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Dear Ms. Dennett,

Draft Exposure Human Rights and Anti-Discrimination Bill 2012

1. In February 2012 Australian Lawyers for Human Rights (ALHR) made a submission to the Commonwealth Attorney-General regarding the Consolidation of Commonwealth Anti-Discrimination Laws discussion paper.¹ ALHR welcomes the opportunity to provide further comments and to make a further submission to the Legal and Constitutional Affairs Committee regarding the Draft Exposure Human Rights and Anti-Discrimination Bill ('**Draft Exposure Bill**'). ALHR's submission is divided into the following sections:

Introduction & summary of ALHR recommendations	2
Areas of concern	4
<i>The Protected Attributes</i>	4
<i>Unlawful Discrimination</i>	9
<i>Measures to Assist Compliance</i>	13
<i>Complaints</i>	14
About ALHR.....	15

¹ www.alhr.asn.au/getfile.php?id=226 (attached as annexure 1 to this submission).

Introduction & summary of ALHR recommendations

2. ALHR strongly welcomes the Draft Exposure Bill as a step forward in producing a unified piece of legislation that provides clearer, simpler protections and obligations for persons, businesses and organisations. We also welcome the inclusion of protection from discrimination on the grounds of sexual orientation and gender identity. While ALHR still has concerns about the Draft Exposure Bill, which are elaborated below, overall, ALHR recommends that the Committee support the Bill's passage through Parliament.
3. ALHR welcomes the implementation of many of its February 2012 recommendations in the Exposure Draft Bill. It urges the Committee to ensure these recommendations are retained in the final Act.
4. ALHR in particular welcomes the introduction of a unified definition of discrimination, and the consistent approach to exceptions for unlawful discrimination through the inclusion of the justifiable differential treatment test.
5. ALHR supports the inclusion of s 124 of the Exposure Draft Bill about sharing the burden of proof. This is distinct from a reverse onus of proof as occurs in s361(1)(b) of the *Fair Work Act 2009 (Cwth) (FW Act)*. In the FW Act, a complainant must show that the conduct took place and allege the basis on which it is said that the conduct is unlawful. The burden then shifts to the respondent to prove that the conduct was not unlawful.
6. In the Exposure Draft Bill, the complainant needs to show the conduct took place and 'adduce evidence from which the court could decide' that the conduct was for an unlawful reason.² When a complainant has done so, the Court can accept that unlawful reason as made out unless the respondent proves otherwise.
7. This sharing of burden is more equitable as the respondent is usually the party in possession of the evidence capable of showing that their conduct was not unlawful. As noted in the Attorney-General's Discussion Paper, the current full allocation of the burden of proof to the complainant in many Commonwealth and State anti-discrimination laws makes it disproportionately difficult for the complainant to establish unlawful discrimination. Further, few international approaches follow the current Australian approach of placing the burden of proving discrimination entirely on the complainant.³
8. ALHR strongly supports the no-costs jurisdiction that has been included in the Exposure Draft Bill. Such an inclusion is essential to ensure the key objective of developing accessible mechanisms for dispute resolution. ALHR notes that a no-costs approach was a key recommendation of the *Productivity Commission Report*.⁴ ALHR advocates for access to justice for all members of our society. The costs of the court process for anti-discrimination complaints, particularly, the potential for adverse costs orders to be made against parties at the conclusion of proceedings, will often prohibit or deter individual litigants from proceeding to a final hearing of their legitimate complaint. This

² *Human Rights and Anti-Discrimination Bill 2012 (Exposure Draft)*, s124(1).

³ *Discrimination Discussion Paper* at [48-50].

⁴ *Productivity Commission, Review of the Disability Discrimination Act 1992 (Report No. 30, 2004) (Productivity Commission Report)*, recommendation 13.4

is especially so where individual litigants complaining of discrimination or harassment will often be in a marginalised or disadvantaged position.⁵ The exception to costs should be consistent with the *FW Act* and therefore be limited to circumstances when the complaint is 'vexatious or without reasonable cause';⁶ or 'the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs';⁷ or both.⁸

