

18 December 2012

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

Re: Exposure Draft of Human Rights and Anti-Discrimination Bill 2012

By email: legcon.sen@aph.gov.au

Dear Committee Members,

The Exposure Draft of Human Rights and Anti-Discrimination Bill 2012 (hence “Bill”) contains concerns to the extent that it **must be rejected**.

Freedom of Speech

The Bill undermines freedom of speech. The meaning of “Discrimination” under the proposed bill includes “conduct that offends, insults or intimidates”. The right to freedom of speech is guaranteed by the International Covenant on Civil and Political Rights (the ICCPR) and Australian law. However there is no right not to be offended or insulted in any international instrument or in any Australian law. Australia’s international treaty obligations do not require Australia to protect persons from being offended.

Freedom of thought, conscience, religion and belief must receive protection as guaranteed by Australian law and international treaties and instruments.

Onus of proof reversed

The Bill, in Section 124, reverses the onus of proof, where no longer will the person making a complaint about “discrimination” be required to prove that discrimination occurred. Instead the person accused must prove that “discrimination” did not happen. This attacks the fundamental principle of the “golden thread” inherited from English Criminal Law, as described by Viscount Sankey, and recently quoted by Cassandra Wilkinson in *The Australian*:

“Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner’s guilt. . . . No

matter what the charge or where the trial, the principle that the prosecution must prove guilt is part of the common law and no attempt to whittle it down can be entertained."

She adds:

"The citizen therefore needs to guard these golden threads with great jealousy against the possibility of action by police who are mistaken or misbehaving."¹

In the situation of this Bill, the only difference from the quote is that there is a different kind of police.

The proposed shift represents a fundamental change to the culture of justice in Australia and any proposed bill must retain the onus of proof on the complainant.

Protection of attributes of sexual orientation and gender identity

The Bill plans to make "gender identity" and "sexual orientation" what are called "protected attributes", which is an expansion of the "protected attributes" under present anti-discrimination laws. Introduction of the new "protected attributes" would be at the expense of freedom of thought, conscience, religion and belief for those who have sincerely and deeply held beliefs or values that conflict with these values. In short, it becomes a blunt instrument to shut down criticism and will be particularly useful to help protect and promote the political goals of those groups defined as having "protected attributes". Orwell would marvel at this new terminology. In particular, it should not be "unlawful discrimination" to discriminate in relation to "sexual orientation" or "gender identity" in aged care as in S 33(3).

Exceptions and exemptions for Churches and Church agencies to be reviewed in 3 years

If this Bill becomes law, freedom of religious practice – and of Churches and faith-based agencies to employ people of their own religious beliefs – will only be tolerated by way of "exceptions" to "unlawful discrimination" or by way of "exemptions" which have to be applied for and are only temporary. There is no guarantee that they will remain, especially if in this Bill they are already defined as exceptions. The legislative intent is eventually to strip these away or make them more restricted over time to the point of non existence. This is a cruel ruse and must be challenged for what it is.

Australian Human Rights Commission will decide on "exceptions"

Continuing from the above point, the Bill says that the "exception" rules are to be reviewed in three years. There is no expectation of permanency for these exceptions. Many groups

¹ Cassandra Wilkinson, 'Fair society needs to guard that golden thread with great jealousy', in *The Australian*, 21 September 2012, <http://www.theaustralian.com.au/business/legal-affairs/fair-society-needs-to-guard-that-golden-thread-with-great-jealousy/story-e6frg97x-1226478387962> (accessed 18/12/12).

seeking to benefit from these laws already have Churches, schools and Church agencies in their sights:

Included below is an excellent summary article of the desires of different groups in the earlier consultation period for the formulation of this Bill **against** the freedoms of these groups and reveals a naked hostility to them:

**NATIONAL AFFAIRS:
Push for new laws to attack churches, schools**

by Patrick J. Byrne

News Weekly, May 26, 2012

The Gillard Labor Government's inquiry into new anti-discrimination legislation has become the source of a concerted attack on churches, independent schools and government funding to church-based welfare organisations.

