



Senate Standing Committee on Legal and Constitutional Affairs
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Anti-Discrimination Board of NSW –submission to the Parliamentary Inquiry into the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012*

Thank you for the opportunity to comment on the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth), (the Bill) which consolidates the five existing federal anti-discrimination acts into a single act.

Please note that the Anti-Discrimination Board of NSW (the Board) has also provided comments for inclusion in the NSW Government's submission to the parliamentary inquiry into the Bill.

Overall, the Bill appears to deliver greater clarity and simplicity in the area of federal anti-discrimination law, by reducing the complexity and inconsistency of the current legislation, and making it easier to understand rights and obligations. The Board feels that the proposed Bill will improve the overall level of protection from unlawful discrimination.

In particular, the Board welcomes:

- the addition of sexual orientation and gender identity to the list of protected attributes, (section 17);
- the simplification of the test for 'indirect' discrimination to include policies which have, or are likely to have, the effect of disadvantaging people with the protected attribute(s), (section 19);
- in deciding whether the reason or purpose for conduct is discriminatory, the introduction of the 'rebuttable presumption' approach, whereby once a complainant has established a threshold or

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'prima facie' case, it then falls to the respondent to show whether there was a non-discriminatory reason for the action, (section 124);

- the inclusion of voluntary and unpaid work in the definition of *employment*, (section 6, page 14).

The Board also wishes to make the following comments or suggestions in relation to specific provisions of the Bill.

1) **Proposed definition of *assistance animal*** (section 6, page 9)

Part (c) of this definition appears to be very wide. Whilst parts (a) and (b) require the animal to be trained to an accredited standard, part (c), merely requires the animal to be trained:

- (i) *“to assist a person who has a disability to alleviate the effect of the disability; and*
- (ii) *to meet standards of hygiene and behaviour that are appropriate for an animal in a public place”.*

We are concerned that any person could claim that they have trained their animal to this standard and for this purpose. The criterion of “appropriate behaviour” is a subjective one, and the inclusion of this clause could introduce significant uncertainty for employers, service providers etc, and may even lead to increased scrutiny and difficulties for individuals who are accompanied by genuine, appropriately-trained assistance animals.

2) **Proposed definition of *gender identity*** (section 6, page 15)

The Board welcomes the inclusion of *gender identity* in the Bill, however it is concerned that the proposed definition is not broad enough to fully protect individuals who are intersex.

In its comments in response to the *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, released in September 2011, the Board recommended:

“broad, inclusive coverage of sexual orientation, gender identity, sex characteristics, and gender expression under a Consolidated Federal Act.

Any definition should ensure that it includes variations in sex characteristics, and people who are neither wholly male nor wholly female. In this way people who are intersex, androgynous and other individuals who do not fit within the current binary approach to defining sex would be afforded protection under anti-discrimination law in this context. The Board recommends that broad and inclusive language be used

in any definitions of discrimination. In particular, any definition should be wide and inclusive enough to cover people who are intersex, without a requirement that any person should identify as either male or female. Discrimination should be prohibited on grounds of actual or perceived sex, sexual orientation and/or gender identity.”

The Board regularly receives feedback from members of the intersex community about their lack of protection under anti-discrimination laws, and the Board is concerned that while the proposed definition will cover people who are transgender, it will continue to exclude many people who are intersex – that is individuals with who are anatomically neither wholly male nor wholly female (whether or not these differences would be apparent to others) – and who do not identify as a member of a particular sex.

According to the Organisation Intersex International

Intersex is congenital difference in anatomical sex. That is, physical differences in reproductive parts like the testicles, penis, vulva, clitoris, ovaries and so on. Intersex is also physical differences in secondary sexual characteristics such as muscle mass, hair distribution, breast development and stature.

Intersex can include things that are invisible to the eye such as chromosomal and hormonal differences. Those kinds of differences usually have a manifestation in primary or secondary sexual anatomy that is visible either externally or internally. Brain differences may account for both homosexuality and transsexualism, but intersex isn't brain sex alone.

(...) it is thought the kinds of differences in [their] anatomy seem to be either male and female at the same time or not quite male or female or neither male or female. So {intersex people} have physical differences that confuse medicine's anatomical ideal of male and female.

(...) Intersex is not a gender nor a gender identity. Gender is social sex role. Our sex is generally male and female and our social roles are generally man and woman. Our sex is about our anatomy – however naturally constructed and medically reinvented that might be – and our gender is how we act out social expectations given our anatomy. Intersex individuals have genders of all kinds including no gender. Gender is generally an identity issue.”¹

We remain concerned that a person who anatomically is neither wholly male nor wholly female, or who does not identify as a member of either

¹ <http://oiiinternational.com/intersex-library/intersex-articles/what-is-intersex-oii-australia/>

sex, (whether or not that person is physically of “*indeterminate sex*”), will continue to be denied protection under anti-discrimination laws.

