



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

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

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

Dear Committee Secretary

***Exposure Draft: Human Rights and
Anti-Discrimination Bill 2012***

Chartered Secretaries Australia (CSA) is the peak body for over 7,000 governance and risk professionals in Australia. It is the leading independent authority on best practice in board and organisational governance and risk management. Our accredited and internationally recognised education and training offerings are focused on giving governance and risk practitioners the skills they need to improve their organisations' performance.

CSA has unrivalled depth and expertise as an independent influencer and commentator on governance and risk management thinking and behaviour in Australia. Our members are all involved in governance, corporate administration, legal practice and compliance with the *Corporations Act 2001* (the Act) with their primary responsibility being the development and implementation of governance frameworks in public listed and public unlisted companies, private companies, and not-for-profit organisations.

CSA welcomes the opportunity to comment on the Inquiry on the Exposure Draft: Human Rights and Anti-Discrimination Bill 2012 (the exposure draft) and supports the consolidation of the anti-discrimination and human rights legislative system.

General comments

CSA notes that the current anti-discrimination and human rights legislative system is fractured and creates inefficiencies and inequalities for those seeking to protect and enforce their rights, and those seeking to understand their legal obligations. CSA is cognisant that this has created a great deal of complexity for businesses who are trying to comply with their obligations under several different legislative instruments. The complexity of the system has also made the policy aims of anti-discrimination and human rights law difficult to achieve.

Consolidation of the various legislative instruments concerning anti-discrimination and human rights law, therefore, will provide a central point of reference for stakeholders seeking to investigate their rights and obligations under the law.

In this light, CSA strongly supports the consolidation of the existing Commonwealth anti-discrimination and human rights legislation, including:

- the Age Discrimination Act 2004 (the ADA)
- the Disability Discrimination Act 1992 (the DDA)
- the Racial Discrimination Act 1975 (the RDA)
- the Sex Discrimination Act 1984, and (the SDA)
- the Australian Human Rights Commission Act 1986 (the AHRCA).

CSA cautions, however, against adopting a 'one size fits all' approach to consolidating standards. By way of example, CSA notes that different organisations in different industries and sectors have a duty to make reasonable adjustments and practical steps to their workplaces to demonstrate their compliance with the *Disability Discrimination Act 1992*. The diversity of organisations that exist and their differing interactions with members of the public who are disabled means that they ultimately are required to take actions in their workplaces which are specific to their particular circumstances. CSA believes that any new criteria which do not account for the particularities of individual organisations may impose significant compliance burden costs.

Similarly, CSA notes that the interaction of anti-discrimination and human rights laws with other areas of law must also remain consistent. For example, employment law requirements throughout the various jurisdictions currently differ in the standards imposed. While we understand that the exposure draft does not make significant changes to what is unlawful and the matters that human rights and anti-discrimination law currently cover, we believe that there must be an assurance of consistency with existing obligations created under other unrelated statutory provisions, to ensure that the transition to a new consolidated act is seamless.

CSA acknowledges that there is flexibility built into the consolidated legislation to account for the diversity of needs of a range of organisations, including, for example, the exception for the inherent requirements of work provisions. CSA also notes the amendments made in order to resolve gaps and inconsistencies which presently exist across the various legislative frameworks, including:

- lifting the differing levels of protection to the highest current standards
- ensuring that the practical outcome is not substantially changed under the operation of the new laws, as opposed to the old legislative framework
- enhancing protections where the benefits outweigh any regulatory impact
- voluntary measures that businesses can undertake to assist their understanding of obligations and reduce occurrences of discrimination, and
- streamlining the complaints process to make dispute resolution more efficient.

However, CSA cautions that there needs to be an assurance provided that the exposure draft does not, either by intention or omission, fundamentally change the framework within which entities currently work. CSA recognises that in undertaking a consolidated project, the possibility exists for unintended consequences to arise.

Extending the definition of discrimination to include 'offensive' conduct

CSA notes that the extension of the definition of unfavourable treatment in s 19 of the exposure draft to include conduct which 'offends' or 'insults' provides an example where unintended consequences could arise.

CSA acknowledges that offensive conduct is usually socially undesirable and potentially detrimental to those who might experience it; however, we do not believe that such conduct should be classified as illegal. CSA notes the words of ABC Chairman, Mr Jim Spigelman, who noted in a recent media article that:¹

¹ Michelle Grattan 'Freedom of speech warning on bill' *Sydney Morning Herald*, 10 December 2012, available from <http://www.smh.com.au/opinion/political-news/freedom-of-speech-warning-on-bill-20121210-2b5pj.html>

There is no right to be offended. I am not aware of any international human rights instrument, or national anti-discrimination statute in another liberal democracy that extends to conduct which is merely offensive... We would be pretty much on our own in declaring conduct which does no more than offend, to be unlawful.

