Senate Standing Committee on Legal and Constitutional Affairs inquiry into the exposure draft of the Human Rights and Anti-Discrimination Bill 2012

ATTORNEY-GENERAL'S DEPARTMENT PRELIMINARY SUBMISSION

The Attorney-General's Department is pleased to provide this preliminary submission to the Senate Standing Committee on Legal and Constitutional Affairs in relation to its inquiry into the exposure draft of the Human Rights and Anti-Discrimination Bill 2012.

The aim of this preliminary submission is to clarify two areas of the exposure draft: the shifting burden of proof and the removal of the equal opportunity in employment complaints regime. The Department will provide the Committee with a second, comprehensive submission that addresses issues or concerns raised in other submissions published on the Committee's website at a later date.

1. SHIFTING BURDEN OF PROOF (CLAUSE 124)

Current application of the burden of proof

Under the 'direct discrimination' tests in existing Commonwealth anti-discrimination law, the burden of proving that the respondent treated the complainant less favourably falls on the complainant. This requires the complainant to prove matters relating to the state of mind of the respondent.

Under the current 'indirect discrimination' tests, once a complainant has established the discriminatory impact of a condition, requirement or practice, the burden shifts to the respondent to prove that the discriminatory condition was reasonable (see subsection 15(2) of the *Age Discrimination Act 2002*, subsection 6(3) of the *Disability Discrimination Act 1992* and section 7C of the *Sex Discrimination Act 1984*).

For both direct and indirect discrimination, the respondent currently has the burden of proving that an exception or exemption applies.

Shifting burden of proof—changes from current practice

The proposed shifting burden of proof only applies once a matter proceeds to court. Very few discrimination complaints made to the Commission proceed to court, with most resolved in conciliation settlements.[1] Where a matter does proceed to court, there are five key elements that must be proven for a successful claim of unlawful discrimination:

1. The complainant has the attribute or attributes.
2. The complainant was treated unfavourably.
3. The unfavourable treatment occurred in connection with an area of public life.
4. The attribute (or attributes) was the reason for the unfavourable treatment.
5. No defences, exemptions or exceptions apply to the respondent's conduct.

[1] Based on statistics from annual reports of the Australian Human Rights Commission, the Federal Court and the Federal Magistrates Court only 4–6% of complaints finalised by the Commission proceed to court.

Clause 124 of the exposure draft Human Rights and Anti-Discrimination Bill 2012 provides for a shifting burden of proof in relation to the reason or purpose for the unfavourable treatment. Under clause 124, the complainant must first establish a *prima facie* case that unlawful discrimination occurred before the burden of proof shifts to the respondent. This reflects the fact that the respondent is in the best position to know the reason for the discriminatory action and to have access to the relevant evidence.

This proposed shifting burden of proof reflects a change from only one element of unlawful discrimination claims under the current anti-discrimination law regime: the reason or purpose why a person engaged in the conduct (see table below). This burden only shifts once the complainant has first established a *prima facie* case.

	Which party has the burden of proof?	
Elements of discrimination	**Current position in anti-discrimination law**	**Proposed position in exposure draft**
Has the attribute or attributes	Complainant	Complainant
Unfavourable treatment	Complainant	Complainant
Area of public life	Complainant	Complainant
Attribute was reason for unfavourable treatment	Complainant	Complainant establishes *prima facie* case, then burden shifts to respondent
Defences, exemptions and exceptions	Respondent	Respondent

Establishing a* prima facie *case

Establishing a *prima facie* case requires the complainant to adduce evidence from which the court could decide, in the absence of another explanation, that unlawful discrimination has occurred. Once this is established, the burden then shifts to the respondent to provide evidence to rebut this *prima facie* case.

Therefore under the proposed shifting burden of proof, to make a *prima facie* case the complainant must first:

- prove they have the protected attribute (or attributes)
- prove there was unfavourable treatment
- prove the unfavourable treatment occurred in connection with an area of public life, and
- adduce evidence from which it could be concluded that the unfavourable treatment was because of their attribute (or attributes).

Once this *prima facie* case is established, the burden of proof then shifts to the respondent to provide evidence that there was a non-discriminatory reason for the conduct, or to explain why the conduct was justifiable (clause 23), or that one or more other defences (for example, a special measure to achieve equality or a compliance code) or exceptions apply to the conduct.

Does not apply to sexual harassment claims

The proposed shifting burden of proof will not affect sexual harassment claims as the reason for the unlawful conduct is not relevant. Sexual harassment is established on the basis of an objective test—that is, that a reasonable person would have anticipated the possibility that the other person would be offended, insulted, humiliated or intimidated by the conduct.

