



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JD:Employment:HumanRights:ElderLaw:GL:VK:589600
Direct line: 9926 0375

15 March 2012

The Hon. Greg Smith SC MP
Attorney General and Minister for Justice
Level 31
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Also by email (letter only): lpclrd@agd.nsw.gov.au

Dear Attorney General,

Consolidation of Commonwealth anti-discrimination laws

Thank you for your invitation to provide comments in response to the NSW Government Discussion Paper, Commonwealth Consolidation of Anti-Discrimination Laws ("NSW Government Discussion Paper").

Various committees of the Law Society of NSW have been working with the Law Council of Australia to provide comments on the consolidation of Commonwealth anti-discrimination laws.

In 2011, the Human Rights Committee (HRC) and the Elder Law & Succession Committee (ELSC) provided comments to the Law Council of Australia prior to the release of the Commonwealth Attorney-General's Discussion Paper on the Consolidation of Commonwealth Anti-Discrimination Laws ("Commonwealth Discussion Paper").

Most recently the Employment Law Committee (ELC) provided comments to the Law Council of Australia for inclusion in its submission on the Commonwealth Discussion Paper. The HRC was satisfied with the Commonwealth Discussion Paper and decided to reserve comment until the release of the draft exposure legislation.

I enclose copies of the following for your further information:

- The submission made by the HRC and ELSC to the Law Council of Australia dated 27 January 2011 ("2011 Submission");
- The submission made by the ELC to the Law Council of Australia, dated 27 January 2012; and
- The Law Council of Australia's initial submission to the Attorney-General's Department dated 1 February 2012.

Employment Law Committee comments

The ELC is now undertaking further dialogue with the Law Council of Australia and its constituent bodies seeking common ground on some outstanding issues to enable the Law Council of Australia to make a further submission to the Commonwealth Attorney-General's

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809
www.lawsociety.com.au



Department. The ELC expects to be able to provide you with a copy of that further submission in due course.

The ELC has also considered the NSW Government Discussion Paper and makes the following comment in respect to Question 6. The ELC supports efforts to achieve improved uniformity between State and Federal laws to the extent that this is constitutionally possible. Where there is common jurisdiction, such as in matters of race, sex, disability and age discrimination, ideally there should be no difference between the State and Federal jurisdictions as to respective rights, responsibilities or remedies.

Human Rights Committee comments

The HRC has extracted below issues first raised in the 2011 Submission that may be relevant to the NSW Government Discussion Paper.

1. Appropriate guiding principle: At the outset, the HRC respectfully submits that the appropriate guiding principle when considering the NSW Government's position on the consolidation project is that because Australia is a signatory to various international human rights treaties, State and Federal Governments have an obligation to promote equality by guaranteeing effective protection against discrimination.

The HRC notes that the focus of the NSW Government Discussion Paper is on the potential regulatory burden for business. The HRC congratulates the NSW Government for taking the practical step of conducting a scoping of the potential impact of any new regulatory burden on business. However, the HRC's view is that even if regulation against undesirable behaviour is increased, the "red tape" to which business is subject will not necessarily suffer a corresponding increase. The HRC's view is that providing effective protection against discrimination is not mutually exclusive from minimising regulatory burden: both can be achieved by thoughtful, evidence-based legislative drafting.

The HRC notes that in any revision of anti-discrimination laws, there is a risk that the process may place too much weight on the objective of reducing the regulatory burden on business, rather than focus on the effective provision of protection against discrimination. The HRC takes this opportunity to respectfully urge the NSW Government to bear in mind that the consolidation project represents an opportunity for the Federal and State Governments to maintain or, where necessary, strengthen the level of protection against discrimination offered by Federal anti-discrimination legislation, in accordance with Australia's international human rights obligations.

2. No weakening of existing protection: The HRC notes that the Commonwealth Discussion Paper takes the approach that the consolidation of Commonwealth anti-discrimination law should not dilute existing protections in Federal anti-discrimination legislation. The HRC notes also that this point has been acknowledged in the NSW Government Discussion Paper at page 4.

In relation to Question 6 of the NSW Government Discussion Paper, the HRC noted in the 2011 Submission that crucially, any process of consolidation of anti-discrimination laws should not reduce the level of protection in any area. For example, the *Racial Discrimination Act 1975* (Cth) (RDA) currently has a very wide level of protection under sections 9 and 10 in respect of the areas covered and a small number of exemptions. It also allows for the invalidation of some laws. This level of protection should not be reduced by making its form resemble less comprehensive statutes such as the *Sex Discrimination Act 1984* (Cth) (SDA).

The HRC's view is that less comprehensive statutes like the SDA should have their form changed to resemble the RDA, reducing exemptions, increasing areas covered and adding a capacity for the invalidation of laws, especially State laws.

3. **Substantive equality:** The HRC's view is that the current approach taken by Australian anti-discrimination legislation emphasises the formal rather than the substantive. Results can be reached where there is equality achieved in form, but in reality inequality persists. The HRC supports the position that the consolidated anti-discrimination regime should provide for requiring equality in fact and not merely in legal form.

Possible mechanisms for achieving greater substantive equality include shifting the onus of proof and imposing a positive duty to promote equality.

Relevant to Question 2 of the NSW Government Discussion Paper, the HRC notes that one example of the first mechanism can be found in the position in the United States of America (US) and the United Kingdom (UK). There, if a complainant is able to establish a *prima facie* case, then the onus of proof is shifted to the defendant, requiring the defendant to prove that they did not discriminate. In Australia the onus is on the complainant alone to establish his or her case. The HRC's view is that the onus in a consolidated anti-discrimination statute in Australia should be amended to reflect the position taken in the US and the UK. The HRC noted also in the 2011 Submission that it is the view of the Discrimination Law Experts' Roundtable in its Report on Recommendations that the "burden of proving that an action is justified and not unlawful should rest with the respondent."¹

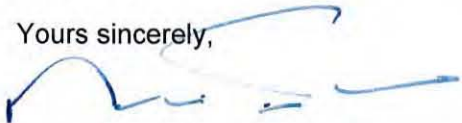
Also relevant to Question 2 of the NSW Government Discussion Paper, the HRC notes that an example of the second mechanism can be found in section 75 of the *Northern Ireland Act 1998* (UK), which contains a positive duty on all public servants to promote equality in all of the duties that they carry out. The effect has been to make equality law in Northern Ireland proactive and not dependent on complaints being made. This section reflects modern thought at the United Nations and European Union on discrimination. In the HRC's view, a similar section should be included in all federal discrimination statutes in Australia.

Elder Law & Succession Committee comments

Relevant to Question 5 of the NSW Government Discussion Paper, the ELSC noted in the 2011 Submission that access issues will become increasingly important as the Australian population ages. Consequently, the ELSC submitted that the consolidated anti-discrimination legislation should require "reasonable adjustments" similar to those defined in section 4 and set out in section 5(2) of the *Disability Discrimination Act 1992* (Cth), regardless of the protected attribute in question.

Thank you once again for the opportunity to comment on the NSW Government Discussion Paper.

Yours sincerely,



Justin Dowd
President

¹ Discrimination Law Experts' Roundtable: Report on Recommendations, 29 November 2010 at p. 9 available online at: http://sydney.edu.au/law/about/staff/BelindaSmith/Discrim_Experts_Roundtable_Report_revised_31Mar2011.pdf (last accessed 15 March 2012).