

CHAPTER 4

MEANING OF DISCRIMINATION AND CIRCUMSTANCES IN WHICH DISCRIMINATION IS UNLAWFUL

4.1 Divisions 2 and 3 of Part 2-2 of the Draft Bill provide for the meaning of discrimination and the circumstances in which discrimination is unlawful. These provisions, along with the exceptions clauses in Division 4 of Part 2-2 (discussed in more detail in chapter 5 of this report), provide the framework for the operation of the unified Commonwealth anti-discrimination law. Submitters and witnesses commented extensively on the general approach in these provisions, as well as making specific suggestions regarding the wording of these clauses.

Definition of discrimination in the Draft Bill

4.2 Numerous submitters raised concerns regarding the new simplified definition of discrimination in clause 19 of the Draft Bill, and particularly paragraph 19(2)(b).¹ Subclause 19(2) states that discrimination by one person treating another unfavourably includes the person:

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

4.3 In public comments cited by many submitters and witnesses to the inquiry, former NSW Chief Justice the Hon James Spigelman AC QC has argued that the inclusion of the terms 'offends, insults or intimidates' in the Draft Bill would have the effect of broadening the scope of conduct which can be considered unlawful discrimination beyond the current standards in the Sex Discrimination Act, the Disability Discrimination Act or the Age Discrimination Act, with adverse implications for the right to free speech in Australia. In particular, the committee notes the following comments by the Hon Mr Spigelman:

[D]eclaring conduct, relevantly speech, to be unlawful, because it causes offence, goes too far. The freedom to offend is an integral component of freedom of speech. There is no right not to be offended...

The new Bill proposes a significant redrawing of the line between permissible and unlawful speech...Words such as 'offend' and 'insult', impinge on freedom of speech in a way that words such as 'humiliate',

1 See, for example, Discrimination Law Experts Group, *Submission 207*, p. 18; Institute of Public Affairs, *Submission 331*, pp 4-5; Australian Chamber of Commerce and Industry, *Submission 411*, p. 4; Law Council of Australia, *Submission 435*, pp 26-27; Freedom 4 Faith, *Submission 447*, p. 10; NSW Government, *Submission 467*, pp 2 and 7; Human Rights Council of Australia, *Submission 475*, p. 5.

'denigrate', 'intimidate', 'incite hostility' or 'hatred' or 'contempt', do not. To go beyond language of the latter character, in my opinion, goes too far.²

4.4 Stakeholders argued that the inclusion of paragraph 19(2)(b) sets a standard for discriminatory conduct which would curtail freedom of speech in Australia.³ For example, Mr Robert Johnston from the Australian Association of Christian Schools told the committee:

This is an extraordinarily low threshold to be embedding in law, especially when coupled with [the] proposed new onus of proof being placed on the respondent rather than the complainant. This is an alarming and dangerous innovation...Far from strengthening the human rights of freedom of speech and expression, this innovation inevitably silences constructive and robust debate on any issue on which one might choose to be offended.⁴

Introduction of a subjective test for discrimination

4.5 Concerns were expressed that the wording of paragraph 19(2)(b) means that the test for discriminatory conduct would be a subjective test, rather than an objective one. Submitters to the inquiry noted that the definition of racial vilification currently in section 18C of the Racial Discrimination Act, and replicated in clause 51 of the Draft Bill, is framed by the 'objective standard' of conduct that is 'reasonably likely, in all the circumstances, to offend'; however, there is no similar objective standard in clause 19 of the Draft Bill.⁵

4.6 In its submission, the Law Council of Australia (Law Council) observed:

[B]y inquiring into whether conduct 'insults, offends or intimidates', paragraph 19(2)(b) focuses on how the conduct is *received* by the aggrieved party and on how that party *feels*, rather than on the nature of the conduct or the reason or purpose for which it was undertaken. This has the potential to confuse the adverse or detrimental impact of the conduct with the way in which the conduct was received.⁶

4.7 The submission from Joint Media Organisations contended that the lack of an objective standard for discriminatory material which 'offends' would have a significant impact on the type of material media organisations would publish:

2 The Hon James Spigelman AC QC, 'Hate Speech and Free Speech: Drawing the Line', Human Rights Day Oration, 10 December 2012, http://humanrights.gov.au/about/media/news/2012/132_12.html (accessed 11 December 2012).

