



**A submission to the inquiry by the
Senate Legal and Constitutional Affairs Committee
into the exposure draft of**

the Human Rights and Anti-Discrimination Bill 2012

January 2013

Summary

Tasmanian Baptists strongly support the principle that all people, by virtue of their common humanity, deserve fair and reasonable treatment. It is the proper role of government to impose such restraints as are necessary to guard against mistreatment and ensure that our international obligations are met. Any attempt to amalgamate and simplify existing anti-discrimination legislation is to be applauded. However, we believe that the draft Bill oversteps the mark and represents an unwarranted intrusion into the lives of citizens.

It takes the form of much of the existing legislation but doesn't seem to have been preceded by any rigorous evaluation of how effective the existing legislation has been in terms of social benefits versus social costs. It is arguably also in conflict with some of the international instruments it purports to give effect to. Some of its major deficiencies are its pejorative misuse of the term 'discrimination'; its misplaced focus on the attributes of the complainant rather than the behaviour of the perpetrator; its unjust limitation of protection to only those who share one or more of a selective list of protected attributes; its legislative overreach in seeking to prohibit even the giving of offence, which is in conflict the Government's responsibility to protect free speech; and its reprehensible reversal of the onus of proof where the accused is brought to court, which is in conflict with the Government's responsibility to ensure just processes.

Ideally, we believe that the proposed legislation should be re-drafted along the lines of a Mistreatment Bill which would give all citizens equal safeguards against unfair or intolerable treatment, without infringing their fundamental rights and freedoms. This should focus on the behaviour of the perpetrator rather than the attributes of the victim and should define mistreatment in such a way as to capture only actions that are likely to cause significant material, social or psychological harm to the victim. It should not incorporate a reversal of the onus of proof. This would be fairer and more just than the draft Bill, which would grant those enjoying protected attributes safeguards against being caused even the mildest offence, whereas others for whom the mistreatment was not based on a protected attribute would have no safeguards against even the gravest of intimidations.

If this proposal is too radical for the committee to accept, then the minimum changes it should recommend would be to revise the draft Bill so that it contains robust safeguards against the infringement of fundamental rights and freedoms such as the rights to free speech and religion and the right to be considered innocent until proven guilty. It should exclude the giving of offence or insults as grounds for action and should incorporate a clear and robust general exclusion for justifiable conduct.

Background

Consistent with Christian teaching, Tasmanian Baptists strongly support the principle that all people, by virtue of their common humanity, deserve fair and reasonable treatment. On the other hand, we all have a responsibility to do what we can to ensure that no-one is unfairly disadvantaged by the actions of ourselves or others. We therefore have a strong interest in matters such as anti-discrimination legislation.

Unfortunately, circumstances prevented us from lodging a submission in response to the Discussion Paper on the Consolidation of Commonwealth Anti-Discrimination Laws when it was released in 2011. However, we strongly support the principles that legislation should to be clear, consistent and unambiguous and as simple as is compatible with its objectives. Consolidation of the five existing Acts into a single Act should help ensure clarity and consistency and we are pleased that the Government has chosen this course of action. We therefore welcome this opportunity to comment on the exposure draft of the proposed Bill.

Anti-discrimination legislation in Australia has become an ever growing structure, but it lacks a firmly established foundation. This would have been a good opportunity for the parliament to establish a robust foundation for the legislation. Our ultimate aim should be to safeguard the genuine rights of all citizens while offering them equal protection against real harm caused by the unjust actions of others

Some general comments on the draft Bill

The lack of rigorous evaluation

Ideally a proposal like this should have been preceded by a rigorous study of the effectiveness of the existing or similar legislation in achieving its objectives. It needs to be asked whether different aspects of it have:

- enhanced or diminished our fundamental rights,
- added to or detracted from the achievement of equal justice for all,
- ameliorated or aggravated existing sources of conflict within the community.

