



Australian Business
Industrial

SUBMISSION

HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

Senate Legal and Constitutional Affairs Committee

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140 Arthur Street
North Sydney NSW 2060

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Introduction

The exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* (the Bill) was released on 20 November 2012 for public comment, and, unusually for this stage of the drafting process, referred to the Legal and Constitutional Affairs Committee (Committee) for review.

Australian Business Industrial (ABI) thanks the Committee for providing the opportunity for comment and the Committee Secretariat for allowing additional time to make those comments. These are ABI's submissions.

ABI appreciates that the exposure draft has emerged from a long period of consideration and consultation. Nonetheless the Bill is the first public airing of the proposed legislation. Both the length of time allowed for comment and the timing of the Bill's release mean that ABI has not the opportunity to engage with members about the Bill in any substantial way.

The Bill is intended to consolidate five existing federal equal opportunity and anti-discrimination acts, the *Racial Discrimination Act 1975* (RD Act), the *Sex Discrimination Act 1984* (SD Act), the *Australian Human Rights Commission Act 1986* (AHRC Act), the *Disability Discrimination Act 1992* (DD Act) and the *Age Discrimination Act 2004* (AD Act). What stands out in the Commonwealth's dealing with anti-discrimination legislation is not only the number of acts but the time span over which different pieces of legislation were enacted. Different notions inform these different acts and they have been incrementally amended over time to address case law and changing views about their individual effectiveness.

The result is neither consistency nor simplicity. This situation is addressed in the media release issued by the sponsoring ministers with the release of the Bill which said:

“By consolidating Commonwealth anti-discrimination laws into one Act, the Government is providing better protections with a clearer and simpler regime for business, organisations and individuals.

‘Making protections and obligations clearer for individuals and organisations will help everybody understand what behavior is expected and will provide certainty for all users of the system,’ Ms Roxon said.”¹

The goals of a clearer and simpler regime for business, organisations and individuals and facilitating what is expected behavior and greater certainty are praiseworthy and are to be supported. There can be no justice where citizens cannot understand their obligations or what is required of them.

Consolidation means there are changes to the established law and there will need to be accommodation to new obligations. The Bill will have these effects as well as expanding the federal jurisdiction by the inclusion of protected attributes within the AHRC Act to those currently covered by the other four acts.

¹ Paras 3 and 4, *Clearer, Simpler, Stronger Anti-Discrimination Laws*, Media Release, 20 November 2012

It is clear that the drafters of the Bill envisage that the Bill's remedies will be more freely available and more frequently accessed than is currently the case.

"Minister Wong said the consolidated laws will make it easier for individuals to seek redress when they've been discriminated against, and will provide the Commission with the ability to dismiss unmeritorious complaints, providing business with certainty.

...

'The complaints process will be streamlined with the adoption of a cost free jurisdiction and shifting burden of proof where the respondent is required to justify the conduct once the complainant has established a prima facie case,' Ms Roxon said."²

It is also clear that the Bill is intended to have a greater impact on small business than is currently the case with the existing system of Commonwealth and state/territory laws. On June 30 2011 figures show small employers (employers employing fewer than 20 employees) employed 4.181 million employees (46% of employees)³. There were 738, 312 of them (89% of employing businesses).⁴

It is important that the enacted legislation strikes the right balance.

About Australian Business Industrial

ABI is registered under the *Fair Work (Registered Organisations) Act 2012* as an organisation of employers. ABI is the successor of the former Chamber of Manufactures of New South Wales.

ABI members are also members of the New South Wales Business Chamber and ABI is the industrial policy and representative affiliate of the New South Wales Business Chamber.

² Paras 9 and 12, *Clearer, Simpler, Stronger Anti-Discrimination Laws*, Media Release, 20 November 2012

³ Table 2.1, *Australian Industry 2010-2011*, ABS Cat 8155.0, issued 22 June 2012

⁴ Table 13, *Counts of Australian Businesses, Including Entries and Exits*, ABS Cat 8165.0, issued 31 January 2012

THE MEANING OF DISCRIMINATION

The Bill dispenses with the formal distinction between direct and indirect discrimination. Proposed s 19 provides that unlawful discriminatory activity follows either unfavourable treatment because of a protected attribute or disadvantage because of the protected attribute which arises from a policy. “Protected attribute” has broad meaning because a protected attribute can comprise two or more listed attributes as well as the individual listed attributes themselves.

