National Tertiary Education Union

Po Box 1323, South Melbourne
Victoria, Australia 3205
Tel 03 9254 1910
Fax 03 9254 1915

NTEU Submission

on the

Exposure draft of the Human Rights and Anti-Discrimination Bill 2012

Organisation: National Tertiary Education Industry Union

Contacts: Jeannie Rea, NTEU President

Susan Kenna, National Industrial Officer

Paul Kniest, Policy and Research Co-ordinator

Details: Level 1, 120 Clarendon St
South Melbourne Victoria 3205
Ph. 03 92541910

Date: 21 December 2012

Introduction

The National Tertiary Education Union (NTEU) is the specialist national Union solely representing academic and general staff in tertiary education. With over 27,000 members employed in Australia's higher education sector, including universities, TAFEs and other education providers, the Union's coverage also includes research centres and institutes as well as student organisations and associations. The NTEU has a long-standing interest in anti-discrimination and human rights matters and we welcome the opportunity to make a submission on the *Exposure draft of the Human Rights and Anti-Discrimination Bill 2012.*

Summary

The NTEU understands that the intention of the legislation is to consolidate five different Acts, with different standards, definitions and rules and to lift the level of protection to the highest current standard. In this respect, NTEU supports the harmonisation of the existing legislation and the passage of the Bill by the Commonwealth Parliament. However, this is with the proviso that current protections established under the respective Acts are not weakened or narrowed, and that the purpose of the harmonisation is to lift the regulatory standards to the highest level, not to reduce it to a base standard. The harmonisation of anti discrimination legislation across the States should be seen as the opportunity to broaden our current laws and regulations to reflect the social and ethical expectations of the modern workplace and society more broadly. Put simply, the Government has the capacity with this Bill to set a meaningful and lasting anti-discrimination agenda nationally, and as such, should be aiming to set a benchmark that other progressive countries would model their own domestic legislation on.

While supporting the Bill, we also wish to highlight that, when addressing the proposed consolidation of Commonwealth anti-discrimination legislation earlier this year, NTEU's submission detailed concerns that the new legislation might result in certain kinds of discrimination being under-acknowledged or even becoming marginalised. What this Bill intends to achieve is an important step in overturning what is, in some areas, an entrenched resistance to dealing with discrimination, both in the workplace and in society more broadly. We would like to emphasise that we do not believe that this legislation has the capacity to stop the existence of discrimination, but that its purpose must be to provide effective tools to create a less discriminatory society and to equip those who are seeking redress as a result of victimisation and discriminatory practices. In saying this, it must be emphasised that amongst the protected attributes, there are clearly certain forms of discrimination that are more common, and that have deeper or more profound societal implications than others – for example, racist discrimination against Aboriginal and Torres Strait Islander peoples. We would like to draw the attention of the Attorney-General's department to this and hope that the intention to ensure a substantive approach to anti-discrimination is underpinned in the objects of the Act.

In examining the proposed legislation, there are a number of important measures and reforms which will enhance the existing frameworks. In particular, we support the introduction of:

- Adoption of a shared burden of proof ;
- Access to complaints via a no cost jurisdiction;
- Adoption of a single definition of Discrimination;
- Removal of technical barriers to complaints.

Nonetheless, NTEU has a number of concerns over particular aspects of the proposed legislation, and believes that the legislation could be improved by addressing the following areas:

- Expanding the positive attributes protected from discrimination;
- The concept of "Inherent requirements of work" is too broad, places too much onus on workers and would be difficult to enforce;
- The Compliance codes proposal does not make practicable sense and should be replaced with minimum standards or codes of practice which involve consultation and are not based on individual employers; and
- NTEU would also like to see a positive duty on employers and capacity to make collective complaints.

NTEU's submission below highlights these areas of concern, as well as making a number of recommended changes to different clauses within the legislation which we believe will strengthen and improve the anti discrimination framework overall.

Summary of NTEU Recommendations:

Recommendation 1: **The NTEU recommends that "educational authority" be included in addition (and separate to) *individual educational institutions*.**

Recommendation 2: **The NTEU recommends that the term "employment" be replaced with the term "*work*".**

Recommendation 3: **The term "family responsibilities" should be deleted and replaced with the term "family or caring responsibilities" at s. 97. The term should also be amended where it appears as a protected attribute at s. 17 (d).**

Recommendation 4: **A separate definition of "family" should be included to encompass domestic relationships and varying cultural understandings of family, including kinship groups and members of an employee's household.**

Recommendation 5: **NTEU recommends that the term "industrial history" be replaced with the term "industrial activity".**

Recommendation 6: **NTEU recommends that the word "marital" be deleted from the definition "marital or relationship status".**

Recommendation 7: **Two new attributes should be included in the list of attributes which are protected from discrimination. These are "Survivor of domestic or family violence" and "Non- relevant criminal record".**

