

DEC 2012



SUBMISSION TO THE SENATE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE

HUMAN RIGHTS AND ANTI- DISCRIMINATION BILL 2012, EXPOSURE DRAFT LEGISLATION

CONTACT

Rev. Elenie Poulos

National Director, UnitingJustice Australia

PO Box A2266

Sydney South NSW 1235

PREPARED BY

Ms. Siobhan Marren

Senior Policy Officer, UnitingJustice Australia

PO Box A2266

Sydney South NSW 1235

1 | INTRODUCTION

UnitingJustice Australia is the justice policy and advocacy unit of the Assembly of the Uniting Church in Australia (the national Council of the Uniting Church), pursuing matters of social and economic justice, human rights, peace and those concerning the environment. It works in collaboration with other Assembly agencies, Uniting Church synod justice staff around the country, and with other community and faith-based organisations and groups. It engages in advocacy and education and works collaboratively to communicate the Church's vision for a reconciled world. It provides resources for the Church as it considers its position on issues of national and international importance and public policy.

UnitingJustice exists as an expression of the Uniting Church's commitment to working towards a just and peaceful world. This commitment arises from the Christian belief that liberation from oppression and injustice is central to the outcome of the work that God has undertaken through Jesus Christ. The Uniting Church in Australia is committed to involvement in the making of just public policy that prioritises the needs of the most vulnerable and disadvantaged in our society. In 1977, the Inaugural Assembly of the Uniting Church issued a Statement to the Nation. In this statement, the Church declared "our response to the Christian gospel will continue to involve us in social and national affairs."¹

The Uniting Church's support for human rights and the upholding of the dignity of all people was fully articulated in our 2006 statement on human rights, 'Dignity in Humanity: Recognising Christ in Every Person'. In part, this statement reads:²

The Uniting Church in Australia believes that human beings are created in the image of God who is three persons in open, joyful interaction. The image of God that is reflected in human life, the form of life that corresponds to God, is the human community – all people – finding its life and sustenance in relationship.

Thus, the Uniting Church believes that every person is precious and entitled to live with dignity because they are God's children, and that each person's life and rights need to be protected or the human community (and its reflection of God) and all people are diminished.

In addition to laying out the theological basis of our commitment to human rights, this statement committed the Church to an ongoing assessment of Australian Government policy and practice against our international human rights commitments under United Nations treaties, and encouraged agencies and other groups within the Church to advocate for social policy consistent with these obligations:

¹ <http://www.unitingjustice.org.au/uniting-church-statements/key-assembly-statements/item/511-statement-to-the-nation>

² This statement is available at http://www.unitingjustice.org.au/images/pdfs/resources/UJA-booklets/dignityhumanity_web.pdf

We affirm our support for the human rights standards recognised by the United Nations. Everyone has a birthright to all that is necessary for a decent life and to the hope of a peaceful future. This birthright is expressed in UN human rights instruments which describe human rights as civil, political, economic, social and cultural rights. These instruments provide a valuable framework for assessing political, economic and social systems and are an important tool for peace.

The United Nations human rights instruments to which Australia is a party recognise the importance of non-discrimination in the realisation of the rights they describe. Discrimination is both a cause and consequence of poverty and social exclusion and a denial of human dignity.

It is in line with the past work and future commitment of UnitingJustice that we welcome the opportunity to make the following submission to the Inquiry into the Exposure Draft of the Human Rights and *Anti-Discrimination Bill 2012* (hereafter, the *Anti-Discrimination Bill*).

2 | SUMMARY OF RECOMMENDATIONS

UnitingJustice strongly welcomes the release of the Exposure Draft of the Human Rights and *Anti-Discrimination Bill 2012*, and we congratulate the Federal Government on the advances that this Bill represents in the area of protecting and promoting equity and justice. We are particularly pleased that the objects of the Bill contain an explicit commitment to seven key international human rights treaties to which Australia is a signatory.

We acknowledge the strides that have been made in streamlining and simplifying the complex series of laws that currently serve to prevent discrimination in Australia, and have welcomed the open and conciliatory nature of the public consultations in which we have participated.