Second, proposed s 19 dispenses with the formal requirement of a comparator associated with direct discrimination. Under proposed s 19 discriminatory treatment is not “less favourable” treatment than that accorded a similar person without the protected attribute, it is “unfavourable” treatment accorded because of the attribute.

The substitution of “unfavourable treatment” for “less favourable treatment” is a consequence of removing the role of the comparator. Currently many cases which come to court are shaped by the selection of the comparator. Much primary and appellate court time has been devoted to the identification of the proper comparator in different situations and under the different acts. Removing the requirement for a comparator would make this kind of determination unnecessary.

Unfavourable Treatment

However, achieving simplicity and certainty crucially depends upon how consistently “unfavourable” is applied and equity requires the right balance of meaning. The question of when different treatment or a different outcome becomes unfavourable treatment is a new question. It does not arise where a comparator is required. The requirement for a comparator really meant that the question which was asked under the current legislation was whether the treatment received was different than would have been accorded a person without the protected attribute in the same situation.

Proposed s 19(2) provides:

(2) To avoid doubt, **unfavourable** treatment of the other person includes (but is not limited to) the following:

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

Clearly much unfavourable treatment which is potentially unlawful (if undertaken because of the protected attribute) is not limited to the wording in proposed s 19(2). Unfavourable treatment includes such outcomes as not gaining employment (a traditional trigger for less favourable treatment claims). Indeed, proposed s 19(2) appears to be an expansionary provision rather than an explanatory one since none of the exemplar words seem to connote unfairness of treatment. Rather, they seem to focus on the mental state of the complainant. Treatment might be plainly unfavourable or it may offend, making it unfavourable.

There seems a real risk that proposed s 19(1) and (2) could operate to mean that the “unfavourable” treatment is treatment which leaves the other person sufficiently aggrieved or

motivated to make a complaint. Proposed s 19(6)(a) which equates the “discriminatory effect” of the conduct to its unfavourable nature does not affect this reading. Assuming this reading is a correct understanding of the meaning of unfavourable treatment, nor does there seem to be any objective “reasonable person” test such as there is in proposed s 49(1)(b) of the Bill which qualifies the definition of “sexually harasses”:

- (b) a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the other person would be offended, insulted, humiliated or intimidated by the first person’s conduct.

The Explanatory Notes are not of great assistance on this issue. They state:

“The alleged discriminator must treat [...] the person unfavourably. It is not necessary to make a comparison to any other person to determine whether treatment is unfavourable. It is sufficient that the treatment is detrimental to the person.”⁵

ABI agrees that there are potential benefits from moving away from requiring a comparator, but the test for unfavourable treatment should be objective and reasonably clear and consistent across different situations.

Consideration might be given to clarifying the notion of “unfavourable treatment” so that it is an objective test which is reasonably clear and consistent to actors in different situations.

No Use of Comparators?

The Explanatory Notes also explain that the removal of the requirement for a comparator does not preclude the use of comparators. They state:

“[...]the Bill defines discrimination by reference to unfavourable treatment only, rather than requiring the construction of a comparator. However, in many cases, a comparative analysis will be useful to determine whether the unfavourable treatment was *because* of the protected attribute.”⁶

This is noteworthy for two reasons. It confirms the fact that under the Bill a comparator is not required to establish (potentially unlawful) discrimination. Second, it proposes that a comparator might assist in determining whether the treatment was because of the person’s protected attribute(s). What’s meant by this is not clear. If followed, using a comparator to attribute cause seems to not only have the effect that the quest for the appropriate comparator remains (with all its complications) for many cases, but also the comparison is moved down the chain of proof to the reason for conduct rather than its detrimental nature.

