Submission: Senate Legal and Constitutional Affairs Committee

Re:
Human Rights and Anti-Discrimination Bill 2012: Exposure Draft Legislation[1]

By
Spencer Gear
Queensland[2]

[1] Available at: http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Documents/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Exposure%20Draft%202.pdf (Accessed 17 December 2012).

[2] My street and email addresses are supplied in the cover email but are not for publication.

19 December 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia
Email: legcon.sen@aph.gov.au

Dear Sir/Madam,

The following is my response to the content of this Draft Legislation.

A threat to freedom of speech: The anti-discrimination Draft Legislation

There is content in this Draft Legislation that is of major concern to me because it is an attack on the continuation of Australia's healthy democracy that includes freedom of speech, freedom of association, and freedom of religion. These threats include:

A. The broad definition of discrimination

Section 19(2) of the Bill defines some of the parameters of this discrimination as indicating that

> a person (the first person) discriminates against another person if the first person treats, or proposes to treat the other person unfavourably because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes…. To avoid doubt, *unfavourable* treatment of the other person includes (but is not limited to) the following: (a) harassing the other person; (b) other conduct that offends, insults or intimidates the other person.

Therefore, 'unfavourable treatment' is to include 'harassing the other person' and 'conduct that offends, insults or intimidates'.

The latter group makes up such a broad definition that it has the potential to suppress free speech and freedom of expression in our robust democracy. I urge the government not to go down this road as it is such a subjective definition of discrimination that many could come up with examples that offend, insult and intimidate that are part of everyday living in work places and education in Australia. Litigation could be increased in voluminous proportions. If a person

disagrees with the ability of a particular cricketer or footballer, politicians (e.g. Julia Gillard vs. Tony Abbott) , doctrines of a church – on the job or by the mass media – this could be open to a charge of discrimination by 'conduct that offends, insults or intimidates the other person'.

Australian society will be devastated by these individualised effects of being offended or insulted. Being open to offense comes with the benefits of living in an open, free democracy. Does the Federal Government want to close down this freedom in Australia? It sure sounds like it!

Former chief justice of NSW and chairman of the ABC, Jim Spigelman, has rightly noted the implications of this broad definition of discrimination:

> I am not aware of any international human rights instrument or national anti-discrimination statute in another liberal democracy that extends to conduct which is merely offensive…. We would be pretty much on our own in declaring conduct which does no more than offend to be unlawful. The freedom to offend is an integral component of freedom of speech. There is no right not to be offended.[3]

There is another radical change that should never be included in legislation in a just society that lives by the legal proof of 'innocent until proven guilty', a fundamental of the legal system of our country.

B. Reversal of onus of proof

Section 124(2) states that 'in proceedings against a person under section 120, the burden of proving that conduct is not unlawful conduct because of any of the following provisions lies on that person'. This reversal of onus of proof on the person accused is contrary to Australian legal justice where a person is 'innocent until proven guilty'. It is repressive and unjust that a complainant could allege that a person's conduct 'offends, insults or intimidates' and the accused person is required to prove that he/she did not discriminate on these grounds. What the complainant has to do, according to this Draft Legislation, is to make a prima facie case against a person and then the onus is on the defendant to demonstrate that the conduct was **not** that which harasses, offends, insults or intimidates.

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[3] Cited in Chris Merritt, Legal Affairs editor, *The Australian*, December 11 2012, 'ABC chairman Jim Spigelman slams ALP laws that make it illegal to be offensive'. Available at: http://www.theaustralian.com.au/business/legal-affairs/abc-chairman-jim-spigelman-slams-alp-laws-that-make-it-illegal-to-be-offensive/story-e6frg97x-1226534081839 (Accessed 18 December 2012).

This reversal of onus of proof threatens a fundamental principle in our justice system that an accused person is innocent until proven guilty. The onus of proof should continue to remain on the person who makes the complaint of 'unlawful discrimination'. The accuser needs to demonstrate the guilt of the accusation.

