CHAPTER 7

COMMITTEE VIEWS AND RECOMMENDATIONS

7.1 The goal of consolidating five Commonwealth anti-discrimination laws into a single Act is one which has been suggested for several years. The Senate Legal and Constitutional Affairs Committee recommended in its 2008 report into the *Sex Discrimination Act 1984* (Sex Discrimination Act) that public consultation should be undertaken on the issue of whether Australia's anti-discrimination laws should be consolidated.[1] The government announced in 2010 that it would proceed to consolidate these laws, as part of its Human Rights Framework.

7.2 The stated aim of this project – producing a clearer and simpler anti-discrimination law for consumers, employers and the general public – is a worthwhile one. Anti-discrimination law is a key mechanism for promoting equality and protecting vulnerable or marginalised groups in Australia, and the parliament must do its utmost to ensure that the law in this area is fair and balanced.

7.3 Consolidating five Acts into one is not a simple task, and the committee acknowledges the consultation process undertaken by the Attorney-General's Department (Department) during the process of developing the Draft Bill. Releasing the legislation as an Exposure Draft Bill has allowed the public further opportunity to comment on these proposed reforms before they are brought before the parliament in their final legislative form.

7.4 Over the course of the committee's inquiry, significant issues have been brought to light regarding the drafting of some sections of the Draft Bill. It is clear that substantial amendments are necessary if the consolidated legislation is to fulfil its stated intent of providing a clearer, simpler law. The committee takes very seriously its responsibility to ensure the best possible outcome for this proposed legislation.

7.5 In addition, the committee is of the view that some of the policy decisions made in the process of consolidating the Acts should be reconsidered. The committee notes the Department's commitment to closely consider the changes suggested by this committee in formulating the final version of the legislation. The committee looks forward to seeing its recommendations implemented when the legislation comes before the parliament in its final form.

7.6 This inquiry generated a high level of interest from submitters and witnesses, the media and the general public. The receipt of 3,464 submissions and form letters from individuals, despite the short timeframe set by the Senate for the inquiry, is an

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1 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.

indication of the strength of the views evoked by the proposals in the Draft Bill among certain sections of the Australian community.

7.7 The committee has carefully considered the key issues raised over the course of this inquiry. For some of the more contentious provisions in the Draft Bill, including the definition of unlawful discrimination, the committee has recommended amendments, as it considers there is a legitimate drafting or policy justification for change.

7.8 For other aspects of the Draft Bill which attracted criticism during the inquiry, including provisions relating to changes to court processes for discrimination cases, the committee has decided that there is not an appropriate justification for change to the provisions in the Draft Bill, and hence has not recommended amendments. In each case, the policy justification for the relevant proposal has been the primary factor considered by the committee.

7.9 The committee's specific comments and recommendations in relation to the Draft Bill are set out below.

Protected attributes

7.10 The committee received evidence regarding many of the protected attributes included in the Draft Bill. The committee has specific comments in relation to several of these, namely: sexual orientation, gender identity, political opinion, social origin, family responsibilities, domestic violence and criminal record.

Sexual orientation and gender identity

7.11 The committee welcomes the introduction of protections for individuals on the basis of sexual orientation and gender identity for the first time in Commonwealth anti-discrimination legislation. This is an historic reform that is long overdue, and will provide significant benefits to sex and gender diverse Australians.

7.12 In relation to the formulation of the definition of 'gender identity' in the Draft Bill, the committee considers that some improvements are necessary in order to provide comprehensive protection on the basis of this attribute. Many submitters and witnesses expressed concern that the current definition is too restrictive and does not go far enough to cover gender-related identity, appearance or mannerisms. The committee concurs that the definition of gender identity should be drafted so as to provide the maximum possible protection for gender diverse individuals.

7.13 The committee also considers that the 'genuine basis' qualification provided in the Draft Bill's definition of gender identity is unnecessary, and in no way enhances the effectiveness of the definition; instead, it has the potential to cause confusion about when an individual will be covered by this protected attribute.

7.14 The committee notes comments from the Department that the definition of gender identity in the Draft Bill reflects the most expansive standard of protection in the states and territories at the time of drafting, and that since that time a more expansive definition has been proposed in the Tasmanian Anti-Discrimination

Amendment Bill 2012.[2] The committee considers that the proposed Tasmanian definition provides broad coverage for the attribute of gender identity, and notes that there was widespread support among stakeholders to this inquiry for the adoption of this definition in the Draft Bill.

