Submission to the Standing Committee on Legal and Constitutional Affairs on the Inquiry into the Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft Legislation

Dr Augusto Zimmermann
Senior Lecturer in Law & Research Dean, Murdoch University

Mrs Lorraine Finlay
Lecturer in Law, Murdoch University

Introduction

We are writing to make a submission to the parliamentary inquiry into the Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft Legislation. The draft bill seeks to consolidate existing Commonwealth anti-discrimination law into a single Act. At present, employers must comply with four anti-discrimination laws, which deal separately with discrimination on the grounds of age, sex, disability, and race. However, if the proposed legislation is passed it would, amongst other outcomes: (i) expand existing anti-discrimination laws beyond the scope of Commonwealth constitutional powers; (ii) greatly expand the scope of existing anti-discrimination laws, while imposing significant restrictions on both freedom of speech and freedom of religion; and (iii) place increased procedural burdens on respondent's seeking to defend themselves against complaints. We would oppose the draft bill in its existing form due to our concerns in relation to these issues.

1. Commonwealth constitutional powers

If the proposed bill was passed it would, in our view, expand existing anti-discrimination laws beyond the Commonwealth's constitutional powers. For reasons explained below, it is doubtful whether the external affairs power could be relied upon to support the entire draft bill in its present form. The expansionary nature of the draft bill is further highlighted by its purported reliance on a range of other Commonwealth constitutional powers. Finally, the draft bill in its current form raises concerns relating to the implied constitutional freedom of political communication.

(a) External Affairs Power

Clause 11 of the draft bill provides that the external affairs power is the main constitutional basis for the legislation, and that the legislation is designed to give effect to various international treaties that Australia has signed and ratified. For the external affairs power to be validly relied upon in this way the domestic legislation claiming to give effective to an international treaty obligation must be capable of being reasonably considered to be

"appropriate and adapted" to giving effect to the treaty obligations.[1] As was noted by Barwick CJ in *Airlines of NSW Pty Ltd v New South Wales (No. 2):*[2]

> "But where a law is to be justified under the external affairs power by reference to the existence of a treaty or a convention, the limits of the exercise of the power will be set by the terms of that treaty or convention, that is to say, the Commonwealth will be limited to making laws to perform the obligations, or to secure the benefits which the treaty imposes or confers on Australia. Whilst the choice of the legislative means by which the treaty or convention shall be implemented is for the legislative authority, it is for this Court to determine whether particular provisions, when challenged, are appropriate and adapted to that end. The Court will closely scrutinize the challenged provisions to ensure that what is proposed to be done substantially falls within the power".

It must be questioned here whether significant sections of the draft bill could be reasonably considered to be "appropriate and adapted" to Australia's international treaty obligations. For example, the obligations outlined in the international treaties listed at clause 3(2) of the draft bill do not extend to preventing conduct that subjectively offends others, yet this is included under clause 19(2) within the definition of unlawful discrimination. The scope of unlawful discrimination is expanded under the draft bill beyond what is required to give effect to Australia's international treaty obligations. It is doubtful whether this expanded definition would be considered to be reasonably appropriate and adapted to Australia's treaty obligations so as to be authorised under the external affairs power.

Clause 11(b)(i) further provides that the Act has effect to the extent that it relates to "matters of international concern". The "matters of international concern" doctrine has not been recognised as an independent ground for validity under the external affairs power. In *XYZ v The Commonwealth* Kirby J considered the concept to be "undeveloped in Australia"[3] whilst the joint judgment of Callinan and Heydon JJ concluded that "there is no case in [the High Court] deciding that the international concern doctrine exists".[4] The "matters of international concern" doctrine does not provide a valid constitutional basis for the draft bill, and should be deleted from clause 11(b).

(b) Other constitutional powers

The draft bill then goes on to list a variety of other potential constitutional bases for the legislation, including the powers relating to corporations, territories, trade or commerce, banking and insurance and telecommunications. The key objects of the Act, as provided under clause 3(1) of the draft bill, are supposedly to give effect to Australia's obligations under various international human rights instruments. If this is the case, then the only constitutional power that would be required to authorise the legislation would be the external affairs power. The fact that clause 12 goes on to include a range of other possible constitutional bases for the legislation hints to the fact that the draft bill goes beyond

---

1 *Airlines of NSW Pty Ltd v New South Wales (No. 2)* (1965) 113 CLR 54, per Barwick CJ at 86; *Commonwealth v Tasmania* (1983) 158 CLR 1, per Mason J at [48], Deane J at [20]-[21]; *Richardson v Forestry Commission* (1988) 164 CLR 261, per Mason CJ and Brennan J at [18], Wilson J at [6], [12], Deane J at [7], Dawson J at [6].

