



Anti-discrimination protections for marginalised community members in Melbourne's inner north

21 December 2012

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

To the Committee Secretary,

We welcome the Government's invitation for submissions from community organisations on the *Human Rights and Anti-Discrimination Bill 2012 (Cth)* (**Bill**).

About the North Melbourne Legal Service

The North Melbourne Legal Service has been assisting disadvantaged and marginalised members of Melbourne's inner northern suburbs for thirty years. We work with partner organisations in our local community and provide free independent legal assistance, community legal education and policy advocacy to promote access to justice and health and wellbeing. In the last financial year we helped over 600 clients, provided over 915 instances of legal assistance and conducted 21 education activities reaching over 300 individuals.

We provide the following recommendations to ensure that the Bill puts into place strong and effective protections from discrimination for the years to come.

Making a complaint

The North Melbourne Legal Service often provides legal assistance to clients who have experienced discrimination. Our clients' experiences of discrimination take various forms, including racial profiling in the criminal justice system, discrimination in obtaining employment on the basis of an irrelevant criminal record, workplace sexual harassment and a failure of government agencies to provide appropriate services for people living with disability.

Unfortunately, very few of our clients decide to pursue anti-discrimination claims. By far the most common response when we suggest that clients pursue an anti-discrimination claim is to the effect of:

"There's no point. It wouldn't make any difference."

Many clients recognise the systemic nature of their discrimination through informal discussions within their communities and feel that speaking up alone will not effect change.

In our experience, the main reasons why clients do not pursue their right to be free from discrimination are:

- being unable to afford making a complaint;
- the existing complaints system is time-consuming, difficult to prove, inaccessible and deterring;
- the perception that conciliation alone will not resolve the problem and the reluctance of clients to participate in conciliation given the power disparity between the parties; and
- the non-binding nature of the outcomes available, even following a successful claim, are not of great assistance to our clients.

We recommend that the Bill:

- (a) ensures any fees in relation to complaints are able to be waived on the basis of financial hardship;
- (b) ensures complaints are made without the fear of a costs order by each party bearing its own costs;
- (c) includes easy, uncomplicated ways for people to be able to make a complaint (eg shifting the burden of proof once a prima facie case is made out consistent with section 136 of the *Equality Act 2010* (UK) and section 361 of the *Fair Work Act 2009* (Cth));
- (d) broadens methods of dealing with complaints, particularly where conciliation is an inappropriate means of dealing with a complaint; and
- (e) empowers the Australian Human Rights Commission (**AHRC**) to make enforceable orders which will make a real difference to the lives of people who have experienced discrimination.

Proactive initiatives for systemic discrimination needed

Despite the improvements to the complaints process included in the Bill, we believe that an individual complaints-based model does little to tackle systemic discrimination without greater focus on proactive measures. Examples of a more proactive approach to discrimination may include:

- implementing a positive obligation to report to the AHRC where a certain number of internal discrimination complaints are made;
- empowering the AHRC to investigate corporations, state enforcement agencies and other government bodies which receive a certain reportable number of complaints about similar types of discrimination;
- human rights and anti-discrimination education campaigns delivered through community based organisations which empower people to protect themselves against discrimination (where possible); and
- allowing causes of action to be brought for breaches of human rights at a federal level.

We recommend that the Bill:

- (a) includes proactive investigation powers, enforcement mechanisms and preventative measures which tackle systemic discrimination in all areas of public life;
- (b) includes express provision for positive duties to promote equality and ensure non-discrimination; and
- (c) ensures the effectiveness of the Act in achieving equality and eliminating discrimination through regular independent reviews.

Irrelevant criminal record discrimination

The North Melbourne Legal Service assists clients who experience difficulties in obtaining employment arising from their prior criminal convictions. Our *Getting Past Your Past* brochure provides information to people with a criminal record who are attempting to find work, including information on how to disclose and discuss their criminal past and ways to ensure that the underlying causes for any previous criminal behavior are avoided. Our clients continue to experience discrimination on the basis of old convictions for unlawful assault or for drug-related offences even after they have successfully completed rehabilitation programs.

Under article 3 of the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (No 111) (**ILO Convention 111**), Australia agreed to legislate to prevent discrimination on the basis of a criminal record. In 2011-2012, the AHRC reported in its annual report that 67 people complained of discrimination on the basis of a criminal record. Discrimination on this ground constituted 13% of all discrimination claims brought under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) for the year.ⁱ

The proposed Bill removes existing protections from discrimination on the grounds of an irrelevant criminal record under the AHRC Act. The Explanatory Notes to the Bill states that:

*In relation to criminal record, the uncertain nature of this concept, and the differences in understanding of what constitutes a relevant or irrelevant criminal record, have made it difficult to assess what costs would result from inclusion of this ground. Consistent with the deregulatory nature of the project, the Bill does not include criminal record as a ground of discrimination.*ⁱⁱ

In our experience, the distinction between a relevant and irrelevant criminal record is generally straightforward: it is relevant if it means that a person is unable to perform the essential or inherent requirements of a particular job – such as a series of recent fraud convictions for a bookkeeper position or serious sex offences for a teaching position. If this is the case, discrimination will be considered lawful as it is fair and reasonable in the circumstances. However, discrimination should be unlawful where a person is able to perform the inherent requirements of a job and the criminal record is not relevant to that job – such as a drink driving charge for a retail assistant job.ⁱⁱⁱ Where there is uncertainty, the AHRC could make decisions on this issue and publish guidelines clarifying the distinction.