James Allan, Garrick professor of law at the University of Queensland, has exposed the 'proposed brave new world' in this Draft Legislation. He also wrote that:

> the government says the accuser will first have to establish a prima facie case (a very low threshold), meaning that it's imaginable that there was discrimination. After that the accused will have to prove there was no discrimination, or that whatever happened was justified. If they can't, they will lose and the person alleging they are the victims will get money and possibly more.
>
> Now all that may seem like lawyerly gobbledegook but it does matter. There is a big difference between something actually being the case and your being able to prove it in a court of law….
>
> Now consider the proposal to reverse the onus of proof in discrimination claims. If it goes through, it will become much easier to make these sorts of claims. Businesses will have to pay out more often, and sometimes will have to pay out even when there was no discrimination (just as newspapers often refuse to run stories that are true but hard to prove).
>
> Bluntly, this proposal is pro-victim, or pro-anyone inclined to make a claim of discrimination. It's also a pro-lawyer proposal, as work in this area will go up, up, up. What it is not is a pro-business or pro-productivity proposal….
>
> This is not a principled "always support the person alleging the wrongdoing" reform. No, it is yet another anti-small business (since big ones have enough in-house human resources people to weather even awful laws) and anti-productivity change dressed up in politically correct verbiage that worships at the altar of those inclined to play the victim.[4]

Note James Allan's issues that he has uncovered in this proposed legislation, as a lawyer and professor of law:

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[4] James Allan, *The Australian*, November 22, 2012, 'Guilty or not business will pay'. Available at: http://www.theaustralian.com.au/national-affairs/opinion/guilty-or-not-business-will-pay/story-e6frgd0x-1226521533567 (Accessed 18 December 2012).

- If this reverse onus of proof is legislated, businesses will have to pay out more often and may have to pay-out even if no discrimination can be proved.
- It is pro-victim; pro-anyone who wants to make a claim of discrimination; and pro-lawyer;
- It is another anti-small business and anti-productivity change, and is
- 'Dressed up in politically correct verbiage that worships at the altar of those inclined to play the victim'.

This reversal of onus of proof is a retrograde step for our democracy. Individuals and businesses do not need this imposition on them, especially in light of the slippery definition of discrimination. My understanding is that this change to onus of proof is contrary to the natural justice principles on which this nation has been built in its legal system. Thus, this draft document proposes discriminatory, anti-discrimination legislation.

C. Threat to freedom of speech

The natural outcome of Section 19(2) and the definition of discrimination as 'unfavourable treatment' to include 'harassing the other person' and 'conduct that offends, insults or intimidates', is that this changing of the boundaries for what is permissible speech and other conduct will reduce freedom of speech. With the frightening prospect of the threat of legal processes, this will prevent or handicap freedom of speech in Australia. Even the words used for parameters of discrimination, 'offend', 'insult', and 'intimidate', threaten freedom of speech.

In his address to the Australian Human Rights Commission on freedom of speech, James Spigelman, former chief justice of NSW, was reported to have said:

> Words such as 'offend' and 'insult', impinge on freedom of speech in a way that words such as 'humiliate', 'denigrate,' 'intimidate', 'incite hostility' or 'hatred' or 'contempt', do not. To go beyond language of the latter character, in my opinion, goes too far.
>
> None of Australia's international treaty obligations require us to protect any person or group from being offended.
>
> We are, however, obliged to protect freedom of speech.[5]

[5] *The Daily Telegraph*, December 11, 2012, 'Health workers on NSW north coast told they cannot use word "mate"'. Available at: http://www.heraldsun.com.au/news/national/health-workers-on-nsw-north-coast-told-they-cannot-use-word-mate/story-fndo317g-1226534327970 (Accessed 18 December 2012).

I urge this government do nothing that will inhibit freedom of speech in this strong democracy. The proposed legislation will take us down the wrong path and silence or censor freedom of speech. Please do not go ahead with this legislation. We do not need it.

D. Threat to freedom of thought, conscience, religion and belief

This legislation represents a threat to freedom of speech, thought, conscience, religion and belief in these ways:

1. Discriminatory anti-discrimination

Chapter 3, Division 8, Section 83 on the 'meaning of temporary exemption' gives procedures for how temporary exemptions may be granted by the Commission that exempts 'particular conduct of one or more persons or bodies (or classes of persons or bodies from being unlawful discrimination'. However, Section 74 has the heading, 'Exceptions and exemptions do not apply to disability standards' according to the 'exemptions under Division 8' and they 'do not apply in relation to requirements in a disability standard'.

While I have deep sympathy for and understanding of those with disabilities (I have spent much of my life in counselling), I find that these exceptions to exemptions amount to discriminatory anti-discrimination. Why should one sector of our community be exempted automatically when others have to comply?

