

## SUBMISSION TO THE INQUIRY INTO THE *HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012* - EXPOSURE DRAFT LEGISLATION

### Introduction

I make this submission as a legal practitioner who has had extensive experience working with discrimination law – particularly in employment and other work situations, education and the provision of goods and services.

I have worked in discrimination law for more than 20 years, representing and advising private and public sector clients in a wide range of sectors. In this role, I have seen the burden placed on government, business and the community by the existing complex and inconsistent Commonwealth discrimination laws. I am familiar with the provisions of each of the *Racial Discrimination Act 1975 (RDA)*, *Sex Discrimination Act 1984 (SDA)*, *Disability Discrimination Act 1992 (DDA)*, *Age Discrimination Act 2004 (ADA)* and *Australian Human Rights Commission Act 1986 (AHRCA)*.

Based on this experience, I support wholeheartedly the government's intention to consolidate and clarify these existing laws, and welcome the Exposure Draft as a critical step towards doing so.

However, the Exposure Draft goes well beyond the primary aim of consolidation. The Explanatory Notes state: '*The Bill does not intend to make significant changes to what is unlawful and what is not.*' (page 1). In my view, the Exposure Draft in its current form would in fact make very significant changes. It would extend the categories of conduct that is prohibited, and would create a significantly broader set of rights to complain of (and seek remedies for) discrimination. In my view, it is important that the Committee recognises this, so that it can deliberately consider the public policy implications.

As I set out below, I have some concerns about the Exposure Draft. I consider that:

- some aspects of the Exposure Draft would impose inappropriate and unfair burdens on individuals and organisations in Australian society; and
- some provisions of the Exposure Draft would introduce a great deal of potential uncertainty and confusion. In my experience, lack of public understanding of discrimination legislation is a significant problem. On the one hand, employers, service providers and others who do not understand their legal obligations generally do not comply with them. On the other hand, confusion about the meaning of the law often results in unnecessary complaints being made to the relevant authorities, with a consequent waste of time, money and energy for all concerned.

In this submission, I have not attempted to comment on every aspect of the Exposure Draft. Rather, I comment primarily on issues that are relevant to the definition and boundaries of unlawfully discriminatory conduct, that is the:

- protected attributes;
- concept of prohibiting discrimination 'connected with' 'public life';
- test for discrimination;
- exceptions; and

- vicarious liability.

I also comment briefly on the proposed reversal of the onus of proof.

I have taken the opportunity to consider some of the other submissions already received by the Committee, and to comment on and/or support some of those submissions.

## 1. THE PROTECTED ATTRIBUTES – CLAUSES 6(1) AND 17

The list of protected attributes in clause 17 of the Exposure Draft, as clarified in some (but not all) cases by the definitions in clause 6, raises a number of issues.

### 1.1 'Club or member-based association'

This attribute is defined in clause 6(1) as being an association formed for a lawful purpose 'that provides and maintains its facilities, in whole or in part, from the funds of the association'. I recognise that this definition is derived from the existing DDA and SDA definitions. However, I am concerned that the meaning of the definition is not clear. I have found no explanation in the Explanatory Memoranda of either the DDA or the SDA in relation to this definition of 'clubs'. There are two issues:

- is it really the intention that (despite the list of indicative purposes included in the definition) any 'lawful purpose' is acceptable?
- what is meant by 'provides and maintains its facilities, in whole or in part, from the funds of the association'? Is this intended as a different way of saying 'not-for-profit'? If so, then would 'not-for-profit' perhaps be a more useful – because more commonly understood – expression? There is no case law elaborating on this point – all the cases reported assume that the club or association involved is a club or association within the meaning of the relevant Act. The only commentary/journal article which gives some insight into this phrase is the New South Wales Law Reform Commission notes in *Report 92 (1999) – Review of the Anti-Discrimination Act 1977 (NSW)*: the Commission considered each of the distinguishing factors used by other jurisdictions to distinguish between 'public' and 'private' clubs including whether the club provides and maintains its facilities, in whole or in part, from its own funds; but the Commission did not ultimately adopt this definition.

### 1.2 'Family responsibilities'

I agree with the submissions of the Human Rights Commission (at section 7.2), the ACTU (pages 4-5) and the Discrimination Law Experts Group (at paragraph 5.8) that the definition of this attribute in clause 6(1) leaves room for uncertainty about the types of caring responsibilities covered. The terminology used should be consistent with other legislation.

In my view, the appropriate law with which federal discrimination law should align is federal industrial law – currently, the *Fair Work Act 2009 (FWA)*. Unlike the Exposure Draft, the FWA explicitly refers to caring for 'a child' (eg section 67) and for members of an employee's 'household' (see section 97).

