

Submission

to the

Senate Legal and Constitutional Committee

On the Draft proposal for the '*Human Rights and Ant-Discrimination Bill 2012*'

From

Salt Shakers

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Salt Shakers is a Christian Ethics group with thousands of readers across Australia. We monitor legislation and community standards and encourage our readers to engage in the political process.

Overview

Salt Shakers is totally opposed to the proposed draft legislation under discussion, the '*Human Rights and Ant-Discrimination Bill 2012*'. This Bill will severely undermine and restrict freedom of speech and freedom of religion in Australia.

We urge the Senate Legal and Constitutional Affairs Committee to recommend that the Bill not be passed and to totally reject the proposed draft Bill.

Although the government claims that the current proposal is mostly aimed at ‘consolidating’ the current various laws, the proposed legislation actually goes much further in expanding and entrenching anti-discrimination laws and imposing far more restrictions on speech and conduct.

Our Submission outlines some of our key areas of concern in the legislation. Although we specifically detail some of these major concerns, **our primary response is to oppose any new anti-discrimination law or expansion of laws. In fact, we would like to see much of the current laws repealed.**

We strongly object to the inclusion of new attributes of sexual orientation and gender identity. We are extremely concerned about the words ‘unfavourable treatment’ and the section that says this can include conduct that ‘offends and insults’.

Some of the current laws should be repealed. In particular, the Racial Vilification law should be repealed. The current Section 18C of the Racial Discrimination Act, which defines racial vilification as conduct that offends, insults or intimidates, is extremely problematic and should be repealed. The notion of having anti-discrimination law relating to religion and political opinion is also extremely problematic, since these attributes are personal convictions, not inherent attributes.

Following are specific comments, along with Recommendations, that relate to specific sections of the proposed draft Bill.

1. Additional attributes – ‘sexual orientation’ and ‘gender identity’

The proposed legislation gives all the protected ‘attributes’ equal status. That means one’s sex or race, which are inherent qualities, are given the same status as ‘political opinion’, a conduct that is limited in scope and place.

Attributes such as religion and political opinion are behaviours and beliefs rather than inherent characteristics over which someone has no control. When such attributes are ‘protected’ it removes the right for people to decide how they act and speak in matters of conscience.

The addition of the attributes of **sexual orientation** and **gender identity** further restrict freedom of speech. Both of these areas are political in nature. They are not inherent characteristics. There is no evidence that sexual orientation is genetic or that ‘people are born homosexual’. Research that has been done, by people such as Simon Le Vey and Dean Hamer, has not been replicated. No research has established any genetic cause.

Research by Pillard and Bailey, done on twins in Australia in 2000, shows that if one twin is homosexual then there was a 25% chance of the identical twin being homosexual also. Of course, if it was genetic, then the percentage should be 100%.

For fraternal twins the percentage drops to 10%.

See the research at <http://faculty.wcas.northwestern.edu/JMichael-Bailey/Publications/Bailey%20et%20al.%20twins,2000.pdf>

Dr Neil Whitehead from New Zealand has analysed all the research and concludes that homosexuality is not genetic, but rather overwhelmingly a result of environmental factors. His website is at <http://www.mygenes.co.nz/>

The attribute of ‘marital or relationship status’ is also a huge problem, especially when combined with the attribute of sexual orientation.

There have been several high profile cases in the UK, under their expanded *Equality Act*, where Christian owners of B&Bs have been accused of, and found guilty of, discrimination, when they refused to allow a same-sex couple to have a double room at their B&B. This was even in cases of

the B&B being run in the couple's own private home – and applying similar prohibitions to non-married couples, namely those in *de facto* relationships.

Christian Institute in the UK has reported extensively on these cases and the subsequent court action and appeals.

One case involved **Peter and Hazelmary Bull** in Cornwall.

Full details at <http://www.christian.org.uk/news/judge-rules-against-christians-in-bb-case-but-allows-appeal/>

Another case involved **Susanne and Michael Wilkinson** and the B&B run in the home. See details at <http://www.christian.org.uk/news/christian-bb-loses-court-case-brought-by-gay-couple/>

These are made much worse by the fact that the previous 'limited grounds' - such as "Commonwealth body or agency; employment and occupation" - have been vastly expanded to refer to 'unfavourable treatment' which includes any conduct that offends or insults – more on that in the following sections.

In a similar way, protecting religion and political freedom on the basis of someone being 'offended or insulted' is absolutely untenable.

