# DISSENTING REPORT BY COALITION SENATORS

1.1 Coalition senators oppose the proposed *Human Rights and Anti-Discrimination Bill*. We do so for four main reasons:

- The provisions of the bill violate fundamental human rights;
- The scope of the bill is impossibly wide and dangerously vague;
- The bill is internally inconsistent and liable to produce unintended consequences;
- The bill would damage Australia's social fabric by encouraging a "culture of complaint".

1.2 We had considered the possibility of recommending a series of amendments to the Bill, in order to repair the serious flaws which we have identified. However, in our view the Bill is riddled with so many fundamental errors, of both a technical and substantive kind, that we have concluded that it would be better to abandon it altogether. As well, the Bill has become, in the relatively short time since its release last November, almost synonymous in the public mind with legislative over-reach and intrusive government – as the very strong reaction of so many commentators, opinion-leaders and ordinary citizens demonstrates.

1.3 In this Dissenting Report, we focus upon the main reasons why, in the view of Coalition senators, the Bill is, as a matter of principle, totally unacceptable in its current form. Nevertheless, we cannot refrain from observing that the "selling" of the Bill by the government, and in particular by the former Attorney-General, Ms Roxon, has been a master-class in political incompetence. Nothing could have been more calculated to destroy the prospects of reforming Australia's anti-discrimination laws than the high-handed, patronizing, politically correct approach of the former Attorney-General.

1.4 That is a shame, for we accept that Australia's existing suite of anti-discrimination laws – which have largely enjoyed bipartisan support – are imperfect and capable of improvement. In our recommendations, we identify one area in particular – discrimination on the grounds of sexuality – which is an obvious gap in the existing legislative scheme. However, that matter can be addressed by a simple amendment to the *Sex Discrimination Act*, rather than by the sweeping and intrusive changes to existing law which the Bill attempts.

## The provisions of the bill violate fundamental human rights

1.5 Despite its misleading title, the draft bill is not a human rights bill at all, if by "human rights", we mean the principles declared, in particular, in Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Rather, important provisions of the Bill violate fundamental human rights recognized by those instruments. In particular:

- The definition of "unfavourable treatment" in cl. 19(2) of the Bill, by including "conduct that offends [or] insults", constitutes an impermissible limitation upon freedom of speech, freedom of expression and freedom of the press, protected by Article 19 of the Universal Declaration and Article 19 of the Covenant.
- The reversal of the burden of proof provided for by cl. 124 of the Bill, which casts the burden of proof upon a person against whom a complaint is made to establish that they did not act for an unlawful reason or purpose, is arguably inconsistent with the presumption of innocence provided for by Article 11 of the Universal Declaration and Article 14 (2) of the Covenant.

### *Freedom of expression*

1.6 Article 19 of the Universal Declaration provides:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

1.7 Article 19 of the Covenant 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 the 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.
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> 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:
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> (a) for respect of the rights of reputations of others;
>
> (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

1.8 In a society in which respect for freedom of speech and expression is a fundamental value – and, in the view of coalition senators, Australia must always be such a society – the Parliament must be vigilant to ensure that those freedoms are not impinged upon by new laws – however well-meaning their purpose. If freedom of speech means anything, then that freedom cannot depend upon the popularity of those views. Indeed, it is the unpopular, unfashionable or eccentric view which is in most need of protection. We are in complete agreement with the wise observation of John Stuart Mill:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[1]

1.9 To categorize conduct (including speech) as "unlawful" because it might cause offence or insult to another person would impose a massive limitation of freedom of expression. Literally any controversial opinion would potentially be caught. It is difficult to imagine a measure more inimical to free public discussion than cl. 19(2) of this Bill. Not only would the proposal threaten Australia's proud tradition of free and robust political discussion, it would also, in the view of coalition senators, be a violation of Australia's obligations under Universal Declaration and the Charter, set out above.

1.10 Although, late in the day during the course of the last hearing on the Bill, the Secretary of the Attorney-General's Department indicated that the Government was likely to resile from the inclusion of "offends [or] insults" in the definition of unfavourable treatment, neither the previous Attorney-General, Ms Roxon, nor the new Attorney-General, Mr Dreyfus, have committed the government to that course. In any event, there is no indication that the similar words in cl. 51, taken from s. 18C of the existing *Racial Discrimination Act*, will be withdrawn.

### *Reversal of the burden of proof*

1.11 Cl. 124 of the Bill creates a statutory presumption that a person against whom unlawful conduct is alleged that:

> the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct, unless the contrary is proved.

