Submission by
Free TV Australia Limited

Senate Legal and Constitutional Affairs Committee

Inquiry into the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012*

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EXECUTIVE SUMMARY

- Free TV Australia (Free TV) recognises the need to ensure consistency in anti-discrimination standards and largely supports efforts to consolidate legislation in this area.
- Commercial free-to-air (FTA) broadcasters take seriously their obligations to provide fair and balanced programming that does not discriminate against individuals or groups within society.
- Legal protections against discrimination are a necessary good which must be upheld. However, these protections must be carefully balanced against the fundamental right of freedom of expression.
- Free TV members have significant concerns with the use of the term 'offends' in the definition of discrimination at section 19(2)(b) of the proposed Bill.
- Defining discrimination to include any conduct that merely offends sets a dangerously low threshold that is likely to undermine freedom of speech. It also creates an entirely subjective standard which is difficult to apply with clarity.
- Anti-discrimination standards should be based on objective and judicious principles to ensure fairness and certainty in the application of the law and protect freedom of speech.
- Commercial FTA broadcasters are already subject to substantial obligations regarding the nature and scheduling of broadcast material under the Commercial Television Industry Code of Practice (Code), including detailed prohibitions on the broadcast of content that discriminates against others.
- The Code provides for a structured and efficient complaints mechanism for viewers. Broadcasters face substantial sanctions if found in breach of any Code provision.
- Alternative complaints processes are unnecessary and are likely to create inefficiencies in the resolution of a complaint.

1 Introduction

This submission is made by Free TV Australia, which is the peak industry body representing all commercial free-to-air broadcasters in Australia. Commercial free-to-air television is the most popular source of entertainment and information for Australians. At no cost to the public, our members provide nine channels of content across a broad range of genres, as well as rich online and mobile offerings.

Free TV welcomes the opportunity to comment on the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* (the Bill) and acknowledges the need to ensure consistency in anti-discrimination standards.

Commercial free to air broadcasters are in the business of providing news, information and commentary on matters of public concern and are highly cognisant of their responsibility to ensure that their material is fair, balanced and free of discrimination.

Legal protections against discrimination are necessary to prevent unjustifiable harm to individuals and groups in society. However, such protections must be carefully structured so as not to undermine the fundamental right of freedom of expression and destabilise the free flow of information on matters of public interest.

2 Conduct that offends and publication

Free TV members are very concerned by the inclusion of the term "offends" in the proposed definition of discrimination at section 19(2)(b) of the Bill. The use of this term sets a dangerously low legal threshold. It means that any conduct which merely offends another could be found to be discriminatory.

This change has the potential to threaten freedom of speech and undermine the activities of the media in providing comprehensive reporting of news and current affairs, including commentary and opinion based programming.

Broadcasters deal with a variety of content on a daily basis and require certainty in meeting legal thresholds. They rely on freedom of speech to provide coverage and information on matters of public concern. These services are a valuable public good and should be protected.

The lower threshold of "offence" will also have significant implications for broadcasters in other areas of programming, including comedy, satire, drama and other artistic works. Many of these genres produce programs that are challenging or thought provoking, and deal with issues of controversy. Such programs may cause offence to certain persons, even where that program is popular, critically acclaimed, has artistic merit, or deals with significant cultural issues. The tension between artistic works and free speech was explored recently in a piece by playwright Louis Nowra, who noted that "*…the notion of offensiveness is one that has changed through the years. We once banned offensive novels such as Lolita and Ulysses; now they are studied".*[1]

The Bill contains no definition for the term "offends", nor does it provide any objective measure by which to guide the application of the term.

Recent judicial consideration of the concept (in relation to the vilification provisions of the *Racial Discrimination Act 1975)* indicated that the assessment is to be made by reference to an ordinary and reasonable member of the group of people concerned, and the values and circumstances of those people.[2]

The Macquarie Dictionary defines "offend" as "to cause displeasure in the mind or feelings"[3].

As such, a legal threshold predicated on the emotional reaction to the words and actions of another creates little to no certainty for those applying the test, and undermines the objective of the Bill in achieving consistency and efficiency in anti-discrimination law.

The term "offence" does not exist in current commonwealth legislation applying to sex, age and disability. It does appear in s 18C of the *Racial Discrimination Act 1975* for racial vilification but is qualified by the requirement that the conduct be "reasonably likely" to offend. This qualification does not exist at section 19(2)(b) of the Bill.

