



The Hon Jarrod Bleijie MP
Attorney-General and Minister for Justice

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Dear Committee Secretary

Thank you for inviting me to contribute to the Senate Legal and Constitutional Affairs Legislation Committee (committee) inquiry into the Human Rights and Anti-Discrimination Bill 2012 (Exposure Draft Bill).

The consolidation of the five Commonwealth statutes – namely, *the Racial Discrimination Act 1975* (RDA) the *Sex Discrimination Act 1984* (SDA) the *Disability Discrimination Act 1992* (DDA), the *Age Discrimination Act 2004* (ADA) and the *Australian Human Rights Commission Act 1986* (AHRC Act) – into a single Bill is a significant development for the national human rights framework and one which has considerable implications for the community at large.

I am extremely concerned, therefore, at the timing of the release of the exposure draft of the Bill and the short time allowed for making submissions. These factors clearly limit the capacity of stakeholders to conduct the detailed analysis of the Bill and to provide informed comment to assist the committee in its scrutiny of the Bill.

While the primary object of the Bill is the consolidation of existing laws, the Bill also includes some significant changes to the Commonwealth anti-discrimination regime.

While I support the underlying objectives of simplification and removal of inconsistencies between the various Commonwealth anti-discrimination laws, I am concerned at key aspects of the Bill which I consider to have the capacity to create considerable uncertainty for the community. This uncertainty arises in two ways:

- interaction of the Commonwealth legislation with State and Territory laws; and
- obligations of duty holders.

Interaction with State and Territory laws

The overlapping Commonwealth and State anti-discrimination regimes raise issues of possible direct and indirect inconsistency and the overriding of inconsistent State legislation under section 109 of the Australian Constitution.

The expansion of the Commonwealth jurisdiction, for example, the Commonwealth protection of the grounds of gender identity and sexual orientation and extending coverage in relation to certain attributes to any area of public life, increases the potential for inconsistency between Commonwealth and State laws.

One of the strengths of maintaining an interlocking framework of Commonwealth, State and Territory anti-discrimination laws is the capacity for the different jurisdictions to be more immediately responsive to local community expectations, to benchmark their laws against anti-discrimination laws in other Australian jurisdictions and to ensure through this process that the nation's anti-discrimination laws are constantly reinvigorated.

These benefits can only be realised through ensuring certainty in the operation of Commonwealth, State and Territory laws.

Indirect inconsistency

The RDA, DDA, ADA and SDA all currently address "covering the field" inconsistency by including "savings" provisions which preserve the effect of State anti-discrimination laws that are capable of operating concurrently with the relevant Commonwealth Acts.

The Bill (clause 14, interaction with state and territory laws) preserves the current approach with some changes.

The clause also removes the current references in the RDA and SDA that limit the preservation of State laws to State anti-discrimination laws that further the objects of international conventions. This is a useful change that removes unnecessary complexity.

However, the clause also defines State or Territory anti-discrimination law as a State or Territory law prescribed by regulation for the purpose of the section. This requirement of prescription is unnecessary and adds a level of procedural complexity that impedes rather than enhances the flexibility of the new laws.

Some State and Territory anti-discrimination measures are currently located in various pieces of State legislation other than the primary anti-discrimination statute. It will take a great deal of effort and care to ensure that every State and Territory discrimination measure or exemption is prescribed and that legislative list continues to be maintained

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over time. If one such State or Territory discrimination measure is not prescribed, it will cause doubt as to the validity of the State or Territory provision.

The clause also excludes disability standards and compliance codes from its operation. While in principle, I recognise the merit in providing certainty to industry through the exclusion, compliance codes are a new concept and their ultimate effectiveness and impact on State laws is still an unknown. I have noted my concerns on this issue below.

Direct inconsistency

Whether or not a State law will be directly inconsistent is determined on a case by case basis.