1.12 Article 11 of the Universal Declaration and Article 14 (2) of the Covenant recognize the presumption of innocence as a fundamental human right. While it is true that Arts. 11 and 14(2) deal specifically with criminal offences, they nevertheless give expression to a more general principle of procedural fairness: that a person accused of unlawful conduct should not have to prove their innocence. Cl. 124 violates that principle.

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1 Mill, *On Liberty* Ch. 2.

1.13 It is not to the point that an applicant must initially show a *prima facie* case before the burden shifts. That is merely a statement of the commonplace fact that the complainant, as the party seeking redress, must come to the court and put before it material on which it may act. In an ordinary civil case, the complainant will have the burden of proving each element of his cause of action on the balance of probabilities. Because of cl. 124, a complainant is doubly advantaged, because:

- he is only required to establish a *prima facie* case, not discharge the burden of proof on the higher standard (balance of probabilities); and
- on the critical issue in the case – the state of mind of the respondent – the burden of proof is reversed.

1.14 As well, a complainant is given a further significant forensic advantage as a result of cl. 8 of the Bill. This provides that a court may conclude that a person engaged in unlawful conduct for a reason or purpose if that reason or purpose "is one of the reasons [or] purposes" for the conduct. There is no requirement that it be the predominant reason or purpose, *or even a significant reason or purpose*. By contrast, other statutes which make culpability depend upon conduct being engaged in for an unlawful purpose or reason, usually require that the purpose or reason be a "substantial" purpose or reason.[2] So a complainant, while enjoying the significant forensic advantage of a reverse onus of proof, is given the additional (and unusual) advantage of being free of the "substantial purpose" requirement. No explanation is offered for the absence of a requirement of substantial purpose.[3]

1.15 A yet further consideration which illustrates how dangerous the reverse onus of proof would be is the fact that most commonly, complaints of unlawful discrimination are based on "indirect" discrimination rather than overt discrimination. Where indirect discrimination is alleged, the conclusion that the respondent has engaged in unlawful conduct is largely based on inferential evidence only. Conclusions based on inferential evidence are much harder to rebut, and even more so where the party against whom the complaint is brought has the burden of proof.

1.16 The effect of these four considerations, taken together, would be to make complaints almost impossible to defend.

1.17 Unlike cl. 19(2), the government has shown no inclination whatever to withdraw the reverse onus of proof provision in cl. 124.

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2 See, for instance, s. 4F of the *Competition and Consumer Act.*

3 *Explanatory Memorandum*, p. 13.

## The scope of the bill is impossibly wide and dangerously vague

1.18 The violations of traditional rights and freedoms embodied in the Bill are not, however, our only serious concern. The entire approach of the Bill is to expand the categories of discriminatory conduct so widely as to make almost any grievance which one citizen might have against another capable of being brought within one or more of its categories. This is, in particular, to be seen in the extension of the number of "protected attributes" (cl. 17 of the Bill) to new attributes of almost limitless meaning. Two, in particular, which concern Coalition senators are "political opinion" and "social origin".[4] To make matters worse, no attempt is made in the Bill to define these two very wide categories.

1.19 In evidence from the Attorney-General's Department, it was indicated that the terms had their genesis in International Labour Organization Convention No. 111, which is one of the "ILO instruments" identified by the Bill.[5] This instrument does not, itself, define the terms, however the Departmental witness pointed to guidelines issued by the International Labour Organizations which suggest the meaning of the terms:

> **Senator BRANDIS:** Well, I am focusing on clause 17. What about social origins, Mr Wilkins? What does that mean? Mr Manning?
>
> **Mr Manning:** The International Labour Organization has put out some guidance in relation to the concept.
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> **Senator BRANDIS:** Pausing there, Mr Manning, the International Labour Organization has given guidance to that term but not to the term 'political opinions', right?
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> **Mr Manning:** It has also in relation to political opinion.
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> **Senator BRANDIS:** It has?
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> **Mr Manning:** They are not defined in the treaty, but to assist member states the ILO has put out its views about what they mean.
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> **Senator BRANDIS:** Has that become part of the jurisprudence?
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> **Mr Manning:** I do not think it is jurisprudence in the sense that it is just the body under the auspices of which the treaties have been developed to put them out.
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> **Senator BRANDIS:** Would it be regarded as part of the opinio juris?
>
> **Mr Manning:** I think they would be, yes. It is guidance material. It would be influence, I would have thought, without necessarily being binding.
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> ...