7.15 Accordingly, the committee is recommending that the definition of 'gender identity' in clause 6 of the Draft Bill be replaced with the definition in the proposed Tasmanian legislation.

Intersex status

7.16 The committee received considerable evidence regarding the coverage of intersex status in the Draft Bill. The committee recognises that intersex individuals are often the subject of discrimination in public life, and that as such there is a need for protection on the basis of intersex status in Commonwealth anti-discrimination law.

7.17 The committee agrees with the evidence presented by Organisation Intersex International Australia, and other submitters, that intersex status is a matter of biology rather than gender identity, and as such should not be covered within the definition of gender identity in the Draft Bill. Further, the committee considers that the current requirement in the Draft Bill that intersex individuals identify as either male or female is misguided, and is unhelpful for intersex individuals whose biological characteristics do not necessarily accord with a male or female identification.

7.18 The committee considers, therefore, that intersex status should be listed as a separate protected attribute under the Draft Bill. The committee notes comprehensive evidence from witnesses that the definition of 'intersex' found in the Tasmanian Anti-Discrimination Amendment Bill 2012 most accurately provides coverage for intersex individuals. The committee supports this definition as the preferred option for inclusion in the final form of the Commonwealth legislation.

7.19 As a concluding point, the committee is of the view that since intersex status is a condition related to the innate biological characteristics of an individual, it should not be an attribute to which any religious exceptions apply.

Recommendation 1

7.20 The committee recommends that the definition of 'gender identity' in clause 6 of the Draft Bill be amended to read:

> ***gender identity* means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and includes transsexualism and transgenderism.**

2 *Supplementary Submission 130*, p. 2.

Recommendation 2

7.21 The committee recommends that subclause 17(1) of the Draft Bill be amended to include 'intersex status' as a protected attribute. 'Intersex' should be defined in clause 6 of the Draft Bill as follows:

> ***intersex* means the status of having physical, hormonal or genetic features that are:**
>
> **(a) neither wholly female nor wholly male; or**
>
> **(b) a combination of female and male; or**
>
> **(c) neither female nor male.**

Political opinion

7.22 The committee does not consider that the Draft Bill requires amendments in regards to the definition of the protected attribute of 'political opinion'. The committee is satisfied that the holding of a 'political opinion' is already protected in the workplace by the *Fair Work Act 2009* (Fair Work Act) and various state and territory legislation. The term 'political opinion' is also undefined in the Fair Work Act, which will allow consistent jurisprudence to develop between the two regimes.

7.23 The committee notes that, since the reporting year 2006–07, the Australian Human Rights Commission (AHRC) has received only 15 complaints on the ground of 'political opinion' under the 'equal opportunity in employment' complaints scheme. Therefore, the committee is satisfied that the inclusion of 'political opinion' as a protected attribute will not lead to a surge of complaints in regards to discrimination on this ground. The committee takes the view that the inclusion of 'political opinion' as a protected attribute which takes its ordinary meaning will not place an onerous burden on duty holders or result in a significant increase in litigation.

Social origin

7.24 The committee is satisfied that reliance on the ordinary meaning of the term 'social origin' in the Draft Bill will not cause problems as an undefined term. The committee takes this view on the basis of the evidence provided to it, coupled with the fact that, in those jurisdictions where it is already unlawful to discriminate on the basis of 'social origin', the law is operating as intended.

7.25 The committee is satisfied that the inclusion of 'social origin' as a protected attribute which takes its ordinary meaning will not increase the regulatory burden for duty holders.

Family responsibilities

7.26 The committee does not consider that the Draft Bill requires amendment to extend the definition of 'family responsibilities'. The committee is satisfied that the protections provided for family responsibilities, including carers and kinship relationships in existing industrial laws, are sufficient.

Domestic and family violence

7.27 During the inquiry, the committee heard examples of situations in which discrimination has occurred on the basis of being a victim of domestic violence. As the law currently stands, there is no recourse available in these circumstances. The committee also heard that the key to enabling a victim of domestic violence to break free from the abusive situation is financial independence and security – which is primarily achieved through secure employment.

7.28 The committee acknowledges the advice of the Department that the regulatory impacts of introducing 'domestic violence' as a protected attribute are unknown. The committee takes the view however that the social cost of domestic violence on victims and families, especially children, is such that any additional regulatory impost is outweighed by the benefits of providing protection from discrimination and thereby enabling victims of domestic violence to achieve financial independence and secure a better future for themselves and their families.

