Senate Standing Committee on Legal and Constitutional Affairs inquiry into the exposure draft of the Human Rights and Anti-Discrimination Bill 2012

ATTORNEY-GENERAL'S DEPARTMENT SUBMISSION

The Attorney-General's Department is pleased to provide this further submission to the Senate Standing Committee on Legal and Constitutional Affairs in relation to its inquiry into the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (the Bill).

At the outset, the Department reiterates that the Government's main objective of the Bill is to simplify and consolidate five laws into one. Other than specific changes outlined in the Explanatory Notes accompanying the Bill, the Government's intention is that the Bill reflects current law.

This submission seeks to address key issues raised by submissions made to the Committee (as published on the Committee's website at the time of making this submission). The submission should be viewed as supplementary to the Explanatory Notes accompanying the Bill, which set out the Government's policy basis and outline of key clauses in the Bill. In relation to issues raised in other submissions, the Department can provide additional explanation of the Government's policy intention.

The submission is intended to provide further information to the Committee explaining the policy rationale behind certain aspects of the Bill. As the Government has made clear, it will closely consider any recommendations of this inquiry that identify that the drafting of the Bill goes beyond the Government's policy intentions, prior to introducing the Bill into Parliament.

The Department's submission broadly follows the outline of the Bill, for ease of reference.

1. PROTECTED ATTRIBUTES

In relation to protected attributes, the Bill's most significant changes from existing Commonwealth anti-discrimination law are:

- new protections against sexual orientation and gender identity discrimination, and extension of protections against relationship discrimination to same-sex couples in any area of public life (clause 17)

- protections for a number of other attributes in the area of work only, to harmonise with protections in the *Fair Work Act 2009* (Cth) and State and Territory anti-discrimination laws (subclause 22(3)), and

- recognition of discrimination on the basis of a combination of attributes (clause 19).

Gender identity

A number of submissions recommend changes to the definition of 'gender identity' and the addition of 'intersex' as a separate protected attribute.

'Gender identity' is defined in clause 6 of the Bill to cover people who are born as one sex and identify as another sex, or who are born intersex and identify as either male or female. This definition reflects the most expansive standard of protection in the States and Territories at the time the Bill was settled. Since that time, the Government has become aware of the proposed definitions for 'gender identity' and 'intersex' in the Tasmanian Anti-Discrimination Amendment Bill 2012.

Expanding the definition in the Bill beyond existing standards in State and Territory anti-discrimination law to include 'gender expression or presentation' and 'intersex' may raise regulatory issues, which the Government would need to consider further.

A number of submissions raise concerns about the use of the phrase 'on a genuine basis' as part of the proposed definition of 'gender identity'. This wording is not a new concept to anti-discrimination law and reflects the definition of gender identity currently used in Victorian and ACT anti-discrimination laws. The wording is not intended to set a particular medical or otherwise high threshold that must be met, but merely requires genuine identification by the person. That is, the definition is intended to cover any person who identifies as a particular gender identity on a day-to-day basis.

Additional protected attributes introduced from the equal opportunity in employment complaints scheme

The Department's previous submission (No 130) provides further explanation of the policy basis for removing the equal opportunity in employment regime and the introduction of industrial history, political opinion, social origin, religion, nationality or citizenship and medical history as protected attributes in the Bill. Discrimination on the basis of these attributes is unlawful in relation to work and work-related matters only.

A number of submissions raise concerns regarding these new attributes, in particular the overlap with the Fair Work Act and State and Territory laws, and the definitions of the attributes.

As noted for each protected attribute below, these attributes are generally protected by existing anti-discrimination obligations, including under the Fair Work Act, State and Territory law, or both. Inclusion of these grounds in the Bill should not increase the regulatory burden for duty holders because in most cases it is already unlawful to discriminate on these bases.

Clause 90 of the Bill also contains a prohibition on 'double-dipping' between different complaint regimes. The clause is intended to make it clear that a person may not make a complaint to the Australian Human Rights Commission ('the Commission') in relation to particular conduct if another complaint has already been made under Part 3-1 of the Fair Work Act or another State or Territory anti-discrimination law, unless it has failed for want of jurisdiction. This reflects barriers on double-dipping in the existing laws.

