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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary,

EXPOSURE DRAFT HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

A joint submission on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012 from three members of the Parliament of Western Australia - Mr Michael Sutherland MLA, Mr Peter Abetz MLA and the Hon Nick Goiran MLC - is enclosed.

Please send all correspondence regarding this submission to the Hon Nick Goiran MLC, Suite 2, 714 Ranford Rd, Southern River WA 6110.

If we can assist the Committee further in its deliberations in any way please let us know.

Yours sincerely

Hon Nick Goiran MLC
Member for the South Metropolitan Region

Cc Michael Sutherland MLA and Peter Abetz MLA

Submission on Exposure Draft Human Rights and Anti-Discrimination Bill 2012

To:

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1. Constitutional basis

Clauses 11-13 of the Bill set out the purported constitutional bases of the Bill.

Clause 11 provides that the main constitutional basis is external affairs. As well as referencing the human rights instruments and ILO instruments which are specified in Clause 3 (2) and (3) of the Bill this clause also makes a claim that the Bill is based on "*matters of international concern*".

The notion that the Commonwealth Parliament may have the power to make a law solely because it relates to a matter of international concern is doubtful in the light of the various dicta in *XYZ v The Commonwealth*[1] (2006) 227 CLR 532.

As Callinan and Heydon JJ observed "*There is no case in this Court deciding that the international concern doctrine exists*"[2] and "*the elusiveness connected with attempts to define 'international concern', strongly suggest that the international concern doctrine does not exist; for if it did, it would operate antithetically to the rule of law*."[3]

The other bases cited in Clause 12 include the corporations power, the trade and commerce power, the banking and insurance power and the telecommunications power.

This extensive attempt to found the Bill on an assortment of section 51 powers suggests some doubt as to the reach of the Bill.

It is hard to see how some provisions of the Bill have any foundation in any of the purported constitutional bases.

For example the prohibition of discrimination based on sexuality, gender identity and marital or relationship status in relation to the provision of accommodation in a private residence of four or more non-family members (clause 22, noting the exception in clause 44) and partnerships of any size (see definition of "work and work-related areas" in clause 7) has no obvious constitutional basis in any of the heads of power mentioned in clause 12 nor in any of the human rights or ILO instruments referenced in clause 11.

The Bill is cast too broadly and purports to legislate in areas for which the Commonwealth Parliament has no clear constitutional head of power. This is unsatisfactory.

Recommendation 1:

The Bill should not proceed in its present form but should be redrafted in order to limit its reach to matters for which the Commonwealth Parliament has a clear constitutional head or power.

[1] *XYZ v The Commonwealth* (2006) 227 CLR 532.

[2] Ibid., at 217

[3] Ibid., at 218

2. Substantive equality and special measures to achieve equality

Clause 3 (d) (i) of the Bill would include as an object of the Act "*to promote recognition and respect within the community for the principle of equality (including both formal and substantive equality)*".

The terms "formal equality" and "substantive equality" are not defined in the Bill. However, the Explanatory Notes to the Exposure Draft explain:

> *'Formal equality' requires that people be treated the same, regardless of their irrelevant personal attributes. 'Substantive equality' takes into account the effects of historical disadvantage and recognises that relevant personal attributes may need to be taken into account and accommodated in order to achieve equal opportunity.*[4]

Clause 3 (d) (ii) of the Bill would add as a further object:

> *To recognise that achieving substantive equality may require the taking of special measures or the making of reasonable adjustments.*

Clause 21 of the Bill would provide that special measures to achieve equality are not discrimination and defines these special measures as follows:

> *a law, policy or program made, developed or adopted, or other conduct engaged in, by a person or body is a **special measure to achieve equality** if:*
>
> *(a) the person or body makes, develops or adopts the law, policy or program, or engages in the conduct, in good faith for the sole or dominant purpose of advancing or achieving substantive equality for people, or a class of people, who have a particular protected attribute or a particular combination of 2 or more protected attributes; and*
>
> *(b) a reasonable person in the circumstances of the person or body would have considered that making, developing oradopting the law, policy or program, or engaging in the conduct, was necessary in order to advance or achieve substantive equality.*

Clasue 79-82 would give the Australian Human Rights Commission the power to determine that a proposed measure is "a special measure to achieve equality".

