



Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Australia

By Email: legcon.sen@aph.gov.au

21 December 2012

Dear Sir / Madam

Submissions in response to the Exposure Draft of Human Rights and Anti-Discrimination Bill 2012

Victorian Women Lawyers (VWL) is a voluntary organisation that promotes and protects the interest of women lawyers and engages with legal and social justice issues, particularly those that affect women. We represent women in the legal profession in Victoria.

We note that the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (*the Exposure Draft*) has been referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report.

We previously provided submissions in relation to the consolidation of Commonwealth Anti-Discrimination Laws together with the Women Lawyers Association of New South Wales (WLANSW) in February 2011 and February 2012.

We now provide the following submissions in response to the Exposure Draft.

1. Preliminary Comments

We submit that a Consolidated Act should not result in any diminution of existing protections in the law, and in drafting the consolidated legislation the government should adopt a consistent and best-practice approach to protection from discrimination.

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In particular, we support measures that will simplify and strengthen the protections against sex discrimination and increase transparency, accountability and enforceability in relation to those protections.

We also note the importance of considering the operation and role of the Consolidated Act with reference to other federal and state laws, particularly the Fair Work Act.

2. International Law

In our previous submissions, we submitted that a Consolidated Act should be developed with reference to the applicable international law principles, and that international law and conventions should be used as a source of guidance in the development of the Consolidated Act.

We support the referral to international conventions Australia has ratified which create obligations in relation to gender equality in the objects clause of the Exposure Draft.¹

2.1. Recommendations

We do not make any recommendations on this topic.

3. Definition of Discrimination

We support the more simple approach to the definition of discrimination in the Exposure Draft. We hope that this definition will remove the undue technicality that resulted from the definition of discrimination in the *Sex Discrimination Act 1984 (Cth)* (*the SDA*).

We submit that the Consolidated Act should not result in any diminution of existing protections in the law. We did not identify any diminution of existing protections of the law. We note that the definition of discrimination in the Exposure Draft does not include discrimination based on 'a characteristic that appertains generally to persons of the aggrieved person'² or 'a characteristic that is generally imputed to persons of the sex of the aggrieved person'³ as provided for under the SDA. Despite this, the Exposure Draft expands the definition of discrimination to a policy that '*has, or is likely to have, the effect of disadvantaging people who have a particular protected attribute*'.⁴ We submit that this section should not cause a diminution of existing protections in the law.

¹ *Human Rights and Anti-Discrimination Bill* (2012) Exposure Draft Legislation, s 3(2).

² *Sex Discrimination Act 1984 (Cth)* s 5(1)(b).

³ *Sex Discrimination Act 1984 (Cth)* s 5(1)(c).

⁴ *Human Rights and Anti-Discrimination Bill* (2012) Exposure Draft Legislation, s 19(3)(b).

Our previous submissions did not comment on whether there should be separate provisions for direct and indirect discrimination. Even though the Exposure Draft does not include separate provisions for direct and indirect discrimination, it clearly states that discrimination includes a policy that *'has, or is likely to have, the effect of disadvantaging people who have a particular protected attribute, or a particular combination of 2 or more protected attributes'*.⁵ We support the inclusion of this section in the consolidated legislation as it will be useful to prevent the systemic and structural discrimination that exists within the legal industry and beyond.

We note that the comparator test has not been included in the Exposure Draft. We submit that this was appropriate as the comparator test has often led to quite torturous assessments of who that appropriate person should be. We submit that the detriment test as drafted in the Exposure Draft is the appropriate test that should be included in the Consolidated Act.

We note that the reasonableness test in relation to indirect discrimination has been replaced with the justifiable test. Therefore, conduct which is justifiable is not unlawful. We submit that a test of justifiability should not be applied.

