

**Submission to the Senate Standing Committee on Legal and  
Constitutional Affairs' Inquiry into the Human Rights and Anti-  
Discrimination Bill 2012 – Exposure Draft Legislation  
(21 December 2012)**

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**INTRODUCTION**

The following submission was prepared by Equality Rights Alliance ('ERA') and endorsed by a range of leading women's organisations and women's equality specialists. ERA is Australia's largest network advocating for women's equality, women's leadership and recognition of women's diversity. We bring together 60 organisations with an interest in advancing women's equality. ERA is led by the YWCA Australia and is one of six National Women's Alliances funded by the Australian government's Office for Women.

ERA welcomes the release of the Human Rights and Anti-Discrimination Bill 2012 ('HRAD Bill') and the opportunity to comment on the Bill prior to its introduction into Parliament. Our submission focuses on the areas of the Bill which we support and recommends improvements which will promote gender equality, and it considers areas which have been omitted from the draft Bill, which we urge the Committee to consider including in the final Bill.

This submission is endorsed by all five of the other National Women's Alliances and is also supported in whole or in part by the 56 organisations listed in appendix one.

**RECOMMENDATIONS**

**Recommendation 1**

**The requirement in clauses 23(6), 24 and 25 that employers make reasonable adjustments should be extended to all of the protected attributes in clause 17. Alternatively, at a minimum, reasonable adjustments should be extended to employees**

**with family or caring responsibilities.**

#### **Recommendation 2**

**The protection of unlawful behaviour on the ground of ‘family responsibilities’ should be extended beyond employment to cover all areas of public life.**

#### **Recommendation 3**

**The term ‘family responsibilities’ should be changed to ‘family and caring responsibilities’ throughout the Bill so that it is consistent with the terminology used throughout the *Workplace Gender Equality Act 2012* (Cth) and s 351(1) of the *Fair Work Act 2009* (Cth).**

#### **Recommendation 4**

**The definition of ‘family responsibilities’ in clause 6 should be defined to include domestic relationships and cultural understandings of family, including kinship groups, and members of the carer's household.**

#### **Recommendation 5**

**‘Survivor of domestic or family violence status’ should be included in the list of protected attributes in clause 17 and the protection should extend to all areas of public life.**

#### **Recommendation 6**

**The reference to ‘formal equality’ should be deleted from clause 3(1)(d)(i) so that it states that the Act's objects are ‘the principle of substantive equality’. The objects should be re-ordered to show that the concept of substantive equality is fundamental to the Bill.**

#### **Recommendation 7**

**Clause 105 should contain a requirement that decisions made by the Australian Human Rights Commission under clause 105(1) and any procedures or guidelines developed by the Commission in order to implement clause 105(1) must be consistent with the Bill's**

**objects as stated in clause 3.**

#### **Recommendation 8**

**Clause 60 should be extended to comprise a general provision requiring equality before the law which applies to all of the protected attributes.**

#### **Recommendation 9**

**The attributes ‘pregnancy’, ‘potential pregnancy’, ‘breastfeeding’, ‘gender identity’ and ‘family responsibilities’ should be removed from clause 32(1).**

#### **Recommendation 10**

**The attributes ‘pregnancy’, ‘potential pregnancy’, ‘sexual orientation’ and ‘gender identity’ should be removed from clause 33(1).**

#### **Recommendation 11**

**The phrase ‘or is necessary to avoid injury to the religious sensitivities of adherents of that religion’ should be removed from clause 33(2)(b)(ii).**

#### **Recommendation 12**

**Clause 33(3) should be extended to cover all Commonwealth-funded services across all of their activities.**

#### **Recommendation 13**

**A guide to damages should be adopted which can be used by judicial officers in discrimination cases. The guide should ensure that the award of compensation properly values the loss suffered by including future loss of pay and career advancement.**

#### **Recommendation 14**

**The available remedies in clause 125(2) should be amended so that damages are not limited to compensating the complainant, so courts have the capacity to award punitive damages which will deter future unlawful behavior, and so courts can make wider orders which will bring about the systemic change required to avoid future**

**discrimination.**

#### **Recommendation 15**

**Clauses 120 and 122 of the Bill should be amended to include a capacity for organisations to engage in strategic litigation by lodging complaints on behalf of affected persons in court. An organisation should be granted standing in similar terms to clause 89 once the court has granted leave following the application of a public interest test.**