9. In addition to this costs issue, ALHR has several recommendations that it urges be adopted when developing this legislation. ALHR remains concerned that the absence of these key recommended elements of the Exposure Draft Bill may hinder the Bill's intended objectives of effectiveness, efficiency, simplicity and accessibility. These are the key points, expanded upon elsewhere in this submission:
 - a) That core aspects of the Exposure Draft Bill be retained in the final version of the act: sharing the burden of proof, no-costs jurisdiction, unified definition of discrimination, consistent approach to exceptions for unlawful discrimination, expanded definition of human rights, expansion of protection into all areas of public life, broad coverage of harassment, the extended list of particular areas covered, simpler and broader coverage of work related areas, application of the Bill to State governments and their agencies
 - b) That protection on the ground of 'family responsibilities' be expanded to include 'family and carer responsibilities' and that 'family responsibilities' include domestic relationships and cultural understandings of family, including kinship groups.
 - c) That all protected attributes apply to all areas of public life.
 - d) That protection from discrimination for those who identify as or are perceived to be GLBTIQ be as inclusive as possible and explicitly include intersex.
 - e) That protection from discrimination on the grounds of irrelevant criminal record, homelessness, social status, being an applicant or in receipt of a social service and being a victim/survivor of domestic/family violence be included.
 - f) That the legislation include an express duty to make reasonable adjustments to the physical or social environment in relation to all protected attributes. This aspect should not be confined to disability discrimination.
 - g) That the vicarious liability provisions be further clarified to require the principal to bear the onus of proving they had no actual or constructive knowledge of the discriminatory conduct.

⁵ Such as commencing or conducting proceedings against a well-resourced corporate or government organisation.

⁶ *Fair Work Act* s570(2)(a)

⁷ *Fair Work Act* s570(2)(b)

⁸ *Fair Work Act* s570(2)(c). The *Native Title Act 1993* (Cwth), s85A also provides a form of 'no costs' regime which aims to ensure that applicants are not prevented from bringing legitimate proceedings by the potential of an adverse costs order, but also allow the Court to order costs against a party which has acted unreasonably, eg: *Davidson v Fesl (No 2)* [2005] FCA 274 per French and Finn JJ; *Bennell v Western Australia* [2006] FCA 1243, [950]; *Yalanji People v Queensland* [2006] FCA 1103, [14]; *Risk v Northern Territory* [2007] FCAFC 46, [182]; and *Birri-Gubba (Cape Upstart) People v Queensland* [2008] FCA 659, [39].

- h) That the Draft Exposure Bill apply to all areas of public life with limited exceptions and that exceptions for religious bodies not apply for Commonwealth funded service delivery.
- i) That exceptions to unlawful discrimination should be reviewed periodically to ensure they continue to be reasonably necessary and proportionate having regard to evolving human rights standards.
- j) The Draft Exposure Bill should protect domestic workers from discrimination by removing any exceptions, measures or provisions that afford domestic workers fewer rights than other employees.
- k) That public sector organisations should have a positive duty to eliminate discrimination and harassment, and that responsibility for discrimination or harassment should be attributable to public sector organisations which subcontract or delegate their functions to private parties.
- l) That the Ministerial standards power as provided in Part 3-1 Division 5 of the exposure Draft Bill, which gives Ministerial power to draft legislative standards, be expanded from disability only to all protected groups and areas of life.
- m) That Section 122 of the Exposure Draft Legislation should include provision for 'representative complaints' and complaints by groups on behalf of, or in the interests of, members'.
- n) That further consideration be given to approaches to standing in federal discrimination law matters by representative organisations and other bodies with a sufficient interest.

Areas of concern

The Protected Attributes

10. The Human Rights and Anti-Discrimination Bill is an opportunity to give effect to Australia's international human rights obligations and meet best practice with respect to protecting against discrimination. It is also an opportunity to remove confusion and ensure consistency across state and federal discrimination laws and the *FW Act*.⁹ It is for these reasons that ALHR recommends expanding protections against discrimination in the Human Rights and Anti-discrimination Bill.

Family responsibilities, industrial history, medical history, nationality or citizenship, political opinion, religion or social origin

11. We welcome the Bill's inclusion of protection from discrimination on the grounds of family responsibilities, industrial history, medical history, nationality or citizenship, political opinion, religion or social origin. This is consistent with Australia's human rights obligations as outlined below.
12. To briefly summarise, protection against discrimination on the grounds of religious

⁹We note section 351 Fair Work Act protects against discrimination in employment on the basis of a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

belief, political belief, trade union membership and industrial action, are found in obligations under International Labor Organisation Convention 111, the *Discrimination (Employment and Occupation) Convention 1958 (ILO 111)*.¹⁰ Obligations are also found in other human rights instruments, including the *International Covenant on Civil and Political Rights*¹¹ (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*¹² (ICESCR) both of which Australia has ratified.

