Human Rights and Anti-Discrimination Bill 2012 Exposure Draft Legislation

Submission on behalf of the Australian Christian Lobby

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Summary of submission

The Australian Christian Lobby (ACL) welcomes this opportunity to comment on the *Human Rights and Anti-Discrimination Bill 2012* exposure draft legislation.

The proposal for simplified and consolidated human rights and anti-discrimination legislation is supported. The means by which this Bill seeks to achieve it however is going to give rise to deep rooted concerns by Australians of any faith. The title of the Bill bears testimony to the fact that anti-discrimination and other human rights deserve concurrent recognition. The Bill taken as a whole would make radical changes to the balances that need to be achieved between the various human rights recognised in the international instruments cited as underpinning the Bill. In particular, freedom of speech and freedom of religion will suffer. The enlarged concept of discrimination by the introduction of offence-based discrimination (without even the standard safeguards of objectivity that currently applies to racial vilification) is only one contributing factor. The reversal of the onus of proof of justifiable conduct, the adoption of unfavourable treatment as the threshold, the risk free environment in which claims may be brought and imputation of liability to others whether they were aware of the conduct or not all generate a fear of contravention that is inimical to peaceful multicultural and multi-religious coexistence to which Australia rightly aspires.

Freedom of religion already has scant legislative protection. The Bill could not do more to tilt the balance against those who depend on that freedom for the simple practise of their faith and to expose them to the risk and burden of discrimination claims. At the same time it does little to protect against religious discrimination, even though it is a Bill concerned almost entirely with the elimination of discrimination, and ventures into the problematic arena of defamation of religion through offence-based discrimination which is known to be a further incursion on religious expression. The burden and cost for small business, and unsustainable risks for volunteers and charities provoke real concerns, not least for the unintended social consequences that are likely to ensue.

The protection against discrimination to be provided by the Bill extends well beyond that contemplated by the ICCPR (and even the other anti-discrimination instruments listed) and significantly enfeebles the remaining ICCPR rights, particularly the freedom of religion which already benefits from inadequate legislative support. The Bill represents a retreat in several notable respects from Australia's obligations under the ICCPR. There is a definable absence of equality before the law for religious groups.

Proposed amendments and Recommendations

- **Clause 3(a): should be amended to read:**

  > **to eliminate unjust 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 to give effect to the other rights and freedoms protected by those instruments including freedom of speech, freedom of religion, and freedom of association.**

- **Exclude from 'work and work-related areas' in Clause 6 voluntary work.**

- **The scope of unlawful discrimination by reference to Clauses 7 and 22 should be confined, as in current legislation, to specified circumstances (outlined below).**

- **Expand discrimination on grounds of religion to all areas specified in Clause 22 (provided offence-based discrimination is removed from Clause 19).**

- **Retain the comparator test in Clause 19(1). Delete Clause 19(3).**

- **Replace Clause 19(2) with**

  > **To avoid doubt, unfavourable treatment of the other person may be constituted by sexual harassment under sections 49 -50 and racial vilification under section 51.**

- **Clarify in more explicit terms in Clause 51(2) that an objective test is to apply under Clause 51(2).**

- **Specific reference should be made to the need to maintain adequate protection for freedom of religion as articulated in Article 18 of the ICCPR within the objects Clause and Clauses 23 and 32/33, or, at the least, in the explanatory notes within those Clauses. In particular:**

  - **In Clause 23 add**

    > **Freedom of religion, freedom of expression and other human rights under the International Covenant on Civil and Political Rights are fundamental human rights and their exercise within the limits of those rights constitutes a legitimate aim.**

  - **Retitle Part 2.2 Division 4 'When discrimination is not unlawful'.**

  - **Retitle Part 2.2 Division 4, Subdivision 'Reasonable grounds for differential treatment'.**

  - **Throughout Part 2.2 Division 4 avoid references to 'exception'.**

  - **Amend Clause 23(3)(c) to read:**

    > **'the first person considered, and a reasonable person in the circumstances of the first person would have considered, that**

engaging in the conduct would achieve that aim, save that where the aim is the exercise of a freedom in a human rights instrument a reasonable person in the circumstances of the first person is attributed with familiarity with the aims and importance of such a freedom'.