I also note that there appears to be an error in the drafting of this definition – an error that has been carried over from section 14A of the SDA. The introductory clause of the definition first refers to a person's responsibilities to 'care for **or** support', and then in part (b) refers to a family member being in need of 'care **and** support' (emphasis added). I suggest that this inconsistency was unintended, and could cause difficulty

in practice. I submit that the inconsistency should be corrected. This correction would also align the SDA more closely with the FWA (see for example section 97 of the SDA).

### 1.3 **'Gender identity' and 'sexual orientation'**

I support the submissions of the Human Rights Commission (at section 7.3), the Anti-Discrimination Board of NSW (at pp 2-4), her Honour Chief Justice Bryant of the Family Court of Australia (pages 1-3), the Discrimination Law Experts Group (at parts 5.1 and 5.2) and the Australian Psychological Society regarding the definitions of these attributes in clause 6(1).

If the law intends to provide protection from discrimination to people whose sexual identity or orientation are 'different', then it should do so comprehensively and not in a way that excludes some of those who are 'different' in these ways.

### 1.4 **'Immigrant status' and 'nationality or citizenship'**

The Explanatory Notes (at paragraph 88) indicate that the attribute of 'immigrant status' is not intended to include 'visa status'. I support Kate Eastman SC's submission (at paragraph 2.1(a)) regarding the definition of this attribute in clause 6(1), and the overlapping comments of the ACTU (at pages 7-8) regarding residency or visa status in relation to the attribute of 'nationality or citizenship' (which is not defined in clause 6(1)). There is significant potential for confusion here.

I recommend the inclusion of a definition of 'nationality or citizenship' in clause 6(1), and/or a note to clause 17 that explains that visa status is not intended to be covered by either attribute.

### 1.5 **'Industrial history'**

I support Kate Eastman SC's submission (at paragraph 2.1(b)) regarding the definition of this term in clause 6(1). In defining this term, it would be preferable to use language consistent with that of the FWA.

### 1.6 **'Marital or relationship status'**

I recognise that the definition of this attribute contained in clause 6(1) is derived from a combination of the SDA definition of 'marital status' and the *Acts Interpretation Act 1901* (AIA) definition of 'de facto partner' (earlier in clause 6(1)). However, I note that some potential difficulty arises from the use of the phrasing 'de facto partner of another person'.

I am concerned that this language suggests that it could be unlawful to discriminate on the ground of the identity of a person's de facto partner rather than on the ground of being in a de facto relationship. Other legislation and cases show clearly that this has never been the intention of any Parliament in Australia.

The phrasing is also inconsistent with the rest of the definition – for example, the definition includes reference to being 'married', rather than 'being married to another person'.

I recommend that the language be made consistent, perhaps by using the phrasing 'being a de facto partner', or (if this can be made to work with the earlier reference to the AIA) 'being in a de facto relationship'.

### 1.7 **'Medical history'**

This attribute is not defined in clause 6(1). However, the Explanatory Notes (at paragraph 93) state that this attribute is intended to include, for example, a history of 'relationship counselling'.

I submit that relationship counselling does not necessarily relate to any medical issue at all, and that this would be an inappropriate inclusion. I do not consider that this meaning would have been intended by the international instruments from which this term derives. I recommend that this be clarified.

### 1.8 **'Religion'**

I support the submissions of Kate Eastman SC (at paragraph 2.1(c)) and the Discrimination Law Experts Group (at part 5.4) regarding the definition of this attribute in clause 6(1). It is inadequate to rely on the 'ordinary meaning' of the term as suggested in the Explanatory Notes (paragraph 98); and as Ms Eastman notes 'religion' is not in fact an attribute at all.

It is important that reference is included to religious belief (or conviction), practice (or activity) and affiliation (or identity) for the intended protection to be given effect. To provide more comprehensive protection, I also consider that the definition should include a reference to religious 'status'. Within some religions, there are denominational differences of opinion about whether a person is in fact a member of that religion; and distinctions on the ground of religious status may reasonably be required in order to allow religious institutions and educational institutions to conduct themselves in accordance with the doctrines (etc) of the religion.

### 1.9 **'Social origin'**

This attribute is not defined in clause 6(1) – rather, the Explanatory Notes suggest (at paragraph 102) that the term 'takes its ordinary meaning'. In my submission, this term has no 'ordinary meaning' in Australia.

The term is derived from international instruments (see eg the Discrimination (Employment and Occupation) Convention, 1958 of the International Labour Organization and the International Covenant on Civil and Political Rights) which have as their signatories countries where the meaning of the term is clear – for example, because in those countries caste systems and the like have historically been in operation. It is difficult to see how the term might be applied in Australia, particularly if no definitional guidance is given. Would it for example be unlawful to refuse to employ a person who comes from a particular suburb of a city?