#### **Recommendation 16**

**The terms of clause 124 should remain as currently drafted in the Bill.**

#### **Recommendation 17**

**The terms of clause 133 should remain as currently drafted in the Bill.**

#### **Recommendation 18**

**We request the Committee make a recommendation that the funding to working women's centres, community legal centres, specialist low cost legal services and Legal Aid should be increased so they have the resources to provide legal advice about discrimination, harassment and other matters in the Bill.**

#### **Recommendation 19**

**We request the Committee make a recommendation that the Australian Human Rights Commission is provided with additional funding to permit the Commission to intervene in matters before the Federal Court relating to the Bill and to human rights.**

#### **Comment 1**

**We note with regret that the Bill does not contain a positive duty on public and private sector employers, educational institutions and other service providers to eliminate discrimination, sexual harassment and promote equality which clearly defines the equality goals it seeks to achieve and include effective monitoring and enforcement mechanisms. This is unfortunate because it means that protection against**

**discrimination in Australia will continue to rely for effectiveness on the capacity of often vulnerable individuals to make complaints and otherwise assert their rights in public life.**

## **JUSTIFICATION FOR RECOMMENDATIONS**

### **1. Family and Caring Responsibilities**

In a recent report, eS4W valued unpaid care at \$650.1 billion which is equivalent to 50.6 per cent of GDP or 11.1 million full-time workers. The report states that women contributed to 60 per cent of the 21.4 billion hours of unpaid care work undertaken across Australia in 2009-2010.<sup>1</sup> Given the number of employees who are engaged in unpaid care work, making things easier for employees with caring responsibilities is of significant value to the Australian economy.

‘Reasonable adjustments’ is a fundamental mechanism for ensuring substantive equality which is consistent with the aims of the HRAD Bill.<sup>2</sup> The purpose of reasonable adjustments is to place an obligation on an employer, educator or service provider to make reasonable adjustments in order to accommodate a particular attribute. This concept has most commonly been used to require organisations to change their practices and policies to accommodate people with a disability. There is no reason for limiting substantive equality to the area of disability; reasonable adjustments could easily be extended to other attributes.

The *Fair Work Act* contains only a limited right for employees to request flexible working arrangements if they have children under school age or a child under 18 with a disability. An employer can refuse their request on reasonable business grounds.<sup>3</sup> We propose a stronger obligation. We recommend extending the concept of reasonable adjustments to people with family or caring responsibilities. This would place an obligation on employers to make adjustments for women and men with such responsibilities. The value of extending the obligation to people with family or caring responsibilities is that it would encourage more family friendly work practices, increase workforce participation and address discriminatory

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<sup>1</sup> eS4W, *Counting on Care Work in Australia Report* (2012).

<sup>2</sup> See clauses 3(1) (d) and (e).

<sup>3</sup> Section 65.

policies and practices proactively, rather than relying on someone to experience discrimination and make a complaint. This type of provision would also assist in promoting dialogue between employers and employees regarding flexible work practices, which is consistent with the general approach taken in the *Fair Work Act* and the *Workplace Gender Equality Act 2012* (Cth) particularly in relation to family and caring responsibilities.

We note that extending the reasonable adjustments provisions to people with family and caring responsibilities was recommended by the Senate Standing Committee on Legal and Constitutional Affairs' in its 2008 inquiry into the effectiveness of the *Sex Discrimination Act 1984* (Cth) ('SDA').<sup>4</sup>

Employers who do not engage in a process of considering reasonable adjustments face a high risk of failing to meet the 'justifiable' defence in clause 23, regardless of the protected attribute. Therefore, extending the reasonable adjustment to other attributes will not add an additional burden to employers and it has the advantage of making clear to employers the best course of action to avoid discrimination.

### **Recommendation 1**

**The requirement in clauses 23(6), 24 and 25 that employers make reasonable adjustments should be extended to all of the protected attributes in clause 17. Alternatively, at a minimum, reasonable adjustments should be extended to employees with family or caring responsibilities.**

As the HRAD Bill currently stands, the definition of 'family responsibilities' and limiting discrimination based on family responsibilities to employment is inconsistent with State and Territory anti-discrimination laws, which increases the regulatory burden. We recommend a consistent approach which will make compliance less complex. In addition, the absence of the protection of caring responsibilities adds to this complexity and means the terminology used in the Bill is inconsistent with related federal legislation.

