



1 February 2012

Assistant Secretary  
Human Rights Policy Branch  
Attorney-General's Department  
Robert Garran Offices  
3-5 National Circuit  
BARTON ACT 2600

By Email: [antidiscrimination@ag.gov.au](mailto:antidiscrimination@ag.gov.au)

Dear Assistant Secretary

## **Consolidation of Commonwealth Anti-Discrimination Laws**

### General

The South Australian Bar Association (SABA) generally agrees with the submissions of the Australian Human Rights Commission (AHRC) dated 6 December 2011 and endorses the AHRC's recommendations. Accordingly, SABA does not wish to respond to every question raised in the Commonwealth's Discussion Paper.

SABA supports the following key reforms:

- Introduction of a unified test incorporating both direct and indirect discrimination based upon a comprehensive list of "protected attributes"
- Broad definitions to prohibit discrimination against persons who are homosexual, lesbian, bisexual, transgender and/or intersex, and against discrimination on the basis of gender identity or expression
- A test which encompasses discrimination on the basis of a person's Associate having one or more protected attribute
- Protection against intersectional discrimination (i.e. on the basis of more than one protected attribute)
- Prohibition of vilification and harassment based upon one or more of any of the protected attributes
- Reversal of the onus of proof to place it upon the respondent once a *prima facie* case of discrimination and/or harassment is raised
- The ability for the AHRC to initiate complaints on its own motion where it is in the public interest, and that the AHRC be appropriately funded to perform this function
- Harmonisation of State and Territory antidiscrimination laws to reflect best practice (including the highest level of protection)

## Compensation

SABA considers that low levels of compensation awarded in discrimination cases have discouraged complainants with valid claims from pursuing them. Low levels of compensation also provide little incentive for those engaging in discriminatory conduct to modify their behaviour.

Without limiting a complainant's right to recover as damages any loss resulting from the unlawful discrimination, in SABA's view discrimination should be actionable *per se*, as in actions for defamation. It should be assumed that in each case where unlawful discrimination is established, that the complainant has suffered "embarrassment, humiliation and injury to feelings" (or similar) which is compensable.

Consideration should be given to prescribing minimum levels of compensation payable by individuals and corporations who are found to have engaged in unlawful discrimination.

## Costs

Notwithstanding the simplification of Commonwealth antidiscrimination laws hoped to be achieved by the proposed consolidation, SABA expects that many parties will continue to require the assistance of solicitors and Counsel. The risk of an adverse costs order discourages many complainants from pursuing their claims, particularly whilst levels of compensation remain low.

However the introduction of a "no costs" jurisdiction may unfairly favour respondents, particularly those with extensive resources to fund legal representation and access to tax deductibility for litigation costs.

The costs regime should encourage the settlement of complaints at conciliation.

For these reasons SABA supports a "no costs" provision for complainants, (with the Court retaining a discretion to order an unsuccessful complainant to pay costs only where the matter was conducted unreasonably, frivolously or vexatiously) and a "discretionary costs" provision for respondents. The Court should have the discretion to order that the respondent pay the complainant's costs. In exercising the discretion, the Court should consider the ability of the respondent to meet an order for costs, the manner in which the litigation was conducted and whether the respondent rejected a reasonable offer of settlement made by the complainant.

## Representation

In matters which are unable to be resolved at conciliation, SABA considers the Commonwealth should do more to ensure complainants in particular, who are often vulnerable persons unable to fund a private lawyer, have access to legal representation. This will help to ensure a "level playing field", educate complainants about their rights and entitlements so as to increase fair out-of-court settlements and reduce the burden upon the court system of unrepresented litigants. It is also important that in the early days of enforcement of the new legislation, when provisions are likely to be tested in the Federal Court, parties are legally represented.

This could be achieved by increased legal aid funding and funding to community legal centres.

Consideration should also be given to a scheme whereby the AHRC may approve a grant to enable a party, usually the complainant, to fund legal representation of the party's choice. A similar system operates in South Australia where the Equal Opportunity Commissioner offers (limited) financial assistance to both complainants and respondents for legal representation in matters which are referred to the Equal Opportunity Tribunal. SABA understands Western Australia provides similar assistance.

### Conciliation Process

The current system of conciliation does not work efficiently in South Australia. With no locally-based conciliation officers, parties are often forced to wait until several complaints are listed before one will travel to Adelaide from interstate (usually from Sydney). This is causing unreasonable delays and is not conducive to timely and effective settlement negotiations.

SABA recommends the use of video conferencing to overcome this problem. Facilities in the Commonwealth Law Courts building should be made available.

Another possible resolution would be to delegate power to the South Australian Equal Opportunity Commission to conduct conciliation conferences under the new Commonwealth law. SABA considers this would be appropriate in the event that State and Commonwealth laws are harmonised and may work well even whilst there remain significant differences. The delegation of powers to the South Australian Industrial Relations Court to determine certain claims under the *Fair Work Act (Cth)* is an example in which the capacity of the existing State framework has been utilised.

### Exceptions and Exemptions

If, and if so, to what extent, exemptions should be retained in the new law, particularly exemptions for religious organisations, is a subject upon which members of SABA have differing views. Accordingly overall, SABA remains neutral on this topic. However SABA does submit that:

- Any "inherent requirements" test in the area of employment must reflect Australia's obligations under the *Discrimination (Employment and Occupation) Convention*
- Caution must be exercised to ensure any "general limitations" clause does not result in a diminution of existing protections, particularly protection from racial discrimination
- Clear transitional provisions will assist in the implementation of any changes

If exemptions are retained, then they should not, in SABA's view, be available where functions are being carried out by an organisation pursuant to a Commonwealth government contract or for activities conducted using public funds. For example, a religious organisation which is contracted by the government to provide a welfare service should not be permitted to discriminate by refusing to employ homosexual or lesbian staff.

SABA also considers that if exemptions are to be retained, the process of applying for an exemption should be more rigorous and transparent. In this respect SABA adopts the process suggested on page 18 of the submission by the Discrimination Law Expert's Group dated 13 December 2011.

### Interaction with Other Laws

In considering the manner in which the proposed consolidated law will interact with other laws, including State and Territory laws, SABA draws particular attention to the Domestic Partners Property Act 1996 (SA) and the definitions contained therein of "domestic partner" and "close personal relationship".

Unlike legislation recognising de facto relationships in some other jurisdictions, a domestic partnership in South Australia includes two persons living in a close personal relationship which is not a sexual relationship. This may be relevant in defining discrimination based upon marital status and is also relevant to the meaning of “family responsibilities”.

SABA consents to the publication of these submissions. We hope they are of assistance.

Yours sincerely

**Mark Livesey QC**  
**President**

**CC: Law Council of Australia, Attention: Ms Rosemary Budavari**

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MEMBER OF THE LAW COUNCIL OF AUSTRALIA

*South Australian Bar Association Inc. ABN 35 957 544 113 | PO Box 6279, Halifax Street, Adelaide SA 5000*  
*Telephone: (08) 8231 8153 | Email: [sabar@sabar.org.au](mailto:sabar@sabar.org.au) | Web: [www.sabar.org.au](http://www.sabar.org.au)*