2 (1965) 113 CLR 54, [45].

3 *XYZ v The Commonwealth*, per Kirby J at [127].

4 *XYZ v The Commonwealth*, per Callinan and Heydon JJ at [217].

Australia's international obligations and could not, in practice, be supported in its entirety by the external affairs power.

In our view, the draft bill is drafted too broadly and goes beyond Australia's international obligations. It should be redrafted to limit its scope to the implementation of Australia's international treaty obligations, which would allow the external affairs power to then be relied upon as a clear constitutional head of power that would be capable of supporting the entire bill.

(c) The Constitutional (In)validity of Anti-Discrimination on grounds of Political Opinion

The draft bill expands the grounds on which individuals can claim to be discriminated against. For the first time ever, discrimination on the basis of 'political opinions' will be unlawful (Clause 17). The protected attributes under the proposed legislation are: immigrant status; industrial history; marital or relationship status; medical history; nationality or citizenship; political opinion; potential pregnancy; pregnancy; race; religion; sexual orientation and gender identity; and social origin. Many of these attributes currently have different levels of protection.

Whereas the Australian Constitution does not contain a comprehensive declaration of rights, some rights are deemed *implicit* in the basic law.[5] The High Court has found an implied right to freedom of political communication as a means of invalidating legislation on constitutional grounds.[6] In *Australian Capital Television* (1992)[7] Mason CJ held that freedom of communication (and discussion) in relation to public and political affairs is an indispensable element in democratic society. He argued for the 'indivisibility' of freedom of communication as related to public and democratic issues:

> "Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community… The concept of freedom to communicate with respect to public affairs and political discussion does not lend itself to subdivision … The consequence is that the implied freedom of communication extends to all matters of public affairs and political discussion...."[8]

The argument has been expanded in *Coleman* (2004), where the majority argued that a law cannot, consistently with the implied freedom of political communication, prohibit speech of an insulting nature without significant qualifications. Standing in the majority, McHugh J held that insofar as the insulting words are used in the course of political discussion, 'an unqualified prohibition on their use cannot be justified as compatible with the implied

---

[5] Of course, legal protection is given to rights against discrimination by statute law at both Commonwealth and State levels. The Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth) and Disability Discrimination Act 1992 (Cth) prohibit discrimination on the stated grounds and offer a remedy where such discrimination occurs.

[6] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, and *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

[7] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

[8] Ibid., pp 138-42

freedom'.[9] He also stated that "insults are a legitimate part of the political discussion protected by the Constitution".[10] Likewise, Gummow and Hayne JJ commented that 'insult and invective have been employed in political communication since the time of Demosthenes'.[11] Kirby J concurred with them and argued that Australia's politics has regularly included 'insult and emotion, calumny and invective', and that the implied freedom must allow for this.[12]

As can be seen, the implied freedom has been found to protect insults, abuse, and ridicule made in the process of the political communication. Such means of communication are a legitimate part of the political discussion recognised by the Australian courts. Of course, debate about political matters might sometimes be quite robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self interest.[13] And yet, as Nicholas Aroney points out, "the decision in *Coleman* suggests that, absent qualifications of the kind relied upon by the majority, laws which prohibit religious [or political] vilification will infringe the implied freedom of political communication".[14]

By aiming to remove discrimination on political and/or religious grounds, the proposed legislation actually interferes with political discourse and so it imposes an unreasonable hindrance to freedom of speech and freedom of association. Of course, one can easily accept anti-discrimination laws which protect people from discrimination on the basis of inherent conditions that are biologically immutable. What is not reasonable, however, is to have the government of a democratic society target speech on the basis of affording certain people some sort of legal protection from strong criticism of their religious, political, and/or ideological convictions, hence allowing the state to dictate what is politically and ideologically acceptable.[15] Doing so may well breach the constitutionally protected implied freedom of political communication.

