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Submission on Consolidation of Commonwealth Anti-Discrimination Laws

Dear Ms Devereux,

This submission is made by the Anti-Discrimination Board of New South Wales in response to the Attorney-General's Department's *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper*, an initiative under Australia's Human Rights Framework, released on 22 September 2011 (the Discussion Paper).

The Anti-Discrimination Board recognises that the consolidation of Federal anti-discrimination laws provides an opportunity to explore opportunities to improve the effectiveness of the Federal legislation to address discrimination and provide equality of opportunity to participate and contribute to the social, economic and cultural life of the Australian community.

The Board welcomes the proposal by the Government to consolidate existing Commonwealth anti-discrimination legislation into a single, comprehensive law and, as part of this project, to deliver on its commitments to also prohibit discrimination on the basis of sexual orientation and gender identity.

The Discussion Paper indicates that the federal Government is committed to ensuring that consolidation will not lead to a reduction of existing protections, and seeks to carry out the reform with the following principles in mind:

- reducing the complexity and inconsistency in regulation to make it easier to understand rights and obligations;
- ensuring there is no reduction of existing protections;
- ensuring simple, cost-effective mechanisms for resolving complaints; and
- clarifying and enhancing protections where appropriate.

While not seeking to respond to all the questions raised in the discussion paper, nor to provide a comprehensive statement of the Board's position in relation to each of the issues raised, the Anti-Discrimination Board of NSW wants to bring the following to the attention of the review.

Meaning of Discrimination

Definitions of discrimination

The Board agrees that the definitions of discrimination in Commonwealth law should be made simpler and easier to understand, and supports the development of a simplified test for discrimination, recognising that the current definitions are often technical, complex and confusing, not only for individual parties to complaints, but also for courts and tribunals. A simplified definition of discrimination could reduce regulatory complexity, increase consistency and promote compliance with anti-discrimination legislation.

The development of any new definition must ensure that there is no reduction of existing protections.

As detailed in the Discussion Paper,¹ all State and Territory definitions of indirect discrimination currently contain the following elements:

- there must be a condition, requirement or practice with which the complainant is required to comply;
- the condition, requirement or practice must disadvantage members of a group with a protected attribute (being a group to which the complainant belongs); and
- the condition, requirement or practice is not reasonable in the circumstances.

In addition to these elements, the *Disability Discrimination Act* (Cth) and the *Race Discrimination Act* (Cth), require that the complainant does not, or is not able to comply, with the condition, requirement or practice. The *Anti-Discrimination Act 1977* (NSW) contains similar wording, requiring the additional step that the complainant does not or cannot comply.

The Discussion Paper explains that case law has led to the satisfaction of this requirement not only where the complainant is incapable of complying, but also where compliance would inflict serious disadvantage, or when 'practical compliance' is not possible. The Discussion Paper notes that the wording of the requirement is "likely to mislead users of the legislation who are not familiar with the case law"².

In the interests of making the legislation easy to understand and widely accessible to users who do not have this familiarity with the case law, the

¹ Discussion Paper, para 35-38

² Discussion Paper, para 38

Board would support the removal of this additional requirement from that part of any definition of discrimination which deals with indirect discrimination.

Burden of proof

Under the current regime of anti-discrimination law, individual direct discrimination complainants have the burden of proving causation for their less favourable treatment by the respondent. This obligation requires the complainant to prove matters relating to the state of mind of the respondent, which can be "both difficult and unfair".³

The Board recognises that, in the absence of any requirement for the respondent to produce evidence of the basis of their action, it can be very difficult for complainants to prove what was in the mind of the respondent. As a result, many cases of direct discrimination fail, because although less favourable treatment is proved, the court cannot be satisfied that this treatment was 'on the basis' or 'because' of the prohibited attribute.

The Board recognises that there is a need for some changes to the current allocation of the burden of proof, so as not to impose the full burden of proof on the complainant, whilst carefully balancing the rights of respondents and maintaining the initial presumption of innocence. The Board would therefore support the 'rebuttable presumption' approach where, once the complainant had made a threshold or 'prima facie' case, it would fall to the respondent to show whether there was a non-discriminatory reason for the action.

Protected Attributes

How should sexual orientation and gender identity be defined?

The Anti-Discrimination Board recommends broad, inclusive coverage of sexual orientation, gender identity, sex characteristics, and gender expression under a Consolidated Federal Act.

Any definition should ensure that it includes variations in sex characteristics, and people who are neither wholly male nor wholly female. In this way people who are intersex, androgynous and other individuals who do not fit within the current binary approach to defining sex would be afforded protection under anti-discrimination law in this context. The Board recommends that broad and inclusive language be used in any definitions of discrimination. In particular, any definition should be wide and inclusive enough to cover people who are intersex, without a requirement that any person should identify as either male or female. Discrimination should be prohibited on grounds of actual or perceived sex, sexual orientation and/or gender identity.

³ Discussion Paper, para 52

Attributes covered by States and Territories, the Fair Work Act and the AHRC Act

The Board recognises that various State and Territory laws, together with the Fair Work Act and the AHRC Act provide coverage of a range of attributes that are not currently covered in federal anti-discrimination law. In the interests of ensuring that there is no reduction of existing protections, the Board supports the inclusion in a Consolidated Federal Act of those attributes currently covered by the AHRC Act.

