is fundamental to ensuring that individuals and groups can access opportunities and essential standards of living so as to participate fully in society and realise their potential. The Australian Greens are committed to creating a more equal world and believe that as a community we should take positive steps to better promote and protect the right to equality and non-discrimination, including by actively addressing the underlying causes of systemic discrimination.

1.2 For these reasons, the Australian Greens strongly support the Government's consolidation of existing Commonwealth anti-discrimination laws, which has provided 'an opportunity to consider the existing framework, and explore opportunities to improve the effectiveness of the legislation to address discrimination and provide equality of opportunity'.[1] The consolidation process has been extensive and ongoing for some time, and we recognise the level of consultation that has been undertaken with stakeholders and the public in order to develop clearer and more consistent anti-discrimination legislation.

1.3 As a result of this comprehensive consolidation process, the Draft Bill is a good improvement on the current situation. In particular, the Australian Greens strongly support a number of key changes, including: the unified definition of discrimination; the expanded coverage of protection against discrimination in all areas of public life; proposed clause 124 that provides for a shared burden of proof; the inclusion of sexual orientation and gender identity as protected attributes; and the change to a 'no costs' jurisdiction.

1.4 However, throughout the Senate Committee's inquiry it became apparent that there remain some gaps and areas that require further strengthening and clarity. For the most part, the Committee Report addresses these gaps and makes recommendations for improvement. The Australian Greens support these recommendations, which are aimed at improving the Draft Bill. However, the Australian Greens are of the view, based on the strong evidence and expert submissions provided throughout the inquiry process, that some recommendations made by the Committee could go further. We also have additional comments and recommendations to make in relation to matters that have not been fully considered by the Committee Report.

1.5 Before we address these matters, we firstly wish to emphasise the importance of the Draft Bill. This Draft Bill provides an opportunity to improve and strengthen Australia's anti-discrimination laws and better promote the right to equality, which

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1 Attorney General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, p. 5 (accessed on 19 February 2013).

will have many positive effects. Recent evidence shows that more equal societies enjoy better public health and educational outcomes, improved social cohesion and positive economic results such as increased productivity, efficiency and growth. These outcomes benefit the whole community.

1.6 The eventual passage of, and assent to, this Draft Bill, incorporating the changes suggested by the Committee Report and these additional comments, will result in positive social and economic benefits for all Australians. This Draft Bill should therefore be prioritised by the Government for introduction and passage through the Parliament by the end of the June sitting this year.

Protected attributes

1.7 The Committee Report recommends that the definition of gender identity be clarified and advocates for protection against discrimination to be extended to intersex people, victims of domestic violence and on the basis of irrelevant criminal record. These recommendations are all very welcome and strongly supported by the Australian Greens. However, we feel that the Draft Bill should also be amended to extend the definition of family responsibilities to include caring responsibilities. In addition, we feel that an opportunity has been lost by failing to expand the protected attributes to include 'social status' (i.e. meaning a person's status as being homeless, unemployed or a recipient of social security payments).

1.8 The Committee Report highlights that several submitters, such as the Discrimination Law Experts Group and the ACTU, called for the definition of family responsibilities to be explicitly extended to cover a broader range of care arrangements. The rationale behind broadening this definition is twofold. Firstly, the definition should be inclusive and recognise the 'different family, caring and kinship relationships' of different groups, which is consistent with the overall aims and purposes of the Draft Bill that seeks to promote equality and celebrate diversity in Australian society. [2] Secondly, the ACTU and the AHRC argued that the definition required amendment so that the Draft Bill was consistent with other relevant Commonwealth laws and state and territory legislation.[3] The Australian Greens feel that this minor amendment is within the scope of the consolidation process and that any regulatory impact would be minimal. We therefore recommend that the definition of 'family responsibilities' be changed to 'family and caring responsibilities'.

1.9 Unfortunately, very little attention was given in the Committee Report to the suggestion by several expert witnesses that 'social status' be included as a protected attribute under the Draft Bill. It is well established that discrimination against people who are homeless, unemployed or recipients of social security payments is widespread in our community.[4] The United Nations Committee on Economic, Social and Cultural Rights has recognised that people can experience 'pervasive discrimination,

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2 Discrimination Law Experts Group, *Submission 207*, p. 17.

3 ACTU, *Submission 310*, p 5; AHRC, *Submission 9*, p. 9.

4 Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination', *Deakin Law Review15* (2002), Volume 7(2).

stigmatization and negative stereotyping' as a result of experiencing poverty or homelessness, which can significantly affect their ability to access and enjoy other human rights.[5]

1.10 The extent of this discrimination in Australian society, and the need for reform to the Draft Bill, was highlighted in the submissions by the HRLC, PIAC and PILCH. Compelling evidence, put forward by Lucy Adams of the PILCH Homeless Persons' Legal Clinic at the Melbourne hearing, made the case for including 'social status' as a protected attribute under the Draft Bill:

> Social status, including homelessness, unemployment and receipt of social security should be a protected attribute. The experience of the PILCH Homeless Persons' Legal Clinic shows us the devastating effect of discrimination against homeless people on a day-to-day basis, and yet this discrimination remains lawful in Australia...[6]
>
> [The clinic] conducted a consultation in 2006 with 183 people who had experienced homelessness. Seventy per cent of them identified that they experienced discrimination on the basis of their homelessness or their receipt of social security or their unemployment or a combination of those things when trying to access accommodation...and 50 per cent of those people identified that they felt discrimination had prolonged their homelessness and made it more difficult or impossible for them to find a sustainable pathway out of homelessness. It does prevent people accessing goods and services. It prevents them accessing accommodation. It essentially presents a barrier to economic and social participation and exacerbates social exclusion. The impacts of that are numerous, including on people's physical and mental health.[7]

1.11 The Australian Greens support the inclusion of 'social status' (to include homelessness, unemployment and recipients of social security payments) as a protected attribute under the Draft Bill. While we understand that this is an expansion of the law and there is no precedent for protecting people from discrimination on the basis of their 'social status', similar to the Committee's view on protecting victims of domestic violence we believe that this is another area where the Commonwealth must lead the way.

1.12 The Australian Greens also concur with the submissions by the AHRC, the Discrimination Law Experts Group, the HRLC, and other organisations,[8] which recommend that subclause 22(3) should be amended to extend protections for the seven attributes set out in that subclause to 'all areas of public life'.[9] We believe that

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5 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20, 2 July 2009, para 35.

