AMBROSE CENTRE FOR RELIGIOUS LIBERTY

SUBMISSION

TO

THE SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

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

The Ambrose Centre for Religious Liberty (Ambrose Centre) is grateful for the opportunity to make this submission.

The Ambrose Centre is a human rights oriented organisation; it is not and does not pretend to be a religious organisation. It is incorporated as a 'Not for Profit" organisation and engages in activities of educating, promoting and bringing awareness to issues affecting the fundamental human right manifesting religious beliefs and appearing with leave of the Court as Amicus Curiae where appropriate .

The Ambrose Centre is aware of the cultural and social effects on society where discrimination laws apply. The consolidation of the commonwealth anti-Discrimination Laws are, therefore, of vital interest to the Ambrose Centre.

The Ambrose Centre has a Board of Advisors drawn from the legal fraternity, former politicians from both sides of the major political parties and individuals from all the main religious communities.

INTRODUCTION

Currently the Commonwealth has five separate Acts which deal with matters of discrimination; namely The Human Rights Commission Act 1986, The Age Discrimination Act 2004, The Disability Discrimination Act 1992, the Racial Discrimination Act 1975 and The Sex Discrimination Act 1984.

The Commonwealth Government seeks to consolidate the five Acts into one simplified Act and has released for public examination an *Exposure Draft Legislation of the Human Rights and Anti-Discrimination Bill 2012* (Exposure Bill).

Subsequent to the release of the Exposure Bill, the Senate referred the Exposure Bill to the Legal and Constitution Affairs Legislation Committee (committee) on 21 November 2012.

The committee has called for written submission on the Exposure Bill to be lodged by no later than 21 December 2012.

The committee is to report on 18 February 2013 with possible public hearings on 23rd and 24th January 2013 at a location to be nominated.

A. THE PROCESS

1. It should be noted there is an intention either by the Government or the Senate (or both) to fast track the process for the consolidation of the five Acts into a single Act.

2. It appears extraordinary that the Exposure Bill is introduced in the second last week of the 2012 Parliamentary Sitting schedule and is referred to the committee for inquiry during the period generally known as the annual shut down time.

3. It is almost an Australian cultural expectation that December is devoted to completing tasks that have been on the drawing board for some time. January is 'slumber' month when many – if not most corporations, company enterprises and individuals - recharge their batteries by resting during annual holidays.

4. The referral to the committee with the time lines proposed is most unfortunate. Why the process could not have been set in motion for February remains a mystery.

5. The committee would not be ignorant of the fact that the Exposure Bill is almost 200 pages; the Explanatory notes are as voluminous and taken with the five Acts in question it amounts to almost a thousand pages to review.

6. The time line proposed does not allow stakeholders to diligently consider fully the ramification arising from the changes in the Exposure Bill with each of the five Acts to be consolidated

7. The Government, presumably, cannot be serious that it wants a thorough consultation on the consolidation process if it stubbornly sticks to the time lines currently proposed. Already there has been public disquiet and criticism on a very small part of proposed changes that would be implemented should the Exposure Bill become law.

8. This unnecessary haste, understandably, may be considered offensive to the reasonably minded person who takes the consolidation process seriously.

9. The committee should seriously consider extending the time lines whereby submissions close in early February, then public hearings with a report back in the first Parliamentary Sitting period after Easter.

10. Having said the above, the consolidation of the five Acts is sensible and appropriate.

B. THE EXPOSURE BILL - OBJECTS

11. Section 3 states the objects of the Exposure Bill. In so far as an object is to eliminate discrimination, it is unremarkable as it is after all an '*Anti-Discrimination Bill*. However, it needs to be said that subsection (1) (b) of section 3, dealing with Objects, casts an extremely wide net. It states:

> *In conjunction with others laws, to give effect to Australia's obligations under the human rights instruments and the ILO...*

12. If this means what it says it raises the question whether it imports into domestic law each article of the Human Rights Conventions and each ILO Convention nominated in subsections (2) and (3) which form part of the Objects section.

13. If it has this meaning then the Exposure Bill assumes powers so wide that it becomes in effect a legislative human rights charter.