7.29 The committee notes the Department's advice that there is no precedent for protecting victims of domestic violence from discrimination within the existing anti-discrimination Acts. The committee however considers that this is an area where the Commonwealth must lead the way, and is encouraged by the Australian Government's recent commitment to amend the Fair Work Act to provide more flexible working conditions for victims of domestic violence in places of employment. The committee considers that this action, together with a further amendment to the Draft Bill, will assist victims of domestic violence to increasingly participate in the workforce and broader community.

Recommendation 3

7.30 The committee recommends that subclause 17(1) of the Draft Bill be amended to include 'domestic violence' as a protected attribute, and that clause 6 of the Draft Bill be amended to include an appropriate definition of this attribute.

Irrelevant criminal record

7.31 Throughout the inquiry, the exclusion of 'criminal record' from the list of protected attributes in clause 17, together with the removal of the separate complaints scheme for 'equal opportunity in employment' matters, drew much attention. These changes remove recourse for persons who consider they have suffered discrimination in relation to work as a result of a criminal record.

7.32 The committee notes that the strongest concerns were raised by disability groups and community legal centres, both of whom represent some of the most marginalised and vulnerable people within society. The committee acknowledges the concerns of these stakeholders and agrees that discrimination in employment on the basis of a criminal record that is clearly irrelevant should not be tolerated.

7.33 In this context, the committee notes the Tasmanian *Anti-Discrimination Act 1998* which provides protection against discrimination on the basis of 'irrelevant criminal record'. The committee considers that the definition of 'irrelevant criminal record' set out in the Tasmanian Act is appropriate, and strongly supports that

approach to include protection against discrimination on the basis of a criminal record that pertains to arrest, interrogation or criminal proceedings where, for example:

- the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises;
- a person was found not guilty;
- charges have been dismissed; or
- a conviction has been quashed or set aside.

7.34 The committee considers that including 'irrelevant criminal record' as a protected attribute, particularly as a result of the removal of the 'equal opportunity in employment' complaints scheme, is an important step that must be taken to provide protection against discrimination on this basis.

Recommendation 4

7.35 The committee recommends that subclause 17(1) of the Draft Bill be amended to include 'irrelevant criminal record' as a protected attribute.

Recommendation 5

7.36 The committee recommends that a definition of 'irrelevant criminal record' be included in the Draft Bill and be modelled on that contained in the Tasmanian *Anti-Discrimination Act 1998*.

Definition of discrimination

7.37 The committee notes the significant interest generated by the definition of discrimination in clause 19, and that this provision has been the subject of extensive commentary in the media as well as in submissions and oral evidence to the inquiry. A large majority of the submissions and form letters received by the committee expressed views on the definition of discrimination adopted in the Draft Bill. Almost all of these submitters voiced strong concern that the inclusion of paragraph 19(2)(b), which states that discrimination can include 'conduct which offends, insults or intimidates' another person, would have a negative impact on freedom of expression in Australia.

7.38 In its evidence to the committee, the Department explained that paragraph 19(2)(b) is intended to be read alongside paragraph 19(2)(a), to clarify the types of conduct which have been found to constitute harassment in anti-discrimination case law.[3] The committee accepts that this is the intent of the provision, however the drafting of paragraphs 19(2)(a) and (b) does not convey this intent clearly. On a plain reading of these provisions, it is arguable that they could have the effect of making offensive conduct unlawful, contrary to the government's stated intention.

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3 *Supplementary Submission 130*, p. 6; Additional Information tabled by the Attorney-General's Department at public hearing on 4 February 2013, 'Options in response to concerns raised in respect of paragraph 19(2)(b)', p. 1.

7.39 For that reason, the committee considers that changes are necessary to this clause to preserve the intent of the drafters and avoid the unintended consequences foreseen as a result of the current drafting. The main options presented to the committee by the Department and other stakeholders were: removing paragraph 19(2)(b) from the Draft Bill; removing both paragraphs 19(2)(a) and (b) from the Draft Bill; or replacing the words 'offends, insults or intimidates' with stronger words such as 'denigrate', 'degrade' or 'humiliate'. The committee considers that each of these options would represent an improvement on the current wording.

7.40 Strengthening the wording with terms such as 'denigrate' and 'humiliate' would create a higher threshold test for harassment, and would avoid making unlawful conduct which merely offends. However, the committee considers salient the evidence from the Department that these alternate words would introduce new concepts in anti-discrimination law, and hence could create further uncertainty within the law and inadvertently expand the operation of the provision.[4] With this in mind, the committee is of the view that the preferable option is simply to remove paragraph 19(2)(b) from the Draft Bill in its entirety.