6 *Committee Hansard*, 23 January 2013, p. 57.

7 *Committee Hansard*, 23 January 2013, p. 60.

8 VGLRL, *Submission 534*, p 5; PIAC, *Submission 421*, p. 4.

9 The seven attributes are: family responsibilities; industrial history; medical history; nationality or citizenship; political opinion; religion; and social origin.

such a change will not only reduce uncertainty and simplify the law,[10] but is more likely to be consistent with the right to equality and non-discrimination.[11]

Exception for justifiable conduct

1.13 The Australian Greens strongly support the recommendation of the Committee Report that clause 23 of the Draft Bill be amended to address the concerns raised by stakeholders. In particular, the provision should be refined to ensure it is 'drafted narrowly in accordance with human rights principles and construed narrowly in accordance with the objects of the Bill and the beneficial nature of the legislation, and...focused clearly and unequivocally on the achievement of substantive equality'.[12] In this regard, the Australian Greens agree that the words 'a legitimate aim' in clause 23(3)(b) be replaced with the words 'an aim that is consistent with achieving the objects of the Act'. We also support the submissions made by the Discrimination Law Experts Group and the HRLC and say further that a clear connection should be required between the justifiable nature of the conduct and the objects of the Act.[13]

Inherent requirements exception

1.14 As the Committee Report recognises, some submitters opposed the inclusion of the 'inherent requirements of work' exception in clause 24. Submitters expressed concern regarding the lack of definition around 'inherent requirements'[14] and the extension of the exception to all protected attributes, which effectively reduces protection against discrimination.[15] There was also evidence that this clause is superfluous because the general exception for justifiable conduct under clause 23 'will provide employers with sufficient scope to defend the use of job requirements as criteria for recruitment and performance management in work'.[16] On this basis, the Australian Greens recommend the removal of clause 24 from the Draft Bill. Alternatively, at a minimum, the inherent requirements exception should specify that duty-holders must make reasonable adjustments before they can rely on the inherent requirements exception.

Religious exceptions

1.15 The Australian Greens acknowledge the importance of the right to freedom of religion and have recommended that protection of this attribute under the Draft Bill be extended to all areas of public life (refer to recommendation 4 below). As such, we respect the right of religious organisations to ordain, appoint, train and educate priests, ministers and members of a religious order in accordance with their own

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10 AHRC, *Submission 9*, p. 9; HRLC, *Submission 402*, p. 30; Discrimination Law Experts Group, *Submission 207*, p. 14.

11 Parliamentary Joint Committee on Human Rights, *Submission 595*, p. 8.

12 Discrimination Law Experts Group, *Submission 207*, p. 24.

13 Discrimination Law Experts Group, *Submission 207*, p. 24; HRLC, *Submission 402*, p. 45.

14 ACTU, *Submission 301*, p 8.

15 Discrimination Law Experts Group, *Submission 207*, p. 26.

16 Discrimination Law Experts Group, *Submission 207*, p. 26.

internally-established practices and doctrines and accept that clause 32 of the Draft Bill is reasonable and should remain.

1.16 However, we do not believe that religious organisations should be automatically exempt from acting consistently with the right to non-discrimination in all instances. Clause 33 of the Draft Bill applies to fields of activity which go beyond the internal workings of religious organisations and impact on members of the public. We therefore support the Committee's recommendation that the Draft Bill be amended to remove exceptions allowing religious organisations to discriminate against individuals in the provision of services. However, after considering a number of written submissions by various stakeholders, the Australian Greens are of the view that we should go much further if we are serious about promoting and protecting the right to equality in Australian society.

1.17 A number of human rights groups and legal experts submitted 'that there should be no permanent exceptions for religious organisations in respect of any protected attributes'.[17] There was evidence that the existing religious exceptions regime effectively 'perpetuates a false and unjustified hierarchy of rights, entrenches systemic discrimination and generally restrains society's pursuit of equality'.[18]

1.18 There was also clear evidence from organisations working with religious bodies that the blanket exception is simply not needed,[19] and instead religious organisations can 'rely on the general exception of justifiable conduct in clause 23 of the Draft Bill'.[20] Indeed, it was submitted that the general exception of justifiable conduct clause, 'used in the right way, would allow a more thorough examination of human rights in conflict and consideration of how they might be balanced'.[21] The Australian Greens are concerned by this evidence, which clearly indicates that the blanket and permanent exception in clause 33 that applies to religious organisations is arbitrary, overly broad and unnecessary, particularly in light of the new general exception of justifiable conduct clause. We therefore recommend that the permanent religious exception contained in clause 33 of the Draft Bill be removed, in favour of reliance on the general exception for justifiable conduct.

Costs

1.19 The Australian Greens support clause 133 of the Draft Bill, which provides that each party will be required to bear their own costs, subject to the court's discretion to award costs in justifiable circumstances. However, we note that some submitters indicated that the provision should be amended to limit costs orders against complainants to circumstances in which the complaint was vexatious, frivolous or

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17 PIAC, *Submission 421*, p. 30. See also HRLC, *Submission 402*, pp 46-48; PILCH, *Submission 425*, pp 17-18; NACLC/KLS, *Submission 334*, pp 38-42.

18 HRLC, *Submission 402*, p. 47.

19 Ms Lucy Adams, PILCH Homeless Persons' Legal Clinic, *Committee Hansard*, 23 January 2013, p. 60.

20 PILCH, *Submission 425*, p. 17.

21 NACLC/KLS, *Submission 334*, p. 38.

without foundation. We are of the view that the Australian Government should give further consideration to whether clause 133 requires refinement to limit costs orders against complainants to circumstances in which the complaint was vexatious, frivolous or without foundation.

Reasonable adjustments

1.20 While there is some discussion in the Committee Report in relation to reasonable adjustments, the Committee does not express a view or recommendation on this matter. This is despite the concerns raised by submitters regarding the inclusion of reasonable adjustments concept in the justifiable conduct exception, rather than within the definition of discrimination, which has the effect of weakening protection against discrimination.[22] The Australian Greens feel that any weakening in the Draft Bill requires adequate consideration and response.

