



NSW Reconciliation Council Submission



- ▶ *To the Senate Standing Committee on Legal and Constitutional Affairs on the Exposure Draft Legislation for the Human Rights and Anti-Discrimination Bill 2012*



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ABOUT THE NSW RECONCILIATION COUNCIL

The New South Wales Reconciliation Council (NSWRC) is the peak representative body for Reconciliation in NSW. The Council is made up of Indigenous and non-Indigenous Australians, working through a range of groups and organisations to promote united communities and address the ‘unfinished business’ of Reconciliation. This means promoting recognition of rights, economic independence and social justice for Aboriginal and Torres Strait Islander peoples, as well as improving relationships and respect between Indigenous and non-Indigenous people.

NSWRC and its membership believe that these relationships at the community level have a vital impact on Aboriginal and Torres Strait Islander peoples’ socio-economic status, health, culture and well-being. As a peoples’ movement in NSW, Reconciliation draws on the wisdom of grassroots and community based individuals, working towards a fairer society for all and greater respect, opportunities and engagement with Aboriginal and Torres Strait Islander peoples.

a. The relevance of anti-discrimination legislation to Reconciliation

NSWRC believes the Reconciliation process can be advanced by raising community awareness and understanding, by promoting and supporting social justice, equity and human rights. Strong legislation which protects individuals and groups from racial discrimination and racial vilification promotes the dignity of all, increases access to services and economic independence and is therefore a vital part of a Reconciled Australia. In addition, raising awareness of the rights and responsibilities of Australians in relation to anti-discrimination in everyday public life benefits all Australians and will create cohesive and inclusive communities based on mutual respect.

1. INTRODUCTION

This submission is made in response to the **Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Draft Bill)**, released by the Commonwealth Attorney-General's Department in November 2012. The NSW Reconciliation Council (NSWRC) welcomes the opportunity to contribute to the process, which it hopes will align anti-discrimination legislation into a simpler format making it accessible for all Australians.

This submission is not intended to comprehensively address all points in the Draft Bill. Rather, it aims to provide a focused response from the perspective of the NSWRC regarding Reconciliation in NSW.

The Draft Bill proposes a number of reforms to Commonwealth anti-discrimination law, including:

- ▶ Introduction of a single, simplified test for discrimination applying to all protected attributes;
- ▶ Protections against discrimination for additional protected attributes including sexual orientation and gender identity;
- ▶ Protection against discrimination and sexual harassment in any area of public life;
- ▶ A streamlined approach to exceptions, including a new general exception for justifiable conduct;
- ▶ Additional measures to assist and promote voluntary compliance;
- ▶ Improvements to the complaints process to improve access to justice; and
- ▶ Some adjustments to the functions of the Australian Human Rights Commission.

2. EXECUTIVE SUMMARY

In considering the Draft Bill, NSWRC supports:

- ▶ The creation of a **unified piece of legislation** which is simpler and clearer in addressing discrimination in Australia.
- ▶ Measures that ensure people subjected to both **direct and systemic discrimination** are able to find redress in a straightforward manner. This includes removing the use of the terms *direct* and *indirect* to define the types of racial discrimination which is prohibited.
- ▶ Removing the reference to 'human rights and fundamental freedoms' as currently contained in the *Racial Discrimination Act 1975 (Cth)* (RDA).
- ▶ The **shifting of the burden of proof** for complainants to establish a *prima facie* case that discrimination occurred.
- ▶ **Implementation of Australia's international human rights obligations into domestic law.** NSWRC urges the Government to progressively implement its other human rights responsibilities under international law, including under the **UN Declaration on the Rights of Indigenous Peoples** (UNDRIP).
- ▶ Increased powers and an **expanded role for the Australia Human Rights Commission (AHRC)**, to enable it to monitor, evaluate and set standards protecting against discrimination. NSWRC also recommends the AHRC's powers are extended to allow it to play a direct role in compelling organisations to act in a non-discriminatory way.

