

## **CHAPTER 2**

### **KEY PROVISIONS OF THE BILL**

2.1 The Draft Bill comprises seven chapters as follows:

- Chapter 1 – Introduction;
- Chapter 2 – Unlawful conduct and equality before the law;
- Chapter 3 – Measures to assist compliance;
- Chapter 4 – Complaints;
- Chapter 5 – Inquiries;
- Chapter 6 – Australian Human Rights Commission; and
- Chapter 7 – Miscellaneous.

2.2 The evidence received by the committee focussed on Chapters 2, 3, 4 and 6 of the Draft Bill; for that reason, this chapter of the report will briefly describe the key provisions in those Chapters only.

#### **Chapter 2 – Unlawful conduct and equality before the law**

2.3 Chapter 2 of the Draft Bill deals with unlawful conduct and equality before the law. It contains proposed provisions in relation to:

- 'protected attributes', including the new attributes of gender identity and sexual orientation (clause 17);
- unlawful discrimination (clauses 18 to 47);
- other kinds of unlawful conduct, including sexual harassment, racial vilification and victimisation (clauses 48 to 54);
- extensions of liability for unlawful conduct (clauses 55 to 58); and
- equality before the law (clauses 59 and 60).

#### ***Protected attributes***

2.4 Clause 17 lists the protected attributes to be covered under the Draft Bill. Ten of these attributes are currently covered by the existing Commonwealth anti-discrimination Acts, six are attributes currently covered under the 'equal opportunity in employment' (EOE) complaints scheme in the AHRC Act, and two are entirely new protected attributes.

#### ***Attributes covered under existing Commonwealth anti-discrimination laws***

2.5 The ten attributes currently covered by the existing four Commonwealth anti-discrimination Acts are: age; breastfeeding; disability; family responsibilities; immigration status; marital status; potential pregnancy; pregnancy; race; and sex. The attribute of 'marital status', currently found in the Sex Discrimination Act, has been expanded in the Draft Bill to cover 'marital or relationship status'.

*'Equal opportunity in employment' complaints scheme attributes*

2.6 Under the EOE scheme in Division 4 of Part II of the AHRC Act, the AHRC is able to conciliate complaints of discrimination in work-related areas on the basis of protected attributes, including:

- medical record (incorporated in the Draft Bill as 'medical history');
- nationality (incorporated in the Draft Bill as 'nationality or citizenship');
- trade union activity (incorporated in the Draft Bill as 'industrial history');
- political opinion;
- religion;
- social origin; and
- criminal record.<sup>1</sup>

2.7 Discrimination on the basis of these attributes under the EOE complaints scheme is not declared unlawful, and complaints are not able to proceed to the Federal Court of Australia (Federal Court) or the Federal Magistrates Court.<sup>2</sup>

2.8 The Draft Bill introduces six of these attributes to the list of protected attributes in clause 17,<sup>3</sup> meaning that discrimination on the basis of these attributes will be unlawful for the first time in Commonwealth legislation.

2.9 The Department has argued that the separate EOE complaints scheme has created confusion and led to significant regulatory overlap.<sup>4</sup> According to the Explanatory Notes, including the EOE complaints scheme attributes (with the exception of 'criminal record') as protected attributes in clause 17 of the Draft Bill will provide clear legal remedies and will allow individuals to take binding action if they consider they have been discriminated against.<sup>5</sup>

2.10 The six attributes from the EOE complaints scheme will be covered under the Draft Bill only in relation to work-related discrimination, and will not be covered in other areas of public life.

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1 'Political opinion', 'social origin' and 'religion' are explicitly included in the definition of 'discrimination' in section 3 of the *Australian Human Rights Commission Act 1986*, while 'trade union activity', 'medical record', 'nationality', and 'criminal record' are prescribed as protected grounds in the *Australian Human Rights Commission Regulations 1989*.

2 Attorney-General's Department, *Submission 130*, p. 4. The committee notes that the *Federal Circuit Court of Australia Legislation Amendment Act 2012* was assented to on 28 November 2012, and provides that the Federal Magistrates Court will continue in existence as the renamed Federal Circuit Court of Australia from 28 May 2013 (unless proclaimed earlier).

