

Submission

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

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The authors of this submission are working together on a project funded by the Australian Research Council concerning the accommodation of minority cultures within the framework of a liberal democratic Australia.¹ The first author is a specialist in constitutional law; the second is author of a well-known textbook on the Australian legal system. We accept the role that anti-discrimination laws have generally played in reducing unfair treatment of groups that have historically suffered discrimination. However, we have concerns about the negative consequences of anti-discrimination laws that go far beyond this purpose, and which may have unintended adverse effects upon social cohesion. This is one such Bill.

Previously, we made a submission to the Attorney-General in relation to the proposed consolidation of Commonwealth anti-discrimination laws. We respectfully draw the attention of the Senate committee to the observations and recommendations made in that submission, a copy of which is attached to this submission for ease of reference.

In this submission we seek to:

- reiterate some of the central points that we made in our earlier submission concerning antidiscrimination laws and multicultural diversity;
- express concerns about certain particular features of the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012;
- draw attention to certain significant constitutional problems with the proposed bill.

1. The scope of the proposed law

The information about the Senate Committee inquiry made available on the Committee's website states that 'The Bill does not propose significant changes to existing laws or

¹ *A Federation of Cultures? Innovative Approaches to Multicultural Accommodation*, ARC Discovery Project DP120101590 (2012-2015).

protections but is intended to simplify and clarify the existing anti-discrimination legislative framework.’ With all due respect, this is simply not the case. On the contrary, the Exposure Draft is a very radical and controversial expansion of the scope of Commonwealth law, which in some respects may well exceed the Commonwealth’s constitutional powers. It proposes several very far-reaching changes and extensions to the current reach of Commonwealth laws.

We address some of these changes in this submission. There are others that we do not address, given the very limited time available to prepare this submission. We do nonetheless refer the Committee to the submission of *Freedom 4 Faith* with which we have had some involvement, and which deals more comprehensively with the problems in this Bill. We support the amendments proposed in that submission.

2. Anti-discrimination laws and multicultural diversity

As we pointed out in our submission to the Attorney-General, anti-discrimination laws need to be considered very carefully in relation to Australian multiculturalism, for unless anti-discrimination laws are crafted with a proper respect for the diversity of cultures, beliefs and values in multicultural Australia, then the impact of those laws will be to reduce diversity rather than enhance it. Critical features of a successful multicultural policy are some level of tolerance for differences in regard to moral, social and cultural values; respect for the freedom to run schools and welfare organisations that seek to meet the needs of minority groups (including religious groups); and more generally, proper respect for the freedom of association of minority groups. Freedom of association is compromised by anti-discrimination laws that nominate a large number of ‘protected attributes’ without balancing freedom of religion and association rights that operate to maintain group identity and cohesiveness.

The issue of multiculturalism is especially important when it is recalled that anti-discrimination laws use the power of the state to regulate relations between peoples of different cultures, beliefs and values. The use of state power in this context is liable to be highly counter-productive if not carefully moderated. Radical anti-discrimination laws are often the antithesis of the approach of ‘live and let live’ which has in the past proved to be a very successful strategy for promoting tolerance and harmony in Australia’s multicultural society. If poorly drafted – as this Bill is – they inhibit the freedom of minority groups to maintain their religious and cultural identities.

3. The problems with Clauses 19 and 22

There has been much critical comment reported in the media concerning the explicit extension of ‘unfavourable treatment’ to include conduct that ‘offends, insults or intimidates’ (clause 19(2) of the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012). We agree with many of the criticisms that have been raised (such as those raised by former Chief Justice of NSW and current ABC Chairman, James Spigelman). But we submit, further, that the problem will not be addressed simply by removing the reference to ‘offends,

insults or intimidates'. Clause 19(2) is expressed to have been inserted 'to avoid doubt' about the meaning of unfavourable treatment. Even if the words "offends, insults or intimidates" were to be removed, unfavourable treatment might still be capable of bearing these meanings because the term 'unfavourable treatment' is so broad. And we submit that it is readily capable of bearing these meanings due to a more fundamental problem with the Exposure Draft, namely the scope of clause 22.

