

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

Preliminary views on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012

Introduction

1.1 The Parliamentary Joint Committee on Human Rights (the committee) has functions to examine bills and legislative instruments that come before Parliament for compatibility with human rights as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Act defines human rights as the rights and freedoms in the seven core United Nations human rights treaties to which Australia is a party. These treaties are the:

- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination against Women;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention on the Rights of the Child; and
- Convention on the Rights of Persons with Disabilities

1.2 The committee recognises that it will have an opportunity to comment on the Human Rights and Anti-Discrimination Bill when it is introduced into Parliament in its final form. However, the committee considers that it is appropriate and timely to share its preliminary views on the Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (exposure bill) now, while amendments are under consideration.

Statement of compatibility

1.3 The *Human Rights (Parliamentary Scrutiny) Act 2011* establishes a requirement for all bills and disallowable legislative instruments to be accompanied by a statement of compatibility, which is an assessment of whether the proposed legislation is compatible with human rights.

1.4 The committee has consistently emphasised its view that statements of compatibility are essential to the consideration of human rights in the legislative process. The requirement for each new bill to be accompanied by a statement of compatibility is intended to increase transparency and accountability in the development of policy and legislation. The committee has said that it does not want statements to be seen as mere procedural hurdles at the end of the drafting process, instead it hopes that the statement requirement will see consideration of human rights genuinely elevated in the policy and

legislative development process. The statement of compatibility is obviously also an important starting point for the committee's consideration of a bill.

1.5 The committee therefore regrets that the exposure bill was not accompanied by a statement of compatibility, setting out the human rights implications of these reforms. The committee acknowledges that statements are not strictly required for exposure drafts. However, given that the statement requirement is designed to encourage early and ongoing consideration of human rights issues in policy and legislative development, it would clearly be good practice to provide such an assessment, particularly where the proposals have the potential to impact on human rights. Providing such information at the exposure stage would have improved community understanding of the precise impact of these changes and also assisted the committee to undertake its scrutiny tasks in a more timely way. The Attorney-General's Department plays a valuable role in supporting and educating the public sector about the statement requirement; it would have been welcome had it taken the lead in this instance and provided a statement of compatibility for this exposure bill.

Human rights issues

1.6 The Parliamentary Joint Committee on Human Rights welcomes the exposure bill as an important step towards providing comprehensive federal anti-discrimination laws. The committee considers that, on the whole, the exposure bill would appear to strengthen protections against discrimination, consistent with the right to non-discrimination, which is a cross-cutting right in international human rights law.

The right to non-discrimination

1.7 The right to non-discrimination is contained in articles 2, 3 and 16 of the International Covenant on Civil and Political Rights (ICCPR) and articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition, article 26 of the ICCPR contains an independent guarantee of equal protection of the law. The right to non-discrimination is also contained in the other core United Nations human rights treaties to which Australia is a party. As such, it is an underpinning principle which applies across the seven core human rights treaties.

1.8 Discrimination means any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of all rights and freedoms. The grounds of prohibited discrimination are not closed, and include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1.9 A difference in treatment on prohibited grounds, however, will not be directly or indirectly discriminatory provided that it is (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved.

1.10 The committee considers that human rights concerns arise with respect to particular aspects of the exposure bill; these concerns are discussed below.

(i) Religious exemptions

1.11 **Overview:** The exposure bill retains the existing exceptions for discriminatory conduct by religious organisations. According to the explanatory notes: 'Given the importance of freedom of religion, it is important to maintain explicit religious exemptions, particularly for matters fundamental to the practice of the religion'.¹ The exposure bill nevertheless introduces a narrow limitation to these exceptions, namely that no provider of aged care services with Commonwealth funding, including religious organisations, can discriminate.² Religious providers can, however, continue to give preference to people of their faith for employment purposes. The exposure bill makes it clear that the requirement for non-discrimination only applies in the context of service provision.³ Therefore, an aged-care provider can still make employment decisions that conform to the tenets of the religion or are necessary to avoid injury to religious sensitivities of adherents of that religion.

1.12 **Human rights compatibility:** The right to freedom of religion is contained in article 18 of the ICCPR:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

1.13 The committee notes that the protection of religious freedom in article 18 of the ICCPR does not extend to an automatic entitlement for religious organisations to be exempted from acting consistently with the right to non-discrimination. It will be necessary for any differential treatment arising from these exemptions to meet the test for legitimate differential treatment to be consistent with the right to non-discrimination. Without the benefit of a statement of compatibility setting out the government's detailed justification

1 Explanatory notes to the exposure bill, p 43, para 183.

2 Exposure bill, cl 33(3).

3 Exposure bill, cl 33(3)(b).

for these provisions, it is hard to determine how such a broad exemption for religious organisations could be consistent with the right to non-discrimination. Without this further information, the committee considers that these provisions are likely to be incompatible with the right to non-discrimination.