Some of the Commonwealth anti-discrimination laws address direct inconsistency to some extent by providing a mechanism to preserve acts done in direct compliance with State or Territory laws, namely:

- the RDA and SDA provide no exemption for acts done in direct compliance with State or Territory laws;
- the DDA allows a regulation to be made exempting acts done in direct compliance with specified State and Territory laws; and
- the ADA exempts acts done in direct compliance with all State and Territory laws except where specified by regulation.

The Bill (Clause 30, exception for conduct in accordance with laws prescribed by the regulations) has adopted the DDA approach.

The Explanatory Notes state that where distinctions are justified they will be covered by the new justifiable conduct exception. The Explanatory Notes also state that because of this exception and the new clause 29 (i.e. general provision about age discrimination to protect children) there should be no need for jurisdictions to undertake a time consuming exercise to identify all laws that might require exemption.

I do not consider that it is appropriate to rely on a broad justifiable conduct exemption which does not give the State the requisite certainty that it is acting lawfully in enforcing State laws. I also do not consider that the mechanism in Clause 30 (modelled on the DDA approach to prescription of "exempt laws") is an effective or workable solution.

Practical experience with the DDA model is evidence of this. Few laws are currently prescribed under the DDA and there is the need for prescribed laws to require constant updating. Despite the statements in the Explanatory Notes, the requirement that States apply to the Commonwealth for a regulation to be made means that States will have to conduct initial time consuming audits on an on-going basis, and the Commonwealth will

also have to examine and analyse these applications before deciding to make the requisite regulation.

The removal of the exemption under the ADA for non-prescribed State legislation will create uncertainty in relation to a range of age-related Queensland laws that are currently exempt from the Commonwealth ADA. The exemption in Clause 29 is a limited exemption which would protect only conduct in accordance with laws that treat young people differently because of their vulnerability and does not adequately address the issue.

I consider that a more appropriate solution would be to replace Clause 30 with a new exemption for State and Territory laws modelled on the ADA approach (ie exemption of State laws unless prescribed under the Bill). This provides greater certainty in the application of State legislation, reduces the need for time consuming audits and making of Commonwealth regulations while giving the Commonwealth control over exemptions to its own legislation.

An alternative approach may be to include an exemption modelled on section 106 of the *Anti-Discrimination Act 1991* (Qld) which exempts acts that are necessary to comply with existing State and Territory laws. The Commonwealth should also consult with the States and Territories on the development of an appropriate mechanism for exempting future laws.

Compliance codes

Chapter 3 Division 6 of the Bill provides for the making of compliance codes by the Australian Human Rights Commission (Commission), either on the Commission's own initiative or on application by one or more persons or bodies (clause 76, process for making compliance codes). A compliance code can provide that the code, in whole or in part, is, or is not intended to affect the operation of State or Territory laws or particular State or Territory laws (clause 75(4)). Compliance codes can provide a complete defence to complaints under both Commonwealth anti-discrimination law and State and Territory anti-discrimination law (clause 75(1) in conjunction with clause 14).

This approach is new and has the capacity to significantly impact the operation of State and Territory laws. It is concerning, therefore, that there has been no prior consultation with Queensland on this issue or on the development of the specific provisions.

The Explanatory Notes to the Bill indicate that the intent is to encourage organisations to develop codes to obtain greater certainty about their obligations.

The Queensland Government supports the intent of providing greater certainty to industry and reducing unnecessary complaints but is concerned at the breadth of the Commission's power. Compliance codes, if made by the Commission, will be legislative instruments and the Commission will be required to comply with the consultation requirement of Part 3 of the *Legislative Instruments Act 2003 (Cth)*. In addition, the Commission will be required to consult with the Ministers of the relevant States who have responsibility for matters related to discrimination about the proposed code (or amendment).

I do not consider a consultation framework between the Commission and Ministers to be satisfactory as a statutory body cannot fully appreciate the complexities of States' interests and rights. To ensure that States' interests and rights are fully considered in this process, I would consider the minimum requirement for the making of such an instrument to be agreement by the relevant Ministers.

