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Business Council of Australia

Assistant Secretary
International Human Rights and Anti-Discrimination Branch
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

Dear Assistant Secretary

CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

The Business Council of Australia (BCA) appreciates the opportunity to comment on the proposed Consolidation of Commonwealth Anti-Discrimination Laws.

The BCA is strongly supportive of efforts to create a more inclusive society that allows all citizens to realise their potential so as to ensure their full participation in economic and social life. Expanding opportunities and removing artificial barriers to contribution and engagement can benefit everyone.

However, legal mechanisms to achieve social outcomes also impose costs. The BCA recognises that it is important to balance costs with benefits, noting that compliance costs themselves have consequences for the ability of firms to expand, innovate and invest. Excessive or poorly designed compliance regimes can impose hidden costs on others and thus lower employment and other opportunities, so care should be taken in compliance design.

As a general point, the BCA notes that no evidence of the quantification of costs or benefits of the current regime, or the extension of new protections, is presented. Consequently, it is unclear whether there are net benefits from these provisions.

As a matter of principle, the BCA notes that the application of minimum standards hard-wired into legislation to meet social objectives is undesirable.

The BCA welcomes the government's efforts to streamline regulation and reduce excessive regulatory burdens on business. However, the proposed consolidation of federal anti-discrimination laws alone will not achieve this. Noting the current number of state and federal Acts (including the Fair Work Act) aimed at addressing discrimination, the BCA urges the government to consider how the consolidation could be used to produce a real net reduction in red tape (thus freeing up resources for other productive uses). As a matter of principle, no more than one Act should be required to achieve the policy objective of addressing discrimination. Given the objective of the consolidation is to streamline anti-discrimination legislation, the BCA considers there would be merit in finding a way to ensure firms are left with only one Act with which to comply. This could potentially be made possible via a cooperative

arrangement with the states, or by ensuring the federal Act overrides the current separate state and territory regulations.

Consistent with these points, the detail of the BCA's submission covers four broad areas: the compliance regime; interactions with the Fair Work Act (FWA); information requests; and questions of scope.

Compliance regime

Question 24 – compliance regime

The BCA supports full consideration of the Productivity Commission's recommendation that co-regulation be used to improve certainty for business (paragraph 179). Allowing flexible mechanisms, like co-regulation, has the potential to reduce compliance costs while still achieving stated policy objectives. By harnessing industry-specific knowledge, such an approach can reduce the risk of one-size-fits-all rule-making. Such an approach is arguably consistent with addressing concerns mentioned in paragraph 173, that business does not have enough certainty or adequate support in compliance.

For the same reasons, the BCA does not support the suggested grant of powers to the Attorney-General to set binding standards (paragraph 181) as this could have unforeseen and unacceptable cost impacts. This is reinforced at paragraph 184, which notes that prescriptive technical standards may not be well adapted to regulating attributes other than disability.

Question 20 – general limitations clause

The BCA is favourably disposed to the inclusion of a general limitations clause as a way to streamline the law and allow for flexibility in application over time, provided the change does not unnecessarily increase uncertainty for business.

As noted in the discussion paper, under its 'bona fide occupational requirement' provision, Canada currently allows discrimination in certain circumstances (paragraphs 40 and 145). The BCA considers that this model warrants careful consideration as a potentially useful mechanism that may assist in minimising costs associated with legislative updates.

Nonetheless, certainty, and the avoidance of transaction costs (referenced via the Productivity Commission's recommendation in paragraph 149), is important for business. Perhaps consideration could be given to addressing these concerns through explicit references in explanatory material (the Explanatory Memorandum and Second Reading Speech) as to how the new law would operate in the case of those existing exceptions. This may guide the courts and the public on the intended scope and application of the general limitations clause (and may reduce uncertainty as to the application of such a new provision).

Question 12 – areas of public life

Related to the 'Scope' section below, the discussion points for this question note that new rights may be extended based on application to new areas of public life. In connection with this, the discussion carries an implication that rights may be extended without reference to their costs (e.g. in relation to accessibility). Another example might be the right to access public transport or accommodation. It is important to note that new rights should be granted carefully, as poorly conceived rights may be unachievable due to their prohibitive cost.

