



Assistant Secretary
International Human Rights and Anti-Discrimination Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit Barton ACT 2600
Via Email antidiscrimination@ag.gov.au

27 January 2012

The Consolidation of Federal Anti-discrimination Laws: Submission by Homelessness Australia

About our organisation

Homelessness Australia is the national peak body representing providers of direct services to people who are experiencing homelessness. We work to prevent and respond to homelessness in Australia and advocate on behalf of our members and the homelessness sector to create a framework to end homelessness. Homelessness Australia seeks to improve community awareness and understanding of the issues facing the 1 in every 200 Australians who are homeless.

Homelessness Australia advocates for people who are homeless, aims to represent the interests of more than 1500 homelessness assistance services, and contributes to policy development and the evaluation of Australia's homelessness service system.

Homelessness Australia works collaboratively with homeless people's associations, homelessness assistance services, State/Territory homelessness peak organisations, national peak organisations from other sectors, governments, business and the broader community to achieve these objectives.

Homelessness Australia represents the single men and women, families, young people and women escaping domestic violence who access the diverse support and advocacy services provided by our founding members.

Background

The review of Commonwealth discrimination law offers an important opportunity to ensure that discrimination law contributes as effectively as possible, to the objectives of the achievement of equality in Australian society and the removal of discriminatory barriers to participation and opportunity.

As outlined in the Discussion Paper, Homelessness Australia agrees that discrimination law can be made easier to understand, comply with, and where necessary to enforce, through:

- greater simplicity and more consistency – across grounds of discrimination and between Commonwealth discrimination law, industrial law, and State and Territory



anti-discrimination and equal opportunity laws. In particular, we support consideration of streamlining of tests for discrimination and of the range of exemptions provided, and review of inconsistent limitations in coverage; and

- consideration of measures for improved access to justice for people and organisations seeking to assert rights, and for increased certainty for people and organisations seeking to comply with their responsibilities – noting that these should be designed to complement and enhance the effective functioning of existing mechanisms rather than implementing new ones.

General comments about the Discussion Paper

Thirty questions are set out in the Discussion Paper. In our submission, Homelessness Australia will only provide responses to those questions bearing most directly upon discrimination on the grounds of homelessness/accommodation, domestic violence, and on intersectional discrimination.

For ease of comprehension, this submission will set out the questions on which comment is provided, followed by our response.

Generally, we are supportive of submissions already made by the National People with Disability and Carer Council, the Australian Human Rights Commission, and the Australian Domestic and Family Violence Clearinghouse.

Answers to specific questions

Question 1. What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

Response: In the view of Homelessness Australia, the current definitions of direct and indirect discrimination are unnecessarily complex. We support a test where the question is simply whether the complainant suffered less favourable treatment on the grounds of the protected attribute. In other words, did the complainant suffer a detriment?

Question 2. How should the burden of proving discrimination be allocated?

Response: The current laws place the onus of proof on the complainant. It may be sensible to harmonise the consolidation bill with the Fair Work Act. This could be achieved by placing a fair work rebuttable presumption into the new anti-discrimination statute.

Question 3. Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

No comment.

Question 4. Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

No comment.



Question 5. Should public sector organisations have a positive duty to eliminate discrimination and harassment?

Response: Yes, absolutely. Such a duty should also be placed upon private sector bodies.

Question 6. Should the prohibition against harassment cover all protected attributes? If so, how would this most clearly be expressed?

Response: a general provision outlawing harassment with respect to all attributes would strengthen our discrimination laws and would strengthen the current provisions proscribing harassment in the Disability Discrimination Act 1992.

Question 8. How should discrimination against a person based on the attribute of an associate be protected?

No comment.

Question 10. Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?

Response: Yes, the consolidation bill should clearly cover intersectional discrimination, that is where a person is discriminated against on the grounds of two or more attributes. Homelessness Australia suggests that intersectional discrimination be covered by an overarching provision to this effect.

Question 11. Should the right to equality before the law be extended to sex and/or other attributes?

No comment.

Question 12. What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

No comment.