The term "*substantive equality*" was referred to by Gummow, Haynes and Heydon JJ in *Purvis v New South Wales (Department of Education and Training)*:

> *"Substantive equality" directs attention to equality of outcome or to the reduction or elimination of barriers to participation in certain activities. It begins from the premise that "in order to treat some persons equally, we must treat them differently". Obviously there are many ways in which "substantive equality" can be defined and there are many different ways in which legislatures may seek to achieve it.*[5]

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[4] Attorney-General's Department, *Consolidation of Commonwealth Anti–Discrimination Laws: Human Rights And Anti-Discrimination Bill 2012: Exposure Draft: Explanatory Notes*, November 2012, p. 11

[5] *Purvis v New South Wales* [2003] 217 CLR 92 at 202

The phrase referred to by their Honours "*in order to treat some persons equally, we must treat them differently*"comes from a judgement of Blackmun J in the US Supreme court upholding an affirmative action programme for admitting black and other racial minority candidates to the Medical School of the University of California at Davis on more favourable terms than non-racial minority candidates.[6]

The concept of "substantive equality" is thus inextricably linked to "affirmative action" programmes which seek to give more favourable treatment to persons with certain protected attributes in order to change the outcomes that are likely to occur, or thought likely to occur, if all persons are treated with formal equality.

The Bill gives the Australian Human Rights Commission (AHRC) the power to determine affirmative action measures to be acceptable despite their formal discrimination.

The track history of the AHRC in making such judgments is not encouraging.

The then Human Rights and Equal Opportunity Commission (the earlier name of the AHRC) opposed moves by the Howard government to amend the *Sex Discrimination Act 1984* to allow scholarships to be offered specifically to attract more men into primary school and other teaching sectors. The Commission claimed that as the lack of men in teaching was not due to discrimination but to other factors (low pay and status; issues around child protection) special measures exempting scholarships from anti-discrimination law were not justified.

This reasoning is, with respect, perverse. No one claimed that men were being discriminated against in the teaching profession. The claim was that whatever the reasons for men's low participation in the teaching profession, anti-discrimination law was posing an obstacle to measures specifically targeted at attracting more men into the profession.

Liberal Senators in their dissenting comments in the Senate Legal and Constitutional Affairs Committee's 2008 report on the Effectiveness of the *Sex Discrimination Act 1984* supported amending the Act to make it lawful for a person to "*offer scholarships for persons of a particular gender in respect of participation in a teaching course. The section would apply only if the purpose of doing so is to redress a gender imbalance in teaching—that is, an imbalance in the ratio of male to female teachers in schools in Australia or in a category of schools or in a particular school*". (para 1.19)

Anti-discrimination legislation should not prevent common sense measures such as the proposed scholarships to attract more men into primary school and other teaching sectors. The reason for seeking a greater representation of men in these sectors was evidence that a lack of male role models and influence was having a detrimental impact on boys' education with consequent poor outcomes for their future employment and life success.

However, quotas and other special measures should not be used to increase the representation of persons with particular attributes simply for the sake of achieving an idealised outcome such as equal numbers of men and women in a particular profession.

[6] *Regents of University of California v Bakke* [1978] USSC 145 at 407 (1978) per Blackmun J.

Recommendation 2: The reference to "substantive equality" in the Bill is code for allowing affirmative action programmes and similar measures to achieve an artificial equality of outcome. Measures to assist disadvantaged groups should be permitted as should measures justified by a genuine social need such as the low male participation rate in certain teaching sectors. However, the concept of special measures should not be linked to the unhelpful notion of "substantive equality".

3. Partnerships

The definition of ***work and work-related areas*** in Clause 7 of the Bill includes:

> *membership of partnerships, including:*
>
> *(i) inviting people to become partners, or removing people from partnerships; and*
>
> *(ii) determining or applying terms and conditions on which people are partners, and benefits or opportunities available to partners; and*
>
> *(iii) performing work as a partner.*

There is no exemption in the Bill for small partnerships of any size which means the full force of anti-discrimination legislation could apply to a partnership of two people. Potentially a person could complain if another person failed to invite him or her to join in forming a new partnership of two people.

This is overly intrusive and an unjustified interference in liberty.

Recommendation 3: The practice of excluding partnerships with less than 6 partners from the reach of anti-discrimination law should be maintained.

4. Volunteers

The definition of ***employment*** in Clause 7 of the Bill includes:

> *voluntary or unpaid work*.

Liberal Senators in their dissenting comments in the Senate Legal and Constitutional Affairs Committee's 2008 report on the Effectiveness of the *Sex Discrimination Act 1984* opposed Recommendation 25 in the Chair's report which proposed removing the exemption for voluntary workers from the Act.

> *Voluntary organisations make a major contribution to our community. This is evidenced in a range of reports from the Australian Government and Volunteering Australia. Removing the exemption in section 39 would require these organisations to comply with the prohibitions on discrimination in Divisions 1 and 2 of Part II of the Act. This may impose significant compliance costs on such organisations that would only serve to lessen their ability to sustain this contribution. Furthermore, there was no evidence that discrimination by voluntary*

organisations in relation to membership is a widespread problem. Rather the arguments for removal of this exemption rested almost entirely on an ideological objection to the provision and the theoretical possibility of such discrimination occurring. (para 1.35)

Recommendation 4: Voluntary workers should remain exempt from anti-discrimination and harassment law in order to avoid imposing unnecessary administrative burdens on the voluntary sector which makes a major contribution to the community.

