Submission on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012

Executive Summary

Freedom 4 Faith ("F4F") is a new body representing various Christian Churches and faith-based organisations in relation to issues of religious freedom. The leadership team for F4F includes senior Christian leaders from the Anglican, Baptist, Pentecostal, Presbyterian, and Seventh-day Adventist traditions, as well as legal experts.

F4F has concerns about a number of aspects of the Bill, in particular the definition of unfavourable treatment, the application of the law to volunteers, the breadth of the definition of 'public life', the lack of reference to human rights other than the right to non-discrimination, and the continuing marginalisation of the rights to religious freedom and freedom of association as exceptions to otherwise general rules. F4F considers that the Bill, in its present form, cannot be reconciled with Australia's obligations under international human rights law.

The effect of the various changes to the law, taken together, is a massive extension in the regulatory reach of federal anti-discrimination law and a significant reduction in the threshold for making complaints. The proposed changes to the law are likely to have an adverse impact upon churches and other faith-based organisations - in particular for small not-for-profit organisations - by increasing costs. Many of these are charities, and the impact of an increased regulatory burden will be less money for front-line services. The Bill will also have an adverse impact on volunteer activity.

In this submission, F4F proposes various amendments to address these issues.

List of proposed amendments

The proposed amendments are listed in their order within the draft Bill.

1. **Section 3(1)(a)**: Amend as follows -

   'to deal with discrimination, sexual harassment and racial vilification, consistently with Australia's obligations under the human rights instruments and the ILO instruments (see subsections (2) and (3)), and taking account of the other rights and freedoms protected by those instruments including freedom of speech, religion, conscience and association.'

2. **Section 6**: Remove 'voluntary or unpaid work' from the definition of employment.

3. **Section 7**: Delete as a consequence of proposed amendment to section 22.

4. **Section 14**: Amend as follows -

   (1) This Act is not intended to exclude or limit the operation of a State or Territory anti-discrimination law.
   (2) This Act does not apply to any action that is not unlawful under any anti-discrimination law in force in the place where the action is taken.

5. **Section 19**: Amend as follows -

   (1) A person (the ***first person***) ***discriminates*** against another person if the first person exercises, or proposes to exercise, a power to affect the interests of the other in such a way as 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.
   (2) The exercise or proposed exercise of a power includes, but is not limited to, the making of a decision in relation to employment or the refusal to provide a service.
   (3) In determining whether a person is treated, or proposed to be treated, unfavourably, comparison may be made with the treatment of someone who does not have the protected attribute.
   (4) For the avoidance of doubt, ***unfavourable*** treatment of the other person includes (but is not limited to):
      a. conduct that sexually harasses the other person;
      b. conduct that intimidates the other person.

(5) The expression of an opinion does not constitute unfavourable treatment.

6. **Section 22(1):** Amend as follows -

   'It is unlawful for a person to discriminate against another person if the discrimination occurs in the course of the following:'

   Then list the areas currently in subsection (2). Re-number the remainder of the subsections accordingly.

7. **Part 2-2, Division 4**: Amend the heading to say: 'When discrimination is not unlawful'.

8. **Subdivision A**: Amend the heading to say: 'Reasonable grounds for different treatment'.

9. **Division 4:** Delete the word 'Exception' throughout the Division, with such consequential amendments as are required.

10. **Section 23:** Insert after subsection (3) -

    'Without limiting the generality of the previous subsection, the protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is justifiable conduct.'

11. **Subdivision C**: Insert a new section before section 32 as follows -

    'This subdivision is a means of giving effect to Australia's obligations under Articles 18, 19, 22 and 27 of the International Covenant on Civil and Political Rights, and to appropriately balance these rights with rights concerning non-discrimination.'

    Note: Additional protection for these rights is provided in section 23 (justifiable conduct).

12. **Section 33(2):** Amend as follows -

    Subject to subsection (3), it is not unlawful for a person (the ***first person***) to discriminate against another person if:

    (a) the first person is a body established for religious purposes, or a body that is intended to be conducted in accordance with religious doctrines, tenets, beliefs or teachings, or an officer, employee or agent of such a body; and
    (b) the discrimination:

a. is connected with the appointment or retention of persons to work within the religious body to ensure that they share the religious commitment of that body or are supportive of its religious purposes; or
b. consists of conduct, engaged in 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; and
    iii. the discrimination is on the ground of a protected attribute to which this exception applies, or a combination of 2 or more protected attributes to which this exception applies.

13. **Section 51(2)(a):** Amend section 51(2)(a) to state: 'the conduct incites unlawful discrimination, hostility or violence.'

14. **Section 47:** Confine the review within three years to provisions other than sections 32 and 33, or review the entire Act and operation of the Australian Human Rights Commission within this time.

15. **Section 124:** Amend as follows -

If, in proceedings against a person under section 120, the applicant:

(a) proves that he or she has a protected attribute;
(b) proves that he or she has experienced unfavourable treatment because of the exercise of a power by another person or that such treatment is proposed;
(c) alleges that the other person engaged, or proposed to engage, in such conduct because of the protected attribute; and
(d) 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.