It is tempting for law makers to believe that the very existence of a law will make things better. Those who are part of the existing anti-discrimination establishment would no doubt argue that the existing law has been effective. But this should never be taken for granted. Can its success be demonstrated by rigorous data? How often, for example, has the threat of action under the various state and commonwealth Acts been used, paradoxically, to intimidate or coerce others into submission, thereby aggravating ill-feeling between the parties and a sense of injustice on the part of those who have been coerced? And how often have parties to a conciliated agreement been left feeling resentful that they have had such an agreement imposed on them, rather than having increased respect for each other's viewpoints? While there is some behaviour that ought not to be tolerated, we know of no study

that has rigorously evaluated whether the social benefits of the existing legislation have exceeded its social costs.

The pejorative misuse of the term ‘discrimination’.

This has become so all-pervading that a whole generation is growing up in ignorance of the true meaning of discrimination, believing it to be something to be abhorred. This belief has been reinforced by the re-definition of the term in legislation in a way that is grossly at variance with its plain English meaning, i.e. the discerning of valid distinctions between things – It is not a synonym for injustice. Surely there could be no more important aid to clarity in legislation than ensuring that the legal definition of terms is consistent with their plain English meaning. Hence, if the opening phrase of the draft bill under ‘Objects of this Act’ (Section 3(1)(a)), ‘to eliminate discrimination...’ is given its plain English meaning then this is not only an unworthy but a most undesirable objective. The notion that all things, ideas and actions should be indiscriminately accorded equal merit is not only inimical to civilised society and impossible to apply, but patently nonsensical.

Anyone who questions the need for discrimination would do well to reflect on what sort of a society we would have if our courts eliminated all discrimination between the guilty and the innocent; our welfare authorities between the needy and the well-off; our licensing authorities between the competent and the incompetent and our legislators between good and bad laws. Further imagine a society where we all failed to discriminate between sense and nonsense, truth and falsehood, justice and injustice, right and wrong.

In reality, although discrimination, like education, may be misused, it is absolutely indispensable to civilised society. That is why a major portion of anti-discrimination acts are commonly devoted to exceptions and exemptions without which society would be unworkable. This is unsound in principle in that the very existence of such exemptions implies that those involved are actually doing something wrong, but their wrong-doing is to be excused because it is in a worthy cause. In fact, if we want a fairer, more just, more orderly and more fulfilling society we need to encourage the exercise of discrimination, not discourage it. We have not just a right, but a responsibility to be discriminating people.

This could be an opportunity for the Australian Government to give a lead. The title of this Bill ought to be replaced with something along the lines of a ‘Mistreatment Bill’, which would be more consistent with its apparent intention to guard against any person treating another in a way that is unfair or intolerable (including the misuse of discrimination). Similar changes would be required to the titles of any related commissions, commissioners, tribunals etc.

The nomination of ‘protected attributes’

The existence of a selective list of ‘protected attributes’ in the bill seems to reflect its recent historical origins, but is clearly inconsistent with its stated (and worthy) objectives under Section 3(1)(d) to promote the principles of equality and the inherent dignity of all people. Are certain specified attributes, and people who share those attributes, more worthy of protection than others? Surely selective justice is

nothing better than institutionalised injustice in disguise. Shouldn't a Bill such as this be designed to provide protection to all people, not just some, against unfair or intolerable treatment?

An inevitable consequence of the existence of a list of protected attributes is an on-going battle by pressure groups for the privilege of having their own distinctive attributes included in the list. This raises the essentially unanswerable question of what criteria (apart from our obligations under international law) should be applied in determining which attributes are included in what is a potentially endless list.

Should the list be based on the relative incidence of particular attributes in our population, the severity of disadvantage likely to be suffered by individuals in the case of their non-inclusion, or some other criteria? In reality, an examination of existing legislation shows that it is more likely to be based on the extent to which a particular sectional interest group is willing and able to promote its cause among the public and the parliament. But special pleading is no basis for just laws. It is noteworthy that the Tasmanian Government, for example, plans to include 'intersex' (incidence around one in 1500) among its list of protected attributes, but there is no proposal to include, say red/green colour-blindness (incidence around one in ten males) or countless other common attributes such as being short, fat or blonde.