ABC Chairman and former Chief Justice of the Supreme Court, James Spigelman, discussed the danger of making behaviour which merely "offends" unlawful in his speech at the Australian Human Rights Commission earlier this month. Spigelman stated that the *"freedom to offend is an integral part of freedom of speech" and that the subjective nature of the proposed test is a "significant redrawing of the line between permissible and unlawful speech"*[4].

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[1] Louis Nowra "No price on free speech" *The Australian* December 15: http://www.theaustralian.com.au/news/features/no-price-on-free-speech/story-e6frg6z6-1226537169726
[2] Bromberg J *Eatock v Bolt* [2011] FCA 1103 at [15]
[3] http://www.macquariedictionary.com.au
[4] http://humanrights.gov.au/about/media/news/2012/132_12.html

In the same speech, Spigelman declared that he is unaware of any international instrument or domestic law in any other liberal democracy that seeks to protect society from conduct that merely offends. Importantly, he further notes Australia's international obligations to protect freedom of speech.

These are significant and compelling arguments against the inclusion of the term "offends" in s19(2)(b) of the Bill. If the term cannot be omitted entirely, the definition should be amended to conduct that is "reasonably likely to offend".

3 Publication Exception

Section 53 of the Bill makes it an offence to publish material that indicates an intention to engage in discriminatory conduct. This extends the current proscription on publication of advertisements to *any publication*.

This change significantly compounds the legal risk for media organisations in the publication of news, information and commentary, particularly if the threshold remains at conduct which merely offends another. Media organisations are likely to avoid reporting and commenting on matters of public concern for fear of being changed with an offence. This will undermine freedom of expression in the media and compromise the free flow of information in society.

The publication exception proposed at section 53(2) of the Bill does not provide sufficient protection to media organisations. The exception is narrow and limited to specific purposes. In addition, it only applies to commentary where the comment is an "expression of genuine belief". This sets a subjective standard to the application of the exception which provides little certainty to media organisations, particularly as it is the respondent who must prove the exception if a complaint comes before courts[5].

To provide assurance for media organisations, Free TV proposes that the Bill contain a clear and separate exemption for media organisations engaged in the provision of news and current affairs. This approach is consistent with a number of other Acts, such as the *Evidence Act 1929* (SA) and the *Privacy Act 1988* (Cth), which provide a precedent both for the exemption itself and as a drafting model.

4 Existing Protections

Commercial free-to-air television broadcasters are already required to prevent the broadcast of discriminatory material under the *Commercial Television Industry Code of Practice* (Code). All Free TV members must abide by the Code, which sets stringent requirements on broadcasters in relation to the nature and scheduling of broadcast content.

The regulatory obligations set out in the Code operate in addition to any legal requirements prescribed under legislation.

Relevantly, the Code provides that:

"A licensee may not broadcast a program, program promotion, station identification or community service announcement which is likely, in all circumstances, to:

1.9.5 Seriously offend the cultural sensitivities of Aboriginal and Torres Strait Islander people or of ethnic groups or racial groups in the Australian community;

[5] Section 124(2) Human Rights and Anti-Discrimination Bill 2012

1.9.6 provoke or perpetuate intense dislike, serious contempt or sever ridicule against a person or group of persons on the grounds of age, colour, gender, national or ethnic origin, disability, race, religion or sexual preference."

In relation to news and current affairs programming, the Code further provides that licensees:

"4.3 must not portray any person or group of persons in a negative light by placing gratuitous emphasis on age, colour, gender, national or ethnic origin, physical or mental disability, race, religion or sexual preference."

In effect, these provisions create a positive obligation on broadcasters to ensure that all material broadcast does not discriminate against an individual or group of individuals based on ethnicity, race, gender, disability, religion or sexual preference.

The Code is accompanied by Advisory Notes including The Portrayal of Aboriginal and Torres Strait Islander Peoples, The Portrayal of Cultural Diversity, The Portrayal of People With Disabilities and The Portrayal of Men and Women.

The Code is co-regulated by industry and government through the Australian Communications and Media Authority (ACMA), an independent statutory authority.

The Code also establishes an expedient complaints handling process which allows members of the public to lodge a complaint directly with the broadcaster. The process works well and is overseen by the ACMA to ensure that broadcasters fulfil their obligations.

Broadcasters are required to respond promptly to complaints and take all reasonable steps to resolve the issues addressed in the complaint. If the complainant is not satisfied with the response provided, they can approach the ACMA for further investigation of the matter. The ACMA is empowered to investigate complaints made under the Code and a range of substantive enforcement provisions apply.

This process provides a practical and efficient mechanism for both viewers and broadcasters to address public concerns and seek appropriate rectification of matters. Any additional complaints processes are unnecessary and will only create inefficiencies in the handling and resolution of complaints.