



Cairns Community Legal Centre Inc

Our Ref:LR:HRADB:SVT

21 December 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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SUBMISSION ON EXPOSURE DRAFT OF HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

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Recommendations

Recommendation 1: That the Bill include in the meaning of discrimination a positive duty currently found in the DDA to make reasonable adjustments.

Recommendation 2: That section 19(2) be deleted, and expanded definitions of unfavourable treatment and harassment be included in section 6.

Recommendation 3: That the terms ‘vilification’ and ‘serious vilification’ be defined in section 6 as set out above.

Recommendation 4: That section 51 be amended to make such conduct against a person or group of person (vilification) on the basis of specific attributes (race, religion, disability, sexual orientation and gender identity) unlawful, as well as making serious vilification an offence.

Recommendation 5: That clear definitions for political opinion, religion and social origin, consistent with ILO definitions, be included in section 6.

Recommendation 6: That criminal record/history be included in the list of protected attributes in section 17.

Recommendation 7: That the definition of family responsibilities in section 6 be amended to more broadly include any dependents.

Recommendation 8: That discrimination on the grounds of all listed attributes be unlawful in all listed areas of public life.

Recommendation 9: That section 8 be amended to correctly reflect current provisions relating to an attribute not having to be a dominant or substantial reason for unlawful conduct where more than one reason is established for the conduct.

Recommendation 10: That section 53 be redrafted to restrict its application to publication or display of advertisements and notices, and that no exception be available.

Recommendation 11: That section 57(3) be amended to reflect that steps should be taken to prevent unlawful conduct, rather than simply to avoid it.

Recommendation 12: That Division 5 of Part 3-1 be amended to:

- acknowledge existing Disability Standards
- detail general powers to formulate and use Standards
- detail that Standards can be formulated with respect to any protected attribute in all listed areas of public life.

Recommendation 13: That the burden of proof in section 124 be extended to include the person claiming an exception of unjustifiable hardship in relation to reasonable adjustments.

Recommendation 14: That Part 2-5 be redrafted to ensure that people with all protected attributes are equal before the law.

Introduction

Background to the Cairns Community Legal Centre Inc (CCLC)

The CCLC is a non-profit, community based organisation run by volunteers and paid workers with Commonwealth and State Government funding to assist socially and financially disadvantaged persons in Far North Qld with various legal problems and issues they face. It offers free legal services in the areas of criminal law, traffic matters, family law, civil law (including motor vehicle accidents and debt recovery matters), consumer complaints, employment law, discrimination work (other than disability discrimination), neighbourhood disputes, bankruptcy matters and other miscellaneous matters.

The CCLC offers other free legal services in addition to the cores service above.

The Disability Discrimination Legal Service provides legal advice and case work which relates to disability discrimination complaints under the Federal *Disability Discrimination Act 1992* (DDA) and the Queensland *Anti-Discrimination Act 1991* (Queensland Act).

The Seniors Legal and Support Service offers legal and support services for the benefit of seniors affected by elder abuse or financial exploitation.

Family Law Service offers legal services in relation to family law matters which involve children's issues.

Consumer Law Service offers legal services for consumers in relation to a range of consumer law matters including credit and debt matters, disputes about consumer products and services, bankruptcy matters and other consumer law matters.

Community education and awareness-raising activities as well as law reform work are important aspect of all the services.

Our interest in the consultation

Our client base is amongst the most vulnerable in society and we make submissions to protect and expand the protections of their human rights.

We made a submission at the initial consultation stage of this process to consolidate the Federal anti-discrimination legislation, and now offer our views on the resultant Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (the Bill).

We commend the Senate Committee on the great work done to bring together the protections in the various pieces of legislation. It has been an enormous undertaking and many improvements have been incorporated.

We offer comment now only on the areas in the Exposure Draft which we consider still remain to be adjusted.

Single test for discrimination

We note that in the Explanatory Notes for the Bill, the Committee lists five key principles it followed in the draft. The first of these included lifting levels of protection to the highest current standard.

Positive duty to make reasonable adjustments

The *Disability Discrimination Act 1992* (DDA) was amended in 2009 to implement Productivity Commission Recommendation 8.1 made in its 2004 Report, to make explicit the positive duty to make reasonable adjustments for a person with disability. It is also consistent with the requirement in the Disabilities Convention to make reasonable accommodation.