3 See, for example, Institute of Public Affairs, *Submission 331*, pp 4-5; Master Builders Australia, *Submission 353*, pp 6-7; Law Council of Australia, *Submission 435*, p. 26; Seventh-day Adventist Church Australia, *Submission 496*, p. 5; Queensland Council for Civil Liberties, *Submission 554*, p. 3.

4 *Committee Hansard*, 23 January 2013, p. 62.

5 See, for example, Institute of Public Affairs, *Submission 331*, p. 5; Australian Christian Lobby, *Submission 419*, pp 12-13; Freedom 4 Faith, *Submission 447*, p. 10; Law Society of South Australia, *Submission 248*, p. 2.

6 *Submission 435*, p. 26, (emphasis in original).

The inability of organisations to foresee what standard will be set is likely to have a 'chilling effect' on the publication or broadcast of potentially contentious material. This will most directly affect consumers, whose access to the range of content they are currently able to read, hear and see, may be limited as a result.⁷

4.8 The Institute of Public Affairs argued that, even if an objective test were included in clause 19, determining what conduct or speech is unreasonably offensive would still be a difficult matter for the courts to determine:

No amount of judicial hypothesising about what an ordinary person might feel will be able to simulate social standards. But legislation that transforms the shifting, amorphous and socially contingent concept of offense into a legal doctrine requires the judiciary to do so.⁸

Departmental response and suggested changes to clause 19

4.9 The Explanatory Notes state that clause 19 is intended to preserve existing policy found in current Commonwealth anti-discrimination legislation, and that the harassment component in the definition of unfavourable treatment in subclause 19(2) largely reflects existing law, as brought out in the relevant case law.⁹

4.10 In its submissions and evidence to the committee, the Department discussed at length the concerns raised regarding paragraph 19(2)(b). The Department reiterated that it 'is not the Government's intention to broaden the prohibition against racial vilification to other attributes'¹⁰ or to make any conduct which a person finds offensive unlawful:

The intention of subsection 19(2) of the Bill is to clarify what courts have already found—that 'discrimination' (treating a person less favourably because of their attributes such as race, sex, disability or age) can include harassment on that basis. The relevant provisions of the Bill (paragraphs 19(2)(a) and (b)) are intended to be read together to provide greater guidance on the types of conduct that may constitute harassment, without limiting the definition of that concept. While not expressly including an objective test, the surrounding context of this provision is intended to require objective analysis.

The objections [in submissions] appear to relate to the possible unintended consequences of the wording used rather than the central idea that 'harassment' falls within the scope of 'unfavourable treatment'. Clarifying that harassing behaviour can fall within the scope (including conduct such as verbal abuse based on a protected attribute) remains important. There is a

7 *Submission 484*, p. 4. See also: Free TV Australia, *Submission 330*, pp 2-3.

8 *Submission 331*, p. 5.

9 Explanatory Notes (EN), pp 27-28.

10 *Supplementary Submission 130*, p. 6.

difference between expressing an opinion, even in strong language, and subjecting another person to harassment.¹¹

4.11 In a document tabled at the public hearing in Canberra, the Department elaborated on the meaning of 'harassment' as part of the definition of 'unfavourable treatment':

There was no intention to attempt to comprehensively define 'harassment', which can take many different forms. However, the inclusion of paragraph 19(2)(b) sought to provide guidance on the type of conduct that might constitute harassment. For example, harassment could include conduct which was offensive, insulting or intimidating towards another person (such as offensive remarks based on the person's race or insulting language about that person's disability). Ultimately, the concepts of harassment and discrimination are limited by the requirement that such treatment be based on another person's protected attributes.¹²

4.12 The Secretary of the Department conceded that, given the concerns raised about the interpretation of paragraph 19(2)(b), the provision should not remain in its current form.¹³ The Department outlined four possible options in relation to this provision:

- remove paragraph 19(2)(b), leaving subclause 19(2) to state simply that unfavourable treatment can include harassment, without giving any guidance as to what might constitute harassment;
- remove subclause 19(2) in its entirety, leaving the legislation silent on the question of whether discrimination can include harassment;
- use alternative words in paragraph 19(2)(b), such as 'degrade', 'denigrate', 'humiliate' or 'intimidate'; and/or
- expressly clarify that the test for harassment is an objective test.¹⁴

4.13 Stakeholders also put forward their views on possible changes to clause 19, which roughly accord with the options outlined by the Department, as discussed below.

Removing paragraph 19(2)(b) or subclause 19(2) in its entirety

4.14 Many submitters and witnesses suggested that paragraph 19(2)(b) should be deleted from the definition of discrimination altogether. For example, the Law Council noted that the unfavourable treatment test contained in subclause 19(1) of the

11 *Supplementary Submission 130*, pp 6-7.