4 Sub-clauses 17(1)(k) and (r), respectively.

5 Sub-clause 3(3)(b).

> **Senator BRANDIS:** Why don't you just read them to us, please?
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> **Mr Manning:** The ILO has suggested social origin is intended to include an individual's membership in a class, caste or socio-occupational category. That comes from its General Survey on Equality in Employment and Occupation of 1996 and the General Survey on Equality in Employment and Occupation of 1988.
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> ...
>
> **Senator BRANDIS:** What about political opinion? Can you read that out to us, please?
>
> **Mr Manning:** This is taken from the ILO's systems for Business on International Labour Standards which talks about political opinion. I am not quoting but it includes membership in a political party, express political, sociopolitical or moral attitudes, or civic commitment. Workers should be protected against discrimination in employment based on activities expressing their political views. This protection does not extend to politically motivated acts of violence.[6]

1.20 Coalition senators record their deep concern at a proposal to introduce such fundamental changes to Australian law, which may have such a profound effect upon the way in which Australians deal with one another, on the basis of terms so vague that the only definitions to which the government can point are guidelines issued by the ILO.

1.21 The breadth of these two new categories illustrates the dangerous over-reach of the Bill. Although they are, in each case, limited to "work and work-related areas,"[7] they nevertheless extend what is ordinarily thought to be the scope of anti-discrimination law. In doing so, they remove the focus of such laws from where, in the opinion of Coalition senators, it ought to be: on members of social groups who, because of a personal attribute, are vulnerable to unfair treatment. These are not necessarily statistical minorities (women, for instance, have always been one of the social categories protected by anti-discrimination law), although they usually are. What they have in common is that, because of the identified attribute, they belong to a group of persons at risk of conduct which unfairly denies them equality of opportunity in certain key areas – such as the workplace, education, access to public facilities or everyday amenities. But this Bill goes much further, by seeking to assimilate any form of unfavourable treatment, alleged by virtually any member of society, within the reach of anti-discrimination law.

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6 *Committee Hansard*, 4 February 2013, p. 8.

7 Sub-clause 22(3).

1.22 Indeed, the key to grasping the philosophy of the Bill lies in its treatment of unlawful discrimination in terms of *unfavourable* treatment rather than *unfair* treatment. The concept of "unfavourable" treatment is much wider than "unfair" treatment. When the prohibited conduct is expressed in terms so wide, and then applied to categories to which every member of society belongs – for instance, everyone has a "social origin" – the reach of the legislation has, in our view, gone well beyond where anti-discrimination law should be. The effect of this Bill would be to replace the proper protection of vulnerable groups from unfair treatment, with an all-purpose grievance-settling machinery, in which the State arrogates to itself the role of settling the day-to-day differences between citizens, and, in doing so, defining the norms of everyday social behaviour. This is a nightmarish dystopia which only Kafka could have imagined.

1.23 It is for this reason that Coalition senators believe that this Bill is not, in truth, an anti-discrimination law at all. It is an attempt to use the guise of anti-discrimination to advance a much more ambitious and intrusive social agenda, in which the role of the state as the arbiter not just of legality, but of the norms of everyday conduct, would be massively expanded. Not only is this a horrendous result in itself; it also diverts attention away from the vulnerable Australians whom it ought to be the core purpose of anti-discrimination law to protect.

1.24 Lastly, Coalition senators point out that the expansion of the "protected attributes" is not the only dangerously vague area of the Bill. Clause 3 of the Bill includes among its objects:

> to promote recognition and respect within the community for...the principle of equality (including both formal and substantive equality)...[8]

No definition of the term "substantive equality" is offered. However the use of the adjective "substantive" does not suggest that the draftsman had in mind merely the notion of equality of opportunity.

1.25 Coalition senators do not support the adoption of language at once so treacherously vague and so ideologically-charged. Nor are we of the view that its presence in the objects clause is appropriate, or necessary for the efficacy of anti-discrimination law. We do not see any point in attempting a statutory definition of "equality". It is at least theoretically possible that the wisdom of the Gillard Government is so great that it is able to solve a profound problem that it has eluded philosophers since the time of Socrates. However, on recent performance, we think it unlikely.

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8 Subclause 3(1)(d)(i).

