



19 December 2012

91.2
JW; ylh

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

and via email: legcon.sen@aph.gov.au

Dear Secretary

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

I refer to your invitation seeking submissions from interested individuals and organisations. Thank you for inviting the Society's comments regarding the Senate Legal and Constitutional Affairs Committee's inquiry into the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* ("the Bill")

Introduction

The Law Society of South Australia (**Society**) is a voluntary professional association for members of the legal profession that serves to represent its members, enhance the legal profession in South Australia and to preserve the integrity of the justice system. The Society is also a member of the Law Council of Australia (**Law Council**), the peak national body representing the legal profession.

In 2011, we provided comments to the Law Council on the proposal by the Commonwealth to consolidate Federal anti-discrimination laws into one Act. In 2012, comments were also provided to the Law Council in relation to the Discussion Paper on the 'Consolidation of Commonwealth Anti-Discrimination Laws'. We were also recently invited by the Law Council to provide feedback on the Bill. We are, for the most part, in agreement with and supportive of the Law Council's submission. However, there are several areas of concern where the Society has considered it appropriate to provide additional comments to the Senate Legal and Constitutional Affairs Committee.

Finding the right balance

The Society supports in principle a consolidation of anti-discrimination legislation. However, the Society considers a balance must be drawn between providing protection against discrimination and similar misbehaviour, and protecting fundamental rights of freedom of expression and conduct. Thus, although the Society favours a legislative regime which provides a clear and coherent basis for the prohibition of discrimination in this country, it does not support measures which will have the effect of stifling freedom of expression and conduct. Nor does it support removal of inconsistencies between current anti-discrimination legislation, if by that it is meant that prohibitions are increased to a common standard, irrespective of the nature of the prohibited conduct. Types of discrimination can differ, and prohibitions and penalties should not be indiscriminate.

An objective test is better than a subjective test

Freedom of speech and religion include the rights to express views which are likely to offend persons of different views or religious beliefs. The robust expression of opinions, short of incitement to hatred, is a strength of our social and legal system. It should not be curtailed to protect subjective offence that individuals may feel when their beliefs or attitudes are criticized.

The Society therefore does not support, and condemns, any definition of discriminatory conduct which is dependent on subjective criteria such as 'offending' or 'insulting' a person at whom the conduct is directed, or who perceives the conduct. The Society suggests that discriminatory conduct must be objectively defined by the nature of the conduct, and in addition have an objective detrimental consequence, if it is to be prohibited. The focus should be on the perpetrator's conduct which can be assessed on an objective basis, rather than the victim's reaction, which will be subjective in nature and may, indeed, be unreasonable or unforeseen in the circumstances.

We support the Law Council's submission that the wording in clause 19(2)(b) should be limited to conduct of a perpetrator which can be assessed objectively, rather than by a subject's or observer's reaction assessed on a subjective basis. We suggest a further requirement that the impugned conduct cause objectively demonstrable harm, such as physical, medical or economic injury.

Protected attributes

The Society is concerned about an approach which attempts to define and promote 'protected attributes'. These are apparently distinct from human rights. The Society suggests there is a need clearly to identify fundamental human rights, and to distinguish them from laudable, but less significant, entitlements. If the 'protected attribute' approach is to be used (and we are not persuaded that it should be used), it should be limited to clearly defined and fundamental human rights.

The Society is further concerned that the approach of trying to protect such 'attributes' is misconceived, in part because of the generality and scope of the 'attributes' and in part because of the risk that attributes may reflect transient rather than fundamental concerns. A more appropriate approach may be to prohibit discriminatory behaviour that is fundamentally inconsistent with tolerance, diversity and freedom of action and expression, such as inciting religious or racial hatred.

Turning to some specific issues:

The prohibition of 'proposing to treat' and 'proposing to impose' (clauses 19(1) and (3)), and their conflation with treating and imposing, is at least problematic, at worst a serious imposition of liabilities for anticipated conduct.

Clause 19(4) of the Bill extends the meaning of having a 'protected attribute' in a number of important ways by including persons who have been assumed to have an attribute. The extension of this approach means that, for example, it may be unlawful for an employer to act on a mistaken belief, for example as to the sexuality of an employee. We are of the view that extending 'protected attributes' to cases where the attribute is merely an assumption, and the attribute does not actually exist, broadens the concept of 'protected attributes' too widely. It may have the unintended effect of capturing conduct that is merely transient or mistaken in nature.

It also raises issues of subjectivity, cultural beliefs and attitudes of individuals and groups that are undesirable. In our view, tests that are based on subjectivity are more likely to lead to inconsistent approaches in the decision-making and complaints resolution process. This is particularly the case where the findings of a decision maker are likely to be partly influenced by that decision maker's own cultural beliefs and attitudes. Others have previously highlighted the difficulties faced in understanding and applying decisions in anti-discrimination law that are inconsistent with each other. Creating a subjective test in the context of victims having 'protected attributes' is unlikely to improve the situation or make the complaints process more efficient.