- **Clause 33(2) should be expressed positively and simply to exempt, consistent with Article 18 of the ICCPR, the practise of religion by a body acting in conformity with its doctrines, tenets or beliefs etc.**
- **Clause 33(4) should follow the substance of the Tasmanian Anti-Discrimination Act 1998 s 51(2) to enable employment of staff most suited to the religious environment of the employer.**
- **Clauses 23, 32 and 33 should include recognition of the freedom of religion in a neutral form such as:**

  'It is acknowledged for the purposes of Clauses 23, 32 and 33 that freedom of religion under Article 18 of the ICCPR is the foundation of such exceptions and includes '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'.'

- **The onus of proving that conduct is not unlawful should only arise once the elements of unlawful discrimination have clearly been made out by the complainant on the balance of probabilities.**
- **Confine Clause 53 to advertisements and in particular exclude other forms of publication.**
- **Confine Clauses 56 (causing etc unlawful conduct), 57 (liability for unlawful conduct of directors, officers, employees and agents etc), 58 (liability of partnerships, unincorporated associations and trusts for unlawful conduct) to instances of clear knowledge of unlawful conduct and active participation in it.**
- **Amend Clause 14 to provide in a new subsection (2):**

  This Act is not intended to apply to any action that is not unlawful under any anti-discrimination law in force in the place where the action is taken.

- **Expressly exclude from Clause 47 (review of exceptions) those exceptions based on the exercise of rights within the freedom of religion (Clauses 23, 32 and 33) and other rights under the ICCPR.**

Clause 3 Objects of this Act

Clause 3 sets out the objects of the Act including in Clause 3(1)(a) '*to eliminate discrimination*' and in Clause 3(1) (b) '*in conjunction with other laws, to give effect to Australia's obligations*' under the human rights and ILO instruments listed in Clauses 3(2) and (3).

One of those instruments is the ICCPR. This indirect reference to the ICCPR is unclear in its intended impact. In view of the interpretive significance of an objects clause under s.15 of the Acts Interpretation Act, Clause 3 serves a vital purpose. It is submitted that it is appropriate to clarify, in consolidated legislation that spans discrimination on the basis of a range of protected attributes, including religion, and which contains important exceptions for the freedom of religion, that the reference to the ICCPR includes various rights set out in the ICCPR , among them the freedom of religion in Article 18.[1] On any view the freedom of religion in Article 18 is of critical importance in anti-discrimination legislation since that freedom contends for its existence, in so far as it is otherwise rendered unlawful by virtue of this Act, on the weight to be given to it in applicable exceptions.

As it currently stands, the reference to the ICCPR may be taken to refer primarily to the equality and non-discrimination provisions of Articles 2 and 26 of the ICCPR. It is noted that Clauses 3(1)(a) and (b) implement Recommendations 2 and 3 of the SDA Report which were respectively to 'refer to other international conventions Australia has ratified which create obligations *in relation to gender equality*' and to insert 'an express requirement that the Act be in accordance with relevant international conventions Australia has ratified ... which create obligations *in relation to gender equality*'.

In the absence of clarification, the effect of the reference to the listed instruments is to empower the anti-discrimination provisions unduly at the expense of the freedom of religion as it arises in the exceptions.

This is exacerbated by the following factors.

Interpretive effect of the objects clause.

1. Clause 3 is obviously central to the interpretation of the entire Act given the High Court's comment that 'the task of statutory construction must begin with a consideration of the text itself', combined with its emphasis on 'the general purpose and policy of a provision' and

[1] Article 18, ICCPR:
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.