We support the use of the term 'family and carer's responsibility' and the extension of the

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<sup>4</sup> Recommendation 14.

protection across all areas of public life. By focusing on the term ‘family’, the present term fails to cover employees who have an obligation to care for someone with whom they do not have a family relationship and unnecessarily covers employees who have family members who are technically dependant on her/him but to whom the employee has no obligation to care, possibly because that care is being provided by someone else. Adding the term ‘caring’ to the phrase takes the emphasis off the family relationship between the two parties and focuses it on the level of obligation and the act of caring for someone, which more accurately reflects the needs of the carer and the intention of the Bill.

It is also important that the term ‘carer’ is defined appropriately and takes into account the various caring relationships that may exist. We note that this was a concern of the recent independent review into the *Fair Work Act* which recommended that the scope of caring arrangements protected under that Act should be expanded to encompass a wider range of caring responsibilities that exist.<sup>5</sup> The definition of ‘family responsibilities’ in the Bill reflects the current definition in s 7A of the SDA and provides that:

Family responsibilities of a person means responsibilities of the person to care for or support:

- (a) a child of the person who is wholly or substantially dependent on the person; or
- (b) any other member of the person’s immediate family who is in need of care and support.

‘Immediate family’ is further defined as:

a person’s immediate family includes:

- (a) a spouse, former spouse, de facto partner or former de facto partner of the person; and
- (b) a child, parent, grandparent, grandchild or sibling of the person, or of a spouse, former spouse, de facto partner or former de facto partner of the person.

This is a narrow definition because it excludes the network of relationships and care obligations of specific groups including, but not limited to, Aboriginal and Torres Strait Islander communities. It is essential that the definition of family responsibilities in the HRAD is an inclusive one, capable of recognising the variety of different family and kinship relationships of all those groups specifically protected by the Act. We note that the definition of ‘family responsibilities’ in s 4(1) of the *Equal Opportunity Act 1984* (WA) is preferable to

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<sup>5</sup> Fair Work Act Review, *Towards More Productive and Equitable Workplaces*, (2012), Recommendation 5.

the current definition in the HRAD Bill.

### **Recommendation 2**

**The protection of unlawful behaviour on the ground of ‘family responsibilities’ should be extended beyond employment to cover all areas of public life.**

### **Recommendation 3**

**The term ‘family responsibilities’ should be changed to ‘family and caring responsibilities’ throughout the Bill so that it is consistent with the terminology used throughout the *Workplace Gender Equality Act 2012 (Cth)* and s 351(1) of the *Fair Work Act 2009 (Cth)*.**

### **Recommendation 4**

**The definition of ‘family responsibilities’ in clause 6 should be defined to include domestic relationships and cultural understandings of family, including kinship groups, and members of the carer’s household.**

## **2. Domestic Violence**

We identify the failure to protect victims of domestic violence as a significant gap in anti-discrimination law<sup>6</sup> and in the HRAD Bill. Adverse treatment on the basis of being a survivor of domestic violence is an issue that severely affects a large number of women, especially in the workplace.<sup>7</sup> While there has been some movement towards addressing this issue in the workplace by providing leave entitlements in enterprise agreements, this will not necessarily address all of the discrimination experienced by women who are survivors of domestic violence. Moreover, this approach does not address the other forms of discrimination women

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<sup>6</sup> Others have identified this gap. See Belinda Smith, Tashina Orchiston, ‘Domestic Violence Victims at Work: A Role for Anti-discrimination Law?’ (2012) 25(3) *Australian Journal of Labour Law* 209; Alana Heffernan, Lee Matahaere, Domestic violence discrimination in the workplace: Is statutory protection necessary? (Our Work Our Lives Conference, 2010, available at [http://www.qwww.org.au/index2.php?option=com\\_docman&task=doc\\_view&gid=25&Itemid=51](http://www.qwww.org.au/index2.php?option=com_docman&task=doc_view&gid=25&Itemid=51)); and Andrea Durbach, Deputy Sex Discrimination Commissioner ‘Domestic Violence Discrimination and the Consolidation of Commonwealth Anti-Discrimination Laws’ (Paper delivered at the Safe at Home, Safe at Work Conference, Melbourne, 5 December 2011, available at [http://www.hreoc.gov.au/about/media/speeches/sex\\_discrim/2011/20111205\\_domestic\\_violence.html](http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2011/20111205_domestic_violence.html) (accessed 19 December 2011).

