



AUSTRALIAN CHAMBER OF
COMMERCE AND INDUSTRY

21 December 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

E-mail: legcon.sen@aph.gov.au

Dear Committee Secretary,

Inquiry into the Human Rights and Anti-Discrimination Bill 2012

The Australian Chamber of Commerce and Industry (ACCI) is the peak council of Australian business associations. Our member network has over 350,000 businesses represented through Chambers of Commerce in each State and Territory, and a nationwide network of industry associations.

ACCI welcomes the opportunity to participate in this inquiry which is examining the Government's exposure draft bill, The Human Rights and Anti-Discrimination Bill 2012. ACCI would like to acknowledge the constructive dialogue it has had with the Government over the course of the year. Unfortunately the timeframe which has been established by the Committee for providing a written submission to the Committee's inquiry has not allowed ACCI to provide a comprehensive submission addressing every aspect of the exposure draft which was only released one month ago.

The exposure draft represents for the first time a significant re-writing of federal anti-discrimination law in Australia. The exposure draft, the accompanying explanatory notes, and the regulatory impact statement span over 400 pages. As such, it is not possible to fully consider each clause of the exposure draft to assess its intended impact and any unintended consequences.

This written submission should be understood to be a preliminary assessment of the exposure draft, which is made without prejudice to ACCI or its members' further consideration.

Please contact my Senior Executive responsible for this matter, ACCI Director of Workplace Policy and Director of Legal Affairs, Daniel Mammone on _____ for further information.

Yours sincerely,

Peter Anderson
Chief Executive

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ACCI Response
Human Rights and Anti-Discrimination Bill 2012 (Exposure Draft Legislation)

1. Introduction

Subject to a range of clear expectations which was provided in a primary submission to the Government in February 2012, the Australian Chamber of Commerce and Industry (ACCI), provided in-principle support to the Government's policy goal to consolidate existing federal anti-discrimination laws into one statute.

ACCI wishes to acknowledge the Australian Government's collaborative and consultative approach to working with key stakeholders including the business community. ACCI continues to have a legitimate interest in advocating the views on behalf of employers and the business community on anti-discrimination legislation and the Government has provided a number of mechanisms for the business community to provide their views since it released its discussion paper in September 2011, titled, "*Consolidation of Anti-Discrimination Laws*" (discussion paper).

ACCI provided an extensive written submission in response to the key issues outlined in the discussion paper in February 2012.

The Committee should refer to the ACCI submission (attached) which articulates ACCI's position in relation to a number of key issues.¹

2. Key Issues

The Government indicated its intention to embark on an ambitious project to consolidate the five separate anti-discrimination Acts in 2010. The then Attorney-General, Hon. Robert McClelland MP, and the then Minister for Finance and Deregulation, Hon. Lindsay Tanner MP, announced on 21 April 2010 that the Government intended to streamline federal anti-discrimination legislation into one single comprehensive law.² There was no previously articulated election commitment to embark on such a reform, other than to create two new additional protections.

By the Government deliberately choosing to deliver this project as a joint initiative through the Better Regulation Ministerial Partnership stream, this was ostensibly a positive signal that there would be beneficial outcomes to business and employers, who are duty holders under existing legislation applying at federal, state/territory levels.

¹ Please note that Attachments A – D of the ACCI submission (February 2012) are not attached to this submission.

² Joint media release, Hon Robert McClelland MP and Hon. Lindsay Tanner MP, "Reform of Anti-Discrimination Legislation", 21 April 2010: http://www.financeminister.gov.au/archive/media/2010/mr_292010_joint.html

A further media release by the then Attorney-General, Hon. Robert McClelland MP and Senator Hon. Penny Wong on 22 September 2011, which accompanied the release of the discussion paper, further indicated and re-affirmed the original policy intention of the Government, as outlined in its earlier media release.³

The business community expected that the Government would release an exposure draft and then allow extensive consultation with it and other stakeholders prior to a consolidated bill introduced into the Parliament.

Notwithstanding this Committee inquiry, ACCI considers it best practice policy that the Government does not rush the implementation of this project and consider further engagement with stakeholders during the course of 2013. There is no immediate policy imperative to introduce a bill which largely replicates the exposure draft into Parliament in the first quarter of 2013.

ACCI has not been able to engage in extensive discussions with its members and the business community since the exposure draft was released.

Given the limited time available to consult with the business community, the following issues have been identified as being either (a) significant issues for the Committee's attention or (b) contrary to ACCI's primary written submission in response to the exposure draft and will require re-consideration by the Government.

This submission should be read in conjunction with ACCI's written submission (attached).