Failure or refusal to make those adjustments is currently direct discrimination.

Section 3(1)(e) of the Bill recognises that achieving substantive equality **may require** the taking of special measures or **making of reasonable adjustments**.

The way that the Bill addresses reasonable adjustments in section 25, simply states that if a person **could have made** reasonable adjustment, it would be reasonable if the adjustment did not cause unjustifiable hardship to the person.

The Bill omits the very important duty to actually provide the reasonable adjustment in the first instance.

We disagree with the claim in the Explanatory Notes that it would be ‘complex to maintain this approach’ in the Bill.

Just as section 19 deals separately with unfavourable treatment and imposition of policies, it can also deal with reasonable adjustments. If necessary, this duty can be limited to the attribute of disability if the Committee is not minded to extend this to all/other attributes.

Recommendation 1: That the Bill include in the meaning of discrimination a positive duty currently found in the DDA to make reasonable adjustments.

Harassment

Although it has not been defined in legislation, case law has consistently taken harassment to mean an action likely to humiliate, offend, intimidate or distress a person.

We expect it would cause confusion to have the term and its meaning listed separately in section 19(2) as the only example of unfavourable treatment.

We consider it would simplify the Bill if this sub-section was deleted, and expanded definitions of unfavourable treatment and harassment instead were included in the Dictionary in section 6.

If it is made clear in the early Parts of the Bill that harassment is unfavourable treatment, it will apply to all attributes, and in all areas of public life (unless specifically stated that it does not). The DDA currently makes it unlawful to harass a person on the basis of

disability in the areas of employment, education, and in relation to the provision of goods and services, and this at least should be maintained in the Bill

Recommendation 2: That section 19(2) be deleted, and expanded definitions of unfavourable treatment and harassment be included in section 6.

Vilification

The lack of a formal definition of harassment, and the inappropriate treatment of the term ‘harassment’ in Part 2-2 Unlawful discrimination, Division 2 – Meaning of Discrimination, leads to further problems in Part 2-3 Other unlawful conduct, Division 3 – Racial vilification.

The *Racial Discrimination Act 1975* (RDA) does not use the term ‘vilification’. It refers instead to ‘offensive behaviour’ in section 18C in that Act. The offensive behaviour is an act which is ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people’ (which corresponds to harassment).

Harassment is already covered as unfavourable treatment in section 19 of the Bill and in our view does not need to be repeated separately (and inappropriately) in section 51.

The use of the term vilification in the Bill is seriously inconsistent with the use of that term in State anti-discrimination legislation.

State legislation defines ‘vilification’ as a public act which incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the grounds of a protected attribute. Serious vilification, where physical harm is threatened against person or property, or others are incited to threaten physical harm against person or property, is an offence with heavy penalties, including imprisonment. These terms are a serious advancement on mere harassment, and should be addressed clearly in the Bill.

We are of the firm opinion that it should be unlawful to vilify a person or group of persons, at least on the basis of race, religion, disability, sexual orientation and gender identity (if the Committee does not want to extend the coverage to all attributes). It should also be an offence to engage in serious vilification as detailed above.

It would be best if the terms were defined in section 6 of the Bill.

Recommendation 3: That the terms ‘vilification’ and ‘serious vilification’ be defined in section 6 as set out above.

Recommendation 4: That section 51 be amended to make such conduct against a person or group of person (vilification) on the basis of specific attributes (race, religion, disability, sexual orientation and gender identity) unlawful, as well as making serious vilification an offence.

Protected attributes

We commend the Committee for including most of the attributes, found in equal opportunity in employment provisions in Division 4 of Part II of the *Australian Human Rights Commission Act 1986* (AHRCA), in the list of protected attributes in section 17.

However, the Bill leaves out definitions for three particular attributes listed in section 17 (political opinion, religion and social origin) and expects them to take their ‘ordinary meaning’.

In our view, it would be problematic for individuals who feel aggrieved by what they see as discriminatory conduct on the basis of these three attributes, to not have guidance in the Bill as to what exactly is covered. They should not be put to the task of examining case law (which is very limited in some respects) to see how the Courts previously interpreted that ‘ordinary meaning’.