In the view of F4F, if these amendments are not made, parliamentarians should vote against the Bill in its entirety. This is because, notwithstanding positive elements of the Bill such as consolidating the existing laws, the Bill does not strike a proper balance between different human rights, is likely to reduce social cohesion, and unnecessarily seeks to regulate areas of voluntary association and activity.

Introduction

F4F is an organisation that was formed to educate the Christian church and wider public on issues relating to freedom of religion in Australia. F4F's leadership team includes senior Christian leaders from the Anglican, Baptist, Pentecostal, Presbyterian and Seventh-day Adventist traditions, as well as legal experts.

F4F welcomes the opportunity to respond to this Exposure Draft. Of particular interest to F4F is the level of protection the Bill offers religious freedom. In this submission F4F supports the government's retention of religious exceptions, but proposes some improvements in how they are drafted. Such exceptions ensure that the principle of non-discrimination is appropriately balanced with other human rights, including rights that are central to maintaining a healthy multicultural society. It is particularly important in a multicultural society such as Australia that cultural and religious minorities are able to retain their identity and values, even where the identity and values of a minority group may conflict with majority values. Articles 18, 22 and 27 of the International Covenant on Civil and Political Rights ("ICCPR") guarantee these important rights and freedoms.

Although this Bill has been marketed as merely a consolidation of existing law which will simplify the law for both complainants and businesses (together with new provisions about sexual identity and orientation), it is in reality a massive expansion of federal law. It extends the reach of federal anti-discrimination law to no less than 18 different attributes – not just age, disability, gender, race and sexual identity or orientation but medical history, political opinion and vague attributes like 'social origin'.

The Bill makes it unlawful to do many things that are lawful under state and territory anti-discrimination laws. It renders state and territory anti-discrimination laws invalid to the extent of conflict with the federal law. It extends regulation to all corners of the community. It even covers volunteers. Although it purports to apply only to 'public life' (s.22), that definition is so broad that there are few areas of life that are left to be 'private'. Certain provisions are drafted very widely indeed, and allow complaints to be made on the basis of nothing more than a claimed personal reaction to something that another has said or done.

Overall, the Bill represents a serious diminution of the human rights of freedom of speech and association.

This significant expansion of the reach of federal law has significant implications for Churches and other faith-based organisations, which are for the most part voluntary associations of people who share common beliefs and values. Pursuant to rights guaranteed by Australia under the International Covenant on Civil and Political Rights, churches and other faith-based organisations seek the freedom to continue to associate in that way without unnecessary restrictions from government, or regulation that imposes too heavy a cost, especially on small, not-for-profit organisations.

1. The costs of the draft legislation to small not-for-profit organisations

Many religious organisations are relatively small not-for-profit organisations. Some are service-providers that seek to maintain their religious identity while providing health, educational or welfare services to the general community. They have limited budgets and few financial reserves.

F4F submits that the proposed legislation, if passed, would impose heavy regulatory burdens that many religious not-for-profit organisations are not equipped to manage. Such regulatory burdens would be caused by the Bill's expanded list of protected attributes, its extended reach into a great many areas of life which the Exposure Draft defines as 'public', and the inclusion of voluntary or unpaid work within the definition of 'employment'.

The range of protected attributes

Among the protected attributes in section 17 of the Bill are those which have long been protected by the law. However, there are a number of attributes included in the Bill that are not justified on the grounds of historical discrimination i.e. there is no evidence that people possessing those attributes have suffered widespread and persistent discrimination. The case for regulation in relation to these attributes is not obvious. When one moves beyond justifying regulation based upon a past record of discrimination, there is no end to the number of attributes that might be added: e.g. weight, physical appearance or homelessness.

F4F recognises that there was already a long list of attributes protected by section 351 of the *Fair Work Act 2009* (Cth). However, these only applied to the area of employment. The Bill proposes an even longer list of attributes and their protection extends to many more spheres of life than is the case in the *Fair Work Act*. Furthermore, section 351 of the *Fair Work Act*

provides that adverse action is not unlawful if it is 'not unlawful under any anti-discrimination law in force in the place where the action is taken.' This prevents confusion between the requirements of state and federal laws and reduces the regulatory burden on small organisations and businesses. Those restrictions have been removed in this Bill.

The Bill enables religious organisations to rely on exceptions that cover some attributes. However, there are still many other grounds that might apply to these not-for-profit organisations. These include, for example, age and medical history.

Organisations generally seek to obey the law if they know what it is. However obtaining good legal advice can be costly for not-for-profit organisations. In any event it will be very difficult to advise churches and other organisations concerning their legal position if they have to be concerned about so many possible grounds for discrimination complaints. For example, it may be very difficult to provide any certainty to a Church about whether it may decline the volunteer services of an elderly man who would like to continue teaching Sunday School, but whose mental condition has the effect of frightening some children.