7.41 With paragraph 19(2)(b) removed, the committee considers that it is acceptable to retain paragraph 19(2)(a), in order to clarify that discriminatory treatment can include harassment. This is consistent with case law in which the courts have held that harassment of a person can constitute unlawful discrimination. The committee believes that stating this explicitly in legislation merely upholds what the courts have already found, rather than dramatically expanding the meaning of discrimination. The committee does not consider that further clarification of the scope of the term 'harassment' is necessary in the Draft Bill, noting the following comments by the Department:

> 'Harass' would have its ordinary dictionary meaning. The Oxford English Dictionary defines 'harass' as 'trouble by repeated attacks;…subject to constant molesting or persecution'...
>
> [T]he dictionary definition [of harassment] is one that would be reasonably clear, as most people would understand harassment as having this meaning. Further, it would be generally agreed that such behaviour is not acceptable and is already unlawful.[5]

7.42 As an additional point, the committee notes that removing paragraph 19(2)(b) from the Draft Bill will not affect protections against racial vilification which are provided for in clause 51. The committee strongly supports the provisions set out in clause 51 of the Draft Bill, which are based on the existing racial vilification provisions in section 18C of the *Racial Discrimination Act 1975*.

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

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

Recommendation 6

7.43 The committee recommends that paragraph 19(2)(b) be removed from the Draft Bill.

Areas of public life covered by the Draft Bill

7.44 The committee is satisfied with the approach taken in clause 22, which provides that discrimination is unlawful in connection with 'any area of public life' and sets out a non-exhaustive list of the areas of public life in which the legislation would apply. This approach is already taken in the *Racial Discrimination Act 1975*, and the committee considers that lifting coverage for the remaining attributes to this standard will not have an excessively expansionary effect.

7.45 In relation to the seven protected attributes covered only in work-related areas, the committee considers that this is an appropriate position for the Draft Bill to adopt. While some submitters presented reasonable arguments for extending coverage for these attributes to all areas of public life in the interests of simplicity and consistency across all protected attributes, these seven attributes are currently only covered in work-related areas, either through the AHRC's equal opportunity in employment complaints scheme or under the Sex Discrimination Act.

7.46 As such, the committee is of the view that it is reasonable to cover these seven attributes in work-related areas only, so as to avoid significantly expanding the scope of the Commonwealth anti-discrimination regime. The committee considers that, if the legislation is enacted, the operation of these provisions should be monitored by the Department with a view to ascertaining whether or not it would be prudent to achieve greater consistency across the attributes by extending protection to these seven attributes in all areas of public life.

Voluntary or unpaid work

7.47 Throughout the committee's inquiry, evidence was received suggesting that the inclusion of 'voluntary or unpaid' work in the definition of employment in clause 6 would have unintended administrative consequences for community and not-for-profit organisations, and may divert funds away from service provision.

7.48 Community and not-for-profit organisations clearly play an important role in society. The committee takes the view, however, that organisations utilising volunteer services, such as places of business more generally, have an obligation to provide a discrimination-free workplace. While the committee supports the government's approach to extend anti-discrimination protections to volunteers, the current wording in the legislation does not adequately reflect the important legal differences between employees and volunteers. An employer has different legal obligations for their employees than they do for their volunteers in relation to, for example, terms of remuneration, and leave and superannuation entitlements. Employers also generally exert different levels of direction, control and supervision over volunteers as opposed to their employees. The current form of the Draft Bill does not adequately reflect these important differences.

Recommendation 7

7.49 The committee recommends that 'voluntary or unpaid work' be specifically listed as an area of public life and be added to subclause 22(2) of the Draft Bill.

Recommendation 8

7.50 The committee recommends that the definition of 'employment' in clause 6 of the Draft Bill be amended to remove paragraph (c) relating to voluntary or unpaid work, and that a new definition of 'voluntary or unpaid work' be included in clause 6.

Recommendation 9

7.51 The committee recommends that, in defining 'voluntary or unpaid work', regard be had to the legal differences between employees and volunteers.

Exceptions

7.52 The committee received a large volume of evidence regarding the statutory exceptions to unlawful discrimination contained in the Draft Bill, and notes that some of these exceptions are among the most contentious aspects of this proposed legislation.

7.53 As a preliminary comment, the committee welcomes the guarantee that all the exceptions contained in the legislation will be reviewed, with that review required to start within three years of the legislation's commencement. As anti-discrimination law is designed to protect vulnerable groups within society, it is essential that any statutory exceptions are properly constructed and specifically targeted to provide the greatest possible protection against discrimination for marginalised groups and individuals. Therefore, the three-year review is an important mechanism to ensure that all exceptions in the legislation are necessary and operating in an appropriate manner.

