

ADDITIONAL COMMENTS BY THE AUSTRALIAN GREENS

1.1 Equality is a cornerstone of our democracy; it is fundamental to ensuring that individuals and groups can access opportunities and essential standards of living so as to participate fully in society and realise their potential. The Australian Greens are committed to creating a more equal world and believe that as a community we should take positive steps to better promote and protect the right to equality and non-discrimination, including by actively addressing the underlying causes of systemic discrimination.

1.2 For these reasons, the Australian Greens strongly support the Government's consolidation of existing Commonwealth anti-discrimination laws, which has provided 'an opportunity to consider the existing framework, and explore opportunities to improve the effectiveness of the legislation to address discrimination and provide equality of opportunity'.¹ The consolidation process has been extensive and ongoing for some time, and we recognise the level of consultation that has been undertaken with stakeholders and the public in order to develop clearer and more consistent anti-discrimination legislation.

1.3 As a result of this comprehensive consolidation process, the Draft Bill is a good improvement on the current situation. In particular, the Australian Greens strongly support a number of key changes, including: the unified definition of discrimination; the expanded coverage of protection against discrimination in all areas of public life; proposed clause 124 that provides for a shared burden of proof; the inclusion of sexual orientation and gender identity as protected attributes; and the change to a 'no costs' jurisdiction.

1.4 However, throughout the Senate Committee's inquiry it became apparent that there remain some gaps and areas that require further strengthening and clarity. For the most part, the Committee Report addresses these gaps and makes recommendations for improvement. The Australian Greens support these recommendations, which are aimed at improving the Draft Bill. However, the Australian Greens are of the view, based on the strong evidence and expert submissions provided throughout the inquiry process, that some recommendations made by the Committee could go further. We also have additional comments and recommendations to make in relation to matters that have not been fully considered by the Committee Report.

1.5 Before we address these matters, we firstly wish to emphasise the importance of the Draft Bill. This Draft Bill provides an opportunity to improve and strengthen Australia's anti-discrimination laws and better promote the right to equality, which

1 Attorney General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, p. 5 (accessed on 19 February 2013).

will have many positive effects. Recent evidence shows that more equal societies enjoy better public health and educational outcomes, improved social cohesion and positive economic results such as increased productivity, efficiency and growth. These outcomes benefit the whole community.

1.6 The eventual passage of, and assent to, this Draft Bill, incorporating the changes suggested by the Committee Report and these additional comments, will result in positive social and economic benefits for all Australians. This Draft Bill should therefore be prioritised by the Government for introduction and passage through the Parliament by the end of the June sitting this year.

Protected attributes

1.7 The Committee Report recommends that the definition of gender identity be clarified and advocates for protection against discrimination to be extended to intersex people, victims of domestic violence and on the basis of irrelevant criminal record. These recommendations are all very welcome and strongly supported by the Australian Greens. However, we feel that the Draft Bill should also be amended to extend the definition of family responsibilities to include caring responsibilities. In addition, we feel that an opportunity has been lost by failing to expand the protected attributes to include 'social status' (i.e. meaning a person's status as being homeless, unemployed or a recipient of social security payments).

1.8 The Committee Report highlights that several submitters, such as the Discrimination Law Experts Group and the ACTU, called for the definition of family responsibilities to be explicitly extended to cover a broader range of care arrangements. The rationale behind broadening this definition is twofold. Firstly, the definition should be inclusive and recognise the 'different family, caring and kinship relationships' of different groups, which is consistent with the overall aims and purposes of the Draft Bill that seeks to promote equality and celebrate diversity in Australian society.² Secondly, the ACTU and the AHRC argued that the definition required amendment so that the Draft Bill was consistent with other relevant Commonwealth laws and state and territory legislation.³ The Australian Greens feel that this minor amendment is within the scope of the consolidation process and that any regulatory impact would be minimal. We therefore recommend that the definition of 'family responsibilities' be changed to 'family and caring responsibilities'.