The government needs to consider how the increased regulatory burdens imposed by the Bill may affect not-for-profit organisations that are often small, have a skeletal central administration, and run on tight budgets. This burden is in addition to those arising from the new Australian Charities and Not for Profits Commission ("ACNC") and the inclusion of all non-government organisations within the scope of the Royal Commission on Child Sexual Abuse in Institutional Settings. The government also needs to consider how such far-reaching legislation will affect insurance costs for not-for-profit organisations.

Collectively, these burdens will increase the costs of running charitable organisations at the expense of those they serve, and will therefore have negative effects for some of the poorest and most vulnerable in our community. Front-line services will need to be reduced to account for the increased costs of administering the organisation, including needing to defend claims that in many instances, would have been far better dealt with in a different way.

The inclusion of volunteers

As the example above demonstrates, the adverse regulatory impact of this proposed legislation is greatly increased by the inclusion of volunteers within its scope. The definition of employment in section 6 of the Bill is as follows:

> ***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.

One of the major interpretative questions is where the boundaries of work, leisure and community service lie. Does the woman who runs the Church playgroup as a volunteer engage in 'unpaid work'? What about the pastoral care team who faithfully visit those who are housebound or in hospital? Is running a youth group considered volunteer 'work'? What if the local church is run by elders who, on a voluntary basis, take turns to preach and carry out other leadership activities?

Going beyond the sphere of religion, is a mother or father's work within the home 'voluntary or unpaid work'? If not, why not? What about another family member, such as a brother-in-law or uncle, who might offer to provide handyman assistance around the home? Including volunteers within the definition is a recipe for enormous uncertainty.

Some indication of the reach of this inclusion of 'unpaid work' may be found in the ILO's Manual on the Measurement of Volunteer Work, 2011. This document assists member countries to measure volunteer work and thereby to make available comparative cross-national data. The Manual illustrates how difficult it is to determine the boundaries of volunteer work, as it takes so many forms. The ILO excludes the running of a household or the care of children as 'work', although sometimes it is immensely arduous work. Conversely, the definition of volunteering given in the Manual is said to include the following:[1]

- Buying groceries for an elderly neighbour
- driving a neighbour to a medical appointment
- Sewing a blanket for a sick neighbour
- Providing counselling support or mentoring to another person without compensation
- Assisting stranded animals
- Making clothes for disadvantaged children
- Serving as a coach for a children's sports league, including one in which one's own child is involved.
- Serving as an usher or otherwise working on behalf of a religious organisation.

It is understandable that the Government may wish to open up some options for legal remedies to volunteers. However, there is no evidence of any problem with discrimination

[1] ILO, Manual on the Measurement of Volunteer Work, 2011, Table 3.1, p.17.

against volunteers in faith-based communities that warrants legislative intervention. Even if one or two examples could be produced, there are likely to be issues concerning freedom of religion and association that need to be balanced against whatever claim of discrimination is being advanced. In practice, if people do not feel welcome in offering their assistance in such contexts, then they will simply go elsewhere.

Furthermore, in many cases where a volunteer makes a claim of unfavourable treatment, it is likely to be against another volunteer. That may well deter people from volunteering not only in charitable organisations but also in running sports programs for children or acting as an umpire. F4F notes, for example that participation in sporting activities (including umpiring, coaching and administration of sporting activities) are included in the definition of 'public life'.

The regulatory burden upon faith-based communities, other not-for-profit organisations and individual volunteers who may be accused of 'unlawful discrimination' cannot possibly justify whatever benefits might accrue from the level of regulation proposed. It is also somewhat unconvincing to characterise all voluntary activity as 'employment' or being a matter of 'public life'.

While some not-for-profit organisations will have no choice but to navigate these difficulties, many are likely to cease engaging volunteers altogether rather than risk claims of discrimination being made against them. While the consequent damage to the existing culture of voluntary work in the not-for-profit sector would no doubt be an unintended outcome of the Bill, the Government needs to be aware of this as a likely outcome.

Proposed solutions

Remove 'voluntary or unpaid work' from the definition of employment in section 6; and

Amend section 14 of the Bill so as not to make unlawful what is lawful within a person's State of residence, as is done in the *Fair Work Act*. This will at least mean that small organisations can deal with one set of protected attributes, not two. Section 14 should be amended as follows:

(1) This Act is not intended to exclude or limit the operation of a State or Territory anti-discrimination law.
(2) This Act does not apply to any action that is not unlawful under any anti-discrimination law in force in the place where the action is taken.

2. The risk of nuisance claims

F4F is also concerned about the possibility of a considerable increase in nuisance claims, or other claims that are relatively minor. This concern arises first from the inclusion of 'offend, and insult' as a form of 'unfavourable treatment' when there are so many grounds on which offence may be taken that are not covered by the religious exceptions, and secondly because the definition of 'public life' extends the reach of the law far beyond its existing scope.