3 'Criminal record' is the only attribute from the 'equal opportunity in employment' complaints scheme not included in the Draft Bill.

4 *Submission 130*, p. 4.

5 EN, p. 22.

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*New protected attributes*

2.11 The two new attributes introduced in the Draft Bill, 'sexual orientation' and 'gender identity', are defined in clause 6. 'Sexual orientation' is defined as a person's sexual orientation towards persons of the same sex, the opposite sex or either sex. 'Gender identity' is defined as follows:

*gender identity* means:

- (a) the identification, on a genuine basis, by a person of one sex as a member of the other sex (whether or not the person is recognised as such):
  - (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or
  - (ii) by living, or seeking to live, as a member of the other sex; or
- (b) the identification, on a genuine basis, by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such):
  - (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or
  - (ii) by living, or seeking to live, as a member of that sex.

***Definition of unlawful discrimination***

2.12 Clause 19 sets out the key definition of 'discrimination' for the purposes of the Draft Bill:

*Discrimination by unfavourable treatment*

(1) A person (the first person) discriminates against another person if the first person treats, or proposes to treat, the other person unfavourably because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes.

Note: This subsection has effect subject to section 21 [which exempts special measures to achieve equality].

(2) To avoid doubt, unfavourable treatment of the other person includes (but is not limited to) the following:

- (a) harassing the other person;
- (b) other conduct that offends, insults or intimidates the other person.

*Discrimination by imposition of policies*

(3) A person (the first person) discriminates against another person if:

- (a) the first person imposes, or proposes to impose, a policy; and
- (b) the policy has, or is likely to have, the effect of disadvantaging people who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and
- (c) the other person has that attribute or combination of attributes.

Note: This subsection has effect subject to section 21.

2.13 The Explanatory Notes state that the proposed new definition of 'discrimination' is not intended to change the underlying policy in existing Commonwealth anti-discrimination legislation:

[T]he existing definitions of discrimination are inconsistent, difficult to understand and apply, and have been widely criticised. The Bill introduces a simplified and streamlined definition of discrimination to make it as easy as possible for duty holders to understand what is required to comply with the Bill.<sup>6</sup>

### ***Areas of public life covered***

2.14 Discrimination will be unlawful if it occurs in connection with any 'area of public life' (as defined in subclause 22(2)), as well as in relation to a number of attributes in the area of work only (subclause 22(3)).<sup>7</sup> According to the Explanatory Notes:

The Bill will simplify the approach to specifying when discrimination is unlawful by prohibiting any discrimination that is connected with any area of public life. This will lead to some expansion of the coverage of anti-discrimination protections. However, there are expected to be relatively few areas of public life that are not already covered, primarily areas such as small partnerships and volunteer work. To balance any unintended consequences for the broader coverage, the Bill includes a general exception for any conduct that is justified.<sup>8</sup>

### ***Exceptions to unlawful discrimination provisions***

2.15 A wide range of streamlined exceptions are set out in Division 4 of Part 2-2 of Chapter 2, including:

- a new general exception for 'justifiable conduct' (clause 23);
- an exception for the inherent requirements of particular work (clause 24);<sup>9</sup> and
- the preservation of exceptions related to religion (clauses 32 and 33).

### ***Exceptions for religious organisations***

2.16 The exceptions for religious organisations relate to:

- the appointment of priests, ministers or members of religious orders (clause 32);<sup>10</sup> and

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6 EN, p. 28.

7 The 'work-only' attributes are: 'family responsibilities' (which under the Sex Discrimination Act only applies to work-related discrimination) and the six attributes from the 'equal opportunity in employment' complaints scheme.

8 EN, p. 33.

9 An 'inherent requirements for work' exemption is currently in both the Age Discrimination Act and the Disability Discrimination Act. The Sex Discrimination Act provides an exemption for 'genuine occupational qualification', while the Racial Discrimination Act has provision for prohibiting discrimination in employment and refers to work 'for which [the] person is qualified': EN, pp 35-36.

