THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRights:JD:VK:674817

12 December 2012

Professor Sally Walker
Secretary General
Law Council of Australia
DX 5719 Canberra

By email: sarah.moulds@lawcouncil.asn.au

Dear Professor Walker,

Exposure draft of the Human Rights and Anti-Discrimination Bill 2012

I am writing on behalf of the Human Rights Committee (HRC) and the Indigenous Issues Committee (IIC) of the Law Society of NSW (together referred to as the "Committees"). The HRC is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly. The IIC represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW. The Committees both include experts drawn from the ranks of the Law Society's membership.

The Committees refer to the Law Council's memorandum of 26 November 2012 and thank the Law Council for the opportunity to provide comments on the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (the "Draft Bill").

The HRC notes as a general comment that the Draft Bill appears to lower the standard of many protections contained in the *Racial Discrimination Act 1975* (Cth). The HRC notes also that there does not appear to be any justification for these changes, and that such a lowering of standards is contrary to what is set out in the Explanatory Notes to the Draft Bill which states that protections are to be raised to the highest existing level.

The Committees comment below in relation to specific clauses of the Draft Bill.

Clause 10 - Does not apply outside of Australia

The HRC notes that this clause provides that the Draft Bill is to apply only to conduct geographically in Australia and not to the conduct of officers of the Commonwealth or Australian citizens overseas. The HRC submits that this clause should at the very least apply to the conduct of officers of the Commonwealth overseas. Otherwise, the Act could be avoided simply by moving the conduct offshore.

Clause 21 - Special Measures

The Committees note that this clause provides a new definition of special measures. The HRC notes that the definition set out in clause 21(2)(b) relies on a reasonableness standard to allow a Court to find that a matter is a special measure. The HRC's view is that this definition is drafted too vaguely, which may allow for measures that ought not to be found to be "special measures" to be so found.

The HRC and the IIC submit that the definition in clause 21 should require the consent of those for whom the special measure has been instituted. This would be consistent with the statement by Brennan J in *Gerhardy v Brown*[1] to that effect. It would also be consistent with *General Recommendation no. 23* of the UN Committee on the Elimination of Racial Discrimination ("CERD Committee")[2] as well as *General Recommendation no. 32* of the CERD Committee[3] to the effect that decisions relating to Indigenous peoples and their interests should not be taken without their informed consent. The IIC submits further that clause 21 should include a provision requiring an effective mechanism for consultation, noting the view of the CERD Committee that "State parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities." (paragraph 18 of *General Recommendation no. 32*).

In addition, the HRC notes that clause 21 uses the phrase "sole or dominant purpose" of securing substantive equality. This varies from (and is weaker than) Article 1(4) of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) which contains the phrase "sole purpose". The HRC is of the view that given the fact that Australia is a signatory to the ICERD, and that the "sole purpose" test is endorsed by Brennan J in *Gerhardy v Brown, c*lause 21 should be amended to use only the phrase "sole purpose".

The IIC notes that the content and meaning of "special measures" under the *Racial Discrimination Act 1975* is currently under consideration in the High Court proceedings in the matter of *Maloney v the Queen* (HCA B57/12).

Clause 22 - Unlawful Discrimination

The HRC notes that clause 22(3) states that discrimination in relation to certain grounds is only unlawful if it is connected to work or work-related areas. The Explanatory Notes to the Draft Bill states at page 1 that the intent of the Draft Bill is to "lift differing levels of protection to the highest current standard..." The highest standard is embodied in clause 22(1) and (2). The HRC's view is that the standard provided for in clause 22(3) is below the highest current standard, and that clause 22(3) should therefore be omitted.

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[1] (1985) 159 CLR 70

[2] UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation no. 23, Indigenous Peoples,* 18 August 1997, CERD/A/52/18, annex V, available at: http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c [accessed 11 December 2012]

[3] UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, 24 September 2009, CERD/C/GC/32, available at: http://www.unhcr.org/refworld/docid/4adc30382.html [accessed 11 December 2012]

Clause 23 - Justifiable Conduct

The Committees note that clause 23 provides a general exemption for justifiable conduct. The HRC notes that while the intent was clearly to remove the plethora of specific exceptions and make the Draft Bill simpler, the clause is drafted too vaguely. The HRC is concerned that potential exists for the drafting of clause 23 to have the effect of nullifying a finding of discrimination under clause 19.