2. Expanding the scope of existing anti-discrimination laws

(a) Failing to Distinguish Natural from Acquired Characteristics of the Individual

The proposed legislation aims at preventing instances of religious and political as well as gender and racial discrimination, thus applying to matters of religion and politics the same formulations which are applied to race and gender. This is rather problematic because while people cannot choose the colour of their skin, religious and political values are, to some degree at least, a matter of personal choice. In contrast to racial issues, where one finds no questions of "true" or "false", religious beliefs involve ultimate claims to truth and error. As Ivan Hare has noted, "religions inevitably make competing and often incompatible claims about the nature of the true god, the origins of the universe, the path to enlightenment and

---

9 *Coleman v Power* (2004) 220 CLR 1, per McHugh J at [54].
10 Ibid.,
11 Ibid, per Gummow and Hayne JJ, at [78]
12 Ibid, per Kirby at [91].
13 *Roberts v Bass* (2002) CLR 1, 62-63.
14 N Aroney, 'The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 288, p 313.
15 Ibid.

how to live a good life and so on. These sorts of claims are not mirrored in racial discourse".[16]

The laws of a democratic society, therefore, "should be less ready to protect people from vilification based on the voluntary life choices of its citizens compared to an unchangeable attribute of their birth".[17] However, James Spigelman makes a very important point about how the proposed legislation effectively reintroduces blasphemy into Australian law:

> "The inclusion of "religion" as a "protected attribute" in the workplace, appears to me, in effect, to make blasphemy unlawful at work, but not elsewhere. The controversial Danish cartoons could be published, but not taken to work. Similar anomalies could arise with other workplace protected attributes, e.g., "political opinion", "social origin", "nationality"."[18]

In this sense, the prohibition of religious discrimination in the context of employment would have the practical effect of introducing a new form of blasphemy law for the nation's workplaces. Although we should not allow our individual rights to be undermined by the inflated sensitivities of a religious person, such a 'sensitive' person could actually exploit such anti-incitement mechanisms so as to secure immunity from appropriate scrutiny of their beliefs and practices.

(b) Promoting a 'Culture of Offendedness'

Clause 19 of the proposed legislation introduces "offending" into the definition of discrimination for all purposes, not just for racial vilification. The draft bill defines discrimination to be any "conduct that offends, insults or intimidates" another person (Clause 19). This means that expressing an opinion that merely offends someone else's political opinions is now grounds for discrimination if it occurs in certain contexts, such as in the workplace. As commentator Simon Breheny points out:

> "It is easily foreseeable that as a result of these proposed laws, individuals or their employers will be taken to court simply because they expressed a political opinion in the workplace that someone else does not like. Clearly, this is an extraordinary limitation of free speech. It's also likely to lead to a much more litigious environment in the workplace, as aggrieved employees are encouraged to take legal action to resolve their disagreements."[19]

The draft bill defines, for the first time in this country, discrimination by unfavourable treatment to include "conduct that offends, insults, or intimidates" another person. It appears therefore that the proposed legislation "contains a subjective test of being offended".[20] Unlike the existing s18C of the *Racial Discrimination Act 1975* (Cth) (or its replacement by the new clause 51), there is no element of objectivity, as presently found in the words "reasonably

---

[16] I Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' (2006) *Public Law* 521, p 531.

[17] R T Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26 *The University of Queensland Law Journal* 293, p 301.

[18] J Spigelman, 'Free Speech Tripped Up by Offensive Line', *The Australian*, December 11, 2012, p 12.

[19] S Breheny, 'Why We are Worried About Anti-Discrimination Law Changes', *Freedom Watch*, IPA, November 22, 2012, at http://freedomwatch.ipa.org.au/why-we-are-worried-about-anti-discrimination-law-changes/

[20] Spigelman, above n.18.

likely to offend". Under the proposed legislation, a person could be found guilty of discrimination even if he or she were actually found to be telling the truth, thus making the truth of a statement relatively irrelevant for the purposes of identifying "discrimination".[21] Of course, such idea seems to be directly inspired by post-modernism and the controversial opinion of legal scholars such as Stanley Fish, who claims that education is an instrument of power and that humanity has never been oriented towards "the truth", and that "there is no such thing as free speech".[22]

