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Submission: Senate Standing Committees on Legal and Constitutional Affairs inquiry into the Exposure Draft of Human Rights and Anti-Discrimination Bill 2012

I wish to contribute a submission to the Senate Standing Committees on Legal and Constitutional Affairs inquiry into the Exposure Draft of Human Rights and Anti-Discrimination Bill 2012 (the 'Draft Bill'). I will consider a number of particular issues, but must state at the outset that this is not a comprehensive analysis of all aspects of the Draft Bill. My comments on specific aspects of the Draft Bill are set out below.

1. Definition of human rights – Clause 6

'Human rights' is defined in Clause 6 of the Draft Bill to mean those rights in the Conventions listed in the objects clause. That is: the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention on the Rights of Persons with Disabilities*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on the Rights of the Child*.

I submit that the Draft Bill should include provision for new human rights Conventions and instruments to be added to the Objects Clause and the Clause 6 definition of human rights by regulation, rather than requiring the consolidated Act to be amended through the parliamentary process. This is consistent with the process for updating existing federal legislation. The Draft Bill could provide for new human rights Conventions and instruments be included in a manner equivalent to that established in s47 of the *Australian Human Rights Commission Act 1986* (Cth) which provides that the Minister may declare an instrument to be an international instrument relating to human rights for the purposes of the Act.

2. Attributes protected

I wholeheartedly endorse extension of Commonwealth prohibitions of discrimination to include the attributes of sexual orientation and gender identity. However, the failure to further extend Commonwealth protection to additional attributes covered by state prohibitions of discrimination is regrettable. This Draft Bill presents a unique and important opportunity to substantially progress harmonisation of Australia's anti-discrimination laws.

Consistency in prohibitions of discrimination around Australia is important for business, organisations and individuals seeking to avoid engaging in discriminatory conduct. Consistent prohibitions also assist facilitate individuals who may have been subject to unlawful discrimination to more easily determine whether their circumstances are covered by a legislative prohibition, and to limit the negative consequences which can arise when different jurisdictions prohibit discrimination with regard to different attributes. Those negative consequences could range from the time, expense, cost and potential stress associated with determining in which jurisdiction/s a claim could be initiated, to a victim of discrimination unwittingly limiting their opportunity to commence action in one jurisdiction by commencing proceedings in another.

In addition to these practical problems, variation in the prohibitions of discrimination in Australia significantly undermines the potential for the Draft Bill to contribute to change of attitudes. The importance of legislation as a means of effecting societal change should not be underestimated. This legislative role has been recognised in both state and federal legislation. For example the *Human Rights Act 2004* (ACT) is explicitly articulated to be intended to effect changes in the way people relate to each other in society. The preamble of the Act states:

'[h]uman rights are necessary for individuals to live lives of dignity and value. ... This Act encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others.'

Similarly, the objects of the *Fair Work Act 2009* (Cth) include 'the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination'.¹

However, where different jurisdictions prohibit discrimination on different grounds, the potential for broad based and consistent condemnation of discrimination which could meaningfully contribute to broader societal change is significantly undermined.

¹ *Fair Work Act 2009* (Cth) s 3.

While it is acknowledged that Clause 14 of the Draft Bill makes it clear the consolidated Act is intended to operate concurrently with existing state and territory prohibitions of discrimination, this Bill none-the-less provides a unique opportunity for the Commonwealth to further rationalise Australian prohibitions of discrimination. It could do this by implementing broad prohibitions of discrimination which mirror the prohibitions in state and territory legislation. This would be of practical benefit for employers and individuals trying to comply with Australia's anti-discrimination regimes, and also ensure that the regulation of discrimination nation-wide constitutes a clear and uniform statement of values which will encourage change of attitudes throughout society and assist to progress the cause of equality. I strongly encourage the Committee to recommend the extension of the Draft Bill to additional attributes to increase uniformity of prohibitions against discrimination around Australia. For example, discrimination on the basis of irrelevant criminal record and/or spent convictions is prohibited in a number of jurisdictions around Australia, and could be incorporated into the Draft Bill.² In addition, in order to further rationalise the legal regulation of discrimination the limitations currently included in the Draft Bill regarding the areas of life in which some prohibitions operate should be reconsidered. This is discussed further below.