A misplaced focus

The above problem arises from a misplaced focus on the attributes of the complainant, whereas the focus of legislation such as this should really be on the nature of the behaviour of the perpetrator. The attributes or attitudes of the complainant should play no part in determining whether the behaviour of the perpetrator is acceptable or not. If certain behaviour is unacceptable when directed towards a pregnant woman then surely it is equally unacceptable when directed towards a woman who is simply rather fat (and the distinction between them is not one that the perpetrator would necessarily be aware of anyway). If a 'Mistreatment Act' were to define what constitutes mistreatment, regardless of to whom it was directed, then it could apply equally to all, thereby avoiding many of the shortcomings of the existing legislation.

Legislative overreach

The existing legislation already incorporates legislative overreach in that it implicitly makes the erroneous assumption that if the law is comprehensive enough it can control all human relationships. The proposed extension of its provisions to cover matters such as the giving of offence compounds this error.

We, as Christians, understand that the law can never make people good. Any assumption that it can will only bring it into disrepute among thinking people. The law can only seek to guard the innocent against the consequences of others' wrongdoing. It may be able to discourage me from punching my neighbour in the nose, but it can't force me to respect him, and if it attempts to do so, this will probably only create resentment. Civilised attitudes are not something that can be imposed by law; they need to be inculcated through all our social interactions, especially

during childhood. The notion that the law is an appropriate educational instrument for encouraging the desirable rather than just prohibiting the intolerable is a spurious one, given that not even the most learned experts can be fully acquainted with all of its provisions and the vast majority never even refer to it.

To make matters worse, although the reach of the draft Bill is limited to areas of public life, as defined in Section 22, the actions that are the subject of a complaint need not take place in public. Its provisions could be invoked, for example by a school teacher who claims to have been offended by criticism of his or her performance by a principal in the course of their work. Furthermore, the inclusion of actions such as the mere giving of offence constitutes a serious erosion of the right to free speech and there is a strong case to be made that this breaches the International Covenant on Civil and Political Rights which is, paradoxically, one of the instruments the draft Bill purports to give effect to.

The reversal of the onus of proof

This is perhaps the worst feature of the draft Bill as it stands. No-one should ever be put in the position of being assumed guilty of an offence unless they can prove their innocence. We will comment further on this matter in reference to the relevant section of the draft Bill.

Some principles for soundly-based legislation

In general, we believe that a well-founded bill should:

- Recognise that discrimination, far from being invariably harmful, is actually indispensable to civilised society and therefore needs to be protected and encouraged.
- Avoid playing favourites, which arises from setting out a list of protected attributes, with the inevitable arguments and injustices that this will involve.
- Base its definition of unacceptable behaviour on that which is likely to cause significant material, social or psychological harm, to whomever it is directed.
- As far as possible, avoid conflicts with fundamental rights such as the right of free speech and religion and the right to be considered innocent until proven guilty.

The draft bill currently satisfies none of these criteria.

Some further comments on specific clauses of the draft Bill

We will now offer some more specific comments or criticisms based on the exposure draft and its accompanying explanatory notes.

Section 3(1)(a)

This states the objects of the Act as 'to eliminate discrimination, sexual harassment and racial vilification, consistently with Australia's obligations under the human rights instruments and the ILO instruments...'. While it is right to attempt to eliminate all sexual harassment and racial vilification, this is not so for all discrimination. Only the misuse of discrimination should be eliminated. It is notable that the explanatory notes (p10, para. 17) state that the object of the Bill is to eliminate unlawful discrimination. And indeed, by the inclusion of exemptions, 'special measures' and a selective list of protected attributes, the Bill provides for many forms of discrimination to remain lawful.

We are not convinced that it is necessary for the objects of the legislation to be couched in terms that (falsely) imply that all discrimination is wrong in order to be consistent with Australia's international obligations.

Section 3(1)(d)(i)

This sets down the worthy objective of promoting recognition and respect for the principle of equality. But the Bill can't do that when, by the inclusion of a selective list of protected attributes, it institutionalises inequality of access to safeguards and redress.

Section 3(1)(e)

The risk with special measures aimed at engineering equality is that they will unjustly create a situation where some are more equal than others. We will comment further on this in relation to Section 21.