Given the democratic imperative that citizens should be allowed to speak openly and publicly about their personal convictions, the current notion of offendedness as endorsed by the proposed legislation is dangerously emotive. According to Spigelman, "[p]rotecting people's feelings against offence is not an appropriate objective for the law".[23] He reminds us that "[t]he freedom to offend is an integral component of freedom of speech', and that 'there is no right not to be offended". And as Spigelman also explains, "there is no international human rights instrument, or national anti-discrimination statute in another liberal democracy, that extends to conduct that is merely offensive".[24]

Although real tolerance demands reflection, restraint and a respect for the rights of other people to find their way to their own truth, in today's public discussion, notes Frank Furedi, "the connection between tolerance and judgment is in danger of being lost due to the current cultural obsession with being non-judgemental".[25] Indeed, those who claim to be "offended" are often speaking of an emotional state on which they claim to have received a real or perceived insult to their beliefs. According to Dr Mohler, "desperate straits are no longer required in order for an individual or group to claim the emotional status of offendedness. All that is required is often the vaguest notion of emotional distaste at what another has said, done, proposed, or presented".[26] In such a case, he concludes, "being offended does not necessarily involve any real harm but points instead to the fact that the mere presence of such an argument, image, or symbol evokes an emotional response of offendedness".[27] In a democracy, however, the citizen's right to speak publicly about his or her innermost convictions imply that the adherents of other convictions must also be free to present their arguments in an equally public manner. This is the basic cost of living in an authentic democracy; a point which has been made by Salman Rushdie, the British novelist who was put under an Islamic sentence of death because he had insulted Muslim sensibilities:

> "The idea that any kind of free society can be constructed in which people will never be offended or insulted is absurd. So too is the notion that people should have the right to call on the law to defend them against being offended or insulted. A fundamental decision needs to be made: Do we want to live in a free

---

[22] Stanley Fish, *There's No Such Thing as Free Speech* (New York/NY: Oxford University Press, 1994). Fish argues that any claim to free speech is 'invalid' because speech serves only an 'instrumental purpose'. He goes on to say: "When one speaks to another person, it is usually for an instrumental purpose: you are trying to get someone to do something, you are trying to urge an idea and, down the road, a course of action. There are reasons for which speech exists and it is in that sense that I say that there is no such thing as "free speech", that is, speech that has its rationale nothing more than its own production". – ibid., p 104.

[23] Spigelman, above n.18.

[24] Ibid.

[25] F Furedi, 'On Tolerance' (2012) 28 *Policy* 30, p 32.

[26] R A Mohler Jr., *Culture Shift: Engaging Current Issues with Timeless Truth* (Colorado Springs/CO: Multnomah Books, 2008), p 30.

[27] Ibid., p 31

> society or not? Democracy is not a tea party where people sit around making polite conversation. In democracies people get extremely upset with each other. They argue vehemently against each other's positions."[28]

Rushdie goes on to conclude:

> "People have the fundamental right to take an argument to the point where somebody is offended by what they say. It is no trick to support the free 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. You only believe in free speech as long as it doesn't get up your nose."[29]

The construction of such a 'right' for people not to feel offended means the end of free speech and of the free exchange of ideas.[30] And yet, the draft bill proposed by the government is clearly designed to impose an environment of 'tolerance' that penalises any strong disapproval of a person's values or beliefs on religious and/or politico-ideological grounds. But nobody who lives in a democratic society should expect to be exempt from the possibility of facing strong criticism. As the European Court of Human Rights has noted:

> "Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others by doctrines hostile to their faith."[31]

Of course, it is rather understandable that advocates of a "multicultural society" would prefer people to moderate their claims so as to avoid comments that might cause offence to others. But to require citizens to have their speech controlled in the name of "tolerance" is to go too far. As it has been properly said, "speech is the means by which we may offer counterarguments to compete against characterisations that we detest, and it forms the means by which communities can create their identities, even if it is in opposition to, or at the expense of, one another".[32] As correctly understood, democracy indeed is firstly about the discussion of conflicting or opposing ideas; a fact that requires a certain freedom of unqualified speech, which is particularly crucial when responsible citizens must decide on questions of political values, faith and truth. Accordingly, a citizen's personal opinion may not be the most politically correct, but he or she still must have the right to manifest it without the risk or threat of persecution, even if such opinion is found to be erring or "offensive" to someone. Conversely, the freedom to hold religious beliefs and political

---

[28] S Rushdie, 'Defend the Right to Be Offended', *OpenDemocracy*, February 7, 2005, at http://www.opendemocracy.net/faith-europe_islam/article_2331.jsp

[29] Ibid.