Industrial history

Section 346 of the Fair Work Act prohibits adverse action against a person 'who engages in industrial activity'. Most State and Territory anti-discrimination laws also prohibit discrimination on the ground of trade union activity or industrial activity. Accordingly, the inclusion in the Bill of 'industrial history' does not prohibit conduct which is not currently unlawful.

The definition of 'industrial history' in clause 6 of the Bill is based on the definition of 'engaging in industrial activity' in paragraph 347(b) of the Fair Work Act. It is not intended that 'industrial history' be limited to a person's industrial activities in the past. The definition of 'industrial history' in clause 6 is focused on a range of activities, expressed in the present tense. In addition, paragraphs 20(4)(b) and (c) provide that having an attribute includes having had an attribute in the past, or the possibility of having it in the future. Read together with the definition of 'industrial history', the Bill would protect discrimination based on past, present and possible future industrial activities.

The term 'industrial history' has been used because the focus of the drafting of the Bill is on attributes of a person, rather than activities undertaken by them. It also ensures coverage for a person who is or has been a member of a trade union, as well as a person who is or has been a member of an employer or other kind of business association.

In 2011–12 and 2010–11, the Commission received 9 complaints and 12 complaints respectively on the basis of trade union activity.

Political opinion

Political opinion is also covered by the Fair Work Act and most of the State and Territory jurisdictions (variously described as political 'affiliation', 'activity', 'belief' or 'conviction'). Further definition of the term is not considered necessary. The term political opinion is also undefined in the Fair Work Act, enabling consistent jurisprudence to develop between the two regimes.

Since 2006–07, the Commission has received 15 complaints on the ground of political opinion.

Religion

Religion is also covered by the Fair Work Act and by most State and Territory anti-discrimination laws. As with political opinion, it is also undefined in the Fair Work Act, enabling consistent jurisprudence to develop between the two regimes.

In the last three years, the Commission has received 53 complaints on the ground of religion.

Social origin

Social origin is an attribute protected by the Fair Work Act, but not by the State and Territory anti-discrimination regimes. Social origin is undefined in both the Fair Work Act and the Bill

to enable consistent jurisprudence to develop. The Government is unaware of any issues that have arisen to date within the Fair Work Act context by having this as an undefined term.

Since 2006–07, the Commission has received two complaints on the ground of social origin.

Medical history

Medical record or history is not covered by the Fair Work Act, but is covered in the Tasmanian and Northern Territory anti-discrimination laws, where the term used is 'irrelevant medical record'.

As with industrial history, the Bill uses the term 'medical history' to fit in with the drafting style of the Bill which relies throughout on a person 'having' a protected attribute.

The Regulation Impact Statement notes that '[p]rohibiting discrimination on the basis of medical record should not lead to any increase in complaints as generally this will fall into the category of discrimination on the ground of disability, apart from minor issues such as medical records relating to relationship counselling.'

In the last three years, the Commission has received one complaint on the ground of medical record.

Nationality or citizenship

Nationality or citizenship is not covered by the Fair Work Act but it is covered by all State and Territory anti-discrimination Acts.

The label of 'nationality or citizenship' is used to more accurately describe the attribute. Australian courts have distinguished 'national origin' from nationality, citizenship and country of residence.[1] 'National origin' is seen as an indicator of race and is expressly covered by the *Racial Discrimination Act 1975* (Cth) ('RDA') while, on the other hand, nationality or citizenship can be a transient legal status.

Since 2006–07, the Commission has received one complaint on the ground of nationality.

Attributes not included in the Bill

A number of submissions have called for the introduction of additional protected attributes, particularly 'homelessness or housing status', 'domestic or family violence', 'carer responsibilities' and 'irrelevant criminal record'.

Save for the Government's commitment to introduce protections for sexual orientation and gender identity, it is not the Government's intention to make significant changes to what is unlawful under existing laws and what is not. Rather, the key aim of the Bill is to improve regulation by making a clearer and simpler law.

[1] See *Australian Medical Council v Wilson* (1996) 68 FCR 46; *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202; *Kienle & Ors v Commonwealth of Australia* [2011] FMCA 210.

Housing status

While the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper (September 2011) did not specifically raise 'housing status', a number of submissions on the Discussion Paper called for 'housing status' to be included as a protected attribute. Careful consideration was given to the possible inclusion of 'housing status' as a protected attribute, however, anti-discrimination law was not considered the most suitable mechanism to deal with the complex issue of homelessness. Where discrimination may arise in the provision of goods and services, current consumer protection arrangements in those areas are an existing means of addressing this issue.