We believe, however, that several areas of the Exposure Draft legislation could be improved. In particular, this submission makes the following recommendations:

Recommendation One: Inclusion of the Declaration on the Rights of Indigenous Peoples in the definition of human rights instruments in section 3(2).

Recommendation Two: That the list of protected attributes be expanded to include homelessness.

Recommendation Three: That the list of protected attributes be expanded to include 'survivor of domestic violence'.

Recommendation Four: That the list of protected attributes be expanded to include intersex status.

Recommendation Five: That the list of protected attributes be expanded to include irrelevant criminal record.

Recommendation Six: That the use of "family responsibilities" be widened to acknowledge kinship groups within Aboriginal and Torres Strait Islander communities, and that carer status be explicitly included.

Recommendation Seven: That the "reasonable persons test" be removed from the special measures clauses referred to under section 21.

Recommendation Eight: That the sections governing religious exception be amended to remove those protected attributes that are not demonstrably justified by religious needs.

3 | JUSTIFICATION FOR RECOMMENDATIONS

Recommendation One: Inclusion of the Declaration on the Rights of Indigenous Peoples in the definition of human rights instruments in section 3(2).

One of the key aspects of this important human rights treaty is the right to self-determination for Indigenous peoples. This is enshrined in section 4 which outlines the importance of free, prior and informed consent for decisions made that impact Indigenous peoples and their communities.

UnitingJustice has maintained a long-standing opposition to the continued erosion of the rights of Aboriginal and Torres Strait Islander peoples. While we acknowledge that section 3(2) of the *Anti-Discrimination Bill* includes reference to the International Convention on the Elimination of All Forms of Racial Discrimination, we do not believe that the Australian Government has taken its obligations under this Convention seriously.

The Committee on the Elimination of Racial Discrimination's (CERD) requirements include that affected communities must be afforded the right to participate in the design and implementation of legislation, including those covered by 'special measures' clauses.³ The process involved in the passing and implementation of the Stronger Futures legislative package has served only to distance and disempower Aboriginal and Torres Strait Islander peoples from the policy process, and is in clear violation of CERD's recommendations.

Given the failure of successive governments to meet their human rights obligations under CERD, we believe it is important that the Declaration on the Rights of Indigenous Peoples be included in the *Anti-Discrimination Bill* to aid in the promotion and protection of the rights of Aboriginal peoples and their communities.

3 Paragraph 18 of General Recommendation 32.

Recommendation Two: That the list of protected attributes be expanded to include homelessness.

In 2007, the UN Special Rapporteur on the Right to Adequate Housing recommended that Australian governments take positive steps, including changing legislation, to address discrimination on the basis of inadequate housing and other forms of social status.⁴

People who are experiencing homelessness are not only discriminated against in their attempts to secure access to accommodation, but also in their interactions with social security and the electoral systems and in accessing healthcare, education and employment opportunities. Furthermore, the criminalisation of certain activities in public spaces also has significant implications for people experiencing homelessness.

The Committee on Economic, Social and Cultural Rights has commented that:

Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping which can lead to the refusal of or unequal access to the same quality of education and health care as others, as well as the denial of or unequal access to public places.⁵

We acknowledge that there is no existing regulatory framework under current legislation to guide the inclusion of homelessness as a protected attribute, however a number of other countries have recognised homelessness as a 'social status', 'housing status' or 'employment status' within the prohibition on

4 Special Rapporteur on the Right to Adequate Housing (2007) *Report of the Special Rapporteur on the Right to Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Australia*, UN Doc A/HRC/4/18/Add.2, Recommendation 130

5 Committee on Economic, Social and Cultural Rights, General Comment 20 on Non-Discrimination, 10 June 2009, 35.

discrimination,⁶ and we believe the issue is worthy of equal attention in Australia under the *Anti-Discrimination Bill*.

Recommendation Three: That the list of protected attributes be expanded to include 'survivor of domestic violence'.

