11 September 2019

Mr Jonathan Smithers
Law Council of Australia
GPO BOX 1989
CANBERRA ACT 2601

By email: leonie.campbell@lawcouncil.asn.au

Dear Mr Smithers


2. The Discussion Paper sets out the AHRC’s preliminary views on the priorities for federal discrimination law reform. The Discussion Paper poses a number of consultation questions and sets out a suggested approach with respect to possible reform.

3. The Society is broadly supportive of the priorities identified by the AHRC and the approach suggested in the Discussion Paper. The Society provides some brief comments below which have been informed by its Human Rights Committee and Women Lawyers’ Committee.

Do you agree that the above principles should guide discrimination law reform? Are there other principles that should be identified?

4. The AHRC identifies the following principles (clear, consistent, comprehensive, intersectional, remedial, accessible, preventative) as important in ensuring that discrimination laws positively contribute to a reduction of discrimination in society and the greater realisation of equality on a continual basis.

5. The Society supports the principles identified by the AHRC and further suggests that greater education/awareness is also required to inform the community of what amounts to discrimination.

What are the key factors relevant to the need for federal discrimination law reform?

6. The Discussion Paper identifies six key reasons for reform including:

6.1 The mix of discrimination laws is complex and similar concepts operate differently across the laws;
6.2 The discrimination laws have not been updated to reflect best practice approaches or to address identified concerns;

6.3 There is an unnecessary level of difference and complexity between federal, state and territory laws;

6.4 Court decisions have limited the scope of certain provisions in the federal discrimination acts;

6.5 Discrimination laws are not comprehensive in their protection and gaps in protection have been identified; and

6.6 Some grounds of discrimination do not provide for an enforceable remedy.

7. The Society considers that all six factors identified by the AHRC are relevant. In particular, that there should be greater harmonisation between federal, state and territory laws. The Society suggests the following factors are also relevant to the need for federal discrimination law reform for the Law Council’s consideration:

7.1 The need for a unified definition of discrimination, which encompasses both direct and indirect discrimination;

7.2 Access to justice in addressing the issue of costs that act as a barrier for complainants under the current system.

7.3 A lack of compliance which could be addressed through Codes of Practice and Guidelines as well as expanding sanctions and public enforcement powers.

What, if any, new protected attributes should be prioritised?

8. The Society suggests that those attributes already forming part of the state or territory regimes should be prioritised as this would be consistent in promoting harmonisation at a federal/state level.

What are your views about the Commission’s proposed process for reviewing all permanent exemptions under federal discrimination law?

9. The Society supports the approach suggested by the AHRC that permanent exemptions should “only exists in permanent form in circumstances that are strictly necessary and which result in the minimum intrusion on people’s rights.”

Are there particular permanent exemptions that warrant particular scrutiny?

10. The Society notes the recently proposed legislative reforms with respect to religious freedoms and exemptions provided to religious institutions. There were concerns raised by the Women Lawyers’ Committee that religious freedoms may be put above sexual discrimination protections and LGBTIQ+ discrimination. As such, these exemptions should be carefully considered/scrutinised.

11. The Society encloses a report by the South Australian Law Reform Institute, entitled “Lawful Discrimination: Exceptions to South Australia’s Equal Opportunity Act”, which may be of relevance with respect to this question.

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1 See for example, Federal Court Rules r 25.14; Richardson v Oracle Corp Australia Pty Ltd [2013] FCA 102.
How can existing compliance measures under federal discrimination law be improved?

12. The Society supports the approach outlined in the Discussion Paper, which refers to the benefits of the AHRC Guidelines, publication of action plans, and development of standards in the form of legislative instruments. As noted above, possible improvements could also include expanding sanctions and public enforcement powers to promote compliance with the anti-discrimination regime.

What, if any, reforms should be introduced to the complaint handling process to ensure access to justice?

13. The Society supports the approach suggested by the AHRC, including protective costs orders and notes paragraph 7.2 above regarding costs in the context of access to justice. The Women Lawyers’ Committee also suggested that consideration should be given to restorative justice procedures.

14. Furthermore, the Society notes the approach of the UK in relation to the burden of proof in discrimination matters. The *Equality Act 2010* (UK) includes a shifting burden of proof. This requires the complainant to establish, at least, a prima facie case of discrimination, and then the burden is said to shift to the defendant to prove that the claimant’s treatment had nothing to do with a protected characteristic. Such an approach could be considered.

Yours sincerely

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