

# Australian Council of Human Rights Agencies

Our Ref: COM090416-09  
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Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
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Canberra ACT 2600

Dear Secretary

## **EXPOSURE DRAFT *HUMAN RIGHTS AND EQUAL OPPORTUNITY BILL 2012***

Thank you for providing the Australian Council of Human Rights Agencies (**ACHRA**) with the opportunity to make a submission on the exposure draft *Human Rights and Equal Opportunity Amendment Bill 2012 (Bill)*. We commend the government for seeking to simplify and improve human rights protection in Australia, and for releasing an exposure draft, which facilitates effective communication.

ACHRA strongly endorses the Bill, subject only to the minor amendments in the attached submission. The Draft Bill updates the federal anti-discrimination regime with contemporary principles and procedures, and will significantly enhance the effectiveness of federal legislation to address discrimination.

ACHRA would be happy to appear before the Committee if it would assist the Committee in its inquiry.

Yours sincerely

Yvonne Henderson  
CHAIR  
**AUSTRALIAN COUNCIL OF HUMAN RIGHTS AGENCIES**

21 December 2012

ACHRA Signatories:

- Anti-Discrimination Commissioner (Tasmania)
- Anti-Discrimination Commission Queensland
- Equal Opportunity Commission of South Australia
- Equal Opportunity Commission of Western Australia
- Human Rights and Discrimination Commissioner (ACT)
- Northern Territory Anti-Discrimination Commission
- Victorian Equal Opportunity & Human Rights Commission

# Australian Council of Human Rights Agencies

## Response to the Exposure Draft *Human Rights and Anti-Discrimination Bill 2012*

December 2012

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# ACHRA response to the Exposure Draft *Human Rights and Anti-Discrimination Bill 2012*

## 1 Introduction

The Australian Council of Human Rights Agencies (**ACHRA**)<sup>1</sup> welcomes the release of the Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (Cth) (**Draft Bill**) consolidating Commonwealth legislation regarding age, disability, race, sex and other forms of discrimination into a single Act.

ACHRA commends the Government for referring this draft legislation to the Senate Legal and Constitutional Affairs Committee (**Committee**) for review and public consultation prior to its formal introduction to Parliament. ACHRA considers that consultation on exposure draft legislation encourages valuable public participation in the development of laws.

ACHRA provided a detailed submission on the Commonwealth Attorney-General's Department (**AGD**) *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* on 1 February 2012 (**February Submission**).

## 2 Summary

ACHRA welcomes the Draft Bill and recommends that the Committee support its passage by the Parliament, subject to minor amendments. ACHRA members would be happy to appear before the Committee to provide clarification on any issues raised in our submissions, or answer questions based on our experience working with anti-discrimination laws around Australia.

ACHRA notes that the Bill:

- would implement (substantially or in full) 34 of the 50 recommendations which ACHRA made in response to the consultation paper released by the AGD in 2011, and
- would (in combination with other recent legislative measures) implement the majority of recommendations made by the Committee in its review of the *Sex Discrimination Act 1984* (Cth).

The Draft Bill introduces some reforms that will significantly improve the effectiveness of federal anti-discrimination legislation to address discrimination and provide equality of opportunity to participate in and contribute to the social, economic and cultural life of the Australian community.

This submission does not respond to all aspects of the Draft Bill or the policy issues considered in ACHRA's February Submission. Drawing on the expertise of the State and Territory Commissions in dealing with anti-discrimination legislation, this

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<sup>1</sup> For the purpose of this submission, ACHRA excludes the Australian Human Rights Commission and the Anti-Discrimination Board of New South Wales.

submission seeks to raise some practical issues associated with the Draft Bill and suggest a number of improvements, with a particular focus on:

- the inclusion and definition of protected attributes
- exceptions
- the meaning of discrimination, and
- compliance powers and mechanisms.

The following members of ACHRA have drafted this submission:

- Anti-Discrimination Commissioner (Tasmania)
- Anti-Discrimination Commission Queensland
- Equal Opportunity Commission of South Australia
- Equal Opportunity Commission of Western Australia
- Human Rights and Discrimination Commissioner (ACT)
- Northern Territory Anti-Discrimination Commission
- Victorian Equal Opportunity & Human Rights Commission

### 3 Recommendations

Recommendation 1 - Intersex should be included as a separate protected attribute. The protection should not be limited to people who are intersex and elect to live as male or female.

Recommendation 2 – The Draft Bill should retain ‘criminal record’ as a separate protected attribute.

Recommendation 3 – The Australian Government should clarify how it intends to meet its obligations under the International Labour Organisation *Discrimination (Employment and Occupation) Convention (1958)*.

Recommendation 4 – Domestic/family violence should be included as a separate protected attribute.

Recommendation 5 – Homelessness should be included as a separate protected attribute.

Recommendation 6 – Other than the exceptions for justifiable conduct (clause 23), inherent requirements of work (clause 24) and reasonable adjustments (clause 25), all exceptions should be removed and dealt with in explanatory material or guidelines.<sup>2</sup>

Recommendation 7 – The exception for justifiable conduct (clause 23) should clarify that it does not apply to discrimination by unfavourable treatment (clause 19(1)).

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<sup>2</sup> The Anti-Discrimination Commission Queensland has a different view to the recommended retention of a general limitations clause in place of specific exceptions (recommendation 6), and will make a separate submission to the Committee.

Recommendation 8 – The exception for justifiable conduct (clause 23) should define ‘legitimate’ and ‘proportionate’, and clarify that purely financial or commercial imperatives cannot justify discriminatory conduct.