12 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 1.

13 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, pp. 2 and 5.

14 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', pp 1-4.

Draft Bill 'would appear to offer sufficient protection against harassment on the grounds of any protected attribute regardless of whether paragraph 19(2)(b) is included'.¹⁵ The Department agreed: '[a]s courts have found that discrimination can include harassment without express reference in legislation to this effect, [removing subclause 19(2)] should not alter this interpretation'.¹⁶

4.15 Some submitters welcomed the intent of explicitly clarifying in the Draft Bill that discrimination includes harassment. Associate Professor Anna Cody from the National Association of Community Legal Centres argued that the concept of harassment should be retained within the definition of unlawful discrimination, even if paragraph 19(2)(b) is removed.¹⁷ Liberty Victoria commended the Draft Bill for including references to harassment as part of unlawful discrimination, and recommended that paragraph 19(2)(b) should be removed or amended, without also removing paragraph 19(2)(a).¹⁸

Strengthening the wording of paragraph 19(2)(b) and including an objective standard

4.16 Other submitters advocated amending paragraph 19(2)(b) rather than removing it altogether. For example, the Public Interest Advocacy Centre recommended that paragraph 19(2)(b) should be redrafted to provide that unfavourable treatment includes, but is not limited to, 'conduct that humiliates or intimidates the other person, or has the intent or effect of nullifying or impairing the other person's enjoyment of human rights on an equal footing'.¹⁹ The Human Rights Council of Australia proposed amending paragraph 19(2)(b) to read 'other conduct that causes tangible or intangible harm or damage to the other person'.²⁰

4.17 Liberty Victoria argued that '[m]ixing subjective, and potentially trivial, terms like 'offends' and 'insults' with objective, and serious, words like 'intimidates' leads to uncertainty and potential interpretations quite at odds with the intent of the Bill'.²¹ Liberty Victoria recommended that, if paragraph 19(2)(b) is not omitted, it should be 'at least replaced with words of objective harm and sufficient seriousness'.²² Further:

The notion of objective harm has to involve not subjective words like 'offend' and 'insult' but where conduct, including words, spoken and written, are known to cause harm, in particular on the basis of an attribute. It has to

15 *Submission 435*, p. 27. See also: Ms Rachel Ball, Human Rights Law Centre, *Committee Hansard*, 23 January 2013, p. 58.

16 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 2.

17 *Committee Hansard*, 24 January 2013, pp 9 and 11.

18 *Submission 379*, p. 6.

19 *Submission 421*, p. 4.

20 *Submission 475*, p. 5.

21 *Submission 379*, p. 6.

22 *Submission 379*, p. 6.

take into account not just what is done or said but the attribute and the history of discrimination suffered by people of that attribute.²³

4.18 The Department warned that using alternative words in paragraph 19(2)(b) such as 'degrade', 'denigrate', 'humiliate' or 'intimidate', would 'likely set a standard of conduct which would be considered unacceptable in society'.²⁴ It cautioned, however, that the introduction of such words into discrimination law could have uncertain implications:

[D]egrade' and 'denigrate' in particular would be new concepts in anti-discrimination law. The use of these new phrases could create further uncertainty, undermining the purpose of including any further guidance in addition to 'harassment'. In particular, such new concepts may have the effect of inadvertently expanding the operation of the provision, as these have not previously been the subject of jurisprudence in this context.²⁵

4.19 The Department stated that, whichever option is chosen for amending clause 19, it should be expressly clear that an objective standard should apply in relation to harassment:

[This] would remove any doubt that the standard to be met is to be objectively determined, rather than whether an individual merely *felt* offended or insulted. This would clarify the Government's policy intention and maintain existing jurisprudence on the meaning of harassment.²⁶

4.20 The Department commented, however, that including an objective standard in relation to harassment 'could inadvertently create further confusion about other aspects of the meaning of discrimination, which do not have express objective tests'.²⁷

Other options

4.21 Several other suggested changes were also put forward by submitters. The Law Council proposed that, as an alternative to removing paragraph 19(2)(b), subclauses 19(1) and (2) could be replaced in their entirety with a provision modelled on the *Equal Opportunity Act 2010* (Vic), which provides that discrimination occurs 'if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute'.²⁸

23 Mr Jamie Gardiner, Liberty Victoria, *Committee Hansard*, 23 January 2013, p. 4.

24 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 3.

