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Business Council of Australia

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

sent via email: legcon.sen@aph.gov.au

Exposure Draft of Human Rights and Anti-Discrimination Bill 2012

Dear Sir/Madam

Thank you for the opportunity to comment on the exposure draft of the Human Rights and Anti-Discrimination Bill 2012.

The Business Council of Australia (BCA) strongly supports efforts to make a more inclusive society that allows all Australians the opportunity to participate fully in the economic and social life of this country and to realise their potential.

The BCA welcomes the government's intention to improve clarity and reduce duplication in its consolidation of various elements of legislation related to human rights and anti-discrimination.

The BCA approaches the introduction of any new regulation from the perspective of the trade-offs that it necessarily requires. The extension of new protections and the new arrangements applying to employers and those providing goods and services or otherwise interacting with individuals within society, must be balanced against the costs to individuals, businesses and the economy. In the case of consolidating Commonwealth anti-discrimination law, the Bill proposes a significant increase in the level of protection afforded to individuals and some significant additional costs to business.

The BCA is disappointed that the relevant provisions of the *Fair Work Act 2009* were not included and that the Regulatory Impact Statement did not fully assess the costs associated with the changes proposed.

The BCA has three major areas of concern with the Bill as it stands.

- The reverse onus of proof is already problematic in the *Fair Work Act 2009* and is likely to be problematic in this new area of law.
- The new arrangements will have the effect of shifting the balance in favour of applicants and to the detriment of those defending themselves against claims.
- The arrangements would introduce a high degree of uncertainty, with the associated costs that this would entail.

These concerns are discussed in more detail below.

A reverse onus of proof

A major concern of business is the change in the onus of proof. Aligning this Bill with the adverse action provisions of the *Fair Work Act 2009* is likely to see similar adverse outcomes as has been the case with the reverse onus of proof in the *Fair Work Act 2009*. Specifically, employers report that, in the *Fair Work Act 2009* context, the reverse onus of proof has led to markedly more claims and threats of claims. They are being used to undermine internal

grievance and performance management processes and are having a detrimental effect on the quality of communications 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. In the context of this Bill, employers are concerned that the costs of defending claims could be very high. Additionally, the Bill proposes to further limit the circumstances in which costs can be awarded, exacerbating this issue.

In a related context, the BCA has recommended as part of the current *Fair Work Act 2009* review process that amendments be made to the *Fair Work Act 2009* to ameliorate these effects while, at the same time, ensuring that the safety net is available to employees.

A major extension of what is 'unlawful' discrimination – shifting the balance of rights and responsibilities in favour of applicants

The Bill significantly extends what conduct will be unlawful, and in what circumstances. While the extension to new protected attributes, including gender identity and sexual orientation, is welcome, other aspects of this shift in balance are likely to cause significant difficulties for business.

The key considerations concern the definition of unlawful discrimination. Most importantly, the subjective nature of the test of what amounts to unfavourable treatment is a major shift from the current objective test, as the new test is simply based on whether the complainant alleges that conduct 'offends, humiliates, insults or intimidates the other person'. If a person says that they are offended etc., regardless of whether based on their own prior conduct that would have been anticipated by a reasonable person, it will amount to unfavourable treatment and therefore unlawful discrimination. This moves away from the effective requirement, which has been retained in relation to sexual harassment, that conduct will be unlawful if a reasonable person would have anticipated the possibility that the person exposed to the conduct would be offended, insulted, humiliated or intimidated. The BCA submits that the aspect of the definition of 'unfavourable treatment' in section 19(2)(b) of the Bill should be amended to provide 'other conduct that a reasonable person, having regard to all the circumstances, would have anticipated would possibly offend, insult or intimidate the other person'. This reflects the definition in section 49(1)(b) of the Bill, regarding sexual harassment. The further elaboration of circumstances which might be taken into account, that are included in section 49(2) of the Bill may also be appropriate to be included.

A second shift in the definition of discrimination would have it depend on "unfavourable" rather than "less favourable" treatment. "Less favourable" is currently considered with reference to a comparator person without the protected attribute; "unfavourable" is potentially a very significant extension of the current law. It is an important part of the defence to many unlawful discrimination claims that a respondent is able to say – I would have treated another person in the same circumstances in the same way – that 'unlawful' ground was not a factor in my decision. The BCA considers that the formulation should remain unchanged and should require a comparator.

A third shift is that the discrimination may be merely "connected with" an area of public life. This too is potentially a significant extension of the current law and does not make reference to the associated costs. The BCA considers that the list of areas of public life set out in 22(2) of the Bill should be exhaustive, so that the Bill does not have unforeseen consequences in potentially regulating any interaction between any persons in a public place.

These changes to the definition of discrimination are important because they expand the definition significantly, and because they do so in ways that are subjective and otherwise uncertain.

A further consideration in the balance of rights and responsibilities concerns costs. As noted above, the court's power to make costs orders that take account of the financial position of the parties may encourage impecunious claimants or claimants of limited means to make a

speculative claim at significant cost to the respondent and with no consequences for the claimant.

Uncertainty for business, and associated costs

A consistent, predictable and objective set of arrangements is crucial for business. Such arrangements constrain costs and permit businesses to focus on productive economic activity.

While the BCA accepts that the Bill reduces inconsistencies and overlap, we do not accept that there is a reduction in the regulatory burden and consider it more likely that the regulatory burden would be higher than at present.

One reason is the transitional costs associated with change. These include the need for businesses to change their corporate policies, train staff, and adjust to new and higher requirements. Importantly, the lack of precedent and case law in areas of change mean that a period of uncertainty is inevitable as the new arrangements are bedded down.

A second reason why the regulatory burden would be similar to or higher than at present is that the "clearer and more efficient laws" do not translate into clearer and more efficient practice. The significant expansion of what conduct is unlawful as well as the subjective nature of some concepts of discrimination are likely to mean less operational certainty and more regulatory burden in dealing with them. For instance, we are concerned about the process for determining a prima facie case, including who makes the assessment and under what criteria they do so.

Additional comments

While the BCA recognises the difficulty of quantifying certain relevant costs and benefits in the case of anti-discrimination laws, we nevertheless consider it important that the government attempts to quantify costs in a situation of this kind, where the legal mechanisms potentially impose substantial costs to achieve a social outcome. Regulation can be a blunt approach to achieving social outcomes, and the BCA has for this reason strongly supported the government's best practice regulation initiatives.

Consolidating disparate pieces of law broadly covering similar material is valuable, but the BCA notes that the practical impact is limited by virtue of the lack of consideration of state and territory anti-discrimination law. The BCA would welcome a more comprehensive approach to simplification that took account of these disparities and divergences that businesses will continue to face, notwithstanding this Commonwealth consolidation effort.

The BCA welcomes the measures to assist and promote voluntary compliance with the Bill, including co-regulation and the option of review by the Human Rights Commission of an organisation's practices for compliance. We see this as a way to contain compliance costs while still achieving the stated policy objectives.

Thank you once again for the opportunity to comment on this exposure draft.

Yours sincerely

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Chief Executive