Recommendation 9 – The Draft Bill should provide guidance on the interaction of the exceptions in the Draft Bill with State and Territory laws.

Recommendation 10 – The religious exceptions in the Draft Bill should be amended to ensure that there is no diminution of State and Territory anti-discrimination protections through the inclusion of broader exceptions in the federal regime.

Recommendation 11 – The Committee should seek a policy explanation for the inclusion of pregnancy and potential pregnancy in the religious exceptions.

Recommendation 12 – The Draft Bill should clarify the implicit obligation to provide reasonable adjustments by including a stand-alone obligation to make reasonable adjustments for persons with a protected attribute.

Recommendation 13 – If the explicit obligation to provide reasonable adjustments for persons with a protected attribute is not included, the Draft Bill should retain the existing obligation to make reasonable adjustments for people with disability.

Recommendation 14 – The Draft Bill should amend the definition of unfavourable treatment in clause 19(2)(b) by replacing the words ‘offends’ and ‘insults’ with ‘degrades’, ‘humiliates’ and ‘denigrates’, so that 19(2)(b) covers ‘other conduct that degrades, humiliates, denigrates or intimidates the other person’.

Recommendation 15 – The definition of ‘discrimination by imposition of policies’ in clause 19(3)(b) should be amended to focus more on disadvantage to an individual with a protected attribute, rather than a group with a protected attribute.

Recommendation 16 – Clause 19(7) should be amended to clarify that the provisions on discrimination by unfavourable treatment (clause 19(1)) and discrimination by imposition of policies (clause 19(3)) are not mutually exclusive.

Recommendation 17 – Personal association with a protected attribute should be included as a separate protected attribute in clause 17.

Recommendation 18 - The Draft Bill should clarify how temporary exemptions and special measure determinations in the Draft Bill are intended to interact with State and Territory laws.

Recommendation 19 – The Draft Bill should explicitly provide for consultation with State and Territory anti-discrimination bodies prior to certifying a compliance code, and consultation and notification prior to granting a temporary exemption or special measure determination.

Recommendation 20 – The AHRC should be appropriately resourced to undertake its functions.

Recommendation 21 – The AHRC should be required to maintain a public register of all legislative instruments, including pending, approved and rejected temporary exemptions, special measure determinations and compliance codes.

Recommendation 22 – The objects of the Act in clause 3(d) should be amended to remove the reference to formal equality.

Recommendation 23 – In addition to the international treaties identified, the objects of the Draft Bill should draw on declarations and other international human rights standards to which Australia has declared its support, including the United Nations Declaration on the Rights of Indigenous Peoples.

Recommendation 24 – The provision on multiple reasons or purposes for conduct (clause 8(1)) should be amended to clarify that the prohibited ground need only be one of the reasons for the conduct, and need not be the dominant or substantial reason.

Recommendation 25 – The provision on requesting information in clause 52 should be reframed based on section 124 of the *Anti-Discrimination Act 1991* (QLD).

Recommendation 26 – The Draft Bill should set a clear timetable to complete the review of its provisions. The three-year review of exceptions should specifically set out the timeframe for completion and Government response, and should be scheduled by reference to the commencement of the Division. The review should consider whether the exceptions are necessary and effective, whether additional protected attributes should be included, and whether the costs regime has helped to remove barriers to litigation for complainants.

## 4 Protected attributes

### 4.1 Gender identity and intersex

ACHRA welcomes the inclusion of ‘sexual orientation’ and ‘gender identity’ as protected attributes in the Draft Bill,<sup>3</sup> but has concerns about the definition of gender identity.

Clause 6 of the Draft Bill defines ‘gender identity’ as the identification by a person of one sex as a member of the other sex or a member of indeterminate sex as a member of a particular sex, by assuming characteristics of that sex or by living or seeking to live as a member of that sex.<sup>4</sup> This conflates two distinct concepts: gender or sex characteristics and gender identity.

ACHRA also has concerns that the Draft Bill does not provide appropriate coverage for people whose innate physical sex is ‘intersex’. Intersex is a physical condition related to sex characteristics, not a gender identity. People who are characterised as having ‘indeterminate sex’ are commonly referred to as being ‘intersex’, having sex characteristics that are neither wholly female nor wholly male, or a combination of the two.

ACHRA submits that the Draft Bill should recognise that ‘gender identity’ and ‘intersex’ are two distinct concepts, and address concerns that the inclusion of people of ‘indeterminate sex’ within the definition of ‘gender identity’ misleadingly conflates

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<sup>3</sup> ACHRA notes that this is consistent with the Yogyakarta Principles, which provide that ‘states shall adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity’. See International Commission of Jurists (ICJ), *Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <http://www.unhcr.org/refworld/docid/48244e602.html>.

<sup>4</sup> Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (Cth), cl 6 (definition of gender identity).



the terms 'indeterminate sex' or 'intersex' and 'gender identity'.<sup>5</sup> Further, the current drafting only provides protection where a person elects to live as a male or a female.

The Australian Government has recognised the need to address these issues in other policy areas, for example, by changing the passport rules to allow people to identify as 'male', 'female', 'intersex', or of 'indeterminate sex'.<sup>6</sup> It is not clear why the Government would choose to allow this kind of discrimination to continue in other areas of public life. ACHRA considers that the absence of anti-discrimination legislation clearly protecting people who are 'intersex' or 'indeterminate sex' and who do not elect to live as male or female is likely to lead to confusion.