[30] John Stuart Mill explained why the suppression of free speech harms not only the speaker but all of humanity: "But the peculiar evil of silencing the expression of opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error ... We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still". – J S Mill, *On Liberty* (2nd ed, London: John Parker & Son, 1859), p 33 and 41.

[31] *Otto-Preminger Institut v Austria* (1995) 19 EHRR 34, at [47].

[32] Harrison, above n.12, p 96.

opinions should not really constitute a right for citizens to never be challenged in relation to their beliefs and opinions, since any society that allows the state to enact legislation that clamps down on free speech has started moving from authentic democracy to a more disguised form of "elected dictatorship".

(c) Churches and Religious Organisations

Under the draft bill proposed by the Commonwealth, religious organisations would retain their current exceptions (Section 32). However, this is a qualified exception because the proposal states that the exception applies only if "the discrimination consists of conduct, engaged in good faith, that: (i) conforms to the doctrines, tenets or beliefs of that religion; or (ii) is necessary to avoid injury to the religious sensitivities of adherents of that religion (Section 33, 2(b))". Commentator Patrick Byrne explains the problem that some churches might face when wishing to apply for such exceptions:

> "The mainstream churches may gain "exceptions" from the law, because their "doctrines, tenets, and beliefs" have been refined and codified over centuries or millennia. However, numerous independent Christian churches will find it hard to define their beliefs so clearly. They may well find themselves subject to the full force of the law."[33]

Experience confirms that it may be extremely difficult, not to mention costly, to argue about doctrinal matters and 'religious sensitivites'. The 2010 case of the CYC camp in Victoria is a classic example. The matter involved a discrimination suit brought by Cobaw Community Health Service against Christian Youth Campus (CYC). This Christian group had refused Cobaw the booking at their camp for the purposes of a gay youth retreat which included instructions that homosexuality is a normal and healthy lifestyle, citing their disagreement with the planned activities.[34] Although the tribunal agreed that this was indeed the motivation for the refusal to offer accommodation, it held that the "... objection to promotion of homosexuality is, in truth, an objection to same sex attraction...".[35] Ben O'Neill comments on the implications of this important aspect of the ruling:

> "[T]he very essence of freedom of conscience is that people must be allowed to make their own assessment of what is true and what is untrue, and that the government must not subjugate this judgement to the views of its officials. However, according to the judge in this case, 'To object to a forum which presents a message of acceptance of same-sex attraction is to deny the right to equality of treatment based on sexual orientation, or to be free from discrimination on that basis [197] ....
>
> It is difficult to avoid the conclusion that this principle drastically undermines the material implementation of freedom of conscience. For the owners of CYC, the ruling means that they are required to allow their own facilities to be used for the promotion of activities which they find objectionable. Even if they are allowed to maintain the belief that homosexuality is wrong (and even this could presumably constitute a lack of 'acceptance'), they must allow their own

[33] P J Byrne, 'New Anti-Discrimination Bill Threatens Religious Freedom', *News Weekly*, December 8, 2012, at http://newsweekly.com.au/article.php?id=5417

[34] *Cobaw Community Health Services v Christian Youth Camps Ltd* (Anti-Discrimination) [2010] VCAT 1613.

[35] See *Cobaw Community Health Services v Christian Youth Camps Ltd* (Anti-Discrimination) [2010] VCAT 1613, at [189]-[190].

> property to be used to hold events that undermine this belief (in fact, they must assist the promotion of such beliefs)".[36]

In addition, the draft bill plans to make it illegal for religious bodies that provide Commonwealth-funded aged care to discriminate on the basis of gender identity and sexual orientation. Clause 33 (3) says that the exception in subsection 2 does not apply if: (a) the discrimination is connected with the provision, by the first person, of Commonwealth-funded care; and (b) the discrimination is not connected with the employment of persons to provide that aged care. These churches or religious organisations would be able to discriminate in employing workers, but not on who they provide the service to. Hence, once the bill becomes law it is quite clear that freedom of religious practice –and of faith-based groups to employ people of their own religious beliefs– would be granted only by 'exceptions' and "exemptions" in the law.

