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Assistant Secretary
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Attorney-General's Department
Robert Garran Offices
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Dear Assistant Secretary

Consolidation of Commonwealth Anti-Discrimination Laws – Discussion Paper

Thank you for the opportunity to make a submission on the Department's proposal to consolidate federal anti-discrimination laws. We are making this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

We wish to briefly address only select issues from the Discussion Paper in our submission.

1 Value of consolidation

We welcome the general proposal to consolidate the various anti-discrimination laws in one federal enactment. Not only does this deliver on the government's undertaking to do so in the Australian Human Rights Framework released on 21 April 2010, with the anticipated benefit of more effective protection for individuals that will arise from greater clarity and consistency for government, business and the community, but it is also an important step in the promotion of greater rights awareness and what has been called a 'rights culture'. Elsewhere, the Framework emphasises the need for greater human rights education and awareness and invests funding in this direction. But we acknowledge that this goal is made so much attainable by legislative instruments that approach rights protection in a holistic and consistent, rather than piecemeal and disjointed, way.

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2 Protection of sexual orientation and gender identity as attributes

The proposal by the government to include protection for the attributes of sexual orientation and gender identity in the consolidated anti-discrimination laws warrants particular comment. In order to sustain Commonwealth legislation enacted using the external affairs power (s 51(xxix)) as the basis for protecting these attributes, a clear connection to Australia's international treaty obligations is required. As the Discussion Paper makes clear, the Commonwealth's existing pieces of anti-discrimination legislation are directly linked to express international obligations to protect the various attributes in question.

The international documents containing general human rights protections do not specifically refer to sexual orientation and gender identity as protected attributes. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states:

'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Article 2(1) provides similar language, with regards to the duty of states to:

'...respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Article 2(2) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) is substantially similar to Article 2 of the ICCPR.

We would submit that a non-restrictive reading of 'other status' as being inclusive of attributes of sexual orientation and gender identity is appropriate given the formulation of these obligations as applying 'on any grounds such as' those that are expressly identified.

In *Toonan v Australia*,¹ the United Nations Human Rights Committee was asked to give guidance as to whether sexual orientation may be included within the phrase 'other status' in Art 26 of the ICCPR. The Committee confined itself to noting that, in its view, 'the reference to "sex" in articles 2, paragraph 1 and 26 is to be taken as including sexual orientation'. While not binding, that finding of the Human Rights Committee may be seen as persuasive upon judicial opinion. But an anticipated counter-argument is that 'sex' in the relevant Articles refers simply to gender.

There seems stronger grounds for arguing that both sexual orientation and gender identity may fall within the 'other status' ground, something left open by the Human Rights Committee in a number of its concluding observations in specific cases. In summary, the HRC clearly favours the inclusion of sexual orientation within the definition of Articles 2 and 26 ICCPR, however it is unclear specifically whether this is on the basis of 'sex' or 'other status'.

General comments by the Committee on Economic, Social and Cultural Rights (CESCR) also discuss the question of sexual orientation and gender orientation. In 2009's Comment 20, CESCR stated that "Other Status' as recognized in article 2, paragraph 2, includes sexual orientation'. It also said that additionally, 'gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or

¹ Human Rights Committee, *Communication No 488/1992: Australia*. 50th sess, UN Doc CCPR/C/50/D/288/1992. (4 April 1994) ('*Toonan v Australia*').

intersex often face serious human rights violations, such as harassment in schools or in the workplace'.²

There is perhaps some parallel to understanding the value of the comments made by the HRC and CESCR in establishing the capacity of the Commonwealth under s 51(xxix) of the Constitution to enact anti-discrimination laws protecting sexual orientation and gender identity, by considering the constitutional significance of formal recommendations made by international bodies.

The High Court in *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 discussed the significance to the constitutionality of domestic legislation of Recommendations that accompanied broader provisions of the International Labour Organization Convention. The majority in that case found, at 516, that provisions of the Commonwealth legislation in question that purported to give effect to a Recommendation could 'be supported under s 51 (xxix) if, but only if, the terms of these Recommendations themselves can reasonably be regarded as appropriate and adapted to giving effect to the terms of the Conventions to which they relate'. In other words, the Recommendation may demonstrate proportionality to the international obligation that enlivens the Commonwealth's legislative power under s 51(xxix). But it is not itself a basis upon which the Commonwealth may legislate using its power to make laws with respect to external affairs. The insufficiency of vague, non-binding international declarations or recommendations was recently considered by several of the Justices in the more recent decision of *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

In the present instance, it is not suggested that the various Comments and Sessions of the CESCR and HRC themselves provide a sufficient basis for regarding the prevention of discrimination against sexual orientation and gender identity as a protected attribute. They merely offer an interpretation of the expression 'other status' in particular Articles in the respective Conventions. But in providing a guide as to the manner in which those Convention obligations may be implemented by signatory countries, through identifying additional attributes to be protected from discrimination, the Committee findings may strengthen the case for valid Commonwealth legislation along the lines proposed by the Discussion Paper.

In short, we submit that the Commonwealth Parliament is very likely to possess the power under s 51(xxix) to enact discrimination protection for the attributes of sexual orientation and gender identity, but that care should be taken in drafting such legislation given the lack of express reference to these attributes in the relevant Conventions – something that distinguishes these attributes from those that have been the subject of Commonwealth legislation to date.

3 Reasonable adjustments

The Discussion Paper invites consideration of whether the duty under the *Disability Discrimination Act 1992 (Cth)* to make 'reasonable adjustments' (with 'unjustifiable hardship' being a defence for a failure to do so) should be applied to other attributes protected by any consolidated enactment.

While appreciating the argument that these concepts do operate implicitly in cases of indirect discrimination that may arise in respect of other attributes, we do not support the creation of a generic duty to provide 'reasonable adjustments'. In part this is because such a clause could never have equal relevance across the different protected attributes. We suspect this is why the trend of international experience favours limiting the express requirement to make 'reasonable adjustments' to anti-discrimination laws for persons with disabilities. It seems awkward to apply terminology of 'reasonable adjustments' to sex discrimination and not at all appropriate in respect of race. Issues of capacity dictated by age would seem able to be addressed by more

² Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc *E/C.12/GC/20* 2 July 2009, 32.

effective protection of intersectional discrimination. Disadvantage experienced by persons due to pregnancy or their family commitments may require remedying by steps that do not typically fall within the ‘reasonable adjustments’ made for persons with disabilities, and should arguably continue to be addressed through the operation of protections from indirect discrimination.

4 State and Territory Laws

On page 57 of the Discussion Paper, two options by which the Commonwealth may expressly leave open ‘the field’ occupied by State and Territory anti-discrimination laws are discussed. The first requires that those laws are not only capable of concurrent operation with the Commonwealth legislation in question but also that they further the objects of the international instruments upon which those Commonwealth laws are based. The second approach simply requires that the State and Territory laws be capable of concurrent operation. While the attraction of the first model as guarding against the possibility of State and Territory legislation departing from international law standards might be thought to appeal on the ground of consistency, we do not favour it. Although in practice it is unlikely that much will turn on this, an additional requirement that State and Territory laws be able to be characterised as furthering the objects of the international Covenants is a gloss upon the constitutional mechanism for determining inconsistency under s 109 which is arguably invalid as an attempt by the Commonwealth to ‘manufacture’ inconsistency or it is simply of no effect. Additionally, the evolution of anti-discrimination law in this country has benefitted greatly from experimentation at the State level. The adoption by the Commonwealth of an overly prescriptive approach to the operation of State enactments (which are not dependent upon the international human rights instruments for their validity) might arguably have a stifling effect.

Yours sincerely

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