**SUBMISSION OF THE WILBERFORCE FOUNDATION TO THE SENATE INQUIRY IN RELATION TO THE HUMAN RIGHTS AND ANTI DISCRIMINATION BILL 2012 (BILL)**

*Introduction*

1. This submission addresses the Bill on a policy basis after an examination of its key clauses. We submit that the Bill is too widely and vaguely drafted and will have a stifling effect on public **and** private discourse in Australia. It, with respect, will need radical amendment if it is to be a useful piece of legislation.

*Overview of and Commentary in relation to the Bill*

2. Clause 6 is the Dictionary. Some definitions which need to be noted are;
   2.1. "associate of a person" includes a member of the immediate family of the person (which is also defined to include ex-family members), or another relative (seemingly however far removed) or another person with whom the person has a care, business of social relationship (there is no definition of a business or social relationship and so the class is almost indeterminate);
   2.2. "employment" includes voluntary or unpaid work (the Bill therefore attempts to enter not only every workplace, but every small club or group in Australia);
   2.3. "human right" means rights or freedoms under the human rights instruments as defined subsection 3(2);
   2.4. "immediate family" includes a former spouse or former defacto partner (the definition is inclusionary and leaves room for expansion);
   2.5. "public place" means a place, or a part of a place, to which the public, or a section of the public, ordinarily has access, whether or not by payment or by invitation (this definition means the Bill would reach into every park, bus, shopping centre and even into most front yards in Australia, as at law there is an implied invitation for members of the public to come onto the front yard of a home to access the front door);
   2.6. "unlawful conduct" means conduct that is unlawful under any of the following:
   (a) Division 3 of Part 2 2 (unlawful discrimination);
   (b) Division 2 of Part 2 3 (sexual harassment);
   (c) Division 3 of Part 2 3 (racial vilification);
   (d) Division 4 of Part 2 3 (requesting or requiring information that could be used to discriminate);
   (e) Division 5 of Part 2 3 (publishing etc. intention to engage in unlawful conduct);
   (f) Division 6 of Part 2 3 (victimisation);
   (g) section 73 (contravention of a disability standard
3. Clause 7 explains the reach of the Bill by introducing the concept of being "connected with an area of public life". This is said to mean:

   Conduct engaged in by a person (the first person) in relation to another person is connected with a particular area of public life or other activity if the conduct is engaged in:

   (a) in the course of, for the purpose of, or in relation to, that area of public life or other activity; or

   (b) without limiting paragraph (a)—while the first person or the other person (or while each of them) is involved in an activity or undertaking in the course of, for the purpose of, or that is otherwise related to, that area of public life or other activity.

It is therefore critical that scope of the areas of public life are understood and clearly defined. As will be seen they are so wide and indeterminate as to be nearly all inclusive.

4. Clauses 11 and 12 set out the constitutional bases for the Bill. Primarily the Bill relies on the external affairs power, but also relies on a combination of other powers such as the corporations power and the trade and commerce power
5. Clause 17 is one of the critical clauses of the Bill. It is necessary to set it out in some detail:

The protected attributes

(1) The protected attributes are as follows:
(a) age;
(b) breastfeeding;
(c) disability;
(d) family responsibilities;
(e) gender identity;
(f) immigrant status;
(g) industrial history;
(h) marital or relationship status;
(i) medical history;
(j) nationality or citizenship;
(k) political opinion;
(l) potential pregnancy;
(m) pregnancy;
(n) race;
(o) religion;
(p) sex;
(q) sexual orientation;
(r) social origin
(2) Each protected attribute is taken to include:
(a) characteristics that people who have the attribute generally have or are generally assumed to have; and
(b) in relation to a particular person—characteristics that the person has because he or she has the attribute.

The breadth of the protected attributes, when coupled with the meaning of discrimination clause 19, mean that even the robust exchange of ideas will be made unlawful.

6. Clause 19 (along with clause 22) is at the heart of the Bill in that it exposits what is unlawful discrimination. It says:

Discrimination by unfavourable treatment

(1) A person (the first person) discriminates against another person if the first person treats, or proposes to treat, the other person unfavourably because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes.

Note: This subsection has effect subject to section 21.