Although the Explanatory Notes for the Draft Bill state that the test is based on the highest current standards in State and Territory anti-discrimination law, ACHRA considers that existing protections in many State and Territory Acts do not reflect the experiences of people in the community or provide them with adequate protection from discrimination. The current standard in State and Territory law is expected to shift in the near future, with an intersex-inclusive Anti-Discrimination Amendment Bill (No. 45 of 2012) (TAS).<sup>7</sup> The explicit inclusion of intersex as a protected attribute in Tasmania has not been controversial, nor has the broader definition of intersex provided in that Bill. The *Anti-Discrimination Amendment Bill 2012* (TAS) received bipartisan support during the Bill's second reading.

**Recommendation 1 - Intersex should be included as a separate protected attribute. The protection should not be limited to people who are intersex and elect to live as male or female.**

## 4.2 Criminal record

The Draft Bill does not provide the Australian Human Rights Commission (**AHRC**) with the jurisdiction to receive complaints of discrimination in employment and occupation on the ground of criminal record.<sup>8</sup> ACHRA notes the Government's commitment to lift differing levels of protections to the highest current standard and resolve gaps and inconsistencies without diminishing protections, and submits that the existing function should be retained.

ACHRA is concerned that removing this avenue of recourse may have a significant adverse impact on people affected by discrimination in employment on the basis of criminal record who presently are able resolve complaints at the AHRC. Persons with a criminal record are regularly discriminated against even if their criminal record is very old and no longer relevant.<sup>9</sup> This form of discrimination persists despite research demonstrating that a person's prior criminal record is an unreliable indicator of future

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<sup>5</sup> Intersex is not a gender identity: it is a biological state, one that in many cases can be determined prenatally, via amniocentesis. Sex is customarily defined as being the two binary sexes. See Organisation Internationale des Intersexués (OII), 'First thoughts on the federal anti-discrimination proposals', available at: <http://oiiiaustralia.com/21358/first-thoughts-on-federal-anti-discrimination-proposals/>.

<sup>6</sup> Australian Government, Department of Foreign Affairs and Trade, *Sex and Gender Diverse Passport Applicants*, available at <https://www.passports.gov.au/web/sexgenderapplicants.aspx>

<sup>7</sup> As at 3 December 2012, the *Anti-Discrimination Amendment Bill 2012* (TAS) was passed by the Tasmanian House of Assembly on 14 November 2012, and had its first reading in the Legislative Council on 15 November 2012.

<sup>8</sup> *Australian Human Rights Commission Regulations 1989* (Cth) reg 4.

<sup>9</sup> Fitzroy Legal Service and JobWatch, *Criminal Records in Victoria: Proposals for Reform*, 2005 <[http://www.jobwatch.org.au/uploaded\\_files/144623crvpr0706.pdf](http://www.jobwatch.org.au/uploaded_files/144623crvpr0706.pdf)>.

behaviour and that discrimination is an impediment to rehabilitation, social reintegration and workforce participation.<sup>10</sup>

Australia has ratified the International Labour Organisation Convention 111, the *Discrimination (Employment and Occupation) Convention 1958 (ILO 111)*, which requires all parties to:

...declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

In 1989, Australia added 'criminal record' to grounds of non-discrimination under the ILO 111.<sup>11</sup> Australian governments must therefore pursue policies to ensure that discrimination on the ground of criminal record is eliminated.

Despite these human rights obligations under international law, current protections from discrimination on the basis of a criminal record are insufficient and inconsistent. The Draft Bill removes the already limited opportunity to make a complaint about discrimination on the basis of criminal record in employment to the AHRC.<sup>12</sup> In Victoria, New South Wales, South Australia and Queensland anti-discrimination laws do not prohibit discrimination on the basis of criminal record, while Tasmania, Northern Territory and the ACT make discrimination on the grounds of a criminal record unlawful subject to certain exceptions.<sup>13</sup> Although few States and Territories provide protection from discrimination on the grounds of criminal record, ACHRA submits that retaining the existing recourse to make a complaint to the AHRC is more likely to lead to a standardised approach in State and Territory anti-discrimination legislation.

In order to give effect to Australia's international human rights obligations, the Draft Bill should comprehensively prohibit discrimination on the basis of criminal record. Discrimination on the basis of a criminal record should only be permitted if such discrimination constitutes a reasonable, necessary and proportionate means of achieving a legitimate aim or purpose.

**Recommendation 2 – The Draft Bill should retain 'criminal record' as a protected attribute.**

**Recommendation 3 – The Australian Government should clarify how it intends to meet its obligations under the International Labour Organisation *Discrimination (Employment and Occupation) Convention (1958)*.**

### **4.3 Domestic/ family violence and homelessness**

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<sup>10</sup> Federation of Community Legal Centres (Vic), *Submission: Draft Model Spent Convictions Bill*, May 2009, 6.

<sup>11</sup> *Australian Human Rights Commission Regulations 1989* (Cth) reg 4. Complainants who have experienced discrimination on the basis of their criminal record are unable to enforce their rights through the judicial system.

<sup>12</sup> *Australian Human Rights Commission Act 1986* (Cth).

<sup>13</sup> PILCH Homeless Persons' Legal Clinic, *Discrimination in Employment on the Basis of Criminal Record, Submission to the Human Rights and Equal Opportunity Commission Inquiry into Discrimination in Employment on the Basis of Criminal Record* (February 2005), 15-16. Note that spent convictions legislation also operates in some Australian states and territories, which in effect operates to prevent discrimination on the basis of criminal record by limiting what information can be used by an employer. However, the application of such legislation is limited in that it only has effect after the relevant crime-free period has expired.

ACHRA notes, with some disappointment, that the Exposure Draft does not include 'domestic/family violence' or 'homelessness' as new protected attributes.

ACHRA notes that such protection against discrimination has been expressly ruled out by the Attorney-General and this position is made clear in the Explanatory Notes.