If a test of justifiability is considered necessary, however, we support the qualification that justifiable conduct must be in good faith, have a legitimate aim and be a proportionate means of achieving that aim, as currently drafted in the Exposure Draft.⁶

3.1. *Recommendations*

- That the Consolidated Act should not result in any diminution of existing protections in the law;
- That a reasonableness test or justifiable test should not be applied;
- If a justifiable test is applied in the consolidated legislation, it should be drafted in the current form in the Exposure Draft;

4. **Special Measures**

We submit that the special measures provision in the Exposure Draft⁷ is a positive step towards redressing historical inequality and disadvantage.

4.1. *Recommendations*

⁵ *Human Rights and Anti-Discrimination Bill* (2012) Exposure Draft Legislation, s 19(3)(b).

⁶ *Human Rights and Anti-Discrimination Bill* (2012) Exposure Draft Legislation, s 23(3).

⁷ *Human Rights and Anti-Discrimination Bill* (2012) Exposure Draft Legislation, s 21.

We do not make any recommendations on this topic.

5. Duty to make reasonable adjustments

We note that the duty to make reasonable adjustments in the Exposure Draft⁸ only applies to individuals with a disability. While the Exposure Draft takes an intersectional approach in applying to a person with a disability and one or more other protected attributes,⁹ we recommend that the duty to make reasonable adjustments should apply to all other protected attributes whether or not the individual has a recognised disability.

We support the retention of the term ‘unjustifiable hardship’ from the *Disability Discrimination Act 1992* (Cth). This term is important to ensure that the needs of an individual, or group of individuals would not unreasonable impose hardship on the person or organisation under a duty to provide such adjustments.

We otherwise note that the exposure draft does not mention how ‘reasonable adjustment’ or ‘unjustifiable hardship’ apply, specifically to the provision of services including flexible workplace arrangements, access to building/transport, education and employment. We recommend that the disability standards mentioned in Division 5 of the Exposure Draft provide some assistance in relation to these areas.

5.1. Recommendations

- The duty to make reasonable adjustments should apply to all protected attributes;
- The consolidated act should clarify how ‘reasonable adjustment’ and ‘unjustified hardship’ apply specifically to the provision of services including flexible workplace arrangements, access to building / transport, education and employment.

6. Public Sector Organisations

The Exposure Draft does not appear to contain any form of positive duty for any type of organisations to prevent discrimination.

In addition, although the Exposure Draft makes it unlawful for a person to discriminate against another if the discrimination is connected with any area of public life¹⁰, there is a lengthy list of exceptions in Part 2 Division 4 of the Exposure Draft, some of which apply to public sector organisations.

⁸ *Human Rights and Anti-Discrimination Bill* (2012) Exposure Draft Legislation, s 23(6).

⁹ *Human Rights and Anti-Discrimination Bill* (2012) Exposure Draft Legislation, s 25(1).

¹⁰ *Human Rights and Anti-Discrimination Bill* (2012) Exposure Draft Legislation, s 22(1).

The application of section 22 to public sector organisations specifically appears to be contemplated by the wording of sections 22(1) and 22(2)(i) of the Exposure Draft. The latter notes that an area of public life includes ‘the administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs.’

However, the lengthy list of exceptions in Chapter 2 Division 4 of the Exposure Draft includes, among others, section 40 which specifically exempts certain public sector organisations from requirements to not discriminate against people with a disability and women.

Pursuant to Chapter 6 of the Exposure Draft, the Australian Human Rights Commission will have the function of promoting compliance with the Act, including the power to issue guidelines in accordance with Chapter 3. However, section 63 of the Act specifically provides that these guidelines are binding neither for public nor private sector organisations.

In addition, there does not appear to be any particular duty to take positive steps to eliminate discrimination in the Act.

The measures to assist compliance under Chapter 3 provide *inter alia* for the Australian Human Rights Commission to make guidelines, review policies and for employers to develop action plans to assist with preventing employees from contravening the Act. However, it is specifically stated throughout Chapter 3 that none of these measures are binding or give rise to any rights or obligations.