3. When discrimination is unlawful - Clause 22

Clause 22 provides that is unlawful for a person to discriminate against another person if the discrimination is connected with any area of public life. 'Areas of public life' are broadly defined to include work and work-related areas; education or training; the provision of goods, services or facilities; access to public places; provision of accommodation; dealings in estates or interests in land; membership and activities of clubs or member-based associations; participation in sporting activities and the administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs.

However, Subclause 22(3) provides that discrimination on the grounds of family responsibilities, industrial history, medical history, nationality or citizenship, political opinion, religion or social origin will only be unlawful if the discrimination is connected with work and work-related areas.

I submit that discrimination connected with any area of public life should be unlawful in respect of all protected attributes. This limitation has unfortunate practical consequences, similar to those discussed above in the context of attributes covered. I have more fully considered these practical consequences elsewhere (see, for example, Anne Hewitt, "Navigating the Maze of Australia's Complex Discrimination Legislation: A Case Study of Belief Discrimination" (2011) 24 *Australian Journal of Labour Law* 1-21).

However, in addition to practical concerns, raising the spectre of improper discrimination but providing no effective or consistent enforcement mechanism to control such discrimination has the potential to significantly undermine public perceptions of the legitimacy of the prohibitions. Enacting prohibitions of discrimination only in the context of work will inevitably inspire questions as to why the prohibitions are not extended into other areas of public life. Not only does this have

² See, for example, *Anti-Discrimination Act 1998* (Tas) s16(q); *Anti-Discrimination Act 1992* (NT) s19(q); *Discrimination Act 1991* (ACT) s7(1)(o).

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

For these reasons the prohibitions against discrimination on the grounds of family responsibilities, industrial history, medical history, nationality or citizenship, political opinion, religion or social origin should be extended to all areas of public life, consistent with the other attributes covered by the Draft Bill. I believe there is sufficient constitutional basis to support this extension under the external affairs power. Article 26 of the *International Covenant on Civil and Political Rights* provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This Article provides specific constitutional basis for protections against discrimination in a broad range of areas of life to be implemented with relation to industrial history (under 'other opinion'), nationality or citizenship, political opinion, religion or social origin.

In addition, I believe that the provision in Article 26 for prohibition of discrimination on the basis of 'other status' is sufficient to support broad federal prohibitions of discrimination based on family responsibilities and medical history. The *Convention on the Rights of Persons with Disabilities* may also support broad prohibitions of discrimination based on medical history. Article 2 of that Convention defines "discrimination on the basis of disability" to mean:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms *in the political, economic, social, cultural, civil or any other field*. (Emphasis added)

If, however, even if these arguments concerning extension of prohibitions regarding family responsibilities and medical history are not accepted, these should be the only grounds on which prohibitions are limited to the context of work. As stated above, the *International Covenant on Civil and Political Rights* provides clear support for broad protections in relation to industrial history, nationality or citizenship, political opinion, religion or social origin, and prohibitions on those grounds should be extended to the full range of areas of life covered in the Draft Bill.

4. Meaning of discrimination - Clause 19

The inclusion in the Draft Bill of a single definition of direct discrimination, which applies to discrimination on the basis of all the protected attributes, is welcome. This constitutes a useful simplification of the current range of tests. In addition, replacing the use of a comparator in establishing discrimination with the concept of 'unfavourable conduct' is positive.

