

Submission to

Attorney-General's Department Canberra

in response to the

Exposure Draft Human Rights and Anti-Discrimination Bill 2012

by

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21 December 2012.

i)

Thank you for giving me the opportunity to make this submission which I have hurriedly prepared. I do not claim that it is exhaustive and has covered every part of the exposure draft bill.

The paper covers some suggestions for –

Page 1.

Item 1. Objects of the Act.

Item 2. Meaning of discrimination. Freedom of Speech.

Page 2.

Item 3. Burden of Proof.

Page 2.

Freedom of Religion. Section A.

Page 3.

Freedom of Religion. Section B.

Page 5.

Promotion of the collegiate nature of the Commission.

Page 6.

References and Sources.

**Recommendations. Refer page ii)**

ii)

## **Recommendations.**

### **1. Objects of the Act.**

To reflect reality in our society the caveat provision be reinserted in Clause 3 (1) (a) to make it read “the elimination of discrimination... as far as possible etc.

### **2. Meaning of discrimination. Freedom of Speech.**

Division 2. Clause 19.

That the definition be revised to reflect an objective criterion for unfavourable treatment for the various areas that does not affect Freedom of Speech in a detrimental way.

### **3. Burden of Proof.**

Part 4-3. Division 2. Clause 124. Reversal of burden of proof.

Revise the bill’s provision so that the onus of proof is on the complainant along the previous lines.

### **4. A. Division 2. Objects of the Act in so far that it strengthens Religious Freedom.**

That the Objects of the Act be strengthened by the inclusion of an SPECIFIC express clause to the effect to Australia’s International obligations to prevent unjustified forms of discrimination in a manner which upholds rights of religion, association and cultural, as well as any other relevant human right.

### **B. Subdivision C. Clause 33.2. (3)(a) and (b). Commonwealth funded aged care services.**

That Clause 33 (a) be deleted as appropriate with an adjustment to the lettering and numbering to the rest of the clause. (Qualification. Not sure of the effect of clause (3)(b) in these matters.)

### **5) Part 6-2. Division 3. Clause 160. Membership of the Commission.**

Reinsert the AHRC, Subsection 8(2) provisions in a new Section 160(a) in the new Act.

## 1)

### 1) Objects of the Act.

Division 2. Clause 3, subsection (1) (a)

The original ADA, DDA and SDA's caveat to eliminate discrimination "as far as possible" should be included. Unfortunately, given human nature, discrimination will never be fully eliminated. Maybe the outward observance will be but not in thought or private action.

**Recommendation. To reflect reality in our society the caveat provision be reinserted to make it read "the elimination of discrimination ..... as far as possible etc".**

### 2) Meaning of discrimination. Freedom of Speech.

Division 2. Clause 19. Unfavourable treatment includes "other conduct that "offends" "insults" etc".

Comment. This meaning extends discrimination for all purposes into all areas of discrimination under the bill with the Racial Vilification provisions having the defined exceptions. Cl 51 (4) (1) (a), (b) and (c) which is much better for the position re an objective criteria though not perfect.

What is offence? There does not appear to be any definition save that of a subjective one that is not defined. There is no way to know that a person is reasonably or genuinely offended or whether they are claiming offence in order to create trouble for the other person.

Freedom of Speech is at issue here and draws an unreasonable line between what is allowed to be said and unlawful speech.

What Human Rights and International Labor Organisation instruments provide for an offence of being "offended"? I understand that there is no right of "not being offended".

**No doubt you would be aware of James Spigelman's (Former Chief Justice of the New South Wales Supreme Court) criticism of the draft bill** as outlined in his article in the Australian of the 11 December 2012 entitled "Free Speech tripped up by Offensive line".

He sets out further points as regards Section 53 and other issues for your attention.

Refer also to criticisms by Dr Kerkyasharian, Chairman of NSW Community Relations Commission re Freedom of Speech. SMH 13 December 2012. "New definition could entrench class system" by Rick Feneley.

## 2)

See ----<http://www.smh.com.au/opinion/political-news/new-definition-could-entrench-class-system-2ba31.html>.

For an Indigenous view refer to Kerry Pholi's view – "Feelings no motive for respect." Australian. 8-9 December 2012.

**Recommendation. That the definition be revised to reflect an objective criteria for unfavourable treatment for the various areas that does not affect Freedom of Speech in a detrimental way.**

### 3) Burden of Proof

Part 4-3. Division 2. Clause 124. **Reversal of burden of proof.**

Whilst appreciating the distinction between the direct and indirect discrimination test I think this provision goes too far. Isolating the reason and purpose from the other core elements would not be consistent in the approach. As well the proposed provision will simply mean that "it will be too easy" to instigate a complaint. The previous provisions under the ADA, DDA and SDA seemed to work. Separate tests for direct and indirect discrimination should apply.

**Recommendation. Revise the bill's provision so that the onus of proof be on the complainant along the previous lines.**

### 4) Freedom of Religion.

#### A.

It is disappointing to see that Freedom of Religion is relegated to "Exceptions" given the importance of Freedom of Religion. This importance is acknowledged on page 41, point 186 of the Explanatory Note. Casting these rights negatively, in the form of "exceptions" does not do justice to their importance. It suggests that they are "tolerated" rather than positively recognised as legitimate and acceptable.

There needs to be a better balance between religious freedom and other human rights in the sense that their importance needs to be better recognised.

### 3)

Religious rights should not be cast as “exceptions” but should be enacted to acknowledge that they are fully fledged rights in themselves as outlined in the International Covenant on Civil and Political Rights (ICCP) which is in force in Australia.