This is further exemplified in the Legislation's 'exceptions for religious bodies and educational institutions' (Section 33) and then singling out aged care facilities that are sponsored by religious organisations. In Section 33(3) it states 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 aged care; and (b) the discrimination is not connected with the employment of persons to provide that aged care'. Contrary to this legislation's view, I propose that if the sponsor of an aged care facility does not support the politically correct emphases on 'sexual orientation' and 'gender identity', for example, that aged care facility should have freedom of thought, conscience, religion and belief protected according to Australian law and our international treaty obligations.

The International Covenant of Civil and Political Rights (ICCPR), to which Australia is a signature, guarantees freedom of thought, conscience, religion and belief. Article 18 of this Covenant states:

> ***Article 18***
>
> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or

> belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. [6]

It is a retrograde step, and a discriminatory one at that, to state that Commonwealth funded aged care facilities cannot discriminate, based on the thoughts, conscience, religion and beliefs of that facility. Why should aged care be singled out? There are many other Commonwealth-funded activities that will not be subject to this discriminatory legislation. Why is aged care one of the social services singled out? Australia's commitment to the ICCPR should guarantee no kind of discrimination in legislation like that imposed by this Draft Legislation.

2. Religion

According to Section 17, religion is one of the 'protected attributes' (see list in my section E below). However, there is a restriction placed by this legislation as Section 7 makes clear, this legislation applies to discrimination in 'work and work-related areas'. This is in contrast to Australia's commitment to the ICCPR, Articles 2 and 26.

Article 2 of the ICCPR states:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[6] Office of the United Nations High Commissioner for Human Rights, 'International Covenant on Civil and Political Rights'. Available at: http://www2.ohchr.org/english/law/ccpr.htm (Accessed 18 December 2012).

> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.[7]

Article 26 of the ICCPR states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[8]

Therefore, to maintain Australia's commitment to the United Nations ICCPR's principles on religion, discrimination must not be restricted to 'work and work-related areas' but should be extended to **all** areas in which religion is expressed. This also applies to **all** areas relating to race, colour, sex, language, religion or other opinion, national or social origin, property, birth or other status. Freedom of religion is guaranteed under the ICCPR, but not in all areas of religion according to this Draft Legislation. The current wording of the Legislation does not endorse the strength of freedom of religion that is in the ICCPR. Why is this Draft Legislation not consistent with Australia's ICCPR commitments in Articles 2 and 26 of ICCPR?

3. Politics

[7] Ibid.
[8] Ibid.

Section 22 of this Draft Legislation states: ‘Discrimination on the ground of any of the following protected attributes (or a combination of protected attributes that includes any of the following protected attributes) is only unlawful if the discrimination is connected with work and work-related areas’. Is the government creating a noose to its own disadvantage? Since the Legislation defines discrimination as any ‘conduct that offends, insults or intimidates’ another person (see Section 19), if this legislation becomes law in Australia, this will mean that political opinions expressed in certain environments, like on the job, could be grounds for discrimination. Imagine nobody on the job being allowed to speak in favour of the Labor, Liberal, National or Australian Party because it might ‘offend’ somebody. Can you imagine a union leader not wanting to promote the Labor Party when in work-related areas?

This proposed Legislation has potential to seriously affect freedom of speech. We do not need this kind of repressive discrimination in Australia. It’s another example of a discriminatory anti-discrimination proposal.

When is discrimination unlawful? Section 22 states:

> **When discrimination is unlawful**
> (1) It is unlawful for a person to discriminate against another person if the discrimination is connected with any area of public life.
> Note: For exceptions to when discrimination is unlawful, see Division 4.
> (2) The ***areas of public life*** include (but are not limited to) the following:
> (a) work and work-related areas;
> (b) education or training;
> (c) the provision of goods, services or facilities;
> (d) access to public places;
> (e) provision of accommodation;
> (f) dealings in estates or interests in land (otherwise than by, or to give effect to, a will or a gift);
> (g) membership and activities of clubs or member-based associations;
> (h) participation in sporting activities (including umpiring, coaching and administration of sporting activities);
> (i) the administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs.