5. Special measures to achieve equality are not discrimination – Clause 21

Clause 21 provides that special measures to achieve equality do not constitute discrimination. Permitting special measures, in addition to prohibitions of direct and indirect discrimination, is important to ensure there are adequate legal tools to redress systematic discrimination and disadvantage in our society. However, if special measures are to be useful, the scope in which they can be used must be clear. I am concerned that the Draft Bill fails to address potential confusion caused by the interaction of Clause 21 with the *Workplace Gender Equality Act 2012* (Cth) (formerly the *Equal Opportunity for Women in the Workplace Act 1999* (Cth)). The *Workplace Gender Equality Act 2012* preserves the merit principle (which limits the use of affirmative action) by providing in s 3(4) that employment matters should be dealt with on the basis of merit. Reference to the merit principle in the *Workplace Gender Equality Act 2012* creates potential confusion as to what constitutes permissible special measures to achieve equality between the sexes pursuant to Clause 21 of the Draft Bill. This potential for confusion makes it less likely that Clause 21 will be utilised and undermines the capacity for special measures to be developed which address sex discrimination. In order to remedy this, the Draft Bill should more thoroughly define the special measures which are permissible. If the Draft Bill articulated the type of action that is permissible as 'special measures' it would be more clearly understood by the community and is likely to be both more widely supported and utilised.

The concept of 'special measures' under Clause 21 could be clarified by way of a more comprehensive definition, or illustrated by way of a legislative note. In either case, I would recommend that a broad range of 'special measures' be permitted including 'hard' forms of affirmative action such as quotas. This is consistent with the interpretation of s7D of the *Sex Discrimination Act 1984* (Cth) as permitting quotas by Crennan J in *Jacomb v Australian Municipal Administrative Clerical and Services Union*,³ and is also consistent with Article 4 of the *Convention on the Elimination of All Forms of Discrimination Against Women*. In fact, the CEDAW Committee has recommended that parties to CEDAW make 'more use of temporary special measures, such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment'.⁴

6. Exceptions for religious bodies and educational institutions - Clause 33

Clause 33 provides an exception for religious bodies and educational institutions to discriminate in relation to the protected attributes of: gender identity; marital or relationship status; potential pregnancy; pregnancy; religion; and sexual orientation.

³ [2004] FCA 1250 (unreported, Crennan J, 24 September 2004).

⁴ United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No. 5 – Temporary Special Measures*, seventh session, 1998.

This religious exception will clearly limit protection afforded under the Draft Bill. While an argument can be made that religious organisations should be entitled to act upon precepts of the religion in decision making, this exception is too broad.

I would recommend that the exemption be limited in a manner similar to those used in *Equal Opportunity Act 1984 (SA) s 34(3)* which provides a limited exception for discrimination on specific groups by an educational institution where:

- (a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and
- (b) the educational authority administering the institution has a written policy stating its position in relation to the matter; and
- (c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and
- (d) a copy of the policy is provided on request, free of charge—
 - a. to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and
 - b. to students, prospective students and parents and guardians of students and prospective students of the institution; and
 - c. to other members of the public.

Limiting the exemption in this way would ensure that religious organisations are required to publically declare their intention to discriminate; in effect to ‘pin their colours to the mast’. This would require organisations to have a frank discussion with the individuals associated with them, and allow dissenting voices regarding such discriminatory practices to be heard, rather than the culture of religious discrimination to continue privately.

7. Equality before the law - Part 2.5

Part 2.5 preserves the equality before the law provisions that were previously contained in section 10 of the *Race Discrimination Act 1975 (Cth)* although in a slightly different form. While the retention of these protections in respect of racial discrimination is encouraging, it is disappointing that the Draft Bill has not included a broader equality before the law provision which extends to all the attributes protected in the consolidated Act. Inclusion of such a provision would complement the other protections proposed in the consolidated Act. In particular, inclusion of a provision which guarantees equal enjoyment of rights by all persons under law would usefully refocus attention to positive steps to promote and protect the right to equality by governments and public organisations, rather than focusing predominately on prohibiting discriminatory acts by individuals and businesses.

8. Burden of proof in court proceedings - Clause 124

Clause 124 introduces a shifting burden of proof in court proceedings so that if the applicant establishes a prima facie case of unlawful discrimination, the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action. The clause also outlines the burden of proof in relation to exceptions to unlawful conduct. I strongly support this approach to the distribution of the burden of proof between complaints and respondents, and believe it will facilitate just resolution of complaints of discrimination.

9. Review

I endorse the proposal included in Clause 47 for a review of the exceptions in the Draft Bill to be commenced within 3 years of the commencement of the consolidated Act. However, the scope of that review should be extended to include the attributes covered and the areas of life in which prohibitions apply, as well as the exceptions.

Yours sincerely

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