General exception for 'justifiable conduct'

7.54 The committee considers that the approach of including a general exception for 'justifiable conduct' in the Draft Bill is a suitable one, and believes that replacing many of the existing exceptions in current legislation with this justifiable conduct exception will produce a simpler law than that found in the existing statutes.

7.55 The committee considers it important to ensure that the operation of the new justifiable conduct exception is monitored closely in the three-year review, as there may be potential to simplify the exceptions further by removing some of the specific exceptions if the operation of the legislation shows that they could be effectively covered by the justifiable conduct exception.

7.56 While supporting the general approach of including a justifiable conduct exception, the committee considers that the drafting of clause 23 could be improved. Submitters raised concerns that: the test for justifiable conduct in subclause 23(3) cannot apply to a person who unintentionally treats another person unfavourably; there is no guidance on how concepts such as 'legitimate' and 'proportionate' in subclause 23(3) should be assessed; and the use of a 'proportionality' test in this

context is inconsistent with other uses of such a test in international human rights law.[6]

7.57 The committee notes two main suggestions from submitters for improving the wording of clause 23, namely:

- replacing the term 'legitimate aim' in paragraph 23(3)(b) with a reference to an aim that 'is consistent with achieving the objects of the Act', to provide a clear link between the justifiable nature of the conduct and the human rights objectives of the Draft Bill;[7] and
- replacing subclause 23(3) with an exception based on the concept of 'reasonableness', to provide that conduct is justifiable 'if the conduct was reasonable in the circumstances of the particular case'.[8]

7.58 Accordingly, the committee is recommending that amendments be made to clarify the operation of this provision, but leaves it to the Department to consider which form of words should be adopted in the final version of the legislation.

Recommendation 10

7.59 The committee recommends that the Australian Government develop amendments to clause 23 of the Draft Bill to address concerns raised in submissions to the committee's inquiry. In particular, consideration should be given to:

- **replacing the words 'a legitimate aim' in paragraph 23(3)(b) with the words 'an aim that is consistent with achieving the objects of the Act'; or**
- **replacing subclause 23(3) with a test based on the concept of 'reasonableness'.**

Exception for 'inherent requirements of work'

7.60 The committee notes concerns from stakeholders that the exception for 'inherent requirements of work' is overly broad and could reduce discrimination protections. The committee also notes the rationale provided by the Department for the wording of this provision, including that existing jurisprudence on the meaning of 'inherent requirements' clarifies that this term is 'an objective element that is not simply a matter of employer discretion'.[9]

7.61 The committee also notes that several stakeholders argued that the 'inherent requirements of work' exception is unnecessary, as it would already be covered under

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6 See Ms Kate Eastman SC, *Submission 452*, pp 6-7; Australian Council of Human Rights Agencies, *Submission 358*, pp 12-13.

7 See Discrimination Law Experts Group, *Submission 207*, pp 24-25; Human Rights Law Centre, *Submission 402*, p. 45.

8 See Law Council of Australia, *Submission 435*, p. 36; Ms Kate Eastman SC, *Submission 452*, pp 7-8.

9 *Supplementary Submission 130*, p. 10.

the new exception for justifiable conduct in the legislation. The committee considers that the issue of whether the inherent requirements of work exception could be removed in deference to the justifiable conduct exception should be thoroughly considered in the three-year review of the exceptions in the Draft Bill.

Exceptions for religious organisations

7.62 The committee received much commentary on the exceptions in clauses 32 and 33 of the Draft Bill relating to religious organisations. Many stakeholders expressed the view that religious freedoms have not been adequately protected, and that the exceptions in clauses 32 and 33 are inadequate. Other stakeholders expressed the view that the exceptions for religious organisations undermine the very principles of non-discrimination the legislation is designed to protect, and argued that these exceptions should be tightened or removed.

7.63 At the outset, the committee acknowledges the strongly held views about the role of religious organisations in the community, and recognises the significant contribution of religious service providers to Australian society in areas such as education, health services and aged care.