Justifiable behaviour

Clause 23 introduces a new concept for Commonwealth anti-discrimination law. This clause will exempt conduct that would otherwise be discriminatory, if that conduct is found to be 'justifiable conduct'. Subclause 23(2) provides that discriminatory conduct which is justifiable is not unlawful.

The 'justifiable conduct' exception is vague, and will require expensive, and for many people unattainable, processes of litigation. There is a serious issue whether the exculpation of conduct should be retrospective. Further comments are set out below.

Subclause 23(3) sets out the test for determining whether the conduct of a person is

justifiable. Conduct is justifiable if:

- the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim;
- that aim is a legitimate aim;
- the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and
- the conduct is a proportionate means of achieving that aim.

This is a complex, cumulative test, incorporating several concepts which are incapable of objective assessment. What is an “aim”? The word “legitimate” may mean ‘lawful’, or it may import some unknown subjective criteria such as ‘socially acceptable’. What is “proportionate”?

The Explanatory Notes to the Bill do not provide any guidance on what types of conduct would be considered to have been undertaken in ‘good faith’. While we note that the concept of ‘good faith’ is explored in detail in other legislation and case law, it would be helpful to be provided with some examples of conduct in ‘good faith’ in the context of ‘justifiable conduct’.

There may also be cases where conduct may not have been in good faith or legitimate – but is arguably justifiable in the circumstances. For example, a human resources manager receives a complaint from an employee complaining of anonymous emails and notes of a bullying and harassing nature. In order to ascertain the identity of the perpetrator, the HR manager engages in conduct that could be viewed as not legitimate or in good faith. Unbeknownst to other employees, the HR manager intercepts and reads emails and correspondence of a number of employees that are suspected of sending the anonymous notes to the victim. Some people may consider the clandestine behaviour of the HR manager to be not legitimate nor in good faith, in breach of employees’ privacy, procedural fairness and other employee rights. On the other hand, the conduct could be justifiable on the basis that it was for the aim of eradicating bullying, and thus, a legitimate aim. In any event, this example highlights the difficulty in applying the ‘justifiable conduct’ test in circumstances where the test is vaguely worded and of wide application.

Whether or not conduct was undertaken in good faith and for a legitimate aim will partly be influenced by the subjective beliefs and attitudes of the decision maker. In addition to being expensive to litigate and defend, it is also likely that the ‘justifiable conduct’ test will lead to inconsistent decisions as a result of applying this test.

Reversing the burden of proof

The presumption of guilt incorporated in clause 124 is inconsistent with proper proof of wrongdoing or the imposition of civil liability. Subclause 124(1) provides for a shifting burden of proof to the defendant, in relation to the reason or purpose for conduct when unlawful conduct is alleged. This effectively means that an applicant can make a number of allegations about the defendant's conduct, or proposed conduct, and also the defendant's reasons, or proposed reasons for engaging in that conduct. *In the absence of any other explanation provided*, it may potentially be open to the court to presume that the applicant's submissions in regard to the defendant's alleged conduct, and alleged reasons for engaging in that conduct, are correct, *unless the contrary is proved*. Subclause 124(1) shifts the burden of proof from the applicant to the defendant, representing a substantial change from the current policy.

The Society is seriously concerned that placing the burden of proof on defendants, in these circumstances, will cause fundamental difficulties for defendants trying to defend a claim. We are of the view that the introduction of subclause 124(1) is an affront to principles of natural justice and is inconsistent with other areas of the Bill that continue to require the applicant to bear the burden of proof. It is likely to force defendants to provide as much information as possible to the court, particularly where there are complicated or confused facts asserted by the applicant. This may lead to lengthy and drawn-out proceedings and examinations, unfairly burdening all involved and increasing the economic and personal costs to all involved.

The Explanatory Notes to the Bill provide no guidance on what standard of proof is intended to be applied to defendants under subclause 124(1). The current standard of proof is the *Briginshaw* test and has been applied in all jurisdictions as the basis for assessing evidence and the allegations:

“The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved.”¹

The *Briginshaw* test is relevant to when applicants bear the burden of proof. If the burden of proof must shift to the defendant under subclause 124(1), the Society is of the view that the Inquiry should further consider what type of standard of proof is to apply to defendants, and whether that standard of proof should be set at a lower threshold than what is currently applicable to applicants.

The Society therefore does not support the Bill, in its present form.

¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362

The purpose of anti-discrimination legislation is to identify, discourage and penalize harmful discrimination. By casting the net too wide, and intruding complex subjective aspects to these processes, we consider the Bill is likely to undermine and discredit its true purposes. It runs the obvious risk of penalizing and alienating people for conduct that, objectively, is trifling or unintended, and exposing such people to economic discrimination and blackmail.

We would encourage further consideration and consultation to preserve the positive aspects of the Bill without what, we trust, are unintended adverse consequences.

I trust these comments are of assistance.

Yours sincerely

John White

PRESIDENT

Email:

Tel: