YOUNG WORKERS' LEGAL SERVICE [SA UNIONS]

SUBMISSION ON FEDERAL ANTI-DISCRIMINATION LAWS CONSOLIDATION PROJECT

February 2012

1. The Young Workers' Legal Service (YWLS) was established in 2003 by SA Unions (the South Australian United Trades and Labour Council). The YWLS provides legal, industrial advice and representation to those aged under 30, in relation to topics including discrimination. It does this in two ways. First, the YWLS answers email and telephone enquiries received from the general public. Second, the YWLS takes on clients and provides them with specialised advice and representation in a range of forums, including the Equal Opportunity Commission (EOC) of South Australia, and the Australian Human Rights Commission (AHRC).

2. The YWLS endorses the submission of the Equality Rights Alliance (ERA) in relation to the consolidation of Commonwealth anti-discrimination laws and calls for the implementation of the proposals contained therein.

3. In addition, the YWLS makes the following submissions.

4. The YWLS seeks the establishment of a discrimination complaints register, to be created and maintained by the AHRC, to allow for the identification of people or organisations that are the subject of discrimination complaints on multiple occasions. The YWLS is concerned that the enforcement of anti-discrimination laws is presently, for the most part, in the purview of individual complainants. This is in spite of evidence which suggests that individuals who experience discrimination often choose not to pursue a formal complaint under federal, or other, anti-discrimination laws. The practitioners of the YWLS witness this frequently. Many clients of the YWLS approach the service

wishing to make a discrimination complaint. However, a large percentage of these potential complainants are deterred from actually entering the complaints process for a range of reasons. For example, in the past, YWLS clients have chosen to refrain from or to cease making a discrimination complaint for fear of not being believed, being ostracised within their community, losing their job, or being victimised by others. For this reason, the YWLS calls for a discrimination complaints register, that identifies individuals and organisations that are the subject of multiple discrimination complaints. Such individuals and organisations could then be investigated by the AHRC and assessed for compliance with anti-discrimination laws. The YWLS recognizes that further work can not be allocated to the AHRC without a corresponding increase in the resources of that organisation. We therefore call for additional funding to be provided to the AHRC in order to meet the costs of creating and maintaining such a database.

5. The YWLS seeks the establishment of further incentives for respondents to discrimination complaints to attend and engage in settlement negotiations. The YWLS notes that, under the *Australian Human Rights Commission Act 1986* (Cth) s46PJ, the AHRC President currently has the power to direct parties to attend compulsory conciliation proceedings. However, in practice, the YWLS has found the AHRC to be unwilling to exercise this power. In the past, the YWLS has found that some discrimination complaints are unable to be resolved through the conciliation process offered by the AHRC, due to a respondent's unwillingness to attend a conciliation meeting. In such cases, we must explain to the client that the respondent is unlikely to be compelled to attend the meeting and that the client has the option of pursuing their complaint in the Federal Magistrates Court or Federal Court of Australia. Most YWLS clients are unable to meet the cost of proceeding to either of these courts. As a small, community legal service, the YWLS lacks the resources to assist clients in these jurisdictions. As such, clients whose current or former employer refuses to attend conciliation proceedings most often abandon their complaint, without any resolution having been explored or reached. The YWLS appreciates that compelling parties to attend conciliation discussions does not guarantee that those parties will participate in those discussions in

good faith, or that they will participate at all. We believe that incentives to attend and participate are therefore required. We suggest that such incentives could be in the form of costs implications for failing to attend or genuinely participate in conciliation processes. For example, where a respondent has refused to attend a conciliation meeting, we suggest that the respondent could be exposed to liability for paying the complainant's costs in the Federal Magistrates Court or Federal Court. Likewise, we suggest that where a client has refused to consider a reasonable offer of settlement, that this could have later costs implications. In addition to costs implications, such conduct on behalf of respondents could also give rise to financial penalties.

6. The YWLS seeks the establishment of informal arbitration processes as alternatives to proceeding to a formal court hearing. As a free legal service, the YWLS is keenly aware of problems with access to justice in Australia. Our clients are unable to afford the cost of legal representation in a formal, court hearing. They are therefore reliant upon their ability to gain pro bono assistance from lawyers, or the help of legal services, in order to access the Australian courts system. To combat this problem, we suggest that an informal arbitration process could be implemented in relation to anti-discrimination laws. Parties could voluntarily elect to use this information arbitration process, instead of proceeding to formal arbitration by a court. In doing so, parties could accept that the outcome of an information arbitration hearing would be binding, and unable to be appealed except on grounds relating to procedural fairness.

