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Uncovering threats to freedom of speech and personal liberty: a program of the Institute of Public Affairs

Submission to Senate Legal and Constitutional Affairs Legislation Committee

Exposure Draft of Human Rights and Anti-Discrimination Bill 2012

Chris Berg
Director, Policy

Simon Breheny
Director, Legal Rights Project

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Free people, free society

Executive summary

The exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* ["the draft Bill"] represents a dramatic and radical attack on Australians' fundamental freedoms under the guise of reforming anti-discrimination law.

The draft Bill makes government the arbiter of behaviour within a substantial range of private political and personal activities. The draft Bill would politicise and regulate private interpersonal relationships in a way they never have been in Australia.

In a very real sense, these laws are not anti-discrimination laws. They are laws designed to give the government authority over our lives in completely new and unjustifiable arenas. This is an excessive and indefensible increase in state power.

The proposed laws give the government explicit power to interfere in almost all facets of human interaction including eighteen areas of public and private life, such as political opinion, religion and social origin. The government is also required to decide what falls into these categories, making the state the total and final arbiter on our most fundamental liberties.

By redefining discrimination to be anything which "offends, insults or humiliates" the proposed law will extend the infamous provisions of the *Racial Discrimination Act* that led to the Andrew Bolt case to almost every area of public and private life. By expanding the grounds on which people can claim to be discriminated against to include areas such as "political opinion" the law will stifle genuine discussion on almost every topic for fear of legal consequences.

This draft Bill has deservedly been criticised from across the political spectrum as a massive overreach and an unjustified curtailment of individual freedoms.

Democratic governments rely on the free exchange of opinion for their legitimacy. This draft Bill, if enacted, would dramatically limit freedom of speech in Australia.

This submission also raises other concerning elements of the draft Bill. The draft Bill substantially reverses the burden of proof onto the defendant. It introduces a large amount of uncertainty and ambiguity into anti-discrimination law.

The draft Bill introduces a subjective test for decisions about whether the law has been breached. Subjective tests are impossible to comply with and should never be used by the courts.

There is no justification for such a dramatic overhaul of anti-discrimination law, and no place for such extraordinary limits on freedom of speech.

Introduction

In September 2011, the Attorney-General, Nicola Roxon, and the Finance Minister, Penny Wong, released a discussion paper – 'Consolidation of Commonwealth Anti-Discrimination Laws.' Public submissions on the discussion paper closed on 1 February 2012.

On 20 November 2012, the Attorney-General released the draft exposure *Human Rights and Anti-Discrimination Bill 2012*. The draft Bill consolidates five existing Commonwealth anti-discrimination acts into a single omnibus Bill:

- *Age Discrimination Act 2004*
- *Australian Human Rights Commission Act 1986*
- *Disability Discrimination Act 1992*
- *Racial Discrimination Act 1975*
- *Sex Discrimination Act 1984*

However, this process has not simply harmonised existing laws. There are a number of radical changes to the law, which are likely to produce perverse outcomes, for example:

- The draft Bill dramatically expands the concept of "discrimination" by defining conduct, which causes offense, to be discriminatory
- It introduces a subjective test about what constitutes offence and insult
- It makes it unlawful to offend someone based on their "political opinion" – by doing so, it seeks to exclude political speech from much of "public life"
- The combined impact of its provisions would restrict the expression of almost all political opinion in an enormous range of circumstances.

1. Threat to freedom of speech

a) The free exchange of opinion is central to democratic legitimacy

Modern democratic governments draw their legitimacy from one source: that they have been elected by the people they govern exercising a free choice.

This legitimisation model presumes a number of things. But first among these presumptions is freedom of speech.

The right to freedom of speech is not only the right to express views. Just as importantly – and critical to the functioning of a legitimate democracy – the right to free speech is the right to hear the views of others. In Chapter 2 of *On Liberty*, John Stuart Mill rightly argued that freedom of speech is, in essence, freedom of discussion.[1]

And it is only through discussion that a citizenry can decide who it will choose to lead. A democracy is reduced as much as its speech is constrained.