13. Obligations to protect against discrimination on the grounds of family and/or carer responsibilities are found in both Article 11 of *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* and the Article 1 of *ILO C156 Workers with Family Responsibilities Convention 1981 (Family Responsibilities Convention)*¹³. The latter acknowledges that more traditional forms of discrimination – such as sex discrimination – do not adequately capture the problems faced by parents and carers, especially in the workforce.
14. ALHR recommends that ‘family responsibilities’ be expanded to include ‘family and carer responsibilities’. This is consistent with the *Fair Work Act 2009* and the *Workplace Gender Equality Act 2012* (Cth).
15. ALHR also recommends that the definition of ‘family responsibilities’ be expanded to include domestic relationships and cultural understandings of family, including kinship groups.¹⁴
16. ALHR further notes that section 351 of the *FW Act* protects against discrimination in employment on the basis of a person’s ‘race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.’
17. ALHR submits that inclusion of the grounds of family responsibilities, industrial history, medical history, nationality or citizenship, political opinion, religion or social origin for protection against discrimination in federal law would reduce confusion and promote consistency of discrimination laws.
18. ALHR notes, however, that these protections in the Exposure Draft Legislation apply to work and work-related areas only as outlined in clause 22(3). We further note and commend the introduction of intersectional discrimination, meaning that discrimination also covers the ‘combination of 2 or more protected attributes’: clause 19. However, it is unclear how intersectional discrimination would operate, for example, with respect to discrimination on the basis of disability and medical history in a context that is not work or work-related. This confusion can be avoided by all the protected attributes applying across all areas of public life.
19. **In the interests of clarity, efficiency and consistency, we therefore recommend that all the protected attributes apply across all areas of public life.**

¹⁰ See Article 1. ILO 111 was ratified by Australia in 1973 and incorporated into domestic law by virtue of the Human Rights and Equal Opportunity Commission Act 1986 (Cth).

¹¹ Articles 18, 19&21, 22 of ICCPR respectively

¹² Articles 6, 7 & 8 ICESCR.

¹³ Convention 156 was adopted by the ILO on 23 June 1981 and ratified by Australia on 30 March 1990

¹⁴ This is consistent with Article 5 of the *UN Declaration of the Rights of Indigenous Persons*, which Australia supported on 3 April 2009.

Gender identity, sexual orientation, gender expression and intersex identity

20. We commend the Government for including sexual orientation and gender identity as protected attributes in the Draft Exposure Legislation. However, we are concerned this is not inclusive of all who identify as or are perceived to be GLBTIQ.
21. We refer to consultations conducted by the Australian Human Rights Commission in 2010 in relation to discrimination on the basis of sexual orientation and gender identity.¹⁵ We note, in particular, the comments during these consultations calling for legal protection to be as inclusive as possible with a number of participants supporting the use of the terms 'sex characteristics', 'gender identity' and 'gender expression'.¹⁶ We further note that a number of participants 'specifically supported the inclusion of the term 'intersex' in federal laws.'¹⁷
22. 'Intersex' should be defined as outlined in the Tasmanian Anti-Discrimination Bill 2012.¹⁸ That is:

'intersex' means the status of having physical, hormonal or genetic features that are
—
(a) neither wholly female nor wholly male; or
(b) a combination of female and male; or
*(c) neither female nor male.*¹⁹
23. **ALHR recommends that protection from discrimination for those who identify as or are perceived to be GLBTIQ be as inclusive as possible and explicitly include intersex.**

Homelessness, social status and being an applicant for or in receipt of a social service

24. ALHR considers the definition of social status should include a person's status as homeless, unemployed or a recipient of social security payments or being in receipt of, or being an applicant for, a social service - eg social housing.
25. A study undertaken by PILCH Homeless Persons' Legal Clinic found that homeless people are treated unfairly in the areas of accommodation and provisions of goods and service on the grounds of homelessness or their social status.²⁰
26. Similarly, the Special Rapporteur on Adequate Housing has stated that:

*...homelessness is often, in addition to social exclusion, a result of human rights violations in diverse forms, including discrimination on the basis of race, colour, sex, language, national or social origin, birth or other status.*²¹

15 Australian Human Rights Commission, Addressing sexual orientation and sex and/or gender identity discrimination - Consultation Report (Commission's Consultation Report), Sydney, 2010 accessed on 15 December 2012 at: http://www.humanrights.gov.au/human_rights/lgbti/lgbticonsult/report/SGI_2011.pdf

16 Commission's Consultation Report at 27(35)

17 Commission's Consultation Report at 29 (37)

18 *Submission on the proposed federal Human Rights and Anti-Discrimination Bill*, 9 December 2012.

19 Parliament of Tasmania, 2012, *Anti-Discrimination Amendment Bill*, No. 45 of 2012,

http://www.parliament.tas.gov.au/bills/Bills2012/pdf/notes/45_of_2012-SRS.pdf, accessed 3 December 2012.

