

**A SUBMISSION TO THE INQUIRY BY THE SENATE LEGAL
AND CONSTITUTIONAL AFFAIRS COMMITTEE
ON THE EXPOSURE DRAFT OF THE
HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012**

Submission by A. Manson

December 2012

Dear Committee members,

I am writing this submission to express my deep concerns at the motives behind the current Australian Government, which is endeavouring to undermine the various freedoms of speech, freedom of conscience and freedom of religion that has always been a part of the democratic life that has existed in Australia for many generations – and that many of our war-servicemen have died for.

This change in government policy towards steering Australia to become a socialist nation is apparent in their establishing of a Media Censorship Commission where anyone who dares to speak out or criticise government members or their policies are gagged. This is especially apparent in the government's Finkelstein Report and especially in the case of newspaper columnist Andrew Bolt, who was found guilty to have contravened Section 18C of the Racial Discrimination Act by Justice Mordecai Bromberg where he stated in his decision that "*fair-skinned Aboriginal people (or some of them) were reasonably likely, in all the circumstances, to have been offended, insulted, humiliated or intimidated by the imputations conveyed in the newspaper articles*" published in the Herald Sun.

My point here is that this type of judgment restricts the freedom of all Australians to be able to openly discuss topics involving multiculturalism about those who might identify themselves by the colour of their skin (e.g. black/white Aboriginals), or about others who have different sexual genders without being labelled racist or sexist because someone simply raised a question about aspects of their motives or behaviour. The recommendations of the Finkelstein report add weight to this claim.

Until recent times, mainstream Australians have been **tolerant** towards others who have 'different preferences' towards what the broader community may regard as 'normal behaviour or moral values' and this has been the foundation of multicultural Australia for many decades and has generally worked very well. However, this intolerance by the broader community is now being taken advantage of by minority groups within the Australian community where they now seek political means through the legislative process to force the broader community to comply with their requirements to have their particular lifestyle (LGBT), culture or religion (Islam and Sharia Law) accepted as mainstream Australian. This is something I find offensive.

I see this proposed Bill as being one of these attacks on the broader Australian community where the government is attempting to stifle public debate about these issues and how they will affect the welfare of the broader community's welfare.

1. Area of Concern – Protected Attributes

I have noted in the Proposed Bill under Chapter 2, Unlawful conduct and equality before the law; the 'protected attributes' on page 34 are listed as:

Age, breastfeeding, disability, family responsibilities, gender identity, immigrant status, industrial history, marital or relationship status, medical history, nationality or citizenship, political opinion, potential pregnancy, pregnancy, race, religion, sex, sexual orientation, social origin.

This makes me concerned that anyone in these categories can legally become 'offended' at anything another person might say in general conversation about them that then paves the way for that 'offence' to become a legal matter adjudicated in a Federal Court.

This proposed Bill puts immense legal power into the hands of any 'protected attribute' individual who wishes to impose his or her values on others within our society by implementing these laws for their own purposes.

In the basic principle of free and fair speech and a fair go, such a Bill is against the broader community's basic human right to express their opinion.

What also concerns me are the new attributes of 'sexual orientation' and 'gender identity' being proposed in these categories. Also of particular concern are the attributes of religion and political opinion listed in Section 17 on page 34.

I consider the attribute of 'marital or relationship status' could be used in adverse ways against innocent Australians as it has been in the UK. An example of this is where similar Human Rights laws to those proposed in this Bill force B&B accommodation owned by religious groups (who reject the homosexual lifestyle) to allow same-sex couples to use their facilities. If a proprietor refuses such an accommodation request by this group, this can lead to legal action and the vilification of the business owners by the media and others in society who have little respect for the proprietor's beliefs or values.

Recommendation

I therefore recommend that the new grounds of sexual orientation and gender identity to be removed from the proposed Bill.

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

2. Area of Concern – Areas of Life

I am particularly concerned that the proposed Bill defines that discrimination can occur (in broad terms) in any area of public life:

Division 3 describes when discrimination is unlawful. In broad terms, discrimination is unlawful if it occurs in any area of public life.

Having such a broad-based law regarding "*any area of public life*" and not having any boundaries or definitions associated with it will have a detrimental affect on our society.

This new proposal effectively states there is no place where an offence can happen. How dangerous can this be to any individual going about their normal daily life and then finding a question they asked or a statement they made caused an offence to someone else who happens to be in the 'protected attributes' group? Such an individual could become embroiled in legal action that could ruin the remainder of their life!

Recommendation

I therefore recommend that this section of the Bill should only apply to DEFINED areas of public life, and not to "*any area of public life*" as it is currently.