Recommendation 8: **NTEU supports the recommendations of the ACTU in relation to Inherent Requirements of work and Reasonable Adjustment. The requirement to make Reasonable Adjustment should be a primary obligation on employers.**

Recommendation 9: **That the provisions of this Act should apply to all institutions, including religious bodies and education institutions, and that any sections within the proposed Act that permits discrimination based on dogma or belief should be removed.**

Recommendation 10: **NTEU does not support the proposal for Compliance Codes as currently drafted in the Bill. NTEU recommends that the Commission be provided with adequate funding in order to develop best practice and industry specific standards or codes of practice, in consultation with unions and employers.**

Recommendation 11**: Receipt of adequate funding to the Australian Human Rights Commission to enable the collection, publication and use of de-identified complaint data for research purposes.**

Recommendation 12**: The provision of adequate funding for this purpose should now be paramount, given the importance of the Commission in its role overseeing the consolidated legislation. NTEU recommends this development, not only for the purposes of transparency for workers, employers and union, but also on behalf of our academic members working in the area of anti-discrimination and equity law.**

Recommendation 13**: A discrete unit should be established within AHRC to enable research to be undertaken for the monitoring, reporting and enforcement aspects of its role. As the preeminent agency in the field of human rights and anti-discrimination, it is imperative that the Commission have the resources to effectively carry out is role.**

Recommendation 14**: That the current statute of limitation on complaints relating to discrimination of 12 months be reviewed, and either extended substantially (to beyond 7 years) or removed completely.**

1) <u>THE DICTIONARY - DEFINITION OF TERMS</u>

In relation to the Definition of Terms (under **Chapter 1 – Division 2 – Interpretation- Section 6**), NTEU recommends the following changes:

Recommendation 1: **The NTEU recommends that "educational authority" be included in addition (and separate to) *individual educational institutions*.**

An education department or authority can set and be liable for policies which reflect human rights and anti-discrimination laws. As such, they must be accountable for policies and procedures which are followed by education providers.

Recommendation 2: **The NTEU recommends that the term "employment" be replaced with the term "*work*".**

This will ensure that work is covered where a worker is:

- employed to complete,
- contracted to complete, or
- volunteers to work for an organisation.

This approach has been adopted in the Model *Work Health and Safety Act 2011,* following the part-harmonisation of Australian health and safety laws; [see sn. 7].

Recommendation 3: **The term "family responsibilities" should be deleted and replaced with the term "family or caring responsibilities" at s. 97. The term should also be amended where it appears as a protected attribute at s. 17 (d).**

And,

Recommendation 4: **A separate definition of "family" should be included to encompass domestic relationships and varying cultural understandings of family, including kinship groups and members of an employee's household.**

NTEU's recommendation that the term **"family responsibilities"** be deleted and replaced with the term "family or caring responsibilities" is to ensure consistency with the *Fair Work Act,* the new *Equal Opportunity for Women in the Workplace Bill 2012,* and *the Sex Discrimination Act* (as follows):

- Under the *Fair Work Act,* caring responsibilities are referred to in the form of "carer's leave"; [s. 97].[1] The definition in this section is combined with that of personal leave (sick leave), and incorporates reference to family as follows:
  "s97 Taking paid personal/carer's leave

  An employee may take paid personal/carer's leave if the leave is taken:

  (a) Because the employee is not fit for work because of personal illness....
  (b) To provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
  (i) a personal illness, or personal injury, affecting the member; or
  (ii) an unexpected emergency affecting the member."

1

At section 351 (1) in relation to discrimination, the term "family or carer's responsibilities" is an attribute protected from adverse action.

- The *Equal Opportunity for Women in the Workplace Bill 2012* refers to *"..the elimination of discrimination on the basis of gender in relation to employment matters(including in relation to family and caring responsibilities);* [s2A Objects], and *"arrangements relating to employees with family or caring responsibilities"* has been added to the definition of employment matters at ss 3 (1).[2] In addition, flexible working practices to support workers with family or caring responsibilities will be a new 'gender equality indicator' under the new Act; [ss 3 (1)].

- Section 4A of the *Sex Discrimination Act* defines "family responsibilities" in a similar way – with the terms "care" and "support" and a limit on family as "immediate family".[3]

Given that the proposed harmonisation legislation is to dovetail with other forms of legislation relating to discrimination, equity and human rights, NTEU believes it is vital that that there is consistency in the terminology so as to avoid any potential conflicts or misinterpretation.

Recommendation 5: **NTEU recommends that the term "industrial history" be replaced with the term "industrial activity".**

This term is long-recognised in state/territory and federal industrial law; it does not preclude history, but industrial history may preclude current industrial activity. This term should also be amended where it appears as a protected attribute at s. 17 (g).