Patrick J. Byrne has raised the practical implications of this aspect if work-related discrimination is based on political opinion:

> Curiously, it seems that even political parties may be subject to the new anti-discrimination law. It will be interesting to see what happens should a card-carrying Liberal Party member take a case to the AHRC [Australian Human Rights Commission] claiming discrimination because he/she was

> refused employment on Nicola Roxon's staff because of his/her political ideas.
>
> If the attorney-general were to lose such a case, all will not be lost. She can appeal to the Federal Court or the Federal Magistrates Court.[9]

We live in a vigorous and healthy democracy where the ability to express political, religious and social views anywhere is regarded as a positive for our country. That will be gone or severely threatened if this legislation becomes law. I find it to be a strange position that any political party would want to adopt that which would try to silence political discussion on the job. Why, oh why, would the Labor Party want to promote such a draconian measure? The same is true for placing religion, gender identity, and sexual orientation in the 'protected attributes' for discrimination in work and work-related areas and access to public places (which I presume will relate to mass media content and speaking in any kind of open-air event or public auditorium).

E. The challenge of an extended list of protected attributes

According to Section 17,

(1) The ***protected attributes*** are as follows:
- (a) age;
- (b) breastfeeding;
- (c) disability;
- (d) family responsibilities;
- (e) gender identity;
- (f) immigrant status;
- (g) industrial history;
- (h) marital or relationship status;
- (i) medical history;
- (j) nationality or citizenship;
- (k) political opinion;
- (l) potential pregnancy;
- (m) pregnancy;
- (n) race;
- (o) religion;
- (p) sex;
- (q) sexual orientation;
- (r) social origin.

(2) Each protected attribute is taken to include:
- (a) characteristics that people who have the attribute generally have or are generally assumed to have; and

[9] Patrick J. Byrne, *News Weekly*, 'New anti-discrimination bill threatens religious freedom', December 8, 2012. Available at: http://newsweekly.com.au/article.php?id=5417 (Accessed 19 December 2012).

(b) in relation to a particular person—characteristics that the person has because he or she has the attribute.

This considerably expanded list of changes to the 'protected attributes' of the offended is extended to include shops, workplaces, sporting clubs, public places and includes 'political opinion', 'religion', 'gender identity', and 'sexual orientation'. So what will happen at any time, but especially at election time, if a shop owner or work place shows signs for a particular political party or political candidate? Are union officials going to be prohibited from promoting the Labor Party on the job? What will happen to a person who writes a letter to the editor of a newspaper, opposing homosexuality? What about an atheist who opposes views on religion and Christianity in newspapers or online? What about a Muslim or Christian who promotes his/her views on the job or in the public arena and these views cause 'offense' to somebody who hears or reads these claims?

These questions exemplify the kinds of unnecessary restrictions that will be placed on all Australians if this legislation becomes law.

F. The costs

"The complaints process will be streamlined with the adoption of a cost free jurisdiction and shifting burden of proof where the respondent is required to justify the conduct once the complainant has established a prima facie case," Attorney-General, Ms Nicola Roxon, said.[10]

However, how will that apply if the complaint is unjustified and the case is dismissed? Will the respondent be ordered to have costs reimbursed by the accuser who made the false claim? This again demonstrates the injustice of this method of reverse onus of proof, which is contrary to the legal processes we have adopted in Australia, where a person is innocent until proved guilty.

G. Conclusion

This is an incredibly invasive piece of proposed legislation that violates some of Australia's fundamental civil, religious and political rights. The legislation should be discarded rather than imposed on the healthy democracy we already have in Australia.

This legislation threatens freedom of thought, conscience, association, religion and belief. We do not need this repressive, discriminatory, anti-discrimination legislation that violates some fundamental freedoms that have been granted to all

[10] Joint Media Release, The Hon Nicola Roxon MP and Senator, The Hon Penny Wong, 'Clearer, Simpler, Stronger Anti-Discrimination Laws', 20 November 2012. Available at: http://www.financeminister.gov.au/media/2012/mr_2352012.html (Accessed 19 December 2012).

Australians because of Australia's signing the United Nations' International Covenant of Civil and Political Rights.

The media release announcing this legislation and calling for submissions was issued on 20 November 2012. Giving a month's notice in the run-up to Christmas was not an appropriate time frame. I was not impressed that the deadline for submissions for this legislation was 21 December 2012 – 4 days before Christmas Day. This does not encourage substantive submissions.

The End