Clause 22(1) of the draft bill proposes an unprecedented expansion of the scope of Australian's anti-discrimination laws. The Commonwealth's existing anti-discrimination laws, like the anti-discrimination laws of the States, are limited to prohibiting discriminatory conduct by persons possessing responsibility, authority or power in particular areas of public life, or those in a position to provide goods or services. Section 15(1) of the *Disability Discrimination Act 1992* may be given as an example. It provides that:

It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability:

- (a) in the arrangements made for the purpose of determining who should be offered employment; or
- (b) in determining who should be offered employment; or
- (c) in the terms or conditions on which employment is offered.

The other prohibitions in the *Disability Discrimination Act*, like the *Sex Discrimination Act 1984*, the *Racial Discrimination Act 1975* and the state antidiscrimination laws, are similarly limited to the conduct of persons possessing responsibility, authority or power in particular areas of public life, whether as employers, managers, administrators, providers of accommodation, goods or services, public authorities, and so on. The proposed clause 22(1) of the Exposure Draft is much wider than this. It proposes that:

It is unlawful for a person to discriminate against another person if the discrimination is connected with any area of public life.

The limitation of Australia's existing anti-discrimination laws to the conduct of persons possessing responsibility, authority or power in particular areas of public life is proposed to be entirely eliminated. If enacted in these terms, the prohibition contained in the Commonwealth antidiscrimination law would extend to the conduct of *any* person provided that conduct was in some way 'connected with' an area of 'public life' – and we note that the areas of 'public life' specified in clause 22(2) are very extensive indeed.

In practice, the proposed clause 22(1) would prohibit *any* employee of a company, *any* student at a school, *any* client of a business, *any* customer of a department store, *any* patron of a restaurant, *any* member of a club, *any* spectator of a sporting activity, *and so on*, from engaging in conduct that is in any way unfavourable to another person connected with that area of 'public life', so long as the unfavourable treatment is in relation to one of the relevant protected attributes.

What would constitute unfavourable treatment in such circumstances, noting that the potential perpetrator need not hold a position of responsibility, authority or power? Clause 22(1), by proposing to define the prohibition in this way, necessarily implies a far-reaching extension in the practical meaning of unfavourable treatment. A bully in a school playground, a rude customer who pushes in front of someone waiting in a queue at a takeaway restaurant, an inconsiderate employee who gossips about another employee, and a spectator who abuses a referee at a children's soccer game – all of these behaviours involve treating others unfavourably in some respect or another, and the conduct may be considered unlawful if the behaviour can plausibly be related to a protected attribute. This extends the reach of the law very far into areas of community life which have hitherto been regulated largely by other norms – in the examples above, by school disciplinary responses, by a public rebuke to the rude customer, by a quiet word by a manager of the gossiping employee, or through criticism of the angry spectator by others at the game.

Clause 22 of the draft bill proposes to extend anti-discrimination law to all of these behaviours, and more. We submit that these are not behaviours which are best dealt with by legal regulation, especially through antidiscrimination laws.

Australia's current anti-discrimination laws are limited to regulating vertical relationships of responsibility, authority or power; the proposed clause 22 would extend anti-discrimination laws to the regulation of horizontal relationships of all sorts of kinds. It is in horizontal relationships that offensive and insulting conduct most often occurs. This kind of conduct is best responded to at a community level, without the distant and heavy hand of Commonwealth law and regulation intruding into such matters. People sometimes behave badly in their social relations with others; but the best way to encourage good behaviour is by modelling it, and by reinforcing standards of right conduct and courtesy, not by running off to court to engage in protracted and expensive legal disputes.

