Human Rights and Anti-Discrimination Bill 2012 – Exposure Draft Legislation

The Salvation Army Australia

Submission to the Senate Legal and Constitutional Affairs Committee

7 January 2013

INTRODUCTION

The Salvation Army welcomes the opportunity to be able to contribute to the current inquiry regarding the exposure draft of the Human Rights and Anti-Discrimination Bill 2012.

The Salvation Army is pleased this inquiry has been referred to the Senate Committee for public consultation prior to its formal introduction to Parliament.

The Salvation Army is an evangelical part of the universal Christian church and is one of Australia's most recognised charities and largest providers of social services and programs for the most marginalised and socially excluded individuals. This submission is informed by these experiences and The Salvation Army's collective knowledge and expertise in this area.

The Salvation Army supports the protection of those who are disadvantaged and experiencing discrimination, but expresses concern regarding the protection of religious freedoms under the Bill. Under the current construction of the Bill religious rights and freedoms appear to be secondary to a person's right to be free from discrimination. The Salvation Army calls for amendments to the Bill that will see greater protection of the rights of religious organisations.

ABOUT THE SALVATION ARMY

The Salvation Army has been operating in Australia for over 130 years, providing services to those in need, without discrimination. The foundation of The Salvation Army and its current ethos affirm its religious commitment and its social commitment as equal and indivisible. The Salvation Army describes this as a 'holistic mission'.

The Salvation Army's message is based on the Bible and its ministry is motivated by love of God. Its Mission is both spiritual and practical, encompassing the preaching of the Gospel of Jesus Christ and alleviating human suffering and distress without discrimination.

The Salvation Army has a significant history working with and advocating for the rights and needs of disadvantaged people in our community. Consistent with the organisation's values of human dignity, justice, hope, compassion and community, The Salvation Army is

committed to the promotion of social justice and protection of the rights of disadvantaged and vulnerable people.

RIGHTS OF DISADVANTAGED AND VULNERABLE PERSONS

The Salvation Army is committed to supporting the rights of disadvantaged and vulnerable people in our community and supports measures in the Bill that will:

- enable improved mechanisms to support people asserting their rights;
- enable improved access to anti-discrimination law in Australia and internationally;
- provide a more efficient process that is easier for complainants to understand and apply;
- alter the burden of proof allowing those best placed to produce the relevant evidence; and
- provide a more consistent approach to human rights.

Whilst The Salvation Army is supportive of the rights of the disadvantaged and marginalised The Salvation Army has significant concerns regarding aspects of the Bill that do not adequately protect the rights and religious freedoms of charitable religious organisations.

DEFINITION OF DISCRIMINATION

In consolidating the current Commonwealth anti-discrimination legislation the Bill has significantly expanded the number of protected attributes. Whilst the broadening of the definition of discrimination to include behaviour that 'offends or insults' (clause 19) may theoretically allow greater access to remedies for complainants, The Salvation Army expresses significant concern about the misuse of such a provision, including an increase in nuisance claims. Such a definition significantly lowers the threshold of what constitutes discriminatory behaviour. The Salvation Army is eager to ensure that our time and resources are able to continue to be focused on assisting the disadvantaged and vulnerable, rather

than on defending claims against applicants who have been insulted by, for example our use of religious icons and symbols. The Salvation Army urges amendment to the clause so that it does not extend to behaviour that either offends or insults. In the alternative, The Salvation Army recommends the remedying of this subjectivity to allow for an objective or comparator test in relation to the alleged discrimination.

The Salvation Army also expresses its concern regarding the prohibition of discrimination in 'public life' (clause 22). Under the Bill, 'employment' in relation to public life is defined broadly to include voluntary or unpaid work. The definition therefore appears likely to extend to a range of voluntary services provided by The Salvation Army in both its church based programs and activities and through its social work for the disadvantaged and vulnerable. The Salvation Army strongly opposes this expansion of discrimination to include volunteers, especially in light of the definition contained in clause 19. It is submitted that further protections should be put in place to protect the right of religious organisations to appoint both employees and volunteers in accordance with their religious sympathies.