(ii) Burden of proof

1.14 **Overview:** The exposure bill proposes a shared burden of proof for discrimination proceedings where they proceed to a court. Specifically, clause 124(1) provides for a shifting burden of proof in relation to the reason for the conduct when discriminatory conduct is alleged. Therefore, the respondent will bear the onus for justifying the reason or purpose for engaging in the discriminatory conduct, but the other elements of the conduct will have to be proved by the applicant. The explanatory notes explain that:

In practice, this will require the applicant to first establish a prima facie case that the unlawful discrimination occurred before the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action, that the conduct is justifiable or that another exception applies. The applicant will not be required to disprove the application of defences and exceptions. The policy rationale behind this is that the respondent is in the best position to know the reason for the discriminatory action and to have access to the relevant evidence.⁴

1.15 These provisions have been criticised as offending against the presumption of innocence.⁵

1.16 The committee notes that a similar but not identical provision is contained in the *Fair Work Act 2009* with regard to proceedings relating to unlawful conduct in the employment context.⁶

1.17 **Human rights compatibility:** The committee notes that the presumption of innocence is guaranteed in article 14(2) of the ICCPR:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

1.18 The presumption of innocence applies to criminal proceedings only.⁷ As discrimination proceedings are civil proceedings, which are concerned with the provision of civil remedies and do not involve criminal penalties, the committee considers that these provisions do not engage the presumption of innocence in article 14(2) of the ICCPR.

4 Explanatory notes to the exposure bill, p 89, para 463.

5 See, eg, submission to the LCA Committee by the Institute of Public Affairs ([PDF 417KB](#)); and the Joint Media Organisations ([PDF 534KB](#)).

6 *Fair Work Act 2009*, section 361.

7 The Human Rights Committee has stated that 'findings of liability in civil proceedings do not affect the presumption of innocence': see General Comment No. 32, [30].

1.19 Although these provisions do not engage article 14(2) of the ICCPR, the guarantees of the right to a fair hearing in article 14(1) of the ICCPR still apply and an assessment of the fairness and reasonableness of requiring the respondent to discharge evidential or legal burdens of proof still needs to be undertaken.

1.20 The committee notes that it is a well-established practice in international and comparative human rights jurisprudence for the burden of proof to shift in discrimination cases once a prima facie case has been made.⁸ Such practice has been welcomed by various human rights treaty bodies.⁹

(iii) 'Conduct that offends or insults'

1.21 **Overview:** The exposure bill defines discriminatory conduct to include 'conduct that offends or insults' a person (clause 19(2)(b)).

1.22 This provision has been the subject of significant criticism for unreasonably restricting the right to freedom of expression.¹⁰

1.23 **Human rights compatibility:** The committee considers that extending the definition of discrimination to encompass offensive or insulting conduct is likely to be inconsistent with the right to freedom of expression in article 19 of the ICCPR, which provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

⁸ See European Court of Human Rights (ECtHR), *Nachova and Others v. Bulgaria* [GC] (Nos. 43577/98 and 43579/98), 6 July 2005; ECtHR, *Timishev v. Russia* (Nos. 55762/00 and 55974/00), 13 December 2005; ECtHR, *D.H. and Others v. the Czech Republic* [GC] (No. 57325/00); European Court of Justice (ECJ), *Susanna Brunnhofer v. Bank der osterreichischen Postsparkasse AG*, Case C-381/99 [2001] ECR I-4961, 26 June 2001. See also case-law of the European Committee of Social Rights: *SUD Travail Affaires Sociales v. France* (Complaint No. 24/2004), 8 November 2005, and *Mental Disability Advocacy Centre (MDAC) v. Bulgaria* (Complaint No. 41/2007), 3 June 2008.

⁹ See eg Concluding observations of CERD on United Kingdom and Northern Ireland, UN Doc. CERD/C/63/CO/11 (2003), [4]; concluding observations of CESCRC on Poland, UN.Doc. E/C.12/1/Add.82 (2002), [7] and Luxembourg, UN Doc. E/C.12/1/Add.86 (2003), [10]; and concluding observations of CEDAW on Bulgaria, CEDAW/C/BGR/CO/4-7 (2012), [4].