Domestic violence

There is no specific protection of domestic and family violence as a ground of discrimination under Commonwealth or State or Territory anti-discrimination laws, although certain impacts of this form of violence may be currently covered. A range of views both for and against including this ground of discrimination were received during consultations on the Discussion Paper. Following detailed consideration of these views, domestic and family violence was not included as a protected attribute in the Bill.

The Government heard anecdotal evidence of victims of domestic or family violence not being afforded leave or flexible working arrangements. However, the Government was also told of a range of actions being taken by employers to address this issue. Again, anti-discrimination law may not be the best mechanism to address challenges faced by victims of domestic or family violence. Also, introducing an additional regulatory burden on employers potentially risks undermining positive action currently being undertaken.

Carer responsibilities

As noted above, apart from the Government's commitment to introduce sexual orientation and gender identity as protected attributes, the Bill is not expansionary in nature. The definition of 'family responsibilities' was therefore not expanded to include caring responsibilities more broadly due to the potential regulatory impact.

Irrelevant criminal record

As noted in the Department's first submission, 'irrelevant criminal record' is not included as a protected attribute in the Bill as it may have a significant regulatory impact. It is not currently covered by the majority of the State and Territory anti-discrimination laws or the Fair Work Act. There is also uncertainty as to when a criminal record is relevant or irrelevant in employment (for example, in submissions on the Discussion Paper, the business sector raised concerns about the ability to use criminal record to establish 'general character'). It is therefore difficult to assess what regulatory impact would result from including irrelevant criminal record as a protected attribute. The Regulation Impact Statement notes that

> the costs to business and other duty-holders of implementing the introduction of criminal record into the unlawful discrimination regime would likely outweigh the benefits. There

> may be more appropriate models for dealing with this important issue which will not impose significant costs (such as existing privacy and spent convictions schemes).[2]

Accordingly, 'irrelevant criminal record' has not been included in the Bill. Maintaining the equal opportunity in employment complaints scheme for criminal record only would not be consistent with the regulatory aims of the Bill.

Visa status

A number of submissions query whether the Bill prohibited discrimination on the basis of 'visa status' as part of the protected attributes 'immigrant status' or 'nationality or citizenship'.

'Immigrant status' is included in the Bill as a protected attribute to reflect the current prohibition on discrimination on this basis in section 5 of the RDA. It prohibits treating a person who is an Australian citizen by birth differently from a naturalised citizen (that is, an Australian citizen who was not born in Australia), solely on that basis.

'Visa status' is not a protected attribute under the Bill, consistent with existing protections in the RDA. That is, 'immigrant status' is not intended to extend to prohibit discrimination between Australian citizens or permanent residents and temporary visa holders. 'Nationality or citizenship' is intended to cover situations where an employer discriminates against a person simply because he or she is a citizen of a particular country. It should not prohibit basing an employment decision on whether a person has a right to remain in Australia permanently or only temporarily, provided that distinctions are not made between citizens or nationals of different countries with the same visa status.

2. MEANING OF DISCRIMINATION

Definition of discrimination—unfavourable treatment

There has been extensive commentary about the wording of paragraph 19(2)(b) of the Bill and the arguments that it represents a 'dramatic expansion' such that any conduct that a person finds offensive will be unlawful. It is not the Government's intention to broaden the prohibition against racial vilification to other attributes.

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.[3] 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.

[2] Consolidation of Commonwealth anti-discrimination laws Regulation Impact Statement, p 78.
[3] For example, *Qantas Airways Ltd v Gama* [2008] FCAFC 69 held that racists remarks can be sufficient to amount to direct discrimination under section 9 of the RDA.

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

Special measures

The existing provisions for 'special measures' are complex and differ across the existing anti-discrimination Acts. Clause 21 of the Bill contains a single, simplified special measures test which applies across all attributes. It is intended to have the same effect as the existing, differently worded, tests. A number of submissions, while welcoming the inclusion of a special measures test, raise concerns about its formulation.

