

21 December 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia



By email: legcon.sen@aph.gov.au

Dear Secretary,

Human Rights and Anti-Discrimination Bill 2012, Exposure Legislation

Please find enclosed Diversity Council Australia's submission in response to the exposure legislation of the above Bill.

As you may be aware, Diversity Council Australia (DCA) is the independent, non-profit workplace diversity advisor to more than 180 organisations – many of whom are among Australia's largest and leading diversity employers.

In partnership with our member organisations, our mission is to:

1. Lead public debate;
2. Develop leading diversity research, thinking and practice;
3. Enable diversity management in a dynamic environment; and
4. Drive business improvement through successful diversity programs.

DCA is deeply committed to the spirit and application of Australian anti-discrimination law, which over the last 40 years has played an important role in raising awareness of discrimination and providing access to remedies for individuals whose complaints fall within the parameters of the various Acts. We also support the important role of the Australian Human Rights Commission (AHRC).

DCA and our members have been pleased to participate in the consultation about the anti-discrimination law consolidation proposal prior to the release of the exposure legislation and welcome the release of the Bill for further public discussion in the context of the Senate Legal and Constitutional Affairs Committee's Inquiry.

DCA members have long recognised the benefits of pro-actively preventing workplace discrimination and harassment, and effectively managing issues and complaints when they arise. This commitment is driven by social and legal imperatives, as well as good business practice.

DCA's view of the Bill

DCA commends the Australian Government for referring this draft legislation to the Senate Committee for review and public consultation prior to its formal introduction to Parliament.

DCA strongly recommends that the Committee support the passage of the *Human Rights and Anti-Discrimination Bill 2012* by the Parliament.

We note that the Bill will implement many of the recommendations put forward by DCA in response to the consultation paper released by the Attorney-General's Department in 2011 and will also implement many of the remaining recommendations made by the Committee in its review of the *Sex Discrimination Act 1984*, to which DCA also put forward a submission.

We are pleased to see that the Bill gives effect to the earlier proposals by the Attorney General's Department to consolidate the various Commonwealth laws so as to provide a more efficient and effective anti-discrimination system. We concur wholeheartedly with the comments made in the explanatory notes to the Bill that *the difficult and inconsistent drafting of the Acts has made compliance unnecessarily burdensome and has diminished the laws' potential to promote attitudinal change*.

We recognise that the Bill makes an effort to deal with these issues in relation to protected attributes by harmonising the protected attributes in the Bill with those in the *Fair Work Act 2009* and State and Territory anti-discrimination laws in relation to work.

We would however like to reiterate the point we made in our earlier submission to the Attorney General's Department that ideally, a federal anti-discrimination law should be truly national, with states and territories agreeing to a national anti-discrimination framework by way of conceding to Commonwealth law. A national legal framework for anti-discrimination would have a significant impact on reducing the burden on business, is key to ensuring individuals across the country have access to equal protection under the law and would enable businesses to better comply with their legal obligations.

We are pleased to note the key principles upon which the Bill has been developed, principally:

- Lifting differing levels of protections to the highest current standard, to resolve gaps and inconsistencies without diminishing protections.
- Providing clearer and more efficient laws which offer greater flexibility in their operation, but with no substantial change in practical outcome;
- Enhancing protections where the benefits outweigh any regulatory impact;
- Offering voluntary measures that business may wish to take to assist their understanding of obligations and reduce occurrences of discrimination; and
- Providing a streamlined complaints process, with the aim of making it more efficient to resolve disputes that do arise.

Support for measures in the Bill

DCA is particularly pleased to note those areas of the Bill that are in line with our earlier recommendations, in particular:

- Establishing a single, simplified test for discrimination which applies to all protected attributes;
- Providing protection against discrimination on the basis of sexual orientation and gender identity discrimination, and extending protections against relationship discrimination to same sex couples;