<sup>7</sup> See further research carried out by the Domestic Violence Workplace Rights and Entitlements Project available at <http://www.dvandwork.unsw.edu.au/research> (accessed 19/12/12).



in this position experience such as discrimination by landlords and other accommodation providers.<sup>8</sup>

We note that at its national conference in 2011, the Australian Labor Party committed to changing anti-discrimination legislation and the *Fair Work Act* so that they provided “appropriate protection to victims of domestic violence in the workplace”.<sup>9</sup> We strongly urge the government to act on this commitment and introduce an attribute which protects survivors of domestic violence from discrimination into clause 17 of the HRAD Bill.

We endorse the Domestic Violence Clearing House’s submission to this Committee and support its recommendations to this inquiry. In addition, we strongly recommend the inclusion of this attribute in the Bill but we do not support the use of the term ‘victim’. We recommend using ‘survivor of domestic or family violence status’ or ‘gender based violence’ which do not contain the pejorative connotations associated with victimhood.

### **Recommendation 5**

**‘Survivor of domestic or family violence status’ should be included in the list of protected attributes in clause 17 and the protection should extend to all areas of public life.**

### **3. Equality Before the Law**

Promoting equality for all people regardless of gender is a key principle underpinning the SDA and the Convention on the Elimination of all forms of Discrimination Against Women. We welcome the introduction of an objects clause which recognises the importance of promoting equality and that it may be necessary to take special measures to achieve substantive equality. However, we think that the reference to both formal equality and substantive equality in clause 3(1)(d)(i) is confusing because the two forms of equality can potentially be at odds with one another. Australian anti-discrimination law has long upheld the principle of formal equality (the idea that likes should be treated alike) but it has been less

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<sup>8</sup> Donna Chung, Rosemary Kennedy, Bev O’Brien and Sarah Wendt, *Home Safe Home: the Link Between Domestic and Family Violence and Women’s Homelessness* (Partnerships Against Domestic Violence, Commonwealth of Australia, November 2000).

<sup>9</sup> Australian Labor Party 46th National Conference, Amendment 448A. See <http://ouralp.net/2011/12/04/all-the-motions-from-national-conference-2011/> (accessed 6/12/11).

effective at achieving substantive equality which can require people to be treated differently to achieve equality (such as reasonable adjustments for employees with family or carer's responsibilities, as discussed above). For this reason, we recommend that the reference to 'formal equality' should be deleted from clause 3(1)(d)(i) so that it is committed to substantive equality. The objects clause is fundamental to the Act because of its use in interpreting the Act, in setting the parameters of the Australian Human Rights Commission's role and functions, and in determining the goals of the new law. We also support the re-ordering of clause 3 as recommended by the Discrimination Law Experts' Group in its submission to the Committee as this would highlight the importance of substantive equality in the Bill.

#### **Recommendation 6**

**The reference to 'formal equality' should be deleted from clause 3(1)(d)(i) so that it states that the Act's objects are 'the principle of substantive equality'. The objects should be re-ordered to show that the concept of substantive equality is fundamental to the Bill.**

#### **Recommendation 7**

**Clause 105 should contain a requirement that decisions made by the Australian Human Rights Commission under clause 105(1) and any procedures or guidelines developed by the Commission in order to implement clause 105(1) must be consistent with the Bill's objects as stated in clause 3.**

We note that the right to equality before the law in clause 60 is limited to race. This stands in contradiction to the Bill's objects, as listed in clause 3, which states that the Act is intended to *inter alia* give effect to Australia's obligations under the human rights instruments (including the Convention on the Elimination of all forms of Discrimination Against Women<sup>10</sup> which enshrines gender equality<sup>11</sup>) and to promote recognition and respect within the community for the principle of equality and the inherent dignity of all people. The title of the Bill suggests that the Bill is intended to protect human rights, yet it does not guarantee one of the most

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<sup>10</sup> Clause 3(2)(d).

<sup>11</sup> See eg Article 2.

fundamental human rights - the right to equality.