14. Under present Commonwealth legislative statutes this is not the case.

15. The Acts Interpretation Act 1901 (AIA) would support the view that if an object states a purpose then that is to be read into the interpretation of the Act.

16. Section 15AA of AIA states:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is preferred to each other interpretation.

17. The Legal and Constitutional Affairs Committee may care to consider this matter because should the Exposure Bill have this effect, then the public at large should be informed that the said Bill is more than a consolidation Bill but in fact has a character very different to what hitherto has been stated.

18. If the committee concludes that the Exposure Bill is wider than a mere consolidation, then respectfully it should refer the Exposure Bill back to allow a wider public consultation on the true character of the Bill.

19. The Objects also make reference to promoting the principle of equality and further uses the words, "substantive equality".

20. The word "equality" is not defined in the definitions of the Exposure Bill so must be given its ordinary meaning[1].

21. The word "equality" is defined by Macquarie Encyclopaedic Dictionary to mean:

    1. *The state of being equal; correspondence in equality, degree, value, rank, ability etc.*

    The Concise Oxford Dictionary defines equality to mean:

    The state of being equal.

22. It is submitted that the word 'equality' in the Exposure Bill should be defined to mean:

    'equal enjoyment of all human rights and fundamental freedoms in particular for all persons with disabilities'[2].

23. Short of the above inclusion of the above meaning of the word equality as used in the Exposure Bill, the present use of the word is not only non-achievable but also misleading. For example how can a person with a high IQ

---

[1] See section 15AB (1) (a) – *Acts Interpretation Act 1901.*

[2] These words are found albeit in slightly different form at Article 1 of the Convention of the rights of Persons with Disabilities.

be equal to a person with a low IQ unless both persons are entitled to equal enjoyment of all human rights and fundamental freedom? It is most unlikely they will be equal in education outcomes.

24. Alternatively, the word equality may be defined to mean – *" equal before the law and equal opportunity for all"*.

C. THE PROCTECTED ATTRIBUTES

25. Section 17 of the Exposure bill nominates 18 attributes which are protected. Although some of the attributes apply only to work and not in everyday social engagement. It needs to be said that not all attributes are human rights.

26. The Exposure Bill seeks to enlarge the category of attributes to be protected, not as issues of human rights but for the purposes of cultural effect.

27. Article 26 of the International Convention on Civil and Political Rights 1966 (ICCPR) more precisely refers to attributes which are to be protected from discrimination. It states:

> *As 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.*

28. Attributes such as gender identity, immigrant status, relationship status, citizenship, potential pregnancy and sexual orientation creates a crowding in the category of attribute for no genuine apparent purpose other than creating a perception of system or repeated discrimination against such persons.

29. There is no readily available evidence to support the view that there is widespread discrimination against these attributes. Their inclusion has an ideological component without merit.

30. Discrimination laws should not be weakened by an ever expanding list of attributes which are not founded on real and genuine personal characteristic supported by conduct connected to the characteristic.

31. It is our submission that Article 26 of ICCPR would give protection upon the appropriate evidence being proved to support 'other status'.

32. The word religion in the list of attributes is not defined in the Exposure Bill and its meaning is unclear.

33. In human rights instruments the word religion is accompanied by '*the right to thought, conscience and religious belief'*. In the Exposure Bill no such enlightenment is provided. The submission will address this issue further down.

D. MEANING OF DISCRIMINATION

34. At section 19 the Exposure Bill gives considerable coverage to the meaning of discrimination; in general it means that discrimination is evident if acts by one person against another (or others) result in unfavourable treatment.

35. At subsection 19(2) (b) unfavourable treatment includes conduct that offends, insults or intimidates the other person. In other words there is no objective test but merely a subjective belief.

36. Effectively, if a person's religion is criticised thus giving offence to a person of that religion, then that is sufficient to invoke discriminatory conduct.

37. If a person criticises a political party, or more to the point, the political leader of the party, then a person belonging to that political party may be insulted by the use of words. Similarly, that would be sufficient to invoke discriminatory conduct.

38. Recent robust discussion in political debates and the use of the word '*misogyny*' may be sufficient to give insult or cause offence. Should this be sufficient to ground a complaint of discrimination?