20 Cited in the Human Rights Law Centre, *Realising the Right to Equality*, January 2012 at 26.

21 M Kothari, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living (E/CN.4/2005/48), [3].

27. Article 2 of ICCPR and Article 2 of *ICESCR* provide for respect of the human rights within the Covenants without distinction of any kind, including “other status”. Article 26 of *ICCPR* provides for protection from discrimination on any ground, including “other status”. General Comment 20 further elaborates upon the meaning of “other status”, noting it is “not an exhaustive list”²² and includes “social origin,”²³ “economic or social group or strata, including a person’s social and economic situation when living in poverty or being homeless”.²⁴
28. **The international human rights standards about discrimination incorporate discrimination on the basis of homelessness, social status and being an applicant or in receipt of a social service. ALHR therefore recommends that the grounds in the draft Bill for protection against discrimination should therefore include homelessness, social status and being an applicant for or in receipt of a social service.**

Irrelevant criminal record

29. Article 2 of *ILO 111* requires all parties to:
- declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.*
30. Australia has incorporated *ILO 111* into domestic law by virtue of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) now called the *Australian Human Rights Commission Act 1986* (Cth). The *Australian Human Rights Commission Regulations 1989* (Cth) includes ‘criminal record’ as a relevant ground of discrimination. This is therefore not a new ground of discrimination and we submit its exclusion in the Draft Exposure Draft is contrary to the drafting principles, namely, a commitment not to diminish protections.
31. **ALHR recommends that discrimination on the basis of irrelevant criminal record be included in the legislation.**

Victim or survivor of domestic/family violence

32. ALHR recommends the inclusion of a new ground of protection against discrimination on the grounds of being a victim or survivor of domestic/family violence.
33. Violence against women is a significant human rights abuse. One in five Australian women will experience physical or sexual violence from a current or former partner during their lifetime.²⁵ It is also the biggest single cause of homelessness among women and children.²⁶ Violence against women costs the nation \$13.6 billion each year.²⁷

22 Committee on Economic, Social and Cultural Rights, General Comment No. 20, 2 July 2009 at paragraph 15 accessed on 15 December 2012 at: <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc>

23 General Comment 20 at paragraph 24.

24 General Comment 20 at paragraph 35.

25 Australian Bureau of Statistics (2005) Personal Safety Survey, ABS Cat. No. 4906.0, Canberra: Commonwealth of Australia. (ABS 2005).

26 Women, Domestic and Family Violence and Homelessness: A Synthesis Report, Commonwealth of Australia accessed on 13 December 2012 at: <http://www.fahcsia.gov.au/our-responsibilities/women/publications-articles/reducing->

34. Research highlights that financial security and independence can provide important protection for victims/survivors of domestic/family violence.²⁸ Having paid employment is an important form of financial security and independence. The 2011 *National Domestic Violence and the Workplace Survey* found domestic/family violence impacts on workers, for example, through the continuation of violence in the workplace in the form of abusive emails and calls as well as the perpetrator attending the workplace.²⁹ Furthermore, nearly half of those who experienced domestic/family violence reported difficulties in getting to work.³⁰
35. In recent years, domestic/family violence workplace entitlements have been included in a number of Australian enterprise agreements and industrial awards.³¹ We note in February 2011, the NSW Government announced its support for domestic violence related leave in the public sector.³² We also acknowledge that one million Australian workers are currently covered by such agreements and awards.³³
36. These are important developments and ALHR warmly welcomes the continuing inclusion of such entitlements in enterprise agreements and industrial awards. However, further protection for victims or survivors of domestic/family violence is required because, as Smith and Orchiston discuss, current legislation does not provide adequate protection from discrimination on the basis of being a victim or survivor of domestic/family violence.³⁴
37. While enterprise agreements and industrial awards which include domestic/family violence clauses may provide access to domestic/family violence leave, they do not protect against adverse action, nor do they protect all workers.³⁵ Significantly, victims/survivors of domestic/family violence are more likely to work in casual employment.³⁶ Such employment generally does not provide access to paid leave. Moreover, such protections are only limited to employment and should apply to all areas of public life.

violence/women-domestic-and-family-violence-and-homelessness-a-synthesis-report?HTML#sum

27 KPMG, *The Cost of Violence against Women and their Children*. Safety Taskforce, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, 2009.

28 ALRC, *Family Violence and Commonwealth Laws Issues Paper: Employment and Superannuation*, February 2011 at 4(8) accessed on 15 December 2012 at:
http://www.alrc.gov.au/sites/default/files/pdfs/publications/IP%2036%20Whole%20Pdf_0.pdf; Rochelle Braaf & Isobelle Barrett Meyering, *Seeking Security: Promoting Women's Economic Wellbeing following Domestic Violence*, Australian Domestic and Family Violence Clearinghouse, March 2011 at 25-30 (27-32) accessed on 15 December 2012 at:
<http://www.adfvc.unsw.edu.au/PDF%20files/Seeking%20Security%20Report%20WEB.pdf>

29 Ludo McFerran, *National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse, December 2011 at 18.

30 *Ibid.*

31 See, for example, <http://www.dvandwork.unsw.edu.au/domestic-and-family-violence-clauses> (accessed on 15 December 2012) and ALRC, *Family Violence and Commonwealth Laws Issues Paper: Employment and Superannuation*, February 2011 at 18 (22).