On the issue of domestic and family violence, this omission is particularly concerning given that the Commonwealth's Consolidation of Anti-Discrimination Laws Discussion Paper 2011 acknowledges that there is currently 'no specific protection for victims of domestic violence in either Commonwealth or State or Territory anti-discrimination law'.<sup>14</sup> The Government committed to taking steps to provide protection through changes to the Australian Labor Party's (ALP) Platform in 2011. Amendment 448A at the ALP's 46<sup>th</sup> National Conference states that 'noting Labor's supported and funded commitment to equal pay, Labor will further ensure that the Fair Work and anti-discrimination legislation frameworks provide appropriate protection to victims of domestic violence in the workplace, including in relation to leave entitlements'.<sup>15</sup>

Whilst ACHRA notes the importance of inclusion of social origin at clause 17(1)(r), we argue against its limited coverage.

Adequate and effective protection from discrimination on the basis of homelessness would enable homeless people to access employment, accommodation and other goods and services on an equal footing with the rest of the community. Social inclusion and participation in civil, political, social, cultural and economic life can reduce and resolve marginalisation, disadvantage and poverty, all of which are causal factors and risk indicators of homelessness, unemployment and criminal activity. Including homelessness as an attribute would have concrete benefits for homeless people.

ACHRA reiterates its earlier recommendation that domestic/family violence and homelessness receive full protection in the Draft Bill.

**Recommendation 4 – Domestic/family violence should be included as a separate protected attribute.**

**Recommendation 5 – Homelessness should be included as a separate protected attribute.**

## 5 Exceptions

### 5.1 Justifiable conduct

ACHRA understands that the rationale for a general exception for justifiable conduct stemmed from the need to clarify, standardise and simplify the anomalous range of exceptions across all five federal anti-discrimination Acts. While ACHRA welcomes the introduction of a general limitations clause,<sup>16</sup> we consider that there is a need for

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<sup>14</sup> Commonwealth's *Consolidation of Anti-Discrimination Laws Discussion Paper* (2011), 24 [85]

<sup>15</sup> Australian Labor Party, 46<sup>th</sup> National Conference, Amendment 448A, available at <http://ouralp.net/2011/12/04/all-the-motions-from-national-conference-2011/>

<sup>16</sup> Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (Cth), cl 23

greater clarity to ensure that the right to equality is limited strictly, and people know and understand their rights and responsibilities with as much certainty as possible.

ACHRA advocated for a general exception for justifiable conduct on the basis that it would replace (as far as possible) specific exceptions and exemptions.<sup>17</sup> What has occurred in the Draft Bill is a combination of specified exceptions as well as a new general exception for justifiable conduct.

One of the dangers of the provision is that it may create a new range of exceptions for discrimination by unfavourable treatment on top of the known and specific exceptions. ACHRA considers that the application of this exception to discrimination by unfavourable treatment is problematic, and inconsistent with accepted international practice. In the UK for example, the defence of justifiable conduct does not provide a defence to a complaint of direct discrimination. This should be addressed by qualifying that the exception for justifiable conduct does not apply to clause 19(1).

Further, the interaction between the general exception for justifiable conduct and the specific exceptions is unclear, giving rise to concerns that the justifiable conduct exception may be read as an overarching provision that is relevant to consideration of the other exceptions. Our view is that the specific exceptions should be removed from Chapter 2 Division 4, with the exclusion of clause 24 (inherent requirements) and clause 25 (reasonable adjustments), and addressed in explanatory material or guidelines to clarify how the exception for justifiable conduct should be interpreted in practice.

ACHRA is also concerned that the exception for justifiable conduct is too broad, and should be defined more narrowly to ensure that the right to equality is not unduly limited. Proportionality and legitimacy (in terms of legitimate bases for restricting non-absolute human rights) are well-established principles of international and comparative human rights law,<sup>18</sup> but translate less effectively to an anti-discrimination context. A legitimate end or purpose for a State under international law may include the protection of national security; public safety, order, health or morals; or the rights and freedoms of others. A proportionate response by a State – that is, a response that is rational, appropriate and adapted – must also follow the least restrictive approach available. In other words, it can only impinge on an individual's right to non-discrimination in the most minimal way.

Conduct that may be legitimate and proportionate for a State under human rights law, such as restricting freedom of movement in a national emergency to protect public safety, is inherently different to conduct that is legitimate and proportionate for an organisation wanting to engage in lawful discrimination. 'Legitimate' and 'proportionate' are not defined in clause 23, leaving open the question of whether discriminatory conduct for purely commercial imperatives may be legitimate or proportionate, and therefore justify discriminatory treatment. In our view, the commercial viability of discriminatory conduct is not, on its own, sufficient to outweigh the harmful effects that would result from that conduct.<sup>19</sup> This reflects the approach

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<sup>17</sup> ACHRA, *Submission on the Consolidation of Commonwealth Anti-discrimination Laws*, 1 February 2012, 46.

<sup>18</sup> See for example, the judicial doctrine of margin of appreciation, which embodies the general approach of the Strasbourg Court to the difficult task of balancing the sovereignty of contracting parties with their obligation under the *European Convention of Human Rights*.

<sup>19</sup> See for example *Thales Australia Limited and ADI Munitions Pty Ltd* [2011] VCAT 729 at [25] and *Raytheon Australia Pty Ltd* [2011] VCAT 796 at [41].

taken by State Tribunals in relation to temporary exemptions, which have found that profitability alone is not a sufficient basis for discrimination.