In keeping with ALP promises made at the last federal election platform, the department of federal Attorney General Nicola Roxon is holding an inquiry into consolidating the Commonwealth's four separate anti-discrimination laws — the Racial Discrimination, Sex Discrimination, Disability Discrimination and Age Discrimination acts — as well as the *Australian Human Rights Commission Act (1986)* and provisions in the *Fair Work Act 2009*.

Ms Roxon issued a discussion paper inviting comment on a number of questions, including issues relating to possible exemptions clauses for churches and community organisations in any new anti-discrimination legislation.

The Attorney-General promised that exemptions would be allowed.

However, *The Australian* newspaper's national opinion writer Paul Kelly, in commenting on similar politicians' assurances that churches would be exempt from any new same-sex marriage law, warned that only a fool would accept the idea that "exemptions" for the churches would be effective and lasting.

Kelly was writing at the time of last November's ALP national conference, which changed its policy to support same-sex marriage, while allowing Labor parliamentarians a so-called "conscience vote" on the issue (*The Australian*, November 30, 2011).

His warning is given substance by the fact that numerous gay and lesbian groups, human rights, legal and other lobby groups have told the Attorney-General's inquiry into a new consolidated federal anti-discrimination law that:

- there must be no exemptions for the churches;
- or, if exemptions are granted, they be severely restrictive;

- or that organisations seeking exemptions be subject to onerous application provisions and conditions;
- or a combination of the above proposals.

Quoted below are the broad statements by 31 submissions to the national inquiry.

It is clear from these submissions that, if exemptions were granted, they would be merely a temporary measure designed to placate the churches and lull public opinion, only to be quietly withdrawn in the future. (A more comprehensive outline of these conditions is available at www.NewsWeekly.com.au).

Australian Lawyers for Human Rights: “Religious exemptions should only apply to the core functions and beliefs of religious institutions....”

Legal Aid Queensland “... argues for the removal of those (i.e., religious) exemptions”.

Legal Aid NSW “... does not support the retention of any exemption on religious grounds”.

Public Interest Law Clearing House (Vic) Inc: “The Consolidated Law should include no exemptions for religious organisations in relation to the protected attributes of sexual orientation and gender identity.”

Discrimination Law Experts Group: “We recommend that the religious exceptions be repealed.”

ANU College of Law “Equality Project”. It “rejects permanent exemptions on religious grounds for institutions or individuals”.

Human Rights Law Centre: “These exemptions are manifestly inappropriate and inconsistent with Australia’s human rights obligations and international best-practice.”

The South Australia Equal Opportunity Commission: “Any religious exemption should be strictly restricted to the inherent requirements of the religious belief or activities rather than apply more broadly to employment-related conduct.”

The Law Institute of Victoria: “religious exceptions ... should be precise, public, and subject to sunset provisions....”

South Australian Bar Association: “If exemptions are retained, then they should not ... be available where functions are being carried out by an organisation pursuant to a Commonwealth government contract or for activities conducted using public funds.”

Australian Council of Human Rights Agencies: “There should be no religious exemptions where:

“(a) The institution is carrying out functions contracted by government in relation to the employment; or where

“(b) The institution is accessing public funds to fund the employment.”

HIV/AIDS Legal Centre: “Remove entirely any religious exemption to discrimination on the grounds of sexual orientation or gender identity.”

Public Interest Advocacy Centre: “There should be no permanent exemptions for religious organisations in respect of any protected attributes.” However, if there are exemptions, they should be limited to “the ordination, appointment, training or education of priests, ministers of religion or members of any religious orders” and to institutions involved in the “employment of staff in the provision of religious education and training”.

The National Association of Community Legal Centres: “The consolidation bill should not provide for religious exemptions in relation to the protected attributes of sexual orientation or gender identity.” However, if there are exemptions, they “should not be applicable to organisations or services in receipt of public funding”.

Young Workers’ Legal Service [SA unions]: “... religious institutions would be required to ‘opt-in’ for exemption under federal anti-discrimination laws”.

Australian Lesbian Health Coalition: “There should exist no blanket exceptions or exemptions for religious bodies.”

National LGBTI Health Alliance: “Religious bodies should not be granted exemptions from anti-discrimination legislation for their activities in the provision of services, such as aged care, health services and education.”

The Diversity Council of Australia “... does not support general exemptions for religious bodies for any acts and practices”.