25 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 3.

26 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 4 (emphasis in original).

27 Additional Information tabled by the Attorney-General's Department at the public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 4.

28 *Submission 435*, pp 26-27.

4.22 The Centre for Comparative Constitutional Studies recommended that, if paragraph 19(2)(b) is to be retained in some form, there should be an explicit exception for the attribute of 'political opinion' so that unfavourable treatment does not include conduct that offends or insults a person on the ground of political opinion.²⁹

Circumstances in which discrimination is unlawful

4.23 The committee received evidence on several issues relating to the circumstances in which discrimination is unlawful under clause 22, namely:

- the general provision in subclause 22(1) that discrimination is unlawful if it is connected with any area of public life;
- the limitation in subclause 22(3) which provides that discrimination on the grounds of seven specific protected attributes is only unlawful in connection with work or work-related areas; and
- the coverage of voluntary and unpaid work under the definition of 'employment' for the purposes of the Draft Bill.

Discrimination to be unlawful in 'any area of public life'

4.24 Subclause 22(1) provides that discrimination against a person is unlawful if it is 'connected with any area of public life', and subclause 22(2) includes a non-exhaustive list of areas of public life covered by the legislation. The Explanatory Notes explain that existing Commonwealth anti-discrimination laws are inconsistent in relation to the coverage of unlawful discrimination.³⁰ According to the Department:

The Bill simplifies the approach to specifying when discrimination is unlawful by prohibiting discrimination that is connected with any area of public life. This raises protections to the current highest standard, reflected in the [Racial Discrimination Act]. The specific areas of public life set out in [sub]clause 22(2) are consistent with the areas regulated by existing Commonwealth anti-discrimination law and are provided for additional guidance.³¹

Concerns about making discrimination unlawful in 'any area of public life'

4.25 Some stakeholders argued that covering 'any area of public life' constitutes a radical expansion of the reach of discrimination law in relation to attributes other than race. For example, Professor Nicholas Aroney and Professor Patrick Parkinson AM asserted:

The Commonwealth's existing anti-discrimination laws, like the anti-discrimination laws of the States, are limited to prohibiting discriminatory conduct by persons possessing responsibility, authority or power in particular areas of public life...[such] as employers, managers,

29 *Submission 350*, p. 2.

30 EN, p. 32.

31 *Supplementary Submission 130*, p. 8.

administrators, providers of accommodation, goods or services, public authorities, and so on...

If enacted in these terms, the prohibition contained in the [Draft Bill] would extend to the conduct of *any* person provided that conduct was in some way 'connected with' an area of 'public life'...In practice, the proposed clause 22(1) would prohibit *any* employee of a company, *any* student at a school, *any* client of a business, *any* customer of a department store, *any* patron of a restaurant, *any* member of a club, *any* spectator of a sporting activity, *and so on*, from engaging in conduct that is in any way unfavourable to another person connected with that area of 'public life', so long as the unfavourable treatment is in relation to one of the relevant protected attributes.³²

4.26 Professors Aroney and Parkinson argued that, while current discrimination laws are designed to regulate 'vertical relationships of responsibility, authority or power', the Draft Bill extends regulation to 'horizontal relationships of all kinds':

It is in horizontal relationships that offensive and insulting conduct most often occurs. This kind of conduct is best responded to at a community level, without the distant and heavy hand of Commonwealth law and regulation intruding into such matters. People sometimes behave badly in their social relations with others; but the best way to encourage good behaviour is by modelling it, and by reinforcing standards of right conduct and courtesy, not by running off to court to engage in protracted and expensive legal disputes.³³

4.27 Freedom 4 Faith argued that the extension of coverage to any area of public life is likely to lead to a greatly increased number of complaints, and in particular nuisance or vexatious complaints, meaning that more time would be spent 'sifting between the few meritorious and the many unmeritorious complaints'.³⁴

Support for making discrimination unlawful in 'any area of public life'

4.28 Conversely, Professor Simon Rice OAM from the Discrimination Law Experts Group welcomed the approach taken in clause 22:

There has been discussion about the breadth of the [Draft Bill] to encompass public life. It has been put in terms of extending the [Draft Bill] horizontally as well as vertically and that certainly seems to be the case. In our view, that is as remarkable as criminal law applying to all areas of life, and I mean all—public and private and not simply selected areas of life—or tort law applying to all areas of life and not selected areas of life. If discrimination law is supposed to represent values in Australia then we support a move that does not privilege some areas of life and exclude other areas of life, but extends to all.³⁵

32 *Submission 558*, p. 3 (emphasis in original).