If this is a correct reading of the Bill and Explanatory Notes it would seem to make making out the prima facie case before the burden of proof shifts required under proposed s 124 of the Bill significantly easier than seems intended in the discussion of the shifted burden of proof. The Explanatory Notes state:

⁵ P 26, para 106, Explanatory Notes

⁶ P 28, para 117, Explanatory Notes

“The complainant bears the burden of establishing the primary elements of discrimination (including the presence of a protected attribute or attributes, unfavourable treatment or imposition of a policy which disadvantages people with that attribute, and connection to an area of public life).

However, in relation to the reasons for the conduct, the Bill introduces a shifting burden of proof (clause 124). Under this rule, the complainant must provide evidence from which the court could decide, in the absence of any other explanation, that the alleged reason is the reason the respondent engaged in the conduct. Once the complainant has discharged this burden, the reason for the conduct will be presumed unless proven otherwise by the respondent.”⁷

...

“To avoid these difficulties, the Bill defines discrimination by reference to unfavourable treatment only, rather than requiring the construction of a comparator. However, in many cases, a comparative analysis will be useful to determine whether the unfavourable treatment was *because of* the protected attribute.”⁸

It also seems to be a significant shift in the law.⁹

Consideration might be given to reworking the Explanatory Notes to make clear that the Bill has excised the role of comparators.

Burden of Proof

The shifted burden of proof goes further than currently exists under indirect discrimination. It will encourage a greater number of complaints, and provide further encouragement for claims settlement. There is a clear risk that the jurisdiction could be increasingly perceived as a fruitful source of go-away money.

ABI understands that the risk of go-away money is intended to be offset by the proposed s 117(2)(c) which provides for the Commission to close complaints which are frivolous, vexatious, misconceived or lacking in substance. However, this capacity is effectively supervised by the court which will inhibit its use. Proposed s 121(1) allows the court to grant leave to a complainant to bring an action in the court despite its closure under proposed s 117(2)(c). As well, tribunals are generally reluctant to exercise these powers where they have them, and especially they are reluctant to deal with them without requiring respondent participation. This issue was most recently demonstrated in the review of the *Fair Work Act 2009*.¹⁰

⁷ P 4, Explanatory Notes

⁸ P 28, para 117, Explanatory notes

⁹ For example at para 13 in *Purvis v New South Wales* [2003] HCA 62, Gleeson CJ said:

“If one were to ask the pupil to explain, from his point of view, why he was expelled, it may be reasonable for him to say that his disability resulted in his expulsion. However, ss 5, 10 and 22 are concerned with the lawfulness of the conduct of the school authority, and with the true basis of the decision of the principal to suspend and later expel the pupil.”

¹⁰ The Review Panel recommended that Fair Work Australia not be required to hold a hearing in all circumstances before dismissing an application (Recommendation 43, p 229) and also to expand the grounds upon which Fair Work Australia can dismiss dismissal applications (Recommendation 42, p 229).

Consideration might be given to strengthening the Commission's capacity to dismiss unmeritorious claims, and to do so with the minimum necessary involvement of respondents.

Medical History

Proposed s 22(3)(c) provides that discrimination in work or work related areas (which includes offering and terminating employment and opportunities which are made available in employment) on the basis of a person's medical history is unlawful. Although currently in the AHRC Act, this protected attribute (as with others in the proposed s 22(3)) is a new ground of enforceable unlawful discrimination across most of Australia.

It is standard practice to consider a person's propensity to injury, including a person's workers' compensation record, when considering selection for certain types of work. It would be inappropriate if the combined effect of proposed s 22(3)(c) and 23 were to make this type of consideration unlawful under the Bill.

Consideration might be given to excluding medical history as a protected attribute for work and work-related areas or including greater guidance in the Explanatory Notes.

Proposed s 57 of the Bill deems a principal to have undertaken the unlawful conduct of its directors, officers, employees and agents. This provision replaces different notions of vicarious liability in the current legislation. ABI welcomes the Bill's objective of standardising the conditions for vicarious liability and defence. While it is clear that an employer which ignores or condones a culture conducive to vilification, harassment or intimidation is, along with others, properly liable for unlawful outcomes arising from that culture it should be recognised that the transfer of liability to an employer for the actions of individual employees, officers or directors is a difficult area which is not fully resolved by the Bill for several reasons.