1.21 Accordingly, taking into account a number of written submissions on this matter, the Australian Greens recommend that the duty to provide reasonable adjustments should be incorporated within the definition of discrimination, as a separate subclause. This will bring the Draft Bill into line with the current situation.

1.22 We are also of the view that the explicit duty to provide reasonable adjustments should be applicable to all attributes, and note that Victorian anti-discrimination law requires employers to make reasonable adjustments for employees with family or caring responsibilities, which appears to be working to the benefit of both employers and employees. This amendment would also bring the Draft Bill into line with what is currently best-practice under domestic law.

Special measures

1.23 Similarly, while there is some discussion in the Committee Report regarding the special measure provision under clause 21 of the Draft Bill, no recommendation follows. This is despite the fact that several submitters raised significant concerns regarding the lack of a consultation requirement and that the way the clause is currently drafted is inconsistent with international human rights law. The Australian Greens believe that the 'special measures' clause under the Draft Bill requires amendment for the following reasons highlighted by the National Congress of Australia's First Peoples:

> [t]he Bill adopts a uniform definition of special measures, but does not include a specific requirement for free, prior and informed consent of First Peoples in the making of laws and policies which affect Aboriginal and Torres Strait Islander Peoples, as required in the United Nations Declaration on the Rights of Indigenous Peoples...special measures are used across Australia to enact laws for the 'advancement' of First Peoples without any yardstick for their effectiveness, duration or community support and acceptance...where laws and policies are being created that affect First Peoples, these peoples should be properly informed and there should be

22 Discrimination Law Experts Group, *Submission 207*, p. 19.

> honest and open negotiation so that affected peoples are able to give their free and prior informed consent.[23]

1.24 The Australian Greens are particularly cognisant of the way that 'special measures' provisions have been used in the past to justify top-down policy approaches particularly in relation to indigenous affairs; the Stronger Futures legislation is a case-in-point. We encourage the Government to refine this clause and note that the submissions of the Discrimination Law Experts Group and the HRLC provide guidance as to how the special measures clause could be amended to better promote the right to equality and non-discrimination. We also note that the Parliamentary Joint Committee on Human Rights indicated that as it is currently drafted this clause appears to enable measures that limit rights to be defined as a special measure and request the Government specifically respond to this concern.[24]

Insurance exception

1.25 A matter that is not addressed in the Committee Report, but which was raised through both written submissions and at the Melbourne hearing, is concern for the current operation of the exception for insurance, superannuation and credit in clause 39 of the Draft Bill. The Mental Health Council of Australia (MHCA) and beyondblue drew the Committee's attention to the way that people with a mental illness regularly experience discrimination when they seek to obtain insurance or claim against an insurance policy. The MHCA and beyondblue raised significant concern that the current exception that applies to insurers is not operating in the spirit in which it was intended to apply and suggested that the Draft Bill be amended to guard against the arbitrary application of this exception. The Australian Greens support the submissions of the MHCA and beyondblue and recommend that the Government consider improving accountability and transparency mechanisms under clause 39, including clarification of the term 'other relevant factors'. The Explanatory Memorandum could also be amended to provide further clarification and explanation of the purpose of the exception.

Systemic discrimination

1.26 Another matter, which was not addressed in detail during the hearing process but that shone through many written submissions, is the need for the Draft Bill to be amended to better address systemic discrimination. Systemic discrimination occurs as a result of patterns, policies and practices that exist in society's institutions and structures and which have the effect of creating and perpetuating disadvantage for whole groups of people. To effectively eliminate barriers to equality, the law must recognise and actively address systemic discrimination that is entrenched in our social structures.[25] The Australian Greens are of the view that the following changes to the

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23 National Congress of Australia's First Peoples, *Submission 238*, p. 7.

24 PJCHR, *Submission 595*, p. 9.

25 HRLC, *Advance Australia Fair: Addressing Systemic Discrimination and Promoting Equality*, 2011, p. 4.

Draft Bill would improve the law's ability to effectively tackle systemic discrimination:

- Include a positive duty on the public and private sector to promote equality and eliminate unlawful discrimination;
- Amend clause 60 – right to equality before the law – so that it applies to all protected attributes;
- Make provision for representative complaints by the AHRC or public interest organisations on behalf of individuals or groups experiencing discrimination; and
- Consider amending the Draft Bill to prioritise and allocate responsibility for sexual orientation, gender identity and intersex issues with a member of the AHRC.

1.27 Amending the Draft Bill to include a positive obligation to promote equality would bring Commonwealth law into line with best-practice under comparative international jurisdictions and current domestic law.[26] It will also ensure that focus is directed towards preventing discrimination in the first place, rather than punishing misconduct, which will go some way towards addressing systemic discrimination.

1.28 Making provision for equality before the law on the basis of all attributes will ensure that laws are non-discriminatory; this will actively promote the right to equality and non-discrimination through the law-making process. To reduce confusion and uncertainty in the Draft Bill, and so that it is consistent with international human rights law, the right to equality before the law in clause 60 should be extended to all protected attributes.

1.29 PILCH and NATSILS made a strong case for amending the Draft Bill to allow for representative actions to be brought on behalf of individuals or groups experiencing discrimination. As Rachel O'Brien from NATSILS said, 'allowing representative complaints to proceed to court could go a long way to addressing some of the systemic issues facing Aboriginal and Torres Strait Islander peoples'.[27] The Australian Greens consider that this amendment is crucial, noting that representative proceedings are currently possible in Victoria and it is appropriate for Commonwealth legislation to promote consistency and follow best-practice domestic law.[28]

1.30 Given the incorporation of sexual orientation and gender identity as protected attributes under the Draft Bill, and the Committee's recommendation to include intersex as a protected attribute, the Australian Greens feel that it is timely and appropriate for these matters to be prioritised by the AHRC. We also suggest that the Australian Government consider amending the Draft Bill to allocate responsibility for these matters to a member of the Commission.

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26 *Equal Opportunity Act 2010* (Vic), section 15; and *Equality Act 2010* (UK), section 149.

27 *Committee Hansard*, 24 January 2013, p. 43.

28 *Equal Opportunity Act 2010* (Vic), section 113.

Recommendation 1

1.31 The Draft Bill should be prioritised by the Government for introduction and passage through the Parliament by the end of the June sitting this year.