Accordingly, we recommend the introduction of general equality clause which applies to all protected attributes. We note that the Senate Standing Committee on Legal and Constitutional Affairs' 2008 inquiry into the SDA recommended the inclusion of a general equality before the law provision, modelled on s 10 of the *Racial Discrimination Act 1975* (Cth).<sup>12</sup> This would meet Australia's international obligations under the Convention on the Elimination of all forms of Discrimination Against Women which requires States Parties to protect the principle of equality of men and women in appropriate legislation.<sup>13</sup>

### **Recommendation 8**

**Clause 60 should be extended to comprise a general provision requiring equality before the law which applies to all of the protected attributes.**

#### **4. Exceptions Relating to Religion**

As we stated in our previous submission, we do not support the inclusion of permanent or automatic exceptions. If such exceptions are to continue, it is our view that, as a general rule, exceptions in human rights legislation should be drafted as tightly as possible so that individual rights are protected to the greatest extent possible. Furthermore, we do not think that exceptions should be included which continue to maintain the subordinate position of women or to allow discrimination based on characteristics which are fundamental to what it is to be a woman, such as family responsibilities and pregnancy.

We welcome the removal of 'sex' as an attribute in clause 33 which relates to discrimination by religious bodies and educational institutions. We are concerned that the exceptions contained in clause 33 for religious bodies and educational institutions are much broader than s 38 of the SDA, which clause 33 is based on. Section 38 only applies to the attributes of sex, marital status and pregnancy in employment and the provision of education or training by a religious educational institution. Clause 33 contains the additional attributes of sexual orientation and gender identity and it is not restricted to employment and the provision of

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<sup>12</sup> Recommendation 9.

<sup>13</sup> Article 2.

education.

Clause 32 contains an exception for the appointment or ordination of priests or ministers of religion, which replicates ss 37(a), (b) and (c) of the SDA. We note with concern that the attributes listed are primarily characteristics related to the status of being a woman.

Any potential religious objection to pregnancy, potential pregnancy, breastfeeding, gender identity, and family responsibilities under clauses 32 and 33 are already adequately covered by the inclusion of sex, sexual orientation and marital or relationship status in clause 32(1) and sexual orientation and marital or relationship status in clause 33(1). In the absence of any evidence to the Committee that there is a religion which specifically requires these exceptions to cover a situation which would not be covered by these attributes, the Committee should reject unnecessary extensions of these exceptions.

#### **Recommendation 9**

**The attributes ‘pregnancy’, ‘potential pregnancy’, ‘breastfeeding’, ‘gender identity’ and ‘family responsibilities’ should be removed from clause 32(1).**

#### **Recommendation 10**

**The attributes ‘pregnancy’, ‘potential pregnancy’, ‘sexual orientation’ and ‘gender identity’ should be removed from clause 33(1).**

The scope of the exception in clause 33(4) goes well beyond activities which primarily affect adherents to a religion. It encompasses activities which may involve relatively few members of a faith and a large number of general members of the public, such as hiring venues or engaging in enterprises owned by a church. We note that this exception is much broader than the current exception in s 38 of the SDA.

Clause 33(4) is not workable in its current form. An exception for ‘religious sensitivities’ cannot be properly tested in court because the term is not defined and is highly subjective. The exception as currently drafted does not require that the sensitivity be linked to any formal creed or publicly acknowledged (and verifiable) doctrine of an established faith.

### **Recommendation 11**

**The phrase ‘or is necessary to avoid injury to the religious sensitivities of adherents of that religion’ should be removed from clause 33(2)(b)(ii).**

While the private activities of a religion may be the subject of limited exceptions, the government should not allow public funds to be used in a discriminatory manner in any circumstances. We support the restriction in clause 33(3) that the exception for religious organisations does not apply if the discrimination is connected with the provision of Commonwealth-funded aged care services but we do not think this requirement goes far enough. First, it is limited to aged care services funded by the Commonwealth, so it does not apply to the wide variety of other Commonwealth funded services which are provided by religious organisations. Second, it is limited to the provision of services in such aged care facilities; it does not extend to other decisions of the aged care provider, such as employment. The restriction should apply to all sectors, such as education, commercial, social and community sectors, which receive public funds, across all of their activities.