While domestic violence against women rarely takes place in the workplace itself, there are important and serious consequences on workplaces and their employees, a fact endorsed by the Australian Human Rights Commission:⁷

Almost one in three women who experience domestic and family violence are in the workforce, so there is no question that the issue of violence affects many of our workplaces... Violence has serious implications for individual women's short and long-term financial security. Domestic and family violence can disrupt women's work and can cause women to incur a range of additional costs and debts... We must develop better workplace responses to domestic and family violence to ensure that women can stay attached to the workforce.

Currently, there is no legislative framework that deals specifically with discrimination in the form of unfair or less favourable treatment of those who are victims of domestic violence, and existing workplace laws 'fail to provide effective or specific redress for survivors of domestic violence who are treated adversely on the basis of this violence'.⁸

6 Australian Human Rights Commission (2008), 'Homelessness is a Human Rights Issue', available: http://human-rights.gov.au/human_rights/housing/homelessness_2008.html

7 Broderick, E. (2010), Speech to forum on domestic violence clauses in enterprise agreements, an Australian first at UNSW, 15 April 2010. Available at http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2010/20100415_violence.html

8 Heffernan, A. & Matahaere, L. (2010), 'Domestic violence discrimination in the workplace: Is statutory protection necessary?' Our Work, Our Lives Conference 2010, Queensland Working Women's Service Inc.

There is a compelling need for specific clauses in the consolidated legislation to capture the range of issues facing survivors of domestic abuse, particularly when we consider that claims utilising existing provisions that are designed to cover areas of life such as family responsibilities, are generally weak. This is clearly articulated by the AHRC when they noted:

It may not always be possible for an employee to link adverse action or a dismissal which is in truth based on domestic violence to a ground of discrimination covered by the FWA. For example, an individual who is discriminated against because she or he requires time off work to attend court or to relocate to escape violence may be unable to make a claim under any ground covered by the FWA.⁹

Survivors of domestic violence are particularly at risk of intersectional discrimination, an alarming fact noted in the 2011 Discussion Paper on the Consolidation of Anti-Discrimination Laws.¹⁰ Its absence as a protected attribute under the *Anti-Discrimination Bill* neglects our commitments under the Convention on the Elimination of All Forms of Discrimination Against Women and the International Labour Organisation Convention 111 (the Discrimination (Employment and Occupation) Convention 1958), under which gender-based violence is recognised as discrimination.

Recommendation Four: That the list of protected attributes be expanded to include intersex status.

UnitingJustice welcomes the inclusion of sexual orientation and gender identity to the list of protected attributes under section 17, however we do not believe that sufficient regard has been paid to the needs of intersex people. The explanatory notes accompanying the *Anti-Discrimination Bill* expands on the definition of "gender identity" under section 6 of the proposed legislation and refers to those of an "indeterminate sex".

9 Australian Human Rights Commission, Submission CFV 48, 21 April 2011.

10 Paragraph 85.

‘Intersex’ should not be conflated with ‘gender identity’, and doing so under this new legislation may well make the lives of intersex peoples more difficult. This is merely reinforced by the restrictive and outmoded notions of sexuality that are utilised in the Bill’s definition of “sexual orientation”.

Currently, intersex people fall largely outside of the binaries that pervade current legislation, and the *Anti-Discrimination Bill* in its current form would perpetuate many of the misunderstandings faced by those of intersex status. The Organisation Intersex International Australia notes that “intersex is a term which relates to a range of natural biological traits or variations that lie between” the traditional gender paradigms of male and female.¹¹ As a biological condition, it requires consideration under the *Anti-Discrimination Bill* independently from gender identity.

Recommendation Five: That the list of protected attributes be expanded to include irrelevant criminal record.

While we acknowledge that certain aspects of an individual’s criminal record are indeed relevant in particular contexts, when criminal record information is misused, it leads to a range of serious problems, including barriers to employment, accommodation, health care and other essential goods and services.¹²

Australia has ratified the International Labour Organisation Convention 111 (the Discrimination (Employment and Occupation) Convention 1958), which imposes an obligation on our governments to pursue policies that ensure discrimination on the ground of criminal record is eliminated.¹³

11 <http://oiaustralia.com/19853/welcome/>

12 Pilch / Vacro, Joint Submission to the Standing Committee of the Attorneys-General Draft Model Spent Convictions Bill, January 2009.