A better approach may be to clarify the considerations relevant to determining whether conduct is justifiable in clause 23(4). Clause 23(4)(c) and 23(4)(d) appear to place too great an emphasis on the inconvenience to duty holders, and should be reframed to reflect the objects and purpose of the Draft Bill to promote substantive equality and eliminate discrimination. These criteria should clarify that purely financial or commercial viability cannot justify discriminatory conduct, and that the right to equality and freedom from discrimination will weigh heavily in the balance against discrimination that is motivated by financial or commercial interests. In assessing whether conduct is justifiable, courts should still be required to consider whether the alleged discriminator 'could instead have engaged in conduct that would have had no, or a lesser, discriminatory effect'.

**Recommendation 6 – Other than the exceptions for justifiable conduct (clause 23), inherent requirements of work (clause 24) and reasonable adjustments (clause 25), all exceptions should be removed and dealt with in explanatory material or guidelines.<sup>20</sup>**

**Recommendation 7 – The exception for justifiable conduct (clause 23) should clarify that it does not apply to discrimination by unfavourable treatment (clause 19(1)).**

**Recommendation 8 – The exception for justifiable conduct (clause 23) should define 'legitimate' and 'proportionate', and clarify that purely financial or commercial imperatives cannot justify discriminatory conduct.**

## **5.2 Religious exceptions**

ACHRA acknowledges and commends the Government's commitment to resolving gaps and inconsistencies in existing protections without diminishing protections. ACHRA is concerned that the exceptions related to religion are significantly broader than those in the State and Territory anti-discrimination legislation. If the Draft Bill is to be the benchmark for harmonisation of State, Territory and Commonwealth anti-discrimination legislation, this will be a diminution of State and Territory laws.<sup>21</sup> In Queensland for example, the religious exception related to employment is limited to discrimination where a person openly acts in a way that is contrary to the employer's religious beliefs and it is a genuine occupational requirement that the person act in a way consistent with the employer's religious beliefs in the course of work. In Tasmania, there are no religious exceptions for educational institutions in respect of admission and a limited exception in respect of employment.

Without looking to the benchmark set by State and Territory laws, the Draft Bill will create a complex patchwork of inconsistent protections and lose the opportunity to standardise State, Territory and federal exceptions and ensure the most rights protective framework. In the interests of preserving the existing protections against

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<sup>20</sup> The Anti-Discrimination Commission Queensland has a different view to the recommended retention of a general limitations clause in place of specific exceptions (recommendation 6), and will make a separate submission to the Committee.

<sup>21</sup> See for example, the *Queensland Anti-Discrimination Act 1991* (Qld)

discrimination in each State and Territory, the Draft Bill should clarify that it is not intended to override State and Territory laws unless the conduct is also prohibited, not dissimilar to sections 26 and 27 of the *Fair Work Act 2009* (Cth).

Further, ACHRA encourages the Committee to seek a policy explanation for the inclusion of pregnancy and potential pregnancy in the religious exceptions, particularly given that no religious organisations have sought to rely on it.

**Recommendation 9 – The Draft Bill should provide guidance on the interaction of the exceptions in the Draft Bill with State and Territory laws.**

**Recommendation 10 – The religious exceptions in the Draft Bill should be amended to ensure that there is no diminution of State and Territory anti-discrimination protections through the inclusion of broader exceptions in the federal regime.**

**Recommendation 11 – The Committee should seek a policy explanation for the inclusion of pregnancy and potential pregnancy in the religious exceptions.**

## **6 Meaning of ‘discrimination’**

### **6.1 Overview**

ACHRA strongly supports the amendments to the definition of discrimination in the Draft Bill, particularly the introduction of a unified test of discrimination, recognition of intersectional discrimination, and the removal of the comparator test. The simplification of the definition of discrimination will generally make the anti-discrimination protections easier to deal with. ACHRA is concerned, however, that the new clause needs to retain existing protections and the current drafting could lead to anomalies and practical issues that should be addressed before the enactment.

### **6.2 Reasonable adjustments**

The explicit obligation to provide reasonable adjustments for people with a disability is not retained in the Draft Bill. The Draft Bill does not include a failure to make reasonable adjustments for a person with disability within the definition of discrimination, consistent with protections in the *Disability Discrimination Act 1992* (Cth).<sup>22</sup> Reasonable adjustments are only addressed in clause 23, which provides an exception for justifiable conduct. The Draft Bill should retain an explicit reference to reasonable adjustments.

Although failing to make reasonable adjustments is not explicitly proscribed in other federal anti-discrimination laws, it is nonetheless implicit in the prohibition of indirect discrimination. ACHRA’s experience has been that it enhances people’s understanding where this is expressly set out in legislation.

In light of the Government’s commitment to retain the existing protections in anti-discrimination laws, ACHRA considers that the Draft Bill needs to include a stand-alone provision that explicitly states that a failure to make reasonable adjustments constitutes discrimination. A contravention of this provision should enable a complaint of discrimination to be made.

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<sup>22</sup> *Disability Discrimination Act 1992* (Cth), s 5 - 6.

In order to make rights and obligations clearer and achieve consistency, ACHRA considers that the obligation to provide reasonable adjustments should extend to all protected attributes. This is consistent with recommendation 13 in ACHRA's February Submission, and would serve to clarify the obligation to make reasonable adjustments implicit in the concept of indirect discrimination (now covered by discrimination by imposition of policies in clause 19(3)).

