

21 December 2012

Ms J Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett:

INQUIRY INTO THE EXPOSURE DRAFT OF THE HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

Introduction

1. The Australian Centre for Disability Law (**ACDL**) is a national specialist community legal centre that practices in disability discrimination and human rights law.
2. We strongly support the *Human Rights and Anti-Discrimination Bill 2012* (**the draft Bill**) and call upon the Senate Standing Committee on Legal and Constitutional Affairs (**the Committee**) to recommend that the Bill be enacted into law without delay.
3. ACDL is a member of the National Association of Community Legal Centres (**NACLC**) and we take this opportunity to endorse the extensive submission made to the Committee by NACLC in relation to the draft Bill. Our submission focuses on a select number of issues of particular concern to our constituency.
4. The draft Bill has a number of very positive features which we strongly applaud and which must be preserved in the passage of the Bill through the Parliament. In particular, we strongly support (subject, where relevant, to the submissions made below):
 - (a) The inclusion of an objects clause in the Bill which provides that it is an objective of the Bill to promote recognition and respect for the principle of substantive equality (clause 3(1));
 - (b) The clear nexus established between Australia's international human rights obligations and the provisions of the Bill (clause 3(2));

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- (c) The simpler definition of discrimination, including the elimination of the comparator test for direct discrimination (clause 19);
 - (d) The extension of the prohibition on discrimination to any area of public life (clause 22);
 - (e) A shift in the burden of proof, once the conduct complained of has been established by the complainant, to the respondent to prove the reason for the conduct was not discriminatory and any exceptions or defences that may apply (clause 124); and
 - (f) The general principle that each party is to bear its own costs in discrimination proceedings (clause 133).
5. The Bill represents a 'once-in-a-generation' opportunity to modernise, harmonise and strengthen Australian equality law. It is therefore imperative that full use is made of this opportunity. In this respect, we make following a number of submissions directed towards the enhancement of the Bill.
6. Additionally, we note that when the Commonwealth announced its intention to consolidate Commonwealth anti-discrimination law it guaranteed that there would be no diminution in existing protections and that existing levels of protection would be harmonised across protected classes at the highest level of that protection.
7. In fact, the draft Bill does eliminate some key protections and it fails to extend some existing protections to all protected classes. In our view this is not acceptable. We also make a number of recommendations below to address these concerns.

Proposals for enhancement to the Bill

Objects clause

8. As noted above, we strongly support clause 3 of the Bill, the objects clause, which is a most important interpretative provision which will be relied upon in the construction of the Bill's operative provisions. However, in our view the clause ought to be amended in two respects in order to provide a clearer purposive underpinning for the operative provisions:
- 8.1 Clause 3(1)(a) ought to be amended to refer to all forms of discrimination and other conduct made unlawful by the Bill. In particular, the clause ought to refer to 'harassment' and 'other offensive conduct' as a particular forms of discrimination made unlawful under the Bill (see clause 19(2)). As currently drafted, the only form of harassment referred to in clause

3(1)(a) is sexual harassment. This is perplexing and may potentially lead to interpretive difficulties;

- 8.2 Clause 3(1)(d)(i) ought to be amended to delete the reference to 'formal equality'. As is reflected in clauses 3(1)(b) and 3(2) of the draft Bill, the Bill has the objective of implementing, in part, Australia's international human rights obligations. The standard of equality mandated by the international human rights instruments referred to in the Bill is substantial equality, not formal equality. The reference to formal equality is thus misleading, confusing and will create significant interpretive difficulties (how is a Court to determine which standard is to be applied?).