NSWRC supports the promotion of understanding and awareness of human rights and anti-discrimination laws and obligations by duty holders and the broader community. In this regard, NSWRC recommends adequate resourcing be provided to the AHRC and community sector to educate and inform Australians about anti-discrimination legislation and the proposed reforms.

In considering the Draft Bill, NSWRC is concerned by:

- ▶ The **definition of race** under the Draft Bill, which does not include acknowledgment of Aboriginal language groups and smaller definitional groups.
- ▶ A lack of discrimination protection for an important attribute: **prior criminal record**
- ▶ Inadequacies in the concept of 'special measures' defined in the Draft Bill and **the failure to properly acknowledge and provide for the unique and permanent rights that Indigenous peoples have in Australia**, by virtue of their status as First Nations.
- ▶ The absence in the definition of 'special measures', of any express requirement that **measures implemented under this provision are only undertaken with the free, prior and informed consent of affected groups**. We consider this particularly important in the context of laws and measures which are designed to 'advance' Aboriginal and Torres Strait Islander communities without consulting those communities. In this regard, NSWRC also recommends the **AHRC be given powers to enable it to oversee and monitor the consultative processes** which should be incorporated into the Draft Bill.
- ▶ The lack of clarity in direction to the AHRC under the **certification of temporary exceptions**
- ▶ The exceptions provided in the Draft Bill related to laws and court orders. Although NSWRC commends the exclusion of racially based discrimination from these exceptions, there is concern that **the broader effect is to create a hierarchy of laws; where other laws are able to override anti-discrimination legislation**. In NSWRC's view this does not afford anti-discrimination laws the appropriate degree of importance within Australia's overall legislative scheme.

3. MEANING OF DISCRIMINATION

a. Removal of direct and indirect discrimination definitions

The Draft Bill removes reference to the terms ‘direct’ and ‘indirect’ discrimination to describe discrimination that occurs either by purpose or effect. The Draft Bill instead distinguishes between *Discrimination by Unfavourable Treatment* - s19(1) and *Discrimination by Imposition of Policies* – s19(2).

NSWRC notes that in reference to the Discussion Paper on the Draft Bill,¹ the National Aboriginal and Torres Strait Islander Legal Services Forum (NATSILS) recommended that distinct tests for *indirect* and *direct* discrimination be retained in the proposed legislation:

*Aboriginal and Torres Strait Islander Legal Services’ (ATSILS) clients are often victims of systemic discrimination which more frequently takes the form of indirect discrimination and thus, having a clear and concise definition of indirect discrimination is important.*²

Conversely, the NSW Aboriginal Land Council (NSWALC) raised concerns over the maintenance of such distinct terminology, due to the potential for a hierarchy of types of discrimination:

*The separation of direct and indirect discrimination within different sections of legislation has led to complexity which can be misleading and overly complex. ... [S]eparate provisions for direct and indirect discrimination has informed the judicial interpretation that the concepts are separate and do not overlap. This is of concern to NSWALC as international definitions of discrimination do not artificially divide the concept of discrimination.*³

Whilst NSWRC recognised the concerns of NATSILS and their particular position in understanding the effects of discrimination of Aboriginal and Torres Strait Islander people in Australia, NSWRC supports the overriding necessity of simplification of the definition of discrimination. There is clarity of expression in the Draft Bill and the proposed wording is also more obviously consistent with the International Convention on the Elimination of Racial Discrimination (ICERD), which states that racial discrimination is:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, national or ethnic origin which has the purpose or effect of nullifying or impairing the

¹ Attorney-General’s Department (2011) Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper (ACT: Commonwealth of Australia)

² NATSILS (2012) NATSILS Submission on the Consolidation of Commonwealth Anti Discrimination Laws, 7

³ NSWALC (2012) NSWALC Submission on the Consolidation of Commonwealth Anti-Discrimination Laws, 2

*recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*⁴

NSWRC considers that the objectives of anti-discrimination legislation will be more likely to be achieved where there is a clear understanding of responsibilities by duty-holders and the broader community.