None of the existing discrimination acts include offensive conduct within their legal frameworks. Instead unfavourable treatment is assessed through a comparator test which requires the identification of a person in the same circumstances as the complainant, but for the protected attribute.

While the comparator element test is complex and the uncertainty of its exercise has created inconsistent and difficult case law, the comparator element test also provided an objective test against which conduct could be judged. CSA notes that the proposed legislation does not offer this comfort and instead removes the necessity to make a comparison to any other person to determine whether treatment is unfavourable. It is sufficient, under the new s 19(1) that the treatment is detrimental to the person involved only.

CSA believes that these two elements, that is, the inclusion of 'offensive' conduct and the move to a more subjective test, represent a substantial departure from the underlying policy expressed in previous Commonwealth anti-discrimination legislation.

Reversing the onus of the burden of proof

Unfortunately, the change from current underlying policy is also exemplified in the drafting of s 124 of the exposure draft which shifts the burden of proof from an applicant alleging unlawful conduct to the defendant in those proceedings where the applicant adduces evidence from which the court decides, in the absence of any other explanation, that the alleged reason or purpose is the reason or purpose why or for which the defendant engage in the conduct.

Although this approach to liability is consistent with the terms of s 361 of the *Fair Work Act 2009*, CSA is concerned that such an approach reverses the fundamental legal principle that a person is innocent until proven guilty. Once the applicant has established objective facts that suggest that a contravention of the law has occurred, the onus falls on the respondent to prove that the action was taken for lawful reasons. The respondent subsequently loses the presumption of innocence before their case has been heard and before any evidence against them has been tested.

As s 57 of the exposure draft also extends liability for unlawful conduct to directors, officers, employees and agents, CSA notes that the reverse onus of proof is also inconsistent with Coalition of Australian Government's (COAG's) current review of personal liability for corporate fault. The reform project has been undertaken to establish a nationally consistent and principled approach to the imposition of personal liability on directors and other corporate officers for corporate fault, with the primary aim of the COAG principles being to ensure that derivative liability is imposed on directors and other corporate officers in accordance with principles of good corporate governance and criminal justice, and is not imposed as a matter of course. Derivative liability provisions impose criminal liability in situations where directors may not be aware of, or have the ability to prevent, the commission of an offence by the company and also often require directors to prove their innocence, which is a reverse of the burden of proof as it operates under the criminal law.

In this case, CSA believes that not only does extending the liability for unlawful conduct to officers and directors run counter to the objectives of the COAG reform project, but it will also only serve to add complexity to the current liability regime. CSA has previously raised concerns about the imposition of differing standards of director liability in light of the large volume of provisions that

currently exist. A report on personal liability for corporate fault by the Corporations and Markets Advisory Committee (CAMAC) in 2006, noted that there are;²

considerable disparities in the terms of personal liability provisions, resulting in undue complexity and less clarity about requirements for compliance

A Corrs Chambers Westgarth analysis in 2011 of director liability provisions further noted that there are 697 provisions in all Australian jurisdictions covering director liability³.

CSA believes that adding a reverse burden of proof test to the legislation, as proposed, at a time when all jurisdictions including the Commonwealth, are reviewing existing legislation to identify where such provisions can be repealed or modified to accessorial liability, adds further complication to the already burgeoning director liability regime and is inconsistent with the aims of the current reform being undertaken.

Conclusion

As noted above, CSA's primary concerns in relation to the exposure draft relate to the changes which alter the framework within which human rights and anti-discrimination laws exist. CSA is concerned that either through intention or omission, the exposure draft fundamentally changes the framework within which entities currently work.

While CSA commends the work of the government, in bringing together the various legislative frameworks on human rights and anti-discrimination and consolidating them to provide clearer guidance for businesses, employees, individuals and the wider public on understanding anti-discrimination law and their rights and obligations under it, CSA recommends that changes be made to the exposure draft.

We recommend that:

- the definition of discrimination should not include 'offensive conduct', and
- the reverse burden of proof in s 57 needs to be amended to align with the fundamental legal principle that a person is innocent until proven guilty.

Yours sincerely

Tim Sheehy
CHIEF EXECUTIVE

² Corporations and Markets Advisory Committee, *Personal liability for corporate fault: Final report*, September 2006, p1, from [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/Personal_Liability_for_Corporate_Fault.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/Personal_Liability_for_Corporate_Fault.pdf)

³ Corrs Chambers Westgarth, *Directors' liability reform: Analysis of the application of COAG's directors' liability principles report*, 5 August 2011, p 13, available from http://www.coagreformcouncil.gov.au/reports/docs/sne-feb-2012/Directors_Liability_Reform_Report.pdf