5. Binding the Crown in the right of the States

Clause 15 of the Bill seeks to bind the "*the Crown in each of its capacities*."

Liberal Senators in their dissenting comments in the Senate Legal and Constitutional Affairs Committee's 2008 report on the Effectiveness of the *Sex Discrimination Act 1984* noted that they did not "*support recommendation 11 [in the Chair's report] which, contrary to the federal nature of the Australian constitution, would amend the Act to provide that the Crown in right of the states and state instrumentalities are bound by the provisions of the Act. There is no need for such an amendment given that all states and territories have their own anti-discrimination legislation*."

It is inappropriate and offensive for the Commonwealth Parliament to seek to bind the Crown in the right of the States especially where (i) as admitted in the Explanatory Notes for this Clause all States already have comprehensive anti-discrimination legislation that binds the Crown in the right of each respective State and (ii) the constitutional overreach of the Bill as discussed above.

Recommendation 5: Clause 15 should be amended to exclude any application of the Bill to the Crown in the right of the States.

6. Meaning of discrimination

Clause 19 of the Bill would provide that discrimination includes unfavourable treatment of a person "*because the other person has a particular protected attribute*". "*Harassing the other person*" and "*other conduct that offends, insults or intimidates the other person*" would be included in the definition of unfavourable treatment.

This proposed definition, combined with the expanded list of protected attributes, especially those applying to work and work-related areas (Clause 22 (3)) such as religion and political opinion, raise significant dangers of the law interfering unnecessarily to curtail in free speech and other freedoms.

The Explanatory Notes cite the example of where "*a shopkeeper is persistently abusive towards people of a particular racial background*" noting "*it will be clear that he or she was harassing these clients on the basis of their race notwithstanding the lack of racial epithets in his or her abuse*".[7]

Some people can be very easily offended by robust expressions of opinion by others on religious or political matters. Will an employer who makes remarks or does not prevent employees making

[7]Attorney-General's Department, *Consolidation of Commonwealth Anti–Discrimination Laws: Human Rights And Anti-Discrimination Bill 2012: Exposure Draft: Explanatory Notes*, November 2012, p. 27

remarks that may be found offensive by an overly sensitive employee of a particular religion or with a particular political opinion be in danger of a complaint of discrimination on the grounds of religion or political opinion and, in the face of evidence that the employee was offended have the burden of proving that the conduct was not offensive and was unrelated to the protected attribute of the employee?

This definition goes well beyond a person being denied a job or promotion because of a protected attribute and seeks to intrude into the day to day interactions between people in the workplace and other areas of public life.

It introduces a form of "religious vilification" law by stealth. Such laws have fallen into disfavour following the notorious finding at first instance in 2005 by the Victorian Civil and Administrative Tribunal in the case of Catch the Fire Ministries which was so scathingly overturned by the Supreme Court of Victoria in *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc*.[8]

In its application to political opinion the provisions are likely to breach the implied right to freedom of political communication in the Constitution.

Recommendation 6: The definition of discrimination in Clause 19 of the Bill should be amended to ensure that it does not impose unjustifiable restrictions on free speech in the workplace and other areas of public life.

7. Exceptions related to religion

Clauses 32 and 33 would provide broad exceptions related to religion. However, these exceptions will not apply to a body established for religious purposes which is receiving Commonwealth funding for aged care delivery.

This exclusion is designed to force religiously based aged care facilities which have a doctrinal objection to active sexual relationships outside of one man, one woman marriage to provide shared accommodation for de facto couples, including same sex couples in their facilities or forego Commonwealth funding.

This heavy handed approach is contrary to the common sense approach to date which has been to recognise the contribution of religious bodies to aged care, while fully respecting their doctrinal positions.

Recommendation 7: The valuable contribution of religiously based aged care services should be respected and the full religious liberty of such services respected. Accordingly Clause 33(3) of the Bill should not be supported.

8. Exceptions related to clubs

Freedom of association is an important value. Single sex clubs and other clubs based on a particular attribute should be allowed without needing to seek permission from any government body or commission.

[8] *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006)

The broad exception for clubs in Clause 35 is therefore welcome.

Recommendation 8: The broad exception for clubs in Clause 35 should be supported.

9. Sport

The exceptions for sport contained in Clause 36 are sensible as they reflect the nature of sport and the different physiology of men and women as well as the interest of people with disabilities.

However, the Bill would preclude competitive sporting activities for people of one sex where it cannot be proved that the "strength, stamina or physique of competitors is relevant".

If single sex clubs are allowed what is the pressing social need to prevent those who want to establish a "women only" or "men only" sporting competition such as for lawn bowls? The social interaction in single sex sporting competitions is different than in mixed competitions. These decisions should be left to those involved not imposed by law.