We submit that references to offence and insult in clause 19 should be removed and the scope of clause 22 should be limited to the specific relationships of responsibility, authority and power regulated by the Commonwealth's existing anti-discrimination laws.

4. Anti-discrimination laws and other human rights

It is a fundamental principle of international human rights law that human rights are indivisible. This means, among other things, that rights not to be discriminated against must be interpreted and applied in a manner that is consistent with other rights, including rights to freedom of speech, religion, association and cultural expression. As we put it in our earlier submission:

The full range of human rights that are protected under the International Covenant on Civil and Political Rights and other international human rights conventions offer a principled basis for determining an appropriate balance between the accommodation of ethno-cultural minorities and their assimilation to Australian values, particularly as they relate to anti-discrimination law. People from ethno-cultural minorities:

(i) need to be protected from discrimination on the basis of various attributes including their race, ethnic origin or religious belief (Article 26, ICCPR);

(ii) have the right to freedom of religion and conscience, alongside all other people of faith (Article 18, ICCPR; cf Article 5(d)(vii), CERD; Article 14, CRC);

(iii) have the right to freedom of association (Article 22, ICCPR; cf Article 5(d)(ix), CERD; Article 8, ICESCR; Article 15, CRC);

(iv) have the right to marry, to found a family and to educate their children in conformity with their religious and moral convictions, thus sharing in the common responsibility of men and women in the upbringing and development of their children (Articles 18(4) and 23, ICCPR; cf Articles 10, 11 and 13(3)-(4), ICESCR; Articles 3(2), 5, 8, 9, 10 and 18, CRC; Articles 5 and 16, CEDAW);

(v) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language in community with the other members of their group (Article 27, ICCPR; cf Article 15, ICESCR).

Great care needs to be taken to ensure that a focus on the first-mentioned right (freedom from discrimination) does not diminish the others (e.g. freedom of religion, association and cultural expression and practice). This can readily happen, for example, if freedom of religion is respected only grudgingly and at the margins of anti-discrimination law as a concessionary ‘exception’ to general prohibitions on discrimination. It can also happen if inadequate attention is paid to freedom of association and the rights of groups to celebrate and practise their faith and culture together.

These dangers are real. Some advocates for reform of anti-discrimination laws have a tendency to place a very high value on ‘non-discrimination’ and to concede ‘exceptions’ based upon freedom of religion, association or cultural expression only with great reluctance, if at all. Although they sometimes recognise that there is a need to give due weight to all human rights and to find an appropriate balance between them, it is generally not acknowledged that posing the question as one of identifying exceptions to the principle of non-discrimination prejudices the inquiry in favour of the right to be free of discrimination and against the rights to freedom of religion, association and culture, understood as both individual and group rights. Moreover, anti-discrimination laws tend to be highly individualistic in focus, and allow relatively little room for group rights, including the associational rights guaranteed and implied by Articles 18, 22, 23 and 27, ICCPR.

There is a need to ensure that in any rewriting of Commonwealth anti-discrimination laws these human rights that are in creative tension with one another are appropriately balanced. Indeed, it is arguable that Australia is not complying with its international obligations if this is not the case. The Australian Government has

recently reaffirmed its commitment to review legislation, policies and practices for compliance with the seven core UN human rights conventions to which Australia is a party, and the current review of anti-discrimination laws is one of the ways in which the Government is seeking to fulfil that commitment.

The Government's commitment that it will not adopt any change to discrimination laws which diminishes protections (Discussion Paper, para 10) is laudable, but the somewhat weaker expressed commitment that the 'policy' expressed in existing exceptions under the current laws will be maintained (para 146) is a cause for grave concern if this means that the human rights to freedom of religion, association and cultural expression that are protected through the current exemptions are going to be undervalued in the reform process. We urge the Government to give proper and full respect for these rights alongside the right to be free from unjustifiable discrimination. This is an imperative driven not only by the requirements of international human rights norms, but also by Australia's increasingly diverse mix of ethnicities, cultures and religions.