Definition of discrimination

9. While we strongly support in principle the simpler definition of discrimination included in the Bill we have two serious concerns about the definition proposed. In our view it is essential that these concerns be addressed if the Bill is to provide persons with disability with effective protection from discrimination:
 - 9.1 Currently, the *Disability Discrimination Act 1992 (Cth) (DDA)* provides in sections 5 and 6 that the failure to provide a reasonable adjustment required by a person with disability amounts to discrimination on the basis of disability. These provisions enact into domestic law Australia's obligations under Articles 2 and 5 of the Convention on the Rights of Persons with Disabilities (**CRPD**), which, inter alia, defines discrimination on the basis of disability to include the denial of reasonable accommodation required by a person with disability.
 - 9.2 The concept of reasonable adjustment and the duty to provide reasonable adjustments does not form part of the definition of discrimination in the draft Bill in Chapter 2, Part 2-2, Division 2. Instead the concept of reasonable adjustment is referred to in Chapter 2, Part 2-2, Division 4 which deals with Exceptions to unlawful discrimination. The effect of this drafting is to remove the current normative duty on duty-bearers to make reasonable adjustments for persons with disability, where required. This is an issue of critical concern. It may very significantly diminish the ability of Australian equality law to realise substantive equality for persons with disability. The definition of discrimination in the draft Bill must be amended to include the obligation to make reasonable adjustments and to provide that the failure to do so is discrimination on the basis of disability.
 - 9.3 Clauses 19(3) and 20 make indirect discrimination unlawful. It is unlawful for a person to impose a 'policy' that will disadvantage persons with a particular protected attribute. The term 'policy' is defined in clause 6 of the draft Bill to 'include a requirement, condition or practice.'
 - 9.4 The prohibition on indirect discrimination seeks to address structural or systemic discrimination, which is made manifest through social processes

that are apparently neutral on their face but have which have a disproportionate impact on members of particular groups. It is important to recognise that indirect discrimination may occur unconsciously and in the absence of any particular intention.

- 9.5 Consequently, we are concerned by the use of the word 'policy' to describe this form of discrimination, albeit as defined in clause 6. This term connotes a level of consciousness and intention which may narrow the reach of the prohibition on indirect discrimination. We urge the Committee to recommend that a word is used, such as 'practice,' that is capable of incorporating both conscious and unconscious conduct.

Reasonable adjustment

10. Clause 25 of the draft Bill purports to provide the meaning of reasonable adjustment, but to the extent that it does so at all, it does so in a circular manner (a reasonable adjustment is one that does not impose an unjustifiable hardship on a duty-bearer). As noted above, the duty to make reasonable adjustments is critical to the realisation of substantive equality for persons with disability. In our view the draft Bill ought to provide much stronger guidance to duty-bearers and to the Courts who will interpret this provision in relation to the scope and content of the obligation to make reasonable adjustments. We therefore recommend that a non-exclusive definition of reasonable adjustment is included either in Clause 6 (Dictionary) or Clause 25 of the draft Bill. We suggest that this definition be in the following form:

'reasonable adjustment' includes the provision of additional or specialised assistance, the modification of existing measures, the flexible application of existing measures, and the removal of a barrier or obstacle'

Vilification

11. Contrary to the Government's commitment to harmonise existing Commonwealth anti-discrimination laws by extending existing protections to all protected classes, the draft Bill only provides explicit protection against vilification on the ground of race (clause 51). However, we note clause 19(2)(a) incorporates into the definition of unfavourable treatment 'other conduct that offends, insults or intimidates.' This prohibition would certainly appear to encompass conduct that would amount to vilification.
12. While we support clause 19(2)(a) in principle we note that it is the subject of attack on the basis that it appears to make any conduct that offends, insults or intimidates unlawful, potentially constraining reasonable freedom of speech.
13. In our view clause 19(2)(a) ought to be redrafted to narrow its scope to conduct that amounts to vilification on the basis of a protected attribute. This would ensure that the Government's commitment to harmonise existing protections

across all protected attributes is realised while addressing the perception that the clause as presently drafted unreasonably constrains freedom of speech.