39. Such dubious subjective beliefs potentially cause greater harm and division rather than harmony and tolerance.

40. Recent comments[3] by former Chief Justice of NSW Supreme Court and present chairman of the Australian Broadcasting Corporation, James Spilegman, were correctly aimed at highlighting the ill-considered description of unfavourable treatment.

[3] Article in The Australian Newspaper 11 December 2012

41. It appears that the proponents of the Exposure Bill learnt nothing from the damaging fall-out caused by the '*Catch the Fires*'[4] case in Victoria.

42. *The Catch the Fires* case involved perceived criticism of the tenets of a religion by Ministers of another religion which were taken to incite others to hate the criticised religion.

43. That case is a very good example of how the law can be used to snuffle genuine 'free of speech' in a democratic society when overreaching laws are enacted.

44. A recent case[5] in the High Court of Justice Chancery Division of England reversed the Appeal Court's decision which upheld the right of an employer to demote an employee for anti-gay comments posted on face book.

45. The employer argued, amongst other things, that the conduct of the employee was in breach of the equal opportunities policy.

46. The employee's case was that he should not be disciplined for exercising the right to freedom of expression and to manifest religious beliefs.

47. The trial judge, Justice Briggs held that the employee's comments were not homophobic and an offended colleague was not objectively reasonable[6].

48. The *Smith* case is indicative of how easily an alleged offence can be constructed merely on personal subjective beliefs.

49. The committee should note that while Australia is looking to introduce potentially anti "free speech" provision, the House of Lords in England has voted overwhelmingly to remove a law that criminalises the use of insulting language in Britain[7].

50. It appears contrary to reason for the Exposure Bill to contain a provision that addresses itself to the imposition of policies having an unintended affect beyond the date if its implementation.

51. Yet subsection 19 (4)(c) makes it a discriminatory act to implement a policy when:

---

[4] *Catch the Fires Ministries Inc & ors v Islamic Council of Victoria Inc. [2006] VSCA* 284

[5] *Smith v Trafford Housing Trust [2012] EWHC 3221* (ch)

[6] Ibid, para 85

[7] The Guardian Newspaper, 12 December 2012.

(c) *the possibility that the person, or an associate of the person, may in the future have the protected attribute.*

52. Perhaps the proponents of the Exposure Bill have a matter in mind that is not manifestly clear. On our reading, the provision of subsection 19 (4)(c) is authoritarian in tone and coercive of policy makers.

E. RELIGIOUS LIBERTY

53. It is a significant omission that the Exposure Bill makes no provision for, mention of or reference to individuals who wish to live their lives in accordance with genuinely held religious beliefs.

54. As mentioned previously the Exposure Bill does not define religion nor acknowledge the meaning of religion as described by the High Court. The High Court said a religion requires both a belief in a supernatural and the acceptance of canons of conduct in order to give effect to that belief, albeit the conduct must conform to the general law [8].

55. The Exposure Bill grants exceptions for the appointment of priests, ministers etc (section 32) and for religious bodies and educational institutions. In addition, the Exposure Bill provides an exception for conduct of a body established for religious purposes.

56. There is no definition of what is a religious purpose which means, presumably, that the Court will be required to determine what a religious purpose is on the merits.

57. Organisations such as the Catholic Welfare Agencies conduction adoption services in England were held not to be acting for a religious purpose even though the agencies where established by the Catholic Church[9].

58. Similarly, the Queensland Branch of St Vincent de Paul was not recognised as acting for a religious purpose although it was accepted that its work was inspired by Catholic doctrine[10].

---

[8] Church of the New Faith v The commissioner of Pay-Roll Tax (Vic) [1983] HCA40; (1983) CLR 120 see in particular Judgement of Mason ACJ and Brennan J, para

[9] *Catholic Care (Diocese of Leeds) and The Charity Commission for England and Wales and The Equality and Human Rights Commission (intervener) [2010] EWHC 530 (ch).*

59. It begs the question as to what the Court will take to be a religious purpose when even health care hospitals and centres run by religious orders are not acknowledged in the Exposure Bill.