The BCA considers that any expansion of rights, with their concomitant costs, should be subject to a 'reasonableness test' (to ensure cost impacts are not unreasonable). Alternatively, the way in which the 'right' is construed should be changed to achieve the same effective outcome but allow alternative (flexible) means of realising the right (e.g. a right to 'access public transport' might be given effect through hire car vouchers, for example, rather than by modifying every form of public transport).

Fair Work Act interactions

Question 2 – burden of proof

Consistent with the existing law and approach, the BCA favours maintaining the current burden of proof, in contrast to harmonising with the reverse burden of proof encapsulated in the Fair Work Act (FWA).

In our 19 May 2011 submission to the Minister for Workplace Relations seeking amendments to the Fair Work Act 2009, the BCA registered concern that the onus of proof in the Fair Work Act (together with its very wide general protections clause) was open to abuse. Specifically, members have advised that there has been a significant growth in both the numbers of claims and threats of them in the past 12 months. They are being used to undermine internal grievance and performance management processes and are having a deleterious effect on the quality of communication between supervisors and employees. The absence of any filtering process means that vexatious and unmeritorious claims are resulting in unnecessary and wasteful costs and loss of management and co-worker time.

As a result, the BCA is recommending as part of the current FWA review process that amendments be made to the Fair Work Act to ameliorate these effects while at the same time ensuring that there is a safety net for employees.

The BCA supports removing the anti-discrimination provisions from the Fair Work Act, beyond those that have been in the federal workplace relations legislation for many years (e.g. the requirement that industrial instruments not include discriminatory provisions and the requirement that employees not be terminated for a discriminatory reason).

The BCA prefers the more settled and tested frameworks encapsulated in current anti-discrimination laws, and so does not support harmonisation with the FWA approach.

Information requests

Question 18 – requests for information

Care needs to be taken to ensure that legitimate collection of information for non-discriminatory or even affirmative purposes is not ruled out. The BCA considers that there is a need to allow requests where there is a 'legitimate reason' for them. This approach may be related to mention under Question 3 (on special measures) of the need to allow for 'positive' measures in certain circumstances. In connection with this, there may be merit in the approach outlined in paragraph 131, of looking at the purpose of the request. Alternatively, instead of prohibiting requests, providing a right of refusal may address this concern.

Scope

The stated aim of the consolidation is to achieve 'clearer and more consistent' anti-discrimination laws. This does not imply that protections should necessarily be

expanded; this is important as expansion may impose new costs on business. Specific comments are below.

Question 4 – reasonable adjustments

On the basis that disability is a special case, the BCA does not support the extension of a duty of reasonable adjustment (as applied in disability discrimination) to other forms of discrimination. In the absence of quantification of the potentially significant costs of such a move, it is unclear whether there would be a net benefit in raising the other Acts to the Disability Discrimination Act level. This position appears consistent with the observation in paragraph 62 that the majority of jurisdictions only apply such a duty in cases of disability.

Question 5 – positive duty

The BCA does not support new positive duty requirements, concurring with the stated ACCI position in paragraph 64 that the precise scope of a positive duty is difficult to quantify (thus making them difficult to comply with and implement).

Question 9 – protected attributes

The BCA considers the current protections to be adequate.

Question 10 – intersectional discrimination

The BCA considers additional protections against intersectional discrimination are unnecessary.

Question 19 – vicarious liability

The BCA does not support any expansion of standards for vicarious liability (paragraph 142). In the absence of evidence that current provisions are inadequate, it is likely the cost of more exacting standards will exceed their benefits.

Question 26 – third party standing

On the basis that it could lead to a (costly) rise in the misuse of the law, the BCA does not support allowing advocacy groups standing to pursue actions through the courts on behalf of complainants (noting they already have the right to bring matters to conciliation on behalf of others).

Question 27 – role of the Human Rights Commission

The BCA notes concerns (paragraph 226) that a greater adversarial and/or advocacy role for the commission may undermine its neutral conciliation role, and that such an approach may duplicate functions of the Fair Work Ombudsman.

If you would like to follow up on any matters contained within this submission, please feel free to contact Ms Claire Thomas, Director Policy, on 03 8664 2626.

Yours sincerely

[signature removed]

Jennifer Westacott
Chief Executive