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

Much discussion occurs throughout the world on human rights, including discussion on what rights people have, or ought to have, and how these rights might be enforced. These are weighty matters. I am sceptical, however, of the practical value of articulating lists of human rights. My preferred approach is to adopt the long-held view that people have equal rights from birth and have equal dignity as human beings, and to assess the governance implications that flow from this – in this case, the human rights governance arrangements.

Governing authorities either operate on the basis that they acknowledge the fundamental equality and dignity of the population, or they do not. There is no middle ground. And they are accountable for their actions and inactions in establishing governance arrangements accordingly.

This is not to say that social governance arrangements should treat any individual's human rights or freedoms as open-ended. Rights and freedoms are exercised within the community. Indeed, no society could function properly without laws that place certain limits on the freedom of its people. Further, people often enter into voluntary arrangements in which they accept obligations that limit their freedom. The choices we make are informed by much more than our preferences. Neither do we always make decisions based on our self-interest.

Over the ages, human societies have established institutions, codes and laws to regulate the transactions of life¹. These social structures must have a rationale, and my starting point is the proposition that their ultimate purpose is the good of that society.

There are important implications for human rights social governance embedded in this proposition and a relatively uncomplicated analysis of these implications can identify three basic reference points – freedom, fairness and

¹ Transactions of life are any actions by any person or entity in the public domain of life. This includes normal physical actions such as communicating, walking in a park, looking at another person, committing an act of violence, offering assistance to someone, speaking to a colleague, eating a meal, participating in a sport and so on. It also includes non-physical actions such as making a decision (including deciding not to act), planning for an event, listening to music, enjoying a view, falling in love and so on.

truth – for assessing whether or not particular structures of society are operating for the good of that society.

Societies define the freedom of their members by communally agreeing what is to be subject to regulations and what is regulation-free. The boundaries of individual freedom are, therefore, ultimately derived from the community. They are established and measured less by what individuals assert as their freedoms, and more by what community standards permit in a society where people have equal rights. Freedom, even in the sense that it is a birthright, is held collectively, though expressed individually.

Freedom implies fairness. The fairness of one person's action is primarily determined by its impact on another person. People rightly expect to be treated fairly, but fairness is not self-defined. Ultimately, fairness is determined by benchmarks entrenched in laws and social customs. Individuals may disagree about whether something is fair and societies use complex processes to resolve such disagreements. These processes are necessarily objective, not least because the people who set these processes have a vested interest in ensuring they themselves would be treated fairly if they were to be subjected to them. Rule makers in a society where people have equal rights cannot avoid the timeless reality that fairness is an immutable law of communal living.

Truth is a multi-faceted concept that philosophers and other scholars have debated for millennia without finding a definition they can agree on. These complications and disagreements notwithstanding, I state unequivocally that social governance without truth is a contradiction in terms. Truth plays a pivotal role in social governance, including human rights governance – and it is not a relative concept. In the everyday transactions of civil life, and even allowing for shades of meaning and differing circumstances, there is generally little or no disagreement about many of the relevant and contributing facts surrounding a given event. The truthfulness of a statement – written or spoken (say, a claim by a person that they did or did not do something to which another person objects) – is open to being objectively tested, if necessary by judicial processes. But there is a deeper more abstract sense in which truth is not a relative concept for social governance: truth is an essential building block of fairness and of freedom and cannot, therefore, be self-defined.

Human rights authorities exercise power. But for this power to have true authority it needs to contribute to peace, order and good government within society. And to do so, it must not be disconnected from the building blocks of social governance: freedom, fairness and truth. Freedom, fairness and truth are constituent elements of authority, meaning that true authority too is communally derived.

People routinely subject civil transactions to a wide range of reviews. For instance: support for or opposition to decisions of government are expressed

in opinion polls and the ballot box; commentators express views about the artistic merit of the performing and visual arts; individuals develop likings and dis-likings for other individuals; businesses analyse the preferences of customers with a view to maintaining or increasing sales; and some actions are formally reviewed by non-judicial tribunals such as Ombudsman and appeal tribunals. Some transactions are held to account by being subjected to full judicial review.

I call the totality of these judicial and non-judicial review arrangements the structures of our social governance: the structures are a mirror in which we literally see a reflection of what our society stands for. They are also an unequivocal statement to the world of who we are as a people.

The structures are constantly evolving. Indeed they must evolve to remain relevant to contemporary circumstances, but they will lose authority if they lose their connection to freedom, fairness and truth.

I respectfully suggest, therefore, that the Exposure Draft be modified:

- to state explicitly that people have equal rights;
- to formally and explicitly embed the notions of freedom, fairness and truth into its operations to establish a platform for human rights social governance arrangements; and
- to make explicit that the human rights institutions and structures of our society have as their ultimate purpose the good of this society and that the transactions of society are open to judicial and/or non-judicial review on the basis of any harm they cause by lacking fairness or truthfulness or by their impact on freedom in this society.

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