



**FECCA Submission to the Senate Standing Committee on Legal
and Constitutional Affairs in Response to the Exposure Draft of the
*Human Rights and Anti-Discrimination Bill 2012***

December 2012

About FECCA

FECCA is the national peak body representing Australians from culturally and linguistically diverse (CALD) backgrounds. FECCA provides advocacy, develops policy and promotes issues on behalf of its constituency to Government and the broader community. FECCA supports multiculturalism, community harmony, social justice and the rejection of all forms of discrimination and racism so as to build a productive and culturally rich Australian society. FECCA's policies are developed around the concepts of empowerment and inclusion and are formulated with the common good of all Australians in mind.

Preliminary

The Federation of Ethnic Communities' Councils of Australia (FECCA) is pleased to respond to the Senate Standing Committee on Legal and Constitutional Affairs' ('The Committee') Inquiry into the Exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* ('the Bill').

FECCA notes that we previously commented substantively on the proposed content of *the Bill* through our submission to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper in February 2012 – our submission now available at <http://www.fecca.org.au/our-submissions/submissions-2012>.

Through our submission FECCA highlighted a number of issues for consideration in the formulation of this new legislation including:

- The impact of racism and discrimination on culturally and linguistically diverse (CALD) community members in Australia.
- The importance of retaining, and indeed advancing, the strength of protections currently offered under the provisions of the *Racial Discrimination Act 1975* (Cth) ('RDA').
- The need for consideration to be given to codifying 'religion' as a protected attribute under the new legislation.
- The potential for the consolidation process to create a 'positive duty' to promote equality and shun discriminatory practice, as is the case in several other jurisdictions.

FECCA commends all of the recommendations in our previous submission to the Committee.

FECCA Response to the Draft Bill

First and foremost FECCA takes this opportunity to commend *the Bill* for its considered and thorough approach to consolidating the complex array of anti-discrimination law presently in operation at the federal level in Australia. FECCA thoroughly supports the consolidation agenda in so much as it is a means to ensuring that anti-discrimination laws will be simpler, more consistent and more accessible to the people who need them the most, and we believe that the draft legislation has gone a long way towards achieving these objectives.

Racial and Religious Discrimination

In particular FECCA is pleased to note that the provisions of the *RDA*, the piece of legislation perhaps most critical for our constituents, members immigrant and refugee communities in Australia, have been well incorporated into the new Bill. Indeed we note that in line with our previous recommendations, the standard of other pieces of federal anti-discrimination legislation has in some ways been raised to the higher standards found in the *RDA*, rather than the scope of the *RDA*, one of the stronger pieces of existing protection, being generally diminished.

FECCA also welcomes the proposed codification of religion as a protected attribute (at clause 17), as is not currently the case under existing federal anti-discrimination law. As we know from our constituents, adhering to a particular belief can often be a barrier to equal access, particularly in the sphere of employment.

However, within the context of general support for *the Bill*, FECCA takes this opportunity to reiterate our call for the cautious execution of the new general limitations clause outlined in *the Bill*. This clause allows for discrimination to occur when classified as ‘justifiable conduct’ (at clause 23). Previously the *RDA* provided in essence very few exemptions, and this new clause now leaves open the possibility that arguments may be made that the provisions as currently found in the *RDA* may not apply in new circumstances. It is imperative that *the Bill* does not work to in effect reduce protections currently in operation. We therefore support the proposal for a review of the operation of the new legislation after three years, in order to ascertain the impact of this new general limitations clause, and the other codified exceptions (at clause 47).

FECCA also expresses our strong support for clause 51 of *the Bill* which deems racial vilification unlawful, in line with the present provisions in the *RDA*. These provisions are imperative in ensuring that conduct which is “reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people” on the basis of race is clearly shown to be unacceptable.

FECCA also commends *the Bill* for its retention of designated Commissioner roles (including the Race Discrimination Commissioner) to allow for specialist advocacy around discrimination related to protect attributes including race (at clause 160).

Burden of proof, costs and standing

Other positive features of *the Bill* include the burden of proof provisions that will in effect shift the burden of proof to the party best able to produce evidence in relation to the case (once a prima facie case has been established) (at clause 124). The new cost provisions, stating that each party will bear their own costs subject to the discretion of the court (at clause 133), are also generally welcome, as we know that fear of bearing the other parties costs can otherwise deter complainants. In exercising its discretion we ask that the court consider the nature of the parties (i.e. individual complainant or business entity) and the relative impact on each party of meeting costs. Both these provisions will ensure that those who believe they have suffered discrimination are given a fair opportunity to present and support their case, and to engage proactively with processes of dispute resolution.

On the matter of standing, FECCA is pleased to note that industrial bodies (at clause 89) may be granted standing to appear. However, we repeat our call here that it would be preferable to also allow for other interested parties, for instance organisations with a particular special interest in the matter, to also be granted standing to appear. The victims of discrimination, in particular racial discrimination, may often face barriers including limited English language skills and unfamiliarity with the Australian legal system, barriers that may hamper their access to justice, and a third party may therefore be better placed to seek redress.

Creating a positive duty

FECCA is also pleased to note that the 'equality under the law' provision as this relates to persons of different races has remained codified under clause 60 of *the Bill* (currently s 10 of the *RDA*). However, as FECCA highlighted in our previous submission we believe that the scope of this positive duty must be extended to all protected attributes including gender and disability. Through the consolidation process we have the opportunity to create a new environment in which discrimination on the basis of any protected attribute is actively prevented not simply redressed. As yet the draft legislation does not extend this duty or indeed create other similar positive duties and the inclusion of such duties should be further considered.

Disability Discrimination

A pertinent issue FECCA has continued to raise, which we highlight again here, is the exemption of the *Migration Act 1958* (Cth) from the provisions related to disability discrimination (as is currently reflected in the *Disability Discrimination Act 1992* (Cth) ('DDA')). This exemption continues to operate in the draft legislation under clause 27(2). FECCA strongly contends that the migration health assessment, which repeatedly fails to make a distinction between disability and health is discriminatory to immigrants with a disability, with persons with a disability and/or families with a person with a disability being denied permanent residency and the opportunity to make a valuable contribution to the economic and social fabric of Australian society.

Overall FECCA is very pleased with *the Bill* and asks the Committee to recommend it be passed.