### **Recommendation 12**

**Clause 33(3) should be extended to cover all Commonwealth-funded services across all of their activities.**

## **5. Damages and Remedies**

Effective anti-discrimination law requires sufficient incentives for individuals to enforce the law and remedies that will ensure systemic change to avoid future discrimination. Except in a few exceptional cases, the damages ordered in successful claims heard under the SDA have been very low, and arguably do not fully compensate women for their loss, especially where discrimination or harassment results in termination of employment. This leads to a situation where there is little incentive for individuals to bring enforcement actions as they may end up with little gain after paying their solicitor client costs. Where complaints are brought, it is only in rare cases that large amounts of damages are ordered.<sup>14</sup> Damages awards must begin

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<sup>14</sup> See further the damages ordered under the SDA between 2000-2011 in Australian Human Rights Commission, *Federal Discrimination Law* (2011), Chapter 7.

to properly value the loss that is suffered in sex discrimination matters. While awards for back pay are common, awards for pain and suffering, and for front pay are often not given, or are unjustifiably low. Pain and suffering awards are often only several thousand dollars, which is quite inadequate in a matter where a complainant has had to persist with litigation in which her competence, personality and motives may have been subject to attack and where she has had to risk the possibility of paying the respondents costs if she lost. This is particularly an issue in cases against government and large corporations where the respondents are not affected in their litigation decisions by resource limitations. For example, in *Hickie v Hunt and Hunt*, the compensation awarded was a very small sum for loss of a career as a law firm partner. A woman who has brought a successful and well publicised claim of discrimination in one of Australia's professions may have a very reduced chance of getting another such position, and under-compensation in that situation is a strong deterrent to challenging discriminatory practices. Where cases appear likely to result in large damages awards (*Thomson v Orica*, *Christina Rich v PricewaterhouseCoopers Australia*), they are usually settled so that the amounts paid out do not become public knowledge.

The Federal Court does not have the power to make systemic corrective orders, such as a change in policy, the introduction of a compliance program that might prevent further discrimination, an audit to ascertain further or more widespread incidence of discrimination similar to that of the individual complainant, training or requiring employers to change their practices and prevent similar discrimination from occurring in the future.

We support the introduction of remedies which will address future behavior as well as address the discriminatory behaviour which has already occurred. We note that in its 2008 inquiry into the effectiveness of the SDA, the Senate Standing Committee on Legal and Constitutional Affairs recommended the introduction of corrective and preventative orders when discrimination is proven.<sup>15</sup> The HRAD Bill does not contain systemic remedies. We urge the Committee to recommend including them in the Bill because if they are not included, the law will continue to remain focused on redressing unlawful behavior after the fact, not on preventing harm or promoting equality.

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<sup>15</sup> Recommendation 23.

### **Recommendation 13**

**A guide to damages should be adopted which can be used by judicial officers in discrimination cases. The guide should ensure that the award of compensation properly values the loss suffered by including future loss of pay and career advancement.**

### **Recommendation 14**

**The available remedies in clause 125(2) should be amended so that damages are not limited to compensating the complainant, so courts have the capacity to award punitive damages which will deter future unlawful behavior, and so courts can make wider orders which will bring about the systemic change required to avoid future discrimination.**

## **6. Strategic Litigation**

There is a strong argument for public support of strategic litigation to ensure the development of an effective set of precedents in Australian discrimination law. This would require provision of a litigation fund to an organisation with responsibility and expertise to resource selected cases, the litigation of which would provide clear guidance to all parties on what the law requires. The cost of legal representation combined with the minimal provision of Legal Aid in Australia for discrimination claims and the under-resourcing of community legal centres means that enforcement is restricted. Furthermore, the resourcing and power imbalance in many litigated matters impacts undesirably on the development of precedent.

There is a strong need to ensure that community legal centres, Legal Aid and the Australian Human Rights Commission are adequately funded, as we discuss below. In addition, effective representative complaints provisions are required to improve the accessibility and efficacy of the individual complaints process. Representative complaints would enable an organisation to lodge an application on behalf of an affected individual if the court determined that it was in the public's interest to do this. An organisation may use this, for example, to test an underused part of the law, to develop precedent or to highlight an issue of concern for women.

Currently, representative organisations can lodge a complaint on behalf of an affected individual at the Commission. We recommend that this is extended so that representative organisations can also lodge claims in the Federal Court. We note that the Australian Human Rights Commission has recommended further consideration of standing in its submission to this Senate inquiry, in particular that further consideration is given to introducing provisions to enable representative organisations to initiate matters in court.<sup>16</sup>

### **Recommendation 15**

**Clauses 120 and 122 of the Bill should be amended to include a capacity for organisations to engage in strategic litigation by lodging complaints on behalf of affected persons in court. An organisation should be granted standing in similar terms to clause 89 once the court has granted leave following the application of a public interest test.**

## **7. The Burden of Proof**

The difficulties with proving discrimination, whether on the basis of sex or another attribute, are well documented. A woman alleging discrimination must establish on the balance of probabilities that she was treated less favourably due, for example, to her gender, marital status or pregnancy, even though the true reason for her treatment is generally known only to the respondent. This can be an insurmountable hurdle for complainants who may not have access to legal assistance, and who themselves are unlikely to have the technical legal expertise to establish their case.