32 'Domestic violence victims granted leave', SMH, 12 February 2011 accessed on 15 December 2012 at:
<http://news.smh.com.au/breaking-news-national/domestic-violence-victims-granted-leave-20110212-1aqy8.html>

33 'Domestic Violence Leave Comes of Age,' Media Release, 30 November 2012 accessed on 15 December 2012 at:
<http://newsroom.unsw.edu.au/news/social-affairs/domestic-violence-leave-comes-age>;

34 Belinda Smith and Tashina Orchiston, 'Domestic Violence Victims at Work: A Role for Anti-Discrimination Law?' (2012) 25 *Australian Journal of Labour Law* 209.

³⁵ Note 30.

36 Suzanne Franzway, Carole Zufferey and Donna Chung, 'Domestic Violence and Women's Employment', paper presented at *Our Work, Our Lives: National Conference on Women and Industrial Relations*, Adelaide, 20 September 2007, citing earlier examples.

38. Significantly, protection for victims or survivors of domestic violence is consistent with Australia's human rights obligations, including Articles 1 and 2 of CEDAW; CEDAW General Recommendations 12 and 19; Articles 2, 3, 7 and 26 of ICCPR; and Articles 3 and 10 of ICESCR. Further, in its 2010 review of Australia, the Committee on the Elimination of Discrimination against Women recommended that Australia develop strategies to prevent homelessness resulting from domestic violence.³⁷
39. Additionally, as the Australian Human Rights Commission notes:
- a law prohibiting such discrimination would help to raise community and business awareness about the impact of domestic and family violence. This may, in turn, facilitate the adoption of policies and procedures to support victims and survivors of domestic violence and aid in establishing workplace and other environments that are generally more supportive of victims and survivors.*³⁸
40. ALHR submits that such an education function could assist in further moving domestic/family violence out of the private sphere into the public sphere
41. The inclusion of this protected attribute is also consistent with the *National Plan to Reduce Violence against Women and their Children*³⁹ (**National Plan**). The National Plan seeks to engage all in community to play a role in addressing violence against women.⁴⁰ It also aims to advance gender equality including through developing workplace measures to support women experiencing and escaping from domestic violence.⁴¹ The inclusion of this protection would also demonstrate Australia's commitment to addressing violence against women.
42. **ALHR therefore recommends the inclusion of protection against discrimination on the basis of being a victim or survivor of domestic/family violence in the legislation. If this protected attribute is not included at this time, then the three year review of the Act should specifically require consideration of including, as an additional protected attribute, being a victim or survivor of domestic/family violence.** The mandate for any such three-year review should be extended to include additional protected attributes to be included in the legislation.

Unlawful Discrimination

43. A key principle in the movement for consolidation, as evinced in the draft, is the formulation of a unified approach to discrimination. ALHR supports this approach and accordingly recommended in its February 2012 submission that the consolidated bill create an obligation to make reasonable adjustments to the physical or social environment to accommodate all protected attributes. ALHR is disappointed that this

³⁷ Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women –Australia*, 30 July 2010, CEDAW/C/AUL/CO/7 at paragraph 29 accessed on 15 December 2012 at: <http://www2.ohchr.org/english/bodies/cedaw/cedaws46.htm>

³⁸ Andrea Durbach, 'Domestic violence discrimination and the consolidation of Commonwealth anti-discrimination laws,' Safe at Home, Safe at Work Conference, 5 December 2011, accessed on 15 December 2012 at: http://humanrights.gov.au/about/media/speeches/sex_discrim/2011/20111205_domestic_violence.html

³⁹ *The National Plan to Reduce Violence against Women and their Children 2010 – 2022*, accessed on 19 December 2012 at: www.fahcsia.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children

⁴⁰ National Plan, Strategy 1.1.

⁴¹ National Plan, Strategy 1.3

recommendation has not been accepted.

44. The present sections 23, 24 and 25 address the concept of reasonable adjustment only in the case of disability. By creating no positive obligation to make reasonable adjustments for other protected attributes, and by explicitly limiting the application of the concept to disability, the legislature impliedly excludes the necessity of making reasonable adjustments for other protected attributes and risks injuring the existing implicit requirements for other attributes. ALHR further notes that the existing unjustifiable hardship limitation on reasonable adjustments for disability could apply equally to adjustments for other protected attributes. While the content of reasonable adjustments for other protected attributes would require consultation from stakeholders, ALHR views this as an opportunity for community engagement. Recent developments in various professional sports⁴² are examples of the importance of positive action and duties to address discriminatory practices and mindsets that have not been achieved through basic legislation.
45. **ALHR therefore reiterates its February 2012 recommendation that the legislation include an express duty to make reasonable adjustments to the physical or social environment in relation to all protected attributes, and not be confined to disability.**