¹⁰ See, eg, submission to the LCA Committee by the Joint Media Organisations (PDF 534KB); the Castan Centre for Human Rights Law (PDF 111KB); and the Institute of Public Affairs (PDF 417KB); see also J Spigelman AC QC, Human Rights Day Oration, 10 December 2012, at: http://humanrights.gov.au/about/media/news/2012/132_12.html.

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

1.24 While the right to freedom of expression is not an absolute right and can be subject to permissible limitations, it is nevertheless considered to be a foundational right. It is well established in international and comparative human rights law that the right to freedom of expression protects not only favourable information and ideas, but also those that 'offend, shock or disturb' because 'such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society'.¹¹

1.25 The committee notes that the Attorney-General's Department presented various proposals to amend these provisions to the Senate Legal and Constitutional Affairs Legislation Committee on 4 February 2013.¹² These range from removing the words 'offends or insults' from the definition in clause 19(2)(b) to clarifying that the definition is subject to an objective test. While the committee considers that changes along these lines may remedy the inconsistency, it refrains from drawing any final conclusion until it sees the redrafted provisions and the statement of compatibility.

(iv) Consistency with discrimination concepts in international human rights law

a. Legitimate differential treatment

1.26 The exposure bill provides a general exception for conduct which would otherwise be discriminatory if it is 'justifiable', that is:¹³

- the person engaged in the conduct, in good faith, for the purpose of achieving a legitimate aim;
- the person considered on reasonable grounds that engaging in the conduct would achieve that aim, and
- the conduct is a proportionate means of achieving that aim.

1.27 This approach will replace many of the exceptions in the current discrimination Acts.¹⁴

11 *Handyside v. United Kingdom* (1976) 1 EHRR 737.

12 See document tabled by the Attorney-General's Department at public hearing held by the Senate Legal and Constitutional Affairs Committee on 4 February 2013 - 'Options in response to concerns raised in respect of paragraph 19(2)(b) [\(PDF 966KB\)](#)

13 Exposure bill, cl 23.

14 For example, accommodation provided by charitable or non-profit organisations to people of only one sex or a particular marital status or disability; discrimination against a person on the ground of a person's disability (which is an infectious disease) where necessary to protect public health; educational institutions

1.28 **Human rights compatibility:** The explanatory notes explain that this approach 'sets out a new concept for Commonwealth anti-discrimination legislation' and is intended to align with the international human rights law concept of 'legitimate differential treatment'.¹⁵

1.29 As noted above, to be consistent with the right to non-discrimination in international human rights law, any difference in treatment on prohibited grounds must be justifiable on the basis that it is (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved. The committee welcomes the adoption of a broadly consistent test in the exposure bill.

b. Prohibited grounds of discrimination

1.30 In addition to the existing grounds for prohibited discrimination, the exposure bill introduces new protections against discrimination on the ground of sexual orientation or gender identity.¹⁶ In addition, to align its provisions with protections under the *Fair Work Act 2009*, the exposure bill recognises nationality, political opinion, religion and social origin as prohibited grounds of discrimination in relation to work and work-related areas.¹⁷

1.31 **Human rights compatibility:** As noted above, the grounds of prohibited discrimination are not closed in international human rights law, and include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Among other things, the Human Rights Committee has found that sexual orientation¹⁸ and nationality¹⁹ qualify as prohibited grounds under 'other status'.

1.32 While the committee welcomes the inclusion of these additional prohibited grounds of discrimination as it better reflects the standards under international law, the committee is, however, concerned that a large number of these grounds will be limited only to work. As such, the committee considers that to the extent that most of these grounds are limited only to work, these provisions are unlikely to be fully consistent with the right to non-discrimination.

1.33 The committee notes that a similar concern arises in relation to the right to equality before the law in the exposure bill, which is limited to race only. Clause 60(1) provides for equality before the law for people of all races. 'Race' is defined in the exposure bill to

established wholly or partly for students above a particular age; and discrimination on the grounds of sex or marital status in the context of residential care of children.

15 Explanatory notes to the exposure bill, p 34, para 143-144.

16 Exposure bill, cl 17.

17 Exposure bill, cl 22(3).

18 *Toonen v Australia* (488/92), *Young v Australia* (941/00).