New Attributes

ACCI opposed the creation of new protected attributes as part of the consolidation project.⁴ ACCI did not oppose the introduction of new protections at the federal level covering sexual orientation and gender identity, which are generally covered under various state/territory laws and the *Fair Work Act 2009* (FW Act). However, ACCI indicated the importance of clearly defining new protected attributes in order for duty holders to understand their legal obligations and minimise any unintended consequences.⁵

ACCI is concerned that despite the clear expectations that *"consolidating all Commonwealth anti-discrimination legislation into one Act will reduce the regulatory burden and drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and business, particularly small business"*

³ Joint media release, Hon Robert McClelland MP and Senator Hon. Penny Wong, "Launch of Discussion Paper on New Anti-Discrimination Law", 22 September 2011:
<http://www.robertmcclelland.com.au/2011/09/22/launch-of-discussion-paper-on-new-anti-discrimination-law/>

⁴ Paragraph 43, ACCI submission.

⁵ Paragraphs 45 to 51, ACCI submission.

the Government has added an additional layer of cost, uncertainty and regulatory duplication for employers. New protections which were not foreshadowed by the Government in the 2010 election, are intended to cover the following attributes and only in relation to work and work-related areas: industrial activity, medical history, nationality or citizenship, political opinion, religion and social origin.⁶ These attributes are only able to be pursued through the Australian Human Rights Commission (AHRC) and not through a determination by the courts. Whilst the Government has not adopted the attribute of a “*criminal record*”, to transform these attributes to unlawful protections creates a new and additional layer of regulation which subjects employers to litigation which does not currently exist under federal anti-discrimination law.

ACCI does not support the creation of new rights to litigate where they are presently not covered by the existing federal statutes. This is antithetical to the policy goal of a consolidation project.

The inclusion of ILO based attributes concomitantly introduces regulatory overlap with other laws and protections at the federal level, such as the FW Act (ss 346, 351, 352 and Part 6-4). For example, the FW Act’s adverse action provisions under s.351 protect employees from “*adverse action*” based on the following attributes: race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, political opinion, national extraction or social origin. Part 6-4 protects against the termination of employment based on prescribed grounds that also cover those grounds listed in s.351, with additional protections for other grounds. These are based on relevant ILO Conventions and Recommendations (ILO Convention 111, ILO Convention 156, ILO Convention 158, ILO Recommendation No. R166).⁷ Part 3-1 protects employees from adverse action on the basis of “*industrial activities*”.⁸

To reiterate, the expansion of protected attributes under federal legislation, is contrary to the position ACCI articulated in its earlier written submission.

Definitions

ACCI is concerned that important attributes in the exposure draft are not defined and will therefore be interpreted according to their ordinary meaning. This will result in uncertainty and potential unnecessary litigation to clarify what policy makers intended. Definitions are also important in defining the scope of the protections and what behaviours and norms are to be regulated.

ACCI notes that there are no statutory definitions provided for the following protected attributes: medical history; nationality or citizenship; political opinion; social origin; and religion. These are based on relevant international treaty instruments (and in some cases, different international instruments).

⁶ Clause 22(3), exposure draft.

⁷ See s.771 of the FW Act.

⁸ See ss. 346 – 350 of the FW Act.

New Tests

ACCI indicated in its submission that its preference was to retain the existing tests for discrimination. Notwithstanding, ACCI provided its preliminary views should there be a decision by the Government to create one unified test for discrimination matters.⁹

It is apparent that new concepts under clause 19 of the exposure draft have already been the subject of public criticism for considerably extending existing concepts to apply in a significantly broader manner (for example, conduct which “*offends*” is deemed to be unfavourable treatment for all protected attributes).¹⁰

ACCI is concerned that the concept of unfavourable treatment is potentially wide in scope. Clause 19(2) is a non-exclusive definition for what is intended to be captured as unfavourable treatment and is significantly broad in scope by extending existing protections (such as sexual harassment under s.28A of the SDA) to cover all protected attributes.

It is unclear whether the test is a subject or objective test. It is also unclear whether the term “*unfavourably*” under clause 19(1) is the same as the term “*unfavourable treatment*” under clause 19(2).

ACCI believes that the new test requires further consideration and does not support the new test as it is currently formulated.

Onus of Proof

The exposure draft introduces a new concept, referred to in the explanatory notes as a “*shifting burden*”, which is said to be based on the UK’s approach to discrimination. ACCI notes that the UK provision is only in relation to 64A of the SDA 1975 (UK), which covers sex discrimination. It has been imported into Australian discrimination law and would be contrary to the approach under existing federal, state/territory laws.

