

Submission to the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012

Introduction

The *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (the Bill) was referred to the Legal and Constitutional Affairs Committee by the Senate. This Bill aims to consolidate existing Commonwealth anti-discrimination legislation into a single Act.¹ The issue with consolidating this legislation is that it has given certain groups the opportunity to extend and modify the scope of existing discrimination legislation. While the Seventh-day Adventist Church in Western Australia is not opposed to amalgamating existing discrimination legislation, we DO NOT agree to the extension and modification to existing legislation as contained in the draft Bill without also recognising that these equality rights need to be properly balanced with other human rights. As such, in its current form we are opposed to its enactment and request that the Bill be defeated.

Alternatively, the Bill be amended to: reflect the provision for Religious freedom as provided for in the Australian Constitution s 116 and in international human rights conventions that Australia is a signatory to and has a responsibility to comply with; express the need to balance human rights and recognise that there can be special measures that may need to be taken in order to protect certain fundamental and non-derogable human rights; maintain the definition of discrimination as it stands in current legislation to require a comparator; and require the burden of proof on the balance of probabilities to rest with the complainant.

Human Rights Protection in Australia

The basic assumption of human rights law is the universality of rights. The premise is that natural rights are inalienable and fundamental to all human beings. With an increasingly multicultural society the challenge is how to achieve an appropriate balance in protecting these rights.

¹ *Racial Discrimination Act 1975, Sex Discrimination Act 1984, Australian Human Rights Commission Act 1986, Disability Discrimination Act 1992, and Age Discrimination Act 2004.*

Few explicit rights are contained in the Australian Constitution² and it is noted that these express rights have often resulted in a narrow interpretation by the Courts.³ In addition to expressed rights, the High Court has recognised that the *Constitution* contains the implied right of political speech⁴ and the additional guarantee of an independent judiciary.⁵ The trend for the Court to imply rights, however, has faltered, noted by its rejection of the implied right to equality in voting power,⁶ and its rejection of the implied right to legal equality.⁷ As such the Constitution does not provide comprehensive protection of rights and freedoms. Statutory protection of rights has also been piecemeal at best.⁸

While Australia has ratified a number of international treaties they do not become binding unless incorporated by Parliament into domestic legislation.⁹ The UNHR Committee has criticized Australia's fragmentary implementation of international treaties into domestic law. This means that there is a lacunae in the protection of rights, including those contained in the ICCPR and ICESCR in the Australian legal system.

We submit that the current Bill is also piecemeal and narrow in that the objects clause 3 focuses solely on the elimination of discrimination and says nothing about the limits of those rights nor how those rights are to be balanced with other rights. The result will most likely result in the violation of other human rights. The nomenclature of the Bill suggests that the objects should be broader than merely the right to non-discrimination. This can easily be attained by redrafting clause 3 to include the recognition of the rights and freedoms protected by the international treaties, including the inalienable and non-derogable right of the freedom of religion. This broadening of the objects will allow competing rights to be considered and balanced when interpreting the provisions of the Act.

Religious Exemptions

While clauses 32 and 33 provide exceptions for religious bodies and educational institutions this protection enables religious freedom to be narrowly construed and perceived as a special concession. Having ratified the ICCPR the Government of Australia has the obligation to ensure that proper recognition is given to fundamental human rights, including the non-derogable right of religious freedom.

We support the further defining of religious freedom by Professor Patrick Parkinson as:

- *Freedom to manifest religion through religious observance and practice*

² These include: acquisition of property on just terms (s51xxxi); the right to trial by jury on indictment (s80); the freedom of religion (s116); the right to be free from discrimination on the basis of interstate residence (s117).

³ For example: *Cheng v The Queen* (2000) 203 CLR 248; *King v Jones* (1972) 128 CLR 221.

⁴ *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520

⁵ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Kable v DPP (NSW)* [1996] HCA 24; *Forge v Asic* [2006] HCA 44.

⁶ *Langer v Commonwealth* (1996) 186 CLR 302; *McGinty v Western Australia* (1996) 186 CLR 140.

⁷ *Leeth v Commonwealth* (1992) 174 CLR 455; *Kruger v Commonwealth* (1997) 190 CLR 1.

⁸⁸ Examples at Federal level: *HREOC Act 1986* (Cth); *RDA 1975* (Cth); *DDA 1992* (Cth); *SDA 1984* (Cth); *ADA 2004* (Cth); *Workplace Relations Act 1996* (Cth); *Equal Opportunity for Women in the Workplace Act 1999* (Cth); *Human Rights (Sexual Conduct) Act 1984* (Cth); *Privacy Act 1988* (Cth); *Freedom of Information Act 1982* (Cth).

⁹ Constitution s51 (xxix).

- *Freedom to appoint people of faith to organisations run by faith communities*
- *Freedom to teach and uphold moral standards in faith communities*
- *Freedom of conscience to discriminate between right and wrong*
- *Freedom to teach and persuade others.*

In order to adequately protect religious freedom an additional explanation should be included in the Bill that the religious exception provisions are to give effect to Australia's obligations under Article 18 and 27 of the ICCPR and s 116 of the Constitution and that these need to be appropriately balanced with rights concerning non-discrimination.

Definition of Discrimination

The test for discrimination is problematic in section 19 of the Bill in that it does not provide for a comparator. The decision whether treatment is detrimental to the person without a comparative is subjective at best and relies on the discretion of the Court. This lowering of the threshold for what constitutes discrimination will enable any person, who considers that they have been harassed, offended, insulted or intimidated regarding a protected attribute, to lodge a complaint.

An advantage of utilising a comparator is greater objectivity in determining whether discrimination has occurred. We believe that the use of a comparator will prevent uncertainty as to which conduct constitutes discrimination and will substantially reduce the possibility of unnecessary and unreasonable complaints.

The definition of discrimination should also include a statement that clarifies where fundamental and non-derogable human rights, such as the right to freedom of religion, association and/or cultural expression, require special measures that this constitutes legitimate protection that is not to be considered unlawful discrimination.

Burden of Proof

We recommend that clause 124 of the Bill needs to be deleted from the Bill. The shift of the burden of proof to the respondent once a complainant has made a prima facie allegation of discrimination is contrary to the presumption of innocence and is a significant change to existing anti-discrimination law. In civil matters the onus is and should be on the complainant to prove all aspects of the complaint on the requisite balance of probability.

To reverse the burden of proof to the respondent to demonstrate that discrimination has not occurred is to open Pandora's box to the possibility of a multiplicity of claims with little substantiation. Jurisprudence may not be served due to the extra expense that will be required of respondents to defend and prove their position and the temptation to settle out of Court to eliminate greater expense and possible loss of reputation.

Conclusion

The Seventh-day Adventist Church in Western Australia does not support the Bill as it currently stands due to the extensions and modifications it makes to existing anti-discrimination law.

We do support a Bill that consolidates anti-discrimination on the basis that it recognises fundamental rights contained in the Australian Constitution and the international treaties to which Australia is a signatory. There needs to be due recognition of the inalienable and non-derogable right of Religious Freedom as espoused in the ICCPR.

Thank you for consideration of this submission.

Lionel Smith
General Secretary