60. The *Cobaw* case[11] presently under appeal to the Victorian Supreme Court of Appeal was decided in Victorian Civil and Administration Tribunal (VCAT) against the respondent on the ground that it was not operating for a religious purpose.

61. The respondent, Christian Brethrens, operated a resort centre on Phillip Island on Commercial terms. Moneys from the centre were directed back to the Christian Brethrens' organisation to further the order's religious vision.

62. The resort centre refused to accept a booking from an organisation[12] which assisted your people who were same-sex attracted. Cobaw wished to use the resort centre for more than one or two including the accommodation facilities at the resort.

63. The Christian Brethrens argued that their religious beliefs would be breached if they acted in a way which may assist the promotion of homosexuality.

64. VCAT held that the resort centre was not being run for a religious purpose even though it was accepted that it was managed in accordance with Christian beliefs.

65. The word 'religion' in the Exposure Bill, absent a definition, will be interpreted by its ordinary meaning. This is consistent with section 15AB of RIA[13] .

66. The Concise Oxford Dictionary defines 'religion' thus:

the belief in and worship of a superhuman controlling power, esp. in a personal God or gods entitled obedience and worship; 2 the expression of this in worship; 3 a particular system of faith and worship

---

[10] *Walsh v St Vincent de Paul Society Queensland (No 2) [2008] QADT 32* (12 December 2008)

[11] *Cobaw Community Health Services Limited v Christian Youth Camps Limited and Mark Rowe VCAT* Reference no A208/2008

[12] The organisations representative is known for short as Cobaw

[13] See n 1

67. The dictionary definition of religion and the view of the High Court in Church of the New Faith[14] are similar in that both hold that religion has two (2) components – one, it comprises a belief in a supernatural and second, the belief is support by conduct which gives expression to the belief.

68. Unless the two components coexist then religion is merely a belief that requires no effort, no strictures, and no obligation and imposes no personal restraint nor applies any moral compass.

69. The Exposure Bill grants no exception for individuals engaged in an enterprise, commercial in nature or welfare in character, to live with a religious belief if engaged in public activity.

70. An example would be a husband and wife running a B & B who wish only to let a room to married couples. The Exposure Bill would deem their conduct unlawful should they refuse a room to a homosexual couple or unmarried couple – if such should be disclosed.

71. Similarly, two partners running a motel who refuse a prostitute a room, from which she would attract clients would be acting unlawfully[15].

72. In both cases above, the conduct would be offending the protected attributes of sexual preference and/or relationship status.

73. Although in both cases the alleged offenders may cite religion as a defence for their action, in both cases the defence of religion would be trumped because no exemption is given for religious belief.. It demonstrates that religion as a protected attribute has no standing or meaning.

74. The putative good that religion brings to a community is reduced to 'so what'. The many charities, health centres, welfare agencies, nursing homes run by religiously motivated people are regarded as services which bring existential consolation to the religious beliefs of the players but the Exposure Bill regards it as not deserving of any special consideration or protection.

75. The Exposure Bill either fails to appreciate or is wilfully attempting to disregard the significance of religion in the lives of believers. It provides the inspiration and motivation for the putative good that individuals perform.

---

[14] See n 7

[15] See the Australian newspaper 8 August 2012 by Caroline Overington reporting on a case before the Queensland Civil and Administrative Tribunal.

76. It is the belief that the '*God*' or '*superhuman being'* requires an obligation which forms the canon of conduct which the religious believers engage in. It is ironic that the High Court understood and expressed this requirement yet the Commonwealth Government abjectly fails to even recognise what a religion comprises.

77. Religion, as it stands in the Exposure Bill is not permitted to be publicly manifested or expressed; it is permitted only as a form of personal worship.

78. Indicative of this course that the Exposure Bill is section 33 which provides for exceptions to religious bodies and educational institutions, but not for health services.