**Recommendation 12 – The Draft Bill should clarify the implicit obligation to provide reasonable adjustments by including a stand-alone obligation to make reasonable adjustments for persons with a protected attribute.**

**Recommendation 13 – If the explicit obligation to provide reasonable adjustments for persons with a protected attribute is not included, the Draft Bill should retain the existing obligation to make reasonable adjustments for people with disability.**

### **6.3 Definition of unfavourable treatment**

ACHRA welcomes the revised definition of discrimination in clause 19(1) of the Draft Bill, which provides that a person discriminates against another person if that person treats, or proposes to treat, the other person unfavourably because the other person has a protected attribute or combination of protected attributes.

The definition of 'unfavourable treatment' is inclusive without being exhaustive, and includes harassment and 'other conduct that offends, insults or intimidates another person'. The phrase is largely borrowed from section 28A of the *Sex Discrimination Act 1984* (Cth) and 18C of the *Racial Discrimination Act 1975* (Cth), with the exclusion of the word 'humiliates' which has been omitted from clause 19(2) of the Draft Bill, despite being referred to in the Explanatory Notes.

ACHRA is generally supportive of the definition of unfavourable treatment. Discrimination laws should aim to protect people's dignity against assault. In our view, the definition of unfavourable treatment is not intended to curtail the right to offend in individual interactions.

ACHRA notes concerns have been raised that 'insults' or 'offence' are both subjective concepts. There may be a need for a balancing with an objective test (as is provided in the *Anti-Discrimination Act 1998* (Tas))<sup>23</sup> and the use of more objective terms by replacing the words 'offends' and 'insults' in clause 19(2)(b) with 'degrades', 'humiliates' and 'denigrates'. Other options include inserting a reasonableness element into test for unfavourable treatment, by requiring that conduct is 'reasonably likely' to intimidate, degrade, humiliate or denigrate; or removing clause 19(2)(b) entirely.<sup>24</sup>

ACHRA is also concerned that clause 19(3) places undue emphasis on disadvantage to a group rather than to an individual with an attribute or combination of attributes. Distinguishing between direct discrimination against an individual and indirect discrimination as affecting a group of people is an unwarranted distinction that is not

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<sup>23</sup> *Anti-Discrimination Act 1998* (Tas) s 17(1).

<sup>24</sup> The Tasmanian Anti-Discrimination Commissioner will be making separate submissions on this aspect of the Draft Bill, based on the experience of her office with the current provision of the *Anti-Discrimination Act 1998* (Tas) that uses the proposed language and has an objective test built into the separate prohibited conduct provision.

consistent with the objectives of protecting people with attributes and eliminating discrimination. Accordingly, clause 19(3)(b) should be amended to clarify that the emphasis is on whether the policy has, or is likely to have, the effect of disadvantaging persons with an attribute, or a particular combination of two or more protected attributes’.

**Recommendation 14 – The Draft Bill should amend the definition of unfavourable treatment in clause 19(2)(b) by replacing the words ‘offends’ and ‘insults’ in clause 19(2)(b) with ‘degrades’, ‘humiliates’ and ‘denigrates’, so that 19(2)(b) covers ‘other conduct that degrades, humiliates, denigrates or intimidates the other person’.**

**Recommendation 15 – The definition of discrimination by imposition of policies in clause 19(3)(b) should be amended to focus more on disadvantage to an individual with a protected attribute, rather than a group with a protected attribute.**

## **6.4 Characterising discrimination**

The Explanatory Notes explain that the rationale for removing the terms ‘direct’ and ‘indirect’ discrimination was to clarify that discrimination can be (and often is) both direct and indirect. Although clause 19(7) provides that clauses 19(1) (‘discrimination by unfavourable treatment’ or direct discrimination) and 19(3) (‘discrimination by imposition of policies’ or indirect discrimination) ‘do not limit each other’, it does not make clear that the two provisions are not mutually exclusive. ACHRA is concerned that this may lead to difficulties when the law is being interpreted and applied. For certainty, clause 19(7) should clarify that clauses 19(1) and 19(3) are not mutually exclusive.

**Recommendation 16 – Clause 19(7) should be amended to clarify that the provisions on discrimination by unfavourable treatment (clause 19(1)) and discrimination by imposition of policies (clause 19(3)) are not mutually exclusive.**

## **6.5 Personal association**

Clause 19(4) extends the grounds of discrimination to personal association with a protected attribute. For clarity and simplicity, ACHRA considers that ‘personal association’ should be addressed in the list of protected attributes. Grouping personal association with other attributes in clause 17 will make it easier for people to see that it is protected, and will make the definition of discrimination less cumbersome. It will also bring the Draft Bill in line with the approach taken in State and Territory anti-discrimination laws.

**Recommendation 17 – Personal association with a protected attribute should be included as a separate protected attribute in clause 17.**



## 7 Burden of proof

ACHRA strongly supports the introduction of a shared or shifting burden of proof in clause 124 of the Draft Bill, which has been inaccurately described as a reverse burden of proof in media and commentary.

ACHRA notes that the shared burden in the Draft Bill differs to a reverse burden, such as the one in the *Fair Work Act 2009*.<sup>25</sup> The shared burden only applies in relation to the reason or purpose for the allegedly unlawful conduct. The rest of the core elements of each form of unlawful conduct have to be proved by the complainant.

ACHRA considers that this appropriately balances the need for the complainant to be able to show an arguable case of discrimination (including the presence of a protected attribute or attributes, unfavourable treatment or imposition of a policy which disadvantages people with that attribute, and connection to an area of public life), with the reality that the respondent will be best placed to explain their conduct.

The impact of this change is managed by the AHRC being able to close complaints on numerous grounds, such as if the AHRC is satisfied that the conduct is not unlawful, there is no reasonable prospect of settling the complaint at conciliation, or the complaint is frivolous, vexatious, misconceived or lacking in substance.<sup>26</sup>

## 8 Compliance codes and mechanisms

### 8.1 Impact of compliance powers on State and Territory laws

While ACHRA welcomes the introduction of mechanisms to facilitate compliance and provide greater certainty to duty holders in principle, its members are extremely concerned that a compliance code certified by the AHRC could, if specified, override State or Territory laws.