- Providing protection against discrimination on the basis of religion in relation to work;
- Providing greater clarity in relation to discrimination on the basis of family responsibilities;
- Recognising intersectional discrimination in the law by providing protection against discrimination based on a combination of attributes;
- Clarification that unfavourable treatment includes harassment;
- Extending protection against discrimination against associates to associates of persons with any protected attributes;
- Introducing a new general exceptions clause;
- Providing an exception in relation to the inherent requirements of a job, which applies to all attributes;
- Retaining special measures provisions which require that such measures must be undertaken in good faith, must have the purpose of advancing substantive equality, and be demonstrably necessary that a reasonable person in the position of the measure-taker would have considered that the special measure was necessary;
- Providing specific coverage to volunteers and independent contractors and coverage to all partnerships regardless of their size;
- Introducing a streamlined complaints process – we strongly support this measure as one which will assist in resolving complaints in the most timely and cost effective way possible. Businesses responding to complaints currently face significant costs in relation to both time and money. It is also important that the Committee be aware that while AHRC is a useful and helpful forum for resolving complaints prior to Court, it clearly has limited resources that prevent it from reaching its full potential in the conciliation sphere. In addition to the need for greater resources to carry out its existing workload, any extension of the work of the AHRC as a consequence of the consolidation Bill will also require additional resourcing.
- The retention of the AHRC's existing specialist Commissioner positions.

Measures to assist compliance

DCA notes the range of new mechanisms which have been introduced with the aim of assisting compliance, and is pleased to see that these are voluntary. In general terms, DCA believes that options to assist individuals and organisations to understand their rights and responsibilities with regard to anti-discrimination legislation are best focused on education and practical assistance rather than by introducing additional regulation and administrative burden. As such we are supportive of those measures which are aimed at assisting business to understand their obligations under the new law such as the introduction of Guidelines, reviews of policy by the AHRC and action plans.

Leading diversity employers already have effective policies and procedures in place to prevent discrimination in their workplaces. DCA supports the aim that business will be offered greater certainty through having such policies and practices certified although it is hard to envisage that in practice such a certification will offer a complete defence against claims of discrimination. Similarly, if specific industries wish to develop compliance codes it is encouraging that these will be designed to provide a

similar defence, but it will be interesting to see how this plays out in practice when cases begin being heard.

We are pleased to support measures aimed at clarifying and introducing greater consistency in relation to vicarious liability provisions. As leading employers, DCA members already take all reasonable steps to ensure that their employees and agents are discouraged from acting in a discriminatory manner towards fellow employees, clients and customers. However, it is clearly important that business across the board – particularly in small and medium sized enterprises – be provided with incentives to introduce such measures.

Suggested areas of improvement

In addition, there are a number of elements of the Bill which DCA would like to offer further comment in relation to. We put these forward in the context that our principal view is one of strong support for the Bill as a significant improvement on the current federal anti-discrimination legal framework.

Definition of gender identity and intersex

Firstly, DCA heartily congratulates the Government on delivering on its election promise to include sexual orientation and gender identity as new protected attributes in the consolidation bill.

Our organisation has long been concerned about discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) employees, and our members are well aware there is much to be gained in terms of reputation, recruitment, retention, productivity and market share from ensuring the workplace is welcoming and inclusive of LGBTI employees.

In 2010, DCA partnered with ACON and Stonewall UK, to establish the *Pride In Diversity* program designed to assist Australian employers introduce human resource and diversity policies that specifically support LGBT employees.

We note that given the difficulty of defining ‘gender identity’ and ‘intersex’ in ways which are as inclusive as possible, that it may be preferable to define both of these terms in the same manner as that used in the *Tasmanian Anti-Discrimination Amendment Bill 2012*, which has widespread community support among LGBTI organisations.

Protection for victims of domestic violence and other suggested attributes

DCA has noted in our previous submissions on these issues that it may well be appropriate to add new grounds of discrimination as community concepts emerge. Such developments can require careful consideration, for example, we are pleased to note that the Bill does not proceed with proposals to include criminal record as a protected attribute.

However, we continue to have some concerns about a number of particular attributes which currently are not offered adequate protection under federal anti-discrimination law. One particular area which we believe requires further consideration is the need to provide protection from discrimination for people who are victims of domestic violence. We are mindful that Australia is beginning to lead the world in recognising domestic violence as an issue which can potentially impact on workers and workplaces, with approximately 1 million Australian employees now covered by domestic violence clauses in their agreement or award conditions.