Vicarious Liability

46. ALHR is pleased that the 'connection with' test has been adopted in s57(1) of the Draft Bill. However, although s57(2) deems the actions of a director, officer, employee or agent of a principal to be the actions of the principal, ALHR considers it necessary to reiterate the need for the principal to bear the onus of proving they had no actual or constructive knowledge of the discriminatory conduct.
47. As noted in our February 2012 submission, there is an interest in attributing responsibility for monitoring and reprimanding those who commit discrimination or harassment as far up the supervisory chain as possible in order to foster environments which discourage discrimination and harassment. This is so in both public and private organisations as it would encourage policies and practices to be adopted with the elimination of discrimination and harassment in mind. It would also promote the reporting of instances of discrimination.
48. This may be achieved by including the words: 'whether or not it was done with the principal's knowledge or approval' after 'the principal is... taken to also have engaged in the conduct' in s57(2) to make it clear that the principal's knowledge of the discriminatory conduct is not necessary for a principal to be found vicariously liable.
49. The above approach would also bring Australian legislation into conformity with other common law jurisdictions such as s41(1) of the United Kingdom's *Sex Discrimination Act 1975*, s15(1) of Ireland's *Employment Equality Act 1998* and s68(1) of New Zealand's *Human Rights Act 1993*.
50. **ALHR therefore recommends that the vicarious liability provisions should be further**

⁴² eg. *Rugby League tackles domestic violence*, 1 March 2012, accessed on 19 December 2012 at: www.nrl.com/rugby-league-tackles-domestic-violence/tabid/10874/newsid/66068/default.aspx; Gay footballer calls for AFL 'pride round', 10 September 2012, accessed on 19 December 2012 at: www.abc.net.au/news/2012-09-09/gay-footballer-calls-for-afl-pride-round/4251060.

clarified in the legislation to require the principal to bear the onus of proving they had no actual or constructive knowledge of the discriminatory conduct.

Exceptions

51. ALHR continues to oppose the extensive application of exceptions for religious bodies. No human rights are absolute, and it is necessary to find an appropriate balance between rights when conflict between rights arises.
52. We note that section 33(3)(a) states that the exception for religious bodies does not apply when connected to the provision of Commonwealth-funded aged care. We welcome this. However, we recommend that the limitation of exceptions for religious bodies goes further. We agree with the National Association of Community Legal Centres (NACLC) and Kingsford Legal Centre (KLC) who, in their submission to this inquiry, state 'there is no principled reason why this should not extend to other Commonwealth-funded service delivery, including education, adoption services, employment assistance and child welfare, in all areas of life and in relation to all protected attributes.'⁴³
53. **The Draft Exposure Bill should apply to all areas of public life with limited exceptions and exceptions for religious bodies should not apply to Commonwealth funded service delivery.**

Exceptions to unlawful discrimination: exceptions for clubs and member-based associations

54. In our February 2012 submission, ALHR noted that the preferred approach to the coverage of clubs and member-based associations would be to adopt a similar (albeit broader) approach to that taken under section 9(1) of the *Disability Discrimination Act 1992* (Cth) (*DDA*) which broadly defines clubs and member-based associations and prohibits any discriminatory conduct which would impair enjoyment of a human right in public life, without exceptions.
55. ALHR notes that the Draft Exposure Bill has retained a potential exception for clubs and member-based associations. While ALHR welcomes the requirement for these associations to show "justifiable conduct" in order to qualify for such an exception, we remain concerned that such an approach may hinder the rights of members of these clubs and associations. As such, exceptions should be reviewed periodically. The review would determine whether the exception continues to be reasonably necessary and proportionate having regard to evolving human rights standards.
56. **ALHR recommends that any exception which an organisation obtains, allowing it to discriminate as 'justifiable conduct', should be reviewed periodically to ensure it continues to be reasonably necessary and proportionate having regard to evolving human rights standards.**
57. Exceptions that are obtained by way of 'show cause' applications should be made publicly available by the club or member-based association. The organisation should also have to identify the reasons for applying for that exception, including how this

⁴³ NACLC and KLC, *Submission in response to the Human Rights and Anti-Discrimination Bill 2012*, final draft at 40.

accords with the 'spirit' or 'intention' of the Act to eliminate discrimination and harassment in all areas of public life.⁴⁴

Exceptions to unlawful discrimination: exception for employment to perform domestic duties