6.1 Recommendations

- That the Consolidated Act include a consistent, positive duty on public sector organisations to prevent discrimination;
- That the Consolidated Act impose a duty to take reasonable and proportionate steps to eliminate discrimination;
- That these duties extend to the private sector.

7. Sexual Orientation

We support definitions of sexual orientation and gender identity that are sufficiently inclusive and broad so as to ensure protection from discrimination on the basis of actual or presumed sexual orientation, gender identity and expression and intersex and sex identity.

We support the definition of sexual orientation in section 6 of the Exposure Draft and in particular the decision not to use labels such as homosexuality, lesbianism, bisexuality or heterosexuality (although

the Explanatory Notes state it is intended that the definition covers each of these categorical orientations in any event¹¹).

We support the adoption of the highest current standard of protection against discrimination based on gender identity¹² and the inclusion of persons of indeterminate sex who identify as a member of a particular sex in the definition of gender identity in section 6 of the Exposure Draft.

We similarly support the protection in section 17(2) of the Exposure Draft against discrimination based on sexual orientation or gender identity that a person has or is assumed to have, as this will cover associated or imputed characteristics.

7.1. Recommendations

We do not make any recommendations on this topic.

8. Family Violence

In our previous submissions we recommended that family violence be included in the Consolidated Act as a protected attribute, on the basis that people experiencing family violence may be 'subject to direct and indirect adverse treatment in the workplace, as a result of their experience' of family violence.¹³ Such treatment may include being denied access to flexible working arrangements or leave, or ultimately having their employment terminated.

In our previous submissions we submitted that under existing Commonwealth anti-discrimination law it is difficult for a person experiencing family violence to prove the requisite nexus between the discrimination experienced and an attribute that is currently protected (for example, sex, family responsibilities or disability). We noted that several overseas jurisdictions have enacted legislation that prohibits discrimination in an employment context on the basis of family violence.¹⁴ Moreover, we noted that a number of organisations in Victoria¹⁵ have now included family violence leave clauses in their Enterprise Bargaining Agreements on the recognition that family violence is a workplace issue.¹⁶

¹¹ Paragraph 101, Explanatory Notes.

¹² Paragraph 86, Explanatory Notes.

¹³ Australian Human Rights Commission, *Submission to ALRC Commonwealth Family Violence Inquiry*, 21 April 2011.

¹⁴ See, eg, *New York State Executive Law* (US) §§ 296-1(a); *New York City Administrative Code* (US) § 8-107.1; *Revised Code of Washington* 49 § 4976 (US) § 49.76; *California Labor Code* (US) §§ 230, 230.1; *Unlawful Action Against Employees Seeking Protection 2007* Fla Stat §741–313 (US) § 741.313; *Anti-Violence Against Women and Their Children Act 2004* (Philippines) s 43.

¹⁵ A number of local councils, such as Surf Coast Shire Council and Maribyrnong City Council have now included Family Violence Clauses in the Enterprise Bargaining Agreements, on the recognition that family violence is a workplace issue.

¹⁶ See, for example: http://www.humanrights.gov.au/about/media/speeches/sex_discrim/2012/20121023_outside_box.html

Family violence is not included in the Exposure Draft as a protected attribute, and we urge the government to consider its inclusion in the Consolidated Act. We submit that the definition of family violence should be gender neutral and consistent across Commonwealth legislation.¹⁷ It should be defined to cover people who have (or are perceived to have) previously experienced or are currently experiencing family violence.¹⁸ We otherwise submit that family violence, as a protected attribute, should apply to direct and indirect discrimination and apply in all areas of public life.

8.1. Recommendations

- That the Consolidated Act include family violence as a protected attribute.

9. Discrimination on basis of hours worked

We support the inclusion of ‘family responsibilities’¹⁹ in the list of protected attributes in the exposure draft legislation. The inclusion of ‘family responsibilities’ as a protected attribute provides prima facie protection for part-time workers – primarily women – from discrimination on the basis of their family responsibilities. ‘Family responsibilities’ is defined in the exposure draft as:

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.