Contrary to some recent media reporting, the approach taken in clause 124 is not actually a reversal of the onus of proof. It is instead a division of the onus into the respective sphere of knowledge of each party, with the complainant required to establish a prima facie case of discrimination and the respondent then invited to rebut the presumption with the evidence in her/his possession.

We strongly support the inclusion of clause 124 in the Bill. Clause 124 brings Australian law

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<sup>16</sup> Recommendation 11.



in line with the approach taken in international jurisdictions.<sup>17</sup> Clause 124 is different to s 361 of the *Fair Work Act* because it is not a reverse onus. Unlike the *Fair Work Act*, under clause 124, the complainant is required to do more than just allege discrimination. The complainant is required to allege that the respondent engaged in conduct for a prohibited reason or purpose *and* adduce evidence that is sufficient for the court to decide that the respondent engaged in conduct for a prohibited reason or purpose. Having done so, the complainant will raise a presumption that the reason or purpose they alleged is the reason or purpose the respondent engaged in the conduct. The respondent can then adduce evidence to rebut this presumption or they can rely on an available defence or exception.

We note that enacting clause 124 will implement Recommendation 22 of the Senate Standing Committee on Legal and Constitutional Affairs' 2008 inquiry into the effectiveness of the SDA. We also note that the introduction of this clause has support from the Australian Human Rights Commission.<sup>18</sup>

In the absence of a positive obligation to avoid discrimination, clause 124 is essential to the proper functioning of the proposed legislation. A purely complaints-based system is essentially unworkable if the complainant (who is often a vulnerable person of limited resources) is required to prove matters which are outside her/his knowledge, such as the respondent's reason for her/his behaviour.

## **Recommendation 16**

**The terms of clause 124 should remain as currently drafted in the Bill.**

## **8. Costs and Legal Resourcing**

Women are less likely to have the necessary resources to pursue a discrimination matter through the courts. As it currently stands, there is a powerful disincentive in the federal jurisdiction for a complainant to take a discrimination matter to court due to the risk of an

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<sup>17</sup> For example, the United Kingdom (s 136 of the *Equality Act 2010* (UK)) and Ireland (s 84A of the *Employment Equality Act 1998-2004* (Ireland)). See also European Council Directives - Burden of Proof Directive 97/80/EC, art 4(1); Racial Equality Directive 2000/43/EC, art 8.

<sup>18</sup> Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee on the Exposure draft Human Rights and Anti-Discrimination Bill 2012* (December 2012), 5.

adverse costs order if the complainant is unsuccessful. For this reason, we support the inclusion of clause 133 in the Bill.

This may mean more women are willing to proceed to hearing in the federal courts but they may not be able to because they lack the resources to obtain specialist legal advice about their claim. Community legal centres and Legal Aid are underfunded and often not able to assist women with a discrimination claim. In its 2008 inquiry into the effectiveness of the SDA, the Senate Standing Committee on Legal and Constitutional Affairs recommended that working women's centres, community legal centres, specialist low cost legal services and Legal Aid receive increased funding so they have the resources to provide advice about matters under the SDA.<sup>19</sup> We strongly urge the Committee to reiterate this recommendation.

We note the value of the Sex Discrimination Commissioner and the Australian Human Rights Commission's work in eliminating sex discrimination, sexual harassment and promoting gender equality and recognise the role that they will continue to play under the Bill. In particular the functions listed in clause 146. We stress that the Sex Discrimination Commissioner and the Australian Human Rights Commission must be adequately funded in order to effectively perform the function of intervening in matters before the Federal Court which relate to and affect gender equality.<sup>20</sup>

### **Recommendation 17**

**The terms of clause 133 should remain as currently drafted in the Bill.**

### **Recommendation 18**

**We request the Committee make a recommendation that the funding to working women's centres, community legal centres, specialist low cost legal services and Legal Aid should be increased so they have the resources to provide legal advice about discrimination, harassment and other matters in the Bill.**

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<sup>19</sup> Recommendation 24.