For these reasons, I agree with the Anti-Discrimination Board of NSW (at page 4) that the introduction of social origin as a protected attribute (beyond the limited coverage provided by current law) is problematic. The nature of the problem is amplified by the lack of any definition or context for the term.

### 1.10 **General**

I agree with Kate Eastman SC (at paragraphs 2.2 and 2.3) that the Exposure Draft leaves open the possibility that the protected attributes could be possessed by a group or incorporated entity, with the result that such an entity might be able to bring a complaint under the legislation. While *Koowarta v Bjelke-Petersen* (1982) recognised the possibility of a group or corporation being protected in the context of the RDA, this possibility has not been extended in the decided cases to the other

grounds/attributes covered by federal legislation to date (ie sex, disability and age). If the Exposure Draft is not intended to have this effect, then this should be clarified.

## **2. 'CONNECTED WITH' 'PUBLIC LIFE' – CLAUSES 7, 22 AND 50**

### **2.1 General**

I strongly support Kate Eastman SC's submissions (at part 3 of her submission) on the operation of clauses 22(1), 22(2) and 50: in prohibiting conduct 'connected with' 'public life', these clauses would significantly expand the reach of federal discrimination law. Nor are the concept or boundaries of 'public life' made clear by the proposed drafting.

In addition to the particular issues outlined by Ms Eastman, I am also concerned about the list of what constitutes 'public life' (clause 22(2)) being an inclusive list. The implication is that any act done in a public space might be caught – so that, contrary to what has always been the case under Australian discrimination law, a person might complain of some perceived negative treatment delivered by a passerby in the street. This would radically expand the categories of 'duty holders' upon whom the law imposes obligations.

The definition of 'connected with' in clause 7 further amplifies the breadth and generality of the prohibitions. The references to 'in the course of' and 'for the purpose of' an area of public life are reasonable, but the term 'or otherwise related to' is so general as to be almost without boundaries. That latter term should be removed.

### **2.2 'Employment' and 'work and work-related areas'**

'Employment' is defined in clause 6(1) to include work relationships other than employment. This is apparently intended to include independent contract relationships, to which a person is generally 'appointed' or 'engaged'. The term 'employment' is then included as one of the forms of 'work and work-related areas' further down in clause 6(1).

While I understand the intention to streamline the language of the Bill, in my view a lay person is likely not to understand these definitions without the need for further explanation. Additional confusion is likely to arise because the term 'employment' is not used consistently as including engagement and appointment throughout the Exposure Draft – eg clause 40(2), in defining one of the exceptions applicable to the Defence Forces, states:

*'It is not unlawful for a person to discriminate against another person if:*

- (a) the discrimination is connected with employment, engagement or appointment in the Defence Force...'*

To avoid these difficulties, perhaps engagement as an independent contractor could be removed from the definition of 'employment' and instead introduced as a subsection in the definition of 'work and work-related areas'.

## **3. THE TEST FOR DISCRIMINATION – CLAUSES 8, 19 AND 20**

### **3.1 Causation and multiple reasons – clause 8**

Clause 8 states that (for the purposes of the Act) a person engages in conduct for a reason or purpose if that reason or purpose is either the sole reason or purpose, or

one of the reasons or purposes, for the conduct. The Explanatory Notes (at paragraph 35) state that this clause 'preserves existing policy in one streamlined provision'. I understand that this was the intention, but I am not persuaded that the current draft is successful.

Many submissions (see for example the ACTU submission at page 11) have raised concerns about the wording of clause 8. Some of the submissions conclude that the clause would impose a 'dominant purpose' test. I do not consider that it does so. However, in my view, the language is somewhat awkward, and is reasonably capable of being read as having that meaning. It seems to me that the language used in section 120 of the DDA, and somewhat differently in section 16 of the ADA, while also awkward, is less susceptible to misinterpretation.

At the very least, clause 8 should clarify, for the avoidance of doubt, that the reason/purpose does not need to be dominant or substantial.

### **3.2 Clauses 19 and 20**

I support Kate Eastman SC's submissions on the operation of clauses 19 and 20 (at part 4 of her submission). The maintenance of an objective test for discrimination is in my view essential to preserve the balance and practicability of the law.

I agree strongly with Ms Eastman, the Discrimination Law Experts Group (at part 6.1) and the Executive Council of Australian Jewry (**ECAJ**) that clause 19(2) should be deleted. Clauses 49 (sexual harassment) and 51 (racial vilification) should be left to do their work without being confused and arguably rendered redundant by a broader overlapping provision in the general definition of discrimination. As the ECAJ notes (at page 5), proposed clause 51, unlike clause 19(2), is subject to an objective test.

## **4. EXCEPTIONS AND EXEMPTIONS**

### **4.1 General comment**

I support Kate Eastman SC's comment (at paragraph 5.9) about the importance of streamlining the exceptions generally to avoid the considerable overlap that is currently proposed.