Recommendation 2

1.32 That the definition of 'family responsibilities' be changed to 'family and caring responsibilities'.

Recommendation 3

1.33 That the Draft Bill be amended to incorporate 'social status' (to include homelessness, unemployment and recipients of social security payments) as a protected attribute.

Recommendation 4

1.34 That subclause 22(3) be deleted from the Draft Bill, in order to extend protections for the seven attributes currently set out in that subclause to 'all areas of public life'.

Recommendation 5

1.35 In addition to replacing the words 'a legitimate aim' in clause 23(3)(b) with the words 'an aim that is consistent with achieving the objects of the Act', the Australian Greens recommend that the Australian Government consider the submissions of the Discrimination Law Experts Group and the HRLC regarding whether a clear connection should be required between the justifiable nature of the conduct and the objects of the Act.

Recommendation 6

1.36 That clause 24 be removed from the Draft Bill. Alternatively, and at a minimum, the inherent requirements exception should specify that duty-holders must make reasonable adjustments before they can rely on the inherent requirements exception.

Recommendation 7

1.37 That the religious exception contained in clause 33 of the Draft Bill be removed, in favour of reliance on the general exception for justifiable conduct.

Recommendation 8

1.38 That the duty to provide reasonable adjustments be incorporated within the definition of discrimination, as a separate subclause.

Recommendation 9

1.39 That the explicit duty to provide reasonable adjustments should be applicable to all attributes.

Recommendation 10

1.40 Amend clause 21 of the Draft Bill to better promote the right to equality and non-discrimination and ensure adequate consultation is undertaken with affected groups. The submissions of the Discrimination Law Experts Group, the HRLC and the National Congress of Australia's First Peoples should be considered as part of this amendment process.

Recommendation 11

1.41 Amend clause 39 of the Draft Bill to incorporate accountability and transparency mechanisms, including clarification of the term 'other relevant factors'. The Explanatory Memorandum should also be amended to provide further clarification and explanation of the purpose of the exception.

Recommendation 12

1.42 Amend the Draft bill to include a positive duty on the public and private sector to promote equality and eliminate unlawful discrimination.

Recommendation 13

1.43 Amend clause 60 of the Draft Bill to extend coverage of the right to equality before the law so that it applies to all protected attributes.

Recommendation 14

1.44 Amend the Draft bill to make provision for representative complaints by the AHRC or public interest organisations on behalf of individuals or groups experiencing discrimination.

Recommendation 15

1.45 Consider amending the Draft Bill to prioritise and allocate responsibility for sexual orientation, gender identity and intersex issues with a member of the AHRC.

Senator Penny Wright
Australian Greens

Senator Sarah Hanson-Young
Australian Greens

APPENDIX 1

SUBMISSIONS PUBLISHED ON THE COMMITTEE'S WEBSITE

Submission Number	Submitter
1	Mr Paul Hobson
2	Mr Allan Choveaux
3	Dr Tiffany Jones
4	Mr Matthew Gee Kwun Chan
5	Name Withheld
6	Mrs Ruth Allison
7	Mr Tristan Pyke
8	Ms Elena Jeffreys
9	Australian Human Rights Commission
10	Dr Arthur Hartwig
11	Mr Chris Hamill
12	Organisation Intersex International Australia
13	Fellowship of Congregational Churches
14	Jodine
15	Name Withheld
16	Canon Dr David Claydon
17	Ms Nola Drum
18	Michael and Denise Corbin and Penelope Butler
19	Dr Mansel Rogerson
20	Ms Tina Vartis
21	Anti-Discrimination Board of New South Wales
22	Name Withheld

23	Wauchope Presbyterian Church
24	Australian Domestic and Family Violence Clearinghouse
25	Rainbow Communities Tasmania
26	Working Women's Centre South Australia
27	Australian Family Association Western Australia
28	Queensland Working Women's Service
29	Mr Dirk Jackson
30	Department of Finance and Deregulation
31	Mrs Anne O'Dwyer
32	Hendrik and Belinda Terpstra
33	The Royal Australian and New Zealand College of Psychiatrists
34	Terry and Cheryl Young
35	Nick and Natalie Blismas
36	Women's Health Victoria
37	Mr Joel van der Horst
38	Jeremy and Rachel Hopwood
39	Mr Matthew Grinter
40	Mr Kenneth Lewis
41	Mr David Forster
42	Christopher and Katharina Hopwood
43	Mr Fred Bramich
44	Mr Michael Clark
45	Name Withheld
46	Mrs Helen Drew
47	Mr Graham McDonald
48	Ms Gabrielle Lord
49	Ms Dorothy Long

50	Name Withheld
51	Name Withheld
52	Confidential
53	Name Withheld
54	Reverend Lance Lawton
55	Mr Ted Skuse
56	Name Withheld
57	Name Withheld
58	Australasian Railway Association
59	Mr Michael Cox
60	Mr Ian Hore-Lacy
61	Reverend Steve Davis
62	Name Withheld
63	Name Withheld
64	Ms Catherine Robertson
65	Mr Andrew Vallance
66	Mr Gordon Kappelhoff
67	Mrs Jennie Pakula
68	Ms Rachel Driver
69	Confidential
70	Mr Terry King
71	Ms Evelyn Castelletti
72	Mr Robert Combs
73	Ms Renai Ahlatis
74	Ms Nastasha Park
75	Mr Lance Eccles
76	Ms Ruth Zanetti

77	Name Withheld
78	Mr Trevor Adams
79	Mr Chris Reibel
80	Mr Mark Vegar
81	Mr Luigi Rosolin
82	Name Withheld
83	Name Withheld
84	Mr Dean McPherson
85	Mr Michael Fisher-White
86	Dr Martin Rice
87	Mr David Stone
88	H Bohn
89	Mr John Wall
90	Pastor Chris Ganter
91	Mr James Warland
92	Apostolic Church Australia
93	Mr Richard Jones
94	Mrs Heather Juniper
95	Name Withheld
96	Name Withheld
97	Mr Randell Greem
98	Name Withheld
99	Mr Luke Howard
100	Ms Raewyn Borlase
101	Mr Michael Ord
102	Brian and Judith Magree
103	Dalby Christian Outreach Centre