NSWRC supports the removal of the terms *direct* and *indirect* discrimination to define types of racial discrimination which is prohibited, and supports the proposed definition of discrimination in section 19 of the Draft Bill.

b. Removal of reference to ‘human rights and fundamental freedoms’ as contained in the Racial Discrimination Act (RDA).

The Draft Bill removes reference to human rights contained in the definition of racial discrimination under s9 of the RDA, which provides as follows:

*S 9(1) Do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, **of any human rights or fundamental freedom** in the political, economic, social, cultural or any other field of public life.*

NSWRC supports this change in definition of discrimination for the following reasons:

- ▶ As demonstrated by NATSILS Submission to Government⁵, human rights and fundamental freedoms have no clear legal meaning in domestic Australian law.
- ▶ Aboriginal and Torres Strait Islander peoples are often subject to differential treatment that may not directly infringe human rights, but is nevertheless a denial of opportunities which are afforded to non-Indigenous people. Using the impairment of human rights as the test for discrimination has had the effect in case law of limiting or excluding this broader definition of discrimination.

NSWRC supports removing reference to *human rights and fundamental freedoms* from the definition of discrimination.

⁴ *International Convention on the Elimination of All Forms of Racial Discrimination 1965*, Art 1

⁵ NATSILS (2012) NATSILS Submission on the Consolidation of Commonwealth Anti Discrimination Laws, 8

4. A SHIFT IN THE BURDEN OF PROOF

NSWRC supports increased accessibility of complaints mechanisms as vital to the effective function of anti-discrimination legislation.

Clause 124 in the Draft Bill provides for a shift in the burden of proof for complainants of discrimination, meaning complainants would only be required to establish a *prima facie* case alleging discrimination for responsibility to then fall upon the respondent to demonstrate their actions were justifiable under the Draft Bill.

This approach acknowledges the difficulties complainants currently face in proving discrimination and will allow the respondent to quickly and simply demonstrate their reasoning behind alleged discriminatory conduct.

NSWRC supports the introduction of a burden of proof in favour of complainants.

5. PROTECTED ATTRIBUTES

a. Definition of Race

Under the proposed legislation, race is a protected attribute and is defined to include colour, descent or national or ethnic origin. NSWRC acknowledges the NATSILS view that race, as defined under case law, should include a reference to Aboriginal language groups and smaller definitional units.⁶

NSWRC recommends the expansion of the definition of race to include Aboriginal language groups.

b. Prior Criminal Record

NSWRC is particularly concerned with high rates of Aboriginal and Torres Strait Islander incarceration in NSW.⁷ It is well documented that Aboriginal and Torres Strait Islanders experience a higher rate of contact with the criminal justice system and are more likely to be charged with an offence than non-Indigenous people under the same circumstances.⁸ Therefore, NSWRC is especially concerned that

⁶ NATSILS (2012) NATSILS Submission on the Consolidation of Commonwealth Anti Discrimination Laws, 15

⁷ NSW Bureau of Crime Statistics and Research (2009) *Why are Indigenous Imprisonment Rates Rising?* Issue paper no. 41

⁸ Cunneen, Chris (2007) *Reflections in Criminal Justice Policy since the Royal Commission into Aboriginal Deaths in Custody* in Gillespie, N. (Ed) *Reflections: 40 Years on from the 1967 Referendum, Aboriginal Legal Rights Movement*, Adelaide

unless the existence of a criminal record is of specific relevance to the circumstance, discrimination by prior criminal record has the effect of embedding and perpetuating discrimination.

As recommended by NATSILS,⁹ the inclusion of such a provision would be consistent with the proposed Clause 23, which allows exceptions for conduct which is justifiable. This would allow an individual's criminal record to be invoked only in circumstances where directly relevant.

NSWRC recommends the inclusion of a further protected attribute: Prior Criminal Record.
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6. SPECIAL MEASURES

a. The unique rights of Australia's Aboriginal and Torres Strait Islander peoples.

