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Australia

HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

On 21 November 2012 the Senate referred the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 for inquiry and report. The purpose of the Bill has been described as consolidating existing Commonwealth anti-discrimination legislation into a single Act and providing the highest standards of protection.

First impressions

Simplifying, consolidating and clarifying legislation are laudable aims and we support this intent. On reading the document however, we were struck by the lack of any logical basis, policy principles, or clarity as to whom it applies. To our understanding, much of the Bill is unconstitutional. The Bill appears to be more of an expression of an ideology or an attempt at coercing the population to accept a certain philosophical viewpoint than a genuine move for legitimate protection against unfair discrimination. Any legislation that devotes 20 pages to exemptions must be deeply flawed in its principles.

Applying the test of “*what is written in the draft that does not belong*” and “*what is not included but should be*”, we conclude that the document lacks integrity. There is no chain of logic. The Bill starts with mainly ILO instruments to justify using the external affairs power of the Commonwealth but then seemingly ignores them as it does not extract protected attributes from these instruments nor identify residual attributes not covered by existing labour laws. The list of protected attributes (section 17) seem to be plucked from thin air and then there is a leap from employers who are the focus of the ILO instruments for treating employees fairly, to apparently including everybody in the country although this is rather vague as the Commonwealth has no head of power for issues such as public life.

There are genuine issues of unfair discrimination that need at least State legislation but it is hard to escape the conclusion that this Bill is a centralist move for mass control.

Principles

The usual starting principle for any important issue is to ask “what, if any, **role for government** is there on this issue?” For example, the Commonwealth obviously has a defence role in protecting the citizens against external threats but for many social issues there is no role for government at all. Assuming the unsaid purpose is social harmony then that can be a legitimate and necessary function of government (but more State than Commonwealth). What then is the best way to encourage social harmony? A country needs some unifying forces or it ceases to be a nation. Like a piece of furniture, nations fall apart when pressure comes and the glue fails as we see in the Middle East at present. An identity, something to love and cherish, are qualities - the glue - which also have to underpin the family and local communities or there is no foundation for society other than selfishness. Cohesion is more important than inclusion.

The bulk of the government’s role in social harmony should be concerned with maintaining the rule of law. Aside from criminal law and general good governance of services, any residual should not be so much about keeping the component sectors and groups from causing each other trouble but more about providing an environment for freedom, responsibility and trust - this Bill does exactly the opposite by potentially creating fear of litigation, lack of trust and animosity.

Moving on to the next principle, governments have at least a dozen instruments available for pursuing their policy objectives - stimulus funding, leadership, regulation, education, research, information transfer, taxation, demonstration, governance structures and so on. Choosing the **appropriate policy instruments** is critical as the instrument must match the deficiency in the existing arrangements but this seems little understood. For example stimulus funding may be needed for a time if the target group lacks the resources to get over a hurdle; information transfer may be needed if the results of research are not getting through to the appropriate audience. On the other hand there is no sense applying regulation if the target group is not educated or skilled in the subject area.

In the case of this Bill, legislation seems entirely the wrong instrument. This Bill demonstrates a lack of trust in the Australian people. It is akin to schoolyard rules. Social justice and harmony are worthy aims but should not be legislated; that is tyrannical. Conduct flows from character, not legislation. Real social harmony is built on truth, responsibility and common values. **ISSUES OF CONSCIENCE SHOULD NEVER BE COMPROMISED BY THE STATE** except in extreme circumstances.

The next policy principle is to ask “what is the **role of Commonwealth** vis-à-vis the States?” The Australian Constitution is of course the guide here and whichever way the Bill is looked at, most of it is unconstitutional as we will explain later.

Finally, how are existing freedoms to be maintained? Similar legislation overseas appears to be used for the capricious protection of a few favoured groups from public scrutiny and comment.

Nobody wants their everyday behaviour (as distinct from criminal behaviour) to be the business of government at all let alone the gratuitous gall of being told what thoughts and actions are proscribed. Personally we do not want to be told what to think, feel, say and believe by a government whatever persuasion. As far as individuals are concerned, legislation should only ever define the limits to socially-accepted behaviour, never the norm. This Bill appears to be a serious threat to freedoms of speech, conscience and truth as a basis for law and order.