33 *Submission 558*, p. 4.

34 *Submission 447*, p. 11.

35 *Committee Hansard*, 24 January 2013, p. 50.

4.29 The Human Rights Law Centre also applauded the expansion of coverage to all areas of public life. It argued that this level of protection is consistent with international human rights law, and 'provides a much clearer, simpler framework for duty-holders and complainants to understand and operate within' than the existing framework of Commonwealth anti-discrimination law.³⁶

4.30 The Explanatory Notes state that, while covering discrimination in connection with any area of public life will lead to 'some expansion' of the coverage of anti-discrimination protections, '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'.³⁷ A departmental official also confirmed in evidence to the committee that none of the specific areas of public life listed in subclause 22(2) are new to Commonwealth anti-discrimination law.³⁸

Protected attributes covered only in work and work-related areas

4.31 Subclause 22(3) provides that discrimination related to seven attributes (family responsibilities, industrial history, medical history, nationality or citizenship, political opinion, religion and social origin) is unlawful only if it is connected to work and work-related areas.³⁹

Arguments for extending coverage for these attributes to 'all areas of public life'

4.32 The AHRC expressed concern that providing narrower coverage for these attributes than the other attributes protected under the Draft Bill could result in complexity and confusion, with particular implications for:

- matters of intersectional discrimination (for example, where a matter which is not work-related raises issues of both race and religion); and
- consistency between the Draft Bill and state and territory laws, which 'provide more general coverage on a number of these grounds'.⁴⁰

4.33 Accordingly, the AHRC recommended further consideration of extending the coverage for these attributes to all areas of public life, 'in the interests of simplicity and improved consistency'.⁴¹ Several other stakeholders agreed with this position. For example, academics from the University of Adelaide Law School argued that limiting the application of some attributes will undermine the effect of the legislation as a whole:

36 *Submission 402*, p. 42.

37 EN, p. 33.

38 Mr Greg Manning, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 8.

39 All of these attributes, except 'family responsibilities', are part of the Australian Human Rights Commission's 'equal opportunity in employment' complaints scheme, while 'family responsibilities' is a protected attribute in work-related areas only under section 7A of the *Sex Discrimination Act 1984*. See: EN, pp 20-21.

40 *Submission 9*, pp 8-9.

41 *Submission 9*, p. 9.

Enacting prohibitions of discrimination only in the context of work will inevitably inspire questions as to why the prohibitions are not extended into other areas of public life. Not only does this have the potential to undermine public confidence in the scope and operation of protections against discrimination offered at federal level, it will also limit the utility of the federal legislation to effect real change in discriminatory attitudes and beliefs in society. Limiting the prohibitions to the context of work effectively states that discrimination on the basis of religion in education (for example) is not serious because it is not prohibited. Such limitations on the regulation of discrimination also have the potential to undermine perceptions of the government's commitment to principles of equality and a broad human rights agenda.⁴²

4.34 The Discrimination Law Experts Group agreed that all attributes should be covered in all areas of public life, stating that limiting protection for these attributes to work-related areas 'creates an irrational disparity between the status accorded to these attributes and that accorded to other attributes protected by the [Draft Bill]'.⁴³

Arguments for reducing or eliminating coverage of these attributes

4.35 Conversely, several submitters argued that covering these attributes in work-related areas goes too far. For example, the Australian Chamber of Commerce and Industry (ACCI) asserted that making discrimination on the basis of the six attributes which are currently part of the AHRC's 'equal opportunity in employment' (EOE) complaints scheme 'creates a new and additional layer of regulation which subjects employers to litigation which does not currently exist under federal anti-discrimination law'.⁴⁴

4.36 The ACCI also noted that the inclusion of these attributes as unlawful protected attributes creates overlap with similar provisions in the Fair Work Act, which protect employees from adverse action on the basis of, among other things, political opinion, social origin or industrial activities.⁴⁵

Departmental response

4.37 The Secretary of the Department indicated that including these attributes in work-related areas will achieve greater consistency with the Fair Work Act and state and territory anti-discrimination regimes.⁴⁶ The Department advised that the '[i]nclusion of these grounds in the Draft Bill should not increase the regulatory

42 Ms Anne Hewitt, Professor Andrew Stewart, Professor Rosemary Owens, Ms Gabrielle Appleby and Ms Beth Nosworthy, University of Adelaide Law School, *Submission 204*, pp 3-4.