Victimisation and incitement

14. Section 42 of the DDA proscribes the offence of victimisation of a person who proposes to, or does, pursue their rights under that Act. The offence carries a maximum penalty of six months imprisonment. Similarly, section 43 of the DDA proscribes the offence of incitement to an act of discrimination, which also carries a maximum penalty of six months imprisonment. These offences are also made unlawful discrimination pursuant to the definition of unlawful discrimination in the *Australian Human Rights Commission Act 1986* (Cth).
15. While we are not aware of any case in which a person has been charged with either offence, these offences do have an important deterrent effect, protecting persons with disability and their associates from victimisation and the incitement of discrimination against them. Certainly, we frequently rely upon these clauses in our interactions with respondents in our case work on behalf of persons with disability who are pursuing complaints of discrimination.
16. These offences are not carried forward into the draft Bill. The draft Bill only makes such conduct unlawful civil conduct. In our view this represents a very serious diminution in existing protections for persons with disability that is contrary to the assurances provided that this would not occur. We call for these criminal offences to be carried forward into the draft Bill.

Exceptions

17. Chapter 2, Part 2-2, Division 4 of the draft Bill sets out an extensive range of exceptions to the prohibition on disability. In our view, each of these exceptions is unnecessary and inappropriate as clause 23 provides a general limitation that is capable of authorising legitimate conduct that has a discriminatory effect. That clause ought to be permitted to do its work. A most undesirable potential implication and risk of having a general limitation clause and numerous express exceptions is that the general will be applied more liberally than it ought on the basis that it has other work to do than that set out in the express exceptions.
18. This issue aside we are strongly opposed to a number of the exceptions, including clause 27 (which excepts conduct done in accordance with the *Migration Act 1958* and health laws from the prohibition on discrimination), clause 30 (which excepts conduct done in accordance with prescribed laws from the prohibition on discrimination) and clause 40 (which excepts the Defence Force and Australian Federal Police from the prohibition against discrimination on the ground of disability). We call for these clauses to be omitted from the draft Bill prior to its passage through the Parliament.

19. Clause 23 is a general limitations clause that excepts 'justifiable conduct' from the prohibition on discrimination. In our view the scope of justifiable conduct is too broad and the clause is otherwise poorly drafted. In our view the clause, in its current form, is likely to seriously undermine and limit efforts to achieve equality. In particular:
- 19.1 The scope and normative context for justifiable conduct must be much better established giving primacy to the objects of the Bill. As it is currently drafted the clause does not give precedence to the objects of the Bill over other 'legitimate aims.' In our view, a duty-bearer ought only be entitled to discriminate against a person with a protected attribute if the discriminatory conduct can be demonstrably justified in a society based on human dignity and equality and it is not reasonable for the duty-bearer to act otherwise. Sub-clause 23(3) ought to be redrafted to give effect to this principle.
- 19.2 The 'proportionality' test set out in sub-clause 23(3)(d) is poorly drawn. The key issue is not whether the duty-bearer's conduct is a proportionate means of achieving the duty-bearer's aim. It is whether the duty bearer's discriminatory conduct is proportionate having regard to the duty not to discriminate against a person on the basis of a protected attribute and the justifying basis of that conduct. In other words, the proportionality test should ensure that the severity and scope of the duty-bearer's discriminatory conduct does not exceed that which is strictly necessary to achieve the legitimate aim.

Protected Attributes

20. Clause 17(1)(d) of the draft Bill provides that 'family responsibility' is an attribute that entitles a person with that attribute to protection from discrimination. We strongly support the inclusion of 'family responsibility' as a protected attribute in the draft Bill.
21. However, the category of persons protected is narrowly defined in clause 6 of the draft Bill to refer to the 'responsibilities of the person to care for or support (a) a child of the person who is wholly or substantially dependent on the person; or (b) any other member of the person's immediate family who is in need of care and support.' 'Immediate family' is defined to include '(a) a spouse, former spouse, defacto partner or former defacto partner of the person; and (b) a child, parent, grandparent, grandchild or sibling of the person, or of a spouse, former spouse, defacto partner or former defacto partner of the person.' The class of persons protected does not include persons who have caring responsibilities for others who are not members of their immediate family.
22. In our view the category of persons covered by the protected attribute ought to be extended to those persons who are in a bona-fide other caring relationship with another person. This would include long-term companions and friends, foster carers, aunts and uncles, nephews and nieces and others. Persons with