Recommendation:

*** The new proposed attributes of sexual orientation and gender identity should be removed from the proposed Bill.**

*** We also want to see religion, political opinion, and marital or relationship status removed from the proposed Bill.**

2. Applies to ALL areas of LIFE!

The proposed law has a **VERY broad definition of discrimination** - the Guide to Part 2-2 (Section 18, p35) states "**In broad terms, discrimination is unlawful if it occurs in any area of public life.**"

Similar state laws define specific and limited areas where discrimination might be unlawful - such as employment or accommodation.

That's how the current federal anti-discrimination laws are worded ([link](#)).

This new proposal greatly expands this.

This Bill would instead apply to **ALL areas of public LIFE!**

This would place an enormous burden on everyone – no would know when they were likely to be subjected to a complaint. This draconian legislation would severely restrict our freedom.

Recommendation:

*** We recommend that the Bill not be passed at all.**

*** However, at the very least it must only apply to extremely LIMITED grounds – not to ALL of public life.**

3. Definition of discrimination - VERY BROAD... "INSULT OR OFFEND"

The Bill describes 'discrimination' as 'unfavourable treatment' (Section 19, page 36).

Even worse, the proposed law prohibits any conduct that offends or insults!

(Section 19(2), page 36) says:

"To avoid doubt, *unfavourable* treatment of the other person includes (but is not limited to) the following:

- (a) harassing the other person;
- (b) other conduct that offends, insults or intimidates the other person.

That means that any conduct /treatment of another person that is deemed to **insult or offend them** could be claimed as 'discrimination'!

For example, a person who was insulted by a comment on their religion or political opinion or their sexual orientation or relationship status could make a discrimination claim of 'unfavourable treatment'.

It would then, under the proposed 'reverse onus' be up to the 'respondent' to prove he didn't discriminate or that his conduct was 'justifiable'.

Recommendation:

* **We recommend that this proposed Bill NOT be passed in any form.**

* **We recommend that Section 19 (2) (b) be REMOVED. In other words, remove the words "(b) other conduct that offends, insults or intimidates the other person."**

4. Exceptions

This Bill contains a range of 'exceptions' - however, there is a huge problem with exceptions. We have often found, through a variety of legal situations in Australia, that we have been personally aware of, that exceptions are not worth the paper they are written on!

The first exception is 'justifiable conduct' - Section 23, page 40.

The government has made it clear that this is the primary test for conduct under the proposed law. This is a very BROAD and VAGUE exception. Disturbingly, its breadth imposes onerous responsibilities on the respondent.

It is easy for a person to make a complaint. It is extremely difficult for the respondent to PROVE why their conduct was 'justifiable'.

This law would say that the respondent must PROVE why his/her conduct was **JUSTIFIABLE**. The proposed law says that this means proving the conduct was "in good faith, for the purpose of achieving a particular aim".

The respondent also has to prove "that aim is a legitimate aim".

But what is 'justifiable conduct'?

Who decides what is justifiable? Or what is 'acceptable behaviour'?

Who decides what is a 'legitimate aim'?

Which government body decides what is legitimate?

Other sections of the proposed law talk of businesses setting up policies which are 'approved' by the Commission – if the business can then show the conduct was in accordance with the 'approved aim' then that would be a defence.

This places all authority for appropriate and legitimate aims and conduct in the hands of a government body, the *Human Rights Commission*.

The granting of powers to the Commission to undertake 'Inquiries' is a very concerning step

All of these aspects remove the notion of free will and conscience and imposes the will of the state on individuals – and companies - in matters where someone is ‘offended or insulted’. And we can ALL be very easily offended or insulted – probably on a DAILY basis!

This is quickly becoming a totalitarian state, where the state dictates what is acceptable behaviour. This is not a situation that is in accord with the freedom of our democratic, representative democracy.

Recommendation:

- * **We recommend that this proposed Bill NOT be passed in any form.**
- * **We recommend that the exceptions as listed in the proposed law be changed. At present the proposals are VERY VAGUE and broad, such as having to establish the conduct was ‘justifiable’. This is a totally unacceptable approach to such laws. The exceptions must be clearly spelt out.**
- * **We recommend that the Human Rights Commission not be given power to determine what are ‘legitimate aims’.**
- * **We recommend that the AHRC not be given the power to undertake ‘Inquiries’.**

5. Exceptions for RELIGION

The proposed legislation provides some exceptions for churches and religious organisations.

Exceptions for religion...

Section 32, page 47 relates to the appointment of ministers or priests, and the participation by people in "any religious observance or practice".

Churches can discriminate on some (but not all) attributes, including **sexual orientation, gender identity, and marital or relationship status**. Also on the grounds of age, breastfeeding, family responsibilities, potential pregnancy, pregnancy, religion and sex.