(a) Causing offence as unlawful conduct

Section 19(1) of the Exposure Draft defines discrimination in the following way:

> 'A 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.'

Section 19(2) explains that unfavourable treatment 'includes (but is not limited to) the following:

a) harassing the other person;
b) other conduct that offends, insults or intimidates the other person.'

This definition proposes a test for discrimination that is entirely subjective. Any person who claims to have been offended, insulted or intimidated on the basis of a protected attribute has grounds to lodge a complaint, and that claim alone is a sufficient basis for deeming the other person's conduct to be unlawful in the absence of some legislatively sanctioned justification. In practice this might mean that a person who feels insulted by a conversation in the work lunch room relating to politics may lodge a complaint for being treated 'unfavourably' on the basis of their political opinion.

'Harassment' is also undefined in the Bill. Unless limited to sexual harassment, it is an open-ended term.

Section 19(2) is to be contrasted with section 51 of the Bill concerning racial vilification, which imposes an objective test that the behaviour is 'reasonably likely' to offend, and requires other matters also to be demonstrated before the conduct can be said to be unlawful. Nevertheless, the words 'offend' and 'insult' are likely to suffer from a lack of agreed meaning even where an objective test is applied. Furthermore, it is questionable whether this section is within federal constitutional power or is consistent with Australia's international human rights obligations. Section 51 is also problematic because it proscribes a much wider

range of conduct than its equivalent provisions in article 20(2) of the ICCPR and article 4 of the International Convention on the Elimination of Racial Discrimination ("ICERD") – both of which prohibit conduct that actually incites discrimination, hostility or violence.

(b) 'Public life'

While section 19 lowers the threshold for what constitutes discrimination, section 22 drastically expands the number of people against whom a complaint can be lodged. Section 22(1) reads:

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

'Public life' is defined in section 22(2) as extending to at least the following areas:

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.'

This broad definition of 'public life' means that a complaint can be lodged against *any* person engaged in one of the aforementioned activities.[2] This represents a significant expansion in the scope of anti-discrimination law. At present, anti-discrimination legislation tends to regulate people in positions of power e.g. an employer or an educational authority. Section 22 does not impose such restrictions, but rather invites employees to take action against other employees or one club member against another. This is likely to lead to a greatly increased number of complaints, and time spent sifting between the few meritorious and the many unmeritorious complaints.

[2] Sub-clause (c) and (e), however, only makes it unlawful for a 'provider' of goods, services, facilities or accommodation to discriminate.

(c) The cost of nuisance complaints

F4F acknowledges there are mechanisms built into the Bill that protect reasonable conduct and that the Commission will have discretion to reject complaints that are 'frivolous, vexatious, misconceived or lacking in substance'.[3] While the power to dismiss frivolous or vexatious claims is useful, experience suggests that courts, tribunals and commissions are very reluctant to exercise such a power, and if they do so, it tends to be only after the complaint has gone some way through the complaints process and it has become clear that it has no prospect of success. Before that can happen, a complaint must go through a preliminary assessment process, causing respondents unnecessary angst, inconvenience and cost.

There are numerous examples of groundless complaints causing such unnecessary grievance. Take for example *Fletcher v Salvation Army Australia.*[4] In that case a prisoner who attended a Christian course called 'Alpha' complained he had been 'vilified' because the program implied that witches are 'Satanists'. Professor Patrick Parkinson explains that the case concluded in the following way:

> 'Justice Morris summarily dismissed the application, regarding the complaint as "quite hopeless." Nonetheless, it took a hearing to determine this. While the respondent appeared in person (by video link from jail), two different barristers were instructed by the two defendants, and a third appeared for Corrections Victoria.'[5]

While this case concerned religious vilification legislation in Victoria, it is likely that the proposed legislation could operate in a similar way. This case is just one example of how offence-based laws can invite the instigation of unmeritorious complaints which can unfairly burden the respondent.

By way of a second example, consider the case of Dr David van Gend, a medical practitioner from Queensland, who was forced to attend a compulsory mediation arranged by Queensland's Anti-Discrimination Commission concerning an article he wrote on gay marriage for the Brisbane Courier-Mail. The Courier-Mail had invited Dr Karen Brooks and

---

[3] See clause 117(2)(c) of the Exposure Draft.

[4] [2005] VCAT 1523.

[5] Parkinson, P 'Religious Vilification, Ant-Discrimination Laws and Religious Minorities in Australia: The Freedom to be Different' (2007) 81 *Australian Law Journal* 954.

Dr van Gend to submit opinion pieces on the case for and the case against gay marriage. Dr van Gend wrote the following in his case against:

> "If you hold the old-fashioned idea that a baby deserves both a mother and a father, (Queensland ALP President) Andrew Dettmer, calls your views 'abominable'.
>
> "Yes, it is discrimination to prohibit the "marriage" of two men, but it is just and necessary discrimination, because the only alternative is the far worse act of discrimination against children brought artificially into the world by such men, compelled to live their whole lives without a mother. Now that approaches the abominable."

