

21 December 2012

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

Dear Ms Dennett

Exposure Draft *Human Rights and Anti-Discrimination Bill 2012*

I thank the Committee for the invitation to make a submission about the Exposure Draft *Human Rights and Anti-Discrimination Bill 2012* (**Exposure Draft Bill**).

I support the consolidation of federal anti-discrimination laws. However, I am concerned that in its present form the proposed law will impose unreasonable and impractical burdens on individuals, organisations and government agencies. Any law that seeks to protect human rights should operate on the premise that human rights are not absolute. Rights may be limited. The critical issue is how to limit human rights in a way that strikes a proper balance between competing rights and interests. In my view, the Exposure Draft Bill does not strike a proper balance.

My submission is informed by more than 20 years of practice in the area of anti-discrimination law, harassment and human rights. I have represented and advised complainants, community groups, employers, service providers, schools, government, business and the statutory bodies that administer Commonwealth, State and Territory anti-discrimination laws.

It is beyond the scope of this written submission to address all of the issues raised by the Exposure Draft Bill, so my submission addresses the key issues which affect the practical operation of federal anti-discrimination laws, namely:

- the attributes,
- the areas where the law applies; and
- the concept of discrimination.

I am happy to assist the Committee further if any hearings are held to address any additional aspects of the Exposure Draft Bill.

Yours sincerely

Kate Eastman

Level 6 & 7 St James Hall Chambers
169 Phillip St, Sydney 2000
DX 328 Sydney
ABN: 57 227 326 241

W: www.sixstjameshall.com.au
www.kateeastman.com

COMMENTS ON THE EXPOSURE DRAFT BILL

1. Clarity and accessibility of the law

- 1.1 There is a need for a consolidated Commonwealth anti-discrimination law. Replacing the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Australian Human Rights Commission Act 1986* and the *Australian Human Rights Commission Regulations* with a single Commonwealth law is welcomed.
- 1.2 Laws of this kind should be accessible and clear to all people who rely on the law to protect their human rights but also those who bear obligations. I am concerned that aspects of the Exposure Draft Bill do not achieve this objective. In *Human Rights and Equal Opportunity Commission v Mount Isa Mines Limited* (1993) 46 FCR 301 at 326 Justice Lockhart said:

Anti-discrimination legislation must be understood, not only by statutory bodies that enforce it, but by all sections of the community because the implications and effects of the legislation could touch us all. It is important that the legislation is not approached and construed with fine and nice distinctions which will not be comprehended by any except experts in the field; nor is there any need for them.

2. Attributes (clause 17)

- 2.1 Some of the attributes identified in cl 17 may require further clarification and definition. Without addressing all of the attributes, I note the following:
- (a) ‘*immigrant status*’ (cl 17(1)(f)): the expression is defined to mean the status of being an immigrant. The expression ‘immigrant’ is not defined and on one view it might refer to a person’s visa status or a person’s future immigration status (if read with cl 19(4)(d)). The Explanatory Notes (at [88]) suggest that the expression is not intended to cover visa status but the terms of the cl 17(f) do not make that clear.¹
 - (b) ‘*industrial history*’ (cl 17(1)(g)): it would be preferable to use language which is consistent with the *Fair Work Act 2009* (Cth). This attribute will give rise to the same kinds of rights that are currently protected by ss 346 – 350 of the *Fair Work Act*. Given the broad protections in the *Fair Work Act*, the two laws should operate consistently;
 - (c) ‘*religion*’ (cl 17(1)(o)): religion is not an attribute *per se*. From an international law perspective a person may choose his or her religion but the attribute relevant to discrimination is the person’s membership of a religious group, the person’s exercise of religious beliefs or engaging in religious activities.² There is no clear definition of ‘religion’ or ‘belief’. For the purpose of international law, beliefs that have been protected by this right include traditional religions, as well as ‘pacifism’,³