<sup>20</sup> We note that this recommendation was also made by the Senate Standing Committee on Legal and Constitutional Affairs in its 2008 inquiry into the effectiveness of the SDA: Recommendation 34.

## **Recommendation 19**

**We request the Committee make a recommendation that the Australian Human Rights Commission is provided with additional funding to permit the Commission to intervene in matters before the Federal Court relating to the Bill and to human rights.**

## **9. Positive Duty to Promote Equality**

Since its introduction, Australia has relied on an individualised, reactive complaints-based model to address discrimination and promote equality. Under this model, discrimination will only be remedied if the victim takes action. The law is limited and cannot address problems proactively before someone experiences discrimination, nor can it address things complaints are not made about. For this reason, in 2008, Senate Standing Committee on Legal and Constitutional Affairs' recommended the introduction of a positive duty to eliminate sex discrimination and sexual harassment and promote gender equality following its inquiry into the effectiveness of the SDA.<sup>21</sup>

However, we note with sincere regret that no positive obligations to promote equality were included in the Bill. This means that the Commonwealth's anti-discrimination laws will continue to rely on an individualised, reactive complaints-based model to address discrimination. Under this model, discrimination will only be remedied if the person who has been subject to discrimination takes action. The law is limited and cannot address problems proactively before someone experiences discrimination, nor can it address things complaints are not made about. Unless this is changed, the law will continue to have only a limited effect on promoting equality.

### **Comment 1:**

**We note with regret that the Bill does not contain a positive duty on public and private sector employers, educational institutions and other service providers to eliminate discrimination, sexual harassment and promote equality which clearly defines the equality goals it seeks to achieve and include effective monitoring and enforcement mechanisms. This is unfortunate because it means that the protection against discrimination in Australia will continue to rely for effectiveness on the capacity of often**

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<sup>21</sup> Recommendations 14 and 40.

**vulnerable individuals to make complaints and otherwise assert their rights in public life.**

## **Appendix one**

This submission is endorsed by the following National Women's Alliances:

- Australian Women Against Violence Alliance (AWAVA)
- National Rural Women's Coalition (NRWC)
- Australian Migrant and Refugee Women's Alliance (AMaRWA)
- Economic Security For Women (ES4W)
- National Aboriginal and Torres Strait Islander Women's Alliance (NATSIWA)

This submission is also supported in whole or in part by the following organisations:

- 2020Women
- Aboriginal Legal Rights Movement
- Amnesty International Australia (National Women's Rights Team)
- Australasian Council of Women and Policing
- Australian Centre for Leadership for Women
- Australian Council for International Development Gender Equity Working Group
- Australian Federation of Graduate Women
- Australian Federation of Medical Women
- Australian Motherhood Initiative for Research and Community Involvement
- Australian Womensport and Recreation
- Australian Women's Health Network
- Children by Choice
- COTA Australia
- Enlighten Education
- Fitted for Work
- Girl Guides Australia
- Homebirth Australia
- Human Rights Law Resource Centre
- Immigrant Women's Speakout Association NSW
- International Women's Development Agency
- JERA International
- Jessie Street National Women's Library
- Maternity Coalition Inc.
- Migrant Women's Lobby Group of South Australia
- Multicultural Women's Advocacy ACT
- National Association of Services Against Sexual Violence
- National Council of Churches of Australia Gender Commission
- National Council of Jewish Women of Australia
- National Council of Single Mothers and Their Children

- National Council of Women of Australia
- National Foundation for Australian Women
- National Union of Students (Women's Department)
- Older Women's Network NSW Inc (OWN)
- Project Respect
- Public Health Association of Australia (Women's Special Interest Group)
- Public Interest Law Clearing House (VIC) Inc
- Sexual Health and Family Planning Australia
- Soroptimist International
- Sisters Inside
- UN Women
- Union of Australian Women
- United Nations Association of Australia Status of Women Network
- Victorian Immigrant and Refugee Women's Coalition
- VIEW Clubs of Australia
- Women in Engineering Australia
- Women on Boards
- Women with Disabilities Australia
- Women's Economic Think Tank
- Women's Electoral Lobby
- Women's Environment Network Australia
- Women's Information Referral Exchange (WIRE)
- Women's International League for Peace and Freedom
- Women's Legal Services Australia
- Working Against Sexual Harassment
- YWCA Australia
- Zonta International District 24