In our February 2012 submission, VWL and WLANSW submitted that the failure to protect workers from discrimination on the basis of working less than full-time hours as a significant gap in anti-discrimination law.

While we support the inclusion of ‘family responsibilities’ as a protected attribute, we urge the government to consider strengthening this protection by including ‘number of hours worked’ in the definition of family responsibilities. This would substantially strengthen protections available for women who work part-time and provide a gender neutral right protecting men who wish to work part-time as a result of family responsibilities as well.

¹⁷ See work done in relation to definitions and a common interpretative framework by the Australian Law Reform Commission: Australian Law Reform Commission, *Family Violence- A National Legal Response*, ALRC Report 114 (2010) and Australian Law Reform Commission, *Family Violence- Commonwealth Laws*, DP 76 (2011).

¹⁸ See: Andrea Durbach, Deputy Sex Discrimination Commissioner ‘Domestic Violence Discrimination and the Consolidation of Anti-Discrimination Laws’(Paper delivered at the Safe at Home, Safe at Work Conference, Melbourne, 5 December 2011) and Alana Heffernan, Lee Matahaere, Domestic violence discrimination in the workplace: Is statutory protection necessary? (Our Work Our Lives Conference, 2010). See also: Australian Law Reform Commission, *Family Violence-Commonwealth Law*, DP 76 (2011) ch 17.

¹⁹ *Human Rights and Anti-Discrimination Bill* (2012) Exposure Draft Legislation, s.17(1)(d)

9.1 Recommendations

- The definition of ‘family responsibilities’ in the Consolidated Act should include a reference to ‘number of hours worked’.

10. Intersectional Discrimination

We welcome the following comments made by Minister Wong that expressly refer to the improved protections for people who experience intersectional discrimination under the proposed legislation:

“It’s ridiculous that at the moment an African woman for example, who has been discriminated against needs to separately make complaints of sex and race discrimination – now she can make a single complaint recognising the discrimination was because she was *both* a woman and African.”²⁰

In our submission Dated 1 February 2012, VWL and WLANSW submitted that for complainants whose experience of discrimination is the compounded result of intersectional discrimination, additional procedural difficulties may arise in relation to proving causation. We noted that as the NACLC submitted to the Standing Committee SDA Inquiry, intersectional discrimination is more than the sum of its parts – it is an entirely new entity.²¹ Thus, establishing causation may be particularly difficult for complainants whose experience of discrimination is not based on a single protected attribute. VWL and WLANSW submitted that complainants should not be required to prove which attribute was the cause of the discrimination, provided that the complainant can establish discrimination on the basis of one or more of the relevant protected attributes.²²

We therefore support the expanded definition of discrimination in clause 19 of the Exposure Draft which expressly provides that ‘a particular combination’ of two or more protected attributes will attract the protections in the proposed legislation. We welcome the accompanying comments in the Explanatory Notes:

“121. The Bill also explicitly covers discrimination on the basis of a combination of attributes. This ensures that where a person has two or more attributes (for example, an Asian woman, an Indigenous person with a hearing impairment, an elderly woman), that person is able to demonstrate unfavourable treatment because of the individual attributes or as a result of the combination of the attributes. For example, an Asian woman may not be able to demonstrate

²⁰ http://www.financeminister.gov.au/media/2012/mr_2352012.html

²¹ NACLC, in the SDA report, 41.

²² This recommendation is drawn from that made by the Equality Rights Alliance: *Women’s Voices for Gender Equality Submission to the Attorney-General’s Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, 16.

unfavourable treatment of Asians generally or women generally, but that an employer based a decision on being an Asian woman."²³

We also support the shifted burden of proof in the Exposure Draft which will require the respondent to 'justify' the conduct once the complainant has established a prima face case of discrimination on the basis of 'one or more' protected attributes, as this will relieve the unfair limitations associated with establishing causation as discussed above.

10.1. Recommendations

We do not make any recommendations on this topic.