However, we note that less than half of the organisations with domestic violence entitlements, commit to not engaging in adverse action on the basis that the employee is a victim of domestic violence. Of the more than 1 million employees with access to domestic violence workplace entitlements, less than 20,000 are protected from adverse action.

A national online survey about domestic violence and the workplace was carried out by the Australian Domestic and Family Violence Clearinghouse between February and July 2011¹. The survey investigated the impact of domestic violence at work and was completed by over 3600 union members. It found that:

- The majority of the respondents were women (81%), two-thirds were in fulltime employment and nearly two thirds (64%) of the respondents were aged 45 and older.
- Nearly a third of respondents (30%) had personally experienced domestic violence.
- Nearly half those who had experienced domestic violence reported that the violence affected their capacity to get to work; the major reason was physical injury or restraint (67%), followed by hiding keys and failure to care for children.
- Nearly one in five (19%) who experienced domestic violence in the previous 12 months reported that the violence continued at the workplace.
- The major form the domestic violence took in the workplace was abusive phone calls and emails (12%) and the partner physically coming to work (11%).
- The main reported impact was on work performance, with 16% reporting being distracted, tired or unwell, 10% needing to take time off, and 7% being late for work.
- 45% of respondents with recent experience of domestic violence discussed the violence with someone at work, primarily coworkers or friends rather than supervisors, HR staff or union representative.
- 48% of respondents who had experienced domestic violence did disclose the violence to a manager/supervisor, though only 10% found them helpful.
- For those who did not discuss the problem at work, the major reason given was 'privacy', followed by reasons of shame and fear of dismissal.

These findings suggest there is significant need to better protect victims of domestic violence at work, as well as through policing and community welfare initiatives.

DCA believes that it would be valuable for the Bill to provide appropriate anti-discrimination protection for victims of domestic violence and that given other developments in this areas, such a change would provide greater clarity to individuals and organisations about their rights and responsibilities.

Protection in all areas of public life

DCA is of the view that in the interests of simplification, it would be preferable if the Bill established a general protection for all attributes in any area of public life. While

¹ A full copy of the report is available on the website: www.dvandwork.unsw.edu.au

we appreciate that protecting a range of attributes specifically in relation to work gives effect to establishing consistency with the *Fair Work Act 2009*, a single provision providing protection in all areas of public life would be clearer and contribute to greater understanding in the community.

Religious exceptions

DCA is pleased to support the greater limitations on religious exceptions with respect to provision of aged care, however, reflecting the spirit of inherent requirements and genuine occupational qualifications exceptions discussed above, we believe that religious exemptions on any grounds should be strictly limited to those situations where there is a specific religious element to employment or the provision of goods and services.

For example, DCA is supportive of continued exceptions where a religious body employs a person as a priest, minister of religion or member of a religious order. Similarly, if a religious school employs a teacher of religion it would appear reasonable for that person to be required to adhere to the relevant religion and its tenets.

However, DCA does not support general exemptions for religious bodies for any acts and practices. For example, it should be unlawful to discriminate against a school bus driver hired by a religious organisation on the grounds of his or her sexual orientation. We would encourage the Government to further narrow the focus of current religious exemptions to bring them into line with the approach to exemptions taken for all other employers.

The right to equality before the law

DCA is of the view that the principle that all people should have a right to equality before the law should be extended to sex and other attributes, rather than retained solely in relation to race. While such a right is clearly important in relation to race, we note that a number of organisations including the Law Council, AHRC and Australian Law Reform Commission have previously made recommendations² about the utility of such a right for other attributes – in particular sex – and that the change was supported by the Committee in the SDA Review Report.

We are disappointed that this recommendation of the Committee in relation to the SDA Review - that the Act be amended to include a general equality before the law provision modeled on section 10 of the *Racial Discrimination Act 1975* – was not included in the Bill.

Protection for domestic workers

It would seem perfectly reasonable for a person hiring an employee to work in a private home – for example such as a nanny for her children or for a personal care provider - to be able to make distinctions between prospective employees that might otherwise be unlawful in a public workplace.