The centrality of free speech to democratic legitimacy is widely recognised by democratic theorists. As Robert Dahl writes in *Democracy and Its Critics*, freedom of speech "is necessary both for effective participation and enlightened understanding". [2] But it has also been recognised by the High Court of Australia when it developed the implied right to freedom of political communication. As the *Lange* ruling said, the Australian Constitution necessarily protects "freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors."[3]

To the extent that Australians have a distinct constitutional right to free speech it is because of this democratic assumption. (Even Article 1 of the International Covenant on Civil and Political prioritises the right of an individual to "freely determine their political status" – something which is not possible without a robust public sphere.)

Certainly, there are arguments for a more general right to freedom of speech that extends well past political matters.[4] Nevertheless, it is vital for the committee to recognise that the liberty to express political ideas – and to hear the political ideas of others – is a generally recognised right, both in theory and in Australian constitutional law.

The offensiveness or otherwise of a political opinion cannot make it any less deserving of free speech protection. A government that wishes to maintain its democratic legitimacy cannot intervene in the free decision making of those who elect it, regardless of how offensive, or unbalanced, or disproportionate it may find those opinions.

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[1] John Stuart Mill, *On Liberty*.
[2] Robert A Dahl, *Democracy and Its Critics*, Yale University Press, New Haven (1989).
[3] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[4] See, Chris Berg, *In Defence of Freedom of Speech from Ancient Greece to Andrew Bolt*, Institute of Public Affairs, Melbourne (2012).

b) The draft Bill would have a chilling effect on speech

The draft Bill makes it unlawful to "offend, insult, or intimidate" another person on the basis of their "political opinions" in "work and work-related areas".

This prohibition is almost limitlessly expansive. Each element ("offend, insult, or intimidate", "political opinions", "work and work-related areas") is ambiguous and unclear. The combination of all three is guaranteed to have a chilling effect on freedom of expression.

The meaning of discrimination is outlined in Division 2 of the draft Bill. Clause 19 defines discrimination by reference to "unfavourable treatment", which includes "conduct that offends, insults or intimidates the other person."

The proposed definition of discrimination represents a radical overhaul of the generally accepted meaning of discrimination in this area of law. Although they vary, current legal definitions of discrimination commonly include unfavourable treatment but as compared to another person. A common test to determine whether discrimination has occurred involves a comparison between the person alleging discrimination and a hypothetical person in the same situation who does not have the characteristic upon which the discrimination is alleged to have occurred.

This draft Bill also proposes to treat discrimination in a way that simply does not resemble any plain English meaning of the word. Discrimination involves the making of distinctions between things. The Oxford Dictionary defines discrimination as "the unjust or prejudicial treatment of different categories of people." The proposed definition has no requirement for prejudice to have occurred or any distinction to have been made before a claim for discrimination can be made out. This renders the concept of discrimination totally meaningless.

i) What offends or insults is entirely subjective

The words "offend, insult and intimidate" appear to have been taken from Section 18C of the *Racial Discrimination Act*. There is now a widespread view that the Section 18C is excessively drafted. We note that the federal Coalition has promised to "repeal Section 18C in its current form".[5]

Offense is an entirely subjective test. Speech that is considered to be offensive, insulting, or intimidatory is entirely determined by the attitude of the listener, rather than the content of the speech. This is a continuously expanding and evolving area of law, as the *Eatock v Bolt* case demonstrated. In existing law, what constitutes "offense" depends upon a court's assumptions about the feelings and reactions of a hypothetical "ordinary, reasonable" listener. One of the more concerning innovations of the Bolt case was that the "ordinary, reasonable" listener became a member of the offended group, rather than the community at large. In the context of the new act this new interpretative frame is particularly important. Given the enormous new range of grounds on which offense can be taken, the perverse consequence is that an ordinary, reasonable listener is anybody who could be offended by the conduct in question.

