



HUMAN RIGHTS & ANTI-DISCRIMINATION BILL 2012

Exposure Draft Legislation

**Submission on behalf of the
Seventh-day Adventist Church – Australia**

SUBMISSION OVERVIEW

While positively consolidating current anti-discrimination legislation, the proposed legislation goes much further without an adequate definition of discrimination and without taking into account the fundamental nature of and significance placed on freedom of religion as provided for in the United Nations declarations and covenants, including the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory. The draft legislation therefore does not achieve a proper balance of human rights for Australia and must of necessity be amended. The proposed amendments to the draft legislation in this submission will also ensure a more socially tolerant and mature Australia as opposed to a heavily regulated society that is not able to think, communicate or act without fearfully looking over one's shoulder.

This submission concludes that while only a small number of aspects of the draft legislation require change, these are of a critical nature and will have a great impact on Australians and most particularly the human right of religious freedom in this country as well as our international obligation to properly protect that human right.

INTRODUCTION

The Seventh-day Adventist Church is a Christian movement that serves both its membership and the needs of the wider community. In Australia this service to the wider community includes, but is not limited to, all levels of education, health services, aged care, personal and community development, and disaster relief.

In view of the above, the Seventh-day Adventist Church has a very strong interest in the proposed Human Rights & Anti-Discrimination legislation. The Church is appreciative of the opportunity to join with others to make comment on and bring forward recommendations in the interest of a final piece of legislation that gets the balance right in such complex matters as human rights and anti-discrimination. The interest of the Seventh-day Adventist Church in human rights is much broader than the matter of religious freedom. But in view of the short time frame provided by the government to give study to and make submissions in regard to the exposure draft of the proposed legislation, this submission has had to remain predominantly focused on the direct and indirect implications for freedom of religion and conscience.

SUBMISSION DETAIL

Recommended amendments to the draft Human Rights and Anti-Discrimination Bill 2012 (by use of strikethrough and underline) along with the rationale for such:

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

“to ~~eliminate~~ address 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;”

Without further clarification, as proposed above, the fundamental human rights of freedom of speech, religion, conscience and association are restricted in favour of other rights in the way the current draft legislation is worded.

Section 6: Remove “(c) voluntary or unpaid work;” from the definition of employment.

If maintained, this clause will place a regulatory burden on charities, religions, community groups and even such entities as small family business. Such entities are least able to afford to address the added regulatory burdens and increased risk. Any expense undertaken to attempt to ensure compliance will have a direct effect on the service that organisations provide the Australian community. It will take people and financial resources away from the front line areas that assist social and human need across Australia.

But going beyond the realm of the actual community services of religious organisations, where does such a definition of “employment” stop? Does it include those appointed by the congregation to serve as elders or caring for children’s activities? Those who offer their services of any kind to any charitable entity or even to an ordinary householder would seem to be swept up into this definition. And all this is exacerbated by the extensive number of protected attributes.

Surely it is not the intent of those drafting this Bill that this extensive anti-discrimination legislation is designed to capture a person driving a neighbour to the hospital or a medical appointment. Yet, if the ILO instruments referred to in section 3 are to be taken into account, that is illustrative of the sort of thing that this section will include.

One end result of volunteers making claim against fellow volunteers, which is the likely outcome of the

proposed legislation, means that this legislation will become a deterrent to volunteering. Yet volunteering is a mark of Australian spirit and culture and saves the public purse a significant amount.

In view of all the above, this sub-section (c) should be deleted.

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

(See under Section 22.)

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, to the extent that the law is capable of operating concurrently with this Act.~~

~~(2) Subsection (1) does not apply in relation to the provisions of this Act relating to disability standards and compliance codes.~~

~~Note: Disability standards and compliance codes may provide that they are, or are not, intended to affect the operation of State laws or Territory laws: see subsections 70(3) and 75(4).~~

~~(3) A **State or Territory anti-discrimination law** is a State law, or a Territory law, prescribed by the regulations for the purpose of this subsection.~~

(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.”