Differences with the **Fair Work Act 2009** *(Cth)*

The proposed shifting burden of proof differs from the reverse burden under the Fair Work Act. Under the Fair Work Act, once a complainant alleges that a person took an action for a particular reason, this is presumed to be the reason for the action unless the respondent proves otherwise. Under the Human Rights and Anti-Discrimination Bill 2012 however, the complainant must also adduce evidence supporting the allegation before the burden shifts to the respondent to prove the reason for the action was not a prohibited one.

Burden of proof in the Fair Work Act 2009:

> **361 Reason for action to be presumed unless proved otherwise**
>
> (1) If:
>
> (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
>
> (b) taking that action for that reason or with that intent would constitute a contravention of this Part;
>
> it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

Burden of proof in the exposure draft Human Rights and Anti-Discrimination Bill 2012:

> **124 Burden of proof in proceedings under section 120 etc.**
>
> *Burden of proof for reason or purpose for conduct*
>
> (1) If, in proceedings against a person under section 120, the applicant:
>
> (a) alleges that another person engaged, or proposed to engage, in conduct for a particular reason or purpose (the ***alleged reason or purpose***); and
>
> (b) adduces evidence from which the court could decide, in the absence of any other explanation, that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct;
>
> it is to be presumed in the proceedings that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct, unless the contrary is proved.

2. REMOVAL OF SEPARATE EQUAL OPPORTUNITY IN EMPLOYMENT COMPLAINTS REGIME

Division 4 of Part II of the *Australian Human Rights Commission Act 1986* (AHRC Act) currently permits complaints to be made alleging discrimination in employment on a number of grounds in addition to those covered in the four discrimination Acts. This 'equal opportunity in employment' complaints regime gives effect, in part, to Australia's International Labour Organization (ILO) obligations.

The attributes currently covered in the equal opportunity in employment regime, that are not also covered under the four discrimination Acts, are:

- trade union/industrial activity
- political opinion
- social origin
- religion
- nationality
- criminal record, and
- medical record.

Under this regime, the Commission may attempt to conciliate complaints of discrimination, but the discrimination itself is not declared to be unlawful. This means there are no enforceable remedies available for these complaints. Where conciliation fails, the Commission reports to the Minister and may make recommendations, but the recommendations are not enforceable. In particular, a complainant cannot take a complaint to the Federal Court or Federal Magistrates' Court on any of these grounds.

This separate complaints process creates confusion and leads to significant regulatory overlap. Permitting complaints in relation to conduct which is not unlawful represents poorly designed regulation. Discrimination on these grounds cannot result in a binding remedy from a court, but employers still face the cost of dealing with such complaints when they arise.

Therefore, consistent with the deregulatory aims of the project, the separate equal opportunity in employment complaints regime has been removed from the exposure draft Human Rights and Anti-Discrimination Bill 2012 to simplify the law. Another factor to consider in relation to these attributes is the Government's commitment to no diminution of protections.

Four of these attributes (religion, political opinion, social origin and industrial history) are already covered under the Fair Work Act. Therefore introducing them into the exposure draft Human Rights and Anti-Discrimination Bill 2012 will have limited regulatory impact on employers as they already must comply with the Fair Work Act.

Similarly, nationality or citizenship[2] is already covered by all State and Territory anti-discrimination Acts and is included in the Bill for consistency with those regimes with minimal regulatory impact.

[2] The broader label of 'nationality or citizenship' is used to more accurately describe the attribute.

Medical history will also be introduced as a protected attribute in the Bill. Most discrimination complaints on the basis of medical history will be covered by the existing ground of disability, so it is anticipated there will be limited regulatory impact. While medical history could also cover matters that do not constitute a disability, such as relationship counselling, discrimination on this basis would largely be covered by existing privacy laws. There have been very few complaints made on this ground under the equal opportunity in employment complaints regime—only one complaint has been received by the Australian Human Rights Commission since 2008–09.

Criminal record, however, is not included as a protected attribute in the Bill, as it may have a more significant regulatory impact. This is due to the fact that it is not currently covered by the majority of the States and Territories or the Fair Work Act, and there is uncertainty as to when a criminal record is relevant or irrelevant in employment.

Therefore, following this consideration of the possible regulatory impact, the equal opportunity in employment attributes, with the exception of criminal record, are introduced into the Bill as protected attributes with discrimination unlawful in relation to work and work-related matters only.