3) **Protected attributes – political opinion and social origin** (section 17, page 34)

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires State Parties to ensure that they respect and accord to all individuals, regardless of “*race, colour sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”, the rights set out in that Covenant (these include, amongst other things, the rights to life, liberty, security of person, and self-determination).

- a) The inclusion of *political opinion* and *social origin* in the list of protected attributes would have the effect of significantly broadening the rights recognised by the ICCPR, under which the Article 2 responsibilities fall upon the Member State, rather than individual employers, service providers or clubs. The Board feels that affording civil and political freedoms to individuals should remain the preservation of government; the ICCPR does not appear to require or intend these rights to be exercisable between individual citizens.
- b) Neither *political opinion* nor *social origin* is defined in the Bill, leading to uncertainty about their intended meanings.
- c) The Board is concerned about the introduction of the protected attribute of *social origin* for a number of reasons:
 - i) the ICCPR refers to ‘*national or social origin*’, rather than social origin alone. The grouping of the terms *national* and *social* in this context appears to suggest that the terms are closely linked or even interchangeable (suggesting links to nationality, ethnicity or country of origin), whereas the words *social origin* alone tend to suggest a very different interpretation – one linked to a class or caste system or the socio-economic background of the individual. The inclusion of *social origin* as a protected attribute would therefore appear to go far beyond the protections envisaged by the ICCPR.
 - ii) As stated above, the term *social origin* is suggestive of the existence of a class system, or a hierarchy based on levels of socio-economic advantage. The Board does not favour the use of this term, feeling that its use is contrary to the Australian concept of an egalitarian and meritocratic society. The inclusion of *social origin* as a protected attribute would appear to codify an acceptance that a class system exists in Australia. It is not clear to the Board that such a system exists, but even if this is the case, its existence should not be legitimised through inclusion in Commonwealth law.

4) **Exception for religious bodies and educational institutions** (section 33, page 48)

The Board is concerned that the definition of *potential pregnancy* (section 6, page 18), particularly as it applies in section 33 (exception for religious bodies and educational institutions), is extremely wide. The definition includes “*the fact that the person is or may be capable of bearing children*”, which appear to extend this definition to any woman who is potentially of childbearing age.

Since the exception provided in section 33 allows religious organisations to discriminate on this ground in a wide range of their functions, (including employment or the provision of education and training by a religious educational institution), this wide definition of potential pregnancy could be used to justify discrimination on the ground of sex against any woman who may be capable of bearing children.

5) **Definition of sexual orientation** (section 36, page 20)

The Bill’s definition of *sexual orientation* maintains a binary approach to defining sex, and continues to exclude people who are intersex. Please refer to comments at 2) above.

6) **Exceptions for justifiable conduct** (section 23, page 40)

Section 23 of the Bill provides an exception for justifiable conduct, where “*justifiable*” means conduct which a person engages in:

- a) in good faith, for the purposes of achieving a particular aim; and
- b) that aim is a legitimate aim; and
- c) the conduct is a proportionate means of achieving that aim.

These criteria are to be determined in light of subsection (4), which includes the objects of the Act, the nature and extent of the discrimination, whether a less discriminatory alternative was available, and the cost and feasibility of such an alternative.

The Oxford English Dictionary² provides several definitions of “legitimate”, including the following:

- d) “*Conformable to law or rule; sanctioned or authorized by law or right; lawful; proper*”
- e) “*Sanctioned by the laws of reasoning; logically admissible or inferrible*”
- f) “*In extended use: valid or acceptable; justifiable, reasonable*”

² www.oed.com

The Board is concerned that in spite of subsection (4), the requirement that the aim is "legitimate" remains extremely subjective, and that some people or groups could argue that their aims are reasonable, justifiable or acceptable, whilst remaining wholly at odds with the objects of anti-discrimination law.

7) **Victimisation** (section 54, page 67)

Section 54(1)(a)(vi) renders unlawful victimisation where a person has "*made an allegation that a person has engaged in unlawful conduct*". We suggest that this section should clarify whether the allegation must be limited to one of unlawful conduct **under this Act**, or of unlawful conduct of a more general nature.

8) **Records of conciliation?** (Division 4)

The Board queries whether the Bill should contain a mechanism for recording and enforcing agreements reached as a result of conciliation.

Under the *Anti-Discrimination Act 1977* (NSW) if a party requests it within 28 days of conciliation, the parties must sign a written record of any agreement reached between them. In certain circumstances the parties may apply to the Administrative Decisions Tribunal for registration of the agreement, and the Tribunal may make enforceable orders in respect of certain provisions of the registered agreement.

Such a mechanism would provide parties to conciliation with a greater degree of clarity and finality upon reaching a conciliated agreement.

The Board thanks the Senate Standing Committee for the opportunity to comment on the exposure draft of this important Bill. Should your officers have any queries regarding this matter, please contact

Yours sincerely,

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President
Anti-Discrimination Board of NSW

Date: 12/12/12