disability disproportionately rely upon others to support and care for them, and it is important that these relationships are well protected by anti-discrimination law. It is also important to recognise that the current narrow scope of the 'family responsibilities' attribute is itself indirectly discriminatory towards Aboriginal and Torres Strait Islander families in which family responsibilities extend well beyond the immediate family of a person.

23. We are disappointed that domestic violence and homelessness have not been included in the draft Bill as protected attributes. Persons with disability are disproportionately subject to domestic violence and homelessness and frequently encounter discrimination on the basis of these attributes. We therefore call for these attributes to be included among those protected by the draft Bill.
24. We are also strongly opposed to the omission of criminal record from the list of protected attributes. This omission is contrary to the Commonwealth's assurance that there would be no diminution in existing protections as a result of the consolidation of Australian anti-discrimination law. It is also contrary to Australia's international human rights obligations, and the Australian Government's social inclusion agenda. Persons with disability, for a range of complex social reasons, are more likely than others to have had contact with the criminal justice system and to have acquired a criminal record. They are frequently subject to discrimination on the basis of their criminal record. The omission of criminal record from the category of protected attributes thus has a disproportionate impact on persons with disability and we call for its reinstatement.

Equality before the law

25. We again note that when the Commonwealth announced its intention to consolidate Commonwealth anti-discrimination law, a stated key objective was the harmonisation and simplification of these laws. Contrary to this key objective, the draft Bill carries forward from the *Racial Discrimination Act 1975* (Cth) the right to equality before the law for people of all races, but does not extend the right to equality before the law to persons with other protected attributes. We view this as a critical failing in the draft Bill.
26. Persons with disability are guaranteed the right to equality before the law under a number of international human rights instruments, including the CRPD (Article 5). Australia has a solemn international obligation to ensure that this right is enacted into Australian law (CRPD Article 4). Persons with disability are disproportionately subject to arbitrary and discriminatory laws based on disability, including in relation to, or in the areas of, criminal justice, restrictive practices, guardianship and administration, child protection, family law and mental health. We therefore call for the extension of the right to equality before the law to persons with protected attributes.

Representative complaints

27. Clause 89 of the draft Bill will permit representative complaints that allege discrimination or other unlawful conduct to be made to the Australian Human Rights Commission (**AHRC**). However, clause 122 of the draft Bill provides that only a person affected by the alleged discrimination or other unlawful conduct may apply to the Court for determination of a complaint. In our view, the asymmetry in these provisions will significantly limit the capacity of the Bill, when enacted, to achieve its objects.
28. Particularly, although not only, in the area of disability discrimination, complaints of discrimination have structural or systemic dimensions. The subject matter of the complaint may affect many people, indeed thousands of people, in the same or a similar way. In these circumstances there ought to be capacity for appropriate individuals and organisations to make representative complaints that seek to remedy the underlying problem and benefit all or most of those persons who are affected by the discrimination. It is extremely onerous, and in many respects artificial, to expect a single individual who is affected by the discrimination to bring these matters before the AHRC and Court in the public interest. We therefore call for a representative complaint provision to be included in the draft Bill that will entitle appropriate individuals and organisations to institute representative proceedings to address discrimination and other unlawful conduct before the Court.

Thank you for the opportunity of making these submissions. We would be pleased to elaborate on the points made, if this would be of assistance to the Committee.

We are also authorised to advise the Committee that People with Disability Australia, a national representative and advocacy organisation, endorses this submission.

Yours sincerely

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Director