



**Australian
Human Rights
Commission**

Opening statement

Senate Legal and Constitutional Committee – Inquiry into the Exposure Draft Human Rights and Anti-Discrimination Bill,

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Thank you for the invitation for the Commission to appear before the Committee today in relation to this important measure.

To commence, I want to state the importance that the Commission places on the process of consolidating federal anti-discrimination laws.

The current collection of Federal discrimination and human rights law has been built by this Parliament over more than 37 years. The existing discrimination laws were introduced in 1975, 1983, 1992 and 2005, with the Australian Human Rights Commission Act also introduced in 1986.

This legislation protects against discrimination on the basis of age, race, sex and disability, and provides a separate regime for other forms of human rights violations. This is in addition to provisions found in the Fair Work Act and in state and territory discrimination laws.

To fully understand the legal obligations on members of the community not to discriminate, you need to have an understanding of each of these 5 pieces of legislation.

Each defines a relatively simple concept – that people should not be discriminated against due to a particular attribute that they hold – but does so in different ways.

There are differences in definitions, coverage – both in terms of where it is unlawful to be discriminated against and the coverage of actions at the federal vs the state level – as well as different exemptions, and different regulatory practices that can assist business to proactively address compliance issues.

These laws have served well in helping to build a freer and more tolerant Australia. Women, and people from different backgrounds, and people across the age spectrum, and people with disabilities and their families, are more able to participate in the economic and social life of our community and make their contributions.

But unfortunately, the complexity of these laws and the seemingly arbitrary nature of the differences between them, means that these laws are no longer able to serve the Australian community to their full potential. They are well overdue for an overhaul.

We have different definitions, for no clear reason, of things like, what is a club. We have different provisions on the duties of employers about conduct by employees. We have different definitions of basics like what is unlawful discrimination, and differently worded exceptions.

The debate over this exposure draft provides ample proof of why the current laws are problematic. Much of the public debate and many submissions state objections to provisions in the exposure draft which have been in our laws for over 20 or 30 years, as if they are newly proposed.

There is a clear lack of community understanding of what some of the current laws already provide for.

So the Commission congratulates the government on its efforts to produce this consolidated bill, and to offer a vision for what a holistic, comprehensive protection against discrimination should look like.

And we don't under-estimate the challenges that producing such a bill have involved. It is a deceptively complex task.

We also commend the Government for releasing this bill in an exposure draft format. This is now a fairly common way of consulting the community in other common law countries. Australia lags way behind others in use of such methods – particularly the UK Parliament. It is a useful way of refining laws prior to being considered in the formal parliamentary process.

Indeed, the release of the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 in November 2012 has done what it set out to do - stimulate public discussion about an important reform initiative. The almost 600 submissions to this committee are testament to this.

The debate around the exposure draft over the last few months has usefully exposed some issues that arise the current form of the Bill.

In particular, the reference in clause 19(2)(b) the bill to conduct which “offends or insults forming part of the concepts of discrimination and harassment has been criticised as risking excessive restrictions on free speech. Amendments to avoid such an unintended consequence would be desirable.

But, as I have argued in the media in recent weeks, we need to very cautious not to throw the baby out with the bath water.

Overall, this is a very impressively constructed piece of legislation. It still requires some minor modification, on which this committee will no doubt provide guidance to the government and the Parliament.

But we should not overlook the overwhelming strengths of this long overdue reform of federal discrimination laws.

A consolidated and simplified law based on the best features of existing law should enable both individuals and organisations to better understand their obligations and better protect their rights. Increased consistency should be good for business and ensure a more robust system for the protection of rights.

Madame Chair, I want to highlight a few other significant features of the bill.

One significant reform, introduced by the Government to meet a cross-party election commitment, is protection against discrimination on the basis of sexual orientation and gender identity. It is an important initiative overwhelmingly supported by the Australian community.

Another change in the Bill, and one which has attracted criticism, is clause 124 which adopts a shared burden of proof of discrimination.

This has been misinterpreted by many. It is not a reverse onus of proof, like that which exists in the Fair Work Act.

Under this Bill, a complainant will still be required to provide evidence on which a court could conclude not only that the alleged conduct happened, but that it happened for a discriminatory reason. At that point, and only at that point, will the respondent be expected to produce evidence explaining that it did not have that reason or purpose.

Not only is this an approach adopted in other areas of civil law in Australia, such as consumer protection, it is also common sense. The obligation to produce evidence is placed with the person who is best able to produce that evidence.

At present, complainants – who are often people in vulnerable circumstances – have had to prove a range of matters where the information is usually more readily accessible to the respondent, an employer for example.

Another reform introduced by the Bill is a strengthening of checks to prevent unmeritorious complaints clogging the courts. Under this Bill, where a complaint is closed by the Commission on the basis that it is vexatious, misconceived or lacking in substance for example, the complaint cannot be proceed to court without the leave of the court. I can confirm that the Commission have seen and understood submissions noting that the success of the Bill will depend on us continuing to exercise our powers in this area.

The Commission is also required under the Bill to work proactively with the business community, including in developing industry codes of practice to prevent prohibited discrimination in the first place. This is a new approach in Australian discrimination law, but one which was recommended by the Productivity Commission almost a decade ago. The Bill expects the Commission to pursue a collaborative approach to ensure that unlawful discrimination is avoided as normal corporate and business procedure.

We also expect the business community to benefit from exceptions provided by the Bill for 'justified conduct' and 'inherent requirements' that will enable a court to balance rights and responsibilities in a fair way to all parties.

The inherent requirements exception is already present in one form or another in all Australian laws. The justified conduct exception is a new approach to achieving simplicity in the law, and submissions from business and human rights organisations alike are quite rightly looking for further detailed discussions to ensure that this provision works appropriately.

Alongside submissions criticising or supporting what is in the Bill, there are submissions criticising what is not included and seeking more extensive protections.

Could the bill have gone further? Yes it could. The Commission submission to this Committee makes a number of recommendations in this respect, for inclusion in the Bill or at least for consideration in the review process contemplated by clause 47 after three years of experience.

But overall the Bill should be regarded as a balanced package that achieves the objectives of delivering legislation which is more efficient, effective and easier to understand and comply with. Achieving a more coherent framework for protection against discrimination is an important step forward and deserves our support.