

21 December 2012

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

Australian Unity Limited
ABN 23 087 648 888

114 Albert Road
South Melbourne Vic 3205
T 13 29 39 Australia-wide
F 03 8682 5555
W australianunity.com.au

*Submission on Exposure Draft of the Human Rights and Anti-Discrimination Bill
2012*

Thank you for the opportunity to make a submission on the draft bill.

Australian Unity is an equal opportunity employer and strongly supports diversity and the human rights and anti-discrimination principles set out in the bill. As a participant in the health and aged care sectors, we are most aware of the need for the protection of human rights and respect for the individual.

While we welcome the proposed consolidation and simplification of existing legislation, we are very concerned about the reduction in objective measures for testing whether conduct is discriminatory and also about the impact of certain procedural changes, particularly the proposed 'reversal' of the burden of proof in court proceedings.

Our specific comments are set out below

1. We are particularly concerned that clauses 19, 124 and 133, taken together, lower the threshold for making claims of alleged wrongdoing significantly and will encourage unfounded claims.

Clause 19(1)

This provides that a person discriminates against another person if the first person treats the other person "unfavourably" (because they have a particular protected attribute or combination of attributes). As is pointed out in paragraph 106 of the explanatory notes on the bill, it is not necessary to make a comparison to any other person to determine whether treatment is unfavourable.

In our view, this effectively does away with any objective test. We believe that considering such treatment by reference to another person (comparator) in the same circumstances, who does not have the protected attribute, is a valid comparison test.

As paragraph 116 of the explanatory notes says, the comparator may be hypothetical but that does not invalidate the usefulness of such a consideration in the circumstances. Particular conduct always needs to be considered in context. In our view, this change will facilitate, if not encourage, frivolous and vexatious claims. This will be to no-ones benefit

Clause 19(2)

This provides that unfavourable treatment includes, among other things, conduct that offends another person. In our view, this really extends the law significantly.

It was reported recently that the former NSW Chief Justice, Mr Jim Spigelman, expressed the view that a proposed law protecting people from offence infringed the right to free speech and suggested that hurting another person's feelings should not be outlawed. We agree with Mr Spigelman on this.

"There is no right not to be offended," he said. "The freedom to offend is an integral component of freedom of speech. I am not aware of any international human rights instrument or national anti-discrimination statute in another liberal democracy that extends to conduct that is merely offensive."

Clause 19(3)

We are concerned that clause 19(3) extends the potential for claims of discrimination where, in fact, no actual discrimination has occurred. In our view, the broad definition of "unfavourable treatment" is sufficient.

Clause 124

This provides that once an applicant has adduced evidence that could show a particular reason or purpose then it is to be presumed in proceedings that the alleged reason or purpose is what the applicant says it is unless the other person proves the contrary.

That reduces the burden of proof on the part of an applicant to the mere making of an allegation (supported by no more than oral evidence from the applicant). In other words, an applicant may allege that they were unfairly treated with no corroboration and the respondent will then be obliged to prove their innocence.

In our view, this is an unwarranted and unnecessary extension of the law. It is not necessary in the context of this area of the law and is contrary to the hard won common law presumption of innocence until proven guilty.

Clause 133

This provides that the default position is that each party is to bear their own costs in proceedings.

The awarding of costs against an unsuccessful party in proceedings is a significant factor in deterring frivolous claims. We believe that changing the default provision is unnecessary, particularly where many law firms now bring actions on the basis of "no-win, no fee" and litigation funding is more prevalent.

In our view, to impose a default position will, in reality, mean that Judges will be constrained in awarding costs against an applicant even where an application has no merit. It would be far better to leave the position as it currently stands with judges having a broad discretion.

2. Other provisions that we would like to comment on are as follows:

Clause 74

Clause 70 and subsequent clauses gives the Minister the power to determine disability standards from time to time. We are concerned that clause 74 provides that the exceptions and exemptions in the Act will not apply in relation to disability standards, other than as provided in a standard. We consider that this extension of regulatory power to the Minister should not include the ability to issue a standard, which may override exceptions and exemptions the Act.

In any event, we believe that industry compliance codes, as provided for in clause 75 and following clauses, will be more appropriate mechanisms than standards imposed by the Minister. To that extent, we review with the comments of the Productivity Commission set out in paragraph 315 of the explanatory notes. In particular, such co-regulation allows greater consultation and flexibility.

Powers of the Commission

We agree with the extended powers of the Commission to engage with industry in creating compliance codes and action plans, providing an educational as well as a compliance role in this important area.

Thank you for the opportunity to comment on the bill.

Yours faithfully,

Kirsten Mander

General Counsel & Company Secretary
Australian Unity Limited