The cost of government interference

Take the example of an employer as the Bill is supposedly mainly in response to ILO instruments. There could be dozens of factors that an employer may take into account in assessing applicants for a job - have they the necessary skills/qualifications, length of experience, aptitude, customer appeal, physical capacity, IQ, communication ability, personal hygiene, teachability, likely loyalty, honesty, integrity, will training expense be lost by early departure, emotional stability, enthusiasm, compatibility with other staff, conformity to the beliefs, ethos or morals of the employer, likely costs due to ill health, attendance record, work ethic, and so on? Put another way "*will this person be a profitable investment or not?*" There are physical, psychological and moral dimensions to this question. Which factors are valid and which are not, bearing in mind that the more government interferes in the choice, it increases the risk that the investment in any new employee will be less profitable?

The same can be said in other areas of life. Then there is the fear/burden of litigation which militates against productivity of individuals and employers. As worded, the Human Rights Commission may need a massive staff to handle the unconstrained level of complaints that this Bill would facilitate.

What is unfair discrimination?

In our society some groups/individuals/companies will be unfairly discriminating against other individuals or groups but we have no way of knowing the extent of genuine cases. Indeed we wonder whether a shared understanding of "unfair" is possible given its subjective nature and the range of factors that an individual takes into account consciously and subconsciously. Importantly none of the protected attributes have any inherent fairness associated with them. Social

origin for example would have a profound influence on a person's perception of what is fair.

Discrimination is not a "dirty word" but actually a sign of a healthy person. It is a core feature of human nature. It is character trait that should be encouraged, not eliminated. Humans need to distinguish between right and wrong, and right and almost right. What then is unfair discrimination?

The definition of discrimination in section 19 (2) is mindboggling in its scope - *"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."*

Using this definition, Gina Reinhart could lodge a complaint against Wayne Swan for his comments about her "social origin", an atheist can be insulted by a nativity scene at Christmas or anybody at a burka or an Aboriginal smoking ceremony, a homosexual couple being refused a marriage (which would be in conflict with the Marriage Act) and on and on. This provision is a lawyer's dream come true.

Daily any individual can personally feel offended by the actions of others and offensive material put before them. Indeed it seems some can be offended by others being offended at them but in practice we expect only certain favoured groups would reap a benefit. Part (b) of this definition must be completely revised and be based solely on whether the treatment was true, not on how the recipient felt.

The protected attributes listed in the Bill are a very mixed bag with no apparent rhyme or reason.

- (a) age;
- (b) breastfeeding;
- (c) disability;
- (d) family responsibilities;
- (e) gender identity;
- (f) immigrant status;
- (g) industrial history;
- (h) marital or relationship status;
- (i) medical history;
- (j) nationality or citizenship;
- (k) political opinion;
- (l) potential pregnancy;
- (m) pregnancy;
- (n) race;

- (o) religion;
- (p) sex;
- (q) sexual orientation;
- (r) social origin.

Why not include the type of car someone drives, whether they have tattoos, are short people, or have a criminal record?

Then when it comes to work (section 24 page 41), what is the logic in apparently reducing the list to:-

- (a) family responsibilities;
- (b) industrial history;
- (c) medical history;
- (d) nationality or citizenship;
- (e) political opinion;
- (f) religion;
- (g) social origin?

Does this mean that an employer can reject someone on the grounds of race, marital status or sexual preference?

So under what circumstances do the remaining protected attributes apply? This Bill gives no useful guidance.

Failings of the list of attributes

Much could be said about each of the attributes but the following is just a sample to illustrate the lack of rationality.