58. Domestic work is one of the world's oldest occupations. Domestic workers may cook or clean, or care for children, the elderly or the disabled. These tasks have been traditionally assigned to women and have been largely uncompensated. However, domestic work may also include gardening, chauffeuring or providing security services, tasks more often performed by men.
59. In developing and developed countries alike, the domestic work sector absorbs significant numbers of workers, many of whom belong to the poorest segments of society with little access to other work or employment, generally, as a result of limited educational opportunities. In many countries, domestic work is performed to a large extent or even exclusively by migrant workers, mainly women, who migrate in order to earn money to support their families in their home countries.⁴⁵
60. Domestic workers are also particularly vulnerable to several forms of discrimination by virtue of their individual employment relationships. In Australia, little is known about this segment of the workforce. Unpaid 'household work' alone contributed \$237 billion (or 91 per cent) to the total value of unpaid work in 1997. Females accounted for 65 per cent of the value of unpaid household work.⁴⁶
61. Section 43 of the Draft Exposure Bill retains the exception for employment of persons performing domestic duties on premises where the employer resides, because this conduct 'falls within the private sphere and is not regulated by the Bill'.⁴⁷
62. Any form of harassment or discrimination against a worker, whether performing domestic duties or not, has the effect of normalising such practices.
63. Further, the failure to protect domestic workers to the same extent as other employees has the effect of discouraging, and further marginalising, domestic work. The assertion that domestic work performed in the residence of the employer is not part of public life should be dismissed. Like any employee, a domestic worker referred to in the Draft Exposure Bill will:
 - enter into a contractual employment relationship with an employer to perform duties at a workplace for money;
 - usually pay income tax on their wages; and

⁴⁴ For instance, in the context of employment, US courts have held that employers are not to assume categorically that women, due to their sex, cannot perform a particular line of work. See, for example, *Weeks v Southern Bell Tel. & Tel. Co.* 408 F2d 228 (5th Cir, 1969); *Rosenfeld v Southern Pac. Co.*, 444 F2d 1219 (9th Cir, 1971). See also Diane Desautels, 'Discrimination Law – Statutory Protection for Volunteers Against Discrimination: Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities' (1987) 204 Conn. 287, 528 A.2d 352 at 130 (http://assets.wne.edu/161/8_comm_Discrimi.pdf).

⁴⁵ ILO, *Report of the Committee on Domestic Workers*, Provisional Record No. 12, International Labour Conference, 99th Session, Geneva, 2010, paras 204–211.

⁴⁶ ABS, media release, *Unpaid work \$261 billion - ABS finding*, <http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/EDC1844960BE61F4CA256973007FCCBF?OpenDocument>. Unfortunately, the ABS has since not released new census data on this subject.

⁴⁷ Item 214 of the explanatory notes to the Human Rights and Anti-Discrimination Bill 2012.

- usually be entitled to superannuation.
64. It should also be considered that non-domestic workers also perform work at private residences (eg electrician).
 65. Further, in the interests of raising awareness about discrimination against domestic workers and reducing their position of vulnerability, ALHR submits that the Draft Exposure Bill include an obligation on the Commission to report annually on the number and nature of complaints made by domestic workers. Such provisions may be included under Chapter 6, Part 6, Division 3, Subdivision A: General provisions, which outline the Commission's reporting requirements for other groups facing disadvantage
 66. Last, an exception that provides fewer rights to domestic workers is unlikely to comply with Australia's obligations under ILO Convention no 111.⁴⁸ Although such an exception may have been appropriate under the *Sex Discrimination Act*,⁴⁹ ALHR submits that the exception for justifiable conduct in section 23 of the Draft Exposure Bill and the inherent requirements exception in section 24 of the Draft Exposure Bill contain the appropriate test for deciding whether the discrimination of domestic workers is lawful or unlawful. Accordingly, a blanket exclusion of anti-discrimination provisions to domestic workers is inappropriate. If particular circumstances arise which are considered to merit an exception, those circumstances can be addressed through the appropriate exception powers.
 67. **ALHR recommends the Draft Exposure Bill should protect domestic workers from discrimination by removing any exceptions, measures or provisions that afford domestic workers fewer rights than other employees.**

Measures to Assist Compliance

Positive Duties

68. ALHR notes with disappointment that the Exposure Draft Bill does not require public sector organisations to have a positive duty to eliminate discrimination and harassment. ALHR submits that, while regulatory costs play a factor in deciding what to include in the final Act, the benefit of including positive duties outweighs any regulatory impact. This approach is in line with the key principles of this Bill as noted in its Explanatory Notes, namely, to develop legislation which enhances protections where the benefits outweigh any regulatory impact.⁵⁰
69. As noted in our February 2012 submission, public sector organisations should have a positive duty to eliminate discrimination and harassment. Further, where public sector organisations subcontract or delegate their functions to private parties, then the public agency must also ensure that anti-discrimination provisions are complied with.
70. Whilst international law is traditionally concerned with 'State' (and hence 'public') actors, substantive equality cannot be achieved by subjecting public authorities and

⁴⁸ ILO, *Discrimination (Employment and Occupation) Convention 1958* (No. 111), ratified by Australia on 15 June 1973, article 2.

⁴⁹ *Sex Discrimination Act 1984* (Cwth) s35.