The case brought against Dr Van Gend was reported as follows:[6]

> 'A member of Gay Dads NSW filed a complaint under the Queensland Anti-Discrimination Act, forcing van Gend to mediation. The complaint was withdrawn but van Gend is still irate.
>
> "I had to cancel a dozen patients to front up and it cost me thousands in legal advice," he says. "It cost him (the complainant) an email and a conference call."
>
> The complaint was "utterly worthless (but) the problem of these laws is they cost innocent people lots of money and time".'

People have strong views on subjects such as gay marriage; in a healthy democracy that respects the human right of free speech, it ought to be possible to articulate the different arguments without being subject to civil litigation. This case illustrates the cost and inconvenience for a respondent even where a complaint is closed or withdrawn. It also shows how creating remedies against other people based upon nothing more than subjective 'offence' can be a weapon of warfare used by different advocacy groups.

The *Human Rights and Anti-Discrimination Bill* is so broadly drafted that it is possible that someone would fall foul of the law by inadvertently insulting someone or causing offence without the slightest intention of doing so. This was evidenced recently in the United Kingdom where a pub singer was arrested for singing the song "Kung Fu Fighting" because a Chinese man who walked past the pub claimed to have been offended.[7]

---

[6] http://www.heraldsun.com.au/opinion/gays-must-curb-vile-vitriol/story-e6frfhqf-1226167514970

[7] 'UK Pub singer arrested for performing Kung Fu Fighting Song' *The European Union Times* 3 May 2011: http://www.eutimes.net/2011/05/uk-pub-singer-arrested-for-performing-kung-fu-fighting-song/

Making it unlawful to offend someone when there are so many protected attributes is likely to lead to a large increase in the number of disputes being taken to the Commission or to the courts. This is problematic for two reasons. Firstly, it imposes a huge administrative burden for the Commission and the courts, particularly the Federal Circuit Court which struggles to cope with its present caseload. Secondly, it encourages people to pursue formal complaints which are not necessarily the most suitable or appropriate means to resolve the underlying social problem, if any. Most problems of this kind ought to be sorted out with some education, explanation and goodwill, or just tolerance for the expression of different opinions in a democratic society. Relationships will not be improved or harmony promoted by civil litigation based upon claims of being offended. Indeed it is likely that being 'offended' will become a weapon of war which will be used by one interest group against another as happened in the 'Catch the Fire' case.[8]

It is also doubtful that it is a good use of taxpayers' money to have to deal with such matters. There are many deserving calls upon public expenditure such as the NDIS that are currently announced in principle, but largely unfunded, and which ought to take a much higher priority than doubling the funding and staff of the Australian Human Rights Commission to deal with complaints about offensive conduct. There will also be a need to increase the size of the Federal Circuit Court if this Bill passes in anything like its present form.

The less visible costs for charities and other not-for-profit organisations also need to be considered. The more that is spent on addressing minor complaints or on seeking to comply with vague and far-reaching laws, the less that is available to meet the purposes for which the organisation exists – and, as noted above, that will likely mean a reduction in front-line services to the needy. Faith-based organisations have particular cause for concern, but the same issues arise for other charities and not-for-profit organisations.

(d) The onus of proof

F4F understands the reasons for placing the onus of proving a lack of causal connection between the unfavourable treatment and the protected attribute on the person who is best placed to offer an explanation for the relevant conduct. However, F4F considers that at least the applicant needs to be put to proof on the other elements: that they have a protected attribute and that they have been subject to unfavourable treatment. These are within the applicant's capacities to demonstrate.

[8] Discussed in Parkinson, above n.5.

Proposed solutions

1. **Section 19**: Amend as follows -

   (1) A person (the ***first person***) ***discriminates*** against another person if the first person exercises, or proposes to exercise, a power to affect the interests of the other in such a way as 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.

   (2) The exercise or proposed exercise of a power includes, but is not limited to, the making of a decision in relation to employment or the refusal to provide a service.

   (3) In determining whether a person is treated, or proposed to be treated, unfavourably, comparison may be made with the treatment of someone who does not have the protected attribute.

   (4) For the avoidance of doubt, ***unfavourable*** treatment of the other person includes (but is not limited to):

      a. conduct that sexually harasses the other person;
      b. conduct that intimidates the other person.

   (5) The expression of an opinion does not constitute unfavourable treatment.

2. **Section 22(1)**: Amend as follows -

   'It is unlawful for a person to discriminate against another person if the discrimination occurs in the course of the following:'

   Then list the areas currently in subsection (2). Renumber the remainder of the subsections accordingly.

3. **Section 51(2)(a):** Amend as follows: ' the conduct incites discrimination, hostility or violence.'

4. **Section 124:** Amend as follows -

   'If, in proceedings against a person under section 120, the applicant:

   (a) proves that he or she has a protected attribute;

   (b) proves that he or she has experienced unfavourable treatment because of the exercise of a power by another person or that such treatment is proposed;

   (c) alleges that the other person engaged, or proposed to engage, in such conduct because of the protected attribute; and

(d) 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.'

