



# HUMAN RIGHTS & DISCRIMINATION COMMISSIONER

## ACT Human Rights Commission

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

Dear Ms Dennett

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

Thank you for the opportunity to respond to the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* ('the Draft Bill'). This is a very significant piece of work, and I commend the extent to which the Australian Government has engaged the community through its consultation process and the release of the Draft Bill for public comment.

I support the passage of the Draft Bill, subject to some suggested amendments, because I believe that it will fundamentally improve Australian discrimination law. Having a single piece of legislation at the Commonwealth level that is more consistent with other discrimination laws in Australia's various State and Territory jurisdictions will benefit both complainants and respondents by clearly outlining streamlined and consistent obligations.

I am a member of the Australian Council of Human Rights Agencies (ACHRA), and a contributor to the ACHRA response to the Draft Bill that has been submitted to this inquiry. I do not intend to reproduce the 26 recommendations made in ACHRA's submission, but I do wish to endorse them. Those recommendations outline a number of ways in which the Draft Bill could be refined to provide better protection for people who are not currently protected, or to bring Commonwealth obligations in line with existing ones in other Australian jurisdictions.

I make these further comments in my role as ACT Human Rights & Discrimination Commissioner, a position I have held since 2004. I also made a submission in February 2012 in response to the Commonwealth Attorney-General's Department *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*.

### **Objects**

In my view, the objects of the Draft Bill should be reworked by removing the reference to 'formal equality' in draft clause 3(1)(d), and then by moving it to the top of the list to give

greater prominence to the aims of achieving substantive equality and recognising the inherent dignity of all people.

I also recommend that the ‘human rights instruments’ outlined in draft clause 3(2) be broadened to include more than the current seven core treaties to which Australia is a party, specifically the declarations (e.g. the Declaration on the Rights of Indigenous Peoples) and standards adopted by the UN General Assembly that are relevant to human rights.

### **Definition of unlawful discrimination**

As reflected in ACHRA’s submission, the construction of unlawful discrimination in the Draft Bill is a significant improvement. It provides a clear and unified test, recognises the existence of intersectional discrimination, and removes the artificial and obstructive reference to a comparator. On the basis of my experience in a jurisdiction that operates without a comparator test, I support the absence of a comparator. I also welcome the explicit inclusion of harassment as a form of unlawful discrimination in the Draft Bill in relation to all protected attributes.

### **Burden of proof**

I support the shifting burden of proof in clause 124 of the Draft Bill. My experience in handling discrimination complaints has shown that complainants are often less likely to have access to evidence that supports a causative link, or the resources to explicitly discover or effectively argue its existence. These complainants bear an unreasonable burden in establishing the reasons for the unfavourable treatment they have experienced, often in the employment context.

### **Attributes**

#### *Family responsibilities*

I recommend that the protected attribute of ‘family responsibilities’ should be extended to encompass both family and caring responsibilities. The definition of the relevant attribute in the ACT *Discrimination Act 1991* is ‘status as a parent or carer’, which includes caring for dependants otherwise than because of a commercial, or substantially commercial, arrangement.

#### *Political opinion and religion*

In addition, the protected attributes of ‘political opinion’ and ‘religion’ should both be explicitly defined to include an absence of holding such an opinion or belief.

#### *Gender identity, intersex*

I welcome the inclusion of ‘gender identity’ as a protected attribute but recommend some refinements to ensure that protection is appropriate. Through my work as ACT Commissioner, and as a member of the ACT Law Reform Advisory Council, I have heard from people in the ACT community who experience regular discrimination but do not have access to legal protection because the law relies on a binary notion of gender that is, from the affected community’s perspective, outdated and unhelpful.

Following amendments to the ACT *Discrimination Act 1991* that introduced the protected attribute of 'gender identity', it has become clear that the definition in our Act does not provide adequate protection for intersex people, and for a range of people who experience discrimination on the basis of sex and gender diversity. To provide more appropriate protection, the definition of 'gender identity' in the Draft Bill should be broader, reflecting that discrimination can occur in response to a person's gender identity, presentation or expression.

For the purposes of ensuring that the Draft Bill attains the highest standard of protection with reference to State and Territory laws, I support adoption of the ACHRA recommendation that 'intersex' be included as a standalone protected attribute, with a definition along the lines of that in the Tasmanian *Anti-Discrimination Amendment Bill* (no 45 of 2012).

#### *Association*

The *Discrimination Act 1991* (ACT) covers discrimination against a person based on association with a person identified by reference to any attribute protected by the Act. The mechanism for this is that 'association' is simply included in the list of protected attributes outlined in section 7 of that Act. This is a clear and consistent approach that has worked well in the ACT and I recommend that it be replicated at the Commonwealth level.

#### *Additional attributes*

Extending the number of attributes protected at the Commonwealth level to at least match those provided in the States and Territories would not place a large burden on the private sector in practice, as they must already in some manner address these obligations. Having all attributes located in a single Commonwealth Act would assist duty-holders to comply with their existing obligations because the actual breadth of their obligations would be explicit. Accordingly, I recommend that the Committee adopt ACHRA's recommendation to retain 'criminal record' as a protected attribute.