11. Equality Before the Law

In our submission dated 1 February 2012, VWL and WLANSW supported the introduction of a general provision that required equality before the law for all protected attributes. VWL and WLANSW recommended that the attribute of equality before the law be extended to all protected attributes.

We note that in the Exposure Draft the principle of equality before the law has only been extended to 'people of all races'²⁴ and not any of the other protected attributes.

We endorse the Australian Human Rights Commission's submission of 6 December 2011²⁵ on this point, which outlines that it is beneficial for the Consolidated Act to clearly state that people can challenge inconsistent state and territory laws under s. 109 of the *Australian Constitution*, which can be best managed with a prescribed laws provision to identify and review inconsistencies.

11.1. Recommendations

- That the Consolidated Act extend the attribute of equality before the law to all protected attributes.

12. Protection of Voluntary Workers

In our submission dated 1 February 2012, VWL and WLANSW recommended that the Consolidated Act support the protection of persons from discrimination and harassment in all spheres of public life, including voluntary work.

²³ Explanatory Notes, 29.

²⁴ *Human Rights and Anti-Discrimination Bill (2012) Exposure Draft Legislation*, s 60.

²⁵ Australian Human Rights Commission 'Consolidation of Commonwealth Anti Discrimination Law' 6 December 2011, p 27.

We note that the definition of 'employment' in the Exposure Draft includes voluntary and unpaid work. We support this approach.

We otherwise submit that a public education campaign should be conducted to educate volunteer organisations in their antidiscrimination obligations. We note that Safe Work Australia provides a dedicated volunteer assistance line to assist volunteers and volunteer organisations to understand their obligations under the new laws.²⁶ We recommend a similar service accompany the Consolidated Act.

12.1. *Recommendations*

- The Consolidated Act should include an education campaign to educate volunteer organisations in their obligations.

13. **Protection of Domestic Workers**

In our submission dated 1 February 2012 VWL and WLANSW expressed support for the protection of persons from discrimination and harassment in all spheres of public life.

We note that the Exposure Draft creates an exception to unlawful discrimination for employment to perform domestic duties.²⁷ We submit that this exception should not be included in the Consolidated Act.

13.1 *Recommendations*

- That the Consolidated Act not include an exception for the performance of domestic duties.

14. **Partnerships**

In our submission of 1 February 2012, VWL and WLANSW recommend that the Consolidated Act apply to partnerships, irrespective of size.

The Exposure Draft deals with the liability of partnerships, unincorporated associations and trusts for unlawful conduct.²⁸ We note this is a new provision in the draft legislation, and on its face appears to apply to all partnerships, regardless of size.

²⁶ Safe Work Australia, see <http://safeworkaustralia.gov.au/News/Pages/TN230111-1.aspx>

²⁷ *Human Rights and Anti-Discrimination Bill (2012) Exposure Draft Legislation*, s 43.

²⁸ *Human Rights and Anti-Discrimination Bill (2012) Exposure Draft Legislation*, s 58.

We welcome the inclusion of this provision, and its role in clarifying the position of partnerships under the consolidated legislation.

14.1 Recommendations

We do not make any recommendations on this topic.

15. Temporary exemptions

In our submission dated 1 February 2012, VWL and WLANSW recommended that the Consolidated Act adopt a general limitations clause to replace other exceptions or permanent exemptions but that such a clause should not diminish existing protection in any way.

It was further submitted that the 'contracting out' of anti-discrimination law should be prohibited under the Consolidated Act. However, it was noted that in exceptional circumstances temporary exemptions may be required. Where exemptions are required they should be temporary and narrow in coverage. It was recommended by VWL and WLANSW that there should be:

- (a) both substantive and process criteria for temporary exemptions across all grounds;
- (b) a consistent process for considering and granting temporary exemptions across all grounds;
- (c) clear and publicly available guidelines which are consistent with the objects of the Consolidated Act; and
- (d) a public register of exemptions granted and refused.