3. The Objects Clause and Religious and Cultural Minorities

Section 3 clearly sets out the objects of the proposed legislation. The objects clause plays a fundamental role in the interpretation of the law.[9] The section outlines seven key objectives of the Bill, which include the following:

- to 'eliminate discrimination' (section 3(a));
- 'in conjunction with other laws, to give effect to Australia's obligations under the human rights instruments and the ILO instruments' that are listed in the draft legislation (section 3(b)); and
- 'to promote recognition and respect within the community for the principle of equality' (section 3(d)(i)).

F4F acknowledges that the elimination of discrimination and the advancement of the principle of equality are important social values. However that begs the questions of what counts as discrimination and what is meant by 'equality'. Treating people equally is not the same as eliminating appropriate differentiation in treatment.[10] In a great many circumstances, *differentiation* is both lawful and appropriate. This is why eight year olds are not allowed to drive cars, hospitals are sometimes established to serve only women, and members of the Liberal Party do not have a 'right' to equal employment opportunity as political advisers in

[9] The note under clause 3 instructs: 'In interpreting a provision of the Act, the interpretation that would best achieve the objects of the Act is to be preferred to each other interpretation: see Clause 15AA of the *Acts Interpretation Act 1901.'*

[10] The term differentiation comes from General Comment 18 of the Human Rights Committee, which states: '[T]he Committee observes that not every differentiation will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].' This communicates the fact that discrimination can be either legitimate or illegitimate, depending on the context.

the office of a Labor government minister. Furthermore, the right to non-discrimination needs to be balanced with other human rights including freedom of association. An environmental group ought to be able to exclude people opposed to the Carbon Tax from membership and voting rights without being concerned that it will be dragged into court for discrimination on the grounds of political opinion.

If the objects clause focuses only on the elimination of discrimination and says nothing about the limits of the right or how it is to be balanced with other rights, then there is a serious risk that other human rights will be violated.

An example of the importance of the objects clause in this regard is the right of a cultural and religious minority (for religion and culture often go together) to form a club which meets the need of that ethno-religious community. Section 35(2) of the Bill provides:

(2) The exception in this section applies in relation to a club or member-based association:

a. if membership of the club or association is restricted wholly or primarily to people (the ***target group***) who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and
b. restricting membership to the target group is consistent with the objects of this Act.

The test is a cumulative one. Both (a) and (b) must be satisfied. However, as presently drafted, it is very difficult indeed to see how restricting a club or association to an ethno-religious minority could be said to be consistent with the objects of the Act. The formation or continuation of such a club is not a special measure in the usual sense of that term for it is not a measure to achieve 'substantial equality'. Such clubs exist to promote and preserve a cultural and religious identity, not to promote substantial equality. The only possible basis might be the reference in (b) to: "in conjunction with other laws, to give effect to Australia's obligations under the human rights instruments and the ILO instruments". However that is both broad and vague, and it cannot readily be known how the courts will interpret it.

The Bill is named the *Human Rights and Anti-Discrimination Bill*. However, the objects of the Bill only relate to the second part of that title. They need also to reflect the first part of the title. This involves a recognition that the right to non-discrimination is, and has always been, a qualified right. It needs to be balanced with other rights and principles such as the right to religious freedom and freedom of association, and subject to appropriate legal limits which arise from the natural limitations that are inherent in youth, old age, mental illness, disability

and other protected attributes. For a great variety of legitimate reasons, people with certain protected attributes are not able to work in every job available or to perform every task normally required by that job.

Proposed solution

F4F proposes that the first object should be amended as follows:

(a) to deal with discrimination, sexual harassment and racial vilification, consistently with Australia's obligations under the human rights instruments and the ILO instruments (see subsections (2) and (3)), and taking account of the other rights and freedoms protected by those instruments including freedom of speech, religion, conscience and association;

This would serve as a reminder of the need to balance competing rights when interpreting provisions of the Act. Without such a reference, courts may construe the objects clause as granting an elevated status to the right to non-discrimination and determine that the legislation puts a low value on other rights and freedoms, confining them to exceptions that should be narrowly construed. Without recognition of Articles 18, 19, 22 and 27 of the ICCPR in particular, courts may neglect to give adequate weight to these freedoms since they are not otherwise implemented into domestic law.[11]

4. Religion as a protected attribute

F4F welcomes the inclusion of religion as a protected attribute. Religion has been a protected attribute in the USA as far back as the *Civil Rights Act* 1964. It was among the first attributes to be protected in international human rights law.[12] This is no doubt because history is replete with examples of groups or individuals who have suffered discrimination on the grounds of their religious belief. Discrimination on the basis of religious belief continues to be a live issue around the world today – not just in Communist and Islamic countries, but also in the West.