43 *Submission 207*, p. 14. See also: Australian Lawyers for Human Rights, *Submission 406*, p. 5.

44 *Submission 411*, p. 3. See also: Clubs Australia Industrial, *Submission 314*, pp 8-9.

45 *Submission 411*, p. 3.

46 Mr Roger Wilkins AO, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 3.

burden for duty holders because in most cases it is already unlawful to discriminate on these bases' under either the Fair Work Act or under state and territory laws.⁴⁷

4.38 The Department also highlighted that clause 90 of the Draft Bill prevents 'double-dipping' between different complaints regimes by making it clear that a complaint may not be lodged with the AHRC by an individual if the same complaint has already been lodged under the Fair Work Act or under state or territory anti-discrimination legislation.⁴⁸

Coverage of voluntary or unpaid work in the definition of 'employment'

4.39 Clause 6 defines 'employment' to include 'voluntary or unpaid work'. The inclusion of voluntary work in the definition of employment received significant attention, with stakeholders divided as to whether or not volunteers should be covered under the legislation.

Arguments supporting the inclusion of 'voluntary or unpaid work' in some form

4.40 The National Association of Community Legal Centres (NACLC) and Kingsford Legal Centre (KLC) expressed support for the expansion of the definition to cover volunteers:

NACLC and KLC welcome the inclusion of 'voluntary or unpaid work' in the definition of employment in section 6 of the [Draft Bill]. We strongly support the inclusion of voluntary workers as protected under discrimination law and believe that all employers and organisations utilising voluntary workers have a responsibility to ensure a discrimination free workplace.⁴⁹

4.41 Similarly, the Human Rights Law Centre supported the inclusion of volunteers in the definition of employment, arguing that current protections for volunteers are ad-hoc and insufficient to meet Australia's international obligations. The Human Rights Law Centre emphasised that the Draft Bill would only cover volunteers in 'public life':

We note that 'public life' would include, for example, volunteers who perform work in the not-for-profit organisations, government bodies, schools and emergency services. By contrast, we expect that volunteering outside 'public life' would include volunteering to co-ordinate a book club for a group of friends or help a neighbour tend their garden.

...[V]olunteering also provides people with engagement and participation opportunities. For example, a person with a disability or parental responsibilities may engage in voluntary work to assist their transition into paid employment. In that sense, protection for volunteers is important for achieving overall substantive equality.⁵⁰

47 *Supplementary Submission 130*, p. 2.

48 *Supplementary Submission 130*, p. 2.

49 *Submission 334*, p. 12.

50 *Submission 402*, p. 42.

4.42 The Public Interest Law Clearing House (PILCH), although supportive of extending discrimination protections to volunteers, expressed concern at the approach taken in the Draft Bill. At the public hearing in Melbourne, Ms Simone Ball from PILCH contended that 'imposing vicarious liability on community organisations for acts done by volunteers...is too broad and may lead to [a] reluctance by not-for-profits to involve volunteers'.⁵¹ In its submission, PILCH suggested that 'liability should only attach where a community organisation exerts a certain level of direction, control and supervision over its volunteers'.⁵² Further, there are 'key legal differences between an employee and a volunteer':

Defining a 'volunteer' as a type of 'employee' disregards important distinctions between these two different types of workers and would be very confusing for [not-for-profit organisations] and volunteers...Different legal obligations are owed by an organisation to their employees, as opposed to their volunteers (for example, remuneration, leave entitlements, superannuation and statutory insurance obligations for employees). The terms 'employment' and 'employee' have always had a well-known, ordinary meaning at law (and been the subject of much judicial consideration), as have the factors...which distinguish employment from volunteering.⁵³

4.43 PILCH suggested that the Draft Bill should be amended to include volunteering as a specifically listed area of public life in subclause 22(2). This would 'provide clarity for the [not-for-profit] sector and assist organisations in interpreting the Federal anti-discrimination laws'.⁵⁴ If this approach is not taken, however, PILCH suggested the following as an alternative:

[T]he Draft Bill should at a minimum be re-drafted to include 'voluntary and unpaid work' as part of the definition of 'work and work related areas' in its own right, rather than as part of the definition of 'employment'.⁵⁵

Arguments opposing the inclusion of 'voluntary or unpaid work'

4.44 Professors Aroney and Parkinson suggested that extending the definition of employment to include volunteer work may pose constitutional difficulties:

[I]t is likely that the constitutional basis for this extension must rest, if anywhere, upon the International Labour Organization (ILO) conventions, in particular, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Notably, that Convention uses the terms 'employment' or 'occupation' rather than 'work', and there is no indication whatsoever in [that] Convention that it is intended to go beyond paid employment...While the ILO may have an interest in volunteer work for statistical purposes, there is no reason to believe that volunteers are within the scope of ILO Convention 111. Indeed, the ILO makes it clear that its

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

52 *Submission 425*, p. 19.