(2) To avoid doubt, unfavourable treatment of the other person includes (but is not limited to) the following:

(a) harassing the other person; insults or intimidates the other person.

(b) other conduct that offends, insults or intimidates the other person;

The vice of the Bill is exposed here. Discrimination is not limited to conduct that is subject to any objective test like refusal of an opportunity for advancement or even objectively ascertainable harassment. It includes (and it is of note that sub-clause (2) is inclusionary) conduct which offends another person, a subjective test which will unquestionably be influenced by that person's beliefs and practices.

However the breadth does not stop there, for subclause 3 extends the unlawful conduct to discrimination by policies, sub-clause 4 extends it to discrimination because an associate of a person having a protected attribute, having had the protected attribute in the past or the possibility that the person or an associate of the person may have the protected attribute in the future..

7. Clause 20 extends the reach of the Bill to intent that is not actually carried out, by making it unlawful to propose to treat a person unfavourably, or to impose a policy to that effect. Given that discrimination is based on a subjective feeling of the claimant, this will lead to litigation based on suspicion.

8. Clause 22 is the clause which makes discrimination unlawful. It needs to be reporoduced in full:

(1) It is unlawful for a person to discriminate against another person if the discrimination is connected with any area of public life.
(2) The 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.
(3) 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.

It is readily seen that the Bill purports to intrude into nearly all areas of life in Australia. Ridiculously if a person (for certain convictions wants to stop another who has a protected attribute) coming onto the first person's front lawn, there may be a breach of the Bill. More seriously, robust expression of opinions in nearly all public life will be curtailed. The subjective nature of the test in relation to discrimination means that the Bill creates a cause of action of protecting a person's feelings. Expressions of opinion or conscience will be subject to litigation.

9. Division 4 deals with exceptions to unlawful discrimination. There are 22 in all. The need for such a range of exceptions shows the breadth of the intended operation of the Bill. We deal with three:
   9.1. Clauses 32 and 33 deal with exceptions in relation to religious ministers and organisations.
   9.2. Clause 32 addresses exceptions for appointment of priests, ministers etc. The protected attributes excepted are matters like age, gender identity, religion and sexual identity. Of the 18 protected attributes 10 are here excepted. This means there are 8 protected attributes which apply to the appointment of priests and ministers. Many religious groups use lay workers. Discrimination in relation to such people is only excepted if they perform duties or functions for the purposes of, or connected with, or otherwise to participate in, any religious observance or practice. There is uncertainty as to how far this exception reaches.
   9.3. Clause 33 deal with Exceptions for religious bodies and educational institution. Here only 5 protected attributes are excepted. They are gender identity, marital or relationship status, potential pregnancy; pregnancy, religion and sexual orientation. However to benefit from the exception the body must prove the discrimination consists of conduct, engaged in in good faith, that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious sensitivities of adherents of that religion (Sub-clause 33 (2)n and (4)).
   9.4. The provisions of clause 33 will require courts to inquire into the doctrines, tenets or beliefs of a religion, something which courts have been loath to do.[1] It is accepted that similar tests exist in State equal opportunity legislation.[2]
10. Clause 51 deals with racial vilification. It provides:
    When racial vilification is unlawful:
    (1) It is unlawful for a person (the first person) to engage in racial vilification.

    (2) Conduct of a person is racial vilification if:

    (a) the conduct is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

    (b) the first person engages in the conduct:

[1] *Wylde v Attorney General for NSW* (1948) 78 CLR 224.
[2] *Equal Opportunity Act 1984 (SA)* - Section 50.

(i) because the other person, or one or more members of the group, is of a particular race, or because the first person assumes that to be the case; or

(ii) because the other person, or one or more members of the group, has an associate who is of a particular race, or because the first person assumes that to be the case; and

(c) the conduct is engaged in otherwise than in private.

(3) For the purpose of subsection (2), conduct is engaged in otherwise than in private if:

(a) it causes words, sounds, images or writing to be communicated to the public; or(b) it is engaged in:

(i) in a public place; or

(ii) in the sight or hearing of people who are in a public place.

This subsection does not limit the circumstances that may constitute engaging in conduct otherwise than in private.