Lesbian and Gay Solidarity (Melbourne) says that the federal government must “withdraw its religious exemptions from all its anti-discrimination laws”.

Equality Rights Alliance: “... exceptions for religious organisation ... should not be included in the consolidated Act.”

Australian Federation of AIDS Organisations (AFAO) says there should “be no religious exemptions in the new consolidated anti-discrimination law”.

ACT Human Rights Commission: It looked favourably on exemptions, but argued that “it is essential that any remaining stand-alone exceptions are

reviewed regularly and rigorously to determine whether they should be retained, amended or repealed...”.

The Coalition of Activist Lesbians Australia Inc. recommended “the complete removal of exemptions for religious organisations with regards to sexual orientation”.

Tasmanian Gay and Lesbian Rights Group said that it “does not support any legislative exemptions or exceptions that are specific to sexual orientation of gender identity and presentation”.

Liberty Victoria, Victorian Council for Civil Liberties Inc. said that religious bodies and educational institutions should be required to have a “licence to discriminate, time-limited but renewable, conditional on ... specific ‘doctrines, tenets, beliefs or teachings’ (that) necessitate it”.

The Equal Rights Trust, UK, said that Australia’s new consolidated act “should expressly recognise that direct discrimination may be permitted only very exceptionally, and only when it can be justified against strictly defined criteria”.

Victorian Gay and Lesbian Rights Lobby said that it “opposes any exemption granted to religious bodies that would permit discrimination on the basis of sexual orientation or gender identity”.

Women’s Electoral Lobby Australia said: “Legislation should remove automatic exceptions for religious and other bodies from all anti-discrimination legislation, and that if any exceptions are made that they be limited to a two-year period, with no automatic extension of exemptions.”

Gay and Lesbian Rights Lobby, Embracing Equality: “Excluding special measures, there should be no religious exemptions or exceptions to Commonwealth anti-discrimination laws.”

The Australian Sex Party: “The Consolidated Act should not include religious exceptions that apply to discrimination on the grounds of sexual orientation or gender identity.... If the Act does include religious exceptions, they should apply only to the ordination or appointment of priests, ministers of religion or members of a religious order.”

ACON (formerly known as the AIDS Council of NSW) said:

“That no exemptions to the consolidated anti-discrimination legislation are available for any organisation receiving government funding when performing those government functions.

“That if exemptions do exist they should be narrow, temporary and made public by organisations utilising them, including when advertising for jobs or the provision of services.”

Patrick J. Byrne is vice-president of the National Civic Council. ²

Freedom of Association

The Bill seriously undermines freedom of association for Australian citizens, expanding the new definition of 'discrimination' to clubs and member-based associations and sporting competitions (Ss 35 and 36).

Further comments

In the Bill, the definition of “Discrimination is “unfavourable treatment” of a person because he/she has a “protected attribute” (S.19(1)). The definition of “unfavourable treatment” includes “conduct that offends, insults or intimidates” (S.19(2)). The definitions are so broad and vague that anything might fall under this definition as grounds for legal action and complaint.

Also, the “unfavourable treatment” definition would seriously undermine freedom of speech in all areas of public life, including in publications (S 53). Subject to the limits of the law of defamation and the prohibition on inciting violence, freedom to offend or insult is, as ABC chairman Jim Spigelman says, integral to freedom of speech.³

The International Covenant on Civil and Political Rights guarantees the right to freedom of thought, conscience, religion and belief and to which Australia is a signatory. This Bill needs to reinforce these rights in law, not make the exercise of these rights as being “unlawful discrimination”. Making band-aid concessions to “religious purposes” appears more as an unwilling concession that is the ‘price’ for having this Bill enacted. Once the machinery is in place then these accretions can be dispensed with over time, particularly as the intent of the groups cited above in the article by Patrick Byrne becomes more manifest.

Thank you for considering our submission.

Yours faithfully,

Gerard and Andrea Calilhanna

² Source: <http://newsweekly.com.au/article.php?id=5191> (accessed 18 December 2012)

³ Honourable James Spigelman AC QC, Human Rights Day Oration, *Australian Human Rights Commission*, 10 December 2012, http://humanrights.gov.au/about/media/news/2012/132_12.html (accessed 18 December 2012)