We are pleased that the Exposure Draft has adopted our first recommendation by incorporating a general limitations clause.²⁹ However, we do not support the inclusion of the other specific permanent exceptions in sections 24 and 26 – 31 of the Exposure Draft.

Section 24 of the Exposure Draft contains an exception for inherent requirements for work. The explanatory notes suggest that this exception applies a similar test to the general exception contained in the general exception for justifiable conduct, but explains that the separate exception has been retained to ensure it is specifically considered in the work context. We accept that these clauses together represent a general limitations mechanism and that this is generally in line with our previous submissions.

²⁹ *Human Rights and Anti-Discrimination Bill (2012) Exposure Draft Legislation*, s 23.

However, we do not accept that all the remaining draft exceptions are necessary. As emphasised in our submission in February 2011, the right to equality of treatment and opportunity should be considered a fundamental human right and exceptions should be restricted as far as possible. It is our view that the reasons set out in the explanatory notes in support of retaining the exceptions can be adequately addressed through flexible application of the general exceptions clause. The general exceptions clause provides significant flexibility through the definition of 'justifiable'³⁰ and by allowing any other matter that is reasonable to take into account to be considered in determining whether or not the conduct is justifiable.³¹

Each of the subdivisions B and C appear to have a central 'factor' or concern that is the basis for the specific exceptions retained in the specific subdivision. For example, Subdivision B is titled 'Exceptions related to other laws, court orders etc' and contains 6 different exceptions. We submit that compliance with a Commonwealth Act, disallowable instrument, court order or regulations would be a factor that could be considered under s 23(5) as a matter that is reasonable to take into account in determining whether the conduct was justifiable. Similarly, subdivision C relates to 'Exceptions related to religion' which can be reflected through s 23(5).

Subdivision D contains a number of further exceptions which are stated to 'further define the scope of certain areas of public life' or 'provide guidance on what constitutes "public" and "private" life...'. The overall purpose of the exceptions appears to be to give greater guidance than what is given by the 'justifiable conduct' exception. It is our submission that this guidance could be given by way of 'examples' or through regulations rather than as separate, discrete exceptions which complicate the regime.

We are pleased to see that the AHRC will continue to grant temporary exemptions upon application under the Exposure Draft and that the exemption must be considered consistent with the objects of the Act. However, there is no specific provision for clear and publicly available guidelines or a public register of exemptions that have been granted or refused. We do note that Division 2, Chapter 3 provides for the Commission to draft Guidelines to assist compliance and that these guidelines can be published in any manner the Commission considers appropriate.

We reiterate that there should be both substantive and process criteria for considering and granting temporary exemptions across all grounds; clear and publicly available guidelines which are consistent with the objects of the Consolidated Act and a public register of exemptions granted and refused. We believe that these recommendations are necessary in order to promote the efficiency and provide adequate transparency and accountability in relation to the operation of the temporary exemption provisions.

³⁰ *Human Rights and Anti-Discrimination Bill (2012) Exposure Draft Legislation*, s 23(3).

³¹ *Human Rights and Anti-Discrimination Bill (2012) Exposure Draft Legislation*, s 25(5).

15.1 Recommendations

- That examples are given in the Act to provide illustrative guidance as opposed to separate, discrete exceptions which complicate the regime;
- That a public register of exemptions be maintained, setting out exemptions that have been granted or refused;
- Guidelines be made publicly available to assist compliance with the Consolidated Act.

16. Guidance for Duty Holders

In our submission dated 1 February 2012, VWL and WLANSW recommended that a well-funded, national education program be implemented in relation to obligations under the Consolidated Act and that the Consolidated Act must be accompanied by adequate funding for community education.