[5] Tony Abbott, Address to the Institute of Public Affairs, Sydney, 6 August 2012.

Even a test of offensiveness based on a reasonable listener has serious problems. The draft Bill compounds this problem further by omitting the words "reasonably likely to," which appear in the *Racial Discrimination Act* immediately before the words "offend, insult, humiliate, or intimidate". ("Humiliate" is absent from this provision of the draft Bill.) The original formulation requires the court to make an objective assessment of the relevant conduct. Removing those words changes the test in a radical way – without them the test becomes entirely subjective. The court is no longer required to assess whether conduct is likely to offend but whether it in fact offended the complainant.

Subjective standards are impossible to comply with. This is amplified in the case of concepts as vague and personal as "offend" and "insult". People can never be sure that their acts are safe from offending another person who might be in a position to make a claim against them. Individuals can be and are offended by all manner of things. Compliance with this aspect of the law can never be guaranteed, even if perfect legal advice is perfectly followed.

Determining what is unreasonably offensive speech is a futile task. In his influential 1702 essay 'On Obscenities' the enlightenment thinker Pierre Bayle identified a basic contradiction in the pursuit of a concept of "community standards". As he argued, those who would decide what is reasonable speech and what the community (or, in our modern case, a reasonable, ordinary listener) would find intolerable only ever deal in hypotheticals and assumptions,

> Censors of obscenities seem to be far more capable of closing the question with an arbitrary sentence upon the whole of the republic of letters than of forming a broad senate of opinion encompassing many sorts of person.[6]

What may be considered unreasonable discourse in the Australian Human Rights Commission, the Federal Magistrates Court of Australia, or the Federal Court of Australia may not be considered unreasonable in the Australian community. No amount of judicial hypothesising about what an ordinary person might feel will be able to simulate social standards. But legislation that transforms the shifting, amorphous and socially contingent concept of offense into a legal doctrine requires the judiciary to do so.

Offend and insult is simply too vague, too subjective, and too intrusive a limitation on speech in a liberal society.

ii) The offended person need not have the protected attribute in question

The draft Bill introduces even more extreme uncertainty and ambiguity by declaring that the person who has been discriminated against need not have the protected attribute themselves, but is considered to have the protected attribute if they are an "associate" of a person who has, or has had in the past, the protected attribute, or may be associated with somebody who may have that protected attribute in the future.

iii) Political opinions encompasses nearly all opinions

What constitutes a political opinion is also excessively vague and expansive.

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[6] Pierre Bayle, 'On Obscenities' in *Political Writings*, Cambridge University Press, Cambridge (200) p 322.

Politics is about more than simply elections and political parties. The growth and expansion of government and political ideology into new areas of life during the twentieth century has assured that there are literally no issues of contemporary Australian social, cultural, or economic life that are not "political". We talk about the "politics of food", the "politics of consumerism", even the "politics of morality".

As the Explanatory Notes state, "political opinion is not defined and takes its ordinary meaning." Given the almost extraordinarily broad meanings of the word political in ordinary use, this is little guide for courts.

But in an important way, speech restrictions themselves make all opinion "political". The draft Bill is recursive: the definition of political opinion necessarily loops back on itself. When the political system takes it upon itself to define what constitutes legitimate or illegitimate speech – that is, what speech is unlawful or prohibited – then even apparently non-political speech is politicised. For example, expression designed to test the limits of speech laws is, in every sense, political speech, even if they were not obviously so in the absence of those laws.

iv) There is no justification for excluding political opinion from any area of public life

That unlawful offense on the basis of political opinion is limited to "work and work-related areas" is no comfort.

The Explanatory Notes demonstrate that the draft Bill intends to have "broad application to any work done in public life". This identifies everything from union membership, "matters relating to occupational qualifications", and "voluntary unpaid work". There is an infinite number of things that could be described as work-*related*.