We consider it important that the attributes be defined in the Bill so that persons feeling aggrieved at alleged discrimination on the basis of similar sounding attributes will not be misled to lodge Complaints that are bound to fail for want of jurisdiction.

We note that the relevant definition of discrimination in the AHRCA refers to any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin. This mirrors the definition in the International Labour Office (ILO) Discrimination (Employment and Occupation) Convention, 1958 (No. 111) which is scheduled to AHRCA and therefore forms part of its jurisdiction.

We are of the view then that the Bill should draw on the ILO for meanings of the particular attributes.¹

Political opinion

According to the ILO, discrimination based on political opinion includes membership in a political party; expressed political, socio-political, or moral attitudes; or civic commitment. However, the protection afforded to aggrieved persons does not extend to politically motivated acts of violence.

Religion

According to the ILO, religious discrimination includes distinctions made on the basis of expression of religious beliefs or membership in a religious group. This also includes discrimination against people who do not ascribe to a particular religious belief or are atheists.

Social origin

According to the ILO, social origin includes social class, socio-occupational category and caste. Social origin may be used to deny certain groups of people access to various

¹ See http://www.ilo.org/empent/areas/business-helpdesk/WCMS_DOC_ENT_HLP_BDE_FAQ_EN/lang--en/index.htm

categories of jobs or limit them to certain types of activities. Discrimination based on social origin denies the victim the possibility to move from one class or social category to another. For instance, in some parts of the world, certain ‘castes’ are considered to be inferior and therefore confined to the most menial jobs.

In an egalitarian society such as we have in Australia, we expect there to be very few (if any at all) Complaints on the basis of this attribute. However, we note the reporting of an online petition to deny persons in a particular suburb access to existing rail transport service on the basis of perception of social standing.

Recommendation 5: That clear definitions for political opinion, religion and social origin, consistent with ILO definitions, be included in section 6.

Criminal history/record

We note that the only attribute currently covered by the AHRCA which has been omitted in the Bill is that of criminal record.

We do not accept that the claim in the Explanatory Notes, relating to uncertain nature of the concept and differences in understanding irrelevant criminal record making it difficult to assess costs of including the attribute in the Bill, should be used to justify excluding an important attribute from legislative protection.

The AHRC reports that in recent years it has received a significant number of complaints from people alleging discrimination in employment on the basis of criminal record. The complaints indicate that there is a great deal of misunderstanding by both employers and people with criminal records about discrimination on the basis of criminal record.

- 23% of all complaints received by the Commission under the AHRCA were on the basis of criminal record discrimination (July 2010 – June 2011)²

In its publication: *On the Record - Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record 2012*, the AHRC addresses issues of relevance to this attribute.

We therefore urge the Committee to include criminal record in the list of protected attributes.

Recommendation 6: That criminal record/history be included in the list of protected attributes in section 17.

Family responsibilities

According to the ILO, family responsibilities include care of children and any other dependents. We disagree with the definition’s restriction in section 6 of the Bill to children or other members of the immediate family. This does not take into account care under broader kinship responsibilities.

Recommendation 7: That the definition of family responsibilities in section 6 be amended to more broadly include any dependents.

² See http://www.humanrights.gov.au/human_rights/criminalrecord/index.html

When discrimination is unlawful

In our view, application of the attributes listed in section 22(3) of the Bill should not be restricted to work and work-related areas. If persons are worthy of being protected against discrimination on the basis of those particular attributes in that one area, then they are worthy of being protected in all areas of public life.

Otherwise, we expect that discrimination may occur in situations that would not be protected under the Bill:

- Accommodation is refused on the basis of criminal history (of the person or their associate)
- Accommodation is refused on the basis of family responsibilities (not wanting to rent holiday units to family groups which include children)
- Services are refused on the basis of religion (refusing service to persons of certain faiths or only providing services to those of a particular faith)
- Not making reasonable adjustments in education for persons who have family responsibilities (which may limit the hours they can attend in person)
- Access to a public meeting is refused on the basis of political opinion of an attendee

If the attributes are properly included in all areas of public life, complainants would first have to establish that discrimination occurred within the jurisdiction of the Bill. There would be no increased cost or burden in administering the legislation.