Section 17(1)

This list of protected attributes appears to have evolved as an accident of history rather than having any rational basis. While people with many of the nominated attributes may well have need for safeguards against mistreatment, that is no less true of countless others who do not share those attributes. As noted above, the existence of such a list only institutionalises inequality of access to safeguards and redress. Although the explanatory notes (P23, para. 87) state, for example, that this clause does not require recognition of, or provision of facilities for, people who do not identify as either sex, the addition of gender identity does give them privileged status in terms of access to safeguards and redress that is denied to others. Rather than expanding the list (a process that could go on endlessly) it should be eliminated, thereby granting all people equal protection under the law. Of all the draft Bill's deficiencies, this is perhaps the most difficult to rectify short of such a major re-structure.

Section 19(1-2)

We have serious reservations about how unfavourable treatment and hence unlawful discrimination is defined in the draft Bill. Harassment and intimidation

should not be tolerated in any context, humiliation should be strongly discouraged and insults are regrettable, but offence is virtually unavoidable if we are to protect the right to free speech and a contest of ideas in the public domain. Where then should the legislative line be drawn?

There is wide and growing recognition that prohibiting the giving of offence is gross legislative overreach, as well being in breach of our obligations to protect free speech. The same could be said of insults. We believe that the legislative bar should be set high enough to avoid prohibiting actions that could reasonably be expected to merely offend or insult others. Only actions likely to cause significant material, social or psychological harm should be prohibited. This is not to give carte blanche to any who would seek to offend or insult others in this or any other context. It is just to say that the giving of offence or insults are matters to be left to the community to judge whether or not they are justifiable in any particular circumstance. They do not constitute behaviour that should be subject to the heavy hand of the law. Rather, their unwarranted use should be discouraged by community disapproval.

There are also practical implications involved in setting the bar as low as this draft Bill would. The daily number of incidents that would potentially fall foul of the prohibition against the giving of offence would probably be in the tens, if not hundreds, of thousands. Clearly, only a tiny minority of these would ever find their way before the Human Rights Commission and they are most unlikely to be the most deserving cases. They are much more likely to be the cases pursued by those who are most willing and able to use legislation to their own advantage (and their opponents' disadvantage). This is no recipe for justice.

Furthermore, if even one percent of these cases were to come before the Commission, dealing fully with all of them would constitute a completely unmanageable workload. The Commission would inevitably have to dismiss most of them as trivial or vexatious. It would be an abrogation of parliament's responsibilities if it were to provide no legislative guidance about where in the very broad spectrum from the most innocuous of offensive remarks to the gravest of intimidations the full force of law should be invoked, but to simply leave it to the judgment of an unelected Commission, as the draft Bill proposes.

Section 21

Again, due to the Bill's mis-definition of discrimination, this section makes what is, if taken at face value, the nonsensical statement that, 'Special measures to achieve equality are not discrimination'.

Furthermore, neither in this section nor in Sections 79-82, which describe a special measures determination and the process for making it, is the important distinction made between equality of opportunity and equality of outcome. Achievement is not just a function of opportunity; it also depends on ability, motivation and application. The provision of equal opportunity is a worthy goal, but the inclusion of 'special measures' in the Bill allows for social engineering favouring one group of people over others, not to provide equal opportunity, but

to contrive equal outcomes. Such cases would again constitute institutionalised injustice.

We therefore have reservations about the inclusion of 'special measures' with the present wording. We also note that there would be no need for this provision if the legislation was revised, as suggested, to recognise that discrimination is desirable and that only treatment that is intolerable or unfair should be prohibited. The provision of equal opportunity could never be found to be intolerable or unfair.

Section 22

It seems irrational that, having nominated a list of eighteen protected attributes, the draft Bill then states that discrimination on the basis of seven of them is only unlawful if it is connected with work and work-related areas. If discrimination on the basis of these seven attributes is acceptable in other areas of public life then why not also in work-related areas? This concern is given extra force by the fact that the definition of 'employment' includes voluntary or unpaid work. Such inconsistency seems to owe more to the history of how anti-discrimination legislation has evolved in Australia than to logic. A complaint could, for example, be brought against a political party on the grounds that it didn't provide an equal chance of employment to a member of an opposing party. The accused party would then be required to prove that its actions were justified. Yet, on the face of it, it would not be unlawful under this Bill for that party to prevent access to public places for other than work-related purposes on the basis of political opinion.