Australians spend much of their lives at work. Modern employment is not easily isolated from the rest of our lives; there has been much social commentary about the way work has bled into home life. In part, the cause is technological (internet access and mobile phones make it easier to work remotely) but it also reflects a social change as well: in a twenty-first century service economy, employment is as much an all-encompassing part of our identity as family or community.

The emphasis here on the blurring lines between work and non-work activity is not only meant to demonstrate the vagueness of "work-related activity". Rather, it is to emphasise that employment and society are not separate, with separate rules. We are as shaped by our interactions in the workplace as we are outside employment. Political opinions are not an alien body in the work environment that the government needs to excise. Australia's democracy would not be served if the proverbial "water-cooler" conversations were excluded as an area of legitimate public debate.

Indeed, the draft Bill makes this clear: "work and work-related areas" are one facet of "public life".

In its comments on the draft Bill the Australian Human Rights Commission has even suggested that political offense should not be limited to the workplace. In the Commission's view, offense on political grounds ought to be unlawful in all areas of public life.[7] This has a logical coherence – given that the

[7] Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Affairs Committee on Exposure draft: Human Rights and Anti-Discrimination Bill 2012, December 2012.

draft Bill wants to make political offense unlawful in public life it makes no sense to limit that to workplaces. The Commission would like this prohibition to be extended to education or training, any provision of goods, services, or facilities, provision of accommodation, membership of clubs or member-based associations, participation in sporting activities, the delivery of Commonwealth programs, even, incredibly, “access to public places”. Furthermore, the draft Bill points out that it is not “limited to” this list: anything that could be plausibly described as an area of public life would be captured.

v) It may be assumed that offense is politically motivated when it is not

The draft Bill introduces even more ambiguity and subjectivity by integrating these concepts into a broader definition of discrimination. As the Explanatory Notes suggest, the offensive conduct does not have to relate to the protected attribute. In other words, courts will be asked to decide whether the offense was given because of the political opinions of the receiver, even though the offense may not have had any political content.

This would have the effect of making political disagreements prima facie evidence of discrimination.

vi) The combined provisions restrict the expression of almost all political opinion

In concert, the ambiguities and excesses of these provisions work together to create a highly risky environment for the expression of political opinions.

Democratic politics is a contest of ideas. The necessary opposition of those ideas gives political opinion an emotive content. Political views – even mainstream ones - can cause offense. As we write this submission some of the most prominent issues in Australian politics are immigration, gender, and gay marriage. There is an enormous opportunity for common views on these issues to be found offensive by others.

As we have argued, what constitutes a “political” opinion is not limited to views about parliament or politicians. All Australians hold political views which can be considered offensive. Politics is a zero-sum game. It has winners and losers. Every political choice is a moral or ethical choice. By definition, political opinions are offensive to those who would lose.

Certainly, Australians make unlawful statements without consequence all the time. As Mark Pearson has pointed out, “there is an enormous amount of defamatory material published safely on the internet every day.”[8] The cost of legal action is prohibitive, and most people who take offense are not aware of the legal actions available to them. This reality is not a defence of such laws. Instead, it suggests that they introduce a high level of risk into public discourse, an extreme arbitrariness, and the opportunity for personal and political grudges to be pursued through legal action.

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[8] Mark Pearson, *How to Blog and Tweet without Being Sued*, Allen & Unwin, Sydney (2012).

vii) Other protected attributes: reintroducing blasphemy into Australian law

We have focused here on political opinion because it is the starkest illustration of the dangers of the draft Bill to freedom of speech in a democratic context. However, it is worth recalling that political opinion is not the only protected attribute in the draft Bill.

It is joined by industrial history, social origin, and religion. Social origin is a particularly vague attribute. The Explanatory Notes say that it "takes its ordinary meaning" which, given that it has no common plain English meaning, this ground would appear to be limitless.

Religion is a particularly concerning inclusion as well, given the expansion of discrimination to mean offense.

Religious belief tends to be more personal than, for example, political opinion; faith is central to self-identification. Not all religious expression is intended to affect feelings in others. An individual may testify their faith by wearing a Christian crucifix, Jewish *kippah*, or Islamic *hijab*: this is less a public statement than a private affirmation of their belief.