1.9 Unfortunately, very little attention was given in the Committee Report to the suggestion by several expert witnesses that 'social status' be included as a protected attribute under the Draft Bill. It is well established that discrimination against people who are homeless, unemployed or recipients of social security payments is widespread in our community.⁴ The United Nations Committee on Economic, Social and Cultural Rights has recognised that people can experience 'pervasive discrimination,

2 Discrimination Law Experts Group, *Submission 207*, p. 17.

3 ACTU, *Submission 310*, p 5; AHRC, *Submission 9*, p. 9.

4 Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination', *Deakin Law Review* 15 (2002), Volume 7(2).

stigmatization and negative stereotyping' as a result of experiencing poverty or homelessness, which can significantly affect their ability to access and enjoy other human rights.⁵

1.10 The extent of this discrimination in Australian society, and the need for reform to the Draft Bill, was highlighted in the submissions by the HRLC, PIAC and PILCH. Compelling evidence, put forward by Lucy Adams of the PILCH Homeless Persons' Legal Clinic at the Melbourne hearing, made the case for including 'social status' as a protected attribute under the Draft Bill:

Social status, including homelessness, unemployment and receipt of social security should be a protected attribute. The experience of the PILCH Homeless Persons' Legal Clinic shows us the devastating effect of discrimination against homeless people on a day-to-day basis, and yet this discrimination remains lawful in Australia...⁶

[The clinic] conducted a consultation in 2006 with 183 people who had experienced homelessness. Seventy per cent of them identified that they experienced discrimination on the basis of their homelessness or their receipt of social security or their unemployment or a combination of those things when trying to access accommodation...and 50 per cent of those people identified that they felt discrimination had prolonged their homelessness and made it more difficult or impossible for them to find a sustainable pathway out of homelessness. It does prevent people accessing goods and services. It prevents them accessing accommodation. It essentially presents a barrier to economic and social participation and exacerbates social exclusion. The impacts of that are numerous, including on people's physical and mental health.⁷

1.11 The Australian Greens support the inclusion of 'social status' (to include homelessness, unemployment and recipients of social security payments) as a protected attribute under the Draft Bill. While we understand that this is an expansion of the law and there is no precedent for protecting people from discrimination on the basis of their 'social status', similar to the Committee's view on protecting victims of domestic violence we believe that this is another area where the Commonwealth must lead the way.

1.12 The Australian Greens also concur with the submissions by the AHRC, the Discrimination Law Experts Group, the HRLC, and other organisations,⁸ which recommend that subclause 22(3) should be amended to extend protections for the seven attributes set out in that subclause to 'all areas of public life'.⁹ We believe that

5 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20, 2 July 2009, para 35.

6 *Committee Hansard*, 23 January 2013, p. 57.

7 *Committee Hansard*, 23 January 2013, p. 60.

8 VGLRL, *Submission 534*, p 5; PIAC, *Submission 421*, p. 4.

9 The seven attributes are: family responsibilities; industrial history; medical history; nationality or citizenship; political opinion; religion; and social origin.

such a change will not only reduce uncertainty and simplify the law,¹⁰ but is more likely to be consistent with the right to equality and non-discrimination.¹¹

Exception for justifiable conduct

1.13 The Australian Greens strongly support the recommendation of the Committee Report that clause 23 of the Draft Bill be amended to address the concerns raised by stakeholders. In particular, the provision should be refined to ensure it is 'drafted narrowly in accordance with human rights principles and construed narrowly in accordance with the objects of the Bill and the beneficial nature of the legislation, and...focused clearly and unequivocally on the achievement of substantive equality'.¹² In this regard, the Australian Greens agree that the words 'a legitimate aim' in clause 23(3)(b) be replaced with the words 'an aim that is consistent with achieving the objects of the Act'. We also support the submissions made by the Discrimination Law Experts Group and the HRLC and say further that a clear connection should be required between the justifiable nature of the conduct and the objects of the Act.¹³

Inherent requirements exception

1.14 As the Committee Report recognises, some submitters opposed the inclusion of the 'inherent requirements of work' exception in clause 24. Submitters expressed concern regarding the lack of definition around 'inherent requirements'¹⁴ and the extension of the exception to all protected attributes, which effectively reduces protection against discrimination.¹⁵ There was also evidence that this clause is superfluous because the general exception for justifiable conduct under clause 23 'will provide employers with sufficient scope to defend the use of job requirements as criteria for recruitment and performance management in work'.¹⁶ On this basis, the Australian Greens recommend the removal of clause 24 from the Draft Bill. Alternatively, at a minimum, the inherent requirements exception should specify that duty-holders must make reasonable adjustments before they can rely on the inherent requirements exception.