⁵⁰ Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Human Rights and Anti-Discrimination Bill 2012: Exposure draft explanatory notes* (November 2012), p 1.

excusing private authorities from the rules and principles which aim to redress discrimination. Jurisprudence from international bodies exists which has considered, not only the obligations of States to comply with non-discrimination principles, but also the obligation to ensure that those principles are observed by private actors. Australia is itself party to Conventions which confer the ability on individuals to bring a claim against public authorities for failures to enforce non-discrimination principles whether publicly or privately.

71. There is also scope to bring matters before international tribunals for failures by the State to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction' the rights in the ICCPR. Further, international case law exists to the effect that public authorities may be responsible for any discrimination that occurs when its functions are delegated or subcontracted to private parties.⁵¹
72. **Having regard to the foregoing, ALHR submits that public sector organisations should have a positive duty to eliminate discrimination and harassment, that that duty should apply to the application of legislation, and that responsibility for discrimination or harassment should be attributable to public sector organisations which subcontract or delegate their functions to private parties.**

Arbitrary Standards

73. The legislation should protect against discrimination which bears no relationship to a person's participation and performance. This approach is in line with one of the key objectives of the Act: to recognise that achieving substantive equality may require the taking of special measures or the making of reasonable adjustments.⁵²
74. **ALHR is disappointed to see that the standards power as provided in Part 3-1 Division 5 of the Exposure Draft Bill gives Ministerial power to draft legislative standards in respect of disability only. It is strongly recommended that this Ministerial power be expanded to all protected groups and areas of life.**

Mechanisms to assist compliance – funding concerns

75. ALHR warmly welcomes the measures to assist compliance set out in Part 3-1 of the Draft Exposure Bill.
76. **However, ALHR supports the renewed call by the Commission for further consideration of approaches to standing in federal discrimination law matters by representative organisations and other bodies with a sufficient interest.**⁵³

Representative Complaints

77. ALHR shares the concern of NACLC and KLC as outlined in their submission to this inquiry that, as a result of recent experiences before Australian courts, advocacy

⁵¹ See, for example, *B. d. b. v the Netherlands* (Communication No. 273/1988, UN doc CCPR/C/35/D/273/1988), accessed on 19 December 2012 at: <http://www1.umn.edu/humanrts/undocs/session35/273-1988.html>

⁵² Section 3(1)(e) *Exposure Draft Human Rights and Anti-Discrimination Bill 2012* (Cth).

⁵³ *Australian Human Rights Commission*, Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Committee (December 2012) p 21-22
www.humanrights.gov.au/legal/submissions/2012/20121206_hrad_bill.pdf p 22 (accessed 18 December 2012).

organisations are now reluctant to bring complaints to challenge instances of systemic discrimination due to uncertainty as to whether the organisation will be found to have standing to do so if the matter proceeds beyond the AHRC level.⁵⁴

78. **As a result, ALHR supports the recommendation of the NACLC that Section 122 of the Exposure Draft Legislation should include provision for 'representative complaints' and complaints by groups on behalf of, or in the interests of, members'.⁵⁵**

Annual reporting

79. ALHR also reiterates its February 2012 submission that the legislation should contain provisions which compel annual reporting by an adequately funded and resourced committee of the number and nature of complaints made by domestic workers on grounds involving discrimination, and which empowers investigation and standing by an independent body (such as the Commission) where discrimination involving domestic workers is concerned.
80. In the interests of raising awareness about discrimination against domestic workers and reducing their position of vulnerability, **ALHR submits that the legislation should include an obligation on the Commission to report annually on the number and nature of complaints made by domestic workers.** Such provisions may be included under Chapter 6, Part 6, Division 3, Subdivision A: General provisions, which outline the Commission's reporting requirements for other groups facing disadvantage.

About ALHR

81. ALHR was established in 1993 and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).
82. ALHR comprises a network of Australian lawyers active in the practice, promotion, and implementation of international human rights law standards in Australia. It raises awareness of international human rights laws and standards through training, information, submissions and networking.
83. ALHR has a national membership of over 2500 and engages its members through National, State and Territory committees.
84. ALHR is a member of the Australian Forum of Human Rights Organisations. It is also a member of the Commonwealth Attorney General's NGO Forum on Human Rights and the Department of Foreign Affairs Human Rights NGO Consultations.

⁵⁴ *National Association of Community Legal Centres*, NACLC's Submission to the Senate Legal and Constitutional Affairs Committee (December 2012) <http://www.equalitylaw.org.au/elrp/submissions/> (accessed 20 December 2012).

⁵⁵ *Ibid* at 22.

ALHR welcomes the opportunity to provide further evidence or elaborate on its comments. If you would like to discuss any aspect of this submission, please contact Stephen Keim, President

Best regards,

Stephen Keim SC
President, Australian Lawyers for Human Rights

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