Recommendation 9: Clause 36 (2) (b) should be deleted so as to extend the exception from discrimination based on sex to all sports for persons over 12.

10. Gender identity and single sex educational institutions and single sex accommodation for students.

The exceptions in Clause 36 for discrimination of the grounds of sex by educational institutions for a single sex and single sex accommodation for students should be expanded to ensure that there is flexibility for these institutions or services to make their own decisions in regard to admitting a person who is not of the specified sex but who identifies as that sex. If no specific exception is made then these institutions and services could be found to have discriminated on the grounds of gender identity if they refuse to admit a person not of the specified sex who identifies as of being of that sex.

Recommendation 10: Clause 36 should be amended by including an exception for single sex educational institutions and single sex student accommodation from discrimination in relation to gender identity.

11. Domestic duties

Clause 43 would create a blanket exception in relation to domestic duties.

It seems common sense that people should be free to decide who to employ in their own home without regard to anti-discrimination laws. It would be heavy handed and statist for the Commonwealth to be dictating to individual householders who they could decline to employ in their own home.

Recommendation 11: Clause 43 of the Bill should be supported.

12. No right to representation at a conference

Clause 110 (4) would provide that a person has no right to be represented at a conciliation conference conducted by the AHRC to attempt to conciliate a complaint.

Anti-discrimination law is complex and many people who either make complaints or are the subject of the complaints will not be equipped to understand the complexities of the relevant law. It seems perverse to deprive people of the right to be accompanied to a conciliation conference by a legal or other representative of their choice.

Too often well-intentioned law reformers fail to appreciate the practicalities experienced by participants in quasi-judicial proceedings. The authentic choice of representation ought never to be taken away from a participant.

Recommendation 12: Clause 110 (4) should be opposed.

13. Burden of proof

Clause 124 of the Bill would, in proceedings before a court alleging unlawful conduct where any evidence is adduced from which the court could decide that an alleged reason is the reason for some conduct by a person, place the burden of proof on the respondent to prove that the alleged reason was not a reason for the conduct.

This is a significant change to anti-discrimination law.

Current Commonwealth anti-discrimination law, as well as all state and territory anti-discrimination laws, place the burden of proof on the complainant by virtue of the general rule that in civil actions the onus is on the complainant to establish that, on the balance of probabilities, the action complained of was carried out for a particular reason or with a particular intent.

This general rule has a long history and is rooted in rabbinic and Roman law. It should not be lightly overturned.

The Mishnah expresses the rule as follows:

> *On him that would exact aught from his fellow lies the burden of proof.*[9]

Roman law has it thus:

> *Proof is incumbent upon the party who affirms a fact, not upon him who denies it.*[10]

[9] *The Mishnah* translated by Herbert Danby, Hendrickson Publishers Marketing, 2011, Baba Bithra 9.6 citing the Sages on p. 96; Bikkurim 2.10 citing Rabbi Eliezer on p. 379; Bekhoroth 2: 6-8 citing Rabbi Akiba; Hullin 10.4 on p. 528; Available at: http://books.google.com.au/books?id=jqdTvyjPkNIC

However, the Commonwealth *Fair Work Act 2009* as well as UK law place the burden of proof on the defendant to prove that the discriminatory reason alleged by the complainant to be the reason for the detrimental action was not the reason for that action.

Liberal Senators in their dissenting comments in the Senate Legal and Constitutional Affairs Committee's 2008 report on the Effectiveness of the *Sex Discrimination Act 1984* opposed recommendation 22 in the Chair's report which proposed reversing the burden of proof for complaints under the *Sex Discrimination Act 1984*.

Their main reasoning for opposing this recommendation (along with several other recommendations in the Chair's report) was that:

> *the combined effect of these recommendations will be to impose significant compliance costs on employers and to encourage and facilitate unfounded claims. In the absence of any clear basis for these changes, or evidence of systemic or obvious failure of the current legislative regime across the federation, these recommendations are not supported.*
>
> *Business organisations told the committee that many employers already feel compelled to settle speculative claims under the Act, irrespective of the strength of the applicant's case, in order to avoid the costs of litigation or damage to their reputation. In unnecessarily and inappropriately broadening the scope of the Act and the definitions of discrimination and harassment, the recommendations of the Chair's Report would simply exacerbate this problem.* (para 1.29-1.30)

Recommendation 13:

In accordance with the general rule for civil actions the burden of proof should remain with the complainant and not be imposed on the respondent. Accordingly Clause 124 of the Bill should not be supported.

[10]Julius Paulus Prudentissimus, *On the edicts*, Book LXIX as cited in the *Digest or Pandects of Justinian*, translated by Samuel P. Scott, Central Trust Company, 1932, Book 22.3.2; Available at: http://webu2.upmf-grenoble.fr/DroitRomain/Anglica/D22_Scott.htm#III