- conduct engaged in in good faith by religious bodies and educational institutions, that: conforms to the doctrines, tenets or beliefs of a religion; or is necessary to avoid injury to the religious sensitivities of adherents of that religion (clause 33).<sup>11</sup>

2.17 The Explanatory Notes state that 'given the importance of freedom of religion, it is important to maintain explicit religious exemptions, particularly for matters fundamental to the practice of the religion'.<sup>12</sup> Further, the exception provided in clause 32 is a narrow exception, while the exception for religious bodies and educational institutions in clause 33 relates to a broader range of conduct, with the only limitation being in respect of Commonwealth-funded aged care.<sup>13</sup>

2.18 The exceptions in clauses 32 and 33 apply in relation to different protected attributes. The exceptions in clause 32 apply to the new attributes of sexual orientation, gender identity and religion, in addition to the attributes previously covered by the Age Discrimination Act and the Sex Discrimination Act (that is, age, breastfeeding, family responsibilities, marital or relationship status, pregnancy or potential pregnancy, and sex).<sup>14</sup>

2.19 The exception in clause 33, however, which relates to religious bodies and religious educational institutions applies to a more limited range of attributes, namely: gender identity; marital or relationship status; potential pregnancy; pregnancy; religion; and sexual orientation.<sup>15</sup>

#### *Review of exceptions*

2.20 Clause 47 requires all the exceptions in the Draft Bill to be reviewed by the Minister, with the review to begin within three years of commencement of the legislation. The Explanatory Notes state that this review is to be conducted 'to enable consideration of whether these exceptions are necessary, taking into account the operation of the new justifiable conduct exception'.<sup>16</sup>

### **Chapter 3 – Measures to assist compliance**

2.21 Chapter 3 of the Draft Bill deals with measures to assist people to comply with the consolidated laws, including proposed provisions in relation to:

- guidelines which the AHRC may make to assist people to avoid engaging in conduct which is unlawful or is contrary to human rights (clauses 62 and 63);

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10 The exception in clause 32 of the Draft Bill is currently found in the Sex Discrimination Act.

11 The exceptions in subclause 33 of the Draft Bill are currently found in section 35 of the Age Discrimination Act, and in paragraph 37(d) and section 38 of the Sex Discrimination Act.

12 EN, p. 41.

13 EN, pp 41-42.

14 EN, p. 41.

15 EN, p. 42.

16 EN, p. 49.

- review of a person's or body's policies or programs by the AHRC, on application, to determine whether they constitute, or may give rise to, unlawful conduct, or conduct engaged in by the Commonwealth that is contrary to human rights (clauses 64 to 66);
- voluntary development and implementation of action plans by persons or bodies, to assist them and their employees to avoid engaging in unlawful conduct (clauses 67 to 69);
- binding disability standards which the Minister may make (clauses 70 to 74);
- compliance codes which the AHRC may make in order to provide additional certainty for specific industries in relation to their obligations (clauses 75 to 78);
- special measure determinations which the AHRC may make (clauses 79 to 82); and
- temporary exemptions which the AHRC may grant (clauses 83 to 86).<sup>17</sup>

## **Chapter 4 – Complaints**

2.22 Chapter 4 deals with complaints to the AHRC, and contains proposed provisions which deal with:

- making complaints about unlawful conduct, or Commonwealth conduct that is contrary to human rights (clauses 87 to 99);
- how the AHRC deals with complaints, including the circumstances in which a complaint can be closed (clauses 100 to 117); and
- when an application may be made to the Federal Court or the Federal Magistrates Court in relation to unlawful conduct (clauses 118 to 133).

2.23 The Explanatory Notes state that the Draft Bill will enable improvements to be made to the complaints process, with the aim of enhancing access to justice.<sup>18</sup> These aims will be achieved through streamlining the complaints process in clause 88.