Again, this inconsistency would not exist if the list of protected attributes was dispensed with altogether.

Chapter 2, Part 2-2, Division 4, Sections 23-47

This whole Division, which deals with exceptions, opens up a real 'can of worms'. It is riddled with anomalies and inconsistencies that seem to owe more to the vociferousness of the special pleading, worthy or otherwise, engaged in by different groups, than the rigorous pursuit of justice.

The current approach is fundamentally wrong in principle, in that it implies that a whole range of commendable behaviour by governments, individuals or various organisations, without which society would be unworkable, is wrong, but will be excused because it is done in a good cause. We are particularly concerned that religious belief and practice should be seen in this way. The legislation should really be designed to protect religious belief and practice, along with other fundamental rights such as the right to free speech, rather than incorporating them as exceptions in a Bill, the general thrust of which is to restrain rights and freedoms.

If it was recognised that discrimination is, in general, necessary and desirable, then logically, the acceptance of discrimination as justifiable should be the

default position, with only its misuse being defined as unacceptable. This would then allow this whole portion of the Bill (over twenty pages) to be dispensed with.

The general exception for justifiable conduct, (Sections 23(2-5)) seems to be an attempt to alleviate such concerns, but it doesn't overcome the fundamental problem that the draft Bill is wrong in principle and conveys a wrong message. How effective the general exception clauses would be is also questionable, especially given the reversal of the onus of proof that is incorporated in the draft Bill. Doing away with the reversal of the onus of proof is essential to making this exception more robust.

The inconsistency alluded to above under our comments on Section 22 also occurs within this part of the draft Bill, with different categories of exceptions applying to different protected attributes. Registered charities, for example (Section 34), and clubs and member-based associations (Section 35) are effectively given carte blanche to exercise discrimination in relation to all the protected attributes, as long as this involves the conferring of charitable or club benefits, whereas religious bodies (Section 33) are given much less leniency. Surely, as long as they are not treating people in an unfair or intolerable way, then it is up to the organisations concerned, not the Government, to decide, for example, the rules under which they operate and what attributes are or are not important in a would-be employee.

Section 33(1-3)

This section would give the Government the power to dictate the policy of any religious organisation in receipt of Commonwealth funding for aged care, even where the Government's contribution was small (see Explanatory Notes, p42, para. 190). This is fundamentally wrong. The Government is perfectly entitled to set policies for aged care bodies for which it is the sole or dominant funder, but not for others, which should be free to determine their own policies and practices, provided that these do not involve unfair or intolerable treatment.

Section 44

It is questionable whether all provision of accommodation should be defined as being an area of public life (Section 22), but if it is, then it seems to be an unwarranted intrusion of government into the personal affairs of individual residents to say that they can only exercise their right to choose to whom they will offer accommodation if they only accept up to three, but not four, guests. Indeed there is a strong case to be made that even non-resident private property owners (e.g. owners of rented holiday shacks) should be free to make such a choice.

Sections 49, 50

Sexual harassment is certainly intolerable behaviour and should be prohibited, although our belief that prohibiting actions that merely offend or insult (Section 49(1)(b)) is legislative overreach (see our earlier general remarks under that

heading) also extends to this area. As it stands, this provision could easily be used to embarrass or disadvantage a rival who may be simply engaging in workplace banter, but may find it difficult to prove his or her lack of ill-intent. Again, we don't believe that it would be helpful for such infringements of decency and good manners to be subject to the heavy hand of the law.

Section 51

The above remarks about where the behavioural bar should be set in relation to sexual harassment also apply to racial vilification (see Section 51(2)(a)).

However, unlike the provisions relating to sexual harassment, this Division specifies that the behaviour must be related to a protected attribute (i.e. the race) of the person vilified. As previously stated, we believe that the list of protected attributes should be done away with. The provisions of this Division would then apply to the vilification or intimidation of any person, regardless of race or any other attribute they may have.