¹ See also *Kuswardana v Minister of Immigration and Ethnic Affairs* (1981) 54 FLR 335

² see Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

³ *Arrowsmith v United Kingdom* 19 DR 5 (1980); [1975] 3 EHRR 218

‘corporal punishment for children’⁴ and a belief that ‘the appropriate framework for sexual relations is within marriage’.⁵

International experience suggests that using a general description of religion as an attribute will give rise to unnecessary and costly litigation around the concept of religion and whether a person has such an attribute.⁶ International experience shows that not all assertions of religious beliefs will be accepted as such. This involves a court assessing the ‘validity’ of belief systems, which I suggests should not be the role of a court:

- in *AYT v Canada*,⁷ the UN Human Rights Committee rejected a claim that a belief consisting primarily or exclusively in the worship and distribution of a narcotic drug engaged article 18 of the International Covenant on Civil and Political Rights (ICCPR);
- in *Countryside Alliance and Anor (R on the application of) v Her Majesty's Attorney General & Anor* [2006] EWCA Civ 817, the UK Court of Appeal rejected a challenge to the ban on hunting on the ground that it was an unjustified interference with the manifestation of the hunters’ beliefs. The claim that hunting constituted a belief was considered to be ‘ingenious’ but misconceived.

While it is important to provide protection against discrimination on the ground of a person’s religious beliefs and/or practices, cl 17(1)(o) could be clarified.

- 2.2 Clause 17(1) does not appear to limit the attributes to those of natural persons. Arguably groups of persons, incorporated associations, corporations or a body politic will have an attribute. Having regard to the scope of cl 19, corporations with an attribute may assert that conduct of another person, corporation or government treats the corporation unfavourably because of the characteristic. Foreign investment is one area which comes to mind because corporate entities have attributes such as a ‘race’, and/or ‘nationality’. In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 236, Mason J said:

[Whilst] generally speaking, human rights are accorded to individuals, not to corporations, ‘person’ [need not] be confined to individuals. ... the object of the Convention being to eliminate all forms of racial discrimination and the purpose of s 12 being to prohibit acts involving racial discrimination, there is a strong reason for giving the word its statutory sense so that the section applies to discrimination against a corporation by reason of the race ... of any associate of that corporation.

- 2.3 Likewise, in a workplace setting, a corporation could have the attribute of ‘industrial history’ or ‘political opinion’.

⁴ *R (Williamson) v SS Education and Employment* [2005] 2 AC 246

⁵ *Playfoot v Governors Millais School* [2007] EWHC 1698 (Admin)

⁶ see *R (Williamson) v SS Education and Employment* [2005] 2 AC 246 and *R v Big M Drug Mart* [1985] 1 SCR 295 at 336 – 337.

⁷ *M.A.B., W.A.T. and J.-A.Y.T. v. Canada*, Communication No. 570/1993, U.N. Doc. CCPR/C/50/D/570/1993 (1994) at [4.2]

- 2.4 From a drafting perspective cl 19(4), which extends the attributes, would be better placed as a subclause of cl 17.
- 2.5 As to the extension to attributes that do not presently exist but may exist in the future, cl 19(4)(c) refers to the 'possibility' of a person having an attribute in the future. The expression 'possibility' will make the assessment of whether unfavourable treatment was done because of a possible future attribute difficult from a practical perspective. I recommend that 'possibility' be deleted.