7. The YWLS calls for discrimination complainants to be given more time in which to institute court proceedings. Currently, the *Australian Human Rights Commission Act 1986* (Cth) s46PO allows complainants only 60 days in which to lodge a court application, following the termination of their complaint by the AHRC. From our perspective as practitioners, this 60 day time frame is insufficient. We have witnessed occasions when our clients have been unable to comply with the requirement to institute proceedings in either the Federal Magistrates Court of Federal Court within 60 days of their complaint in the AHRC being terminated. Our clients who wish to obtain legal aid assistance

before proceeding to court are particularly disadvantaged. In one instance, a client who had made a sexual harassment complaint to the AHRC missed her opportunity to continue her case in court due to her inability to secure legal aid assistance within the 60 day time frame.

8. The YWLS seeks the abolition of the rule which currently prevents a person who has made a complaint in a state or territory jurisdiction, and later withdrawn it, from then shifting their complaint to the federal jurisdiction. The *Sex Discrimination Act 1984* (Cth) s10(4), the *Racial Discrimination Act 1975* (Cth) s6A(2), the *Disability Discrimination Act 1992* (Cth) s13(4), and the *Age Discrimination Act 2004* (Cth) s12(4) have the combined effect of preventing a person who has made a complaint under state or territory anti-discrimination laws from later removing their complaint from the state or territory jurisdiction, and shifting it to the federal jurisdiction by making a complaint to the AHRC. While we perceive the necessity of establishing a framework which prevents the creation of duplicitous complaints in various jurisdictions, the YWLS believes that this rule against a person making a federal discrimination complaint after making a state or territory complaint rests on the unrealistic assumption that discrimination complainants either possess a nuanced understanding of the various anti-discrimination jurisdictions, or that they are able to source legal advice on this point. At the YWLS, we have experienced many instances of clients coming to our service, having already instituted a discrimination complaint in the South Australian EOC, with a complaint that would have better been made in the federal anti-discrimination jurisdiction. In these circumstances, we must advise our clients that they have unknowingly forfeited their ability to make a complaint in the federal jurisdiction, even though their complaint would have been likely to have fared better in that jurisdiction. Rather than preventing all persons who have made a discrimination complaint under state or territory laws from later making a complaint in the federal anti-discrimination jurisdiction, we believe that federal anti-discrimination laws should allow people, who have made a discrimination complaint in a state or territory jurisdiction, to withdraw that complaint and then be allowed the opportunity to complain under federal laws.

9. The YWLS calls for the establishment of pecuniary penalty provisions in relation to breaches of anti-discrimination laws. Pecuniary penalties would act as a deterrent and send a clear message to the public that violations of discrimination law can lead to serious consequences. We suggest a system that enables a Court to exercise its discretion in handing down penalties. A range of considerations could guide the court's discretion, such as the size of a respondent organisation, the level of intentionality involved in the breach and the impact of the breach on the complainant. In our experience, many organisations, particularly larger businesses, do not view the existing system as a deterrent. The process private dispute resolution means that respondents' reputations are rarely tarnished as a result of a complaint and further, the amount of compensation agreed to in this process is often low or does not reflect current precedent. Penalties would encourage organisations and individuals to take discrimination issues seriously and employ preventative strategies in the workplace.

10. The YWLS seeks the establishment of positive duties to avoid all types of discrimination. Organisations should be required to take positive steps to accommodate the needs of individuals with protected characteristics. We have assisted many clients whose employers have unreasonably refused to provide them with flexibility measures. For example, a number of our young women clients have been refused the opportunity to extend their maternity leave notwithstanding the fact that their employer could have easily accommodated this. We note that refusing to accommodate the needs of an individual with special needs is not in itself is not actionable unless it falls within the scope of indirect discrimination. We therefore call for the introduction of positive duties, which place the burden on employers to offer certain individuals flexibility unless it can show that it would cause the organisation unjustifiable hardship.

11. The YWLS supports ERA's call for the abolition of the current religious institutions exception to anti-discrimination laws. However, if this submission is not accepted, the YWLS calls for religious institutions to be required to opt-in to coverage by an exception. We envision a framework within which

religious organisations would not automatically be excepted from federal anti-discrimination laws. Instead, religious institutions would be required to 'opt-in' for exemption under federal anti-discrimination laws. We suggest that religious institutions could be required to submit information to the AHRC concerning the nature of their organisation and reasoning for wishing to seek an exemption to federal anti-discrimination laws. Such institutions could also be required to submit evidence of having a considered approach to discrimination within their organization by, for example, providing copies of their anti-discrimination policies to the AHRC. We would suggest that such information, submitted to the AHRC, be made publicly available on the AHRC website.