104	Victorian Trades Hall Council
105	Mr Geoff Dyer
106	Mr Joseph Stephen
107	Mr Allan Wilkinson
108	Ms Natasha Burfield
109	Mr John O'Regan
110	Name Withheld
111	Mr Ken Fraser
112	Mr Trevor Warmsley
114	Mr Clinton Le Page
115	Mr Peter Dolan
116	Linda and John Patey
117	Mr Julian Oosterloo
118	Name Withheld
119	Mr Chris Broomhead
120	Dr Stephen Ridge
121	Mr Adrian Gallagher
122	Name Withheld
123	Brian and Robyn Pickering
124	Mr Les Ormrod
125	Mr Barry Mulquin
126	Mr Alastair Wilson
127	Mr John Angelico
128	Dr Jereth Kok
129	Mr John Craig
130	Attorney-General's Department
131	Endeavour Forum

132	Joint submission from the Hon Nick Goiran MLC, Mr Michael Sutherland MLA and Mr Peter Abetz MLA
133	Mr Michael Weeks
134	Mr Ian Collett
135	Mr Alan Barnard
136	Mr Paul McCormack
137	Mr Andy Semple
138	Mr Chris Field
139	Mr Marcel Smith
140	Name Withheld
141	Ms Gabrielle Walsh
142	Mr Tim Tunbridge
143	Department of Developmental Disability Neuropsychiatry, University of New South Wales
144	Mr Andrew Batts
145	Mr Alexander Cornell Stewart
146	David and Elizabeth Cronin
147	Mr Matthew Sakaris
148	Mr Peter Magee
149	Mr William Grant
150	Mr James Milner
151	Benedictine Community of Christ the King
152	Mr David Perrin
153	The Humanist Society of Victoria
154	Parents and Friends of Lesbians and Gays
155	Dyslexia Parent Network Victoria
156	JOY Melbourne
157	Mr Kenneth Higgs

158	Mr Senthorun Raj
159	Mr Ron Thiele
160	Mr Jeremy Gordon
162	Dr Philomena Horsley
163	Ms Carli Lewis
164	Mr Jai Wright
165	Mr Russell Vernon
166	Ms Dianne Murphy
167	Ms Lianna Sliw
168	Mr Damian Wilson
169	Mr Robert Starky
170	Mr David Jackson
171	Ms Pia Cerveri
172	Gwen and Bryan Hardman
173	Mr Brian Brady
174	Mr Paul Sampson
175	Graham and Lois Mitchell
176	Ms Beryl Jobe
177	Ms Julie Hagedorn
178	Mr Peter Kriewaldt
179	Mrs Colleen Blacket
180	Mr Paul Russell
181	Jeff and Karen Lawson
182	Mr Lynton Phillips
183	George and Margaret Gourlay
184	Mrs Harriet Remy-Maillet
185	Mr Ken Burt

186	Ms Doreen Western
187	Mr Stuart Clarke
188	Mr Peter Kentley
190	Mr David Drew
191	Menno and Marlene Bokma
192	Ms Patricia Horneman
193	Mr Allan Cleanthous
194	Mr Roji Chacko
195	Mr Edwin Holt
196	Mr Willem Roodt
197	Mr Ken Grundy
198	Mr Amit Khaira
199	Ms Sibon Apile
200	Mr Ian Kilminster
201	Family Council of Victoria
202	Dr Janet Berry
203	Councillor Tony Briffa
204	Ms Anne Hewitt, Professor Andrew Stewart, Professor Rosemary Owens, Dr Gabrielle Appleby and Ms Beth Nosworthy
205	Dr Rosemary Mann
206	Ms Anita Downes
207	Discrimination Law Experts Group
208	Mr Rowan Payne
209	Mr Samuel Brand
210	Ms Leslie Jones
211	FamilyVoice Australia
212	Dr John Davies

213	Ms Christine Elam
214	Ms Jan Sanders
215	Mr Barry Lock
216	Confidential
217	beyondblue
218	Shop Distributive and Allied Employees' Association
219	Ms Lorraine Harrison
220	Mr Craig Wallace
221	Ms Aileen Benger
222	Reverend Matthew James
223	Ms Patricia Heazlewood
224	Ms Rosamund Riley
225	Ms Judith Patterson
226	Rainbow Families Council
227	Australian Association of Social Workers
228	Mr Rod Bevan
229	Mr Ken Brunjes
231	Dr Peter Couttie
232	Peter and Margaret Dormer
233	Pastor Brian Kempson
234	Rick and Lynn Bristow
235	Name Withheld
236	Mr Barry Bell
237	Christian Schools Australia
238	National Congress of Australia's First Peoples
239	Australian Federation of AIDS Organisations
240	Salt Shakers

241	Doctors for the Family
242	Executive Council of Australian Jewry
243	Melbourne Savage Club
244	ACON
245	NT Working Women's Centre
246	Australian Baha'i Community
247	Catholic Prison Ministry
248	The Law Society of South Australia
249	Castan Centre for Human Rights Law
250	Ms Tamara Britza
251	Mr Chris Gill
252	Ms Jan Thwaites
253	Mr Stephen Kinkead
254	Name Withheld
255	National Aboriginal and Torres Strait Islander Legal Services
256	Mr Paul Rogerson
257	National Farmers' Federation
258	Mr Robert Claxton
259	Ms June Laws
260	Mr John Smith
261	Ms Pippa Boyd
262	Ms Louis Stevenson
263	Willoughby, Margaret and Dorothy Summerson
264	Mr Graham Rule
265	Mr Allan Wilson
266	Mr Nolan Murphy
267	Ms Bronwyn Molloy

268	Ms Mary Allison
269	Mr Owen Allison
270	Mr Grant Lock
271	Mrs Diane Newland
272	Ms Jill McKay
273	Mr Alex McCulloch
274	Mr Richard Pratt
275	Job Watch
276	Mr Ian Holford
277	Ms Mieke Walker
278	Ms Anne Rolfe
279	Suncorp Group
280	Ms Celia McCoy
281	Mr Robert Hoerisch
282	Ms Mary Whitta
283	Ms Lyn Gargan
284	Dr KF Leong
285	Ms Rebeka Diamondstar
286	Name Withheld
287	Mr Geoffrey Brent
288	Father David J Smith
289	Mr Brendan Cameron
290	Ms Carlene Strauss
292	Mr Cal Pritchard
293	Mr Leigh Cowan
294	Ms Jessica Lancaster
295	Ms Elizabeth King

