

20 December 2012

Ms Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia
email: legcon.sen@aph.gov.au

Dear Ms Dennett,

INQUIRY INTO EXPOSURE DRAFT OF THE *HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012*

Submission by Mr Dale Reardon, PhD Student in Anti-Discrimination Law at ANU College of Law

I wish to make some submissions in relation to the exposure draft of the *HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012*. I am currently undertaking PhD research for my thesis into the Australian anti-discrimination legal system in relation to the area of disabilities and employment in particular. I have just transferred to the ANU College of Law for my studies effective 1 January 2013.

I am blind myself and use a dog guide for mobility and have faced discrimination personally on a number of occasions. My comments are based on both my research and my own personal experiences of discrimination and the discrimination complaint system. I have taken several complaints of discrimination before the Australian Human Rights Commission (AHRC), the Victorian Equal Opportunity and Human Rights Commission and the Tasmanian Anti-Discrimination Commission so have personal knowledge and experience of the processes and pitfalls. From personal experience it is my opinion that the current system does not work well enough.

Legal costs and the possibility of an adverse costs order if the complainant is unsuccessful are powerful deterrents and problems faced when deciding whether to bring a complaint or whether to settle a complaint. Unfortunately there is normally a large power imbalance faced between the complainant and the respondent and the respondent normally has access to greater legal resources. I welcome the proposed changes in the exposure draft particularly clause 133 whereby the current situation in relation to costs is altered. This is a significant and much needed change to enable disadvantaged persons to protect their human rights. I however would like to see some amendments to this clause. I believe it would be appropriate for there to be a bar to the complainant being required to pay the respondents costs, even if the complaint was ultimately unsuccessful in the case, provided they have established a prima facie case. If the complainant is able to establish a prima facie case and

the respondent escapes liability solely by establishing some defence then I don't think the complainant should be required to pay the respondents costs in any circumstances.

I also believe that any public importance of the case should be added as one of the considerations in relation to costs. By this I mean that if a positive outcome to the case is going to provide benefits to other members of the public then there should be a presumption against costs.

I further believe that a sub-clause should be added to specify that the outcome of the case of itself is not sufficient to award costs to either party.

Another factor that should be amended in relation to the issue of costs is the defence of unjustifiable hardship. If a complainant establishes that discrimination has taken place but the respondent is able to escape liability through proving unjustifiable hardship then the complainant should never be required to pay costs – after all discrimination has been proven. The recent Federal Court case of *King v Jetstar* showed that even when discrimination was proven, a large public benefit was involved in the case, the complainant was still required to pay \$20,000 in adverse legal costs when the respondent established unjustifiable hardship. The complainant had very limited financial means and the respondent had vast financial resources so the outcome seems grossly unfair.

A major problem with the current discrimination system is that it is one of personal rights rather than being viewed as a community obligation to provide a society where human rights are protected and people are protected against discrimination. For example if I am refused entry to a restaurant with my guide dog (this happened recently in Sorrento Victoria) then it is for me individually to take action rather than some public body prosecuting the case. Surely the maintaining of an orderly society free from discrimination is a worthy goal and there should be some independent public body that can enforce these anti-discrimination laws on my behalf? Presently I must decide if the costs of returning to Victoria, legal representation, the stress, the time, the emotional toll are all worth defending a human right – I may never return to that restaurant but the owners need to be taught that anti-discrimination laws must be obeyed.

This is the situation with many consumer protection laws for example. Take the *Trade Practices Act (Cth)* for example, which prohibits misleading and deceptive conduct and protects consumers. Such rights are not viewed purely as personal rights but the Australian Competition and Consumer Commission (ACCC) has enforcement powers and takes enforcement action on behalf of all consumers. I would like to see the AHRC take on such a public enforcement role, or a different independent public body be created to enforce anti-discrimination laws. The enforcement of these anti-discrimination laws needs to be viewed as a community obligation rather than a personal obligation.

From a personal perspective I can tell you that it takes a large toll, emotionally, physically and financially, to enforce your anti-discrimination rights. It is a very difficult decision as to whether to bring an action and not as many of the submissions suggest a case where many frivolous actions are brought easily. The process of bringing a complaint is also time consuming and you must be really serious about the need for a positive outcome before a complaint is brought. If a public body was taking enforcement action on your behalf this

would remove many of the obstacles to enforcement and ensure the worthwhile aims of this legislation were achieved.

