

CHAPTER 1

INTRODUCTION AND BACKGROUND

Referral of the inquiry

1.1 On 20 November 2012, the then Attorney-General, the Hon Nicola Roxon MP, and the Minister for Finance and Deregulation, Senator the Hon Penny Wong (Minister), released the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Draft Bill).¹ On 21 November 2012, the Senate referred the Draft Bill to the Senate Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 18 February 2013.² The reporting date was subsequently extended to 21 February 2013.³

Purpose of the proposed consolidation

1.2 The Draft Bill consolidates into a single Act the five existing Commonwealth Acts which deal with human rights and anti-discrimination laws. The five Acts to be consolidated are:

- the *Racial Discrimination Act 1975* (Racial Discrimination Act);
- the *Sex Discrimination Act 1984* (Sex Discrimination Act);
- the *Disability Discrimination Act 1992* (Disability Discrimination Act);
- the *Age Discrimination Act 2004* (Age Discrimination Act); and
- the *Australian Human Rights Commission Act 1986* (AHRC Act).

1.3 In announcing the release of the Draft Bill, the then Attorney-General and the Minister explained that the current Commonwealth anti-discrimination regime is 'unnecessarily complex and difficult to navigate'.⁴ Further, the consolidation of anti-discrimination legislation would provide better protection against discrimination, with a clearer and simpler regulatory framework for business, organisations and individuals.⁵

1 The Hon Nicola Roxon MP, Attorney-General, and Senator the Hon Penny Wong, Minister for Finance and Deregulation, 'Clearer, simpler, stronger anti-discrimination laws', *Joint Media Release*, 20 November 2012, <http://pandora.nla.gov.au/pan/132822/20130204-0704/www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/20November2012-Clearersimplerstrongerantidiscriminationlaws.html> (accessed 20 February 2013).

2 *Journals of the Senate*, 21 November 2012, p. 3344.

3 *Journals of the Senate*, 7 February 2013, p. 3613.

4 'Clearer, simpler, stronger anti-discrimination laws', *Joint Media Release*, 20 November 2012.

5 'Clearer, simpler, stronger anti-discrimination laws', *Joint Media Release*, 20 November 2012.

1.4 According to the Attorney-General's Department (Department), there are significant differences in the drafting and coverage of protections under each piece of Commonwealth legislation dealing with anti-discrimination matters, many of which add to the complexity facing organisations and individuals attempting to comply with the law.⁶ Each of the four core anti-discrimination Acts deal with different protected attributes, namely:

- race and immigrant status (Racial Discrimination Act);
- sex, marital status, pregnancy, potential pregnancy, breastfeeding and family responsibilities (Sex Discrimination Act);
- disability (Disability Discrimination Act); and
- age (Age Discrimination Act).

1.5 Each of these Acts takes a different approach to how the attributes are defined and covered, and the areas of public life in which they are protected. For example, the Racial Discrimination Act prohibits discrimination in any area of public life, while the Age Discrimination Act, the Disability Discrimination Act and the Sex Discrimination Act only prohibit discrimination in specified areas of public life.⁷ Other areas of inconsistency between the current Commonwealth Acts include: the approaches to the test for discrimination; provisions relating to vicarious liability; and the exceptions and exemptions under the Acts.⁸

1.6 The Explanatory Notes to the Draft Bill (Explanatory Notes) state:

Little of this complexity is necessary to achieve the policy aims of the legislation. Rather, the difficult and inconsistent drafting of the Acts has made compliance unnecessarily burdensome and has diminished the laws' potential to promote attitudinal change.⁹

Background to the proposed reforms

1.7 The proposal to consolidate the Commonwealth anti-discrimination framework into a single Act has been suggested for a number of years, and has been the subject of considerable public consultation prior to the release of the exposure draft legislation.

6 Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, pp 5-6, <http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx> (accessed 13 February 2013).

7 Explanatory Notes to the Draft Bill (EN), p. 32.

8 Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, pp 5 and 37.