Proposed legislation provides for special measures which are “laws, policies or programs that are necessary to help a disadvantaged group achieve equality with the broader community.”¹⁰ This law is designed to bring protected groups ‘in step’ with equivalent levels of treatment experienced by other Australians. The provision is applicable in areas of disability and sex discrimination, and in some areas of race discrimination such as the provision of educational support.

However, an essential element of the concept of special measures is temporariness. Special measures are designed to exist only for the period of time required to establish substantive equality with other groups. This concept of special measures fails to properly recognise Aboriginal and Torres Strait Islander peoples’ rights which are unique and continuing, by virtue of that group’s status as First Nations. These rights have been recognised by Australia in becoming a signatory to the UNDRIP.

Further, as clarified by the Committee on the Elimination of Racial Discrimination,¹¹ special measures should not be confused with specific rights pertaining to certain groups. The Recommendation compels state parties to carefully observe these distinctions in law and practice.

In addition, NSWRC is concerned over the operation of the special measures provision in relation to Aboriginal Corporations which act in accordance with Aboriginal and Torres Strait Islander peoples rights to economic development and self-determination. NSWRC is of the view that the Draft Bill should

⁹ NATSILS (2012) NATSILS Submission on the Consolidation of Commonwealth Anti Discrimination Laws, 16

¹⁰ Explanatory Notes, Exposure Draft Legislation for the Human Rights and Anti-Discrimination Bill 2012, 127

¹¹ Committee on the Elimination of Racial Discrimination (August 2009) *General Recommendation 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32

contain a clause making it explicit that such corporations are either not discriminatory under clause 19 or are special measures under clause 21.

The special measures definition in the Draft Bill should be amended to account for the legitimate recognition of permanent ongoing rights. Specifically, the Draft Bill should recognise the continuing and unique rights pertaining to Aboriginal and Torres Strait Islander people, by virtue of their status as First Nations peoples. This should be distinguished from special measures as that term is currently understood in domestic and international law.

NSWRC urges the redrafting of the special measures definition in the Draft Bill to accord with Australia's responsibilities under international human rights law in recognising the unique, continuing and permanent rights of Aboriginal and Torres Strait Islander peoples, including the governance of Aboriginal Corporations.

b. Free, Prior and Informed Consent

The Draft Bill provides for special measures for the purpose of achieving equality. NSWRC notes that the terms "substantive equality" and "achieving equality" may have differing interpretations and is concerned that current wording may not provide effective protection against actions which give effect to discrimination. This is particularly of concern in reference to Aboriginal and Torres Strait Islander peoples who have historically been subject to the imposition of policies which have caused disadvantage and systematically destroyed cultural and social structures.

It is of foremost importance that the law reflects a need to ensure that discriminatory policies, which may be shrouded in 'good intentions' do not disadvantage the very groups they purport to assist. NSWRC is concerned that the current wording of special measures may not protect groups against such discriminatory policies.

Human rights mechanisms under international law, including ICERD, Art 2(1)(a) recognise the importance of consultation and obtaining consent. For example, Article 19 of the UNDRIP provides that:

*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.*

NSWRC supports the following comments made by NATSILS in its submission to Government on the Draft Bill:

The requirement for consent is essential for a measure to be meaningfully declared as being for the ‘advancement of certain racial or ethnic groups’... Australian governments have an obligation to ensure that no decisions directly relating to Aboriginal and Torres Strait Islander peoples’ rights and interests are made without their informed consent. Methods of consultation and obtaining consent should also be consistent with international human rights standards and thus, reflect Aboriginal and Torres Strait Islander models of decision-making.¹²

Special measures should only be undertaken when the group affected by those measures agrees and consents to such measures being in their best interest. This is a vital element in the achievement of substantive equality, which must not be overlooked. Further, it acknowledges the inherent rights of self determination held by Aboriginal and Torres Strait Islander people, also enshrined in the UNDRIP.