However, our support for the inclusion of religion as a protected attribute is dependent upon the Bill being amended in ways recommended by this submission. Without such amendments, the inclusion of religion as a protected attribute has the potential to advance a conception of individual religious freedom at the expense of the freedom of religious groups to associate and form organisations in accordance with their religious beliefs and convictions.

[11] The words 'in conjunction with other laws' in s.3(b) might suggest that only the clauses of human rights instruments that have been implemented into Australian law ought to be given effect.

[12] For example the *Civil Rights Act 1964* (US) and the *Universal Declaration of Human Rights 1948* (UDHR).

Respect for diverse community groups is central not only to religious freedom, but also to a healthy multicultural society.

Section 22(3) of the Bill states that discrimination on the ground of religion will only be unlawful if the discrimination is connected with work and work-related activities. This limitation means that it would be lawful to deny a person access to public goods, services, education, training, facilities on the basis of their religion.

F4F recognises that the reason for this might be to do with limitations of constitutional power (since the protection of these attributes presumably relies on the *Discrimination (Employment and Occupation) Convention 1958* (No. 111)), but perhaps this issue could be clarified. F4F has a preference for seeing religion as a protected attribute in a greater range of areas, provided that the reference in section 19(2) to 'insults' and 'offends' is deleted. Australia has opposed the moves internationally to outlaw 'defamation of religion' and it would clearly be an error to introduce such a provision domestically by allowing offence on religious grounds to be the basis of lawsuits.

5. Religion as an 'exception'

F4F recognises that the government has demonstrated its continuing respect for religious freedom by retaining the exceptions afforded to religious bodies and educational institutions (sections 32 and 33).

F4F expects that these sections will attract some debate, as there is a determined constituency arguing for the elimination of religious exceptions. Many view such exceptions as unjust concessions granted as some form of political compromise.[13] There are repeated calls for the abolition of all exceptions, and while the government has not acceded to those demands, it has acknowledged the arguments of those lobby groups by providing that the exceptions should be reviewed after three years (section 47).

This misunderstands the place and importance of religious exceptions. These exceptions do not exist as a means of justifying what would otherwise be unlawful discrimination. Rather, they give expression to fundamental human rights, such as freedom of religion, association and the rights of cultural minorities.[14]

[13] See generally: Thornton, Margaret (2011) 'Christianity 'Privileged' in Laws protecting Fairness' *Viewpoint*, 5.

[14] See for example article 18, 19 and 27 of the International Covenant on Civil and Political Rights (ICCPR).

For this reason, F4F is deeply concerned that religious freedom and freedom of association are protected only by means of 'exceptions'. We recognise that it is a standard form of drafting for anti-discrimination statutes to define discrimination and then to identify exceptions. However, in the modern climate where there is a new hostility to any form of exception, it is no longer appropriate to protect fundamental human rights by reference only to exceptions from otherwise applicable laws which might be narrowly construed. The language of 'exceptions' compounds the perception that religious organisations receive special concessions.

F4F is of the view that addressing issues of religious freedom only by way of a narrowly construed exception could be seen as being in violation of Australia's international human rights obligations. It is also inconsistent with the UN Human Rights Committee's definition of discrimination in paragraph 13 of General Comment 18 which states that differentiation of treatment will not 'constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.[15]

Measures that respect the autonomy of religious organisations to differentiate between people where this is in accordance with requirements of faith, doctrine, moral teaching and religious observance fall outside the definition of 'discrimination' in international law.

Proposed solutions

This problem could be rectified, within the structure of the current exposure Bill, in the following ways:

1. Amend Division headings

Currently, the headings provide:

> Division 4—Exceptions to unlawful discrimination
>
> Subdivision A—Main exceptions

It would do much to alleviate the concerns of Christian churches and faith-based organisations if these Division heads were changed to say:

> Division 4—When discrimination is not unlawful

[15] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument

Subdivision A—Reasonable grounds for different treatment

And then delete the word 'exception' throughout the Division. So for example, section 23 could be headed 'justifiable conduct' and 23(1) could begin: "This section applies…". There would need to be other amendments to the Division consequent to the deletion of the language of 'exceptions'.

The requirement for a review of the exceptions after three years should be confined to the exceptions other than in sections 32 and 33. Alternatively, there should be a review of the entire Act after three years. It is very difficult to examine the exceptions to a rule without examining the rule itself, for the rule may be inappropriately drafted or too broad in scope.

If a full review is undertaken, it may also be appropriate to review the operation of the Australian Human Rights Commission. This is long overdue in any event; but given the massive expansion of the reach of federal law proposed in this Bill, it will be necessary to examine, after three years, how the Australian Human Rights Commission is managing its increased workload. It will also be appropriate to consider how the courts are balancing the right of non-discrimination with other human rights.

2. Amend section 23

Section 23(2) states:

> 'It is not unlawful for a person to discriminate against another person if the conduct constituting the discrimination is justifiable.'