53 *Submission 425*, p. 19.

54 *Submission 425*, p. 19.

55 *Submission 425*, p. 19.

own definition of volunteer work for statistical purposes seeks to capture activity which is quite unrelated to the world of paid employment. Examples...include buying groceries for an elderly neighbour or driving a neighbour to a medical appointment.

We find it difficult to see where in the federal Constitution the Commonwealth is authorised to regulate such activity (and nor can we see any sensible reason to do so).⁵⁶

4.45 Religious organisations raised concerns about the broadening of the definition of employment to include volunteers, citing the potential administrative burden it may introduce. For example, Freedom 4 Faith stated:

[T]he adverse regulatory impact of this proposed legislation is greatly increased by the inclusion of volunteers within its scope...One of the major interpretative questions is where the boundaries of work, leisure and community service lie. Does the woman who runs the Church playgroup as a volunteer engage in 'unpaid work'? What about the pastoral care team who faithfully visit those who are housebound or in hospital? Is running a youth group considered volunteer 'work'? What if the local church is run by elders who, on a voluntary basis, take turns to preach and carry out other leadership activities?⁵⁷

4.46 Freedom 4 Faith acknowledged that the government may wish to provide protections from discrimination for volunteers, but questioned why such provisions are required:

[T]here is no evidence of any problem with discrimination against volunteers in faith-based communities that warrants legislative intervention. Even if one or two examples could be produced, there are likely to be issues concerning freedom of religion and association that need to be balanced against whatever claim of discrimination is being advanced. In practice, if people do not feel welcome in offering their assistance in such contexts, then they will simply go elsewhere.⁵⁸

4.47 The Australian Catholic Bishops Conference (ACBC) agreed:

Volunteers are the backbone of the Church, much of which is a collection of small enterprises with limited resources...Across the Church nationally, tens of thousands of volunteers are involved in the activities of the Church in Australia. Legislation that diverts resources away from service delivery to managing risk, litigation and developing protocols to serve new anti-discrimination laws, risks jeopardising the services provided by Church agencies and volunteers. Imposing a duty not to discriminate would significantly increase compliance costs, be disruptive and a disincentive to engage volunteers. Therefore, the ACBC does not support the application of

56 *Submission 558*, pp 7-8.

57 *Submission 447*, pp 7-8.

58 *Submission 447*, pp 8-9. See also Presbyterian Church of Australia's General Assembly, *Submission 465*, p. 3; The Salvation Army Australia, *Submission 499*, p. 5.

anti-discrimination regulation to the acceptance of and treatment of volunteers in the same way as applied to employees.

A regulatory or financial burden placed on Churches or charities should not be so high as to hinder the recruitment and retention of volunteers, as the costs will fall on those people the organisations care for.⁵⁹

'Special measures' and 'reasonable adjustments' clauses

4.48 Some submitters commented on the provisions in the Draft Bill relating to 'special measures' and 'reasonable adjustments', which are aimed at promoting equality for protected groups to prevent discrimination.

'Special measures' provisions

4.49 Clause 21 provides that policies, programs or conduct which are designed to achieve substantive equality for people who have a particular protected attribute are designated 'special measures' and are not unlawful discrimination. Under clause 80, the AHRC may make 'special measures determinations' to state that a particular policy, program or conduct is a special measure. These determinations are legislative instruments and are in effect for such period as stated in the determination.

4.50 Several submitters commented on these provisions, expressing concern that there is no requirement in the Draft Bill for the AHRC to undertake consultations with the group that would be affected by a special measures determination during its development. In relation to special measures affecting Indigenous Australians, the National Congress of Australia's First Peoples commented:

[T]he Bill adopts a uniform definition for 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 [currently] used across Australia to enact laws for the 'advancement' of First Peoples without any yard stick for their effectiveness, duration or community support and acceptance...

[W]here laws and policies are being created that affect First Peoples, these peoples should be properly informed and there should be honest and open negotiation so that affected peoples are able to give their free and prior informed consent.⁶⁰

59 *Submission 360*, p. 3. See also: Anglicare Sydney, *Submission 329*, pp 4-5; HammondCare, *Submission 388*, p. 17.

