

The question from Senator HUMPHRIES which I took on notice was as follows: "...the ACTU submission argues that the definition of employer in the bill should include the Crown in right of the states and territories. What is your response to that argument?"

The response to this question is as follows.

As a matter of drafting, there is no need to amend the Bill to specify the Crown in right of a State or Territory as an employer in the definition of "employment" in clause 6. This is because the Bill as currently drafted binds the Crown in right of a State or Territory. As a result, the provisions of the Bill governing discrimination in work and work-related areas including employment would apply to the Crown in right of a State or Territory as an employer.

However there is a real question whether the Commonwealth has the constitutional power to regulate all "employment" by the Crown in right of a State or Territory in the terms of the draft Bill. As noted in the Victorian Government's written submission, it is unclear that the Commonwealth's external affairs power (and other powers) would authorise legislation in the terms proposed in the Bill for all the protected attributes set out in the Bill. In addition, the constitutional principle of inter-governmental immunities may prevent the Bill from having valid application to core State government functions and officers in relation to employment or other discrimination - see *Australian Education Union ex parte Victoria* (1995) 184 CLR 188.

Finally, the Victorian Government (including the Crown in right of Victoria) is bound by the Equal Opportunity Act 2010 (Vic) and fully regulated as an employer by that anti-discrimination legislation. The Victorian Government considers that no clear policy rationale has been articulated as to why a second and largely duplicative layer of broad-based federal anti-discrimination law under this Bill should also apply to the State as an employer.