We wish to reiterate these concerns in relation to the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 and we respectfully request the Senate Committee consider the specific recommendations we made in that submission and to assess the Exposure Draft in that light.

5. Constitutional issues

We noted in our earlier submission that it is *arguable that Australia is not complying with its international obligations* if its anti-discrimination laws do not give sufficient weight to all other human rights, such as freedom of speech, religion, association and cultural expression.

We submit that there will be serious doubts about the constitutionality of any Commonwealth anti-discrimination law, in so far as it is based on the external affairs power, to the extent that such law:

- is in breach of, or does not properly give effect to, Australia's obligation to protect all of the human rights explicitly referred to in the International Covenant on Civil and Political Rights;
- extends the prohibition of unlawful discrimination beyond the protected grounds and protected rights and freedoms referred to in the relevant international treaties, such as the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Discrimination (Employment and Occupation) Convention.

The Exposure Draft presents constitutional problems on both counts. First, despite its title, the objects of this proposed legislation are focused only on non-discrimination, and there is no requirement to take account of other human rights with which 'equality rights' need to be balanced. We submit that the Bill as currently drafted does not adequately take into account

Australia's obligation to protect all of the human rights explicitly referred to in the International Covenant on Civil and Political Rights, including rights to freedom of speech, religion, association and cultural expression. If Australian laws do not adequately respect these rights Australia will be in breach of its international obligations and the constitutional validity of Commonwealth anti-discrimination laws will be placed in significant doubt. This is because, in giving effect to a treaty pursuant to the external affairs power, the Commonwealth cannot just cherry pick one obligation out of many, and a fortiori, cannot do so in a way that represents a breach of its other obligations under that same treaty.

The Exposure Draft presents constitutional problems on the second count also because the reach of the proposed law exceeds the scope of Australia's international obligations and, to that extent, cannot be authorised under the external affairs power. Parts of this Bill rely upon tenuous extrapolations from the texts of the relevant international treaties. For this reason, the constitutionality of these provisions is highly doubtful. Constitutional challenges to Commonwealth legislation in the form of the Exposure Draft would not be unlikely and their prospects of success would not be weak. We draw attention to three such constitutional problems in Section 6 below. We suspect that there may be others.

6. Specific constitutional problems

a) The application of the law to volunteers

Employment is given a very wide definition in the Exposure Draft. Clause 6 provides:

employment means:

- (a) work under a contract of employment (within its ordinary meaning); or
- (b) work that a person is otherwise appointed or engaged to perform; or
- (c) voluntary or unpaid work.

whether the work is on a full-time, part-time, temporary or casual basis.

It is far from clear to us that there is any constitutional basis for including volunteers within the scope of 'employment' for the purposes of Commonwealth human rights and anti-discrimination legislation.

Unless volunteers are covered by some other treaty or convention such as CEDAW, then it is likely that the constitutional basis for this extension must rest, if anywhere, upon the International Labour Organization (ILO) conventions, in particular, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Notably, that Convention uses the terms 'employment' or 'occupation' rather than 'work', and there is no indication whatsoever in the Convention that it is intended to go beyond paid employment. The expressed purpose of the provisions in Convention 111 is to support equal opportunity and treatment in relation to paid employment. Article 1 of the Convention defines discrimination in terms of actions that nullify or impair 'equality of opportunity or treatment in employment or occupation'.

Certainly, the ILO has in more recent times sought to give a broader meaning to employment for certain purposes. The main document is the ILO's *Manual on the Measurement of Volunteer Work* (2011). The preface to that document explains the purposes for which voluntary work is being included (p.(i)):

This *Manual on the measurement of volunteer work* is intended as a guide for countries in generating systematic and comparable data on volunteer work by means of regular supplements to labour force or other household surveys. The objective is to make available comparative cross-national data on a significant form of work which is growing in importance but is often ignored or rarely captured in traditional economic statistics. Doing so will help to fulfil the United Nations Secretary General's recommendations in his follow-up to the implementation of the International Year of Volunteers report (United Nations, 2005) that governments "vigorously" pursue "actions to build up a knowledge base" about volunteer work and to "establish the economic value of volunteering."

