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**Practice Group(s):**  
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## Anti-Discrimination Reforms: The Proposed Harmonisation of Anti-Discrimination Laws

**By Alice M. De Boos and Courtney Fleming**

The Federal Government has released an exposure draft for a new Anti-Discrimination Bill, which proposes to harmonise, into a single statute, the Commonwealth's anti-discrimination laws and the *Australian Human Rights Commission Act 1986* into one piece of legislation, the Human Rights and Anti-Discrimination Bill 2012 (Draft Bill).

The proposed changes to the current laws are:

### Altered Definition of Discrimination

The Draft Bill proposes to simplify the definition of direct discrimination by defining direct discrimination as 'unfavourable treatment because of a protected attribute'. In consequence of this change, the comparator test that is currently applied under the *Age Discrimination Act 2004* and *Sex Discrimination Act 1984* will be replaced by a 'detriment test' that is currently applied under State anti-discrimination legislation in Victoria and the Australian Capital Territory.

The Draft Bill also proposes to simplify the test for indirect discrimination to limit indirect discrimination to circumstances where an employer imposes a condition, practice or requirement that would have the effect of disadvantaging an employee with a protected attribute.

### Increase in Protected Attributes

The Draft Bill proposes to introduce sexual orientation and gender identity as attributes that will be protected at a Federal level. The Draft Bill also removes the religious exemption for federally funded aged care organisations in relation to sexual orientation and gender identity.

In addition, the Draft Bill proposes to extend the anti-discrimination regime to include industrial history, medical history, nationality or citizenship, political opinion and religious or social origin as grounds for a complaint of unlawful discrimination in the employment arena.

The definition of a 'protected attribute' is also expanded to include a person or an associate who has, is assumed to have, had in the past or may have in the future, a protected attribute.

### Shifting Burden of Proof

The Draft Bill proposes to introduce a reverse onus of proof, consistent with the obligations imposed on respondents under the General Protections provisions of the *Fair Work Act 2009* (Cth). This would see employers bearing the onus to prove that the actions taken were for a reason other than because of a protected attribute.

Under the Draft Bill a complainant must establish a *prima facie* case of discrimination and once established, the burden will then shift on to the respondent to show that:

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- the action taken was for a non-discriminatory reason;
- the conduct was justifiable; or
- another exception applies.

### Defences

The Draft Bill provides that an employer will be exempt from a discrimination claim if the employer can establish that the conduct was justifiable. In order to establish that the conduct was justifiable, an employer will need to establish that:

- the alleged discriminatory conduct was taken in good faith for the purpose of achieving a particular aim;
- the aim is a legitimate aim;
- the duty holder considered that the conduct would achieve the aim;
- a reasonable person considered that the conduct would achieve the aim; and
- the conduct is a proportionate means of achieving the aim.

### Introduction of Compliance Codes

The Draft Bill also proposes to introduce compliance codes as a complete defence to a discrimination complaint. If enacted, the Draft Bill would give the Australian Human Rights Commission power to:

- draft disability and compliance codes to assist with anti-discrimination laws;
- produce guidelines to assist employers to comply with the consolidated anti-discrimination regime; and
- review policies and programs developed by particular industries to ensure compliance with anti-discrimination laws.

If enacted, the Draft Bill will also give the Australian Human Rights Commission the power to certify compliance codes and action plans that are developed voluntarily by employers to ensure compliance with anti-discrimination laws.

### Vexatious Claims and Costs

The Draft Bill proposes to bring anti-discrimination laws into line with the *Fair Work Act 2009* (Cth) with respect to costs and if enacted, would require each party involved in a discrimination complaint to bear their own costs. The court would however maintain an overarching discretion to award costs in the interests of justice. It is anticipated that this change will remove the barrier that currently exists in the anti-discrimination regime for complainants who often do not commence discrimination litigation in fear that a costs order will be made against them.

As this proposed change has the potential to increase the number of discrimination complaints that are brought with little merit, the Draft Bill also proposes to introduce a further procedural change that would give the Australian Human Rights Commission the power to discontinue a complaint if it is satisfied that the complaint is frivolous, vexatious, misconceived or lacking in substance.

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### Potential Implications

The consolidation of anti-discrimination legislation into a single statute is intended to assist employers and employees to better understand their rights and obligations by removing the definitional and coverage complexities that exist in the current anti-discrimination regime. However, if adopted, the Draft Bill will have a significant impact on the manner in which employers comply with anti-discrimination laws. Employers will be required to update their policies and procedures, as well as train employees in the new consolidated legislation. This has the potential to result in significant compliance costs to a business.

### What Happens Now?

The Draft Bill is currently in its exposure stage and has not yet been introduced into Parliament. It is presently not clear when the Draft Bill may be passed or whether it will be passed in its current form. The Draft Bill is currently open for submissions and there is a potential for the proposed reforms to be further amended following these submissions.

While the precise form of the harmonised anti-discrimination legislation is not yet known, businesses should begin preparing for a consolidated anti-discrimination regime by reviewing their equal opportunity policies and procedures and consider the extent to which the business may be required to change and adapt to the proposed new laws. It is clear that the proposed harmonisation of Federal anti-discrimination laws has the potential to place a higher standard on employers to ensure the protection of their workers and businesses will be required to develop new practices to ensure that this standard is sufficiently met.

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