### **4.2 Special measures – clause 21**

I support the submission of the Discrimination Law Experts Group that it is onerous to require a special measure to be something done for the 'sole or dominant purpose' of equality.

### **4.3 Justifiable conduct – clause 23**

I support Kate Eastman SC's submission regarding 'justifiable conduct'. Draft clause 23 is both unworkable and onerous.

The Explanatory Notes suggest (at paragraph 148) that this concept 'builds on the defence of reasonableness'. I disagree. Rather, it would replace 'reasonableness' with a significantly more demanding and restrictive test which respondents would have to satisfy to make out the exception. I submit that the public has come to understand the concept of 'reasonableness' over decades of experience with existing laws. That experience and understanding are valuable, and should not be jettisoned by a total change in language.



Further, the proposed introduction of an additional requirement that conduct be 'legitimate' introduces a raft of potential problems, including public confusion and the possible limitation of the exception beyond what is intended.

Accordingly, I support Ms Eastman's proposed alternate wording for clause 23, except that I would suggest deleting the proposed final words of clause 23(4): 'may also be taken into account'.

#### 4.4 **Commonwealth laws – safety law**

I support the proposed general exception for compliance with Commonwealth laws. Based on my experience, I am concerned, however, about the omission of an exception for compliance with work health and safety laws.

The interaction between discrimination and safety laws has long been recognised as complex. The consolidation of federal discrimination laws is an opportunity to clarify that interaction. Because safety is an area regulated largely by state laws, the exception in proposed clause 26 will not apply to that area except for that limited category of 'persons conducting a business or undertaking' who are covered by Commonwealth safety law. This could be addressed either by inserting an additional provision to deal explicitly with this issue, perhaps as a new clause 27, or alternatively by making it clear that safety laws should be included in those prescribed by the regulations under clause 30.

#### 4.5 **Religious bodies and educational institutions – clause 33**

I suggest that, while it is likely that this was intended, it is not abundantly clear from proposed clause 33(4) that it would be lawful for an educational institution to make religious belief, practice, identity or status a ground for admitting or excluding students. This should be clarified. It would be consistent with the spirit of the proposed religious exceptions, and very important to many religious schools, to permit this.

It is also potentially problematic for the exceptions in clause 33 not to include the attribute of sex for some purposes. For example, in some religious schools, it is important that sex education be delivered to single-sex classes by teachers of the same gender.

#### 4.6 **Clubs – clause 35**

I acknowledge and support the statement in the Explanatory Notes (at paragraph 200) that the policy rationale for the exception in proposed clause 35 is that:

*'many attribute-based clubs and associations play a significant and meaningful role in the community... by promoting, advocating and protecting the interests of, and providing support to, a particular group'.*

However, I am concerned that the current drafting of the clause may defeat the policy objective of permitting such groups, because I consider that the Explanatory Notes are incorrect in stating that such associations are necessarily '*aligned with the objects of anti-discrimination law to achieve substantive equality*' or always '*help to address historical disadvantage*'.

For example, a club for:

- (a) survivors of breast cancer; or

(b) refugees from a particular country or region

might well provide valuable support for their members (for example in terms of sharing experiences and preserving cultural/ethnic identity), yet not in a way that seeks to address disadvantage or achieve equality. Accordingly, such clubs might not be permitted by current proposed clause 35(2), which requires the restriction of membership to the target group to be 'consistent with the objects of the Act'. I recognise that the insertion of that requirement is intended, as the Explanatory Notes comment, to ensure that a club cannot gain the benefit of the exception in a way that would defeat the objects of the Bill (eg a whites-only racial supremacist club). However, I recommend that the test be reconsidered and the clause redrafted to ensure that a broad range of attribute-based clubs that are not offensive to the aims of the legislation be explicitly permitted to operate.

## **5. VICARIOUS LIABILITY – CLAUSE 57**

I agree with Kate Eastman SC (at paragraph 6.1(2)) that the insertion of the concept of 'due diligence' alongside 'reasonable precautions' in clause 57(3) should be considered further. I recognise that this is derived from the DDA and ADA, but I am concerned that this imposes a confusing and possibly double burden on respondents – one phrase should be sufficient to convey the type of measures that need to be taken to make out the defence to vicarious liability.

## **6. THE BURDEN OF PROOF – CLAUSE 124**

I support the submission of her Honour Chief Justice Bryant of the Family Court of Australia (at pages 6-7) regarding the shifting burden of proof: that is, that the argument that this should occur because the respondent is in the best position to know the reason for the discriminatory behaviour and have the best access to relevant evidence is tenuous.

The proposed change, which as her Honour points out is a significant departure from current practice in discrimination law, would impose a significantly greater burden on respondents.

I hope that my submissions are of assistance to the Committee.

**Jacquie Seemann**