'the mischief it is seeking to remedy'[2]. The self evident mischief to be eliminated is discrimination, stated in terms in Clause 3(1)(a), and reinforced by the reference in Clause 3(1)(b) to the listed human rights instruments which contain provisions overwhelmingly directed at anti-discrimination. Clause 3 should specifically acknowledge the limits to the Act's anti-discrimination objects in giving effect to the fundamental freedom of religion (and other relevant rights). The interpretive effect of Clause 3 currently is that the exceptions for religious freedom are to be construed restrictively so as to favour the anti-discrimination objects and aims of the legislation over the freedom of religion.

In short, the importance of the freedom of religion needs to be explicitly reflected in the stated objects, among other relevant rights in the listed instruments.

Absence of statutory protection for freedom of religion.

2. When reference is made in Clause 3(1)(b) to the purpose '*in conjunction with other laws, to give effect to Australia's obligations under the human rights instruments*' it should be observed that there are no 'other laws' that substantively protect domestically freedom of religion under Article 18.[3] The ICCPR does not have direct effect within domestic law, and the ratification of the ICCPR confers no meaningful rights on the individual, or obligations towards the individual.[4] In the context of Clause 3 it is necessary therefore to be unambiguous in the intention to give proper place to the freedom of religion where it otherwise benefits from no substantive statutory protection under this particular 'human rights instrument'.

3. It is a serious and acutely sensitive matter whenever legislation operates to restrict religious freedom, all the more so when there is no directly enforceable right anywhere in Commonwealth or state legislation, and none proposed here in the Commonwealth context, that equates to the protection guaranteed under Article 18. Appropriate acknowledgment should therefore be given expressly to freedom of religion in reference to the exceptions, to indicate that those that are available to freedom of religion are there in order to address the balancing of the aims of eliminating discrimination and upholding the freedom of religion.

International obligations

4. The effect of Clause 3, if insufficient support is given for Article 18, would be that a construction that accords with Australia's obligations under Article 18 is not open to the court in the face of clear statutory language asserting anti-discrimination aims without suitable qualification.[5]

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[2] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at para [47].
[3] The only protection for freedom of religion is in the Commonwealth Constitution s 116, the Constitution Act 1934 Tasmania s46, and the Victorian and ACT charters.
[4] *Dietrich v the Queen* (1992) 177 CLR 292; *Victoria v the Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416.
[5] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 591.

5. It is said that the Act does not intend to make significant changes to what is lawful and what is not. If suitable changes are not made to the objects clause the effect will be to supplant any consequences for freedom of religion that otherwise might flow from ratification of the ICCPR. The role of freedom of religion implicit in references to the ICCPR would be extinguished by the overwhelming emphasis on the Bill's anti-discrimination objects.

6. The proposed legislation would otherwise face critical analysis under the *Human Rights (Parliamentary Scrutiny) Act 2012*.

Recommendation

Clause 3(a): should be amended to read:

> **'to eliminate unjust 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 to give effect to the other rights and freedoms protected by those instruments including freedom of speech, freedom of religion, and freedom of association.'**

Clause 6 Dictionary

Given the obvious value of community work conducted by volunteers and charities, and the fact that this often alleviates public cost, 'work and work-related areas' in Clause 6 should exclude (for the purposes of Clause 22(2)(a)) voluntary work. It is not appropriate that volunteers should face the costs and risks associated with this legislation.

Recommendation

Exclude from 'work and work-related areas' in Clause 6 voluntary work.

Clauses 7 and 22. Meaning of 'connected with any area of public life'

The extension of prohibited conduct to matters 'connected with an area of public life' (in Clauses 7) or the even broader "*any* area of public life" (in Clause 22) represents a radical and general expansion of the scope of unlawful discrimination.