However, DCA is of the view that exceptions to the prohibition against discrimination should continue to remain in place only in relation to determining offers of employment for domestic duties or employment in a private household. It may be helpful for the Bill to clarify that such an exception does not apply in relation to termination and discrimination during employment.

² See for example the Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*, December 2008 and ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, July 1994, and ALRC, *Equality Before the Law: Women's Equality*, ALRC 69 Part II, December 1994,

Positive duty to reasonably accommodate requests for flexibility

DCA is disappointed to note that the Bill is not in line with the recommendation of the Committee in relation to the SDA Review that the Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities, modelled on section 14A of the *Equal Opportunity Act 1995 (Vic)*.

DCA has carried out extensive work in relation to the need to better support workplace flexibility and supported such proposals in relation to the *Fair Work Act, 2009*.

Our recent research on workplace flexibility - *Get Flexible: Mainstreaming Flexible Work in Australian Business* released in March and *Men Get Flexible! Mainstreaming Flexible Work in Australian Business* released in August - found there is significant evidence that flexible work optimises resources and productivity. Both reports, produced in partnership with Westpac and supporting sponsors Stockland, Origin and Allens, demonstrate that flexible work can generate positive outcomes for men, women, families and organisations.

DCA believes it is crucial that the Government encourages employers to adopt flexibility in a more mainstreamed way and facilitate this through appropriate legal frameworks. Workplace flexibility is critical to ensuring gender equality and that those who need it do not continue to be sidelined into poor quality, insecure work that is badly paid and has few career prospects. Attention needs to be directed to the making flexible work and flexible careers standard operating practice.

We note that existing right to request provisions available to parents of young children and children with a disability under the *Fair Work Act 2009* do not appear to be resulting in any undue burden on employers. We further note a recent analysis of international evidence by the National Work+Family Policy Roundtable which suggests that a right to request flexibility can be extended to a broader population of workers than those already covered in the *Fair Work Act 2009*, without creating difficulties for business³. A similar right is available to all employees in the Netherlands and Germany and to an expanded range of employees in the UK. Extending the right to all employees makes it simpler for employers to manage, can encourage innovation in work organisation, and can increase workplace acceptance that men as well as women need to be supported to be working carers. It is also important that flexible work arrangements continue to be monitored to ensure flexibility that supports carers is available to workers across the labour market.

Discriminatory requests for information

DCA is of the view that the prohibitions on discriminatory requests for information are unnecessary.

Employers and service providers often request information from employees, potential employees, service users and customers for perfectly legitimate purposes. DCA members have told us that the existing prohibitions on discriminatory requests for information are not only unnecessary but can in fact be counter-productive. For example a company may consider that it would be helpful to obtain information from its employees and/or customers to enable it to understand the diversity of its employee and customer base better – and in turn to provide better, and more targeted and relevant, services and support. However, the existing prohibitions

³ Work+Family Policy Roundtable, 2012, Submission to The Fair Work Act Review Panel, Accessed at: <http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Documents/WorkandFamilyPolicyRoundtable.pdf>

represent a disincentive to do so, and can have the unintended effect of stifling such initiatives.

We would argue that if discriminatory conduct ensues following a request for information, then an individual has legitimate grounds to make a complaint of discrimination. However a request for information in and of itself is not a discriminatory action and this prohibition could be removed from the Bill as part of the simplification exercise.

Bullying

DCA would also like to raise a further issue not canvassed in the Bill – that of bullying. We would recommend that the new Act attempt to better clarify the difference between discrimination, harassment and bullying in order to reduce community confusion about these behaviours and their legal definitions. It is DCA's experience that the differences between these behaviours are not well understood in the general community, nor are the respective legal jurisdictions that cover each. The development of a new anti-discrimination framework offers a unique opportunity to clarify for individuals and the business community their rights and responsibilities with regard to workplace bullying. This view has been strongly supported by DCA members.

Thank you for the opportunity to make this submission. DCA would be happy to provide further clarification on any issues raised by this submission or other issues of interest to the Committee and if you would like any further information in regards to DCA's submission, please contact our Director of Policy and Research, Jo Tilly

We look forward to this important Bill being further discussed and the Committee recommending the support of this legislation in Parliament.

Yours sincerely,

Nareen Young
Chief Executive Officer