296	Mr Jed Gilbert
297	Ms Maddalena Torre
298	Androgen Insensitivity Support Group Australia
299	Mr Bayne MacGregor
300	Mr Jeffrey Gill
301	Mr Michael Yates
302	Ms Jessica Sutton
303	Mr David Hollingworth
304	Ms Sianon Daley
305	Ms Deborah Hoad
306	Mr Justin Johnson
307	Civil Contractors Federation
308	Australian Psychological Society
309	Australian Federation of Disability Organisations
310	Australian Council of Trade Unions
311	White Ribbon Australia
312	Catholic Women's League Australia
313	Australian Women Against Violence Alliance
314	Clubs Australia Industrial
315	United Voice
316	Domestic Violence Victoria
317	National Tertiary Education Union
318	Prisoners' Legal Service
319	Business Council of Australia
320	National LGBTI Health Alliance
321	Chartered Secretaries Australia
322	A Gender Agenda

323	National Disability Services
324	Vision Australia
325	Tasmanian Gay and Lesbian Rights Group
326	UnitingCare Community
327	North Melbourne Legal Service
328	New South Wales Council for Civil Liberties
329	Anglicare Sydney
330	Free TV Australia
331	Institute of Public Affairs
332	Mr Aram Hosie
333	Australian Unity
334	National Association of Community Legal Centres and Kingsford Legal Centre
335	Inner City Legal Centre
336	Women's Legal Services Australia
337	Living Positive Victoria
338	Caxton Legal Centre
339	Women's Legal Services New South Wales
340	Women's Legal Centre (ACT and Region)
341	Mr Steven Münchenberg
342	Queensland Independent Education Union
343	Australian Education Union
344	Q Society of Australia
345	The Hon Diana Bryant AO, Chief Justice, Family Court of Australia
346	Victoria Legal Aid
347	Federation of Ethnic Communities' Councils of Australia
348	Financial Services Council

349	Tenants' Union of New South Wales
350	Centre for Comparative Constitutional Studies
351	Australian Services Union
352	Equality Rights Alliance
353	Master Builders Australia
354	Women's Law Centre of Western Australia
355	Victorian Government
356	Independent Education Union of Australia
357	Australian Family Association
358	Australian Council of Human Rights Agencies
359	Australian Association of Christian Schools
360	Australian Catholic Bishops Conference
361	Australian Institute of Company Directors
362	Anti-Discrimination Commission Queensland
363	National Retail Association
364	Victorian AIDS Council/Gay Men's Health Centre
365	Right to Life Association Western Australia
366	Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service
367	The Equal Rights Trust
368	LGBTI Legal Service
369	Arts Law Centre of Australia
370	South Australian Wine Industry Association
371	Val's Cafe
372	Gay and Lesbian Health Victoria, La Trobe University
373	Mr Dale Reardon
374	Maurice Blackburn Lawyers

375	Hotham Mission
376	The Australian Sex Party
377	Wilberforce Foundation
378	Diversity Council Australia
379	Liberty Victoria
380	Anglican Church Diocese of Sydney
381	Victorian Employers' Chamber of Commerce and Industry
382	Construction, Forestry, Mining and Energy Union
383	Australian GLBTIQ Multicultural Council
384	Coalition of Activist Lesbians Australia
385	Cairns Community Legal Centre
386	Catholic Health Australia
387	NSW Gay and Lesbian Rights Lobby
388	HammondCare
389	New South Wales Reconciliation Council
390	Aboriginal and Torres Strait Islander Women's Legal Service
391	Catholic Archdiocese of Sydney
392	Victorian Automobile Chamber of Commerce
393	Ethnic Communities' Council of Victoria
394	Seventh-day Adventist Church Western Australia
395	All Out
396	Darebin Sexuality, Sex and Gender Diversity Advisory Committee
397	Respect
398	Scarlet Alliance
399	Victorian Women Lawyers
400	Seventh-day Adventist Church Victorian Conference
401	Stanley River Valley Community Church

402	Human Rights Law Centre
403	National Seniors Australia
404	Saint Mary MacKillop College Albury
405	Healthy Communities
406	Australian Lawyers for Human Rights
407	Civil Liberties Australia
408	Professor Sheila Jeffreys
409	Ambrose Centre of Religious Liberty
410	Dr Augusto Zimmermann and Mrs Lorraine Finlay
411	Australian Chamber of Commerce and Industry
412	Queensland Advocacy
413	Dr Jo Harrison
414	Youth Advocacy Centre
415	Australian Industry Group
416	Australian Business Industrial
417	Dads4Kids Fatherhood Foundation
418	Australian Institute of Aboriginal and Torres Strait Islander Studies
419	Australian Christian Lobby
420	Insurance Council of Australia
421	Public Interest Advocacy Centre
422	Equal Opportunity Commission of Western Australia
423	ACT Human Rights Commission
424	Australian Finance Conference
425	Public Interest Law Clearing House
426	Mr Spencer Gear
427	Mr Bill Lloyd-Smith
428	Dr Mark Hughes

429	Anti-Discrimination Commissioner of Tasmania
430	COTA Australia
431	Reformation Ministries
432	Matrix Guild of Victoria
433	Defence Lesbian, Gay, Bisexual, Transgender, and Intersex Information Service
434	Ms Helen Stitt
435	Law Council of Australia
436	Lesbian and Gay Solidarity (Melbourne)
437	Ethos
438	Mr Alton Bowen
439	Ms Gayle Foster
440	Mr John Pfeiffer
441	Confidential
442	Ms Vi Maidment
443	Michael and Meryl Stathis
444	Dr Raymond Jones
445	Mr Tony Fisher
446	ANU College of Law "Equality Project"
447	Freedom 4 Faith
448	National Council on Intellectual Disability
449	Ms Gail Instance
450	Mr Spero Katos
451	Name Withheld
452	Ms Kate Eastman SC
453	Name Withheld
454	Mr Robert Jones

