THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: Employment Law Committee:GL:584202

27 January 2012

Ms Margery Nicoll
A/g Secretary General
Law Council of Australia
DX 5719 Canberra

By email: rosemary.budavari@lawcouncil.asn.au

Margery,

Dear Ms Nicoll,

Re: Consolidation of Commonwealth Anti-Discrimination Laws

Thank you for seeking the view of the Law Society of NSW on the consolidation of Commonwealth anti-discrimination laws. This issue has been considered by the Law Society's Employment Law Committee ("Committee") which has provided the comments set out below. The Human Rights Committee may also provide comments following the release of the exposure draft legislation.

The Committee understands that the Law Council of Australia intends to make a submission in relation to the Discussion Paper released by the Attorney-General's Department *Consolidation of Commonwealth Anti-Discrimination Laws* ("Discussion Paper"). The Law Council Secretariat having analysed the Discussion Paper in the light of the Law Council's Policy Position Paper ("Position Paper"), identified 10 issues for comment by its constituent bodies. The Committee responds to those issues (a) to (m) below and additionally makes the following general observations.

1. The focus of the Discussion Paper is the consolidation of federal anti-discrimination law, not harmonisation of anti-discrimination law across the States and Territories and the proposals are not based on referral of powers that would supplement any lacunae with international conventions.

2. A guiding principle overall is that the legislation should use terms readily understood by members of the general public without the need to resort to complex legal provisions or case law. This is particularly important for key definitions as it is members of the public who initiate complaints under the legislation.

(a) (b) (c) Test for direct discrimination, removal of the distinction between direct and indirect discrimination and burden of proof

Since these matters are interlinked it is preferable to consider them together. The Position Paper at paragraph 13 proposes a review of the existing definitions or tests for discrimination and at paragraph 14 posits two alternative definitions if the existing ones fail to comply with international human rights standards or are deficient. The Secretariat asks which of these two tests should be preferred.

In the Committee's view, it would be preferable to maintain the current definition of discrimination as constituting "less favourable treatment because of [attribute]". The advantages of doing so is that the language is familiar after many decades of anti-discrimination legislation, it is readily understood by the general public and encapsulates the ordinary understanding of the meaning of discrimination. The proposed draft definition of the Experts in their submission of 28 November 2011 at page 8 differs little from the current wording – "treating a person unfavourably on the basis of a protected attribute".

The removal of the distinction between direct and indirect discrimination is not supported. As stated at paragraph 47 of the Discussion Paper no Australian jurisdiction uses a unified test for unlawful discrimination. To remove the distinction and then seek to rely upon avoidance of doubt provisions, legislative examples or statement of intent in extrinsic materials would be an unsatisfactory approach to legislative drafting.

The reverse onus of proof is to be considered by the High Court and therefore it is preferable to await its decision before further comment on this approach in the anti-discrimination legislation. Special leave has been granted by the High Court in *Board of Bendigo Regional Institute of Technical & Further Education v Barclay & Anor*, to be heard in 2012. Although awaiting the decision in this matter may not be ideal or possible given the timeframes, the Committee cautions against being too hasty in responding to the reverse onus of proof for all discrimination complaints before the High Court hears this case.

(e) Positive duty for public sector organisations to eliminate discrimination

It is problematic to impose a positive duty on public sector organisations by law. The principal reasons for this are that fairness lies in the anti-discrimination law applicable to the public sector being the same as that for the private sector. Further, there are grey areas in defining the boundaries of the "public sector" and whether this might be taken to include those who contract with the public sector. Having the same law applicable in public as in private sector does not preclude the Federal Government from implementing additional programs to eliminate discrimination.

Associate discrimination

The query raised by the Position Paper is very important as "associate" is not defined in the RDA, though it is in s 4 of the DDA to include a spouse of the person; another person who is living with the person on a genuine domestic basis; a relative of the person; and a carer of the person; another person who is in a business, sporting or recreational relationship with the person).

While consistency is desirable in the definition, can a single definition of "associate" apply to all of the attributes? Further consideration of the definition might be preferable (see the recent decision of the Court of Appeal in *Sydney Local Health Network v QY and QZ [2011] NSWCA 412* on the meaning of "associate" in s 4 of the *Anti-*

Discrimination Act 1977 (NSW) where the Court held that an associate must be of a person who was alive at the time that the discrimination occurred).