Section 33 deals with **religious bodies and educational institutions**.

Exceptions apply to the attributes of gender identity, marital or relationship status, potential pregnancy, pregnancy, religion and sexual orientation.

However, if a complaint is made, the respondent must be able to PROVE that ...

- (b) the discrimination consists of conduct, engaged in in good faith, that:
 - (i) **conforms to the doctrines, tenets or beliefs of that religion;** or
 - (ii) **is necessary to avoid injury to the religious sensitivities of adherents of that religion;**

Firstly, it is extremely concerning that the proposed Bill talks of reviewing the exceptions in three years. (Section 47).

There is a real concern that exceptions that are included now could well be removed then. This causes major problems for churches and religious organisations.

Under this scenario, we are concerned that religious organisations and churches could be persuaded to support the Bill, thinking that they are ‘protected’ from the law, and thus they will not worry about how it will affect other people and organisations. Then, in three years time if exceptions are then removed this false sense of security would be removed.

We actually believe that there is VERY LITTLE protection for religious organisations under the proposed Bill. There are significant and real impositions on freedom of religion.

The real problem is that, in three years time, once churches have agreed to some regime of these laws at this time, the government could then “CHANGE THE RULES” and radically alter or remove the exceptions for these groups.

It is important to note that if a complaint is made, the organisation has to defend themselves! We have seen this happen many, many times in similar state legislation. This is often at great expense. The case of religious vilification fought by the two pastors in defending complaints made by the Islamic Council, cost the pastors and their supporters over \$400,000 – if they had paid their lawyers in the first part at the Tribunal the costs would have been more than \$700,000. This legislation is a lawyers’ picnic especially once cases go to court. They will be the ones making money!

The sort of wording, as in Section 33, that says the respondent must prove that the conduct “conforms to the doctrines, tenets or beliefs of that religion” and “is necessary to avoid injury to the religious sensitivities of adherents of that religion, is extremely concerning and problematic.

It is this sort of wording that meant *Christian Youth Camps* (Phillip Island) and *Wesley Mission* (Sydney) had to spend time, and a great deal of money, in tribunals and courts arguing on matters of doctrine and 'religious sensitivities'. In both cases, their theologians were arguing against OTHER theologians from the SAME religion!

In both cases, the Christian organisations LOST their cases - *Wesley Mission* won on appeal, whilst the *CYC* appeal is yet to be decided ([read overview of case](#)).

Under this clause... we might well ask, as has happened in the courts and tribunals...

- What ‘religion’ is the organisation?
- What are the ‘doctrines’ of the religion or organisation?
- What is a ‘doctrine’?
- What is a ‘religion’?
- What is a ‘tenet’ of the religion?
- What is a ‘belief’ of the religion?
- Do they need to be written down?
- Is it enough to refer to the Bible to show a ‘doctrine’?
- What if a denomination or religious organisation has MULTIPLE approaches on an issue – for example, the Uniting Church on homosexuality?
- Then, we can ask, ‘What is necessary?’
- What are ‘religious sensitivities’?
- Who are the ‘adherents’? Do they have to be members or just ‘attendees’?
- The list goes on – all needing to be ‘proved’ in court!

This is a legal MINEFIELD – lawyers will make lots of money arguing the case – usually with theologians of varying persuasions arguing against each other.

This is not the role of the Commission or the court to determine religious doctrine.

Recommendations:

*** Reject the whole of this proposed draft Bill.**

*** Section 32, regarding exceptions for religious practice is essential.**

However, the fact that we have a law, and that there have to be ‘exceptions’ is a blight on our community. It should go without saying that churches can make rules about their own organisations!

*** Regarding Section 33, we believe that religious organisations should have the same exception as for churches.** We recommend that religious bodies have a broad ranging exception similar to that of Section 32, where all conduct attracts an exception.

*** The current proposed exception Section 33 (b) should be REMOVED.**

Religious organisations should NOT have to justify matters of doctrine in a regular court – or to prove that their conduct accords with the sensitivities of adherents.

A court is not the place to adjudicate on what constitutes doctrines and beliefs.

*** The notion of ‘reviewing exceptions’ must not be written into any proposed law.**

It just invites the government and the Human Rights Commission to make ‘changes’ to the exceptions in three years time.

6. RELIGION - EXCEPTION to the exception - AGED CARE

The federal government has proposed that if a religious organisation or church runs an aged care facility, then they will NOT be allowed to discriminate on the basis of the stated attributes – and that includes sexual orientation, gender identity and marital or relationship status - Section 33, 3 (a).