Of course, one may also argue that once the existing five anti-discrimination laws are all combined in one single Act, it would become much easier to amend the Act so that such "exception to the exception" could be extended to schools and other services in the future. Indeed, as Byrne points out:

> "In selecting candidates for the ministry, churches are told they can freely choose, but only because they will be allowed to 'discriminate' on grounds of sex, age, relationship status, sexual orientation, etc. However, when it comes to faith-based schools and other church agencies, the new law will only make an 'exception' for discrimination that consists of conduct that 'conform to the doctrines, tenets or beliefs of that religion; or is necessary to avoid injury to the religious sensitivities of adherents of that religion".[37]

(d) Defences

There seems to be a curious distinction drawn in the draft bill, with a range of specific defences concerning artistic works, public interest and fair comment being made available to the maker of a statement only in relation to racial vilification and not any other forms of discrimination. Clause 51(4) specifically provides for these exceptions in the context of the person who engages in conduct that would otherwise be considered racial vilification. The same exceptions are not specifically provided for in relation to any other type of discriminatory behaviour. Rather, the single defence of justifiable conduct is provided for under clause 23. It may be argued that discriminatory behaviour within the context of artistic works, public interest debates or fair comment may naturally fall within the scope of this justifiable conduct defence. If, however, this was the case then why is a separate exception needed under clause 51(4) in relation to racial vilification? The existence of this separate exception undermines an interpretation of clause 23 to encompass these specific (and traditional) defences.

These are important defences if we are to maintain some level of balance between anti-discrimination laws and the protection of freedom of speech. Extending protected attributes to include political opinion and extending the definition of unfavourable treatment to include conduct that subjectively offends is already a significant overreach. Doing so without

---

[36] B O'Neill, 'Anti-Discrimination Law and the Attack on Freedom of Conscience', (2011) 27 (2) *Policy* 3, p 5.

[37] Byrne, above n.43.

expressly providing exceptions for artistic works, public interest and fair comment would likely have the effect of severely curtailing freedom of speech in Australia.

3. Increased procedural burdens

The three key procedural burdens that the draft bill places on a respondent facing a claim of discrimination are the reversal of the onus of proof (under clause 124), no right to legal representation at a conciliation conference (under clause 110(4)) and the question of costs (under clause 133).

(a) Reversing the Onus of the Proof

The new scheme outlined in the proposed draft bill reverses the onus of the proof so respondents must prove their innocence.[38] In brief, those accused of discrimination would bear the onus of proving their innocence, because the burden of proof would rest with the person who has been charged, instead of staying with the person who claims to be offended. This is a major breach of the rule-of-law principle that one is innocent until proven guilty. Rather, those who were charged under the new legislation would be required to prove why they have not committed any discrimination, or why they would qualify for any exemptions. In doing so, they would bear all the expenses with lawyers and legal costs. Of course, the risk of being dragged into a court will deter many people from arguing the merits, for example, of someone's religious beliefs and/or political convictions. This self-imposed censorship of ideas would inevitably cause a 'chilling effect' that would limit freedom of speech, because of "the fear of litigation and its risk of financial ruin, jail, collegial ostracism, or embarrassment".[39]

In their Preliminary Submission the Attorney-General's Department have considered this shifting burden and note that it only applies once the complainant has first established a *prima facie* case and once a matter proceeds to court (emphasising that most discrimination complaints are resolved in conciliation settlements and very few ultimately proceed to court). The rationale behind this shift is "the fact that the respondent is in the best position to know the reason for the discriminatory action and to have access to the relevant evidence".[40] Discrimination complaints are not unique in this respect. It is generally the case in all criminal and civil cases that the accused/respondent is in the best position to know the reasons behind their actions and to have access to relevant evidence. Despite this, it is a fundamental principle of our justice system that an accused is not required to prove their innocence, and that the burden falls on the person bringing the action to establish their charge. The reversal of the onus of proof under clause 124 is a significant departure from this principle, and one that we do not support in the context of the draft bill. No evidence has been presented to demonstrate a need for this shift in the burden of proof in relation to discrimination complaints and it is particularly concerning given the expanded scope of potential claims under clause 19 of the draft bill.