7.64 The committee agrees that religious freedom is a fundamental human right, as acknowledged in the International Covenant on Civil and Political Rights (ICCPR) and other international treaties, and that this right should be acknowledged in any discussion of religious exceptions to anti-discrimination laws. The committee notes that many religious organisations which provided input to the inquiry argued that the right to religious freedom has not been properly recognised in the Draft Bill, and proposed amendments to this effect.[10]

7.65 The committee also acknowledges that a tension can sometimes exist between the competing right to freedom of religious expression and the right to non-discrimination. In the committee's view, discrimination on religious grounds is justifiable if it is reasonable and proportionate in all the circumstances. This does not mean, however, that discriminatory conduct by religious organisations should always be lawful. The law should not provide broad statutory exceptions allowing disproportionate or unreasonable discrimination on religious grounds. The committee considers that the potential impact of any discriminatory conduct on the individual concerned is a crucial issue when determining the reasonableness of such action.

7.66 In this regard, the committee notes comments from the Parliamentary Joint Committee on Human Rights that, without further explanation from the government about how the broad religious exceptions in the Draft Bill are consistent with other human rights, 'these provisions are likely to be incompatible with the right to non-discrimination'.[11]

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10 See, for example, Australian Association of Christian Schools, *Submission 359*, p. 14; Australian Catholic Bishops Conference, *Submission 360*, pp 2-3; Ambrose Centre for Religious Liberty, *Submission 409*, p. 5; Australian Christian Lobby, *Submission 419*, pp 4-5; Freedom 4 Faith, *Submission 447*, pp 20-23.

11 *Submission 595*, p. 5.

7.67 Turning to more specific issues relating to the religious exceptions, the committee has comments on several matters.

Exceptions for religious organisations in relation to employment

7.68 The committee considers that religious bodies and institutions should maintain the right to employ staff in accordance with their founding ethos and values, and notes evidence from submitters and witnesses that staff members' faith can be relevant to their appropriateness for employment even if they are not being employed in a specifically religious role.[12] The committee believes that religious organisations and educational institutions should retain this right, subject to the notification requirement discussed in more detail below.

Limited exception for Commonwealth-funded aged care

7.69 The committee agrees with the policy approach taken by the government in deciding to limit the religious exception for Commonwealth-funded aged care. The committee heard evidence, in particular, on the negative effects of discrimination against older LGBTI Australians in aged care settings,[13] and considers that it is fundamentally important that all older Australians maintain the right to access aged care services on an equal basis. The committee notes that in some areas of Australia there is very limited choice of aged care service providers, and hence does not agree with the argument that individuals will always be able to choose a non-religious service provider should they so wish.

Service provision delivered by religious organisations

7.70 More generally, while the committee is of the view that religious organisations should retain their statutory exceptions in relation to employment, it can see no reason why individuals should automatically lose their right to non-discrimination in the provision of services because a particular service is being provided by a religious organisation. The committee is of the view that no organisation should enjoy a blanket exception from anti-discrimination law when they are involved in service delivery to the general community. It is vitally important that the rights of minority groups are upheld when they are receiving help from service providers, particularly in cases where the service provision is Commonwealth-funded.

7.71 The committee notes that, in other jurisdictions in Australia and internationally, much tighter exceptions apply in relation to service delivery by religious organisations than proposed in the current wording of the Draft Bill. The committee heard evidence that, under the Tasmanian Anti-Discrimination Act, there are no statutory exceptions for religious organisations from anti-discrimination requirements in relation to the delivery of services to the public. The Tasmanian Anti-Discrimination Commissioner told the committee that these provisions have

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12 See, for example, Freedom 4 Faith, *Submission 447*, p. 23; Mr Robert Johnston, Australian Association of Christian Schools, *Committee Hansard*, 23 January 2013, p. 64.

13 See, for example, Associate Professor Mark Hughes, *Committee Hansard*, 24 January 2013, p. 40.

operated in Tasmania for over a decade without serious concerns being raised about the erosion of freedom of religion.[14]

7.72 Accordingly, the committee is recommending that the Draft Bill be amended in order to remove exceptions that allow religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful. The committee strongly supports the Tasmanian model for religious exceptions to anti-discrimination law in this regard, and considers that this model should be implemented nationally through the consolidated Commonwealth Act. With regards to the specific amendments that would be required to implement this recommendation, the committee leaves it to the Department to develop appropriate drafting for clause 33 in order to meet this policy goal, undertaking further consultation if necessary.