The proposed draft says “The exception will not apply to religious bodies IF “the discrimination is connected with the provision, by the first person, of Commonwealth-funded aged care.”

The Attorney General noted that this was because the homosexual couple or person would be living in ‘their own home’ in the aged care facility.

However, that totally overlooks the fact that it is the HOME of the people who are already residents in the facility!

We ask this question, “How long until that is extended to other institutions run by churches - such as schools, welfare, foster care, adoption or other ‘services’ funded by the government?”

This section of the proposal is totally unacceptable and imposes impossible conditions on religious organisations that run aged care.

Recommendations:

Remove Section 33, 3 that states the exception doesn’t apply to the provision of aged care... that is,

“(3) The exception in subsection (2) does not apply if:

(a) the discrimination is connected with the provision, by the first person, of Commonwealth-funded aged care; and

(b) the discrimination is not connected with the employment of persons to provide that aged care.

7. Cases heard at federal courts

Complaints initially go to the *Australian Human Rights Commission*, where a conciliation conference is usually held.

Unlike the state laws, which generally go on to tribunals, the proposal is for unconciliated cases to be heard in the Federal Court or the Federal Magistrates Court. (Section 118, page 118)

Perhaps one good thing is that the Bill specifies that, if the case goes on to the Federal Court or the Federal Magistrates Court, each party "is to bear that party's own costs." (Section 133, page 127) The potential burden of paying the costs of the complainant is a cause of great anxiety to many who are subjected to a complaint of discrimination or vilification.

On the other hand, it is easier for people to make complaints if they think that they won't have to pay costs. There are exceptions to this, especially if the case has not been found to have any merit, if parties received assistance or their financial circumstances.

Our major concern about the discrimination cases being heard in the courts is covered in the next section – where the onus of proof is reversed...

8. Proposed Bill REVERSES the ONUS of PROOF

Normal court procedure places the onus on the complainant to prove their case.

We are extremely concerned that this proposed law **reverses the onus of proof**.

Once the complainant establishes a 'prima facie case, the RESPONDENT will have to PROVE their case as to **why their conduct was JUSTIFIED**.

Section 124 (page 120) deals with reversing the onus of proof.

The reversal of the onus of proof has caused enormous angst and problems in a range of discrimination law. The most notable of these was the religious vilification case involving the two pastors who ran a seminar about Islam. It is extremely difficult to prove that one's conduct is justified.

Recommendation: We recommend that Section 124 be DELETED / REMOVED.

9. Remove racial vilification law

The proposed law includes a prohibition of **racial vilification**. (Section 51, page 63).

This is currently known as section 18C in the federal *Racial Discrimination Act* and is the law under which Andrew Bolt lost his case after complaints were made concerning his statements about aborigines.

The federal law is more draconian than the state vilification laws (such as Victoria's notorious *Racial and Religious Tolerance Act*).

Instead of prohibiting the **incitement of hatred** and so on, the federal law bans conduct that "is reasonably likely, in all the circumstances, to **offend, insult, humiliate or intimidate another person or a group of people**".

This is an incredibly LOW threshold of 'offence'!

As we often say, we could all be offended every day!

Although the proposal has not been extended to include sexuality vilification at this time, this could easily be added at a later date if this proposed legislation is passed. Homosexual activist groups are already lobbying for such a law.

Once the framework, law and penalties are established, it is very easy to extend the law and add additional attributes. Recently the Tasmanian government extended their vilification law to cover **ALL the protected attributes** – a most concerning situation.

However, it is the fact that ‘OFFEND’ and ‘INSULT’ are included that cause major concerns.

Recommendation: We ask that Section 51 (Page 63), relating to the prohibition of racial vilification, be totally removed from the proposed law.

CONCLUSION

We are extremely concerned about the incredible expansion of the proposed anti-discrimination law at the federal level.

This is not just a simple putting all the laws into one consolidated Act, as the government maintains. It is not just ‘adding a couple of extra attributes’ - as in sexual orientation and gender identity, although that concerns us greatly.

It is not just the ‘unfavourable treatment’ which is being defined as including conduct that ‘offends or insults’ in ANY area of public life.

It is not just the prohibiting religious organisations from saying no to a same-sex couple having a place in their aged care facility.

Rather, it is the combined effect of all of these aspects, each of which are undesirable and problematic, that cause this proposed Bill to be the most draconian piece of federal legislation ever proposed in Australia.

We call on the Committee to preserve free speech, freedom of conscience and freedom of religion and totally reject the proposed draft the *'Human Rights and Ant-Discrimination Bill 2012'*.