3. Areas covered and the concept of public life (clause 22 and clause 50)

- 3.1 Clauses 22(1), 22(2) and 50 significantly expand the coverage and reach of the federal discrimination and sexual harassment laws.
- 3.2 If the Exposure Draft Bill is passed in its present form, it would mean that almost every interaction between people may be regulated by this law. The only areas excluded would be wholly private interactions with no connection to public life. The expansion of the anti-discrimination laws to every aspect of public life or connected with public life is too broad. Alternatively, if the new law is to apply to all aspects of public life, then the new law should not commence immediately. Employers, service providers, accommodation providers and educational institutions will require sufficient time to adjust to the new obligations.
- 3.3 To the extent that the concept of 'public life' comes from international law (see for example article 1(1) of *International Convention on the Elimination of All Forms of Racial Discrimination*) it is important to note that international law speaks to the relationship between the State and the citizens/individuals. The expression 'public life' means the areas where the State and the individual may interact. One way of looking at 'public life' is to equate the concept to the public sector. The distinction between the public sector and private sector is readily understood. However, in the Exposure Draft Bill, the expression 'public life' is not used to limit the operation of the anti-discrimination laws to the public sector or interactions with government, reflecting the international law.
- 3.4 The expression 'public life' in cl 22 and cl 50 appears to be used to make a distinction between public activities and private activities. It then assumes that interactions between people in the areas of employment, provision of goods and services, accommodation and education is all done in public life, even if the employer, service provider etc operates in the private sector. In my view, the expression public life is confusing and is likely to lead to litigation about distinctions between public and private spheres.
- 3.5 Using a public/private dichotomy may have unintended consequences by reducing the protection for people operating in the private sphere. For example cl 22(2)(d) provides that it will be unlawful to discriminate with respect to 'access to public places'. By definition it excludes 'private places' and premises which may be private but accessible by the public from time to time. Clause 22(2)(d) is more limited than the current laws, for example, s 23 of the *Disability Discrimination Act* which applies to private places

or private premises if the public or a section of the public is entitled or allowed to enter or use (whether for payment or not) the premises.

- 3.6 Likewise, if the Exposure Draft Bill is passed in the proposed form, it allows a person who is offended by any conduct or any decision made by government or government officials to challenge such conduct or decision as discriminatory. It would be difficult for government to argue that any conduct or decisions were not done in connection to public life. The effect of cls 19 and 22(1) of the Exposure Draft Bill means that all such conduct and decisions can be challenged as offensive or unfavourable because the aggrieved person has a relevant attribute.

4. Test for discrimination (clauses 19 and 20)

- 4.1 Abandoning concepts of 'direct' and 'indirect' discrimination is welcomed. However, the proposed tests set out in cls 19 - 20 of the Exposure Draft are problematic.
- 4.2 Subclauses 19(1) and 19(2) of the Exposure Draft Bill represent a significant and radical change to the way in which discrimination has been defined and applied at a federal level.⁸ The concept of discrimination (ie adverse differential treatment) has been abandoned and replaced with the concept of unfavourable treatment (ie adverse detriment or impact). It is akin to the concept of 'adverse action' in the *Fair Work Act*.
- 4.3 By focusing on the *effect* on the person rather than the nature of the treatment, the proposed law moves from an objective test to a subjective test wherein discrimination is determined by the effect or impact on the person with the attribute.
- 4.4 The current laws focus on the *treatment accorded to* a person with an attribute. The current test is objective and directed to ascertaining *why* an employer, service provider, educational institution etc treated a person in a particular way. Comparing similarly placed persons is a way of testing whether a reason for adverse treatment is a person's attribute. If a person without the attribute receives more favourable treatment, it points to the treatment in question being done because of a person's attribute.
- 4.5 Clause 19(1) in the Exposure Draft Bill is not directed to ascertaining whether there has been different treatment between people with different attributes. Rather it is concerned with a subjective assessment of whether a person with an attribute experiences unfavourable treatment. The focus on the experience of the aggrieved person is reinforced by cl 19(2)(b) in particular.
- 4.6 At the outer reaches, the effect of cl 19(2)(b) means that every conversation or interaction between individuals that results in a person feeling offended, insulted or intimidated could be cause for complaint. If the aggrieved person has a relevant attribute and believes his or her attribute may be a reason for the conduct which he or she feels is offensive, then a complaint could be lodged.
- 4.7 I am strongly of the view cl 19(2) should be deleted. Clause 19(2)(a) undermines renders the sexual harassment (cl 49) and racial vilification (cl 51) redundant. I pose rhetorically, why opt for a more onerous test for sexual harassment and racial

⁸ Possibly the same analysis applies to cl 54 with respect to victimisation.

vilification where cl 19(2)(a) and (b) provide a lower bar for establishing that sex-based harassment or racist speech has caused offence?

