



THE LAW SOCIETY
OF NEW SOUTH WALES

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25 October 2019

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: leonie.campbell@lawcouncil.asn.au

Dear Mr Smithers,

Priorities for Federal Discrimination Law Reform

Thank you for the opportunity to contribute to a Law Council submission to the Australian Human Rights Commission ("AHRC") regarding its discussion paper *Priorities for federal discrimination law reform* ("the discussion paper").

The views of the Law Society have been informed by our Employment Law and Human Rights Committees. Our input is linked to the consultation questions posed by the discussion paper.

1. What are the principles that should guide federal discrimination law reform?

The Law Society is of the view that any reforms to federal discrimination law should be guided by the following principles.

- *Consolidation.* The Law Society supports consolidation of the existing Commonwealth discrimination laws into a single Act, as proposed by the Law Council's 2011 policy statement on the federal discrimination regime.
- *Alleviating complexity.* Australia has a complex system of federal discrimination laws, layered over a similarly complex set of State and Territory laws. Any reforms to Australia's federal discrimination framework should have the effect of alleviating this complexity, rather than increasing it.
- *Maintaining or enhancing current levels of protection.* Any reforms to federal discrimination laws should preserve or enhance – rather than weaken – existing protections against discrimination and promote substantive equality.
- *Upholding international obligations.* Federal discrimination law should be consistent with Australia's obligations under international law.¹

¹ Including the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2; and the *International Labour Organization Discrimination (Employment and Occupation) Convention* (C111), 25 June 1958, No. 111.

2. Are there other major challenges that exist with federal discrimination law that require reform?

In addition to the challenges outlined at pp 7-9 of the discussion paper, the Law Society recommends the following issues be considered as part of any process to reform Australia's federal discrimination law.

- Whether s 46PO of the *Australian Human Rights Commission Act 1986* (Cth) ("AHRC Act") should be amended to specify that the Federal Court of Australia and the Federal Circuit Court of Australia are no costs jurisdictions for discrimination complaints. In this regard, we note the potential for a costs order may discourage individuals from bringing a discrimination complaint before the Federal Circuit Court and Federal Court.
- Whether any reforms to Australia's federal discrimination law should introduce a rebuttable presumption as to reason or intent for the less favourable treatment alleged, similar to the rebuttable presumption under s 361 of the *Fair Work Act 2009* (Cth). The rationale for any such provision would be that the reason behind any purportedly less favourable treatment usually lies entirely within the knowledge of the person who took the action, and is not available to the complainant.
- Whether 'reasonable adjustments' requirements under federal discrimination law should be extended to other protected attributes in addition to disability – for example, age or pregnancy.

3. What, if any, changes to existing protected attributes are required?

The Law Society is of the view that federal discrimination law should be amended to provide coverage to an employee of a State or a State instrumentality, subject to any constitutional limitations. We note that an amendment of this nature to the *Sex Discrimination Act 1984* (Cth) ("SDA") was recommended by the Senate Standing Committee on Legal and Constitutional Affairs in their 2008 inquiry into the effectiveness of the SDA.² Amendments should also be made to provide coverage for volunteers, interns, and other categories of unpaid workers.³ We further submit that consideration should be given to whether coverage under federal discrimination law should be extended to associates of people with a protected attribute to a greater degree than is already the case.

4. What, if any, new protected attributes should be prioritised?

The Law Society's comments in relation to this question are as follows.

- The AHRC's proposal for a new protected attribute on the basis of "thought, conscience or religion" should be considered in light of wording contained in the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958*. The proposed religious freedom reforms, and definitions contained therein, may also have a bearing on any such protected attribute.
- All protected attributes within the AHRC's 'ILO 111' jurisdiction – namely those at Reg 4 of the *Australian Human Rights Commission Regulations 1989* – should be enforceable and applicable to all areas of public life, unless there is a strong rationale to the contrary. As with other complaints under federal discrimination statutes, complainants should have access to the full complaints system, including conciliation conferences at the AHRC, and access to the Federal Circuit Court or Federal Court should the matter not resolve at conciliation.

² Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Report, December 2008) xiv.

³ International Labour Office Employment Policy Department, *The regulation of internships: A comparative study* (Working Paper No. 240, 2018).

- Victims and survivors of family and domestic violence and homelessness should be added as protected attributes. We note that the AHRC has previously recommended that domestic violence be recognised as a protected attribute in federal discrimination laws as well as in the *Fair Work Act 2009* (Cth),⁴ and the Senate Legal and Constitutional Affairs Legislation Committee made a similar recommendation in 2013.⁵ The Australian Law Reform Commission considered the implications of including family and domestic violence as a protected attribute under federal discrimination law in a 2011 report, noting that:

several overseas jurisdictions have enacted legislation that prohibits employers from terminating an employee's employment or otherwise discriminating against them where the employee is, or is perceived to be, a victim of family violence, or where they take time off work, for example, to testify in a criminal proceeding, seek a protection order or seek medical attention related to experiences of family violence.⁶

5. What are your views about the AHRC's proposed process for reviewing all permanent exemptions under federal discrimination law?

As noted above, the federal discrimination law framework is extremely complex. This is due, in no small part, to the many exemptions and exclusions available under the SDA, *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth). If the draft Religious Discrimination Bill 2019 is passed in its current form, this complexity will be heightened. The Law Society agrees with the AHRC that "permanent exemptions need to be considered in light of the overall purpose of discrimination law to promote equality and fair treatment".⁷ As an alternative to the proposed review process outlined in the discussion paper, we suggest another approach would be to remove all permanent exemptions in federal discrimination law and replace them with a general limitations clause. Such a general limitation clause could potentially operate as follows:

- The general limitations clause would deem discriminatory actions or conduct to be lawful when it is a reasonable, necessary and proportionate means of achieving a legitimate aim; and
- The Court would be required to consider the objects of the relevant federal discrimination law when determining the application of the general limitations clause.

