



Submission to the Senate Legal and Constitutional Affairs Committee on the Exposure Draft of Human Rights and Anti-Discrimination Bill 2012

21 December 2012

Introduction

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts.

Arts Law provides expert legal advice, publications, education and advocacy services each year to over 2,500 Australian artists and arts organisations operating across the arts and entertainment industries.

Our clients reside in metropolitan centres and in regional, rural and remote parts of Australia. They are from all Australian states and territories. Our client base is multi-cultural, Indigenous and non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists. We also represent the organisations that support them.

Human Rights and Anti-Discrimination Bill 2012

1. Arts Law acknowledges that the Bill seeks to consolidate the existing Commonwealth anti-discrimination legislation (including the *Racial Discrimination Act 1975* (RDA)) and that the major reforms proposed in the Bill include:
 - a single, simplified test for discrimination;
 - introduction of additional protected attributes, including protections against sexual orientation and gender identity discrimination and extension of protections against relationship discrimination to same-sex couples in any area of public life; and recognition of discrimination on the basis of a combination of attributes;
 - coverage of discrimination and sexual harassment in any area of public life;
 - a streamlined approach to exceptions.
2. Arts Law acknowledges the purpose of s. 51 of the Bill is to determine that racial vilification is unlawful and that, as stated in *Kelly-Country v Beers* [2004] FMCA 336 (21 May 2004) [117] “one of the primary purposes of part II A of the RDA is to enable Australia to comply with its obligations pursuant to the International Convention on the Elimination of All Forms of Racial Discrimination. Article 4 of this Convention condemns racial vilification; ideologies based on racial superiority; and institutionalised racial discrimination; in any form.”

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Council of Patrons Robyn Archer AO, Jan Chapman AO, Deborah Cheetham, Ian David, David Gulpiil AM, Roger Knox, Frank Moorhouse AM, Professor Sally Morgan, David Page, Rachel Perkins, Peter Sculthorpe AO OBE, William Yang, The Hon. David Angel, The Hon. Justice Terence Buddin, Julian Burnside AO QC, The Hon. Jerrold Cripps QC, The Hon. Elizabeth Evatt AC, The Hon. Malcolm Gray RFD, The Hon. Michael Kirby AC CMG, The Hon. David Levine AO RFD QC, The Hon. Justice John Mansfield AM, The Hon. Justice Jane Mathews AO, Shane Simpson AM, The Hon. Antony Whitlam QC

3. Arts Law also acknowledges, as stated in *Kelly-Country v Beers* [118], that “Articles 19(3) and 20(2) of the International Covenant on Civil and Political Rights allows for legal restrictions on freedom of speech necessary to respect the rights or reputations of others, and requires that any advocacy of racial hatred that constitutes incitement to discrimination, hostility or violence be prohibited by law. Accordingly, this Covenant, which deals with freedom of speech, recognises that it is lawful for there to be restrictions placed on this right to enable the achievement of the abolition of government policies based on racial discrimination or theories of racial superiority. It is in this context that the exceptions provided by section 18D must be considered. Accordingly, although the exceptions provided by section 18D must be construed narrowly, the conduct envisaged by CERD is extreme.”
4. Arts Law thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to make a submission that is focused on the s. 51(4) ‘performance ... of an artistic work’ defence.

s. 51(4) ‘performance ... of an artistic work’ defence

5. Arts Law recommends that the *Explanatory Notes* to the Bill should confirm that in relation to s. 51 (4) “the exemption that deals with an act that is done reasonably and in good faith in relation to artistic work. This exemption would cover both serious drama and comedy acts. Whilst some of these performances may cause offence to some people, they are presented as entertainment and are not within the scope of the prohibitions.” See *Racial Hatred Bill 1994* explanatory memorandum at pages 10-11.
6. Arts Law notes that the expression “artistic work” is not defined in the Bill.
7. Arts Law notes that paragraph 233 of the *Explanatory Notes* to the Bill states: “Exceptions apply to anything done or said, reasonably and in good faith, in: artistic performances” and in other specified circumstances. Arts Law also notes that paragraph 234 states: “This clause replicates without change sections 18C and 18D of the RDA.”
8. Arts Law submits that the inclusion of the statement set out above in paragraph 5 of this Submission will act to confirm that the s. 51(4) ‘performance ... of an artistic work’ defence (in the draft Bill) can be interpreted in the same way as in *Kelly-Country v Beers* [2004] FMCA 336 (21 May 2004) which considered s18D of the RDA.

Yours faithfully,

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