Under clause 75(4), a compliance code may provide that the code, in whole or part, is or is not intended to affect the operation of State or Territory laws, or particular State or Territory laws. This represents a vast expansion of AHRC powers, and may limit the ability of individual's to seek redress for a complaint of discrimination by overriding State and Territory protections. It arguably adds to the complexity of understanding of State and Territory legislation if a person has to understand their rights or obligations under State or Territory anti-discrimination laws as well as understand what current federal codes etc impact on those rights or obligations. This is particularly concerning in respect of potential complainants seeking redress under State or Territory legislation.

Further, as legislative instruments, special measure determinations, temporary exemptions and compliance codes may also make conduct lawful under the statutory authority exceptions in State and Territory anti-discrimination acts. The specific wording of statutory authority exceptions varies between jurisdictions. In the Northern Territory for example, a person may do an otherwise discriminatory act that is necessary to comply with, or is specifically authorised by, an Act or regulation of either the Commonwealth or the Territory, including a legislative instrument of the Commonwealth or Territory.<sup>27</sup> In Tasmania, a person may discriminate if it is

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<sup>25</sup> *Fair Work Act 2009* (Cth), s 361, 783.

<sup>26</sup> Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (Cth), s 117(2).

‘reasonably necessary to comply with’ any law of Tasmania or the Commonwealth; or ‘any order of a commission, court or tribunal’.<sup>28</sup> The statutory authority exceptions in other States and Territories do not appear to be broad enough to cover Commonwealth legislative instruments.<sup>29</sup>

**Recommendation 18 - The Draft Bill should clarify how temporary exemptions and special measure determinations in the Draft Bill are intended to interact with State and Territory laws.**

## 8.2 Consultation

ACHRA is particularly concerned that the AHRC may certify compliance codes—and, to a lesser extent, grant temporary exemptions<sup>30</sup> and make special measure determinations<sup>31</sup>—without first consulting with the public affected by these decisions or the State and Territory anti-discrimination bodies, particularly given that these instruments can override State and Territory anti-discrimination legislation in some circumstances.<sup>32</sup>

When making legislative instruments, the AHRC must comply with the *Legislative Instruments Act 2003* (Cth), which requires reasonable and appropriate consultation.<sup>33</sup> In determining whether consultation was appropriate, the AHRC may consider the extent to which it drew on the knowledge of persons having expertise in fields relevant to the proposed instrument, and ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.<sup>34</sup> This is important because the decisions can affect the equality rights of people not represented in any proceedings.

While ACHRA recognises the AHRC’s expertise on human rights and discrimination issues nationally, it is concerned that the AHRC may not fully appreciate the impact of issuing a compliance code that covers, for example, the provision of public

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<sup>27</sup> *Anti-Discrimination Act* (NT) (as at 2012) s 53. Section 51 of the *Interpretation Act* (NT) (as at 27 January 2012) provides that a reference (either generally or specifically) to a law or statutory instrument includes a reference to the statutory instruments in force under the law, instrument or provision.

<sup>28</sup> *Tasmanian Anti-Discrimination Act 1998* (TAS) s 24.

<sup>29</sup> In Victoria, discrimination will be lawful where it is necessary to comply with, or is authorised by, a provision of an Act or an ‘enactment’, such as a legislative instrument, however this is limited to Acts or enactments of the respective State. See *Equal Opportunity Act 2010* (VIC); s 4, 75. See also *Dulhunty v Guild Insurance Limited* (Anti-Discrimination) [2012] VCAT 1651, for authority that the statutory authority exception in section 75 of the *Equal Opportunity Act 2010* (VIC) does not extend to Commonwealth Acts or enactments. Similarly, in New South Wales and the Australian Capital Territory, discrimination will only be lawful where it is necessary to comply with a respective State or Territory law: *Anti-Discrimination Act 1977* (NSW), s 54; *Interpretation Act 1987* (NSW) s 65; *Discrimination Act 1991* (ACT) s 30. In Queensland, the exception is very narrow; discrimination will only be lawful if it is necessary to comply with, or is authorised by an existing provision of another Act, or an existing provision of an order or award of a court of tribunal etc: *Anti-Discrimination Act 1991* (Qld) s 106. ‘Existing provision’ means a provision in existence at the commencement of the section (in 1991). South Australia has no statutory authority exception, and the Western Australian exception was subject to a sunset clause which has lapsed: *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA) s 5, 69.

<sup>30</sup> Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl 84(5).

<sup>31</sup> Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (Cth) cl 80(5).

<sup>32</sup> Neither the Draft Bill nor *Legislative Instruments Act 2003* (Cth) explicitly require the AHRC to notify or consult with relevant State or Territory anti-discrimination bodies in making legislative instruments

<sup>33</sup> *Legislative Instruments Act 2003* (Cth) s 17.

<sup>34</sup> *Legislative Instruments Act 2003* (Cth) s17(2).

transport in each State and Territory, without first talking to the community and the relevant anti-discrimination bodies.

State and Territory anti-discrimination bodies are experts in anti-discrimination law and have relevant knowledge and expertise in the structure of local services and industries that is highly relevant to consideration of compliance codes. We have extensive experience liaising with industry bodies in performing our education, policy and dispute resolution functions. This expertise is underpinned by decades of experience resolving complaints of discrimination in the community. In ACHRA's view, the Draft Bill should specifically require consultation with ACHRA's State and Territory members prior to certifying a compliance code, and consultation or notification prior to granting, renewing or refusing a temporary exemption or special measure determination.