The HRC notes that the highest standard in this regard is currently under the *Racial Discrimination Act 1975*, which has almost no exceptions, and those that exist are specific. Rather than raising all grounds of discrimination to this level, it lowers the standard for racial discrimination to a much lower level that involves considerable exceptions. The HRC's view is that the generality and vagueness of this clause may lower the level for all of the grounds of discrimination currently protected because the more specific exceptions allow for greater protection for complainants against discrimination.

Further, the IIC notes that, similar to its concerns in relation to clause 21, the proposed clause 23 does not make any reference to either (a) whether that particular aim is for the benefit of that discriminated person; or (b) whether that discriminated person has any input into the decision.

Clause 27 - Exceptions in relation to the *Migration Act 1958* (Cth)

The HRC acknowledges that some forms of discrimination in relation to the *Migration Act 1958* may be necessary in relation to the issue of specific visas (as stated in the Explanatory Notes to the Draft Bill). However, the HRC submits that clause 27 should be drafted narrowly to relate only to the relevant visa decisions. The HRC notes that clauses 27(2)(b) and 27(3)(b) allow for discrimination on the basis of age, disability and marital and relationship status generally; however, decisions made under the *Migration Act 1958* should not represent a complete vacuum in relation to the protections that would otherwise be available under the Draft Bill in relation to those attributes.

Clause 30 - Regulation making power

The HRC notes that clause 30(2)(c) appears to allow for the exclusion of provisions of the Draft Bill by regulation. The HRC's view is that this clause has the potential to significantly undermine the protective effect of the Draft Bill. It is the HRC's view that the provisions of any legislation, let alone legislation that seeks to protect fundamental human rights, should not be subject to exclusion by regulation made under the executive power. The HRC submits that this clause is inconsistent with the primacy of Parliament and should be omitted.

Clause 60 – Equality before the law

The HRC notes that clause 60 replicates section 10 of the *Racial Discrimination Act 1975*. Such a principle would seem to apply to all grounds of discrimination. The HRC submits that clause 60 should be amended to apply to all of the protected attributes set out in clause 17.

Compliance Codes, special measures determinations & temporary exemptions & judicial power

The HRC notes that Chapter 3 of the Draft Bill contains measures to assist compliance including compliance codes, special measures determinations and temporary exemptions. The HRC's view is that again, compared to the high standards set by the *Racial Discrimination Act 1975*, compliance codes and temporary exemptions lower the standard involved rather than raise the standard to the highest existing level. The *Racial Discrimination Act 1975* contains no such provisions. The HRC submits that these provisions should either be redrafted to avoid lowering existing standards, or should be omitted.

In addition to the concern above, it is not clear to the HRC how the special measures determination will operate on a practical level. It is not clear how the Australian Human Rights Commission could affect the jurisdiction of a Court to determine what a special measure is by making a determination that something is a special measure. The HRC's view is that Division 7 of Chapter 3 may in fact be invalid because it provides for the exercise of judicial power by an administrative body in a way similar to the arrangements invalidated by the High Court in *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10.

Aboriginal Corporations

It is not clear to the HRC how clause 21 and Division 7 of Chapter 3 in relation to special measures will operate in relation to Aboriginal Corporations both under the *Corporations Act 2001* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). Given that a great deal of Aboriginal business is conducted through such corporations and their establishment is required under the *Native Title Act 1993* (Cth) the HRC is of the view that the Draft Bill should contain a clause making it explicit that such corporations are either not discriminatory under clause 19 or are special measures under clause 21. The HRC submits that without such clarification, the new law is likely to create uncertainty that will undermine the efforts of Aboriginal and Torres Strait Islander peoples to obtain economic development and self-determination.

The Committees are mindful of the short timeframe available to make submissions, and respectfully request that the Law Council let the Committees know at its earliest convenience if the Law Council does not intend to incorporate any of the issues raised in this submission. The policy lawyer for the Committees is Vicky Kuek, who is contactable at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Once again the Committees thank you for the opportunity to provide comment.

Yours sincerely,

Justin Dowd
President