A number of submissions recommend that the special measures test include the additional criteria referred to by the Committee on the Elimination of Racial Discrimination in its General Recommendation 32 on special measures. For example, the Committee suggests that a special measure should be based on accurate data, that affected groups should be afforded prior consultation and the measure should be proportionate. The submissions claim that these criteria are requirements under international law. The suggested additional criteria do not form part of the test for special measures under international law. The views of the Committee are generally treated as a source of guidance, however they are not binding and do not, in and of themselves, impose obligations under international law.

Submissions also raise concerns about the use of a 'reasonable person test', claiming that it is not founded in international law. Further, there is no indication of the criteria or standards by which such an assessment would be made. Although the 'reasonable person test' is not explicitly referred to in international human rights treaties, in the Government's view, it is consistent with the test for special measures under international law. In addition, the inclusion of the reasonable person test (in addition to the good faith requirement) is likely to provide further protection to affected groups, as it imposes an objective element to the test for necessity.

A number of submissions also raise concerns about the requirement that the special measure have the 'sole or dominant purpose' of securing substantive equality. They note that this is wider than the test under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which refers to 'sole purpose' only, but narrower than the test under the *Sex Discrimination Act 1984* (Cth) ('SDA') which allows for a sole purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.

The international treaties contain different standards in this regard. For example, while CERD refers to a measure having the 'sole purpose of securing adequate advancement', the Convention on the Elimination of All Forms of Discrimination Against Women refers to measures 'aimed at accelerating de facto equality'. In order to ensure no diminution of protection for race under domestic law, the 'dominant purpose' test was adopted for all

attributes. Any conduct that currently may be a special measure under a broader test, but not meet the 'dominant purpose' test, would likely still fall within the exception for justifiable conduct.

3. WHEN DISCRIMINATION IS UNLAWFUL

A number of submissions raise concerns about extending the coverage of Commonwealth anti-discrimination law to 'any area of public life'.

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 RDA. The specific areas of public life set out in clause 22(2) are consistent with the areas regulated by existing Commonwealth anti-discrimination law and are provided for additional guidance.

Attributes protected only in connection with work and work-related areas

A number of submissions recommend that discrimination on the basis of all protected attributes in the Bill should be unlawful in connection with any area of public life.

There are a number of protected attributes where discrimination is only unlawful if it is connected with work and work-related areas (see clause 22(3)). These attributes are 'family responsibilities' and the six attributes from the equal opportunity in employment complaints regime (industrial history, medical history, nationality or citizenship, political opinion, religion and social origin).

'Family responsibilities' is limited to work and work-related areas consistent with the current scope of the prohibition of family responsibilities discrimination in the SDA. Industrial history, medical history, nationality or citizenship, political opinion, religion and social origin were only covered in relation to work and work-related areas under the separate equal opportunity in employment complaints regime. They have similarly been limited to work and work-related areas in the exposure draft.

As noted above, a key aim of the project is to improve regulation by making the law simpler through the consolidation of existing Commonwealth anti-discrimination law. Accordingly these attributes are limited to work and work-related areas to maintain the status quo, minimising the regulatory impact. The potential regulatory impact of expanding the coverage for any of these protected attributes to any area of public is unknown.

4. EXCEPTIONS TO UNLAWFUL DISCRIMINATION

Exception for justifiable conduct

A number of submissions raise concerns about the drafting of the new general exception for 'justifiable conduct' and how it would operate in practice.

The current Commonwealth anti-discrimination laws permit discriminatory conduct where it is justifiable through a range of specific exceptions and exemptions. These exceptions and

exemptions recognise that there are circumstances where conduct based on a person's attributes may be justifiable and distinctions made for this reason might be appropriate.

Consistent with the aim to produce a clearer and simpler law, the Bill simplifies this approach by providing a general exception for justifiable conduct in clause 23. This general limitations clause replaces many of the specific exceptions in the current Acts, and is intended to allow for a more flexible, case-specific approach that assists people and organisations in determining whether a practice or action was the most appropriate method of achieving an objective.

Clause 23 is intended to align with the international human rights law concept of 'legitimate differential treatment'. Although a new concept to Commonwealth anti-discrimination law, it requires similar analysis to the defence of reasonableness in existing indirect discrimination provisions in the anti-discrimination Acts, and reflects the policy rationale underpinning existing exceptions and exemptions.