455	Council of Small Business of Australia
456	Tasmanian Baptist Churches
457	Reverend Narelle Oliver
458	Confidential
459	Confidential
460	John and Dorothy Wheeler
461	Confidential
462	Mr Paul Smithers
463	Mr Roy Ford
464	Presbyterian Church of Victoria
465	Presbyterian Church of Australia's General Assembly
466	UnitingJustice Australia
467	New South Wales Government
468	CANdo
469	Ms Chelle Destefano
470	Ms Jo Daniels
471	Mr Malcolm Eglinton
472	Mrs Louise Brady
473	Name Withheld
474	Ms Beverley Demopoulos
475	The Human Rights Council of Australia
476	Ad Hoc Interfaith Committee
477	Mr Douglas McDonald
478	Mr George Kokonis
479	Australian Baptist Ministries
480	Catholic Women's League of Victoria and Wagga Wagga
481	Reverend Les Percy

482	TransGender Victoria
483	Men's Australian Network
484	Joint Media Organisations
485	Mr Colin Johnston
486	Mr John Szilard
487	Confidential
488	Ms Amanda Williamson
489	Ms Merle Ross
490	Doug and Jean Holmes
491	Name Withheld
492	Name Withheld
493	Name Withheld
494	Ms Christine Hodges
495	Queensland Attorney-General and Minister for Justice, the Hon Jarrod Bleijie MP
496	Seventh-day Adventist Church Australia
497	Redfern Legal Centre and the Australian Human Rights Centre
498	Legal Aid New South Wales
499	The Salvation Army Australia
500	Women With Disabilities ACT
501	Ms Lynda Neasbey
502	Mr Roy Everett
503	Ms Cheryl Harrold
504	Mr Peter Dixon
505	Ms Anne Kirkwood
506	Bible Believers' Church
507	Dr Kameel Majdali

508	Name Withheld
509	Graham and Eulalie Holman
510	Ms Chris Sitka
511	Mr Andrew Stagg
512	Reverend Peter Rose
513	Dr John Leach
514	The Perth Sisters and Brothers of the Order of Perpetual Indulgence and OPI Sisters Perth Abbey of the Black Swan
515	Anglican Diocese of Tasmania
516	Mr Alastair Lawrie
517	Mr Alan Mitter
518	Mr Bob Densley
519	Mr Peter Gelding
520	Name Withheld
521	Mr Peter Torlach
522	Pastor Neil Hampel
523	Mrs M Cottrell
524	Ms Marilyn Kulpinski
525	Mr C Bennett
526	Mr Edward Yee
527	Mr David Glasgow
528	Dr D Gaffney
529	Mr Lyle Hutchinson
530	Mr Patrick Cole
531	Mr Ken Francis
532	Mr Jason Stehn
533	Reverend Angus McLeay

534	Victorian Gay and Lesbian Rights Lobby
535	Mr Daniel Scot
536	Name Withheld
537	Mr Alex Greenwich MP
538	Mr Graham Douglas-Meyer
539	Mr Adrian Gunton
540	Mr Corey Irlam
541	Mr Matthew Vermeulen
542	Mrs Yvonne Pratt
543	Name Withheld
544	Simone Tippett and Karen Magee
545	Mr Greg Walsh
546	Name Withheld
547	Ms Rita Joseph
548	Name Withheld
549	Name Withheld
550	Mr Graeme Scott
551	Kerry and Karen Bos
552	Name Withheld
553	Mr Drew Koppe
554	Queensland Council for Civil Liberties
555	Mr Duane Sewell
556	Australian Centre for Disability Law
557	Tasmanian Attorney-General and Minister for Justice, the Hon Brian Wightman MP
558	Professor Nicholas Aroney and Professor Patrick Parkinson AM
559	Name Withheld

560	Confidential
561	Mrs Mary Clare Meney
562	Ms Michele Dickinson
563	Reverend Richard Armour
564	Mr James Newburrie
565	Name Withheld
566	Mr Alan Manson
567	Name Withheld
568	Ms Heidi Forrest
569	Mrs Judy Wilyman
570	Tamsin White
571	Mr Matt Brazier
572	Mr Philip Rabl
573	Mr Bob Buckley
574	Jack and Nanette Blair
575	Associate Professor Guy Hall
576	Mr Damian Capp
577	Mr Eric Jones
578	Mr Steve Lick
579	Name Withheld
580	Ms Zoe Brain
581	Mr Phillip Douglass
582	Ms Jo Lillicot
583	Ms Jacquie Seemann
584	Mr R Brennan
585	Rationalist Society of Australia
586	Mental Health Council of Australia and beyondblue

587 Confidential

588 Gender Vie

589 Gerard and Andrea Calilhanna

590 Australian Federation of Employers and Industries

591 Victorian Women's Trust

592 Police Federation of Australia

593 Accommodation Association of Australia

594 Jewish Australian Community

595 Parliamentary Joint Committee on Human Rights

ADDITIONAL INFORMATION RECEIVED

1 Article tabled by Liberty Victoria at public hearing on 23 January 2013 – 'If we believe all people are equal we must live this'

2 Article tabled by Liberty Victoria at public hearing on 23 January 2013 – 'Shutting out the 'sinners' feeds bigotry'

3 Document tabled by beyondblue at public hearing on 23 January 2013 – 'Summary of proposed amendments to the Human Rights and Anti-Discrimination Bill 2012'

4 Report tabled by beyondblue at public hearing on 23 January 2013 – 'Mental Health, Discrimination and Insurance: A Survey of Consumer Experiences 2011'

5 Report tabled by Organisation Intersex International at public hearing on 24 January 2013 – 'On the management of differences of sexual development: Ethical issues relating to "intersexuality"'

6 Opening statement tabled by the Australian Human Rights Commission at public hearing on 24 January 2013

7 Response to a question on notice provided by Mr Mark Sneddon, Crown Counsel (Advisings) on behalf of the Victorian Government on 31 January 2013

8 Response to question on notice provided by Australian Chamber of Commerce and Industry on 31 January 2013

9 Responses to questions on notice provided by Australian Council of Trade Unions on 31 January 2013

10 Response to question on notice provided by Australian Human Rights Commission on 4 February 2013

11 Document tabled by Attorney-General's Department at public hearing on 4 February 2013 – 'Options in response to concerns raised in respect of paragraph 19(2)(b)'

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Melbourne, 23 January 2013

ADAMS, Ms Lucy, Senior Lawyer, PILCH Homeless Persons' Legal Clinic, Public Interest Law Clearing House

BALL, Ms Rachel, Director, Advocacy and Campaigns, Human Rights Law Centre

BALL, Ms Simone, Lawyer, PilchConnect, Public Interest Law Clearing House

BANKS, Ms Robin, Anti-Discrimination Commissioner, Office of the Anti-Discrimination Commissioner Tasmania