While the ILO may have an interest in volunteer work for statistical purposes, there is no reason to believe that volunteers are within the scope of ILO Convention 111. Indeed, the ILO makes it clear that its own definition of volunteer work for statistical purposes seeks to capture activity which is quite unrelated to the world of paid employment. Examples from the manual (Table 3.1, p.17) include buying groceries for an elderly neighbour or driving a neighbour to a medical appointment.

We find it difficult to see where in the federal Constitution the Commonwealth is authorised to regulate such activity (and nor can we see any sensible reason to do so).

b) The extension of the prohibition to discrimination connected with any area of 'public life'

As noted, clause 22(1) of the draft bill states: 'It is unlawful for a person to discriminate against another person if the discrimination is connected with any area of public life.' Clause 22(2) goes on state that 'areas of public life include (but are not limited to) the following:

- (a) work and work related areas;
- (b) education or training;
- (c) the provision of goods, services or facilities;
- (d) access to public places;
- (e) provision of accommodation;
- (f) dealings in estates or interests in land (otherwise than by, or to give effect to, a will or a gift);
- (g) membership and activities of clubs or member-based associations;
- (h) participation in sporting activities (including umpiring, coaching and administration of sporting activities);
- (i) the administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs.'

A significant question arises as to the constitutional basis for the expansion of anti-discrimination legislation in this way: into so many different areas, in relation to so many different 'protected attributes', and simply on the basis that the conduct is 'connected with' any such area of public life.

The Commonwealth has no legislative power in relation to ‘public life’. And to say that ‘areas of public life include (but are not limited to)’ the list which follows is to assert that federal legislative power extends even more widely than the specific areas listed. To assume that Commonwealth laws can ordinarily extend this far cannot survive constitutional scrutiny. Clearly, to the extent that the Bill implements or gives effect to a specific Convention obligation such as those contained in the International Convention on the Elimination of All Forms of Racial Discrimination, or the Convention Eliminating All Forms of Discrimination Against Women, then there may be a constitutional basis for some of these areas of public life to be included in that particular respect. However, clause 22(1), by extending the reach of federal anti-discrimination prohibitions to any unfavourable treatment that is ‘connected with any area of public life’, is no longer carefully tied to the ‘human rights and fundamental freedoms’ that are the subject of protection under these conventions and which arguably provided the constitutional basis for the much more circumspect existing federal anti-discrimination laws. Moreover, where the Commonwealth is neither reliant on a specific UN convention nor on the ILO’s Discrimination (Employment and Occupation) Convention, it is difficult to see what basis it has for a law that seeks to address so many protected attributes. The International Covenant on Civil and Political Rights cannot provide such a basis as the Bill is concerned with only one human right (and with a consequent diminution of others).

We surmise this is a reason why the proposed clause 22(3) limits the protection of certain attributes to work or work-related areas:

Discrimination on the ground of any of the following protected attributes (or a combination of protected attributes that includes any of the following protected attributes) is only unlawful if the discrimination is connected with work and work-related areas:

- (a) family responsibilities;
- (b) industrial history;
- (c) medical history;
- (d) nationality or citizenship;
- (e) political opinion;
- (f) religion;
- (g) social origin.