- 4.8 To avoid any doubt, it is also appropriate that cl 19(1) expressly provides for an objective test to determine whether there has been unfavourable treatment.⁹ For consistency, language of the kind used in cl 49(1)(b) and 49(2) should be included in cl 19, which imports a reasonableness test.
- 4.9 The purpose and effect of cl 20 is not clear. I am concerned that it will draw a court into assessing a hypothetical situation or circumstances. A federal court should not be asked to provide an advisory opinion where there is no real dispute between the parties.¹⁰

5. Exception for justifiable conduct (clause 23)

- 5.1 From a practical perspective, cl 23(3) in the Exposure Draft Bill poses an unworkable test. At the most basic level, it will only provide a defence to a person who has a particular purpose when he or she engages in discrimination. Clause 23 cannot apply to a person who acts without any particular purpose or unintentionally treats another person unfavourably.
- 5.2 Clause 23(3) has four limbs that must be satisfied before the defence applies. The test is far more onerous than the international law instruments that underpin the proposed new law. In General Comment 18,¹¹ the UN Human Rights Committee considered the scope of Article 26 of the International Covenant on Civil and Political Rights. Article 26 prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The UN Human Rights Committee confirmed that the right is not absolute. At [13] of its General Comment 18, the Committee said:

Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

The test is a simple one based on reasonable and objective differentiation. It is also important to observe that this exception or limitation on the right applies to differential treatment, not unfavourable treatment in the form provided by cl 19(1).

- 5.3 Each limb of cl 23(3) imposes an onerous evidentiary burden on the person seeking to rely on the defence. The concept of 'good faith' used in cl 23(3)(a) is difficult if the person is a corporation or body politic where the subjective element of 'good faith' may not be attributable to a single person.

⁹ see *Aitken & Ors v The State of Victoria – Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547 at [156] ff with respect to the *Equal Opportunity Act 2010* (Vic) which now defines 'direct discrimination' by reference to 'unfavourable treatment' and dispensing with a comparison test to determine whether discrimination has occurred.

¹⁰ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [45] and see also *Woods v Wollongong City Council and Ors* (1993) EOC 92-486.

¹¹ Human Rights Committee, 'General Comment No.18', in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (2006), 188.

- 5.4 The concept of ‘legitimate aim’ used in cl 23(3)(b) and (c) may draw a court into making an assessment about public policy and public expenditure in claims made against governments. For claims against private sector enterprises and businesses, the courts may be called on to determine whether certain strategic plans, resource allocation, financial model and human resource decisions are ‘legitimate’. There is nothing in the Exposure Draft Bill that assists a court to make an assessment of what is legitimate and what is not. In my view, a court should not be asked to step into a management role or make the assessments required by cl 23(3)(b) and/or 23(3)(c). In *State of Victoria v Schou* (2001) 3 VR 655 at 660 [30]-[31], Harper J said:

When considering in any particular case whether the burden has been discharged courts and tribunals must act with an appropriate degree of diffidence. The expertise of judges and tribunal members does not generally extend to the management of a business enterprise... and just as the courts, in proper recognition of the lack of relevant expertise, will not in general issue to company directors instructions about how they should manage the business under their control, so courts and tribunals concerned with equal opportunity legislation should resist the temptation unnecessarily to dictate to persons who manage, and work on, the shop floor. At the same time, any discrimination legislation should be liberally construed. Getting the balance right will often be difficult.