Protected Areas of Public Life (f) (g) (h) (i)

The present approach in the ADA, DDA and SDA which makes discrimination unlawful in specified activities in specific areas of public life is well understood.

The Committee supports the introduction of the proposed new protected attributes (sexual orientation and gender identity) referred to in the Discussion Paper at paragraph 73.

The additional attributes regulated under the *Australian Human Rights Commission Act 1986* in the area of employment (religion, political opinion, industrial activity, nationality, criminal record and medical record) overlap with some protections available to workers under the *Fair Work Act 2009*, however, the AHRC has a limited function of conciliating such complaints (in keeping with ILO Convention No. 111). Given the different remedies available, the Committee suggests that protections against discrimination on the basis of these attributes continue to co-exist with those available under FWA.

(j) Volunteers

The Discussion Paper directs attention to "voluntary workers" not to "volunteers". The Committee generally supports extension of protections to "voluntary workers", however, it is important to consider whether it is a matter of considering the capacity in which the person is working and/or the activity that is being undertaken.

The Committee recommends that a distinction be made between "voluntary workers" as being those working (though not paid) in a business and typically alongside employees (e.g. museum guides) and "volunteers" where the activity is being carried out along with others, none of whom are employed and there is no business (e.g. clean up campaigns).

(j) Partnerships

It is often the case that small partnerships are formed by those in close personal relationships, for example family or (life) partners. Apart from the RDA, small partnerships have been excluded from coverage.

While there may be some consideration to legislate an exclusion in the formation of partnerships through a "single size" limitation (such as number of partners and/or based on the partnership's annual turnover), excluding partnerships from coverage is undesirable as it leads to inconsistencies in the application of the legislation to other (potentially smaller) proprietary limited companies. Further, using a single size limitation may not necessarily reflect the size of the business.

It is inconsistent to limit from coverage partnerships based on their size, and not small business. Further, the size of the partnership does not necessarily reflect the size of the business. Also, from a policy perspective, the mere fact that they may be family-based does not necessarily provide strong support for exempting them from discrimination legislation. For these reasons, we would caution against introducing a standard exclusion for small partnerships.

(k) Inherent requirements exception

The inherent requirements exception in the DDA should be retained along with the genuine occupational qualification in the SDA. The Committee recommends this even if it is not possible to create a single common exception.

Consideration should be given to the adoption of the European Union approach in Article 23 of EU Directive 2000/78/EC, which states:

> *In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.*

(m) Interaction with the *Fair Work Act*

The Discussion Paper refers to two types of interaction between the *Fair Work Act 2009* and Commonwealth anti-discrimination laws. The first is the power of Fair Work Australia to vary discriminatory modern awards and enterprise agreements on referral from AHRC and the second is between the general protections in the *Fair Work Act* against discrimination in employment and the Commonwealth anti-discrimination laws.

The first results in Fair Work Australia determining complaints about breaches of Commonwealth anti-discrimination laws in the terms of modern awards and EAs. That works effectively.

The second interaction reveals overlap, however, the matters covered in the FWA and the anti-discrimination jurisdictions are not the same, nor are the remedies that are available. Importantly, there are legislative limitations in multiple claims alleging discrimination in relation to employment, pre-employment and terminations of employment. The complainant is required to make a choice of jurisdiction.

In a case on appeal to the High Court, *Board of Bendigo Regional Institute of Technical & Further Education v Barclay & Anor,* the High Court will give consideration to questions of the reasons for an action (s 346 FWA protection) and how that is determined in a shifting balance of proof (s 361 FWA reason for action to be presumed unless proved otherwise).

Additional Comments

By way of completeness, the Committee also makes the following comments in relation to the Discussion Paper, not raised in the Position Paper.

- Temporary exemptions should be made available across all areas of discrimination (currently not consistently available, e.g. not in RDA, when compared with other States and Territories which all have an exemption provision subject to appropriate safeguards). The Committee supports the Expert Group's position in this regard. (see page 17)

- The process through the Australian Human Rights Commission is slow, and in some cases adds unnecessary costs. Consideration should be given for allowing matters to proceed directly to Court where alternative dispute resolution mechanisms are available at the appropriate time.

The Committee would be grateful if the Law Council could incorporate its comments into its submission.

Yours sincerely,

Justin Dowd
President