13 ILO 111 was ratified by Australia in 1973 and incorporated into domestic law by virtue of the Human Rights and Equal Opportunity Commission Act 1986 (Cth). In addition to specifying certain grounds of non-discrimination, including race, colour, sex, religion, political opinion, nationality and social origin, the ILO 111 allows for States parties to add further grounds of non-discrimination. In 1989, Australia added a number of further grounds, including criminal record.

At the federal level, the Australian Human Rights Commission Act (Cth) provides for a pathway for complaints to the Australian Human Rights Commission. However, there are no enforceable remedies if the AHRC establishes discrimination on the basis of irrelevant criminal record.¹⁴

The European Court of Human Rights has interpreted non-discrimination on the grounds of ‘other status’ in international human rights accords to include non-discrimination on the basis of criminal record.¹⁵ Additionally, discrimination on the grounds of irrelevant criminal record is unlawful in both Tasmania and the Northern Territory, while other States – with the exception of Victoria – provide for the removal of convictions under spent convictions schemes.¹⁶ By including irrelevant criminal record in the list of protected attributes, there will be greater consistency amongst the various pieces of legislation governing this area, and less risk of discrimination.

Recommendation Six: That the use of “family responsibilities” be widened to acknowledge kinship groups within Aboriginal and Torres Strait Islander communities, and that carer status be explicitly included.

The definition of “family responsibilities” employed in the *Anti-Discrimination Bill* is drawn from the Sex Discrimination Act 1984 (Cth). We believe that this definition is too narrow and does not accurately reflect the reality of life for many families in Australia, particularly Aboriginal and Torres Strait Islander kinship groups.

The Fair Work Act 2009 (Cth) provides for a more inclusive description by explicitly employing the term “carer” – an omission from the *Anti-Discrimination Bill* that we believe should be rectified.

14 S. 31 Australian Human Rights Commission Act 1986 (Cth)

15 See *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97.

16 www.afp.gov.au/what-we-do/police-checks/spent-convictions-scheme.aspx

In a recent review of the Fair Work Act, it was found that the scope of caring responsibilities protected under existing legislation inadequately represented the wide range of obligations that many people were faced with. The inclusion of a broader definition and the use of the word “carer” in the *Anti-Discrimination Bill* would ensure greater protection for those subject to potential discrimination in this area.

Recommendation Seven: That the “reasonable persons test” be removed from the special measures clauses referred to under section 21.

UnitingJustice is concerned by the inclusion of a “reasonable person test” for the application of special measures under section 21(2)(b). We view this as directly undermining several international treaties to which we are a signatory, including the Declaration on the Rights of Indigenous Peoples and the International Convention on the Eliminations of All Forms of Racial Discrimination.

Australian law governing special measures currently falls short of the Committee on the Elimination of Racial Discrimination’s (CERD) requirements contained in its General Recommendation 32, including that affected communities participate in the design and implementation of the proposed special measures.¹ This position was reiterated in *Gerhardy v Brown*, where Justice Brennan noted:²

The wishes of the beneficiaries for the [special] measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.

The application of a “reasonable person test” removes the obligation to consult and work with members of the group to which the special measure is applied.

In light of the recent application of special measures to Aboriginal and Torres Strait Islander peoples under both the Northern Territory Emergency Response (the Intervention) and the Stronger Futures legislative

package, we see this lowered standard as a direct affront to the worth and self-determination of Aboriginal peoples.

UnitingJustice recommends the “reasonable person test” be removed from this section of the *Anti-Discrimination Bill* and that the standards of care advocated under the Declaration on the Rights of Indigenous Peoples and the International Convention on the Eliminations of All Forms of Racial Discrimination be applied in its place.