As currently written, there will inevitably be conflict with State anti-discrimination legislation. This will cause greater confusion rather than the Commonwealth government’s stated purpose of simplifying legislation for entities such as small business. The proposed amendment simplifies and clarifies.

Section 17: The stated objective at the outset of the consolidation of the five Commonwealth Acts addressing the matter of anti-discrimination was to make it less difficult to comply, especially not-for-profits and small businesses. The number of protected attributes should thus be reconsidered. Those attributes that are long protected by law are rightly included by virtue of historical need. While there are others that should be included in view of their fundamental nature as described by international covenants, such as freedom of religion and belief, many of the proposed protected attributes in Section 17 present no evidence of having been the basis of widespread and persistent discrimination. If the current list of proposed protected attributes is maintained, there might be many other attributes that could be just as legitimately included. That is not desirable as it would even further drag this legislation into the realm of complexity for organisations and persons operating in and interacting with the public sphere. But it does highlight the need to reduce this list.

Section 19: Amend the first part under “*Discrimination by unfavourable treatment*” as follows (with the subsequent subsections under Section 19 renumbered accordingly) -

“(1) A person (the **first person**) **discriminates** against another person if the first person ~~treats, or proposes to treat,~~ 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.

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

a. ~~harassing~~ conduct that sexually harasses the other person;

b. ~~other~~ conduct that ~~offends, insults or intimidates~~ the other person.

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

Note: The terms “offend” and “insult” are also addressed within Section 51 (2) (a).

The definition of unfavourable treatment should include the exercise of power or threat to do so, overtly including the matter of employment in this.

There is no objective test. At least in section 51, racial vilification, an objective test is imposed.

There is need for a comparator when addressing any claim of discrimination. This requires greater objectivity rather than relying on the discretion of the court.

The scope of harassment needs to be focussed as that is what is noted in Section 3 (1) (a).

The use of the terms “insult” and “offend” are so subjective as to provide fodder for excessive nuisance claims. This will result in the closure of free speech that should include the right to debate, holding and declaring differing views. While it is desirable that debate occurs with respect and demeanor, surely Australia is not going to resort to creating more legislation and thus resultant opportunity for civil action every time that is not achieved. While this submission notes the impact on freedom of religion as provided for in the international instruments, it is also noted that this will impact on every sphere of life in that the 18 protected attributes leaves very little of life in Australia untouched.

Section 22 (1): The proposed section 22 (1) and (2) greatly expands the scope of anti-discrimination law in Australia and will inevitably expand the claims lodged by people, filling courts with often minor matters and will inevitably include nuisance claims. Is this what we want? This submission suggests not.

But if this extensive list is to remain, then it would be best to amend it as follows so that the list is not used as a definition of “public life” -

“It is unlawful for a person to discriminate against another person if the discrimination is connected with any area of public life occurs in the course of the following.”

Then list the areas currently in subsection (2). Thus the next subsection (3) will become subsection (2).

Section 22 (3): Delete “(f) religion;”.

While the Fair Work Australia Act addresses religion in the limited context of the work place, that is the legitimate scope of that Act. The scope of the current draft Bill is extensive and thus the human right of freedom of religion, that carries such weight in international covenants as being declared a fundamental human right and non-derogable, should be accorded greater protection than just connected to work and work-related areas.

Part 2-2, Division 4: Amend the heading: “Exceptions to unlawful discrimination-When discrimination is not unlawful”.

In view of the fundamental nature of freedom of religion, the rights afforded religion should not be expressed as “exceptions” but established rights. This approach to terminology will better maintain the balance of human rights as indicated in the international instruments of human rights.

The following six recommended amendments are based on this same rationale.

Subdivision A: Amend the heading: “Main exceptions-Reasonable grounds for different treatment”.

For the rest of Division 4: Delete the word “Exception” and its various forms throughout Division 4, with such consequential amendments as are required based on the same principles as applied in the previous two amendments. For example, the title for Section 23 could be amended as follows: “Exception for Justifiable conduct”.

Section 23: Insert the following sentence 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.”

Subdivision C: Insert a clause under the subdivision title and 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).