Although the provisions of Section 51(4) and especially Section 51(4)(c)(ii) seem, on the face of it, to provide adequate protection for free speech, we note that the Explanatory Notes (p51, para 234) report that Clause 51 'replicates without change' the relevant sections of the Racial Discrimination Act. In the light of journalist Andrew Bolt's recent conviction under that Act when he was exercising his right to make, 'a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment', this calls its effectiveness into question. Perhaps further consideration needs to be given to its adequacy in safeguarding free speech.

Section 124

This is perhaps the most objectionable clause in the draft Bill. It provides for the reversal of the onus of proof when a case comes before the court. This means that it will be assumed that the complainant's assertions that the actions concerned were for a purpose contrary to the Act are correct, unless the person complained against can prove otherwise. The rationale given in the Explanatory Notes (i.e. that the respondent is in the best position to know the reason for the discriminatory action – p89, para.463) is flimsy in the extreme. The defendant in any court case is almost invariably in the best position to know the reason for their actions, but they are not expected to prove their innocence. No-one should ever have to prove the worthiness of their motives. The long-held fundamental principle of justice that a person is held to be innocent unless and until proven guilty should never be so lightly discarded. It should be up to the complainant to demonstrate that the actions complained of were contrary to the law. This provision must be reversed.

Conclusions

We believe that before introducing legislation of this nature, it would be helpful to apply the following tests.

- Can the law effectively impose goodness on people, as the prohibition of actions such as giving offence seeks to do?
- Can legislation that prescribes a selective list of protected attributes give equal protection to all, without being exploited to suppress dissenting views?
- Can the addition of more attributes ever overcome the inherently unjust nature of providing redress only to those who can claim one or more of a selective list of protected attributes?
- Would the legislation enhance, rather than inhibit, the protection of fundamental freedoms such as freedom of speech and religion?
- Would the proposed legislation ease, rather than aggravate existing divisions within our community?

We don't believe that the draft Bill, as it stands, would pass any of these tests.

The existing anti-discrimination legislation has evolved over recent decades without apparently being subjected to any serious appraisal of whether its form is the most appropriate way to deal with the problems it seeks to solve. The proposal to amalgamate five Acts into one is a very worthwhile measure to simplify the excessively large body of existing legislation. However, as it stands, the draft Bill represents a lost opportunity to establish a firmer foundation for the legislation and to remove the worst of its anomalies and injustices. Furthermore, it reinforces some of the worst features of the existing legislation while adding more of its own.

Tasmanian Baptists believe that the term 'anti-discrimination' should be dispensed with, as it misrepresents discrimination as something to be abhorred when in fact it is indispensable to any just and civil society. Ideally, what is needed is something along the lines of a Mistreatment Act that would specify what constitutes unfair or intolerable treatment and prohibits anyone from treating anyone else in such a manner. The focus should be on the behaviour of the perpetrator without regard to the attributes of the victim, as it is in other fields of law. Unfair or intolerable treatment would include things such as sexual harassment and intimidation or victimisation of others for whatever reason, but should not extend to matters such as the mere giving of offence or insult. These are unavoidable in a society that values free speech and are beyond the capacity of the law to control anyway. They should not be incorporated in legislation on the dubious grounds that this would help educate the community on what is acceptable behaviour.

If the Government persists with the present proposal, the least it should do is to re-draft the legislation so as to ensure adequate safeguards against the infringement of fundamental rights and freedoms such as the rights to free speech and religion and the right to be regarded as innocent until proven guilty. It should ensure that only actions that can reasonably be expected to cause significant material, social or

psychological harm to another person fall foul of its provisions. It should incorporate a clear and robust general exclusion for justifiable conduct. The list of protected attributes appears to be at least partly due to an attempt to meet our international obligations under various human rights instruments. However, we are not convinced these instruments necessitate the use of a selective list of protected attributes. Ideally, justice requires that they should be covered by provisions that are universally applicable, even if a list is retained in the form of examples of where the legislation may come into play.

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