Religious exceptions

1.15 The Australian Greens acknowledge the importance of the right to freedom of religion and have recommended that protection of this attribute under the Draft Bill be extended to all areas of public life (refer to recommendation 4 below). As such, we respect the right of religious organisations to ordain, appoint, train and educate priests, ministers and members of a religious order in accordance with their own

10 AHRC, *Submission 9*, p. 9; HRLC, *Submission 402*, p. 30; Discrimination Law Experts Group, *Submission 207*, p. 14.

11 Parliamentary Joint Committee on Human Rights, *Submission 595*, p. 8.

12 Discrimination Law Experts Group, *Submission 207*, p. 24.

13 Discrimination Law Experts Group, *Submission 207*, p. 24; HRLC, *Submission 402*, p. 45.

14 ACTU, *Submission 301*, p. 8.

15 Discrimination Law Experts Group, *Submission 207*, p. 26.

16 Discrimination Law Experts Group, *Submission 207*, p. 26.

internally-established practices and doctrines and accept that clause 32 of the Draft Bill is reasonable and should remain.

1.16 However, we do not believe that religious organisations should be automatically exempt from acting consistently with the right to non-discrimination in all instances. Clause 33 of the Draft Bill applies to fields of activity which go beyond the internal workings of religious organisations and impact on members of the public. We therefore support the Committee's recommendation that the Draft Bill be amended to remove exceptions allowing religious organisations to discriminate against individuals in the provision of services. However, after considering a number of written submissions by various stakeholders, the Australian Greens are of the view that we should go much further if we are serious about promoting and protecting the right to equality in Australian society.

1.17 A number of human rights groups and legal experts submitted 'that there should be no permanent exceptions for religious organisations in respect of any protected attributes'.¹⁷ There was evidence that the existing religious exceptions regime effectively 'perpetuates a false and unjustified hierarchy of rights, entrenches systemic discrimination and generally restrains society's pursuit of equality'.¹⁸

1.18 There was also clear evidence from organisations working with religious bodies that the blanket exception is simply not needed,¹⁹ and instead religious organisations can 'rely on the general exception of justifiable conduct in clause 23 of the Draft Bill'.²⁰ Indeed, it was submitted that the general exception of justifiable conduct clause, 'used in the right way, would allow a more thorough examination of human rights in conflict and consideration of how they might be balanced'.²¹ The Australian Greens are concerned by this evidence, which clearly indicates that the blanket and permanent exception in clause 33 that applies to religious organisations is arbitrary, overly broad and unnecessary, particularly in light of the new general exception of justifiable conduct clause. We therefore recommend that the permanent religious exception contained in clause 33 of the Draft Bill be removed, in favour of reliance on the general exception for justifiable conduct.

Costs

1.19 The Australian Greens support clause 133 of the Draft Bill, which provides that each party will be required to bear their own costs, subject to the court's discretion to award costs in justifiable circumstances. However, we note that some submitters indicated that the provision should be amended to limit costs orders against complainants to circumstances in which the complaint was vexatious, frivolous or

17 PIAC, *Submission 421*, p. 30. See also HRLC, *Submission 402*, pp 46-48; PILCH, *Submission 425*, pp 17-18; NACLC/KLS, *Submission 334*, pp 38-42.

18 HRLC, *Submission 402*, p. 47.

19 Ms Lucy Adams, PILCH Homeless Persons' Legal Clinic, *Committee Hansard*, 23 January 2013, p. 60.

20 PILCH, *Submission 425*, p. 17.

21 NACLC/KLS, *Submission 334*, p. 38.

without foundation. We are of the view that the Australian Government should give further consideration to whether clause 133 requires refinement to limit costs orders against complainants to circumstances in which the complaint was vexatious, frivolous or without foundation.

Reasonable adjustments

1.20 While there is some discussion in the Committee Report in relation to reasonable adjustments, the Committee does not express a view or recommendation on this matter. This is despite the concerns raised by submitters regarding the inclusion of reasonable adjustments concept in the justifiable conduct exception, rather than within the definition of discrimination, which has the effect of weakening protection against discrimination.²² The Australian Greens feel that any weakening in the Draft Bill requires adequate consideration and response.

1.21 Accordingly, taking into account a number of written submissions on this matter, the Australian Greens recommend that the duty to provide reasonable adjustments should be incorporated within the definition of discrimination, as a separate subclause. This will bring the Draft Bill into line with the current situation.