Despite qualifications such as these, there are grave doubts about the constitutionality of clause 22(2) when read with the proposed bill as a whole.

c) Freedom of political communication

Clause 19 defines unfavourable treatment to include any conduct which offends or insults another person. Two of the protected attributes in clause 17 are political opinion and industrial history. Although unlawful discrimination on these grounds is limited by clause 22(3) to the context of ‘work and work-related areas’, the reach of this sub-clause is extensive, for ‘work and work-related areas’ is defined in clause 7 to *include* ‘employment’, which term not only bears the wide meaning stipulated in clause 6, but is in clause 7 said to

include, among other things, ‘performing work as an employee’. Because clause 22(1) lays down the general rule that anyone may be liable for unfavourably treating anyone else, it follows that any offence caused to someone because of their political opinions or industrial history within a work context is potentially unlawful.

Politicians are engaged in work. Therefore, any statement which is not made under the cover of parliamentary privilege and which concerns the political opinions or industrial history of another person may be unlawful if the other person is (or, in practical terms, claims to be) offended or insulted by the first person’s comments about their political opinions or industrial history. The prohibition on language that offends or insults could apply to many statements of politicians outside of Parliament.

This is subject to the availability of the defence under clause 23, but that defence is limited to proportionate conduct that is in pursuit of a legitimate aim. It would be unsafe to assume that the defence is sufficient to make the law consistent with the constitutionally-mandated freedom of political communication simply because the law adopts a proportionality test. The proportionality test under the constitutional freedom of political communication concerns the proportionality of the law to its legitimate objectives, not the proportionality of the communication to its particular political objectives. While the constitutional freedom may not extend to all speech on political matters, however expressed (for example, it will not extend to language that incites violence), the High Court has affirmed that insulting, abusive, intemperate or inflammatory speech about political matters may still be protected by the constitutional freedom. As Kirby J put it in *Coleman v Power*, ‘Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion ... By protecting from legislative burdens governmental and political communication in Australia, the Constitution addresses the nation’s representative government as it is practised’.²

Not only politicians, but also journalists, broadcasters, opinion page writers and professional bloggers are also engaged in work and may similarly fall foul of this broad law.

This particular defect can be cured by removing the reference to offences and insults in clause 19 and restricting the definition of unlawful conduct to the exercise of a power or discretion that results in unfavourable treatment, as explained above.

7. The concurrent operation of State laws

Another issue relevant to Australia’s federal structure concerns the justification for duplicating so much that is already covered by State law. It is important that each State retains the capacity to formulate its own legislative and policy responses to the challenges of

² *Coleman v Power* (2004) 220 CLR 1 at paras [238]-[239].

accommodating diversity in a manner appropriate to its specific conditions and the values of its resident communities.³

In a properly functioning federation, the people of each State (and, we would add, each Territory) need to retain the capacity, through their respective governments, to respond to the pressures of economic globalisation in the manner that they think best.

The intrusion of the Commonwealth into so many new areas hitherto regulated (if at all) by the States and Territories cannot be justified on the basis of uniformity of regulation because businesses and organisations will still have to deal with two sets of anti-discrimination laws in each jurisdiction, and it may not be clear for many years which parts of State law are invalidated as being inconsistent with the proposed new federal statute. That increases uncertainty. It does not reduce it. The proposed law, by extending regulation so far, increases the complexity of the law for businesses and other organisations. Businesses and other organisations are entitled to expect that they should be able to know what is lawful and unlawful within each jurisdiction by reference to one set of laws. For these reasons:

We submit that, rather than confirming the continuing operation of State and Territory anti-discrimination laws only to the extent that they are compatible with the Commonwealth law (the proposed clause 14 of the Exposure Draft), the terms of section 351(2)(a) of the Fair Work Act 2009 should be adopted, namely that the prohibitions of any Commonwealth Human Rights and Anti-discrimination Act do not make unlawful conduct that is 'not unlawful under any anti-discrimination law in force in the place where the action is taken.'

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³ The Australian States are more diverse than is commonly realised. Our federal system should operate in a manner that takes this diversity more seriously. See Nicholas Aroney, Scott Prasser and Alison Taylor, 'Federal Diversity in Australia – a Counter Narrative' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: International and Comparative Perspectives* (Cambridge: Cambridge University Press, 2012) 272.