79. Subsection 33 (2) states:

> *Subject 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 an officer, employee or agent of such a body; and*
>
> *(b) The discrimination consist of conduct, engaged 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*
>
> *(c) The discrimination is on the ground of a protected attribute to which this exception applies, a combination of 2 or more protected attributes to which this exception applies.*

80. For completeness, subsection 33 (3) goes on to say:

> *(3) 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:*

81. The provision at subsection 33 (3) says it all. It is naked attempts to coerce religiously run aged care centres in receipt of some Commonwealth funding to be agents of the government and to abandon their religious beliefs. Examples would be the refusal to grant a room with a double bed to an unmarried couple consistent with the religious doctrine of the particular denomination running the aged care centre.

82. This, the government would argue, offends against the attribute of marital or relational status or sexual preference or sexual orientation or gender identity. Yet the attribute of religion is of no account because it is protected in name only, not in practice.

83. This is not a government being neutral to religion but one that is hostile to religion. This is a government that is saying, "i*f you receive Commonwealth funding, then the government's policy may be forced upon you if you wish to continue to receive Commonwealth funding"*

84. This is precisely what occurred in the Catholic Care (Diocese of Leeds) case[16] when the High Court of England held that the Catholic Agencies needed to comply with the law that homosexual couples must be considered for adoption services irrespective of the doctrines of the Catholic Church. The Catholic Church stopped providing adoption services as a result so that their doctrine would not be compromised. Government funding was also an issue in that case.

85. If this is a purpose of the Exposure Bill then let the government be transparent in its dealings not adopt the politics of stealth by detrimentally acting doctrine would not be compromised. Government funding was also an issue in that case. Presumably, the government may be issuing a stark reminder to every religious house which is in receipt of Commonwealth funding that the funding may in the future have strings attached.

86. Is the reason that catholic run health services do not cater for abortion that health service centres have been omitted from the exceptions section?

[16] See n9

87. If this is a purpose of the Exposure Bill then let the government be transparent in its dealings and not adopt the politics of stealth by detrimentally acting against religious house involved in social good or in the delivery of goods and services in public works.

88. When taken with the reverse onus of proof, there is no requirement for a person lodging a complaint to ground the complaint on a matter of substance. The Exposure Bill may be well intentioned in not discouraging a person from acting on discriminatory conduct, but reality needs to be adhere to and simultaneous not encourage frivolous complaints.

F. CONCLUSION

89. The Exposure Bill is being rushed and not sufficient consideration has been given to the full implications of the effects the Bill may have.

90. While it is laudable that there be a single Act dealing with discrimination it is essential we as a Country get it right. There are too many uncertainties and social experiments hidden in the text of the Exposure Bill for it to pass without much deeper scrutiny than what the current time lines permit.

91. The Exposure Bill is predicated on removing discrimination but lacks balance when applying protection to all attributes equally. The submission points out some glaring omissions in this respect.

92. The belief as to what constitutes discrimination is such an example. The full court of the Federal Court in *Australian Building and Construction Commission v McConnell Dowell Constructors (Aust) Pty Ltd*[17] gave consideration to the meaning of '*discrimination*'. The proponents and drafters of the Exposure Bill may find it useful and reflect upon some of the comments.

[17] [2012] FCAFC 93

93. The court commented favourably from the passage of Justice Gray in *Cozadinos v Construction, Forestry, Mining and Energy Union*[18] where he said:

> *[93] In an appropriate context," discrimination" can even mean no more than to distinguish one thing from another, or to express a preference for one thing over another. I discriminate between types of music, or types of food, when I say that I prefer one to the other. If s 45(1) of the BCII Act were to make discrimination of this kind subject to a penalty, it would be a gross derogation of the right of free speech.*

94. Hopefully, the committee will reflect upon the unreasonable haste with which this process is being handled.

95. It is unfortunate that this submission has not been able to have examined the entire Exposure Bill, in particular the work and responsibilities of the Australian Human Rights Committee and the operation of the Compliance measures and the handling of complaints.

96. The Ambrose Centre would appreciate the opportunity to give verbal evidence before public hearings at the appropriate time.

Submitted by:

Ambrose Centre for Religious Liberty
Rocco Mimmo
Founder & Chairman

Tel: 61 2 9264 0200
Fax: 61 2 9264 0277
Email: rmimmo@ambrosecentre.org.au

[18] [2012] FCA 46