1.22 We are also of the view that the explicit duty to provide reasonable adjustments should be applicable to all attributes, and note that Victorian anti-discrimination law requires employers to make reasonable adjustments for employees with family or caring responsibilities, which appears to be working to the benefit of both employers and employees. This amendment would also bring the Draft Bill into line with what is currently best-practice under domestic law.

Special measures

1.23 Similarly, while there is some discussion in the Committee Report regarding the special measure provision under clause 21 of the Draft Bill, no recommendation follows. This is despite the fact that several submitters raised significant concerns regarding the lack of a consultation requirement and that the way the clause is currently drafted is inconsistent with international human rights law. The Australian Greens believe that the 'special measures' clause under the Draft Bill requires amendment for the following reasons highlighted by the National Congress of Australia's First Peoples:

[t]he Bill adopts a uniform definition of special measures, but does not include a specific requirement for free, prior and informed consent of First Peoples in the making of laws and policies which affect Aboriginal and Torres Strait Islander Peoples, as required in the United Nations Declaration on the Rights of Indigenous Peoples...special measures are used across Australia to enact laws for the 'advancement' of First Peoples without any yardstick for their effectiveness, duration or community support and acceptance...where laws and policies are being created that affect First Peoples, these peoples should be properly informed and there should be

22 Discrimination Law Experts Group, *Submission 207*, p. 19.

honest and open negotiation so that affected peoples are able to give their free and prior informed consent.²³

1.24 The Australian Greens are particularly cognisant of the way that 'special measures' provisions have been used in the past to justify top-down policy approaches particularly in relation to indigenous affairs; the Stronger Futures legislation is a case-in-point. We encourage the Government to refine this clause and note that the submissions of the Discrimination Law Experts Group and the HRLC provide guidance as to how the special measures clause could be amended to better promote the right to equality and non-discrimination. We also note that the Parliamentary Joint Committee on Human Rights indicated that as it is currently drafted this clause appears to enable measures that limit rights to be defined as a special measure and request the Government specifically respond to this concern.²⁴

Insurance exception

1.25 A matter that is not addressed in the Committee Report, but which was raised through both written submissions and at the Melbourne hearing, is concern for the current operation of the exception for insurance, superannuation and credit in clause 39 of the Draft Bill. The Mental Health Council of Australia (MHCA) and beyondblue drew the Committee's attention to the way that people with a mental illness regularly experience discrimination when they seek to obtain insurance or claim against an insurance policy. The MHCA and beyondblue raised significant concern that the current exception that applies to insurers is not operating in the spirit in which it was intended to apply and suggested that the Draft Bill be amended to guard against the arbitrary application of this exception. The Australian Greens support the submissions of the MHCA and beyondblue and recommend that the Government consider improving accountability and transparency mechanisms under clause 39, including clarification of the term 'other relevant factors'. The Explanatory Memorandum could also be amended to provide further clarification and explanation of the purpose of the exception.

Systemic discrimination

1.26 Another matter, which was not addressed in detail during the hearing process but that shone through many written submissions, is the need for the Draft Bill to be amended to better address systemic discrimination. Systemic discrimination occurs as a result of patterns, policies and practices that exist in society's institutions and structures and which have the effect of creating and perpetuating disadvantage for whole groups of people. To effectively eliminate barriers to equality, the law must recognise and actively address systemic discrimination that is entrenched in our social structures.²⁵ The Australian Greens are of the view that the following changes to the

23 National Congress of Australia's First Peoples, *Submission 238*, p. 7.

24 PJCHR, *Submission 595*, p. 9.

25 HRLC, *Advance Australia Fair: Addressing Systemic Discrimination and Promoting Equality*, 2011, p. 4.

Draft Bill would improve the law's ability to effectively tackle systemic discrimination:

- Include a positive duty on the public and private sector to promote equality and eliminate unlawful discrimination;
- Amend clause 60 – right to equality before the law – so that it applies to all protected attributes;
- Make provision for representative complaints by the AHRC or public interest organisations on behalf of individuals or groups experiencing discrimination; and
- Consider amending the Draft Bill to prioritise and allocate responsibility for sexual orientation, gender identity and intersex issues with a member of the AHRC.

1.27 Amending the Draft Bill to include a positive obligation to promote equality would bring Commonwealth law into line with best-practice under comparative international jurisdictions and current domestic law.²⁶ It will also ensure that focus is directed towards preventing discrimination in the first place, rather than punishing misconduct, which will go some way towards addressing systemic discrimination.