Recommendation 6: **NTEU recommends that the word "marital" be deleted from the definition "marital or relationship status".**

The word is obsolete as the definition itself goes on to define relationship status, including marriage and divorce etc.

2

3

2) THE PROTECTED ATTRIBUTES

As stated, this legislation provides us with a unique opportunity to update anti-discrimination and human rights law in Australia to reflect current societal trends and concerns. Therefore, with respect to the Protected Attributes (see Chapter **2-Part 2-1 – Division 2**) there are two additional key areas that NTEU wishes to see included in the legislation as attributes. These are:

- Survivors of domestic or family violence; and
- Those with a 'non-relevant' criminal record.[4]

These attributes are particularly relevant to employment and industrial law.

In relation to domestic violence, unions and governments have revolutionised the approach to safety and work and the provision of leave for survivors, over the last couple of years. The *Safe at Home, Safe at Work* project recently announced that 1 million Australian workers are now able to access paid domestic violence leave.[5] The project has provided a range of resources for workers, unions and employers to better understand the affects of domestic violence on individuals and the workplace, to provide referral services and training for workers and employers. This is a suite of initiatives which will make a real difference to the lives of workers.

Unfortunately there is no guarantee that this work will have continued funding beyond June 2013. It would seem anomalous to not include protection against discrimination for survivors of domestic violence in the new legislation.

The Australian Human Rights Commission provides and updates guidelines for assessing means of preventing discrimination at the workplace, in relation to non-relevant criminal records[6]. At present, state laws are inconsistent in preventing such discrimination. This consolidation of anti-discrimination legislation is the opportunity to protect workers with this attribute from discrimination.

Recommendation 7: **Two new attributes should be included in the list of attributes which are protected from discrimination. These are "Survivor of domestic or family violence" and "Non-relevant criminal record".**

[4] Professor Marilyn Pittard (Faculty of Law, Monash University) and others are considering the issue of discrimination on the grounds of 'non-relevant' criminal record as part of a project *Living Down the Past: Criminal Record Checks and Access to Employment for Ex-Offenders.*

[5] *One Million Workers now have access to Domestic Violence Leave,* Media Release, ACTU, 23 November 2012

[6] See *On the Record,* Australian Human Rights Commission (updated May 2012).

3) EXCEPTIONS TO UNLAWFUL DISCRIMINATION

Ss 23-25 - Exception for Inherent Requirements of work and Reasonable Adjustment (see Chapter 2-Part 2-2 Division 4)

NTEU does not agree with the breadth of the exception for inherent requirements of work, as it places too much emphasis on an individual worker to challenge such an exception (let alone understand or be aware of the implications of such an exception). Instead, the onus should be on employers in a way which is similar to the requirement to make reasonable adjustment for workers with a disability.

Ideally, the Union would like the concept of reasonable adjustment to be extended to most if not all of the attributes; for example, this should be feasible in the case of adjusting rosters to take account of family or caring responsibilities; [see *Victorian Equal Opportunity Act,* s. 19]. Similarly, many industries already have provisions in place around breastfeeding mothers and health and safety provisions supporting pregnant workers (in NTEU negotiated Agreements, there are specific provision for breast feeding mothers and time required for caring duties). Inherent requirements is an established concept in health and safety and workers' compensation law, (as well as industrial law), however, the way the Bill is drafted, it effectively places a new and indiscriminate layer of technicality in the way of anti-discrimination claims. This contradicts what should be the key aim of the legislation – to protect individuals (and indeed groups of individuals) from discrimination. It also contradicts the positive development under the *Fair Work Act* in relation to adverse action – where there are comprehensive protections against discrimination and reverse onus of proof.

Recommendation 8: **NTEU supports the recommendations of the ACTU in relation to Inherent Requirements of work and Reasonable Adjustment. The requirement to make Reasonable Adjustment should be a primary obligation on employers.**

Ss 27-28 Exception in accordance with certain Commonwealth migration and health laws and on the grounds of nationality or citizenship.

The NTEU understands that under the protected attributes in Clause 17 discrimination on the basis of industrial history, medical history, and nationality or citizenship will become unlawful, but only in the area of work (subclause 22(3)). The NTEU notes with interest that the Act makes an exception for discrimination on the basis of nationality and citizenship when consistent with a Commonwealth law. The NTEU would like greater insight as to the intention of government through the introduction of this exception, and the instances in which Commonwealth laws that discriminate against individuals on the basis of nationality or citizenship are deemed to be necessary.

Subdivision C – Exceptions related to religion

S 33 Exceptions for religious bodies and educational institutions.

The NTEU does not believe that exceptions at 33 (1) should apply in relation to religious bodies and educational institutions, aside from s 33 (1) (e) – which clearly can apply if related to dogma or beliefs.