Most claims are settled, not contested to final determination by the court. Some measure of this can be found by looking at general protections claims under the *Fair Work Act 2009*. Where an alleged breach of general protections or unlawful termination provisions gives rise to a dismissal the claim must first be brought to Fair Work Australia [ss 365 and 772 Fair Work Act]. If Fair Work Australia cannot resolve the matter by conciliation it issues a certificate to that effect which is a prerequisite for bringing the matter to court. Not all claims which can go to the court, do, and many of those which get to the court system are settled before final determination.

In 2011-2012 there were 2303 applications lodged under ss 365 and 772 and 2268 claims finalised during that year. (Not all claims are lodged and finalised in the same year.) Of the claims which were finalised in 2011-2012, 931 (41%) were disposed of by issuing a certificate¹¹ meaning that 60% were settled or went away. The more readily employers attract vicarious liability, the more likely large employers are to be subject to claims because of their capacity to pay. Little of educative value flows from these settlements because most people understand that small employers do not have the same capacity to pay.

Proposed s 57(1) applies liability in the following terms:

- (1) This section applies if a person (the **first person**) who is a director, officer, employee or agent of another person (the **principal**) engages in conduct connected with the first person's duties as a director, officer or agent, or connected with the first person's employment.

There is a balance being struck here, but the causal link to the employer's liability seems significantly differently weighted for each of the two possible linkages to the employer. Vicarious liability flows if the director, officer, employee or agent engages in inappropriate conduct connected with his or her duties as the director, officer, employee or agent. This is not inappropriate.

Vicarious liability also flows if the conduct is connected to the first person's employment. For the phrase "...connected with the [...] person's employment" to have meaning beyond the duties of the person (which is covered by the first leg) it must be read broadly to mean something like arising in the course of their employment. This reading does not appear confined to activity over which the employer has legitimate control.

¹¹ P 26, Table 13, *Fair Work Australia, Annual Report 2011-12*

Proposed s 57(3) provides a defence to a principal which took reasonable precautions and exercised due diligence to avoid the conduct. It is notorious that one of the greatest complexities facing employers is the problem of controlling inappropriate conduct or performance.

Controlling behavior is difficult because employers' capacity to sanction is significantly circumscribed, in many situations different sets of statutory protection are called into play for the different actors involved, different sets of statutory obligation are often invoked in the one situation, and the line between public and private is unclear.

Particularly amongst small employers, where the money in the business is the employer's own capital put at risk, there is a strong sense of injustice that they can be liable for an individual's conduct which is clearly inappropriate, not done with permission and not condoned.

Consideration might be given to whether the phrase "...conduct [...] connected with the first person's employment" unreasonably extends vicarious liability.

THE HUMAN RIGHTS BILL AND OTHER REMEDIES

It is clear that the current regulatory framework is unhelpful and confusing and that its rationalisation is a key prerequisite to improving peoples' understanding of what is unreasonable. The current regulatory framework goes beyond the five federal acts which the Bill would consolidate. It includes the *Fair Work Act 2009* and a myriad of state and territory legislation. The current regulatory patchwork does not assist the achievement of the goal of improved equality of opportunity nor better productivity. In the workplace the current patchwork gives rise to inhibited decision making and anxiety. It should be addressed.

Whilst discussing industrial relations flexibility in its 2007-08 annual report the Productivity Commission said:

“There is a range of other regulations that can reduce an organisation’s adaptability or responsiveness, and burden it with unnecessary costs. Compulsory standards, complex requirements, or marked differences across jurisdictions can all limit, or raise the cost of, organisational changes needed for successful innovation.”¹²

In concert with the New South Wales Business Chamber, ABI commissioned a study into the drivers of national productivity and the extent to which the principles underpinning the *Fair Work Act 2009* supported or detracted from productivity growth. Part of the study involved individually interviewing just over 70 employers of different sizes across Australia from a diverse range of industries. The resulting information was summarised in tables on the basis of importance ranging from very high priority issues to issues which were not a priority in the view of the majority of interviewees.