Section 23(3) goes on to say that conduct is justifiable if:

(a) the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim;
(b) that aim is a legitimate aim; and
(c) the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and
(d) the conduct is a proportionate means of achieving that aim.'

F4F proposes an additional section to be inserted after subsection (3), (based upon the recommendation made by Professor Patrick Parkinson and Professor Nicholas Aroney in their original submission responding to the Discussion Paper)[16]:

> 'Without limiting the generality of the previous subsection, the protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is justifiable conduct.'

This proposed inclusion reflects the UN Human Rights Committee General Comment 18 which states the circumstances in which differentiation of treatment will not constitute 'discrimination'.[17] Because subsection (4) refers to the Objects of the Act, it is also important that these objects are amended to take a broader view of the protection of human rights.

6. Subdivision C and the 'religious exceptions'

The subdivision really needs a new explanatory section to be introduced before section 32 on the following lines.

(1) This subdivision is a means of giving effect to Australia's obligations under Articles 18 and 27 of the International Covenant on Civil and Political Rights, and to appropriately balance these rights with rights concerning non-discrimination.'

Note: Additional protection for these rights is provided in section 23 (justifiable conduct).

Furthermore, F4F considers that it is now time to rewrite the religious exceptions in a manner which more closely aligns with the purposes that they serve and to avoid sometimes complex and fruitless arguments about what is and is not required by the doctrines of the religion or a group within a religious tradition.[18]

---

[16] Parkinson, P and Aroney, N 'Submission to Consolidated Commonwealth Anti-Discrimination Laws' (2012), which is available on the Attorney General's website.

[17] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument

[18] See e.g. *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155; *OW & OV v Members of the Board of the WesleyMission Council* [2010] NSWADT 293.

No faith-based organisation seeks to discriminate against anyone else but many choose staff, or at least prefer staff, who adhere to the beliefs of the organisation, because such beliefs are central to the expression of the organisation's work and purpose.

Accordingly, we propose the following amendment to section 33(2) in order to clarify this.

> 'Subject to subsection (3), it is not unlawful for a person (the ***first person***) to discriminate against another person if:
>
> (a) the first person is a body established for religious purposes, or a body that is intended to be conducted in accordance with religious doctrines, tenets, beliefs or teachings, or an officer, employee or agent of such a body; and
>
> (b) the discrimination:
>
> a. is connected with the appointment or retention of persons to work within the religious body to ensure that they share the religious commitment of that body or are supportive of its religious purposes; or
>
> b. consists of conduct, engaged in 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; and
>
> iii. the discrimination is on the ground of a protected attribute to which this exception applies, or a combination of 2 or more protected attributes to which this exception applies.'

7. The religious exceptions and aged care

F4F notes the limitation in relation to the provision of aged care services, and understands the reasons for it. However, it is concerned that this will become a precedent for the erosion of the autonomy of faith-based organisations in other respects.

Aged care facilities are not only services but communities, and it is important, at least to some organisations running such facilities, that they be entitled to maintain the ethos and culture of the community in particular ways. Some aged care facilities, for example, have a preference for people of the particular faith-community that runs the facility. This helps ensure a certain level of cohesion. These valid concerns of aged care providers need to be taken into account very carefully before limiting their autonomy to provide their services. The best way to ensure that everyone has access to such services is by ensuring a plurality of available aged care options, both faith-based and secular.

8. The definition of 'discrimination' and the need for a comparator

F4F supports the government's attempt to simplify the test for discrimination in principle, but has concerns about the current definition. Section 19(3) provides:

> A person (the ***first person***) ***discriminates*** against another person if:
>
> a. the first person imposes, or proposes to impose, a policy; and
> b. the policy has, or is likely to have, the effect of disadvantaging people who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and
> c. the other person has that attribute or combination of attributes.

This definition for discrimination is problematic because there is no requirement to have a comparator. This means that a tribunal or court, in determining whether or not discrimination has occurred, need not compare the treatment of the complainant with the treatment of some other person, real or hypothetical, who does not have the protected attribute. As the Exposure Draft's Explanatory Notes indicate: 'It is sufficient that the treatment is detrimental to the person.'[19] Neither the Bill nor the Explanatory Notes further explain what constitutes detriment for the purposes of this section.

F4F considers that the insertion of a comparator will ensure greater objectivity in the application of this test. Any organisation against which a complaint of discrimination may be brought is entitled to know in advance what conduct might constitute discrimination so that it can avoid crossing that line inadvertently. Saying that a general policy is discriminatory just because it has the effect of disadvantaging a person with a protected attribute, without more, is a recipe for uncertainty and confusion and could lead to a multiplicity of unreasonable complaints.

Proposed solution

The proposed amendment to section 19 (above) addresses this problem.

Conclusion

F4F welcomes the opportunity to respond to this Exposure Draft and would appreciate the opportunity to discuss the contents of this submission with the Senate Committee or the Attorney-General's Department.

---

[19] See clause 106 of the Explanatory Notes.