I also encourage the Committee to consider adopting recommendations that the Bill does not miss the opportunity to include new and important protected attributes recognising the adverse impacts of homelessness and domestic or family violence. I note that ACHRA's submission to this Committee contains an analysis of the benefits of including these as standalone attributes.

#### **Exceptions**

I am concerned that any mechanisms that allow a departure from the prohibition on unlawful discrimination are both carefully limited and thoroughly justified. I am not confident that all of the exceptions in the Draft Bill are appropriate. My original submission to the Australian Government in response to its discussion paper supported the introduction of a general exception of the kind in clause 23, but that was on the basis that this would replace need for a range of specific exceptions.

The ACT Discrimination Act contains a range of exceptions that are often dependent on a particular protected attribute. Some, like the statutory authority defence in s.30 of that Act, were intended to be temporary but are still in existence over twenty years later. This is an example of the danger of including too many exceptions in an Act of this nature. It is essential that any stand alone exceptions are reviewed regularly and rigorously, in order to determine whether they should be retained, amended or repealed.

I again support ACHRA's recommendations with respect to the drafting of the exception for justifiable conduct, the removal of exceptions other than those in clauses 23-25, and more suitable limits to exceptions related to religion (if they are to be included). In relation to excepting justifiable conduct, the *Human Rights Act 2004* (ACT) may contain a workable definition in s.28(2)(e), which requires the least restrictive approach to be taken.

### **Explicit duty to make reasonable adjustments**

For consistency and clarity, I recommend that an express provision for reasonable adjustments should be included and that it should apply to all protected attributes. The ACT Discrimination Act currently does not explicitly include an obligation to make reasonable adjustment for any protected attribute. It has been accepted by ACT Courts and Tribunals that unlawful discrimination will occur where a person does not make 'reasonable adjustment' for a person with a disability in public life. The duty has been inferred from other provisions of the Act.<sup>1</sup>

### **Prohibition against vilification**

I am disappointed that the prohibition of vilification has not been extended to all protected attributes. Under the *Discrimination Act 1991* (ACT), vilification is unlawful on the grounds of race, sexuality, gender identity and HIV/AIDS status. Enquiries to our office suggest vilification is occurring in the community in relation to other attributes, particularly disability and religion, but there is insufficient protection for victims under either ACT or Commonwealth law. A single definition of vilification with respect to all attributes would avoid the difficulties of meeting different 'harm thresholds' for a complaint, and a clearly expressed defence will enable potential respondents to understand and comply with their obligations. Accordingly, I recommend that the Draft Bill prohibit vilification on the basis of any of the protected attributes.

### **Right to equality before the law**

I support extending the right to equality to all attributes in the Draft Bill. The possible effect on special legal regimes for people with disabilities, such as guardianship and mental health legislation, should be managed with appropriate legislative safeguards that take into account the human rights of people with limited legal capacity.

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<sup>1</sup> The ACT Discrimination Tribunal noted in *Lewin v ACT Health & Community Care Service* [2002] ACTDT 2 (5 February 2002), "Subsection 4[A](2), however, extends the operation of the Act to a refusal or failure to do an act. The Act can impose an obligation upon a service provider to provide services in a special manner to avoid the commission of unlawful conduct.... The Act imposed, in my opinion, an obligation on the respondent to take steps to ensure that the detrimental effect which the complainant's attribute had upon her capacity to have access to those services, was avoided".

## Temporary exemptions

Following my experience with the consideration of temporary exemptions in the ACT, my view is that it is important to include conditions in the Draft Bill that would ensure that the effect of an exemption does not undermine the purpose of the legislation. The grant of temporary exemptions should be confined both in time, and in accordance with the objects of the Act.<sup>2</sup>

## Scope

The Draft Bill represents a rare opportunity to enact a law that reflects national and international best practice. Providing meaningful protection for the widest range of people who experience discrimination is a better reflection of our international obligations and, in my view, more effective long term implementation. To this end, I would be most pleased to see the Government pursue Option 4 as identified in the regulation impact statement accompanying the Draft Bill; *“a proactive anti-discrimination regime involving a significant expansion of the framework, the imposition of positive duties and specific obligations and a formal regulator”*.<sup>3</sup>

I am disappointed that there is no positive duty proposed as part of the Draft Bill. For the reasons outlined in my original submission, this is an important step to better address discrimination by actively encouraging consistent non-discriminatory behaviour. At a minimum, I advocate that a specific positive duty be applied to all public sector bodies as soon as possible, and then be progressively applied to private and non-profit organisations.

I understand that having a largely deregulatory policy focus has worked against the possibility that this kind of best practice regime would be adopted in the Draft Bill and that new protections have been included only *“where the benefits outweigh any regulatory impact”*. However, discrimination law must be responsive and at least keep step with, if not be ahead of, community experiences to remain relevant and effective.

Yours sincerely

Dr Helen Watchirs OAM  
Human Rights and Discrimination Commissioner

21 December 2012

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<sup>2</sup> A summary of our experience in dealing with applications from companies seeking an exemption to discriminate on the grounds of race is on our website at: <http://www.hrc.act.gov.au/discrimination/content.php/category.view/id/205>

<sup>3</sup> Australian Government, *Consolidation of Commonwealth Anti-Discrimination Laws: Regulatory Impact Statement* (2012), page 81.