Amongst the high priority issues was the proposition that “...additional measures in the Fair Work Act were necessary to prevent discriminatory behavior in the workplace”. This proposition was disagreed with by those respondents which had been involved in such matters. The comments and preferred Fair Work system response were summarised as:

“An inconsistent set of legal definitions and tests was further exacerbated by the provisions in the Fair Work Act.”

“...[the] proliferation of definitions [is] very unhelpful so prefer consolidation of better balanced anti-discrimination legislation.”¹³

State and Territory Legislation

Section 14 of the Bill proposes that the Bill is not intended to exclude or limit the operation of a prescribed state or territory anti-discrimination law to the extent that it can operate concurrently with the Bill, except in the case of disability standards and compliance codes.

¹² P 18, *Enhancing Australia’s Productivity Growth, Annual Report 2007-08*, Productivity Commission

¹³ P 53, Figure 10, *Productivity and Fair Work*, Australian Business Foundation, March 2012.

The preferred outcome would be for there to be a single national legislation applied consistently across the nation. Desirable as it might be this objective does not seem likely in the near future. As noted in the Regulation Impact Statement:

“The Government also acknowledges calls from stakeholders to have a single national regime relating to discrimination. The Government has already committed to retaining the concurrent operation of State and Territory regimes as part of this project. The Australian Government strongly supports cross-jurisdictional efforts, through the Standing Council on Law and Justice (the ministerial council of Commonwealth, State and Territory Attorneys-General), to harmonise anti-discrimination regimes.”¹⁴

Presuming that harmonisation of Commonwealth and state/territory laws is a desirable end point (and the record for this approach to national consistency is mixed) progress on harmonisation has been very slow. This does not bode well for improvement in this area.

It is possible that enacting the final form of the Bill may give impetus to state and territory jurisdictions to amend their various pieces of anti-discrimination legislation, but it is also possible that some jurisdictions might seek to raise the bar to restore or gain competitive advantage over the national system. The reality is that where there are multiple systems of redress there will be forum shopping. Complainants are naturally going to assess which system is best for their chances. Even in harmonised systems there are very real difficulties in sustaining consistent case law.

Consideration might be given to ways to promote greater consistency between the jurisdiction and to timing such moves to coincide with the commencement of the enacted version of the Bill.

Fair Work Act

Proposed s 17 of the Bill introduces the notion of “industrial history” (defined in proposed s 6) as a protected attribute which is unlawful if a reason for unfavourable treatment or disadvantageous policy in work and work-related areas. “Industrial history” is intended to be broadly consistent with the provisions of the *Fair Work Act 2009*. The Explanatory Notes state:

“This definition is based on the concept of ‘engaging in industrial activity’ in section 347 of the *Fair Work Act 2009*, to ensure consistency between the protections afforded by the two Acts in this regard. For example, it would be unlawful for an employer to discriminate against an employee who joined a union, or for an employee to harass other employees because they had refused to join a union.”¹⁵

Making “industrial history” a protected attribute under the Bill creates a new, second federal jurisdiction where none previously existed. While it may be better that if there are two jurisdictions there should be consistency between them, it would really be better if there were not two jurisdictions.

There seems a real risk that the effect of the inclusion of “industrial history” as a work related protected attribute is that there will be an increase in complaints against employers brought under the enacted Bill for conduct by other employees because of the vicarious liability provisions in the Bill (and the greater capacity of employers, compared with fellow employees, to meet damages)

¹⁴ P 80, Consolidation of Commonwealth Anti-Discrimination Laws, Regulation Impact Statement

¹⁵ Para 90, Explanatory Notes

whilst employers' capacity to impose policies about this type of matter is constrained by the general protections for engaging in industrial activity under the *Fair Work Act 2009*.

ABI's preferred outcome is that the industrial activity and discrimination provisions in the *Fair Work Act 2009* should be repealed and these bases of discrimination be the subject of the general discrimination legislation. Until such time as this can occur it would be preferable to exclude "industrial activity" from the bill's coverage.

Consideration be given to removing "industrial activity" from the Bill's protected attributes until such time that the *Fair Work Act 2009* can be amended so that at no time are there overlapping jurisdictions dealing with this attribute concurrently.