Further, s. 33 (2)(b)(ii) should be deleted. The avoidance of injury to 'the religious sensitivities of adherents of that religion' is subjective and unworkable. Section 33 (2)(b)(i), in so far as it relates to dogma, should suffice.

NTEU's members working in higher education institutions are professional and academic staff, who are employed because of their skills, qualifications and experience. The marital status, pregnancy or sexual orientation of these staff must be irrelevant and protected, no matter what the religious basis of an institution. This is fundamental to the tenets of human rights and anti-discrimination law. (See *International Covenant on Economic, Cultural, and Social Rights*, General Assembly Resolution 2200A(XXI) of 1966**,** cited as a Human Rights Instrument in the Objects of the Bill).

Recommendation 9: **That the provisions of this Act should apply to all institutions, including religious bodies and education institutions, and that any sections within the proposed Act that permits discrimination based on dogma or belief should be removed.**

4) COMPLIANCE CODES

Chapter 3- Part 3-1 – Division 6

In lieu of a positive duty within the legislation, NTEU is baffled by the concept of the Compliance Codes- the form they will take and what positive use they can be.

Numerous universities have been awarded in "Employer of Choice" citations under the current *Equal Opportunity for Women in the Workplace Act*. However, there is often a gap between the policy and practise within the institution, particularly where these policies have not been developed in consultation with workers or NTEU.

The idea of voluntary Compliance Codes is in our view, akin to a weak form of self-regulation. We have the following specific questions and concerns about the codes:

- How will consultation occur? NTEU understands that the process provided by section 76 of the Bill will be worthless. Part 3 of the *Legislative Instruments Act* in fact *exempts* consultation on matters of employment. [s. 18(f)]
- How will the Commission measure the proposed codes and how will they be monitored?
- Will the Commission have adequate funding and resources to adequately and objectively assess and monitor codes to agreed standards?

NTEU is extremely concerned that these self-developed codes could be used in defence of discrimination claims. It is possible that the purpose of the Codes may be misapplied where large employers or employer organisations have the capacity to develop such codes without appropriate representation, and thus effectively 'wipe their hands' of either proper consultation in relation to the development of the codes, or positive and active support for anti-discrimination measures. The NTEU does not believe the legislative wording has clearly demonstrated that this is a positive step forward in the development of anti-discrimination law.

Alternatively, we suggest the Committee consider a best practice approach from the health and safety jurisdictions.

NTEU, other unions and employer groups have a long history of involvement in consultation over Codes of Practice within the various state, territory and Commonwealth health and safety jurisdictions. These Codes are based on health and safety hazards or industries, and are developed in consultation with industry experts, prior to approval by Government regulators.

Adherence to a Code of Practice can be a powerful defence against prosecution, but only because these Codes have tri-partite and thorough input from experts and are therefore seen to reflect the modern workplace and/or industry.

Recommendation 10: **NTEU does not support the proposal for Compliance Codes as currently drafted in the Bill. NTEU recommends that the Commission be provided with adequate funding in order to develop best practice and industry specific standards or codes of practice, in consultation with unions and employers.**

OTHER RECOMMENDATIONS:

NTEU made earlier submission to Attorney-General's Department Discussion Paper on the proposed laws on 3 February 2012. The following remain outstanding and NTEU would again seek to have them included:

- **Recommendation 11: Receipt of adequate funding to the Australian Human Rights Commission to enable the collection, publication and use of de-identified complaint data for research purposes.**

- **Recommendation 12: The provision of adequate funding for this purpose should now be paramount, given the importance of the Commission in its role overseeing the consolidated legislation. NTEU recommends this development, not only for the purposes of transparency for workers, employers and union, but also on behalf of our academic members working in the area of anti-discrimination and equity law.**

- **Recommendation 13: A discrete unit should be established within AHRC to enable research to be undertaken for the monitoring, reporting and enforcement aspects of its role. As the preeminent agency in the field of human rights and anti-discrimination, it is imperative that the Commission have the resources to effectively carry out is role.**

In addition, NTEU is highly concerned that the allotted 12 months is insufficient period of time as a statute of limitations on complaints around discrimination, particularly in relation to forms of discrimination where the victim may feel intimidated or be bullied into silence (such as when it is based on gender, sexual orientation or race), or where the physiological impact of discrimination may be such that it takes the victim some time to come to terms with their situation and take action. Indeed, NTEU believes that in the case of serious discrimination, there should not be a statue of time at all. However, if a statue of limitation is required, NTEU would certainly recommend a much longer period than currently proposed, and to be commensurate with other legislative frameworks.

Recommendation 14: That the current statute of limitation on complaints relating to discrimination of 12 months be reviewed, and either extended substantially (to beyond 7 years) or removed completely.

Should the Committee wish to discuss any aspect of this submission please contact either Jeannie Rea (President), Susan Kenna (Industrial Officer,) or Paul Kniest (Policy and Research Co ordinator).