NSWRC strongly urges that the Draft Bill be amended to accord with Australia’s international obligations under the UNDRIP and ICERD, which require essential free, prior and informed consent by all affected groups subject to government measures.

c. Overseeing of consultation process

NSWRC is highly supportive of the increased powers under the Draft Bill for the AHRC to oversee anti-discrimination measures. In relation to special measures provisions, NSWRC also considers that there may be a role for an independent body such as the AHRC to oversee and monitor the processes involved in obtaining the free, prior and informed consent of affected groups in the context of special measures.

NSWRC notes that under Division 7 of Part 3-1 of the Draft Bill, the AHRC has the ability to determine when particular policies are special measures, and urges the government to include overseeing of consultation processes within the powers of the AHRC under the Draft Bill.

NSWRC recommends that the AHRC, or another independent body, be given powers to oversee the free, prior and informed consent of affected groups under the special measures provisions.

¹² *United Nations Declaration on the Rights of Indigenous Peoples 2007, Arts 3, 18, 19.* in NATSILS Submission to Government,12

7. EXCEPTIONS

a. Exceptions related to other laws, court orders

Subdivision B of Division 4 in Chapter 2 of the Draft Bill is representative of a hierarchy in which anti-discrimination laws can be ‘trumped’ by other Commonwealth legislation. Although there is an exclusion of race from this exception, NSWRC is concerned that establishing a system enabling a derogation from anti-discrimination legislation does not afford anti-discrimination laws the appropriate degree of importance within Australia's overall legislative scheme.

NSWRC expresses concern regarding the provision allowing future legislation to be drafted which overrides anti-discrimination protections. This provision undermines the objectives of the Draft Bill. NSWRC supports the simplification of anti-discrimination law for its potential to grow respect for rights. However, this provision increases the complexity of the Draft Bill and undermines the legitimacy of it in the eyes of ordinary Australians and duty holders.

NSWRC does not support the exceptions established in the Draft Bill that enable the objects of anti-discrimination law to be overridden by other Commonwealth laws.

b. Temporary Exemptions

Under the RDA, there are no provisions for temporary exemptions. Clause 83 of the Draft Bill gives the AHRC the power to certify special measures to achieve equality. NSWRC does not support the reduction of protection under current racial discrimination legislation in any form, however recognises that temporary exceptions may sometimes be necessary to permit organisations to comply with their obligations.

In its current wording Clause 83 does not provide enough guidance to determine when a temporary exception is justifiable.

NSWRC recommends the redrafting of Clause 83 to provide clear guidance to the AHRC about the parameters of temporary exceptions.

8. REVIEW OF POLICIES AND PROGRAMS FOR COMPLIANCE

a. Increased role of the Australian Human Rights Commission

NSWRC is supportive of the increased powers of the AHRC proposed under the Draft Bill, which will enable it to make, amend or revoke voluntary compliance codes, certify special measures, develop action plans and grant temporary exemptions.

The AHRC plays a vital role in the protection and promotion of human rights in Australia. The expanded powers for the AHRC under the Draft Bill is welcomed by NSWRC, which also supports empowering AHRC to investigate discrimination without having to rely on a complaint first being made.

Consistent with comment 4. above, it is important that the burden of bringing a discrimination claim does not rest solely on the shoulders of complainants. Victims of discrimination are often of lower socio-economic status and already marginalised and vulnerable. In NSWRC's view, Providing the AHRC with the power to investigate circumstances on its own accord will go some way to reducing discrimination and also promote an anti-discriminatory culture. The AHRC having these powers is particularly relevant for Aboriginal and Torres Strait Islander Australians, who are often subject to systemic discrimination; which can be difficult to prove on an individual basis.