On the other side of the ledger, the deeply personal nature of religious belief makes the potential for feelings of offense or insult much greater. The draft Bill reintroduces into Australian law the concept of blasphemy, and, furthermore, makes the assessment of what is considered blasphemous dependent on the subjective judgment of the offended person.

2. Threat to legal rights

a) Reversal of the burden of proof

The Latin maxim *actori incumbit onus probandi* means “the burden of proof rests on the party who advances a proposition affirmatively.” In the context of the Australian legal system, this principle dictates that the burden of proof rests with the person bringing a legal claim. In criminal law, this is the crown or the state; in civil proceedings this is the plaintiff. Usually, the burden of proof requires that the person bringing the claim must prove each of the elements of the legal claim they seek to make out.

The rationale behind this approach to the resolution of legal disputes is to give the person against whom the claim is made the benefit of assumption. In criminal cases, this is called the presumption of innocence. But this assumption should always remain in the context of the civil law also. It is an important legal protection that has been developed through hundreds of years of common law.

Placing the burden of proof on the person alleging wrongdoing is not only important as a legal tradition; it is also essential as a matter of logic. The fact that it is impossible to produce evidence of something which has not occurred is an irrefutable argument for retaining the presumption of innocence as a fundamental right in any just legal system.

The government’s draft Bill reverses the burden of proof. The draft Bill creates a system where the accused is guilty until he proves himself to be innocent of wrongdoing. Clause 124 states that in the case of an applicant alleging discrimination and adducing “evidence from which the court could decide, in the absence of any other explanation” that discrimination has occurred the court will assume that discrimination has occurred and it is then for the defendant to prove otherwise.

This provision puts in place a prima facie test for the plaintiff. The threshold that must be met in this case is only marginally higher than simply the making of an allegation. The court only needs to conceive of discrimination occurring on the basis of facts that are presented by the complainant. This is enough to place the burden of proof on the defendant. The conclusion that there was discrimination need not be the only or even the most likely inference to be drawn from the facts; it is sufficient that it is within a range of reasonable inferences.

Prima facie tests are common in law. They are generally used in the early part of a court hearing to eliminate unreasonable and vexatious claims. But the usual course is to then test the case by having the plaintiff prove the elements of the legal claim. Making out a prima facie case is simply the preliminary hurdle before engaging in the legal questions that require resolution.

b) The draft Bill would introduce unacceptable levels of legal risk

The draft Bill gives rise to significant risk of litigation. The new definition and the reversed burden of proof together make it much easier for a complainant to make out a claim. This approach builds incentives into the discrimination law framework, which are likely to produce perverse outcomes.

A reverse burden of proof has been introduced into law in the context of adverse actions claims under the *Fair Work Act 2009*. The introduction of the reversed burden has coincided with a significant increase in the number of claims being made. In large part, this has been caused by the reversal of the burden of proof. In many cases, those accused of discrimination will simply pay out even in cases where discrimination has clearly not occurred because of the significant costs involved in litigation.

These perverse outcomes are further encouraged due to the costs structure in the draft Bill. Legal costs usually follow a court order – meaning that if a party loses the case they must pay not only their own legal fees but also those of the other party. This is to discourage vexatious claims. The draft Bill removes this disincentive and will encourage the commencement of even more frivolous litigation.

3. The draft Bill is not about discrimination

The draft Bill makes unlawful an enormous range of activity, speech, and conduct in a very large range of public life. But more importantly, it represents a significant and highly consequential conceptual change in what discrimination means, and what anti-discrimination law is supposed to do.

a) Redefining discrimination from harm to offence

The standard conception of discrimination describes unjust or unmerited differential treatment. Typically, discrimination is made unlawful in areas of public life, such as employment, service delivery, or access to government programs according to a range of prescribed attributes. The law then provides exceptions where discrimination is not unlawful.