We strongly believe that the consolidation of federal anti-discrimination laws should not result in removing existing protections. This is particularly important for our clients as the *Equal Opportunity Act 2010* (Vic) does not provide protections for people in Victoria against discrimination on this ground.

It is important that people are not discriminated against and prevented from re-entering the workforce because of an irrelevant criminal record. This type of discrimination further stigmatises and marginalises people who have a criminal history. It prevents people who have a criminal history from finding work and as a result causes serious long term financial hardship and social exclusion. This in turn increases the risk of people re-offending and being caught up in the cycle of homelessness and minor criminal offences.

The North Melbourne Legal Service assists many clients currently experiencing homelessness as a result of criminal record discrimination in their search for employment and secure housing. We believe that protections from discrimination on this basis are critical to ensuring people with a criminal history do not enter and remain in the cycle of homelessness and social exclusion, and are entitled to protections from discrimination alongside other members of our community.

We recommend that the Bill retains the current federal protection from discrimination on the basis of an irrelevant criminal record.

Family violence discrimination

The North Melbourne Legal Service engages in a significant amount of work in relation to advocating for and on behalf of victims/survivors of family violence, and providing education aimed at addressing family violence in a range of settings.

The Bill does not currently provide for any protections for victims/survivors of family violence, despite Australia having ratified the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**). Article 2 of CEDAW requires Australia to enact legislation which prevents, investigates, prosecutes and punishes gender-based violence and discrimination. In 2011-2012, there were 50,382 incidents of family violence reported to Victoria Police, which is 23.4% higher than the number of family violence incidents reported the previous year.^{iv}

Associate Professor Andrea Durbach explains how discrimination in the workplace against victims/survivors of family violence may involve:

- demotion or dismissal where the workplace performance of a person experiencing family violence declines without an obvious explanation; or
- termination where a person is harassed by an abusive partner visiting the workplace, making threatening telephone calls or sending abusive emails.^v

Discrimination in employment, accessing services or any area of public life creates more difficulty and hardship for people – largely women – in situations of family violence. As Durbach explains, discrimination on the basis of family violence only ‘compound[s] the already significant harm of the original acts of violence’.^{vi}

We recommend that the Bill includes protections from discrimination for people experiencing family violence.

Religious exemptions

Section 33(1) of the Bill allows religious bodies and educational institutions to discriminate on the basis of:

- pregnancy or potential pregnancy;
- marital or relationship status;
- sexual orientation;
- gender identity; and
- religion.^{vii}

In theory, a hospital could refuse to employ an unmarried woman, a housing service could refuse to find crisis accommodation for a pregnant woman and a school could expel a student for being attracted to someone of the same sex.

Religious organisations receive government funding to provide a significant percentage of Australia's healthcare services, housing support services, drug and alcohol counseling services, educational services, social support services and financial counseling services. Accordingly, there must be legal protections to prevent discrimination from occurring in a way which would disadvantage people who need to access these services.

We believe that if there is a legitimate reason for differential treatment, religious organisations should be required to prove that they are fair and reasonable in the same way that other organisations in Australia are required to justify discrimination as legitimate and proportionate for it to be lawful. We note that the Bill prevents government funded religious organisations from discriminating in aged care. We encourage the Bill to extend the same protection to include all types of services provided by government funded religious organisations.

We recommend that the Bill removes exemptions for all government funded religious bodies and educational institutions and that these organisations are subject to the same legal requirements as government funded non-religious organisations.

Endorsement of submissions

We endorse and support the National Association of Community Legal Centres' submission and ask that their recommendations also be adopted.

At the North Melbourne Legal Service, we advocate for stronger protections from discrimination in the hope that more of our clients will be treated equally. We support the leadership of the Australian Government in seeking to reduce the regulatory overlap and inconsistencies of the existing anti-discrimination system. To achieve equality, the consolidation of anti-discrimination laws must provide stronger protections from discrimination, implement a more accessible process and be able to achieve results that will make a real difference to the lives of people who have been discriminated against.

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ⁱ Australian Human Rights Commission, *Annual Report 2011-2012*, p 142.

ⁱⁱ Australian Government Attorney-General's Department, *Human Rights and Anti-Discrimination Bill 2012: Explanatory Notes* (November 2012), p 22.

ⁱⁱⁱ This interpretation relies on the inherent requirements exception in article 1(2) of ILO Convention 111 and *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (State of Victoria, Department of Justice: 2008) p 81-82.

^{iv} Victoria Police, *Crime Statistics 2011/2012*, p 7.

^v Associate Professor Andrew Durbach, 'Consolidating Australia's Anti-Discrimination Legislation', *Australian Domestic & Family Violence Clearinghouse Newsletter* (Spring 2012: 50), p 6-7.

^{vi} Ibid.

^{vii} Provided that the discrimination is accordance with the religious tenets of the organisation, and except in relation to aged care.