3. Area of Concern – the Definition of Discrimination

In Section 19 (page 36) of the proposed Bill, it describes 'discrimination' being defined as 'unfavourable treatment'. Even worse, the proposed law prohibits any conduct that offends or insults another individual in the 'protected attributes', in ways as stated below:

"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.

These points appear to mean that any conduct or treatment from one person to another that is deemed to insult or offends could be claimed as “discrimination”!

To provide an example of this; if a person felt insulted by a comment made about their religious, political opinion, sexual orientation or a relationship status, such an ‘offence’ could attract a discrimination claim of ‘unfavourable treatment’ being made against them. Where does that leave the ‘offender’ if the ‘offence’ was of a trivial nature but exaggerated by the person offended?

The Bill requires that a considerable amount of legal effort be applied by the alleged offender to convince the offended person they did not mean to cause any offence.

Recommendation

I therefore recommend that that Section 19 (2) (b) be REMOVED ENTIRELY!

4. Area of Concern – Exception for Justifiable Conduct

I am particularly concerned that the proposed Bill defines ‘justifiable conduct’ mentioned in Section 23, page 40 as demanding the ‘offender’ to justify the basis of the alleged offence – possibly when they have no idea they were committing an offence:

- (2) It is not unlawful for a person to discriminate against another person if the conduct constituting the discrimination is justifiable.

This can only mean that the offender of the discriminatory act must first be able to establish *justifiable proof* that the conduct he or she directed towards the other person was done “in good faith” – for the purpose of achieving a particular aim that would enable the recipient to be pleased and not offended.

Alternately, if the person was offended, then the offender has to prove “the aim was a legitimate aim” – something that may prove impossible to do.

Recommendation

The exceptions as listed in the proposed law are vague and too broad for any respondent to have clarity as to whether he or she has broken the law. In other words, this section of the proposed Bill allows the judge on the day to have the latitude to hand down a decision that he or she deems appropriate based upon his or her own opinions and NOT what the law prescribes.

If the law is there to defend all Australian’s interests equally, it should be more explicit as to defining what the legal boundaries are, and in doing so, contain clear and defined exceptions where appropriate.

To allow ‘protected attributes’ the right to launch legal action without any legal definitions being established is absurd and offensive!

5. Area of Concern – Exceptions for Religion

In Section 32, page 49, the proposed Bill relates to the appointment of ministers or priests, and the participation by people in “any religious observance or practice.”

The wording of the Bill indicates that religious institutions MUST NOT discriminate in the areas of age, breastfeeding, family responsibilities, gender identity, marital or relationship status, potential pregnancy, pregnancy, religion, sex, sexual orientation when it comes to their internal matters of:

- (i) the ordination or appointment of priests, ministers of religion or members of any religious order;

- (ii) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of any religious order;
- (iii) the selection or appointment of persons to perform duties or functions for the purposes of, or connected with, or otherwise to participate in, any religious observance or practice; and

As an example of what this means to religious orders (e.g. the Catholic Church), their requirements to only have male priests offer Communion can now be overturned by this Bill, as it would oppose discrimination on the grounds of sex. This will mean their *religion* cannot remain what it has been for centuries because it will have broken a 'protected attribute' associated with this Bill.

This Bill in itself discriminates against all religions that in any way violate one or more of the rights of these 'protected attributes.' This proposed Bill is therefore un-Australian and highly discriminatory against Australian society in general to say the least.

It is important to note that if a complainant is an offended person under the 'protected attributes,' the organisation or the individual who caused the offence has to defend themselves at their own legal expense. It is this sort of wording that forced Christian Youth Camps (Phillip Island) and Wesley Mission (Sydney) to spend time (and a great deal of money) attending tribunals and courts arguing on matters of doctrine and 'religious sensitivities' that courts could not relate to. In both matters, the Christian organisations lost their cases - Wesley Mission won on appeal, whilst the CYC appeal is yet to be decided.

Recommendation

It is a legal and potentially huge financial burden for any religious organisation to have to justify matters of doctrine in a secular court (as to the validity or otherwise of their beliefs) and for the judiciary to adjudicate on what constitutes acceptable beliefs. In other words, beliefs may be based on the Bible, Koran or other religious books that the presiding judge may have no regard for.

It is NOT unreasonable to require that religious institutions should comply with all criminal, civil and human rights laws without exception. If any of their clergy break these laws, there are adequate penalties available to bring the offending institution to court and the offenders prosecuted.

Therefore, this section of the Bill is flawed and must not be included, as it is impossible for a secular-based judiciary to be able to judge on whether religious beliefs are compliant to a secular set of beliefs or not. The religion should not be judged in these instances – it is the offence that should be judged.

6. Area of Concern – Exceptions for Aged Care

The proposed Bill says that if a religious institution runs an aged care facility, the facility will NOT be allowed to discriminate against any person who does not accept the established moral, ethical or religious principles associated that institution's beliefs.