60 *Submission 238*, p. 6. See also: Human Rights Law Centre, *Submission 402*, pp 21-22; National Aboriginal and Torres Strait Islander Legal Services, *Submission 255*, pp 11-12.

4.51 The Discrimination Law Experts Group agreed that there should be more extensive requirements for consultation regarding special measures determinations, in a process that 'must be transparent, and must guarantee that active and appropriate measures are taken to seek the views of persons likely to be affected'.⁶¹

4.52 While supportive of the inclusion of special measures provisions in the Draft Bill, the Law Council expressed concern that the current drafting constitutes a 'significant departure' from how the term 'special measures' is understood at international law.⁶² In particular, the Law Council advocated a form of drafting which would ensure that special measures are formulated:

- after appraisal of the need for the measure based on accurate data on the socio-economic and cultural status of the group; and
- through prior consultation with the affected group and with their active participation.⁶³

4.53 Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service expressed concern that, under the current drafting of the special measures provisions, a special measure exemption could be granted to allow an employer to pay workers with a disability lower wages than other workers. They argued that the Draft Bill should explicitly clarify that this cannot constitute a special measure.⁶⁴

'Reasonable adjustments' provisions

4.54 Several submitters commented on the way the 'reasonable adjustments' provisions, currently found in the Disability Discrimination Act in relation to the protected attribute of disability, have been included in the Draft Bill.

4.55 In the Disability Discrimination Act, the concept of 'reasonable adjustments' is incorporated into the definition of discrimination itself, providing that a person's conduct is discriminatory if they do not make reasonable adjustments to accommodate a person's disability. The Draft Bill retains the concept of 'reasonable adjustments' in relation to disability only, but rather than including it in the clauses defining discrimination, it is included in the 'justifiable conduct' exception in clause 23. Subclause 23(6) provides that, in relation to disability, conduct is not 'justifiable' if a reasonable adjustment could have been made but was not.

4.56 The Discrimination Law Experts Group argued that not including the reasonable adjustments concept in the definition of discrimination is a reduction of protection against disability discrimination, by making the reasonable adjustments

61 *Submission 207*, p. 33. The Discrimination Law Experts Group also made this argument in relation to Disability Standards, Compliance Codes and Temporary Exemptions.

62 *Submission 435*, p. 29.

63 *Submission 435*, p. 30.

64 *Submission 366*, p. 3.

obligation 'less explicit and thus weaker in effect'. In addition, the placement of this provision with the exceptions in the Draft Bill is problematic:

[It] arguably creates the misleading impression that reasonable adjustments are relevant only at the stage of defending a claim, rather than being an element that is essential to consider in determining whether discrimination occurred.⁶⁵

4.57 Disability Discrimination Legal Service and Villamanta Disability Rights Legal Service agreed that placing the reasonable adjustments provision in the definition of discrimination would strengthen the definition for people with a disability and would provide more clarity.⁶⁶ Conversely, National Disability Services expressed support for the way the 'reasonable adjustments' provisions have been included in the Draft Bill.⁶⁷

4.58 The Discrimination Law Experts Group also argued that the reasonable adjustments provisions should be extended to all protected attributes since there is an implicit obligation under the Sex Discrimination Act, the Age Discrimination Act and the Racial Discrimination Act to make reasonable adjustments in relation to other attributes:

[I]n the Bill the explicit obligation to provide reasonable adjustments operates only in respect of disability. This results in inconsistency across attributes, and may incorrectly suggest that adjustments are not required in respect of other attributes.⁶⁸

4.59 The Department did not explain why the reasonable adjustments provisions have not been included as part of clause 19, but did provide a rationale for not extending the provisions to all protected attributes:

The Government is not proposing to extend the duty to make reasonable adjustments to other attributes in the Bill due to the regulatory aims of the project, and a concern that extending the requirement to other attributes may diminish the prominence of the duty to make reasonable adjustments in relation to disability.

For attributes other than disability, a requirement to be flexible and consider alternative arrangements is a key component in the exception for justifiable conduct... In circumstances where an adjustment could readily be made to avoid discrimination, it would be difficult to establish that not modifying a policy or practice to adopt the adjustment is justifiable.⁶⁹

65 *Submission 207*, p. 19.

66 *Submission 366*, p. 3.

67 *Submission 323*, p. 2.

68 *Submission 207*, p. 19.

69 *Supplementary Submission 130*, p. 11.