1.28 Making provision for equality before the law on the basis of all attributes will ensure that laws are non-discriminatory; this will actively promote the right to equality and non-discrimination through the law-making process. To reduce confusion and uncertainty in the Draft Bill, and so that it is consistent with international human rights law, the right to equality before the law in clause 60 should be extended to all protected attributes.

1.29 PILCH and NATSILS made a strong case for amending the Draft Bill to allow for representative actions to be brought on behalf of individuals or groups experiencing discrimination. As Rachel O'Brien from NATSILS said, 'allowing representative complaints to proceed to court could go a long way to addressing some of the systemic issues facing Aboriginal and Torres Strait Islander peoples'.²⁷ The Australian Greens consider that this amendment is crucial, noting that representative proceedings are currently possible in Victoria and it is appropriate for Commonwealth legislation to promote consistency and follow best-practice domestic law.²⁸

1.30 Given the incorporation of sexual orientation and gender identity as protected attributes under the Draft Bill, and the Committee's recommendation to include intersex as a protected attribute, the Australian Greens feel that it is timely and appropriate for these matters to be prioritised by the AHRC. We also suggest that the Australian Government consider amending the Draft Bill to allocate responsibility for these matters to a member of the Commission.

26 *Equal Opportunity Act 2010* (Vic), section 15; and *Equality Act 2010* (UK), section 149.

27 *Committee Hansard*, 24 January 2013, p. 43.

28 *Equal Opportunity Act 2010* (Vic), section 113.

Recommendation 1

1.31 The Draft Bill should be prioritised by the Government for introduction and passage through the Parliament by the end of the June sitting this year.

Recommendation 2

1.32 That the definition of 'family responsibilities' be changed to 'family and caring responsibilities'.

Recommendation 3

1.33 That the Draft Bill be amended to incorporate 'social status' (to include homelessness, unemployment and recipients of social security payments) as a protected attribute.

Recommendation 4

1.34 That subclause 22(3) be deleted from the Draft Bill, in order to extend protections for the seven attributes currently set out in that subclause to 'all areas of public life'.

Recommendation 5

1.35 In addition to replacing the words 'a legitimate aim' in clause 23(3)(b) with the words 'an aim that is consistent with achieving the objects of the Act', the Australian Greens recommend that the Australian Government consider the submissions of the Discrimination Law Experts Group and the HRLC regarding whether a clear connection should be required between the justifiable nature of the conduct and the objects of the Act.

Recommendation 6

1.36 That clause 24 be removed from the Draft Bill. Alternatively, and at a minimum, the inherent requirements exception should specify that duty-holders must make reasonable adjustments before they can rely on the inherent requirements exception.

Recommendation 7

1.37 That the religious exception contained in clause 33 of the Draft Bill be removed, in favour of reliance on the general exception for justifiable conduct.

Recommendation 8

1.38 That the duty to provide reasonable adjustments be incorporated within the definition of discrimination, as a separate subclause.

Recommendation 9

1.39 That the explicit duty to provide reasonable adjustments should be applicable to all attributes.

Recommendation 10

1.40 Amend clause 21 of the Draft Bill to better promote the right to equality and non-discrimination and ensure adequate consultation is undertaken with affected groups. The submissions of the Discrimination Law Experts Group, the HRLC and the National Congress of Australia's First Peoples should be considered as part of this amendment process.

Recommendation 11

1.41 Amend clause 39 of the Draft Bill to incorporate accountability and transparency mechanisms, including clarification of the term 'other relevant factors'. The Explanatory Memorandum should also be amended to provide further clarification and explanation of the purpose of the exception.

Recommendation 12

1.42 Amend the Draft bill to include a positive duty on the public and private sector to promote equality and eliminate unlawful discrimination.

Recommendation 13

1.43 Amend clause 60 of the Draft Bill to extend coverage of the right to equality before the law so that it applies to all protected attributes.

Recommendation 14

1.44 Amend the Draft bill to make provision for representative complaints by the AHRC or public interest organisations on behalf of individuals or groups experiencing discrimination.

Recommendation 15

1.45 Consider amending the Draft Bill to prioritise and allocate responsibility for sexual orientation, gender identity and intersex issues with a member of the AHRC.

Senator Penny Wright
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