The exception provides that it is not unlawful to discriminate against another person if that conduct is justifiable. Conduct is justifiable if all of the following elements are satisfied:

- the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim
- that aim is a legitimate aim
- the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim, and
- the conduct is a proportionate means of achieving that aim.

In determining whether each of these elements is satisfied, the following matters *must* all be taken into account:

- the objects of the Bill
- the nature and extent of the discriminatory effect of the conduct
- whether the first person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect, and
- the cost and feasibility of engaging in other conduct.

Some existing exceptions will be maintained to provide greater certainty and guidance in relation to specific issues. All exceptions will be the subject of a review after three years to enable consideration of whether these specific exceptions are still necessary, taking into account the operation of this exception for justifiable conduct.

Inherent requirements

There are existing 'inherent requirements' exceptions in the *Age Discrimination Act 2004* (Cth) ('ADA'), *Disability Discrimination Act 1992* (Cth) ('DDA') and for all attributes covered by the Fair Work Act. The SDA contains an exception for genuine occupational requirements in relation to sex.

Some submissions raise concerns about the potential scope and application of the inherent requirements exception in clause 24 of the Bill.

Clause 24 is modelled on the exception in the DDA and provides that it is not unlawful to discriminate against another person in work if the other person cannot meet the inherent requirements of a job.[4]

The key changes made by the Bill are that the inherent requirements exception will now apply to all protected attributes, and that a consistent test is used across all attributes. Clause 24 is not intended to set a lower threshold than the existing exceptions.

The term 'inherent requirements' is not specifically defined in any of the existing Commonwealth legislation. In considering the meaning of 'inherent requirements' under the DDA and Commonwealth industrial relations legislation, the High Court has held that 'inherent requirements' means 'something essential' to, or an 'essential element' of, a particular position.[5] While appropriate recognition should be given 'to the business judgement of the employer in organising its undertaking', employers are not permitted to organise or define their business to permit discriminatory conduct.[6]

Therefore whether a condition is an inherent requirement of the job is an objective element that is not simply a matter of employer discretion. Inherent requirements are those which are permanent and inseparable from the nature of the particular work—that is, no adjustment could be made. If an adjustment to work practices can easily be identified that would allow discrimination to be avoided it is very unlikely that a specific policy will be an inherent requirement of a job.

The burden of proving that a condition is an inherent requirement of the job will be borne by the employer, as it is currently.

Reasonable adjustments

A number of submissions recommend that the requirement to make 'reasonable adjustments' apply to all attributes.

At present, only the DDA imposes an explicit requirement to make reasonable adjustments. There is no provision in the ADA, RDA or SDA regarding reasonable adjustments. However, under the tests for discrimination in those Acts, where conditions, requirements or practices disadvantage individuals on the basis of their attribute it is necessary to consider whether the condition, requirement or practice is reasonable. Part of that assessment would normally include an assessment of whether other, less unfavourable, options could be

[4] This exception does not apply to discrimination on the basis of a person's disability if the employer could have made a reasonable adjustment for that disability that would allow the other person to carry out the inherent requirements of the job (see 'reasonable adjustments').
[5] *Qantas Airways Ltd v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 200 CLR 177.
[6] *X v Commonwealth* (1999) 200 CLR 177, 189-90 [37] (McHugh J).

adopted. In practice, this leads to an analysis of reasonable adjustments that is similar to that imposed by the DDA.

Subclauses 23(6) and 24(4) of the Bill provide that, in relation to discrimination on the basis of disability, the justifiable conduct and inherent requirements exceptions do not apply if the person could have made a reasonable adjustment. Reasonable adjustment is defined in clause 25 to mean an adjustment that could have been made without causing unjustifiable hardship. This is similar to the approach adopted in the DDA.

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. Whether conduct is justifiable will include an analysis of whether other, less discriminatory conduct could have achieved the same aim (paragraph 24(3)(c)). 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. Similarly, a requirement will not be an inherent part of work within the meaning of the inherent requirements exception if it could reasonably be modified to avoid discrimination.

Specific exceptions

A number of submissions recommend that the Bill not contain any specific exceptions in addition to the general exceptions for justifiable conduct, inherent requirements and reasonable adjustments.