ACCI indicated in its submission that it did not support the reversal of existing evidentiary or legal burdens of proof.¹¹

Exemptions/Exceptions

ACCI has provided in-principle support to the creation of a general exemption based on the concept of justifiability, subject to key and important statutory exemptions/exceptions being retained. ACCI believes that the general exemption

⁹ See generally paragraphs 52 – 63, ACCI submission.

¹⁰ For example, clause 19(2). There is repetition of concepts for sexual harassment in the exposure draft as clause 49 deals with sexual harassment in a similar way. See clause 49 (1)(b).

¹¹ Paragraph 12, ACCI submission.

under the exposure draft requires further consideration. For example, to satisfy the exemption, a respondent would need to satisfy (on the balance of probabilities) each limb under clause 23(2) which appears unlikely to be met in but the rarest of occasions. It is difficult to foresee how a respondent would be able to rely on this exemption, when each limb under sub-paragraphs (a) to (d) carries a high threshold. The explanatory notes indicate that the policy intention is that a number of situations would be “covered” by clause 23(2) and these are provided at paragraph 148 of the explanatory notes (ie. not allowing a vision impaired person to obtain a driver’s licence) and further at paragraph 151.

Based on ordinary statutory construction principles, a court will not necessarily have recourse to the extrinsic materials to assist in the interpretation of a substantive section of an Act. Even if a court did have recourse to the relevant extrinsic materials and a respondent attempted to rely on the examples articulated paragraph 148, a respondent may not be able to satisfy the test under clause 23.

ACCI’s submission indicated that it would strongly oppose the removal of the inherent requirements exception. The exposure draft retains the concept and ACCI is seeking specific feedback from members as to the current wording of the exception to ensure it does not have unintended consequences or re-casts the exception in a narrower manner.

Costs

The exposure draft radically alters the longstanding approach to how costs are treated under anti-discrimination law at the federal level. ACCI opposed any changes to the way costs have been historically dealt with under federal laws.¹²

The changes in the onus of proof, coupled with changes in creating a “no-costs” jurisdiction, will likely see a rise in the number of complainants pursuing claims under the federal anti-discrimination jurisdiction.

Representative Actions

ACCI is pleased that, consistent with its submission, representative actions are not included in the exposure draft.

Reasonable Adjustments/Positive Duties

ACCI is pleased that, consistent with its submission, reasonable adjustment provisions are confined to disability and the exposure draft does not create positive duties.

Vicarious Liability

¹² Paragraph 143, ACCI submission.

Vicarious liability remains one of the single most important issues for employers, which remains a careful balancing exercise for policy makers.

Whilst the exposure draft retains important exemptions for employers, ACCI indicated in its submission that it preferred the formulation under the ADA and DDA (as opposed to the alternative wording in the SDA and RDA and which is picked up in the exposure draft at clause 57), which only makes an employer vicariously liable for the actions of its employees or agents who act within their "*actual or apparent authority*".¹³ The formulation adopted under the exposure draft based on a "*connection*" to an employee's employment, means that employees or agents who act outside of the scope of their authority (for example, by engaging in unauthorised, unlawful or illegal activities) will potentially create the same legal liability for their principal. This poses a real and not hypothetical problem when employees engage in activities which are "*connected*" to their employment, but which a reasonable person would consider to be private in nature or which is conduct that is not sufficiently connected to the person's duties as an employee.

Moreover, ACCI prefers the wording under the SDA and RDA which requires an employer to demonstrate that it took "*all reasonable steps*", as opposed to the ADA and the DDA (which is picked up in the exposure draft) that the employer took "*reasonable precautions and exercised due diligence*" (emphasis added).

Regulatory Overlap

It is regrettable that the exposure draft does not reduce any overlapping coverage. The exposure draft creates new regulatory overlap and inconsistencies. The exposure draft will allow aggrieved individuals to choose which forum to lodge a discrimination claim and will encourage forum shopping amongst different jurisdictions. This is contrary to the expectations of a consolidation project.

ACCI expressed support for the consolidated bill to "*cover the field*" in terms of existing rights at the federal jurisdiction and reiterates support for a move to a single federal framework for discrimination matters, subject to those laws being fair and balanced set of legal obligations for duty holders.¹⁴

3. Conclusion

ACCI and its members have not provided a comprehensive analysis of the impact of the exposure draft to this Committee inquiry. This submission does not analyse, even on a preliminary basis, the impact of changes to the institutional framework for complaints and other matters contained in Chapters 3 to 7 of the exposure draft.

This Senate Committee should recommend that the Government engage in further consultation and dialogue with key stakeholders prior to the Government introducing a consolidation bill into the Parliament.

¹³ Paragraph 103, ACCI submission.

¹⁴ Paragraphs 159 – 165, ACCI submission.