19 *Gueye v France* (196/85), *Adam v Czech Republic* (586/94), *Karakurt v Austria* (965/00).

include colour, descent, national or ethnic origin.²⁰ The right to equality before the law, as noted above, is guaranteed in article 26 of the ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1.34 The committee notes that by restricting the right to the prescribed grounds, the provision falls short of Australia's obligations under international human rights law. Further, article 26 of the ICCPR protects not just equality *before* the law – that is, the equal administration and application of the law to individual cases – but also equal protection *of* the law, which means the distinctions drawn in the law itself must not be discriminatory. The committee considers that the exposure bill may not fully reflect the scope of article 26 of the ICCPR.

c. Special measures

1.35 The exposure bill provides for a single special measures test that applies across all the proposed grounds for prohibited discrimination. Conduct that meets the definition of a special measure in clause 21 of the exposure bill will not constitute discrimination; nor will it come within the scope of the right to equality before the law in clause 60.

1.36 Clause 21 provides that a special measure is a measure that (i) is undertaken in good faith, (ii) for the purpose of advancing substantive equality, and (iii) which meets an objective test of necessity. The explanatory notes state that the proposed test maintains the existing policy from the existing anti-discrimination legislation.²¹

1.37 The committee notes that the definition of special measures in the exposure bill is intended to retain the current position under domestic discrimination legislation. However, the committee is concerned that the definition would appear to be inconsistent with how the concept is understood in international law as it would appear to enable measures that limit rights, to be defined as a special measure.²²

20 Exposure bill, cl 6.

21 Explanatory notes to the exposure bill, p 30, para 131.

22 See for example, comments by the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Observations on the Northern Territory Emergency Response in Australia, February 2010, para 21:

[I]t would be quite extraordinary to find ... that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members. Ordinarily, special measures are accomplished through preferential treatment of disadvantaged groups ... and not by the impairment of the enjoyment of their human rights.

1.38 The explanatory notes do not shed any light on why the exposure bill proposes a definition for special measures that would permit restrictions on the enjoyment of rights, when conventionally such measures should exclusively involve positive measures or the conferral of benefits.

1.39 The committee intends to consider this issue in further detail when the exposure bill is presented in its final form and in light of an explanation in the statement of compatibility.

(v) Exclusion of ICESCR rights

1.40 **Overview:** The exposure bill proposes to harmonise the definition of ‘human rights’ in the bill with the *Human Rights (Parliamentary Scrutiny) Act 2011*, that is, the seven human rights treaties to which Australia is a party. The harmonised definition extends to the Australian Human Rights Commission's functions,²³ which includes a complaints-handling mandate.²⁴ However, the exposure bill provides that the AHRC may not receive individual complaints relating to rights under the International Covenant on Economic, Social and Cultural Rights.²⁵

1.41 **Human rights compatibility:** The committee welcomes the harmonised definition of human rights proposed in the exposure bill. The committee however makes the following comments on the exclusion of ICESCR rights from the AHRC's complaints-handling mandate.

1.42 The committee notes that the exclusion is unlikely to raise any issues of inconsistency with human rights as there is no requirement under ICESCR to provide for a specific type of remedy. However, adopting this approach is unfortunate as:

- It prioritises civil and political rights (CPR) over economic, social and cultural rights (ESCR), contrary to the principle that all human rights are indivisible and interdependent, a principle that the AHRC is required to take into account when performing its functions.²⁶ The committee considers that it would be preferable to provide an explicit mechanism for dealing with ICESCR complaints. Adopting this approach would underline the equal status of both sets of rights, so that ESCR claims might then be raised directly rather than by indirect reliance on CPR.
- The explanatory notes do not provide any reason for this exclusion. The committee is concerned that it may be based on the common misconception that all aspects of ESCR involve issues of resource allocation. However, ICESCR creates obligations of two kinds: (i) obligations of immediate effect (which include, in particular, obligations of non-discrimination and to ensure a minimum core level of enjoyment

23 The AHRC's functions are set out in cl 146 of the exposure draft.

24 Exposure bill, chapter 4.

25 Exposure bill, cl 88(2).

26 Exposure bill, cl 151(1).

of ESCR; and (ii) obligations of progressive realisation (which involve adopting measures to facilitate the full realisation of ESCR over time, subject to available resources). The committee notes that the National Human Rights Consultation Committee recommended a circumscribed ESCR complaints-handling jurisdiction for AHRC.²⁷

- It appears to assume that ESCR are only contained in the ICESCR. ESCR are also recognised in various other treaties encompassed by the revised definition (for example, the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of the Child.) Therefore, the logic of prohibiting individual complaints only in relation to ICESCR rights rather than ESCR more generally is not clear.

27 National Human Rights Consultation Committee Report 2009, Recommendation 13, p xxxii. The Committee suggested that if AHRC was unable to resolve an ESCR complaint, there should be 'no scope to bring court proceeding', (p 360 of the report).