As noted above, some specific exceptions have been retained to provide further certainty as to the operation of the general exceptions. The specific exceptions retained in the Bill seek to balance competing policy objectives (for example, the exception for single-sex or disability education institutions in clause 37) or clarify that certain conduct is not within ‘public life’ (for example, the exception for shared accommodation in clause 44). The exceptions in clauses 26–30 regarding other laws recognise that certain areas of public policy are more appropriately determined by Parliaments and not the courts.

All exceptions will be reviewed three years after commencement of the Bill to enable consideration of whether these specific exceptions are still necessary, taking into account the operation of the new general justifiable conduct exception and the development of case law in this area.

Exceptions for insurance, superannuation and credit

Submissions from the insurance, superannuation and finance sector welcome the proposed exception in clause 39, but raise concerns regarding the requirement to provide actuarial or statistical data to individuals in subclause 39(5)(b)(iii).

Clause 39 is a single streamlined exception for insurance, superannuation and credit based on the complex exceptions in the existing Acts.[7] It applies to the same attributes to which the existing exceptions apply. This exception is likely to be permitted under the general justifiable conduct exception. However, it has been retained to provide certainty for this industry while a body of law develops in relation to the concept of justifiable discrimination. Like all other exceptions, it will be subject to a review after three years.

Subclause 39(5) sets out certain conditions that must be met before the exception can apply. This includes basing the discrimination on reasonable actuarial or statistical data, or, in the absence of such data, any other reasonable factors. It also requires the provider of the insurance, superannuation or credit to provide reasonable access to the data if requested to do so. This can be done by either providing a copy of the data to the person or making it available at a reasonable time and place.

The requirement to provide access to the data relied upon is based on paragraph 41(1)(e) of the SDA, and now applies uniformly across all attributes and services covered by this exception. The requirement is intended to allow scrutiny of claims that discrimination is based on actuarial or statistical on which it is reasonable to rely.

Exceptions related to religion

Submissions raise a number of concerns regarding the exceptions related to religion. Some submissions consider the exceptions to be too broad, while others considered them to be too narrow.

The Discussion Paper on the proposal to consolidate anti-discrimination laws stated that the Government did not propose to remove the current religious exemptions, apart from considering how they may apply to discrimination on the grounds of sexual orientation and gender identity. Therefore, the Bill replicates the wording of the existing exceptions in the SDA and ADA and applies to the attributes covered in those Acts (with the addition of sexual orientation and gender identity).

In the context of adding sexual orientation and gender identity as protected attributes and considering how the religious exemptions should apply, a particular example which arose was the treatment of same-sex couples in aged care, particularly where those aged care services are provided with Commonwealth funding. In addition, some stakeholders submitted that the religious exemptions should not apply to *any* services for which public funding is provided.

[7] See section 37 of the ADA, section 46 of the DDA and sections 41, 41A and 41B of the SDA.

Three options were assessed in the Regulation Impact Statement:

- Option One: maintain the status quo
- Option Two: exemptions do not apply to religious organisations providing aged care services with Commonwealth funding
- Option Three: exemptions do not apply to religious organisations providing any services with Commonwealth funding, but permit discrimination in employment (if registered)

The Government chose Option Two given the need to ensure people are not discriminated against in the receipt of aged care paid for, at least in part, by Commonwealth funding. In this case, the benefits to older lesbian, gay, bisexual, transgender and intersex (LGBTI) people of improved wellbeing and emotional support by living as a same-sex couple outweighed any cost to aged-care institutions. As set out in the Regulation Impact Statement, this would better balance the rights to freedom of religion and freedom from discrimination and provide greater accountability and transparency for the use of Commonwealth funding.

5. OTHER UNLAWFUL CONDUCT

Vilification

A number of submissions suggest changes to the 'vilification' provision in clause 51, including that it should apply to all protected attributes.

As previously noted, the primary aim of the project is to improve regulation, rather than further expand the anti-discrimination laws beyond what had already been committed by the Government. Consistent with this aim, the Discussion Paper on the proposal to consolidate anti-discrimination laws did not canvas amending the existing vilification law as set out in section 18C of the RDA. Therefore, section 51 of the Bill replicates existing section 18C.

6. EQUALITY BEFORE THE LAW

A number of submissions recommend the right to 'equality before the law' apply to all protected attributes.