Central to this model of discrimination is the real, practical consequences of discrimination. The Attorney General's Department September 2011 Discussion Paper emphasises the distinction between direct discrimination and indirect discrimination. Both examples the Discussion Paper provided described practical harms. As an illustration of direct discrimination, the paper cited an individual who was not hired because of their sex. To illustrate indirect discrimination, the paper cited a workplace maintaining an unreasonable and inflexible rule requiring all employees to work until 5pm: a policy which would make it impractical for working mothers to comply.

The draft Bill significantly expands the definition of discrimination to include conduct that offends, insults or humiliates. This language is drawn from the *Sex Discrimination Act* and the *Racial Discrimination Act*, but the new definition discards some critical conceptual differences. In the *Sex Discrimination Act*, this language specifically describes sexual *harassment*. In the *Racial Discrimination Act*, the prohibition on offensive or insulting conduct in Section 18C is not categorised, but the 1995 *Racial Hatred Act*, which introduced s 18C, spoke of hatred.

Indeed, the draft Bill still nominates "sexual harassment" and "racial vilification" as separate instances of unlawful conduct to unlawful discrimination.

Offense, by itself, does not cause any of the problems that anti-discrimination law was originally intended to resolve: discriminatory conduct in hiring and firing, unequal service provision, prohibitions on access to public spaces based on gender, racial or ethnic characteristics. Certainly discriminatory conduct can involve offensive behaviour – an individual who has been discriminated against is understandably likely to offended – but offense, in and of itself, has never been sufficient to constitute discrimination. The draft Bill completely eliminates these crucial distinctions, to radical effect.

b) Shutting down the public sphere

The consequences of this conceptual change are perverse. As we have explained, the draft Bill would dramatically limit discussion and expression in a whole range of areas of public life, and across a nearly limitless range of topics.

But, furthermore, the draft Bill would have an extremely corrupting influence on civil society and Australians' interpersonal relationships.

In a free, pluralistic society, differences of political and religious opinion are endemic. Indeed, the form of liberal democracy is predicated on these differences. In Section 1 of this submission we discussed the interaction between a vibrant public sphere and democratic legitimacy. The formal institutions of democracy (voting, elected representatives) are merely the tips of the iceberg; a range of mechanisms to ensure that the teeming passions in the public sphere do not swamp the necessary system of government.

In our view, this draft Bill is an attempt to neutralise or suppress those teeming passions. Offense is an intrinsic part of a public sphere, at least where political and religious beliefs are held deeply. To make offense unlawful – to redefine offense as discrimination – is to attack that public sphere head on.

The draft Bill replaces democratic debate and discussion with an elaborate legal process. Rather than encouraging Australians to contend with their differences in a democratic manner – through interaction and argument – it encourages them to take those differences to the Australian Human Rights Commission, the Federal Magistrates Court or the Federal Court of Australia. In other words, a bureaucratic conciliation panel or a federal court will be the arbiter of interpersonal differences, rather than healthy debate.

The draft Bill should not be seen in isolation. In 2009, the Australian Human Rights Commission published a paper that recommended that the "hand of government, even if gentle and gloved" should be empowered to manage the interactions between religions in the public sphere, "for the good governance of inter-religious relations."[9]

The paper went on to describe a role for government in the "moderation of the public sphere".

We consider this draft Bill to be part of that project: an insertion of government regulation and restriction into the normal and democratically necessary interactions of the public sphere.

A democratically government can have no role "moderating" the public sphere, as it is that very public sphere which provides it with its democratic legitimacy. There are many problems with the draft Bill as it stands – from reductions in legal rights, to limitations on freedom of speech – but most critical, and most concerning, is the way it would suppress public discourse, punish religious and political expression, and undermine our democratic values.

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[9] Tom Calma and Conrad Gershevitch, "Freedom of Religion and Belief in a Multicultural Democracy: an inherent contradiction or an achievable human right?" In Freedom of Religion and Belief in a Multicultural Democracy, Australian Human Rights Commission, 3 August 2009.