11. There are two observations to be made in relation to section 51. Firstly it again uses the subjective language as a test (offend, insult, humiliate or intimidate) although there is the limitation of a "reasonable likelihood of offending etc, which is not found in section 19. However, use of subjective language changes the prohibition from objectively judged hate speech to subjectively judged offensive speech. Secondly, the definition of a public place as so wide that a private conversation in a park between two people which is overheard by someone who is offended may well fall foul of the provision. There are exceptions but they are limited.
12. Clause 52 unlawful conduct to requesting information if it is to be used for the purpose or unlawful conduct or for the purpose of deciding whether to engage in such conduct. It therefore makes unlawful investigative conduct as to whether some action is to be taken or not. It will be a significant disincentive to investigative journalism, as journalists may be accused of making preparations to unlawfully discriminate.
13. Clause 53 prohibits publishing etc. of material indicating an intention to engage in unlawful conduct. It applies not only to a publication by a person that he or she intends to engage in such conduct but to publishing that another intends to engage in such conduct. While there are exceptions in relation to fair comment etc, this is still a massive disincentive to free and open speech.
14. Division 2—Extensions of liability for unlawful conduct:
    14.1. Clause 56 says "A person who causes, instructs, induces, aids or permits another person to engage in conduct is, for the purposes of the provisions of this Act relating to unlawful conduct, taken also to have engaged in the conduct, and to have engaged in it for the same reasons, or for the same purposes, as it was engaged in by the other person." No distinction is drawn between the offender and a person to whom applies.
    14.2. Clauses 57-58 extend liability to principal's, partners and even members of a committee of an unincorporated association, such as a neighbourhood watch group or a chess club.
15. Part 2.5 Deals with Equality before the Law.
16. Clause 60 deals with equality before the law for people of all races.

(1) If, because of a law, persons of a particular race:
(a) do not enjoy a right (whether a human right or some other right) that is enjoyed by persons of another race; or
(b) enjoy a right (whether a human right or some other right) to a more limited extent than persons of another race;
then, by force of this section (and despite anything in that law), persons of the first mentioned race enjoy that right to the same extent as persons of that other race.
(2) Subsection (1) does not apply to a law that is a special measure to achieve equality.

It raises questions such as whether non-indigenous people could use it to argue for some special benefits indigenous people receive. The Court would have to decide if a particular provision was a "special measure to achieve equality".

17. Part 3.1 deals with the role of the Human Rights Commission in achieving compliance with the law.
18. Part 4.1 deals with complaints.
19. Clause 96 obliges the Commission to assist a person who the Commission is aware wishes to make a complaint. Clauses 105-108 give the Commission power to investigate a complaint, including the power to inspect and retain documents. However clause 110 expressly provides that at a conference to attempt to conciliate a complaint a person subject to the complaint is not allowed to have legal representation. This is akin to state legislation.[3] However, it is puts one party to the dispute at considerable disadvantage, especially if the Commission has investigated and taken a view in relation to the complaint.
20. Part 4.3 then deals Court Proceedings.
21. Pursuant to clause 124 the burden of proof is effectively reversed and thrown on the respondent. The Clause provides:
    (1) If, in proceedings against a person under section 120, the applicant:
    (a) alleges that another person engaged, or proposed to engage, in conduct for a particular reason or purpose (the alleged reason or purpose); and
    (b) adduces evidence from which the court could decide, in the absence of any other explanation, that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct;
    it is to be presumed in the proceedings that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct, unless the contrary is proved.
22. The breadth of the provisions together with the reversal of onus gives significant potential for there to be injustice worked by the application of these provisions.
23. The burden of proof in relation to the exceptions also lies on the person claiming the benefit of the exceptions (clause 124 (2)).