NSWRC supports extended AHRC powers. NSWRC recommends further extending AHRC powers to enable it to effectively investigate cases of discrimination without relying on a complainant to raise an issue.

b. Increased funding and support for community education

Clause 3(1)(a) of the Draft Bill provides that an object of the Bill is to eliminate unlawful discrimination, sexual harassment and racial vilification. Clause 3(1)(d) provides that another objective is to **promote recognition and respect for formal and substantive equality, and the inherent dignity of all people.**

NSWRC considers that the development of, and respect for, human rights and anti-discrimination relies on both effective complaints mechanisms and effective community education to prevent discriminatory behaviour. NSWRC notes the increased capacity of the AHRC to establish compliance codes with sectoral bodies, but is aware of the need to educate not just duty holders of their responsibilities, but also individuals of their rights.

NSWRC supports the role of the AHRC in developing a rights-respecting culture and recommends that appropriate resourcing and funding is allocated to the AHRC and other associated organisations such as

the Aboriginal Legal Services for the purpose of providing grassroots education for duty holders and individuals. Such a measure would assist in preventing discrimination, easing the burden on the AHRC conciliation process and the courts, as well as increase outcomes across many social indicators including health, housing and criminal justice for Aboriginal and Torres Strait Islander peoples.

NSWRC recommends adequate resourcing of the AHRC and community sector to educate and inform Australians about anti-discrimination legislation.

9. COMPLAINTS

a. Litigation in the Courts

NSWRC is concerned that access to justice for a complainant can be limited by prohibitive litigation costs, which may discourage victims with strong cases to attempt resolution through the Federal Courts. In addition, the limiting of individual complaints to the Federal Court as opposed to representative complaints increases the difficulty in addressing systemic discrimination which may affect more than one individual. Allowing representative action would assist complainants in standing on a more even footing as respondents in a discrimination claim.

NSWRC recommends that the Draft Bill is revised to allow representative organisations to bring discrimination complaints to the Federal Court.

10. CONCLUSION

The continued discrimination experienced by Aboriginal and Torres Strait Islander peoples restricts engagement in public life, sustains racism and affects outcomes in health, education, employment and criminal justice. This diminishes the potential for equity and understanding within the Australian community. The elimination of discriminatory behaviour is pivotal to achieving social justice and Reconciliation in Australia.

NSWRC broadly supports the proposed consolidation and simplification of anti-discrimination laws in the hope that this will enable duty holders and policy makers to understand their obligations and to actively work to eliminate discrimination.

NSWRC is supportive of Government empowering the AHRC to increase and oversee compliance with anti-discrimination laws and urges Government to ensure adequate resourcing for the sector and for community education.

Nevertheless, NSWRC is concerned by some elements of the proposed legislation and urges the Federal Government to further implement its human rights obligations in domestic law. This should include holding a referendum to enshrine relevant protections into the Australian Constitution. In particular, NSWRC urges the Government to redraft the Draft Bill to incorporate a requirement of free, prior and informed consent of affected groups subject to special measures provisions.

Reconciliation will only be achieved when there is a greater respect for Aboriginal and Torres Strait Islander people and their distinct rights. Australia has some way to go, but the promotion of rights and responsibilities in plain language and simple legislation is an important step in this process.

11. REFERENCES

- ▶ Attorney-General's Department (2011) Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, ACT: Commonwealth of Australia
- ▶ *Exposure Draft Human Rights and Anti-Discrimination Bill 2012* (Cth)
- ▶ NATSILS (2012) NATSILS Submission on the Consolidation of Commonwealth Anti Discrimination Laws
- ▶ NSW Bureau of Crime Statistics and Research (2009) *Why are Indigenous Imprisonment Rates Rising?* Issue paper no. 41
- ▶ Cunneen, Chris (2007) Reflections in Criminal Justice Policy since the Royal Commission into Aboriginal Deaths in Custody in Gillespie, N. (Ed) *Reflections: 40 Years on from the 1967 Referendum*, Aboriginal Legal Rights Movement, Adelaide
- ▶ *International Convention on the Elimination of All Forms of Racial Discrimination 1965*
- ▶ NSWALC (2012) NSWALC Submission on the Consolidation of Commonwealth Anti-Discrimination Laws