Inclusion of the attributes would also be consistent with State anti-discrimination legislation.

Recommendation 8: That discrimination on the grounds of all listed attributes be unlawful in all listed areas of public life.

Multiple reasons or purpose for conduct

We note that currently three of the four anti-discrimination Acts being consolidated all set out that if one of the reasons for the conduct is the attribute, whether or not it is the dominant or substantial reason, then for the purposes of the Act, the conduct is taken to be done for that reason.

Since the first key principle in the Bill is to lift levels of protection to the highest current standard, the Bill must reflect the existing provisions. It too must set out that an attribute does not have to be the dominant or substantial reason for conduct to be unlawful.

Recommendation 9: That section 8 be amended to correctly reflect current provisions relating to an attribute not having to be a dominant or substantial reason for unlawful conduct where more than one reason is established for the conduct.

Publishing / discriminatory advertising

We note that all existing Federal anti-discrimination legislation in this category refers specifically to publishing or displaying an ‘advertisement or notice’.

In our view, section 53 is too wide and is poorly drafted:

- It refers to ‘material’ generally instead of specifically to advertisements or notices.
- It refers generally to intended ‘unlawful conduct’ without specifying that the conduct is unlawful under particular provisions of the Bill.
- Exceptions available under the provision relating to vilification should not be reproduced for discriminatory advertising. Such exceptions are not currently available under State or Federal legislation, and it was not the intention of consolidation to expand in this way.

Recommendation 10: That section 53 be redrafted to restrict its application to publication or display of advertisements and notices, and that no exception be available.

Liability for unlawful conduct

We note that the first object of the Bill is to ‘eliminate’ discrimination.

We therefore consider that the exception available to principals in section 57(3) should be for taking reasonable precautions and exercising due diligence to ‘prevent’, rather than ‘avoid’ the unlawful conduct of its directors, officers, employees or agents.

Recommendation 11: That section 57(3) be amended to reflect that steps should be taken to prevent unlawful conduct, rather than simply to avoid it.

Standards

The Guide to Part 3-1 states that the various measures included are measures to assist people to comply with the Act.

As we stated in our submission in the initial consultation phase, in addition to the existing Disability Standards, we consider it important that relevant Ministers can make Standards in connection to other attributes in relevant areas of public life.

It may for example, be appropriate for the Minister to formulate Standards on the basis of race, nationality or citizenship, in relation to the treatment of refugees. This is not meant to undermine the authority of the *Migration Act 1958*, but to set standards of how refugees and those seeking assessment as refugees are to be treated, in order to ensure their rights are protected and that we meet our obligation under international treaties and conventions.

Recommendation 12: That Division 5 of Part 3-1 be amended to:

- incorporate existing Disability Standards
- detail general powers to formulate and use new Standards

- **detail that Standards can be formulated with respect to any protected attribute in all listed areas of public life.**

Burden of proof

We submitted above in our Recommendation 1. that the positive duty to make reasonable adjustments should be retained in the definition of discrimination.

In keeping with the intention of section 124 of the Bill, it follows on then that anyone claiming that the adjustment requested would cause unjustifiable hardship would also have the burden of proving that exception.

Recommendation 13: That the burden of proof in section 124 be extended to include the person claiming an exception of unjustifiable hardship in relation to reasonable adjustments.

Equality before the law

If such a provision is needed in relation to race, then the first provision of such a section should make it clear that the protections of the Act extend to people with all protected attributes, not just race.

A subsection can then detail the existing provisions relating to property issues for Aboriginal or Torres Strait Islander persons.

Recommendation 14: That Part 2-5 be redrafted to ensure that people with all protected attributes are equal before the law.

Consultation

We commend the Committee on making particular measures to assist compliance with the provisions (disability standards, compliance codes and special measure determinations) and temporary exemptions, legislative instruments.

This brings to bear general requirements of the Legislative Instruments Act 2003 to consult broadly with all interested parties before making a legislative instrument.

Under that Act, such consultation could involve notification, either directly or by advertisement, of bodies that, or of organisations representative of persons who, are likely to be affected by the proposed instrument. Such notification could invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

We thank you for the opportunity to make a submission on this Draft Exposure. If you have any queries on our submission, please direct your enquiries to Sue Tomasich at our office.