From the proposed Bill, the following 'protected attributes' to which these exceptions apply are - Section 33, 3 (a):

- (1) The exceptions in this section apply in relation to the following protected attributes:
 - (a) gender identity;
 - (b) marital or relationship status;

- (c) potential pregnancy;
- (d) pregnancy;
- (e) religion;
- (f) sexual orientation.

This means that the aged care facilities operated by religious institutions (e.g. those that hold to Christian values and who do not condone homosexual relationships and their associated practices), will be deemed as being discriminatory towards such 'protected attributes.' Any homosexual so offended can therefore force the institution using this proposed Bill to allow any practicing homosexual (of any particular type such as trans-sexual, androgynous, bisexual, pansexual, omnisexual, cisgendered, gay, gender-queer, etc.) to lodge a complaint regarding discrimination.

Such a concept would be highly offensive to most ordinary Australians as the Bill would force elderly people in these facilities (who are unfamiliar in associating with individuals and groups who practice such unfamiliar sexual behaviour) to not only abuse their human rights to live their life without having to accept others with alternative lifestyles, but also deny them their human rights to choose the community values they want to associate with during their retirement or convalescing years.

Recommendation

It is totally unsatisfactory that the elderly, infirm and frail-aged persons within our society who live in aged-care facilities run by religious institutions should have their human rights overturned by this proposed Bill in favour of minority groups who will have little or no respect for their ethical, moral or religious views.

If the government considers there is need to provide aged care accommodation for those who are 'protected attributes,' then the government should provide financial assistance to help them establish their own facilities that accommodate their 'protected attribute' lifestyle.

Therefore, this section of the proposed Bill should be removed.

7. Area of Concern – Detainees

Section 97 pages 101 and 102 identifies the rights 'detainees' have regarding documentation and representation.

Recommendation

The proposed Bill fails to identify how the individual came to become a 'detainee'.

Is the detainee referred to an alien (meaning, a non-Australian citizen) and held in a refugee centre awaiting processing (i.e. boat people); or can the term 'detainee' refer to an Australian citizen who is a respondent to a person claiming their Human Rights, and is being 'detained' until the matter is resolved?

This matter needs clarification, as do many other issues contained in this Bill.

8. Area of Concern – Onus of Proof

Normal court procedures elsewhere in the nation place the onus on the complainant to provide evidence that establishes their case against the respondent.

This proposed Bill reverses the onus of proof on the claimant to provide the evidence to lodge a claim and transfers this requirement to the respondent.

In effect, this means the respondent is deemed guilty of the offence by both the claimant and the Court until the respondent is able to prove his or her innocence to their "alleged reason or purpose" for causing the offence.

Section 124 (page 120) deals with identifying whom the onus of proof is assigned to.

Once the complainant has established their prima facie case, the onus is on the respondent to PROVE why their conduct was justified.

Recommendation

To reverse the onus of proof from the claimant to the respondent is unfair and unjust. It defies natural justice and basic human rights associated with Common Law.

This aspect of the proposed Bill should be removed entirely.

8. Area of Concern – Racial Vilification

The proposed Bill includes prohibition of racial vilification in Section 51, page 64.

In Section 18C of the 1975 Federal *Racial Discrimination Act*, this was the law that caused Andrew Bolt to lose his case after complaints were made from the Aboriginal Community against him about statements he made in the Herald Sun newspaper regarding Aboriginal people.

Instead of vilification laws prohibiting the incitement of hatred and so on as they should, the current Federal law (together with the law in the proposed Bill) 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 for an 'offence' to be committed, as many people can feel offended from the actions or behaviour of others every day in the course of their daily life. To allow such people with 'protected attributes' to commence litigation about a perceived offence being committed is unjust on other Australian's rights to their rights of free speech.

Recommendation

Do we want Australia to become a litigious society where selected groups who have 'protected attributes' have the resources of the Federal Court opened to them to pursue legal action to gain recourse for any perceived 'offence' committed against them? [No]

Are we (as a society) now becoming a *Nanny state* where our government makes laws that enable anyone accused of Human Rights violations guilty when accused, unless they have the legal and financial resources available to prove otherwise? [Yes]

I agree that racial vilification laws should exist and be enforced appropriately wherever possible, however the law should be used to prevent hatred and vilification occurring in the first instance rather than providing easy access for litigants to clog up the court systems with claims based on the very broad interpretation of Division 3, Section 51, (2), (a).

Another concern is that although the proposal has not been extended to include sexual vilification at this time, this could easily be added at a later date if this proposed Bill is passed.

I therefore request that Division 3, Section 51, (2), (a) be removed from the proposed Bill.

Yours sincerely,

A. Manson