A worthwhile first step is to vastly broaden the ability of organisations to make representative complaints. A support organisation, such as Blind Citizens Australia (in relation to the blind) or People with Disabilities may be in a better position to litigate a complaint. They may have greater financial resources and man power and the necessary skill to pursue a complaint which is going to benefit all their members. The disability discrimination system needs to stop concentrating on the individual and move towards a community focused enforcement system.

I have read submission 207 by the Discrimination Law Experts Group and concur with the majority of their submissions and would like to adopt the majority of their submissions. I would however like to differ in relation to their recommendation number 24 in relation to reduced wages. I personally believe as a disabled person that the possibility of reduced wages through a special exemption should exist. If this is the only way a disabled person can get employment, or their disability results in less work capacity or less productivity, then reduced wages should be a possibility. There are still many benefits that flow from employment for a disabled person such as a purpose in life, integration into the community, better quality of life etc that make a job beneficial even at a reduced wage.

I would also like to see the usage of the internet, internet websites and internet technologies covered by the Bill. It is currently not clear as to whether the provision of goods and services and websites is always covered by anti-discrimination laws. The internet is a marvellous empowering technology for disabled people but if applications, software or websites aren't designed correctly then we can be locked out and not experience the benefits. The NBN is coming to Australia, and as a disabled person I welcome it and can't wait to gain its benefits, but we must also ensure that technologies brought about by this great technology are covered by anti-discrimination laws.

I have also only recently become aware of a feature of the British anti-discrimination system which is detailed in a news story explaining how it works at:

<http://www.guardian.co.uk/money/work-blog/2012/dec/07/fighting-discrimination-job-interview?partner=skygrid>

I believe the adoption of such a questionnaire system would greatly assist with proving discrimination complaints but also assist in the conciliation of cases as the respondent provides answers to the questions.

I also commend the Bill in relation to its changes in regard to the burden of proof. I have personally experienced the difficulty of proving a case when the respondent claims it has valid reasons for prima facie discriminatory conduct and the reversal of the burden of proof in this regard will make the situation fairer and promote the aim of equality.

I also endorse the recommendations of the Discrimination Law Experts Group in relation to research and publishing of cases and case outcomes by the AHRC. I have recently approached the AHRC for assistance in relation to my PhD research and the AHRC has thus

far told me they do not have the resources to assist my research, even if I were to pay them for their assistance. Research in the area of anti-discrimination laws is important on an ongoing basis to ensure the aims of the legislation are being achieved, to see how the laws are working in the community and how individuals are experiencing the laws and the complaint system. Currently I am facing difficulties with my research and greater resourcing of the AHRC is required to ensure that vital research can take place.

I would also like to see the concept of unjustifiable hardship be clarified and the factors that the respondent can claim reduced. The recent case of *King v Jetstar* has potentially expanded broadly the factors that can be taken into account and allows a very broad definition of unjustifiable hardship. This defence needs limiting or the supposed benefits of disability protection cannot be realised.

Finally it is of concern to me that damages in discrimination cases are relatively low and do not reflect the significant stress and trauma that can be suffered by a person who experiences discrimination. The courts have tended to treat the general loss and damage suffered through discrimination as less significant than physical injuries. From a personal perspective, and from my own personal experience of discrimination, the long term suffering caused through discrimination can be very traumatic and in fact potentially greater than physical injuries. For example I have suffered discrimination on a large number of occasions with taxis and my guide dog. This has ranged from abuse by drivers, refusal to carry me and my guide dog, to driving off and causing me to miss an employment interview and lose a job. Now, every time I call a taxi I wonder if the driver is going to cause a problem, whether a night out is going to be ruined, whether I will miss a crucial meeting etc. The damage is ongoing and the very small damages awarded do not adequately reflect the damage that is suffered. I am sure the same situation applies to sex and race discrimination as well – the people concerned suffer for years and fear ongoing discrimination.

Perhaps the objects clause could be expanded to promote higher damages, perhaps the damages power clause could incorporate a statement on the level of damages.

I would also like to see judges educated on the suffering that is endured through discrimination so they can more fully appreciate the situation and this would hopefully lead to higher levels of damages to more truly reflect the harm that is suffered.

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