7.73 In making this recommendation, the committee notes that some of the religious organisations who presented evidence to the inquiry informed the committee that they provide services on a non-discriminatory basis.[15] Many other stakeholders made compelling arguments for the limitation or removal of religious exceptions in relation to service delivery, on the basis that all Australians should be able to access services equitably.[16]

7.74 In relation to government tender requirements for the provision of a service, the committee considers that the Australian Government should have the option of specifying in any public tender process that the service must be provided on a non-discriminatory basis, if that is appropriate in the particular case. The committee has heard evidence that amendments to the Draft Bill may be necessary to clarify that the government can make such specifications in public tender processes.[17] The committee considers that the Department should investigate if this is the case, and, if so, the Draft Bill should be amended to clarify that exceptions in the legislation do not limit the government's ability to require that a service contracted by the Commonwealth be provided on a non-discriminatory basis.

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14 Ms Robin Banks, Anti-Discrimination Commissioner of Tasmania, *Committee Hansard*, 23 January 2013, p. 47.

15 The Salvation Army Australia, *Submission 499*, pp 3 and 7; Mr David Martin, HammondCare, *Committee Hansard*, 24 January 2013, pp 34-35. These these stakeholders supported the retention of religious exceptions in anti-discrimination legislation. See also:
The Reverend Peter Sandeman, Anglicare SA, 'If we believe all people are equal we must live this', article tabled by Liberty Victoria at public hearing on 23 January 2013.

16 Discrimination Law Experts Group, *Submission 207*, pp 28-29; National LGBTI Health Alliance, *Submission 320*, p. 2; The Equal Rights Trust, *Submission 367*, pp 30-31; Human Rights Law Centre, *Submission 402*, pp 48-49; Human Rights Council of Australia, *Submission 475*, p. 13; Victorian Gay and Lesbian Rights Lobby, *Submission 534*, pp 27 and 31-36.

17 Mr Greg Manning and Mr Paul Pfitzner, Attorney-General's Department, *Committee Hansard*, 4 February 2013, p. 17.

7.75 As a final point, the committee notes that religious freedom is protected under section 116 of the Australian Constitution, as well as under the ICCPR and other international treaties to which Australia is a signatory. In that context, the committee acknowledges comments from stakeholders that there may be a strong argument that reasonable and proportionate actions taken in line with religious freedoms are likely to be considered 'justifiable conduct' under the general exception in clause 23 of the Draft Bill.[18]

Notification requirements

7.76 A significant number of submitters and witnesses argued that, in the interests of transparency, religious organisations intending to rely on an exception in clause 33 should be required to notify prospective employees, students or other service users of that intention. The committee heard that a similar requirement exists with regards to religious educational institutions in South Australia. Subsection 34(3) of the *Equal Opportunity Act 1984* (SA) provides that these educational institutions must have a written policy regarding any discriminatory practices, and must give a copy of this policy to prospective employees, as well as to any students, parents or members of the public who request one.

7.77 The committee is of the view that there is considerable merit in this type of notification requirement for religious organisations intending to rely on an exception in clause 33. Such a measure would promote transparency and alert individuals ahead of time as to the practices of a particular organisation.

7.78 The committee notes evidence from the Australian Catholic Bishops Conference that Catholic health and aged care services in Australia already have a publicly available ethical standards document.[19] A representative from the Australian Association of Christian Schools also told the committee that, if religious freedoms were more adequately protected, it would be quite reasonable for schools to declare the basis on which they make decisions in such matters.[20]

7.79 The committee does not consider that such a requirement would impose an undue administrative burden on organisations, and believes that the public benefit in having such matters clearly stated on the public record by service providers justifies its inclusion in the Draft Bill.

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18 See, for example, Ms Lucy Adams, Public Interest Law Clearing House Homeless Persons' Legal Clinic, *Committee Hansard*, 23 January 2013, p. 60; Public Interest Advocacy Centre, *Submission 421*, p. 30.

19 The Reverend Brian Lucas, Australian Catholic Bishops Conference, *Committee Hansard*, 24 January 2013, p. 27.

20 Mr Robert Johnston, Australian Association of Christian Schools, *Committee Hansard*, 23 January 2013, p. 63.

Recommendation 11

7.80 The committee recommends that the Draft Bill be amended to remove exceptions allowing religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful. The committee considers that the Australian Government should develop specific amendments to implement this recommendation, using the approach taken in the Tasmanian *Anti-Discrimination Act 1998* as a model.

Recommendation 12

7.81 The committee recommends that clause 33 of the Draft Bill be amended to require that any organisation providing services to the public, and which intends to rely on the exceptions in that clause, must:

- **make publicly available a document outlining their intention to utilise the exceptions in clause 33;**
- **provide a copy of that document to any prospective employees; and**
- **provide access to that document, free of charge, to any other users of their service or member of the public who requests it.**

Complaints and court processes

7.82 The committee is of the view that the changes proposed in Chapter 4 of the Draft Bill which seek to improve access to justice will strike the right balance in enabling people with complaints to pursue claims of discrimination whilst minimising unmeritorious complaints and their costs to the broader community.