- 5.5 Clause 23(3)(d) is arguably redundant if cl 23(3)(a) – (c) are satisfied. It should not be necessary to determine whether the conduct is proportionate in addition to the matters set out in cls 23(3)(a) - (c). There is no guidance on how proportionality should be assessed. It is a complex and difficult concept.¹² The concept of proportionality is not one which is commonly used in Australian law. Further, the evidentiary burden on the person seeking to establish that conduct is proportionate is substantial.
- 5.6 I would strongly suggest that clause 23(3) is replaced with a simple test of the kind described by the UN Human Rights Committee. The concept of reasonableness is one which has been used for many years in federal anti-discrimination laws. The concept of reasonableness is one familiar to Australian courts and is preferable to proportionality. The test could be along the following lines:

23 Exception for justifiable conduct

Protected attributes to which this exception applies

- (1) The exception in this section applies in relation to all protected attributes.

Exception for justifiable conduct

- (2) It is not unlawful for a person to discriminate against another person if the conduct constituting the discrimination is justifiable.

When conduct is justifiable

- (3) Subject to subsection (5), conduct of a person (the **first person**) is **justifiable** if the conduct was reasonable in the circumstances of the particular case.

¹² In other contexts see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30 – 31, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 -568, *Coleman v Power* (2004) 220 CLR 1 at [93]-[96], [196], [211], *South Australia v Tanner* (1989) 166 CLR 161 at 164, *Victoria v Commonwealth* (1996) 187 CLR 416 at 487, and *Parker v Minister for Sustainability, Environment, Water, Population and Communities* [2011] FCA 1325 at [61] - [67]

- (4) In determining whether conduct is justifiable, the following matters must be taken into account:
- (a) the objects of this Act;
 - (b) the nature and extent of the discriminatory effect of the conduct;
 - (c) whether the first person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect;
 - (d) the cost and feasibility of engaging in other conduct as mentioned in paragraph (c); and
 - (e) any other matter that it is reasonable to take into account may also be taken into account.

Disability: conduct not justifiable if a reasonable adjustment could have been made

- (5) In relation to discrimination on the ground of disability (or on the ground of a combination of disability and one or more other protected attributes), conduct of a person is not **justifiable** if:
- (a) there is a reasonable adjustment that the person could have made; and
 - (b) if the person had made that adjustment:
 - (i) the conduct would have had no, or a lesser, discriminatory effect; or
 - (ii) the person would instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect.

Note: The concept of reasonable adjustment is dealt with in section 25.

- 5.9 Finally, it would be preferable to have a streamlined approach to exceptions and defences. Clauses 23 - 45 point to a large number of overlapping and intersecting defences. The existence of a large number of exceptions may lead to some confusing as to how the exceptions interact.

6. General Comments

- 6.1 Other aspect of the Exposure Draft Bill which require careful attention are:

- (1). the special measures provision (cl 21) which appears to introduce a reasonableness test rather than following the approach described by Justice Brennan in *Gerhardy v Brown* (1985) 159 CLR 70;
- (2). the exception/defence relevant to vicarious liability, which now has two limbs
 - (i) reasonable precautions; and (iii) due diligence (cl 57(3));
- (3). why cl 60 is only concerned with 'race' and what this means for the definition of 'race' vis-a-vis the other race related attributes in cl 17;
- (4). why a merits review in the Administrative Appeals Tribunal has not been included with respect to the Australian Human Rights Commission's power to grant temporary exemptions (cl 83 ff). This is particularly concerning because the only review option will be judicial review not merits review;

- (5). an express provision with respect to the time limit for making complaints to the Australian Human Rights Commission. At the present time, there is no real time limit as to when a complaint should be made (cl 117(2)(b));
- (6). whether cl 121 is consistent with Chapter III of the Constitution and the exercise of judicial power if there is no hearing; and
- (7). burden of proof (cl 124) and whether it is in fact a shifting burden or whether the significant of the evidentiary burden falls on a respondent.