The right to equality before the law is a key concept in race discrimination under the RDA and is therefore retained without amendment in the Bill. The potential regulatory impact on Commonwealth, State and Territory laws to broaden its application to other protected attributes is unknown. Consistent with the aim of simplifying Commonwealth anti-discrimination law, the Government decided not to single out further attributes to be included in the absence of others.

7. MEASURES TO ASSIST COMPLIANCE

Compliance codes

A number of submissions raise questions about the operation of compliance codes and raised concerns that the consultation requirements in the Bill are inadequate.

Compliance codes are one of the mechanisms in the Bill designed to assist compliance with anti-discrimination law. These measures do not impose mandatory obligations. This means that if, for example, the Commission developed a Small Business Code, an individual small business could choose not to use the code even though it can apply to all small businesses.

Compliance codes as a defence to discrimination

Under the Bill, compliance with a certified compliance code would be a complete defence against a claim of unlawful discrimination. However, the mere *existence* of a compliance code does not provide an unqualified exemption from discrimination law. The conduct complained of must comply with the code for the protection from liability to apply.

To ensure that there will be no diminution of protections, the Commission is required, in making the code, to ensure it is consistent with the objects of the Bill (see subclause 76(2)). In addition, proposed codes may be disallowed by either House of Parliament.

Applications to make codes

A compliance code would only cover those persons or bodies specifically named in the code. It is expected that the codes would generally be sought by and apply to particular industries, but could also name individual companies or organisations.

Revocation of codes

The Commission may revoke codes on application by one or more of the original applicants, or on its own initiative if the Commission is no longer satisfied that the code complies with clause 75 and is consistent with the objects of the Bill.

There is no provision for members of the public who are affected by a code to apply for revocation of a code. However, members of the public may bring matters to the attention of the Commission, which may give the Commission reason to exercise its power to revoke a code on its own initiative.

Consultation

In making a compliance code the Commission must comply with the consultation requirements of Part 3 of the *Legislative Instruments Act 2003* (Cth). It is intended that all interested and affected parties would be consulted in the development of a compliance code. This may include Commonwealth, State and Territory governments, State and Territory anti-discrimination bodies, industry, relevant peak bodies and the broader community. The views of individuals potentially affected by the code should be sought and carefully considered in this process.

Temporary exemptions—application to race

Several submissions are concerned that the availability of temporary exemptions for race under the Bill would be a reduction in existing protections.

Under the Bill the Commission can issue temporary exemptions while organisations take steps to improve compliance. Temporary exemptions will be available in relation to all attributes to ensure consistency across the Bill.

Temporary exemptions are currently not available for 'race' under the RDA. However, as the Commission may only grant temporary exemptions to provide protection for organisations while they transition towards full compliance with the law, rather than to permit ongoing discriminatory conduct, in practice temporary exemptions on the basis of race are unlikely to be granted.

8. COMPLAINTS

Representation at Commission conciliation

A number of submissions raise concerns that there is no right to legal representation at Commission conciliation conferences under clause 110.

Under existing arrangements, conciliation at the Commission is intended to be a relatively informal process focussed on dispute resolution rather than legal technicality. Accordingly, under section 46PK of the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act'), replicated in clause 110 of the Bill, a person is only entitled to be represented at a conciliation conference with the consent of the person presiding at the conference.

Clause 110 applies to all conciliation conferences, whether a person attends voluntarily or is required by notice to attend. The AHRC Act is silent as to the arrangements which apply to voluntary conciliation conferences. There is no reason in principle why representation should be allowed at voluntary conferences but not at compulsory conferences.

In this context, 'representation' is intended to refer to representation 'on behalf of' or 'in place of'. That is, the provisions ensure that, other than with leave, individual parties to the matter attend the conciliation conference in person. This is a necessary component of conciliation, where the aim, as noted above, is to focus on determining the circumstances of the matter to see if an agreed resolution can be reached, rather than to conduct legal negotiations or arguments.

Importantly, these provisions *do not* prohibit another person from attending along with the individual who is a party to the matter. This could be a lawyer, a union or business representative, an advocacy organisation or even a personal support person. However, in these circumstances, these provisions ensure that it is the individuals, not the support people, who are the primary participants in the conference.

These arrangements recognise that the majority of cases are resolved through conciliation. Conciliation is a process between the affected party and the respondent, and it is therefore not generally appropriate that another person (for example a legal representative) should take on a lead role in the process.