- **Breastfeeding** is an inappropriate issue to be even mentioned in Commonwealth legislation;
- If **immigration status** and **nationality or citizenship** are legitimate grounds for discrimination in certain areas of Commonwealth employment or being elected an MP, why are those grounds not good enough for others?
- Not being able to request **medical history** for say a pilot is ridiculous!
- As for **political opinion**, does that mean a Liberal parliamentarian can be forced to employ a Labor supporter as a staffer or vice versa? Would all political electioneering material be liable to a complaint?
- While the Commonwealth as an employer may decide that it will not discriminate on **religious** grounds, it should not force that restriction on others as there are downsides to employing adherents to certain faiths that an employer should not have to bear if they do not want to;
- As acknowledged in the Government's announcement, **sexual orientation** is a new addition. Despite the claims, sexual orientation is not an inherent

attribute but a lifestyle choice with strong moral overtones. No employer should be forced to compromise their moral beliefs nor should any member of the public be silenced from speaking about their beliefs;

- Finally, what on earth is **social origin**? It is not defined and sounds like a catch-all provision to ensure almost any complaint can be successful. Everybody has a social origin or some sort.

A better way

While we support outlawing discrimination on the basis of issues over which an individual has no control such as age, race, disability (with conditions) and gender; legislation should not extend to matters of choice. Individuals make many choices and no particular choice is sacred - just the right to make individual choices. Individuals should then bear the consequences of their own choices; preferably not other individuals or society as a whole. The Exposure Bill seems to use the guise of issues with a legitimate basis to introduce matters that we feel fall in the category of social engineering.

We suggest the protected attributes listed in the Bill should only be:

- (a) age (with conditions);
- (b) disability (with conditions);
- (c) family responsibilities;
- (d) pregnancy;
- (e) race;
- (f) sex.

We believe that now is the time to start dismantling this type of legislation rather than building it up. We expect you are aware that Canada for example recently repealed one section of its Act because it was sometimes used unjustly. There should be less government interference in the employment/accommodation area, not more.

The Bill has too many areas that are open to interpretation by commissioners and judges and that is dangerous especially where there are social and moral dimensions. This is not a reflection on the present incumbents in Australia but experience in Europe and Canada shows that Australia could easily suffer similar injustices in future. Australia needs to avoid the whole rights, discrimination and social intervention/inclusion system becoming a self-perpetuating growth industry as has occurred overseas where it is sometimes used as a means of persecuting targeted minority groups who hold conscientious objections. The chairman of Britain's Equality and Human Rights Commission even came out and publicly vilified a minority group! We should simply not have such laws that are so open to ideological interpretation.

Burden of proof

The burden of proof should always remain on the accuser. This has been a principle of civilized societies entrenched in common law for centuries. It is fundamental for every citizen and business to be regarded as innocent until proven guilty. Otherwise someone can be bankrupted just trying to clear their name for example.

Is legislation needed?

The justification for the Bill is weak. Of the Objects of the Bill listed on page 3, at least (c), (d), (e) and (f) do not require any underpinning legislation; the Commonwealth could just carry out those activities itself.

Then page 27 asserts that the main Constitutional basis is the external affairs head of power. We assume that virtually all the issues in the cited covenants and conventions are already enacted in Federal labour awards and other industrial relations provisions such as unfair dismissal. However the cited instruments actually only relate to a small proportion of the protected attributes on page 34 and services on page 20. The Bill goes well beyond the international instruments and so its justification on this head of power is spurious.

The Commonwealth does not need such legislation for employment in the Public Service or Defence Forces or other Commonwealth activity and the Bill duplicates some State and Territory legislation. In fact the wording of the Bill in relation to State and Territory legislation is very messy because it has overstepped the mark of the Constitution.

The Bill mentions the corporations, commerce and trade, banking and insurance, and telecommunications heads of power but it is a stretch of the imagination to suggest that anti-discrimination is included in the original intent of these heads of power. We believe it is a misuse of the Constitution to include these heads of power in the Bill.

We suggest that the appropriate way of putting into effect Australia's obligations under the cited international instruments is to not have Commonwealth legislation at all but to ensure the States and Territories include those obligations in their legislation. Furthermore such efforts by the Commonwealth should be restricted to the very limited range of attributes included in the international instruments.

Scope of the legislation

The Bill should be very clear about who it applies to. As worded, a reader may well obtain the impression that it applies to every employer, landlord and citizen in the country as page 26 says that it will apply throughout Australia (geographically though). To our understanding, the Commonwealth does not have this power.

Also Division 3, section 23 mentions “public life” which is an all-encompassing word but the Commonwealth has no Constitutional powers for that either. Parts of “services” described on page 20 appear to be no business of the Commonwealth - entertainment, recreation, refreshment and so on. Also why are religious organisations even mentioned? They are not a Commonwealth responsibility.