BERG, Mr Chris, Director, Policy, Institute of Public Affairs

BLANDTHORN, Mr Ian, National Assistant Secretary, Shop, Distributive and Allied Employees' Association

BREHENY, Mr Simon, Director, Legal Rights Project, Institute of Public Affairs

BROWN, Ms Anna, Director, Advocacy and Litigation, Human Rights Law Centre

BRYANT, Ms Therese, National Women's Officer, Shop, Distributive and Allied Employees' Association

CARNELL, Ms Kate, AO, Chief Executive Officer, beyondblue

COLEMAN, Mr Richard, Solicitor, Fairfax Media, Joint Media Organisations

DAVIS, Ms Anna, Co-Coordinator, National Alliance of Working Women's Centres

FEAR, Mr Joshua, Director, Policy and Projects, Mental Health Council of Australia

FLYNN, Ms Julie, Chief Executive Officer, Free TV Australia

GARDINER, Mr Jamie, Vice President, Liberty Victoria

GIANNI, Mr Stephen, National Policy Officer, Australian Federation of Disability Organisations

GOLDNER, Ms Sally, Treasurer, Victorian Gay and Lesbian Rights Lobby

HALL, Ms Lesley, Chief Executive Officer, Australian Federation of Disability Organisations

HAMEED, Ms Shabnam, Industrial Project Officer, Safe at Home, Safe at Work Project, Australian Domestic and Family Violence Clearinghouse

IRLAM, Mr Corey, Member, Victorian Gay and Lesbian Rights Lobby

JOHNSTON, Mr Robert, Executive Officer, Australian Association of Christian Schools

LYONS, Mr Tim, Assistant Secretary, Australian Council of Trade Unions

MAMMONE, Mr Daniel, Director of Workplace Policy and Director of Legal Affairs, Australian Chamber of Commerce and Industry

MARCUS, Ms Gaby, Director, Australian Domestic and Family Violence Clearinghouse

McCORMACK, Ms Fiona, Chief Executive Officer, Domestic Violence Victoria

McFERRAN, Ms Ludo, Manager, Safe at Home, Safe at Work Project, Australian Domestic and Family Violence Clearinghouse

NAYLOR, Mr Andrew, Chairperson, Human Rights Council of Australia

PHILLIPS, Ms Julie, Manager, Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service

SAAB, Miss Sylvie, Manager of Media Policy and Regulatory Affairs, Free TV Australia

SCHUBERT, Ms Georgia-Kate, Head of Policy and Government Affairs, News Limited, Joint Media Organisations

SNEDDON, Mr Mark, Crown Counsel, Advisings, Government of Victoria

TAYLOR, Ms Jessie, Senior Vice President, Liberty Victoria

TKALCEVIC, Ms Belinda, Legal and Industrial Officer, Australian Council of Trade Unions

TOOHEY, Ms Karen, Acting Commissioner, Victorian Equal Opportunity and Human Rights Commission, Australian Council of Human Rights Agencies

WILSON, Mr Tim, Director, Climate Change Policy and the Intellectual Property and Free Trade Unit, Institute of Public Affairs

Sydney, 24 January 2013

BROUN, Ms Jody, Co-Chair, National Congress of Australia's First Peoples

CARPENTER, Morgan, Secretary, Organisation Intersex International Australia

CODY, Associate Professor Anna, Director, Kingsford Legal Centre, appearing on behalf of the National Association of Community Legal Centres

COHEN, Ms Michelle, Senior Solicitor, Public Interest Advocacy Centre

COWDERY, Mr Nicholas, QC, Human Rights Adviser, Law Council of Australia

CUDMORE, Mr Dominic, Senior Associate, Prolegis Lawyers and Legal Adviser, HammondCare

DICK, Mr Darren, Director, Policy and Programs, Australian Human Rights Commission

DICKSON, Dr Elizabeth, Senior Lecturer, Queensland University of Technology, Discrimination Law Experts Group

FORSYTH, Bishop Robert, Member, Campaign Committee, Freedom 4 Faith

HORNER, Mr Jed, Policy and Project Officer, NSW Gay and Lesbian Rights Lobby

HUGHES, Associate Professor Mark, Southern Cross University

KOONIN, Dr Justin, Co-Convenor, NSW Gay and Lesbian Rights Lobby

LEE, Ms Frieda, Project and Policy Officer, National Association of Community Legal Centres

LUCAS, The Reverend Brian, General Secretary, Australian Catholic Bishops Conference

MALEZER, Mr Les, Co-Chair, National Congress of Australia's First Peoples

MARTIN, Mr David, General Manager, People, Learning and Culture, HammondCare

MASON, Mr David, Principal Adviser, Human Rights Scrutiny, Australian Human Rights Commission

MICHAELS, Miss Tara, In House Legal Counsel, HammondCare

MOULDS, Ms Sarah, Senior Policy Lawyer, Law Council of Australia

O'BRIEN, Ms Julie, Director, Legal Services, Australian Human Rights Commission

O'BRIEN, Ms Rachel, National Legal Secretariat Officer, National Aboriginal and Torres Strait Islander Legal Services

PANDOLFINI, Ms Camilla, Senior Solicitor, Public Interest Advocacy Centre

PIETSCH, Mrs Chelsea, Executive Officer, Freedom 4 Faith

RAYMOND, Ms Tracey, Director, Investigation and Conciliation Section, Australian Human Rights Commission

RICE, Professor Simon, OAM, Chair of Law Reform and Social Justice, Australian National University, Discrimination Law Experts Group

SANTOW, Mr Edward, Chief Executive Officer, Public Interest Advocacy Centre

SHULMAN, Ms Joanna, Chief Executive Officer, Redfern Legal Centre, appearing on behalf of the National Association of Community Legal Centres

SMITH, Dr Belinda, Senior Lecturer, University of Sydney, Discrimination Law Experts Group

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

WILSON, Gina, President, Organisation Intersex International Australia

Canberra, 4 February 2013

MANNING, Mr Greg, First Assistant Secretary, International Law and Human Rights Division, Attorney-General's Department

PFITZNER, Mr Paul, Director, Human Rights Reform Section, Attorney-General's Department

WILKINS, Mr Roger, AO, Secretary, Attorney-General's Department