Anti-discrimination legislation has previously been very precise in defining the particular circumstances which give rise to unlawful discrimination or prohibited discrimination.[6] Neither

[6] The Age Discrimination Act 2004 confines the relevant areas of public life to employment and related matters, education, access to premises, provision of goods and services, provision of accommodation, disposal of land, administration of Commonwealth laws and programs, and requests for information on which age discrimination may be based.
The Disability Discrimination Act 1992 confines the relevant areas of public life to work (employment (with particular provisions for commission agents and contract workers), partnerships, employment agencies etc), education, access to premises, provision of goods and services, provision of accommodation, disposal of land,

Clauses 7 nor 22 confine the term 'area of public life' with any clarity. Clause 7 extends the concept to 'other activity' which is even more Delphic and uses the vague language of 'in relation to'. The reach of liability to anything 'connected' to any area of public life is also obscure. The areas listed in Clause 22 are merely inclusive.

The ACL is opposed to the open-ended concept of 'public life' (as distinct from the specified circumstances for unlawful conduct that apply under existing legislation). In other words 'public life' should define with particularity the circumstances in which discrimination is unlawful just as it does with existing legislation at Commonwealth and state and territory levels.

The regulatory burden and cost to the community of the proposed legislation would be greatly reduced if the scheme in which unlawful discrimination occurs is predictable. The risk of unwarranted or accidental restrictions being placed on other human rights would also thereby be significantly reduced.

It is regarded as untenable for an extension to occur in one sweep to all areas of public life for all forms of discrimination, where previously such generality only applied in the clear cut area of race discrimination. To do so is also contrary to the policy objective of not unduly extending existing legislation.

These comments apply even if offence-based discrimination is removed from Clause 19, as discussed below.

The recommendation below is intended to illustrate the ease with which discrimination may be kept within current bounds across all protected attributes. It should be acknowledged that even this recommendation represents an important expansion of the circumstances in which discrimination is unlawful, as it is not attribute-specific. It is proposed as a means of promoting certainty in the community and of achieving clarity. It is consistent with equivalent contemporary legislation such as the UK Equality Act 2010.

Recommendation

The scope of unlawful discrimination by means of Clauses 7 and 22 should be confined, as in current legislation, to particular circumstances, in similar form to the following.

7 Meaning of *connected with* an area of public life etc.

Conduct engaged in by a person (the ***first person***) in relation to another person is ***connected with*** a particular area of public life if and only if it occurs in the circumstances set out in section 22(1).

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clubs and unincorporated associations, sport, administration of Commonwealth laws and programs, unjustifiable hardship and requests for information on which age discrimination may be based
The Sex Discrimination Act 1984 confines the relevant areas of public life to employment or superannuation (with particular provisions for commission agents and contract workers), partnerships, qualifying bodies, registered organisations, educational authorities, goods, services and facilities, accommodation, land, clubs and the delivery of Commonwealth programs.
The Racial Discrimination Act 1975 is the only act to apply generally to areas of public life but it does so to a high threshold namely to prohibit a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

22 When discrimination is unlawful

(1) It is unlawful for a person to discriminate against another person in the following areas of public life:

(a) work and work-related areas

(i) where the first person is an employer who discriminates against a person

(a) in the arrangements made for the purpose of determining who should be offered employment; or
(b) in determining who should be offered employment; or
(c) in the terms or conditions on which employment is offered.
(d) in the terms or conditions of employment that the employer affords the employee; or
(e) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or
(f) by dismissing the employee; or
(g) by subjecting the employee to any other detriment; or
(h) in relation to the payment of a superannuation benefit to or in respect of a member of a superannuation fund, where the first person exercises discretion against other person

(ii) where the first person is a principal and the other person is a commission agent

(a) in the arrangements the principal makes for the purpose of determining who should be engaged as a commission agent; or
(b) in determining who should be engaged as a commission agent; or
(c) in the terms or conditions on which the person is engaged as a commission agent; or
(d) in the terms or conditions that the principal affords the commission agent as a commission agent; or
(e) by denying the commission agent access, or limiting the commission agent's access, to opportunities for promotion, transfer or training, or to any other benefits associated with the position as a commission agent; or
(f) by terminating the engagement; or
(g) by subjecting the commission agent to any other detriment.