7.83 The committee considers that removing the separate complaints scheme for 'equal opportunity in employment' matters, and ensuring that those matters are provided for through their inclusion as protected attributes, will clarify the law and result in efficiencies.

Shifting burden of proof

7.84 The committee recognises that there has been considerable debate concerning the proposed shifting of the burden of proof in clause 124 of the Draft Bill, but considers that much of the public debate surrounding this provision has been misinformed. The Draft Bill only imposes a civil liability – not a criminal liability – so the suggestion that the Draft Bill removes the presumption of innocence is inaccurate and misleading.

7.85 The committee takes the view that the shifting burden of proof proposed in clause 124 is appropriate and will in fact reduce costs for respondents as they will only be required to produce evidence explaining that their conduct was justifiable after an applicant has established, through evidence, that unlawful treatment actually occurred. The committee considers that imposing this requirement on applicants will act as a deterrent against vexatious litigation.

7.86 Further, the committee notes the comments from the Parliamentary Joint Committee on Human Rights that 'it is a well-established practice in international and comparative human rights jurisprudence for the burden of proof to shift in discrimination cases once a prima facie case has been made'.[21]

Costs

7.87 The committee agrees with the approach set out in clause 133 of the Draft Bill, which provides that each party is to bear its own costs, but includes discretion in subclause 133(2) for the court to make orders as to costs. The committee notes that a number of stakeholders voiced support for this approach on the basis that it will markedly improve access to justice, particularly for vulnerable groups.[22]

Closing complaints

7.88 The committee supports the approach taken in clause 117 that streamlines and clarifies the AHRC's ability to close complaints, and provides an obligation to give notice of closure and the reasons for that closure. The committee commends the inclusion of paragraph 117(2)(c) that explicitly provides the AHRC with the authority to close complaints that it determines are frivolous, vexatious, unmeritorious or lacking in substance.

7.89 The committee acknowledges that it received evidence from submitters suggesting that, in those instances where leave is first required before a closed complaint can proceed to the Federal Court or the Federal Magistrates Court, provision should be made for representatives to initiate those applications on behalf of an applicant. The committee does not agree that such a provision is necessary, since clause 89 of the Draft Bill provides for representative actions in the first instance, and clause 129 provides a right of representation when applying to the Federal Court or Federal Magistrates Court in relation to unlawful conduct.

Other issues

7.90 Due to the complexity of the issues raised during the committee's inquiry, and the short timeframe in which it has been undertaken, the committee has necessarily focussed its attention on a limited number of key issues. In making its preceding comments and recommendations, the committee acknowledges that it has not been able to address all of the recommendations put forward in submissions and evidence to the inquiry.

7.91 Some of the issues raised by stakeholders – but in relation to which the committee has not been in a position to form extensive views – include:

- 'special measures' provisions in clause 21;

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21 *Submission 595*, p. 6.

22 See, for example, National Association of Community Legal Centres and Kingsford Legal Centre, *Submission 334*, p. 15; Australian Lawyers for Human Rights, *Submission 406*, pp 2-3; Mr Edward Santow, Public Interest Advocacy Centre, *Committee Hansard*, 24 January 2013, p. 10.

- 'reasonable adjustments' provision in subclause 23(6);
- the interaction between the proposed operation of the Draft Bill, and other state and territory laws provided for in clause 14, as well as the operation of the exception in clause 30 for conduct in accordance with prescribed laws; and
- the exception for insurance, superannuation and credit in clause 39.

7.92 In the circumstances, the committee considers that the Department is best placed to actively and thoroughly consider all evidence presented to this inquiry during the formulation of the final version of the legislation.

7.93 Further, and due to significant time limitations, the committee has not been in a position to closely consider certain recommendations proposed by submitters which relate to specific technical aspects of the Draft Bill. The committee therefore expects that, in addition to considering the recommendations set out in this report, the Department will analyse and address such suggestions prior to introduction into the parliament of the legislation in its final form.

7.94 In particular, the committee considers that recommendations that relate to improving the technical drafting of the legislation made by submitters such as the Australian Human Rights Commission (Submission 9), the Discrimination Law Experts Group (Submission 207), the Law Council of Australia (Submission 435), and the Parliamentary Joint Committee on Human Rights (Submission 595) should be closely examined by the Department.

Senator Trish Crossin

Chair