9 EN, p. 1.

Previous committee inquiry

1.8 The Senate Legal and Constitutional Affairs Committee's 2008 inquiry into the effectiveness of the Sex Discrimination Act touched on the question of whether the Commonwealth anti-discrimination laws should be consolidated. The committee received evidence detailing the opportunities and challenges associated with such a change, and recommended that the Australian Human Rights Commission conduct an extensive public inquiry to examine the merits of replacing the existing Commonwealth anti-discrimination Acts with a single Act.¹⁰

Government announcement and consultation

1.9 On 21 April 2010, the former Attorney-General, the Hon Robert McClelland MP, released Australia's Human Rights Framework, an initiative outlining a range of measures intended to further protect and promote human rights in Australia. One of the key measures announced as part of the Human Rights Framework was the consolidation of Commonwealth anti-discrimination laws into a single Act.¹¹

1.10 On 22 September 2011, the government released a discussion paper to seek community views on the consolidation of Commonwealth anti-discrimination laws.¹² The discussion paper received 240 public submissions from a wide range of stakeholders, covering many issues relating to the consolidation project. The release of this paper was followed by a four-month consultation process, which included three public stakeholder forums as well as individual meetings between the Department and key stakeholders.¹³ This consultation process has guided the development of the exposure draft legislation.¹⁴

10 Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008, pp 164-165.

11 Attorney-General's Department, *Australia's Human Rights Framework*, <http://www.ag.gov.au/RightsAndProtections/HumanRights/HumanRightsFramework/Pages/default.aspx> (accessed 13 February 2013).

12 The Hon Robert McClelland MP, and Senator the Hon Penny Wong, 'Launch of discussion paper on new anti-discrimination law', *Joint Media Release*, 22 September 2011, <http://www.robertmcclelland.com.au/2011/09/22/launch-of-discussion-paper-on-new-anti-discrimination-law/> (accessed 12 November 2012).

13 Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Regulation Impact Statement*, November 2012, p. 84, <http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx> (accessed 20 February 2013).

14 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 2.

Approach taken in the consolidation project

1.11 The Explanatory Notes state that, in consolidating five Commonwealth Acts into a single Act, the Draft Bill is not intended to significantly change what conduct is currently unlawful. The Draft Bill will, however, make a number of changes to the existing anti-discrimination framework with the aim of producing a simpler and clearer law.¹⁵

1.12 The Explanatory Notes explain that the Draft Bill aims to:

- lift differing levels of protections to the highest current standard, in order to resolve gaps and inconsistencies without diminishing protections;¹⁶
- ensure that clearer and more efficient laws provide greater flexibility in their operation, with no substantial change in practical outcomes;
- enhance protections where the benefits outweigh any regulatory impact;
- encourage voluntary measures that business can take to assist their understanding of obligations and reduce occurrences of discrimination; and
- establish a streamlined complaints process, to make it more efficient to resolve disputes that do arise.¹⁷

New policy positions adopted in the Draft Bill

1.13 Despite being primarily a consolidation exercise, the Draft Bill contains several changes from existing Commonwealth anti-discrimination law, including:

- a single, simplified test for discrimination applying to all attributes;
- introduction of new protected attributes of sexual orientation and gender identity,¹⁸ and recognition of discrimination on the basis of a combination of attributes;
- a streamlined approach to exceptions, including a new general exception for justifiable conduct and the preservation of religious exceptions (with some limitations applying to Commonwealth-funded aged care services provided by religious organisations);

15 EN, p. 1.

16 For example, the current anti-discrimination Acts differ in the approach to coverage of protected attributes. The Draft Bill adopts the approach in the Racial Discrimination Act – which offers the broadest protection of the current Acts – by providing that discrimination is unlawful in connection with any area of public life. See: EN, pp 32-33.

17 EN, p. 1.

18 Introducing protection for these two attributes implements a 2010 election commitment made by the government. See: Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, p. 21.

- additional measures to promote voluntary compliance with the Draft Bill, including certification by the Australian Human Rights Commission (AHRC) of organisation or industry-specific compliance codes; and
- changes to the complaints process, including:
 - a shifting burden of proof once an applicant has established a prima facie case of discrimination;
 - an enhanced ability for the AHRC to dismiss clearly unmeritorious complaints; and
 - provision that parties should generally bear their own costs in legal proceedings.¹⁹

Conduct of the inquiry

1.14 The committee advertised its inquiry in *The Australian* on 5 December 2012. Details of the inquiry, including links to the Draft Bill and the Explanatory Notes, were placed on the committee's website at www.aph.gov.au/senate_legalcon. The committee also wrote to over 500 organisations and individuals, inviting submissions by 21 December 2012.