A person with disability is always entitled to nominate another person to attend on their behalf if their disability means they cannot attend or participate fully.

Unmeritorious or vexatious complaints

The Bill strengthens the Commission's ability to close unmeritorious complaints. The Commission welcomed this proposed change in its submission to the Committee (No 9).

A number of submissions raise concerns that anti-discrimination cases could be brought for reasons other than to genuinely address unlawful discriminatory conduct, such as to gain 'go away money'. They also raise concerns that changes to the burden of proof and to parties bearing their own legal costs may increase the number of unmeritorious complaints to the Commission and progressing to the courts.

These concerns are in part addressed by the Commission's power to close unmeritorious complaints. Clause 117 of the Bill provides that the Commission may close complaints for a range of reasons, including that the conduct complained of was not unlawful or contrary to human rights or that the complaint was frivolous, vexatious, misconceived or lacking in substance.

This provision enhances the Commission's ability to dismiss clearly unmeritorious complaints and to focus resources on meritorious complaints. This in turn should limit the number of unmeritorious complaints being brought before the courts. The provision recognises the resources of the Commission, the complainant and the respondent are not limitless. These resources should not be absorbed by complaints that do not relate to unlawful conduct or are unmeritorious, at the expense of arguable cases of discriminatory conduct.

Examples given such as resentful ex-employees and repeat nuisance claims seeking 'go-away money' are likely to fall within the Commission's powers in clause 117 as vexatious, frivolous or insubstantial complaints.

Under clause 121, the complainant may only proceed in the Federal Court of Australia or the Federal Magistrates Court with the leave of the court when a complaint has been closed for reasons outlined above. The courts may deal with these applications without a formal hearing.

Shifting burden of proof

A number of submissions raise concerns about the proposed shifting burden of proof, in particular the potential regulatory burden on respondents and the requirements of a *prima facie* case. The Department's refers to its earlier submission (No 130), which addresses these issues and provides further explanation on the intended operation of the shifting burden of proof.

Costs

During consultations on the Discussion Paper, human rights groups and legal practitioners argued that the costs of the current system creates significant barriers to accessing justice. At present, in most cases the unsuccessful party will pay the costs of the successful party (costs follow the event). Submissions on the Discussion Paper raised concerns that many complainants are reluctant to pursue genuine claims of discrimination due to the risk of an adverse costs order if they are unsuccessful. In response to these concerns, clause 133 provides that, as a default position, each party must pay their own legal expenses.

Some submissions argue that changes to the current costs or standing arrangements could lead to an increase in complaints without merit. As noted above, the Bill will strengthen the Commission's powers to close unmeritorious complaints, and require leave of the Court to proceed where a complaint has been closed on that basis.

Some submissions to the Committee misunderstand how a 'no costs' jurisdiction functions. The Commonwealth will not pay for all anti-discrimination cases, nor will the respondent always pay for the complainant's costs.

Rather, as noted above, in most cases each party must pay their own legal expenses. The court retains its discretion to make different orders as to costs if it considers it is just to do so. This may include orders allocating some or all of the costs to either the applicant or the respondent depending on the circumstances of the case.

In considering whether there are circumstances that justify making such an order, subclause 133(3) sets out a range of matters that the court must have regard to, including:

- the financial circumstances of each of the parties
- whether any of the parties are receiving financial assistance or legal aid
- the conduct of the parties to the proceedings
- whether a party has been wholly unsuccessful in the proceedings
- whether a party made an offer in writing to settle the matter and the terms of the offer, and
- any other matters the court considers relevant.

In cases of clearly unmeritorious or vexatious complaints, it will therefore be open to the Court to make an adverse costs order against the applicant.

9. OTHER ISSUES

Measures to address systemic discrimination—positive duty to eliminate discrimination and own motion investigations by the Commission

Some submissions suggest that the Bill should address systemic discrimination by, for example, imposing a positive duty to eliminate discrimination, or empowering the Commission to initiate own motion investigations into discrimination or other human rights

concerns. None of the existing Commonwealth anti-discrimination Acts impose positive duties of this kind or empower the Commission to undertake own motion investigations.

As outlined in the Regulation Impact Statement, the Government has not adopted these policy options because they could substantially increase regulatory burden, have significant resource implications for the Commission and may harm the perception of the Commission as an impartial conciliator in the complaints process.