One advantage of a general limitations clause is that it would help address a weakness of the current regime of exemptions and exclusions identified by the discussion paper identified, namely that it "freezes in time community standards in relation to sex, age, disability, sexual orientation and gender identity".⁸

6. Are there particular permanent exemptions that warrant particular scrutiny

The Law Society has previously recommended that exemptions available to religious organisations under anti-discrimination law be reviewed to consider whether they strike an appropriate balance between the freedom to manifest one's religion, and protections for

⁴ Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination Law – domestic and family violence*, (2012).

⁵ Senate Legal and Constitutional Affairs Committee, Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (2013), Recommendation 3.

⁶ Australian Law Reform Commission, *Family Violence and Commonwealth Laws - Improving Legal Frameworks Final Report* (2011), ALRC Report 117, 410.

⁷ Australian Human Rights Commission, Free and Equal An Australian Conversation on Human Rights (Discussion Paper: Priorities for federal discrimination law reform, October 2019) 11.

⁸ *Ibid.*

other rights.⁹ The Law Society notes that the framework of religious exemptions in anti-discrimination legislation is the subject of an ongoing Australian Law Reform Commission inquiry, due to report by December 2020, and we look forward to reviewing the findings and recommendations of this inquiry.

7. What additional compliance measures would assist in providing greater certainty and compliance with federal discrimination law?

The Law Society recommends that the AHRC be empowered to conduct own-motion investigations of what appears to be discrimination under federal discrimination law, and the power to commence court proceedings without receiving an individual complaint, in order to address systemic discrimination.

8. What form should a positive duty take under federal discrimination law and to whom should it apply?

The Law Society recommends the AHRC consider whether federal discrimination law should be amended to impose a positive duty on employers to take all reasonable steps to prevent unlawful discrimination in their workplace. A positive duty would ideally oblige employers to take all reasonable steps to prevent discrimination from occurring, and impose civil penalties for breaches of this positive obligation. One advantage of such a positive duty is that it would help to prevent discrimination before it occurs. At present, an organisation may fail to implement policy measures or introduce internal reporting mechanisms in relation to discrimination, but will not face scrutiny unless an individual makes a complaint which then engages vicarious liability provisions.

9. What, if any, reforms should be introduced to the complaint handling process to ensure access to justice?

The Law Society notes that the ability of the President of the AHRC to terminate a complaint if it is not brought within six-months of an alleged act or practice taking place may act as a barrier for individuals who wish to seek redress for discrimination. We therefore restate our recommendation made in December 2018 that, at a minimum, s 46PH(b) of the AHRC Act be amended to reinstate the 12-month time limit that was in place prior to passage of the *Human Rights Legislation Amendment Act 2017* (Cth).¹⁰

We also recommend that the Federal Government adequately resource the AHRC so it can effectively carry out its investigation, complaint and conciliation functions. This would have the effect of reducing waiting times from lodgement of a complaint to conciliation, and allowing complainants access to alternative dispute resolution mechanisms in a timely manner, thereby ensuring their access to justice.

The Law Society further notes that there is a scarcity of data available on AHRC conciliation outcomes. We recommend this be rectified to provide guidance to unrepresented litigants who are determining whether – and in what forum – to pursue a claim. This would also assist unrepresented respondents to better prepare for conciliation conferences.

The AHRC should publish a conciliation register on their website that contains de-identified data on conciliation outcomes. This would also assist in identifying trends in conciliation and settlement outcomes, and would enable lawyers to give tailored advice to complainants and

⁹ Law Society of NSW, Letter to the Law Council of Australia, *Religious Freedom Review*, 1 February 2018, 2.

¹⁰ Law Society of NSW, Letter to the Law Council of Australia, *National Inquiry into Sexual Harassment in Australian Workplaces*, 11 December 2018, 4.

respondents based on previous outcomes. Additionally, such data could be used to identify areas where the law is not operating as intended, or where reform is required.

10. What, if any, reforms should be introduced to ensure access to justice at the court stage of the complaints process?

As noted above, the Law Society recommends that the AHRC consider whether the AHRC Act should be amended to specify that the Federal Court and the Federal Circuit Court are no costs jurisdictions for discrimination complaints. We are also of the view that a streamlined method for enforcing conciliation agreements would assist in promoting access to justice for complainants.

11. Is there a need to expand protections relating to harassment and vilification on the basis of any protected attributes?

The Law Society's position is that any reforms to federal discrimination laws should preserve or enhance, rather than weaken, existing protections against discrimination, and promote substantive equality. In relation to protections relating to harassment and vilification, we suggest that the impact and efficacy of State and Territory practice be analysed to inform any changes at the federal level.

12. Are there other issues that you consider should be a priority for discrimination law reform?

The Law Society would support an amendment to the AHRC Act to promote compliance with the Paris Principles relating to the Status of National Human Rights Institutions ("Paris Principles"). Relevant sections of the Paris Principles include:

The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights.¹¹

Thank you for the opportunity to contribute to the Law Council's submission on this issue. Questions may be directed in the first instance to Andrew Small, Acting Principal Policy Lawyer, at (02) 9926 0252 or andrew.small@lawsociety.com.au.

Yours sincerely,



Elizabeth Espinosa
President

¹¹ *Paris Principles* defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7-9 October 1991, adopted by Human Rights Commission Resolution 1992/54, 1992 and General Assembly Resolution 48/134, 1993.