

Submission to the Senate Standing Committee on
Legal and Constitutional Affairs

Human Rights and Anti-Discrimination Bill 2012

7 January 2013



The West Australian



About the parties to this submission

This submission is supported by AAP, ABC, ASTRA, Commercial Radio Australia, Fairfax, FreeTV, MEAA, News Limited, SBS, Sky News and WAN.

The parties to this submission regard free speech, free press and access to information as fundamental to a democratic society that prides itself on openness, responsibility and accountability. Any limitation on openness must be clearly articulated and limited to what is necessary and proportionate in a democratic society and only to protect essential public interests.

Executive Summary

The parties to the submission welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee regarding the *Human Rights and Anti-Discrimination Bill 2012* (the 2012 Bill). The parties support the overall objectives of the 2012 Bill in simplifying anti-discrimination legislation. However, there are parts of the 2012 Bill which will substantially change the regulatory treatment of published and broadcast content and this submission outlines significant concerns in this regard.

This submission addresses the following issues:

1. Extension of the offensiveness and insult test;
2. Introduction of a subjective standard; and
3. Reversal of the onus of proof.

1. Extension of the 'offensiveness' test

The parties to the submission do not support inclusion of 'conduct which offends or insults' within a general statutory definition of discrimination.

With the exception of the *Racial Discrimination Act 1975*,¹ none of the existing Commonwealth acts extend the definition of discrimination to conduct which is simply insulting or offensive. Nevertheless, the 2012 Bill specifically includes such conduct within its definition of 'unfavourable treatment',² thereby extending the application of this test to matters of age, sexual orientation or immigrant status – among others.³

Throughout Australia's media landscape, a wide variety of outlets currently publish or broadcast material which some members of the audience will, on occasion, find offensive. This content ranges from satirical material and political commentary, to informative programming on matters of historical or religious sensitivity. Whilst these, and similar topics, may be offensive or insulting to some viewers, this does not make them discriminatory. Rather, the inclusion of such content within the national conversation is essential for fostering robust social and political debate, and therefore to ensuring a healthy democracy.

There are few subjects which elicit a single view within the community. The regulation of media content to date has accepted that there is the possibility for offence in material which touches upon contentious issues. For example:

- I. Clause 2.14 of the *Commercial Television Code of Practice* allows for the presentation of material which may offend viewers where there is an identifiable public interest for doing so;
- II. Clause 2.1(c) of the *Subscription Broadcast Television Codes of Practice* similarly permits potentially offensive material where that material is presented in good faith in broadcasting an artistic work including comedy and satire, or in the presentation of news, commentary, discussion or debate on a matter of identifiable public interest; and
- III. Standard 7 of the ABC's *Editorial Policies* (Harm and Offence) notes that publishing innovative content involves taking risks and experimenting with new ideas. The standard then notes that 'This can result in challenging content which may offend some of the audience some of the time'.

These standards recognise that in order to satisfy the interests of audiences as a whole, there may be instances in which some level of offence is justified, in the public interest. That is, the possibility of causing offence is sometimes inherent in coverage of complex issues. The 'offensiveness' test in the 2012 Bill would appear to require media organisations to limit the dissemination of complex, contentious or experimental content, to the ultimate detriment of audiences.

To extend the definition of discrimination in this way would also place Australia out of step with current international standards. No other liberal democracy has a human rights or anti-discrimination statute proscribing conduct which merely offends or insults. Similarly, under

¹ *Racial Discrimination Act 1975* (Cth) s 18C.

² Section 19(2)(b)

³ Section 17 – protected attributes

international law, restrictions to free speech on racial grounds are only permitted for vilification, racial hatred, or intimidation, 'and even then only if it incites discrimination or violence'.⁴

Recommendation 1 – remove the terms 'offends' and 'insults' from section 19(2)(b)

The parties to the submission call on the Government to amend section 19(2)(b) to remove the words 'offends' and 'insults' from the definition of unfavourable conduct, and thereby, from the general definition of discrimination laid out in section 19 of the 2012 Bill.

2. Introduction of a subjective standard

The parties to the submission are also concerned by the absence of an objective test from the 2012 Bill's current definition of discrimination.⁵

Whereas section 18C of the *Racial Discrimination Act 1975* (and its replacement in the 2012 Bill: section 51) imposes an objective reasonableness test, section 19 of the 2012 Bill includes no such qualification. As former NSW Supreme Court Chief Justice and current ABC Chairman, James Spigelman, noted in his 2012 Human Rights Day Oration, the logical conclusion to be drawn from this omission is that section 19 measures offence and insult subjectively.⁶

The parties submit that if this is the case, it will place defendants at an unfair disadvantage. Introducing a subjective test will also produce a legal climate in which would-be complainants are encouraged to be unnecessarily 'thin-skinned' and sensitive to offence.