*The Stifling Effect of the Bill and Constitutional Difficulties*

24. The above overview and commentary shows that the Bill will have a stifling effect on public and private discourse in Australia. As James Spigelman has argued the Bill may

[3] Ibid section 95.

cause Australia to be in breach of its international obligations to protect freedom of speech.[4]

25. With respect that is a correct observation. Article 19 of the International Covenant on Civil and Political Rights (**ICCPR**) states "[e]veryone shall have the right to hold opinions without interference" and "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".
26. The prohibition from offending means that there is a fetter on the freedom of expression which cannot be cured by exceptions.
27. Article 18 of the ICCPR is also relevant. It provides "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance". The effect of the Bill in public places is that it may prohibit the proclamation of religious convictions in that they may be said to give offence. Clearly religious doctrine in its moral aspects may attack the legitimacy of some of the protected attributes and so found to give offence and so made unlawful. That would be contrary to Article 18.
28. Further, the doctrines of faiths such as Islam and Christianity are diametrically opposed. Islam says Jesus Christ is not God, Christianity says He is. The effect if the workplace of someone proclaiming the doctrinal view of one religion may lead to the adherent of the other being offended and the law being broken. Again Article 18 will be breached. As James Spigelman observed the effect of the Bill may be to make blasphemy unlawful at work. And, of course, doctrine for one, is blasphemy for another.
29. It is also likely that the restrictions on free religious discourse referred to above will be in breach of section 116 of the *Constitution*. By virtue of that section the Commonwealth Parliament cannot make any law which prohibits the free exercise of any religion. By making it unlawful (if it causes offence) for a street preacher to proclaim a message against, say, homosexuality, the freedom is impinged. It is correct that the Bill is expressed to operate within power, but a Bill which is likely to lead to costly litigation for ordinary people is not good legislation.
30. It is of course correct that there are exception provided in the Bill, but they have to be established at what may be considerable cost.
31. The above example is a real one. In *The Corporation of the City of Adelaide v Corneloup and Others*,[5] street preachers who preached against matters such as homosexuality argued successfully that they fell within the constitutional freedom of political communication. They were successful before the South Australian Supreme Court and the matter went on appeal to the High Court. It is now awaiting judgment on appeal.[6]
32. As *The Corporation of the City of Adelaide v Corneloup and Others* shows, the Bill may also offend the implied freedom of political communication.[7] As Kirby J said in *Coleman v Power*[8] "In Australia we tolerate robust expressions of public opinions because it is part of our freedom and inherent in the constitutional system of representative democracy.

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[4] *The Australian* Tuesday December 11 2012 Commentary p.12.
[5] (20111) 110 SASR 334.
[6] *The Attorney-General for the State of South Australia v The Corporation of the City of Adelaide & Ors* [2012] HCATrans 233.
[7] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[8] (2004) 220 CLR 1.

That system requires freedoms of communication. It belongs as much to the obsessive, emotional and inarticulate as it does to the logical, the cerebral and the restrained".[9] The effect of the Bill is expressly contrary to this freedom. It is no answer to say the Act, may then be read down, as that will be only after expensive litigation, which in itself is a burden on freedom of expression.

*The Aim of the Bill is wrong*

33. James Spigelman quotes Jeremy Waldron (who has joint appointment at the Oxford and New York Universities law schools "Protecting people's feelings against offence is not an appropriate objective for the law."[10] That is, with respect, correct. As Dr Augusto Zimmerman[11] has argued legislation of this nature produce results antithetical to the tolerance that is hoped for or claimed.[12]
34. As Salman Rushdie has argued "People have a fundamental right to take an argument to the point where someone is offended by what they say. It is no trick to support the freedom of speech of somebody you agree with or to whose opinion you are indifferent. The defense of free speech begins at the point where people say something you can't stand, If you can't defend their right to say it, then you don't believe in free speech"[13]
35. The Bill should be radically reworked or rejected.

*Conclusion*

36. We are content for this submission to be made public and are willing to appear before the Committee to give evidence.

Dated 21 December 2012

The Wilberforce Foundation- lawyers committed to common law values, rights and liberties.

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[9] Ibid at 99-100.
[10] See note 4.
[11] Senior Lecturer & Associate Dean (Research) Murdoch University, School of Law.
[12] Religious Vilification Laws in Australia: Philosophical Underpinnings and Constitutional Implications; Paper for the Annual International Law and Religion Symposium: 'Religion, Democracy and Civil Society' Provo, Utah, October 7-10, 2012.
[13] Salman Rushdie, "Defend the Right to be Offended" OpenDemocracy, February 7, 2005 referred to an note 153 of Philosophical Underpinnings and Constitutional Implications cited at note 12.