

21 December 2012

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

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

I wish to make a number of comments in relation to the Exposure Draft of the Rights and Anti-Discrimination Bill 2012, currently being considered by the committee. These comments are made in a private capacity.

The stated purpose of the Bill is to consolidate a number of existing Acts to reduce complexity and inconsistency in the existing legislation, although the Bill also makes substantive changes to the law. Overall, the stated objective of this legislation is to eliminate discrimination, harassment and vilification and to promote equality and respect for the inherent dignity of all people.

In an ideal world, mutual respect and the eradication of discrimination, harassment and vilification would not require legislation. Our society falls short of such an ideal and therefore, over a number of years, Parliament has put in place laws that seek to protect individuals in our society from the effects of intolerance and to give the victims of intolerance an avenue for redress.

A clear distinction, however, needs to be drawn between the policy intent of legislation and its actual practical effect. To criticise the practical effect of legislation is not the same as criticising its policy intent, although this distinction is frequently misunderstood or misrepresented in public debates about regulation.

While the proposed Bill covers a wide range of issues, I wish to focus in particular on the practical effect of one provision of the draft Bill. That provision, clause 19, is almost ironic in its effect, given the policy intent of the legislation. Clause 19(2)(b) brings conduct that offends or insults within the meaning of 'unfavourable treatment' under the legislation. Clause 19(1) makes unfavourable treatment a form of discrimination. The combined effect of the clauses is to make conduct that offends or insults a form of discrimination unlawful under the Bill.

The irony of this is that such a provision, in a Bill designed to promote tolerance, can be used by the intolerant to suppress criticisms of their own beliefs.

It would appear, for example, that under the proposed Bill, to speak out against the vile practice of female genital mutilation leaves one vulnerable to prosecution for discrimination. It is perfectly foreseeable that a proponent of female genital mutilation, who maintains the practice is necessary for religious or cultural purposes, could take offence at strident criticism of the practice and those

who advocate it. Religion and cultural beliefs derived from social origin are attributes protected under clauses 17(o) and (r).

Clause 23 allows that causing offence may not be prohibited where it is justifiable, however, this places the burden on the person alleged to have caused offence to show that their actions or words were justifiable. It seems a bizarre outcome that a Bill such as this could result in those opposed to practices largely viewed as abhorrent by our society having to prove legally that their conduct is justifiable because proponents of the practice are offended by their opposition. There is a risk that the Bill could, ironically, be used to obstruct or intimidate those that would speak out against intolerance, through the threat of legal action.

A number of other submissions have also noted the deeply worrying implications of clause 19 for freedom of speech. For example, the effect of clause 19 is to make discriminatory any conduct connected with work or in work related areas that causes offence or insult to someone on the grounds of their political opinion (a protected attribute under clause 17(k)). This seems to raise interesting implications for both Question Time and political satire.

Question Time appears to largely consist of attempts to insult members or Senators across the floor based on their political opinions. Members of Parliament not infrequently claim to have been offended by remarks made by those opposite. Question Time clearly relates to the work of Members of Parliament, for which they are remunerated by taxpayers. Assuming Parliament does not intend to exclude its own members from laws it is imposing upon the rest of society, clause 19 appears to apply to Question Time.

Insofar as the new Bill will therefore prohibit any conduct on the floor of either chamber that causes offence or insult, it is to be commended and I am confident the Australian community will welcome the new golden era of Parliament, where our political leaders conduct debates characterised solely by mutual respect and tolerance for differences of political opinion.

Members of Parliament may also want to note that their public comments may breach the legislation. The then Prime Minister, Bob Hawke, offended a citizen of Whyalla in 1989 by calling him a "silly old bugger". Under the proposed legislation, such a statement today, causing offence, would be considered unfavourable treatment and hence unlawful discrimination. Discrimination on the grounds of age is not restricted to workplaces alone. Silly old buggers across the country will be pleased to know that they are now expressly protected from insulting politicians.

The Bill also appears to raise challenges for political satire. Under the new Bill, a political satirist who mocked the political opinions of a neo-fascist could breach the anti-discrimination provisions of the legislation if the neo-fascist found the mockery offensive or insulting. Again, the satirist could argue their conduct was justifiable, but it is perverse that they should be put in such a position. It may also be harder to argue justification if the conduct that causes offence is directed at more mainstream political views. Is political satire of conservative, liberal or socialist views that causes offence to their adherents to be prohibited?

I note that discrimination on the grounds of political opinion, religion or social origin is only unlawful if the discrimination (including causing offence or insult) is connected with work or work related areas (clause 22(3)). This distinction appears to complicate significantly a law that is intended to

simplify and raises the prospect of all sorts of strange anomalies. For example, if I drop my lunch in my lap in a restaurant and invoke the name of the Almighty in exasperation, a passing waiter of particularly devout inclinations may consider my exclamation blasphemous and offensive, within his work related area. I therefore appear to have broken the law. If, however, I tell a joke in the street to the waiter's face, which he finds offensive, he seems to have no recourse under the law. In the former example I had no intention to cause offence, in the latter, I may have.

The legislation also seems to present some interesting challenges for stand up comedians. It would seem that the legislation requires a comedian to have a detailed knowledge of the political and religious views of all back stage and front of house employees, as well as their medical and industrial histories (clause 22(3)(b) and (c)) before delivering their routine, or else risk breaching the law by causing offence to those employees in their workplace. The Bill makes it unlawful to discriminate against another person, where unfavourable treatment is discriminatory and includes conduct that causes offence. The Bill does not appear to require the offensive conduct to be directed specifically at the person offended.

It is also worth noting that clause 19(4) extends discriminatory behaviour to those who are associates of an individual with protected attributes. An associate is widely defined to include, for example, anyone with a 'social relationship' with the person.

This clause appears to extend the legal prohibition against conduct that offends or insults to include those who take offence on behalf of another person, such as someone they meet on a social basis. The clause goes on to extend the legal prohibition to an associate of someone who has had the attribute in the past or may have the attribute in the future. If I make a comment in the work place disparaging of, for example, Scientology, a recognised religion in Australia, I may cause offence to someone whose friend is, was, or is contemplating becoming, a Scientologist, and thereby act unlawfully.

In light of the above, it would seem that any person wishing to avoid the possibility of breaching the legislation, particularly in the workplace, must refrain from any statement that could be connected with the 18 protected attributes in clause 17, lest they inadvertently cause offence. No tolerant, right thinking person could condone discrimination, harassment or vilification based on these attributes, but the effect of the law as proposed requires a level of Puritanism that would make most pre-Enlightenment Puritans blush (if that is not offensive to Puritans).

Steven Münchenberg
Melbourne, Victoria