The Exposure Draft does recognise a function of the Commission to promote an understanding of and compliance with the Act and to undertake education and research, for the purpose of promoting human rights.³²

Further, the Exposure Draft Explanatory Notes refers to a recommendation that the Human Rights and Equal Opportunity Commission be provided with additional resources to enable it to carry out an initial public education campaign in relation to changes to the Act and devote additional resources to its functions to educate the public about the Act.³³

Notably, this recommendation is listed in the Explanatory Notes as 'noted' by the Government in their initial and final responses. This Recommendation has not been addressed in the Exposure Draft nor in any further detail in the Explanatory Notes. There are also no apparent materials available to indicate the future implementation of this recommendation.

The Regulation Impact Statement related to the Exposure Draft does refer to the provision of the Commission with \$6.6million over a four year period, which may be utilised, in part, to expand its community education role. However, the Regulation Impact Statement does not indicate the amount remaining of this funding or the quantum to be designated to the implementation of any education programs relating to the Exposure Draft.

³² *Human Rights and Anti-Discrimination Bill (2012) Exposure Draft Legislation*, s 156.

³³ Recommendation 34, Exposure Draft Explanatory Notes

Accordingly, while the Exposure Draft does envisage the Commissions involvement in education,³⁴ the Exposure Draft does not address this recommendation satisfactorily.

16.1 Recommendations

- That a well-funded, transparent and well-planned national education program be implemented in relation to obligations under the Consolidated Act.

17. Changes to the Conciliation Process

Whilst we support attempts to reduce the cost and improve the efficient management of disputes under a Consolidated Act, VWL and WLANSW's submission dated 1 February 2012 raised significant concerns in relation to the potential effects power imbalance would have in the context of conciliation of discrimination complaints. Drawing on our experience as advocates, and as women, we note that conciliation may not be the most appropriate means of dispute resolution under the Consolidated Act.

The Explanatory Notes provided with the Exposure Draft notes that section 105 of the Exposure Draft – which requires the Commission to investigate and/or conciliate complaints – “is intended to maintain the importance placed on the Commission attempting to resolve complaints through conciliation, which is a low-cost, informal and flexible alternative dispute resolution mechanism”.

We note that the Explanatory Notes make no mention of the potential limitations of conciliation in circumstances where there is a significant gendered or other power imbalance, and the deterrent effect this could have on complainants.

We note that section 106 provides a general discretion as to how conciliation is conducted. However, both the Exposure Draft and the Explanatory Notes are silent on circumstances where conciliation may be inappropriate.

As set out in VWL and WLANSW's submission dated 1 February 2012, we would support the introduction of a model that allows complainants to elect to take their complaint straight to a decision making body, in circumstances where a face to face or informal mode of dispute resolution may be inappropriate, or alternatively that the Commission has power to appoint an appropriate independent arbiter as an alternative to conciliation.

17.1 Recommendations

³⁴ *Human Rights and Anti-Discrimination Bill (2012) Exposure Draft Legislation*, s 146.

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- That the Consolidated Act make clear provisions for other low-cost dispute resolution methods in circumstances where face-to-face conciliation may be inappropriate.

18. Improvements to the Court Process

As set out in section 17, above, we would support the principle of low cost, efficient dispute resolution wherever possible when complaints are brought under the Act. However, we also recognise that in some circumstances informal dispute resolution may not be appropriate.

Part 4-3 of the Exposure Draft deals with applications to the Federal Court or the Federal Magistrates Court. The Exposure Draft provides a scheme whereby application can be made once a complaint is closed by the Commission, or if a complaint has been made to the Commission.

We consider that without specific provisions for complaints that are not appropriately dealt with through conciliation (as discussed above), the Act should include provision for applications to be made directly to the Court in certain circumstances (i.e. in cases where a power imbalance exists making informal dispute resolution inappropriate).

The Victorian *Equal Opportunity Act* 2010 currently provides a mechanism which allows a person to make an application to the Victorian Civil and Administrative Tribunal, whether or not the person has brought their complaint to the Victorian Commission first.³⁵

Alternatively, it may be appropriate to provide a mechanism whereby a written request can be made to the Commission to dispense with the need to conciliate a complaint, and allow for closure of the complaint, under s.117(2)(g) (i.e. that there is no reasonable prospect of the complaint being settled by conciliation).