The Board advocates further extensive public discussion in relation to any proposed additional grounds of discrimination, and will consider with interest any submissions in this area.

Intersectional discrimination

Intersectional discrimination is discrimination experienced by a person because of two or more aspects of their identity (for example, an elderly man with a hearing impairment may experience discrimination because of both his both age and his disability.)

The Anti-Discrimination Board believes that when a complaint is made alleging discrimination on the basis of more than one attribute, it should generally be handled as a single complaint rather than a series of complaints on separate grounds. This is the approach currently taken by the Anti-Discrimination Board of NSW, and the Board understands that this is also the approach generally used by the Australian Human Rights Commission.

The Board understands however, that the current separation of attributes under distinct federal anti-discrimination laws may lead to confusion about whether people have to show the discrimination was because of one particular attribute, or whether complainants have to choose a particular aspect of discrimination to pursue.

In the interests of clarifying the law, and making it more accessible to complainants, the Board believes that a Consolidated Federal Act could clearly state that discrimination on the basis of one or more protected attributes is covered under the new law.

Protected areas of public life

Voluntary workers

The Anti-Discrimination Board notes that the existing Commonwealth law against discrimination and harassment in the area of employment does not extend to volunteers. Similarly, the *Anti-Discrimination Act 1977* (NSW) contains a general exception (at section 57) for voluntary bodies.

However in 1999 the Law Reform Commission of New South Wales recommended ⁴ that the *Anti-Discrimination Act 1977* (NSW) should be amended to include work done by volunteers, trainees or unpaid workers, noting that these unpaid workers would often have no redress if discriminated against. In order to afford protection to unpaid workers, who may be inexperienced and vulnerable, the Board would support an extension of the current coverage to provide protection from discrimination to volunteer, trainee and unpaid workers.

The Anti-Discrimination Board understands that there may be concerns about the effect of extending the protections of anti-discrimination law to volunteer workforces upon small, not-for-profit associations or clubs. The Board recognises the importance of balancing the rights of volunteers against the obligations upon those who utilise volunteer services. However the Board believes that, properly applied, the concept of reasonableness, (both in terms of what are reasonable adjustments, and the requirement that a condition be 'reasonable in all the circumstances') should, adequately achieve the necessary balance.

Exceptions and exemptions

How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

The Anti-Discrimination Board acknowledges and respects the right to freedom of religion. However it also acknowledges that this freedom must be balanced against the rights of individuals to protection from discrimination.

The Anti-Discrimination Board notes from the Discussion Paper that the Government is not proposing to remove the current religious exception provisions, apart from considering how they may apply to discrimination on the grounds of sexual orientation or gender identity.⁵ As stated above, the Anti-Discrimination Board favours the inclusion in the Consolidated Act of a wide and inclusive coverage of people of all sex and/or gender identities in order to afford them with improved protection against discrimination.

The Anti-Discrimination Board believes that further public discussion is required in relation to the scope of any religious exceptions, and recognises the need to appropriately balance the competing rights of freedom of belief and the right to practice religion with the right to equality and freedom from discrimination.

The Board would welcome further debate to about how to ensure that the core practices and teaching of religion are exempt from the operation of a

⁴ Law Reform Commission (NSW) Report 92 (1999) - Review of the Anti-Discrimination Act 1977 (NSW) - at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r92toc>

⁵ Discussion Paper, para 161

Consolidated Federal Act, while ensuring that safeguards are provided in areas where religious organisations engage more widely in public life.

Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

The *Anti-Discrimination Act 1977* (NSW), in common with several of the existing Commonwealth Acts, provides a mechanism for the granting of temporary exemptions from the unlawful discrimination provisions of these Acts.

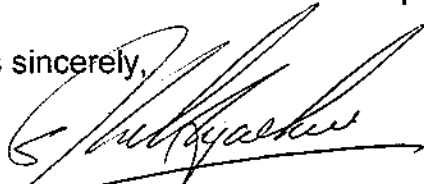
The Board recognises that in certain circumstances, temporary exemptions can sometimes be necessary and practical. In New South Wales, when considering an application for an exemption, the President of the Anti-Discrimination Board is required to consider the following matters:

- whether the proposed exemption is appropriate or reasonable,
- whether the proposed exemption is necessary,
- whether there are any non-discriminatory ways of achieving the objects or purposes for which the proposed exemption is sought,
- whether the proponent of the proposed exemption has taken reasonable steps, or is able to take any reasonable steps, to avoid or reduce the adverse effect of a particular act or action before seeking the exemption,
- the public, business, social or other community impact of the granting of the proposed exemption,
- any conditions or limitations to be contained in the proposed exemption⁶.

The Board considers that similar criteria should apply to exemption applications under a Consolidated Federal Act, and that the terms of any exemption should be as limited as possible, and directly proportionate to the need for the exemption.

The Anti-Discrimination Board of NSW thanks the Attorney-General's Department for the opportunity to comment on this important Discussion Paper, and looks forward with interest to the public discussion and consultation which will arise in response to the questions it raises.

Yours sincerely,



Stepan Kerkyasharian AO
President
Anti-Discrimination Board of NSW

31 JAN 2012

⁶ Anti-Discrimination Regulation 2009 (NSW), clause 5