**Recommendation 19 – The Draft Bill should explicitly provide for consultation with State and Territory anti-discrimination bodies prior to certifying a compliance code, and consultation and notification prior to granting a temporary exemption or special measure determination.**

### **8.3 Resourcing**

The development and certification of compliance codes is likely to require significant resources. If this AHRC function is not appropriately resourced, certifying compliance codes on a fee-for-service basis under clause 209 may give rise to a perceived conflict of interest (i.e. an industry paying for a code, compliance with which will provide a complete defence to a complaint of discrimination).

**Recommendation 20 – The AHRC should be appropriately resourced to undertake its functions.**

### **8.4 Register of legislative instruments**

To ensure accessibility and transparency, ACHRA considers that the AHRC should keep a public register of all legislative instruments, including exemption and special measure applications granted and refused, and a list of all laws prescribed for the purposes of clause 30 of the Bill. The Commonwealth's legislative instruments register is not easy for the general community to access, if, for example, they are looking for information about whether a particular employer or service provider has a temporary exemption. An online register of legislative instruments would provide the general public with an easy way to search for, and locate, legislative instruments issued by the AHRC, and legislation relevant to understanding any current exceptions or exemptions to the Act as enacted.

**Recommendation 21 – The AHRC should be required to maintain a public register of all legislative instruments, including pending, approved and rejected temporary exemptions, special measure determinations and compliance codes.**

## **9 Other technical drafting issues**

### **9.1 Objects and purpose**

ACHRA welcomes the inclusion of substantive equality in the objects and purpose of the Draft Bill.<sup>35</sup>

The objects and purpose clause refers to formal and substantive equality, which can be conflicting. Treating everybody in the same way may not provide equal opportunity, for example, stairs at the entry to a building may provide everybody with the same conditions, but people with a physical disability might not be able to get in the door. In our view, formal equality should not be a goal in itself, and should be removed from the objects and purpose.

The objects and purpose define 'human rights instruments' by reference to the seven core international human rights instruments. ACHRA considers that the objects of the Draft Bill should also draw on declarations and other international human rights standards to which Australia has declared its support, including the *United Nations Declaration on the Rights of Indigenous Peoples*. The definition should be drafted so that any other instruments that Australia ratifies in the future are automatically taken to be included, without needing to amend the legislation.

**Recommendation 22 – The objects of the Act in clause 3(d) should be amended to remove the reference to formal equality.**

**Recommendation 23 – In addition to the international treaties identified, the objects of the Draft Bill should draw on declarations and other international human rights standards to which Australia has declared its support, including the United Nations Declaration on the Rights of Indigenous Peoples.**

## 9.2 Multiple reasons for conduct

Clause 8(1) provides that a person engages in conduct for a particular reason or purpose, if it is a sole or one of the reasons or purposes for the conduct. ACHRA is concerned that this may have the effect of excluding a significant reason for the conduct. The rationale for these provisions is that any decision or conduct which is tainted by a discriminatory motivation should be prohibited. Federal discrimination laws currently provide that the prohibited ground need only be one of the reasons for the conduct, and need not be the dominant or substantial reason.

ACHRA submits that clause 8 needs to be clear that the existing tests are not diluted by the current drafting, which omits the clarification 'whether or not the matter or reason is the dominant or substantial reason for doing the act'.<sup>36</sup>

**Recommendation 24 – The provision on multiple reasons or purposes for conduct (clause 8(1)) should be amended to clarify that the prohibited ground need only be one of the reasons for the conduct, and need not be the dominant or substantial reason.**

## 9.3 Requesting information

Although the shifting burden of proof applies to requests for information under clause 52, ACHRA considers that establishing a prima facie case of a request for

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<sup>35</sup> Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (Cth), cl3(d).

<sup>36</sup> See for example, *Sex Discrimination Act 1984* (Cth) s 8.

information may be extremely difficult for a complainant, particularly for example in an employment selection process where there is likely to be no evidence, circumstantial or otherwise, open to the complainant. To overcome this issue, ACHRA suggests reframing the provision based on section 124 of the *Anti-Discrimination ACT 1991* (QLD).

**Recommendation 25 – The provision on requesting information in clause 52 should be reframed based on section 124 of the *Anti-Discrimination Act 1991* (QLD).**

## **10 Review of key provisions**

Clause 47 of the Draft Bill sets out a requirement for a review of exceptions to be ‘commenced within three years of commencement of this section’. ACHRA is concerned to ensure that such a review is not only commenced, but also completed within a reasonable time frame, with the Government’s response also provided in a timely way. As such, it is proposed that this clause be amended to include a completion date and specify the time frame for tabling of the Government’s response. Further, it is not clear why the clause refers to ‘commencement of this section’ rather than ‘commencement of this Division’. The timing of the review should be tied to commencement of the Division setting out the exceptions, rather than self-referencing the review clause itself.

Given the issues raised earlier in this submission, ACHRA believes that the Draft Bill should also have a clear timetable for review of its other provisions, including whether the specific exceptions are necessary, whether additional protected attributes should be included, and whether the costs regime has been effective in removing barriers to litigation for complainants.

**Recommendation 26 – The Draft Bill should set a clear timetable to complete the review of its provisions. The three-year review of exceptions should specifically set out the timeframe for completion and Government response, and should be scheduled by reference to the commencement of the Division. The review should consider whether the exceptions are necessary and effective, whether additional protected attributes should be included, and whether the costs regime has helped to remove barriers to litigation for complainants.**