This is an issue which directly affects a variety of media organisations and would significantly restrict the content and discussions which those organisations could publish. The introduction of a subjective test could create significant uncertainty for media organisations conducting pre-publication review of material. The inability of organisations to foresee what standard will be set is likely to have a "chilling effect" on the publication or broadcast of potentially contentious material. This will most directly affect consumers, whose access to the range of content they are currently able to read, hear and see, may be limited as a result.

Take, for example, a 2006 claim filed against SBS in the Australian Human Rights Commission. The complaint was filed under section 18C of the current *Racial Discrimination Act 1975*, and concerned SBS's broadcast of a documentary titled *As it Happened: The Armenian Genocide*. SBS was able to successfully defend itself by demonstrating that a wealth of academic and historical experts (including former Human Rights Commissioner Dr Sev Ozdowski) agree with the historical conclusion that the former Ottoman Empire was engaged in genocide. SBS also emphasised that the documentary focused on events which occurred nearly a century ago. For both these reasons, SBS was able to establish that by an objective and reasonable standard, the documentary should not have been considered offensive to contemporary Turkish people. However, if section 19 of the 2012 Bill had been in force when this complaint was made, the outcome may have been dramatically different. Irrespective of the documentary's historical accuracy and academic merit, the conclusions reached by the Commission would have hinged on the claimant's subjective reaction to the documentary, not its objective offensiveness. The parties to the submission submit that such a

⁴ Professor Zifcak, quoted in <http://www.theaustralian.com.au/business/legal-affairs/abc-chairman-jim-spigelman-slams-alp-laws-that-make-it-illegal-to-be-offensive/story-e6frg97x-1226534081839>

⁵ Section 19

⁶ James Spigelman, 2012 Human Rights Day oration

conclusion would have been both unjust, and to the detriment of Australia's commitment to free speech.

It should also be noted that because the 2012 Bill includes race as a protected attribute,⁷ the objective test included in section 51 (racial vilification) is rendered superfluous. Given the option, no complainant would bring an action under section 51 when section 19 offers a comparable alternative – but without the additional difficulties inherent in meeting an objective test of reasonableness.

Further, the specific exceptions to racial vilification (currently under section 18C of the *Racial Discrimination Act 1975* and replicated in section 51 of the Bill) for anything done or said, reasonably and in good faith, in artistic performances, genuine academic debate, fair and accurate reporting or making fair comment on a matter of public interest, would not apply to an allegation of racial (or any other form of) discrimination made pursuant to section 19 of the Bill.

Recommendation 2 – insert an objective standard and an exception equivalent to section 51(4) into section 19

The parties to the submission call on the Government to insert an objective standard into the general definition of discrimination laid out in section 19. This could be achieved by amending section 19(2)(b) to include the phrase 'is reasonably likely, in all the circumstances' (as is currently included in section 51).

The parties also call on the Government to insert an exception into section 19 which is equivalent in every material way, on all material issues, to the exception laid out in section 51(4).

3. Reversal of the onus of proof

The parties to this submission strongly oppose reversing the onus of proof in favour of the complainant where a prima facie case has been presented.

Burdening defendants with the onus of proving their innocence is both procedurally unfair, and unjust. Should this be coupled with a subjective test for offensive conduct, it would require media organisations to defend their innocence each time a member of their audience felt insulted or offended. Given the public nature of their business, media organisations are subject to frequent complaint, and accordingly, the parties submit that it would place these organisations at an immense disadvantage should they be required to defend their innocence in every instance where offence was claimed.

Once again, this is an issue which directly affects the parties to the submission. For example, the SBS has received a number of complaints over the years related to its broadcast of documentaries concerning issues of historical dispute. Similarly, the ABC devotes substantial air-time to covering the full range of opinions on complex social and political issues. It is the ABC's experience that its coverage on certain issues will attract negative commentary from both sides of an argument. Under the 2012 Bill, the ABC could be faced with having to defend itself in relation to a subjective test of offence being argued by multiple parties with opposing views.

⁷ Section 17

Consequently, to require these organisations to prove their innocence on each and every occasion would create an unfair and unnecessary burden. This unfairness would be further compounded were the 2012 Bill in force, and these organisations been compelled to defend themselves against a subjective standard of offensiveness. In fact, the parties submit that the very the existence of a complaint would likely be sufficient to satisfy this subjective threshold, thereby prejudicing the respondent and tipping the scales in favour of the complainant from the very outset of any investigation.

Recommendation 3 – maintain existing burdens of proof by removing section 124

The parties to the submission call on the Government to maintain the existing burdens of proof, whereby a claimant must show, on the balance of probabilities that discrimination occurred. To achieve this, section 124 of the 2012 Bill should be removed.