## The bill is internally inconsistent and liable to produce unintended consequences

1.26 The inclusion of "political opinion" among the "protected attributes" gives rise to an unintended consequence. Clause 17 lists 18 such attributes, in alphabetical order, without distinction or preference between them. Hence, the Bill is as much about protecting political opinions as it is about protecting any other attribute. As no definition of "political opinion" is contained in the Bill, cl. 17(1)(k) can only be understood as an intended reference to all political opinions. This produces an internal inconsistency. The Bill protects people from forms of behaviour which is, for instance, racist or homophobic. Simultaneously, it protects racist or homophobic political opinions. The Secretary of the Attorney-General's Department, Mr Roger Wilkins, acknowledged that this was a problem, which he thought could be corrected by a drafting change.[9] Professor Simon Rice of the Australian National University, Chair of the Anti-Discrimination Law Experts Group, agreed that the Bill appeared to contain an "inconsistency" in this respect.[10]

1.27 Coalition senators do not regard this issue as merely a drafting error. It goes to a central aspect of the Bill. If "political opinion" is a protected attribute, then it cannot be confined to one type of political opinion only. Once that is accepted, then the inclusion of the attribute inevitably protects opinions which are hostile to the other purposes of the Bill. This is yet another example of the consequences of over-reach.

## The bill would damage Australia's social fabric by encouraging a "culture of complaint"

1.28 As we observed in paragraph 20, the scope of the Bill goes well beyond protecting vulnerable people from unfair treatment, but seeks to create a comprehensive mechanism for the arbitration and settlement of virtually all social differences, wherein one citizen might feel aggrieved by his treatment at the hands of another. It is not the role of the state to do so; if it were, the intrusion of the state into the everyday lives of citizens would be almost without limit.

1.29 One consequence of such a significant realignment of the relationship between the citizen and the state is that, were it to occur, it would encourage the development of a more litigious society, dominated by what Robert Hughes once described, in a critique of contemporary America, as a "culture of complaint".[11] Both the current and former Attorneys-General regarded the ease with which access might

9 *Committee Hansard*, 4 February 2013, p. 7.

10 *Committee Hansard*, 24 January 2013, p. 56.

11 R Hughes, *Culture of complaint: the fraying of America*, Harvill, London, 1995.

be had to the Bill's dispute-settlement mechanisms as one of its virtues.[12] Coalition senators are of a contrary view.

1.30 By introducing a quasi-litigious model for the settlement of disputes which are, today, resolved informally between citizens without the state's intervention, not only is the role of government massively expanded; resort to such governmental mechanisms, rather than informal resolution, will increasingly become the norm. That is not a characteristic of a healthy society; it is a description of a sick one. The Bill positively encourages this, by making the complaints procedure cost-free,[13] reversing the burden of proof,[14] and relieving complainants of the requirement of proof in accordance with the normal rules of evidence.[15]

1.31 Of course, each of those features of the Bill is also likely to have the effect of encouraging opportunistic complaints which it is not worth an employer's while to defend, and which he is more likely to pay off to go away.

## An area for reform

1.32 For all of the foregoing reasons, Coalition senators are of the view that the Bill is so fundamentally flawed, in both conception and design, that it should proceed no further. Perhaps it may find a home in a cultural museum of the future, as an exhibit of how close Australians, in the Year of Our Lord 2013, came to being captured by "the Nanny State". But it has no place in a healthy liberal democracy. Nor would its enactment advance desirable reform of the existing suite of anti-discrimination laws.

1.33 Nevertheless, Coalition senators were impressed with one part of the evidence before the inquiry – that from the GLBTI community,[16] who pointed out that none of the Commonwealth Acts which deal with anti-discrimination law extend to sexuality-based discrimination. This is, in our view, an obvious gap, which should be addressed. People in that category are no doubt vulnerable to unfair discrimination. Discrimination against members of that community is unacceptable by modern community standards, and is reflected in the removal in 2008 – on a bipartisan basis – of all discriminatory treatment from Commonwealth legislation. It is also consistent with the policy which the Coalition took to the 2010 election. A simple amendment to the *Sex Discrimination Act*, which includes sexuality (or, for completeness, identity as a gay, lesbian, bisexual, transgender or intersex person) as a protected attribute, would overcome that lacuna.

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12 See, for instance, Nicola Roxon doorstop interview, 20 November 2012; and interview with Mark Dreyfus by Steve Austin, ABC 612 (Brisbane), 22 January 2013.

13 Cl. 133.

14 Cl. 124.

15 Cl. 131.

16 Acronym for Gay, Lesbian, Bisexual, Transgender and Intersex.

**Recommendation 1**

**1.34 Coalition Senators recommend that the Bill not be passed.**

**Recommendation 2**

**1.35 Coalition Senators recommend that Part II of the *Sex Discrimination Act* 1984 be amended to include identity as a gay, lesbian, bisexual, transgender or intersex person as a protected attribute to which the Act extends.**

**Senator Gary Humphries**
**Deputy Chair**

**Senator Sue Boyce**

**Senator the Hon George Brandis SC**