Section 96 of the Constitution allows the Commonwealth to make tied financial assistance available to the States and Territories. There is no provision in the Constitution for the Commonwealth to make tied grants or loans available to groups, local government, or individuals. All tied financial assistance must be via the States and Territories. As far as we can see, the Commonwealth has no head of power in relation to accommodation so it should not have anti-discrimination laws in relation to accommodation.

To our understanding, Constitutionally the Bill could have no application to individuals, local government, private companies, print media, community organisations and associations, private sector landlords, religious organisations, or unincorporated bodies. This should be made clear.

Vilification

As the Bill stands it only outlaws vilification on racial grounds. There may be pressure in the Committee stages to include other sorts of so-called hate speech including on the grounds of religion or sexual preference. Anti-vilification provisions are a gratuitous inclusion in this Bill and section 51 should be deleted entirely. So called hate-speech legislation is a failed experiment and an anathema in a free society where there can be well-deserved and justified grounds for criticism or causing offence. Such laws have no place on our statute books. Other laws for example about defamation and offensive behaviour are already in place and are adequate.

The wording of section 51 is also particularly worrisome. As it stands, a person only has to feel offended or insulted or whatever to bring a successful complaint. Feelings are no basis for determining whether an act is lawful or not. Neither should intent to insult etc. even be the basis of the issue; the only grounds should

be whether the offence or insult is based on truth or not. Some of the high profile cases in Australia appear to be racial groups hiding behind the legislation to avoid fair comment or criticism of the behaviour of a section of the racial group. That is unjust.

Affirmative action

Affirmative action (section 21 page 38) has reached its use by date and that section should be deleted entirely. Equal opportunity remains a laudable goal but the nation has matured to where we no longer need imposition of quotas. The section states that “special measures to achieve equality are not discrimination”. That statement is untrue as favouring one group over another is discrimination. It is a national shame to enshrine a deliberate falsehood in legislation.

Again the wording is misleading. While all people are of equal value and legislation may aim to achieve equality of opportunity, for medical treatment and before the law, etc, no legislation can make every person equal in all respects as section 21 purports. Whatever criteria are used, no cultures, religions or philosophies are equal and neither are humans in terms of capabilities, behaviour, character and so on. One of Australia’s strengths is that we have a competitive society and while we must care for those who suffer disadvantage, it is nonsense to suggest that all individuals and organisations are equal.

Exemptions

The 20 pages devoted to exemptions in Part 2.2 illustrate that the Bill is not based on sound principles. If exemptions are permitted for some people/organisations then the protected attributes themselves should not apply to anyone and should be deleted. For example if it is okay for religious organisations to have exemptions for gender identity; marital or relationship status; potential pregnancy; pregnancy; religion; and sexual orientation (as drafted), then anyone with similar views should likewise enjoy such exemptions. Where is there logic in making a difference between the plural (organisations) and the singular (individuals) when it comes to faith? These attributes should be removed from the list of protected attributes altogether and then the exemption can be dispensed with.

Conclusions

We believe this Bill if it became law would be counterproductive and destructive to Australian society by becoming a cause for social disharmony rather than a cure. It will bring out the worst in people rather than the best by promoting a culture of litigation, immaturity (“run to the teacher to solve our differences”), being

quarrelsome and fearful. While genuine cases of unfair discrimination in employment do need to be addressed, this is not the way.

We propose that the Bill be dismantled to remove the ideological content that equates to micro-managing people's lives or removing freedoms of belief and conscience. Furthermore the idea of feeling offended, insulted, and etc. should be removed.

Burden of proof should not be reversed.

The scope should be wound back to cover only attributes over which an individual has no choice, namely age, disability (with conditions), family responsibilities, pregnancy, race and sex.

The Bill should only rely on the external affairs head of power and to put into effect only the attributes not covered in existing labour laws. It should impose on the States only the exact requirements of those instruments and no more.

The Bill should make it clear that complainants only go to the States and not to the Human Rights Commission.

Sections regarding vilification (s 51) and affirmative action (s 38) should be removed as they are bad law.