18.1 Recommendations

- That the Act includes a mechanism for direct application to the Courts in circumstances where a complaint to the Commission may not be appropriate.

19. Role and Function of the Commission

VWL and WLANSW's submissions dated 1 February 2012 recommended that the AHRC be empowered to proactively investigate complaints by instigating own-motion investigations. Further, investigation powers should be coupled with an enforcement powers such as the ability to issue compliance notices or penalties for non-compliance in a similar manner to agencies such as Fair Work Australia and the Victorian WorkCover Authority.

³⁵ *Equal Opportunity Act* 2010 (Vic) s 122.

We have also suggested that the Commission be more active in providing education campaigns and resources.

Chapter 4 of the Exposure Draft relates to complaints to the Commissioner. It does not appear that our recommendations that the Commission be empowered to monitor and enforce individual complaints or commence own-motion investigations has been adopted.

We note that the process of referring complaints to enforcement bodies such as Fair Work Australia has been streamlined however there are complaints that will fall outside the powers of these other enforcement bodies. The Commission should have the power to address these complaints beyond investigation and attempting conciliation.

19.1 Recommendations

- That the relevant body be empowered to monitor and enforce individual complaints;
- That the relevant body be empowered to commence own-motion investigations, along with powers to enforce findings;
- That the Consolidated Act be coupled with appropriate funding for legal information and support to claimants and duty holders.

20. Interaction with the *Fair Work Act*

We note that the inclusion of industrial history as a protected attribute and unlawful discrimination on this ground in work and work-related areas.³⁶ The protected attribute of 'industrial history' is consistent with the meaning of 'engaging in industrial activity' in section 347 of the *Fair Work Act* meaning that a complaint may arise that enlivens grounds of unlawful discrimination based on industrial history in the consolidated act or adverse action in section 346 of the *Fair Work Act*.

The exposure draft legislation proposes that an individual must not make a complaint to the Commission if a person has already made an application under Part 3-1 of the *Fair Work Act* and therefore a person must elect which jurisdiction the complaint will be heard. We are concerned that individuals making a complaint under this new ground may unintentionally disenfranchise themselves from the Australian Human Rights Commission through first making a complaint to Fair Work Australia.

We recommend that there be greater interaction between the organisations that administer the *Fair Work Act 2009* and the Australian Human Rights Commission, including arrangements to transfer

³⁶ *Human Rights and Anti-Discrimination Bill (2012) Exposure Draft Legislation*, s 22(3).

complaints between organisations, so that an individual is not disadvantaged in electing a particular jurisdiction.

We also recommend that the organisations that administer the *Fair Work Act* and the Australian Human Rights Commission work together on a campaign and guidelines to clarify which types of complaints and actions are most appropriate to be made to each body.

20.1 Recommendations

- Development of a system to transfer complaints between the Australian Human Rights Commission and Fair Work Australia, and the provision of education on the appropriate scheme for complaints.

21. Interaction with other Commonwealth, State and Territory laws

The Exposure Draft provides that it does not operate to exclude State and Territory anti-discrimination legislation, which does not correspond with our recommendations.³⁷

The recommendation to avoid diminution of protections provided by State or Territory government instrumentalities, however, is largely reflected in the Exposure Draft. We welcome the aligning of protections against discrimination with the highest current standard in the States and Territories on grounds such as sexual orientation and gender identity in section 17 of the Exposure Draft.

22.1 Recommendations

- That the Act sets out clear provisions to avoid the diminution of any protections provided by State or Territory Government instrumentalities

For further information, please do not hesitate to contact the Co-Chairs of the VWL Law Reform Committee, Emily Hart or Beth Altson

Yours sincerely,

Verity Shepherdson
Convenor – Victorian Women Lawyers

³⁷ *Human Rights and Anti-Discrimination Bill (2012) Exposure Draft Legislation*, s 14.