(iii) where the first person is a principal and the other person is a contract worker

(a) in the terms or conditions on which the principal allows the contract worker to work; or
(b) by not allowing the contract worker to work or continue to work; or
(c) by denying the contract worker access, or limiting the contract worker's access, to any benefit associated with the work in respect of which the contract with the employer is made; or
(d) by subjecting the contract worker to any other detriment.

(iv) where the first person comprises a partnership of six or more persons or comprises six or more persons proposing to form themselves into a partnership (as the context permits)

(a) in determining who should be invited to become a partner in the partnership; or
(b) in the terms or conditions on which the other person is invited to become a partner in the partnership; or
(c) by denying the other partner access, or limiting the other partner's access, to any benefit arising from being a partner in the partnership; or
(d) by expelling the other partner from the partnership; or
(e) by subjecting the partner to any other detriment.

(v) where the first person is a an authority or body that is empowered to confer, renew, extend, revoke or withdraw an authorisation or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation

(a) by refusing or failing to confer, renew or extend the authorisation or qualification on the other person or
(b) in the terms or conditions on which it is prepared to confer the authorisation or qualification or to renew or extend the authorisation or qualification on the other person or
(c) by revoking or withdrawing the authorisation or qualification or varying the terms or the conditions upon which it is held.

(vi) where the first person is a registered organisation, the committee of management of a registered organisation or a member of the committee of management of a registered organisation

(a) by refusing or failing to accept the other person's application for membership; or
(b) in the terms or conditions on which the organisation is prepared to admit the other person to membership; or
(c) by denying such member access or limiting such member's access, to any benefit provided by the organisation; or
(d) by depriving such member of membership or varying the terms of membership; or
(e) by subjecting such member to any other detriment.

(vii) where the other person is an employment agency

(a) by refusing to provide the other person with any of its services; or
(b) in the terms or conditions on which it offers to provide the other person with any of its services; or
(c) in the manner in which it provides the other person with any of its services.

(b) education or training;

(i) where the first person is an educational authority

(a) by refusing or failing to accept the other person's application for admission as a student; or
(b) in the terms or conditions on which it is prepared to admit the other person as a student, or
(c) where the other person is a student, by denying access, or limiting the student's access, to any benefit provided by the educational authority; or
(d) where the other person is a student, by expelling the student; or
(e) where the other person is a student, by subjecting the student to any other detriment.

(c) the provision of goods, services or facilities;

where the first person who, whether for payment or not, provides goods or services, or makes facilities available discriminates against the other person,

(a) by refusing to provide the other person with those goods or services or make those facilities available to the other person; or
(b) in the terms or conditions on which the first person provides the other person with those goods or services or makes those facilities available to the other person; or
(c) in the manner in which the first person provides the other person with those goods or services or makes those facilities available to the other person.

(d) access to public places;

where the first person discriminates against the other person

(a) by refusing to allow the other person access to, or the use of any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not); or
(b) in the terms or conditions on which the first person is prepared to allow the other person access to, or the use of, any such premises; or
(c) in relation to the provision of means of access to such premises; or
(d) by refusing to allow the other person the use of any facilities in such premises that the public or a section of the public is entitled or allowed to use (whether for payment or not); or
(e) in the terms or conditions on which the first person is prepared to allow the other person the use of any such facilities; or
(f) by requiring the other person to leave such premises or cease to use such facilities.

(e) provision of accommodation;

where the first person, whether as principal or agent, discriminates against the other person

(a) by refusing the other person's application for accommodation; or
(b) in the terms or conditions on which the accommodation is offered to the other person; or

(c) by deferring the other person's application for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation; or
(d) by denying the other person access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person; or
(e) by evicting the other person from accommodation occupied by the other person; or
(f) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person.