2.24 Clause 117 provides a streamlined process for the closing of complaints.<sup>19</sup> It sets out the circumstances in which the AHRC is able to close a complaint and the AHRC's obligations to provide written notice in such circumstances.<sup>20</sup>

2.25 Clause 117 is generally consistent with the current complaints policy and, in those instances where a complaint is closed pursuant to subclause 117(2), an application that the conduct was discriminatory can be made to the Federal Court or the Federal Magistrates Court. It is important to note, however, that an application can

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17 'Disability standards', 'compliance codes', 'special measure determinations' and 'temporary exemptions' are defined terms: see clause 6 of the Draft Bill.

18 EN, p. 3.

19 EN, p. 85.

20 EN, p. 85.

only be made to the Federal Court or the Federal Magistrates Court if the court has granted leave to the applicant where a complaint was closed by the AHRC in the following circumstances:

- where the AHRC is satisfied that the conduct is not unlawful or is not conduct by the Commonwealth that is contrary to human rights;<sup>21</sup>
- the complaint was made more than 12 months after the alleged conduct occurred;<sup>22</sup>
- the AHRC is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance;<sup>23</sup>
- if some other more appropriate remedy has been sought in relation to the subject matter of the complaint and the AHRC is satisfied the subject matter of the complaint has been adequately dealt with;<sup>24</sup> or
- the AHRC is satisfied that some other more appropriate remedy is reasonably available.<sup>25</sup>

2.26 The Explanatory Notes explain:

The rationale for limiting access to the courts is to provide the [AHRC] with an increased ability to dismiss clearly unmeritorious complaints and to focus resources on meritorious complaints; this in turn should limit the number of unmeritorious complaints being brought before the courts. With the early dismissal of unmeritorious complaints comes the potential deregulatory benefit of only involving respondents in the matter when there is an arguable matter to be dealt with.<sup>26</sup>

***Burden of proof***

2.27 Clause 124 provides for a shifting burden of proof in relation to the reason for, or purpose of, the alleged unlawful conduct.

2.28 Under existing Commonwealth anti-discrimination legislation, the burden of proof for claims of direct discrimination falls on the applicant – that is, it is the applicant who is required to prove that the respondent treated them less favourably.<sup>27</sup> In contrast, the burden of proof for claims of indirect discrimination requires that the applicant establish the discriminatory impact of a condition, requirement or practice

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21 Paragraph 117(2)(a).

22 Paragraph 117(2)(b).

23 Paragraph 117(2)(c).

24 Paragraph 117(2)(d).

25 Paragraph 117(2)(e).

26 EN, p. 86. Also see EN, p. 87.

27 EN, p. 89.

and, once this is established, it is then for the respondent to prove that the condition, requirement or practice was reasonable.<sup>28</sup>

2.29 The proposed shifting of the burden of proof applies after the core elements of unlawful conduct have been established by the applicant – it will only be after the applicant has established a *prima facie* case that unlawful discrimination has occurred that the burden will shift to the respondent. The respondent will then be required to explain the reasons for the treatment or justify their conduct.<sup>29</sup>

2.30 The Explanatory Notes state that an applicant will still be required to prove the core elements of each form of alleged unlawful conduct:

In practice, this will require the applicant to first establish a *prima facie* case that the unlawful discrimination occurred before the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action, that the conduct is justifiable or that another exception applies. The applicant will not be required to disprove the application of defences and exceptions. The policy rationale behind this is that the respondent is in the best position to know the reason for the discriminatory action and to have access to the relevant evidence.<sup>30</sup>

2.31 The Department illustrated the proposed changes as follows:<sup>31</sup>

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

### Costs

2.32 Clause 133 is a costs provision, whereby each party will be required to bear their own costs in relation to complaints proceedings, subject to the court's discretion to award costs, or security for costs, in justifiable circumstances. The effect of clause 133 is that costs will not follow the event, as is the case currently.<sup>32</sup>

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28 EN, p. 89.

29 EN, p. 89.

30 EN, p. 89.

31 *Submission 130*, p. 2.

32 EN, p. 94.

## **Chapter 6 – Australian Human Rights Commission**

2.33 Chapter 6 sets out proposed provisions relating to the AHRC, including providing for its continuation following the repeal of the AHRC Act (clause 145).