Question 13. How should the consolidation bill protect voluntary workers from discrimination and harassment?

Response: The consolidation bill should clearly protect volunteer workers from discrimination.

Question 15. What is the best approach to coverage of clubs and member-based associations?

No comment.

Question 16. Should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?

Response: Yes, the consolidation bill should apply to all partnerships irrespective of size.

Question 17. Should discrimination in sport be separately covered? If so, what is the best way to do so?

No comment.



Question 18. How should the consolidation bill prohibit discriminatory requests for information?

Response: As outlined in the Discussion Paper, the Victorian provision could be used as an appropriate provision to cover discriminatory requests for information.

Question 19. Can the vicarious liability provisions be clarified in the consolidation bill?

No comment.

Question 20. Should the consolidation bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?

No comment.

Question 21. How should a single inherent requirements / genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?

Response: The requirement that the complainant be able to undertake the inherent requirements of the work, is an exception to discrimination in the Disability Discrimination Act. It would be sensible for the consolidation bill to adopt the inherent requirements test as set out in the Fair work Act as this would further harmonise Commonwealth anti-discrimination law.

Question 22. How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

No comment.

Question 23. 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?

Response: The temporary exemptions process can work well. However, the consolidation bill should specify that when granting exemptions etc, the Australian Human Rights Commission should consider exemptions in the light of the objects of the consolidation bill.

Question 24. Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

Response: Action plans could be further promoted.

Question 25. Are any changes needed to the conciliation process to make it more effective in resolving disputes?

Response: Conciliation is generally a useful method of resolving disputes.

Question 26. Are any improvements needed to the court process for antidiscrimination complaints?

Response: Homelessness Australia suggests that advocacy bodies and other representative organisations be enabled to bring proceedings on behalf of complainants in the courts. Requiring an individual who is aggrieved to bring the cases is unfair and too difficult for



many disadvantaged people. It is further suggested that in discrimination cases, each party should bear its own costs.

This would encourage more complainants and bodies to undertake proceedings to protect these persons and bodies from proscribed acts of discrimination.

Question 27. Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

Response: On balance, it is the view of Homelessness Australia that the inquiry powers of the Australian Human Rights Commission should be broadened to enable the Commission to inquire into discriminatory practices in the States and Territories. The Commission should be given broad investigative and enforcement powers so that in appropriate matters the Commission should be empowered to enforce the provisions of the consolidation bill in the Federal Magistrates Court and in the Federal Court.

Question 28. Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

No comment.

Question 29. Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

No comment.

Question 30. Should the consolidation bill apply to State and Territory Governments and instrumentalities?

No comment.

Further comments

While not covered by a specific question in the Discussion Paper, Homelessness Australia strongly believes that there is a need to consider how best to cover attributes which are not presently covered clearly and expressly, such as:

- domestic violence and
- accommodation status (homelessness).

Further work is required in relation to each of these additional grounds to ensure that coverage is not more restricted or complicated than intended. This consolidation exercise appears to be the ideal opportunity to ensure that coverage is optimal to reduce discrimination in Australian society. Consultation with organisations with specific expertise in these areas, such as Homelessness Australia, will be particularly valuable.

Evidence shows that domestic violence disproportionately affects women, and that homelessness disproportionately affects people with attributes already covered by Commonwealth discrimination law including people affected by mental illness, specific



coverage of these issues within Commonwealth discrimination law could be seen to some extent as constituting clearer statement of existing rights and responsibilities rather than involving wholly new regulatory requirements.

Conclusion

In light of evidence that victims of domestic violence experience discrimination in the workplace and in accommodation, inclusion of a ground protecting victims of domestic violence should be included in the consolidated Act.

Additionally, given intersectional discrimination, homelessness or accommodation status should also be included as a ground protecting vulnerable Australians.

Protection on these grounds would make the Act clearer and more consistent.

Contact

For any questions about this submission or for further information, please contact

Nicole Lawder

CEO

Homelessness Australia

ceo@homelessnessaustralia.org.au

(02) 6247 7744