Impact on obligations of duty holders

The Bill will expand the rights of persons to make complaints of discrimination and will consequently increase the obligations on duty holders, such as businesses.

I am concerned that the Bill will also increase uncertainty for duty holders due to:

- the definition of "unfavourable treatment" in the new definition of discrimination (clause 19);
- "areas of public life" not being defined (clause 22); and
- a new justifiable conduct defence which replaces more specific exemptions (clause 23).

New definition of discrimination

The Bill provides that discrimination can arise in two ways, both of which may arise from the same set of facts, namely:

- where a person treats another person unfavourably; or
- where a person with a particular attribute is disadvantaged by a policy (which may of itself be apparently neutral).

"Unfavourable treatment" is defined to include (though not limited to):

- harassing the other person (19(2)(a)); or
- other conduct that offends, insults or intimidates the other person (18(2)(b)).

The Commonwealth Government argues that the new definition of discrimination focusing on "unfavourable treatment" will simplify the test for when conduct is discriminatory and to avoid the problems that have arisen with the current test of "less favourable treatment"

which involves a comparison of treatment of two people (one with the attribute and one without the attribute). This is known as the comparator test.

However, I am concerned that removing the comparator test means it is difficult to objectively determine whether a person has been discriminated against because of their attribute. Further, the use of subjective language such as “insult” and “offend” in the statutory definition of “unfavourable treatment” may be interpreted to set a low threshold test for discrimination which will result in unmeritorious complaints and lack of alignment with international human rights benchmarks that focus on the need for equality, rather than merely on the social value of being polite. Such a low threshold may also impact negatively on the right to freedom of speech without justification.

While I recognise that terms such as “insult” and “offend” have been used to describe discrimination in case law, such descriptions have been made in the context of the particular facts of the case. I am concerned that the express statutory definition of “unfavourable treatment” in these broad terms, without qualification, will create uncertainty amongst the community regarding their obligations.

Expanding jurisdiction to any area of public life

In relation to the extension of the jurisdiction to “any area of public life” (which is undefined in the Bill), I note that the Explanatory Notes state that this is intended to simplify the law and that there would be few areas not covered by the non-exhaustive list of areas where discrimination is prohibited.

It is difficult to see how leaving coverage so open will simplify the law. If there is any reason why areas other than those listed should be covered, I consider it reasonable for the community to expect that they would be clearly identified.

New definition of vilification

In addition, the definition of unfavourable treatment for the purpose of discrimination is also almost identical to the definition of “vilification” (Clause 51) and this will exacerbate uncertainty and difficulties of interpretation. These two separate legal actions should have different elements so the causes of action will not be confused.

The Bill prohibits vilification only on the basis of race. This contrasts with the prohibition on discrimination which applies to all the attributes listed in Clause 17. The prohibition on discrimination in all areas of public life applies to a narrower, but still extensive range of attributes.

This raises the question as to what is actually intended by Clause 19 (meaning of discrimination). For example, could it be interpreted to extend the vilification provisions to other attributes without any of the specific exemptions that apply in Clause 51 (eg

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exemptions for performance, exhibition or distribution of an artistic work and for statements, publications, discussions, or debate for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest)?

New general defence of justification

The Bill also includes a new general defence of "justification", which means discrimination is lawful when done for legitimate aim and is proportionate to the aim. There is merit in introducing a catch all defence into anti-discrimination law.

However, the new defence has replaced a range of subject-specific exemptions which provided certainty to duty holders in a range of areas. I am concerned that the onus has been placed on the respondent to raise the defence of justifiable conduct and currently there is no guidance about rights and obligations in this very important area of the law. I strongly suggest that clear legislative provision for specific exemptions remains so as to provide certainty to duty holders in a range of areas.

If you need any further information on my submission, please contact Ms Sharon Sargent, Senior Legal Officer, Strategic Policy, Department of Justice and Attorney-General on phone _____ who would be pleased to assist.

Thank you again for giving me this opportunity to comment on this Bill.

Yours sincerely

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Attorney-General and Minister for Justice