ICCP articles 4(2), 2(1) and 26 apply but particularly Article 18.

The right to religious freedom is a “non-derogable” right under 4(2), meaning that governments may not act to restrict or suspend this right even in times of public emergency. However it is acknowledged that this freedom may be subject to some restrictions- “.....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” 18(3).

Whilst not mentioned in the Objects of the Act as being human rights instruments in force for Australia the “Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief” (DEIDRB) could also act as an advisory source for guidance.

Another point, though I am not going to elaborate on it, is that there needs to be a broad view of the bodies that constitute organisations and groups of people.

#### **Recommendation .**

#### **Comment -**

I am not competent to technically know how to express a more positive view of “Freedom of Religion” as outlined above but I offer that if you retain the “Exceptions” which, no doubt you will –

**Recommendation - that the Objects of the Act be strengthened by the inclusion of a SPECIFIC express clause to the effect to Australia’s international obligations to prevent unjustified forms of discrimination in a manner which upholds rights of religion, association and cultural, as well as any other relevant human rights.**

#### **B.**

**Exceptions for religious bodies and educational institutions.**

**Subdivision C. Clause 33.2. (3)(a) and (b)**

**Commonwealth funded aged care services.**

4)

**Religious bodies do not construe their mission expressly in terms of “excluding” people. They simply include and work with those who uphold the world-view and moral framework of the body. All are free to participate on that basis or to go their separate ways.**

**Likewise, religious people often have to accept that they really do not belong in some places that espouse a different world-view and moral framework.**

**Also note re ICCPR-Civil and Political Rights 18.3 and Religion Declaration Article 6.**

The United Nations Human Rights Committee has also noted in comment on 18 that “not every differentiation of treatment” will constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. (Reasonable in relation to their belief system!)

**The Explanatory Note stated on Page 42 that –**

- 1) there was significant feedback during consultations of the discrimination faced by older same-sex couples in aged care run by religious organisations, particularly when seeking to be recognised as a couple; and
- 2) the government does not consider that discrimination in the provision of those services is appropriate.

**Comment.**

- 1) What was the strength of 1) above and 2) what was the evidence for such assertions? Were any religious aged care providers given an opportunity to rebut such a point?
- 2) Policy should be based on evidence not assertion!
- 3) Just because the government provides funding for aged care is no justification for it binding a recipient of such funding to its views. What mandate does the government have from the people in the Federal election in 2010 when it was elected on a minority basis? For that matter was it in the policy that the ALP took to the people in 2012? Even if it was the general population would not have known about it!
- 4) Same-sex people can go to a non-religious aged care provider. No one is forcing them to go to a religious provider. Refer to the opening paragraph of this section.**
- 5) Were same-sex people at the consultation using this point as a “political weapon” to gain acceptance from religious bodies?
- 6) a) Religious providers provide such aged care out of their beliefs and should not be forced to act against their consciences.

## 5)

b) Inhabitants expect and go into these institutions on the basis of the faith provision which includes a moral point of view/ issues.

### **Qualification - General comment for the Attorney General's Department.**

I appreciate that these points are "political" and that you have no influence over them in so far that you act on the instruction of the government.

### **Recommendation.**

**That Subdivision C.33. Clause (3) (a) be deleted as appropriate with an adjustment to the lettering and numbering of the rest of the clause.**

Qualification. I am not sure of the effect of (3) (b) in these matters.

## **5) Promotion of the collegiate nature of the Commission.**

Part 6-2. Division 3. Clause 160. Membership of the Commission.

I do not know why the AHRC Act provision was not reproduced. Would not this be a good thing to have, especially in terms of the operation of the Commission? Whilst the Commissioners might have different functions they should all be working together. Their relationships with one another are vital here.

**Recommendation. Insert the previous AHRC, Subsection 8(2) provisions in a new Section 160 (a) in the new Act.**



## 6)

### References and Sources.

1) \* Human Rights and Anti-Discrimination Bill 2012. Explanatory Notes.

2)

\* Australian. 11 December, 2012. James Spigelman. Article "Free Speech tripped up by Offensive Line."

\* Editorial. Australian. 12 December 2012.

\* Sydney Morning Herald. (SMH) 13 December 2012. Rick Feneley article on Dr Kerkyasharian entitled "New definition could entrench class system."

\* Australian. 8-9 December 2012. "Feelings should not be afforded special protection from being hurt." Kerry Pholi.

\* Australian. 11 December 2012. "ABC Chairman slams ALP laws that make it illegal to be offensive"

\* Australian Christian Lobby. "Proposed bill creates concerns for freedoms – Have your say"

<http://www.acl.org.au/2012/12/proposed-bill-creates-concerns-for-freedoms-have-your-say/>

\* SMH. 20 November 2012. "Roxon defends her anti-discrimination bill"

<http://news.smh.com.au/breaking-news-national/roxon-defends-her-antidiscrimination-bill-20121120-29mwc.html>

3. \*Explanatory Notes.

4. \* ICCP.

Also note re ICCPR-Civil and Political Rights 18.3 and Religion Declaration Article 6.

The United Nations Human Rights Committee has also noted in comment on 18 that "not every differentiation of treatment" will constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Paragraph 13 of the Human Rights Committees General Comment 18 (Non Discrimination).

\* DEIDRB

5. \* Explanatory Note.

As well some of the above might refer to the Senate Enquiry items. Former Acts-ADA, DDA and SDA RDA are also referred to as well as parts of the AHRCA.