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-consists of conduct, engaged in good faith, that:

(i) 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

(+)(ii) consists of conduct, engaged in in good faith, that:

- a. conforms to the doctrines, tenets or beliefs of that religion; or
- (ii)b. is necessary to avoid injury to the religious sensitivities of adherents of that religion; and
- (c) the discrimination is on the ground of a protected attribute to which this ~~exception-section~~ applies, or a combination of 2 or more protected attributes to which this ~~exception-section~~ applies.”

Section 33 (3): Delete sub-section 3.

True equality is treating people with differing perspectives, all deeply held and in good faith, with the same level of respect. In order to do that, we must respect the fundamental human rights of freedom of religion and the right of free association, and we must, as far as is possible, consistently act in a manner that respects the diversity of our community.

We can all agree that in a free and diverse society, people of all beliefs and practices should be able to receive services. And we can also agree that a free and diverse society requires the ability of communities to create entities with unique cultures reflecting the beliefs and practices of those communities. There is generally no conflict between these principles, as we can see in the field of education.

In the field of education, in order to meet the needs of our diverse society, it is laudable that we have Catholic schools that promote the principles and values of the Catholic Church, Anglican schools, Adventist schools, Jewish schools, Lutheran schools, secular private schools, state schools and many other variants, that all promote their values in their unique way. Parents can opt in or out of educational options depending on their values and the needs of their children. If we threaten to penalize Catholic schools unless they compromise their core values, for example, we would necessarily limit the freedom of parents to choose a Catholic education while at the same time stifling the diversity of our culture.

The same principle applies to aged care facilities. While many church-based aged care facilities operate in a manner largely indistinguishable from their secular counterparts, some aged care facilities are created to specifically provide an environment in which those interested in that unique community’s lifestyle and values can retire in comfort. Should the state move to penalize unique communities, it will result in limiting the freedom of people from those communities to choose a unique community and it will limit the diversity of options available to retirees.

Limiting the freedom of seniors and stifling the diversity of retirement options available to them is the wrong move if we are to maintain a commitment to a free and diverse society. If there is a bona fide lack of places in retirement facilities for same-sex couples, for example, the answer is for the government to ensure there are facilities that provide for same-sex couples – not to use the power of the state to coerce the few retirement communities operated to meet the unique needs of particular religious communities. All such service providers that meet the minimum standard of care for the diverse range of elderly people of Australia, should have a right to access government funding.

True equality cannot be built on coerced homogeneity. Rather, equality requires equal respect for the rights, freedoms and uniqueness of all Australians.

Section 47: Delete this section. If there was to be a review, it would need to be of the entire Act and the operation of the Australian Human Rights Commission within the time that has lapsed, which would be three years if the proposed period of time is considered worthy. If this section 47 was not to be deleted and a review was to be undertaken as proposed, then such a review should exclude sections 32 and 33 in view of the necessity of these sections to ensure Australia continues to uphold its human rights obligations as ratified by Australia in the relevant international declarations and covenants.

Section 51 (2) (a): Amend section 51 (2) (a) as follows: “the conduct is reasonably likely, in all the circumstances, to offend, insult, humiliate another person or a group of people incites unlawful discrimination, hostility or violence; and”.

The use of the terms “insult” and “offend” are so subjective as to provide fodder for excessive nuisance claims.

Section 124: Amend the first part under “*Burden of proof for reason or purpose for conduct*” 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;

(a)(c) alleges that the other person engaged, or proposed to engage, in such conduct for a particular reason or purpose (the alleged reason or purpose) 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.”

The current wording will inevitably bring about a considerable increase in nuisance claims or claims of a very minor nature as the onus of proof would lie with the respondent.

CONCLUSION

The national office of the Seventh-day Adventist Church in Australia is appreciative of the opportunity afforded us and the whole of Australia to interact with the exposure-draft of the Human Rights and Anti-Discrimination Bill 2012. There is much potential good in the proposed Bill but some elements of this exposure-draft also have potential to negatively affect society in Australia. It would be disappointing if Parliamentarians needed to be called upon to vote the bill down in its entirety when the problem areas in the legislation are identifiable and solutions achievable. This submission is made in good faith in order to enhance the draft Bill’s benefit to all Australians.