Recommendation Eight: That the sections governing religious exceptions be amended to remove those protected attributes that are not demonstrably justified by religious needs.

UnitingJustice is deeply concerned that the wide-ranging list of protected attributes to which an exception applies for religious organisations serves only to perpetuate the potential for discrimination both by and within religious organisations and institutions.

While we believe that the right to freedom of religion is of vital importance, and its recognition necessary, we do not believe that this is an absolute right. We acknowledge, then, that the exercise of religious freedom is subject to the regulatory norms that govern Australian society. Importantly, we support the International Covenant on Civil and Political Rights statement that discussions in this area must consider whether an exemption is “demonstrably justified in a free and democratic society based on human dignity, equality and freedom”.³

We believe that religious organisations require an exemption in relation to the ordination or appointment of their religious leaders. The act of ordination is core to the integrity of a religious community and we believe it is appropriate that religious organisations are given the freedom to appoint their leaders in keeping with their religious traditions and beliefs.

¹ Paragraph 18 of General Recommendation 32.

² *Gerhardy v Brown* (1985) 159 CLR 70.

³ Article 18(3)

We are concerned, however, with section 33 of the *Anti-Discrimination Bill*, and feel that it gives too wide an exemption to the activities of religious organisations and institutions. We do not believe that it is necessary, in light of the need to balance the rights of the wider community with the freedoms to be afforded to religious groups, to grant an exception to that permits discrimination when:

that discrimination consists of conduct, engaged in good faith, that:

- (i) conforms to the doctrines, tenets or beliefs of that religion; or
- (ii) is necessary to avoid injury to the religious sensitivities of adherents of that religion.

When religious bodies are provided to what amounts to a 'blanket exception', there is no incentive for that body to ensure that it does not discriminate, and no incentive to promote equality and inclusion in areas of employment and representation other than those leadership positions necessary to maintain the integrity of the religious organisation.

While we acknowledge "the need for some level of exemption, to allow faith-based organisations to maintain their integrity according to the tenets of the relevant communities" faiths,¹ references in the *Anti-Discrimination Bill* to concepts such as "doctrine", "tenets of that religion" and "injury to religious sensitivities" are, in many cases, unhelpful. This language is contested even within religious communities themselves, and so to require participants in court proceedings to present and decide on a definitive definition of any of these terms is problematic.

In its submission to the Australian Human Rights Commission's Freedom of Religion and Belief in the 21st Century project, the Uniting Church National Assembly stated our support for

federal legislation prohibiting religious discrimination, including a specific provision which allowed for discrimination on the basis of religion by faith communities in the area of employment in leadership and teaching positions, where it is reasonably necessary for maintaining the integrity of the religious organisation.²

Several of the protected attributes listed under sections 32 and 33 disproportionately impact women, including pregnancy, potential pregnancy, breastfeeding and family responsibilities. There are no justifiable grounds for the inclusion of such attributes. Indeed, they serve only to act as a proxy of sorts for enabling discrimination on the grounds of gender. For this reason, we do not support the wide-ranging list of exceptions granted to religious organisations and institutions under the proposed legislation.

4 | CONCLUSION

UnitingJustice again takes this opportunity to congratulate the Government on the Exposure Draft of the Human Rights and *Anti-Discrimination Bill 2012*. With attention to the above recommendations, we support its passage and look forward to continued conversations around this important piece of legislation as we work towards reducing instances of harmful discrimination in all areas of life in Australia.

¹ The Honourable Catherine Branson QC, President of the Australian Human Rights Commission, (2010), 'Religion in the Public Square,' speech delivered at the 'Religion in the Public Square Colloquium,' available at http://www.hreoc.gov.au/about/media/speeches/speeches_president/2010/20100723_religion.html

² Uniting Church in Australia National Assembly, (2009), 'Submission to the Australian Human Rights Commission Freedom of Religion and Belief in the 21st Century Project,' available at http://www.unitingjustice.org.au/images/pdfs/issues/human-rights/submissions/uca_freedomofreligion_ahrc_submission0309.pdf