---

[38] Clause 124.

[39] J Harrison, 'Truth, Civility, and Religious Battlegrounds: The Context Between Religious Vilification Laws and Freedom of Expression' (2006) 12 *Auckland University Law Review* 71, p 79.

[40] Attorney-General's Department Preliminary Submission, *Senate Standing Committee on Legal and Constitutional Affairs inquiry into the exposure draft of the Human Rights and Anti-Discrimination Bill 2012,* p 1.

(b) No Right to Legal Representation

Clause 110(4) provides that parties are not entitled to be represented at a conciliation conference unless the person presiding at the conference consents. In our view, the complex nature of anti-discrimination law and the serious consequences that result from a complaint of unlawful discrimination being made against a respondent warrant a right to legal representation being provided to parties involved in discrimination complaints at all stages of the complaints process. We would recommend that clause 110(4) be amended to reflect this.

(c) Costs

Clause 133 provides that in the ordinary course of events (and unless the court makes a contrary order) each party is to bear their own costs in court proceedings under the draft bill. This is a departure from the current default position under anti-discrimination law which generally provides that costs follow the event. This change "removes a key disincentive for complainants with weak or vexatious complaints".[41] The significance of this change is further heightened given the broadening of both the categories of protected attributes and the definition of unfavourable treatment, with the latter particularly likely to encourage speculative claims. A respondent wishing to defend themselves against such claims will now, in the ordinary course of events, be required to pay their own costs. We would recommend that clause 133 be amended to provide for the default position that costs follow the event.

Conclusion

The draft Human Rights and Anti-Discrimination Bill 2012 seeks to expand and standardise the current anti-discrimination laws. Generally speaking, the draft anti-discrimination law seems to be based on the contestable premise that *all* discrimination is irrational and unjust. The result is a dramatic expansion of government power from the protection of particular groups, to the protection of particular activities. Indeed, laws which disallow a person to voice comments deemed 'offensive' to another person create undue fear and intimidation on those who wish to express their ideas and opinions freely. Such laws pose a chilling effect on free speech and this is probably why so many Australians are quite reluctant to join public moral conversation, seeming to fear what others and even the government might do in return. As James Spigelman comments:

> "The new Bill proposes a significant redrawing of the line between permissible and unlawful speech. This is so, notwithstanding the ability to establish that relevant conduct falls within a statutory exception. A freedom that is contingent on proving, after the event, that it was exercised reasonably or on some other exculpatory basis, is a much reduced freedom. Further, as is well known, the chilling effect of the mere possibility of legal processes will prevent speech that could have satisfied an exception."[42]

In conclusion, the proposed legislation in its current form must be rejected. Its provisions dangerously expand this controversial field of law to further regulate speech and opinion,

---

[41] 'Federal Anti-Discrimination Law Changes to Increase Employer Obligations', *Herbert Smith Freehills*, November 26, 2012, at http://www.herbertsmithfreehills.com/insights/legal-briefings/federal-antidiscrimination-law-change-to-increase-employer-obligations.

[42] Spigelman, above n.18.

with direct attacks on freedom of conscience and freedom of speech, which are cardinal tenets of a truly open and democratic society. When complaints are made, the onus of the proof will be inverted so that the respondent would have to "justify" their actions. As such, the draft bill also violates basic principles of the rule of law and it certainly undermines natural justice. Alternatively, we propose the draft bill be amended as follows:

- to reduce the scope of the legislation so that it more accurately reflects Australia's international obligations, such that the external affairs power becomes the only constitutional head of power required to support the legislation;
- to remove from clause 19 the words, "conduct that offends, insults or intimidates" and the words "religion" and "political opinion" from the list of protected attributes in clause 17;
- to allow religious freedom to religious bodies in all circumstances;
- to delete clause 124 which reverses the onus of the proof;
- to amend clause 110(4) to allow respondents the right to legal representation if they wish; and
- to amend clause 133 to provide for costs to ordinarily follow the event.