

21 December 2012

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

Dear Sir/Madam

Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012

The Human Rights and Anti-Discrimination Bill 2012 is an important legislative initiative to improve the protection of human rights in Australia. The legislative proposals contained in the Bill would introduce many important improvements to the current protections contained in Commonwealth anti-discrimination legislation.

This submission focuses on two areas where the Bill could be improved—the importance of ensuring anti-discrimination legislation promotes respect for all human rights, and ensuring that the consolidation of the Commonwealth discrimination legislation does not undermine the effective operation of minority cultural and religious organisations.

Emphasising the importance of all human rights

It is important that anti-discrimination legislation is drafted to clearly express support for all of the human rights instruments that Australia is committed to respecting under international law. The promotion of equality is appropriately recognised as a key object of the Bill through its inclusion in clause 3. Unfortunately the clause fails to mention a variety of other rights that should be respected and promoted within anti-discrimination legislation including freedom of association, freedom of expression, the right to religious liberty, the right to privacy, and the rights of minorities. The Bill could easily be amended so that it demonstrates appropriate respect for the relevant rights. For example, clause 3(1)(d) could be amended to specifically identify these rights and any other relevant rights.

The general principle that anti-discrimination legislation should be drafted to show respect for all human rights should be complied with throughout the Bill. Under Part 2-2 Division 4, the provisions of the Bill will not apply to an extensive range of areas often because other important human rights would be adversely affected if such a limitation was not imposed. For example clause 35 protects rights such as the right of persons to enjoy their own culture—a right protected by a variety of international human rights instruments including Article 27 of the International Covenant on Civil and Political Rights.

Despite the justifiability of the various limitations the term 'exceptions' is used throughout the Bill. This kind of terminology has the unfortunate consequence of providing support for the view that these limitations, or at least some of them, are unjustifiable restrictions on the operation of anti-discrimination legislation rather than an appropriate way to structure the legislation so that it respects a variety of human rights.

It would be preferable for the Bill to be structured in a way that avoids this undesirable devaluing of a range of important human rights. Clause 21 provides an example of how this could be done as it explicitly states that special measures are not discrimination. Adopting

similar language for the limitations in Division 4 could be a useful way of ensuring the Bill appropriately recognises and respects all the human rights that Australia is obliged to protect under international law.

A further area of concern is that clause 47 of the Bill requires a review of the 'exceptions' within three years of the Act's commencement. A requirement that there be a review only of this part of the Bill has the potential to promote the view that at least some of these limitations are unjustifiable and should be regularly reviewed and hopefully removed or further limited in the future. Considering that many of these limitations are aimed at the promotion of human rights it would be preferable for clause 47 to be removed or expanded to address the entire Bill. A failure to make this amendment could reasonably be interpreted as devaluing the significance of a variety of important human rights.

Protection of cultural and religious groups

It is important that anti-discrimination legislation is structured in such a way that it supports the operation of cultural and religious organisations. The right of individuals to enjoy their culture and practice their religion is explicitly recognised under international law (e.g. International Covenant on Civil and Political Rights arts 18, 22, 27). The current structure of the Bill may undermine, rather than effectively support, the operation of these groups.

For example, clause 33(2)(a) limits the operation of the Bill to a 'body established for religious purposes'. Such a provision leaves open the possibility that a narrow interpretation of 'religious purposes' could be adopted that would exclude many religious charitable groups from being recognised as religious organisations and so deprive them of the ability to hire and retain employees committed to the religious nature and objectives of the charitable group.

The religious identity of many charities is central to its ability to effectively perform its work as its religious identity is often a key factor that leads adherents of the particular religious community to donate their time and money to the charity. A failure to adequately protect the ability of religious organisation to select employees who are committed to the religious mission of the charity has the potential to undermine the valuable community assistance provided by many religious charities. It would be useful for clause 33(2)(a) to be amended to specifically provide protection to religious charitable organisations that are operated according to a religion.

The proposed expansion of the Bill to include volunteer workers is also a concern in relation to the operation of religious charitable groups. Many religious charities would have to divert their resources from their charitable work to defending themselves against discrimination complaints by volunteers. This could have many unfortunate consequences including a reduction in the amount of charitable services provided, a reluctance of charities to rely on volunteer assistance, and an inability of some charitable organisations to continue operating.

The Human Rights and Anti-Discrimination Bill 2012 has the potential to substantially improve the protection of important human rights in Australia; however, there are some important areas where the Bill needs to be amended. Two important areas where changes should occur is in ensuring that the Bill emphasises the importance of a variety of important human rights, and adequately protects the operation of cultural and religious groups within the community.

Yours faithfully,

Greg Walsh