BURDEN OF PROOF

The Bill places a prima facie burden of proof on the complainant to establish its case and the respondent is required to prove that it did not discriminate. Whilst the policy rationale of such a position is understood, The Salvation Army is concerned that the shifting of this burden will place an undue burden on religious institutions required to defend alleged discriminatory conduct. The shifting of this burden, combined with the potential for an increase in nuisance claims outlined above, may place an unnecessary administrative and financial burden on such organisations. The Salvation Army therefore calls for a higher burden of proof to be placed on complainants in the initial instance.

RELIGIOUS FREEDOMS AND EXCEPTIONS RELATED TO RELIGION

The Bill retains current exceptions for educational institutions and religious bodies (clause 32 and 33). However, these exceptions do not apply to all protected attributes and do not adequately protect religious freedoms.

The Salvation Army submits that dealing with religious freedoms as merely 'exceptions' is an inappropriate way to categorise and protect these rights. It portrays the exercise of religious freedom as an allowable form of discrimination rather than a recognised and equally protected right. The Bill, in framing conduct by religious bodies as an 'exception', fails to adequately address the notion of freedom of religion, as set out in the ICCPR.

The Salvation Army believes these rights would be better protected by a general definition of discrimination that specifies action carried out in pursuance of another human right (including the right to religious freedom) in good faith is not discrimination.

The objects clause (clause 3), which will be an important interpretative factor in the application of the Bill, does not reference the importance of balancing the right to non-discrimination with other human rights, such as the right of association and the right to religious freedom. Whilst the Bill references the ICCPR as a human rights instrument under which Australia has obligations (clause 3(3)) it does not reflect the content and rights requiring protection under this instrument. The Salvation Army recommends amendment to the objects clause to highlight the necessity of considering and balancing other rights, including religious freedoms.

The Salvation Army strongly opposes the inclusion of clause 47 in the Bill, providing that the exceptions in Division 4, Subdivision D be reviewed within three years of the commencement of the Bill. Such a provision seriously threatens the protection of religious organisations in exercising their religious freedoms. The Salvation Army favours the deletion of this subdivision so that any changes occur by way of normal due process.

AGED CARE SERVICES

The Salvation Army has been providing permanent accommodation and care services to older Australian's since 1899. Under clause 33 (3) of the Bill religious aged care providers who receive Commonwealth funding do not have the same protections as other religious bodies.

Under the Bill, The Salvation Army perceives significant restrictions to its current provision of services if the removal of such a religious exemption is upheld. The Salvation Army is concerned that the clause may restrict the teaching and mission of The Salvation Army in the provision of these services. Whilst The Salvation Army does not discriminate on the basis of to whom it provides aged care services, there is significant concern that the inclusion of this clause will undermine the ability of The Salvation Army to provide holistic aged care services in accordance with its religious values.

Further, The Salvation Army has grave concerns that the inclusion of this clause will erode protections to religious freedoms available in other areas of service provision. The Salvation Army expects provisions relating to aged care providers, at the very least, to provide the same protections and positive discrimination exemptions as are available to religious organisations providing other services under the Bill.

CONCLUSION

The Salvation Army commends the referral of this Bill to the Senate Committee for public consultation and the opportunity to provide comment. The Salvation Army is supportive of the Bill insofar as it provides greater protection for the rights of the disadvantaged and vulnerable in our community. However, The Salvation Army also expresses its concern regarding the lack of adequate protection for religious freedoms under the Bill. The Salvation Army therefore urges consideration of greater protections for religious organisations be inserted into the Bill prior to its presentation to Parliament.

The Salvation Army supports proposed amendments to the Bill put forward in the submissions by Freedom 4 Faith and the Australian Christian Lobby.

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