1.15 The committee received 3,464 submissions to the inquiry. For administrative purposes, approximately 1,300 of these submissions were categorised as 'form letters' (or variations of form letters).²⁰ Approximately 1,200 of these submissions opposed the Draft Bill, while around 100 supported it.

1.16 Most of the form letters appeared to result from 'campaign-style' emails. Some of the form letters referred to specific clauses in the Draft Bill, calling for the removal or amendment of clauses, or supporting particular clauses. The majority of form letters, however, did not contain substantive commentary on these clauses.

1.17 A further approximately 1,550 submissions were categorised as submissions expressing general support for, or opposition to, the Draft Bill. Many of these general statements did not refer to the provisions in the Draft Bill at all, nor did they address or provide commentary on substantive issues. Of these submissions, approximately 1,480 opposed the Draft Bill and 70 expressed support for it.

1.18 The committee decided to publish all submissions received from organisations on its website, as well as a selection of submissions from individuals that were indicative of the types of views presented. Examples of each type of form letter received were also published on the committee's website. A total of 595 submissions

19 EN, pp 2-3.

20 A submission was categorised as a form letter where it contained a specific, or easily identifiable, template of words. A submission was included as a variation to a particular form letter where the template of words was modified but could still be identified as having derived from a form letter, or where the template was supplemented with additional material.

were published on the committee website. The submissions published on the committee's website are listed at Appendix 1 to this report.

1.19 The committee held three public hearings for the inquiry: in Melbourne on 23 January 2013; in Sydney on 24 January 2013; and in Canberra on 4 February 2013. A list of the witnesses who appeared at the hearings is at Appendix 2 to this report, and copies of the *Hansard* transcripts are available through the committee's website.

Scope of the report

1.20 Due to the short timeframe given to the committee to conduct this inquiry, the committee has necessarily been required to limit its analysis and consideration to key areas. It has simply not been possible for the committee to fully investigate the range of matters raised by stakeholders during the course of the inquiry. Accordingly, the committee's report focusses on the major issues raised in submissions and at the public hearings. The committee recognises, however, that many submissions made extensive recommendations relating to specific policy areas, as well as technical aspects of the Draft Bill, and the committee considers that these issues are worthy of examination by the Department.

1.21 In that context, the committee notes the commitment given by the Secretary of the Department at the public hearing in Canberra:

[T]he department welcomes the views of those many stakeholders who have constructively engaged in this process to highlight where the wording of the draft bill may not match the policy intentions. Indeed, consultation has been a major part of this project and a valuable tool in finding out what is working, what is not and how things could be done better to improve the federal anti-discrimination system... We should be clear that we do not want to be defensive about anything in this legislation, so if people have ideas and the committee has ideas, [we] should listen carefully and take that on board.²¹

1.22 Given this undertaking, the committee expects that the Department will review all submissions received by the committee and address relevant policy and drafting issues prior to the introduction into the parliament of the legislation in its final form.

Structure of the report

1.23 This report is divided into seven chapters:

- chapter 2 outlines the key provisions of the Draft Bill;

21 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, pp 1-2.

- chapter 3 examines the protected attributes covered under the Draft Bill, as well as discussing additional attributes that have not been included in the Draft Bill as protected attributes;
- chapter 4 discusses the Draft Bill's definition of discrimination, and the coverage of discrimination protections in public life;
- chapter 5 discusses the exceptions to unlawful discrimination, focussing on the general exception for justifiable conduct, the 'inherent requirements for work' exception, and the exceptions relating to religious organisations;
- chapter 6 examines the complaints and courts processes established under the Draft Bill for discrimination cases, focussing on the burden of proof and the costs model for court cases; and
- chapter 7 sets out the committee's views and recommendations.

Note on references

1.24 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official Hansard transcript.

Acknowledgement

1.25 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

