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 –
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> (a) neither wholly female nor wholly male; or
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> (b) a combination of female and male; or
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> (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.