(f) dealings in estates or interests in land (otherwise than by, or to give effect to, a will or a gift);

where the first person, whether as principal or agent, discriminate against the other person

(a) by refusing or failing to dispose of an estate or interest in land to the other person; or
(b) in the terms or conditions on which an estate or interest in land is offered to the other person.

(g) membership and activities of clubs or member-based associations;

where the first person is a club or incorporated association, the committee of management of a club or a member of the committee of management of a club or incorporated association and discriminates against the other person:

(a) who is not a member of the club or association by refusing or failing to accept the person's application for membership; or
(b) who is not a member of the club or association in the terms or conditions on which the club or association is prepared to admit the person to membership; or
(c) who is a member of the club or association in the terms or conditions of membership that are afforded to the member; or
(d) who is a member of the club or association by refusing or failing to accept the member's application for a particular class or type of membership; or
(e) who is a member of the club or association by denying the member access, or limiting the member's access to any benefit provided by the club or association; or
(f) who is a member of the club or association by depriving the member of membership or varying the terms of membership; or
(g) who is a member of the club or association by subjecting the member to any other detriment.

(h) participation in sporting activities (including umpiring, coaching and administration of sporting activities);

where the first person discriminates against the other person by excluding that other person from a sporting activity, which includes a reference to an administrative or coaching activity in relation to any sport.

(i) the administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs.

where the first person

(a) performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program; or
(b) has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program;

and discriminates against the other person in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

(j) prohibition on racial discrimination

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the

recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.
Where:

(a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
(b) the other person does not or cannot comply with the term, condition or requirement; and
(c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

Clause 17 The protected attributes

It is noted that the prohibition of discrimination in relation to religion is confined only to discrimination in work and work-related areas (Clause 22(3)). This falls well short of the non-discrimination provisions of the ICCPR (Articles 2 and 26) which both specify religion. Given this legislation is proposed with the aim of eliminating discrimination this seems inconsistent with the purpose of the legislation. It conveys the message that in all other aspects connected with an area of public life protection against discrimination on the basis of religion is unwarranted, despite the fact that protection against other kinds of discrimination is seen as necessary.

It sadly reinforces the lack of legislative support for the freedom of religion noted above and serves to emphasise the need for corrective adjustment in the Bill. The very limited scope of protection against religious discrimination is a powerfully negative statement that cannot have been intended. Australians of all faiths will be disappointed at the message this conveys.

The protection against discrimination under the ICCPR and other instruments does not extend to protection against offence. It has always been controversial whenever legislation is proposed that would prohibit the causing of offence on the basis of religion. For this reason it is recommended that discrimination on grounds of religion be extended to all areas specified in Clause 22 provided offence-based discrimination is removed from Clause 19.

Further comments on the omission of religion as a relevant attribute are made under the heading *Clause 19(2) Discrimination through offence below*.

Recommendation

Expand discrimination on grounds of religion to all areas specified in Clause 22 (provided offence-based discrimination is removed from Clause 19).

Clause 19(1) Unfavourable treatment

The adoption in Commonwealth legislation of the concept of unfavourable treatment would favour the conclusion that any unfavourable treatment was *because* the other person has a particular protected attribute. This is in contrast to the current situation, in which a comparator test applies in most cases to determine whether the alleged discrimination was due to a protected attribute. The

concept of 'unfavourable treatment' increases the risk of inadvertent discrimination with all the burdens that entails.

The new definition of 'direct discrimination' removes the 'comparator test', that is, the requirement to prove that the treatment was less favourable than treatment someone without the attribute or with a different attribute would have received in the same or similar circumstances. The removal of the comparator test would make claims easier when the threshold of unfavourable treatment is already too low. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (instruments cited in the objects clause) stipulate that discrimination exists strictly in circumstances where a 'distinction, exclusion, restriction or preference' based on the relevant attribute 'has the purpose or effect of nullifying or impairing' a relevant right or freedom. Paragraph 7 of General Comment 18 on discrimination makes clear that the UN Human Rights Committee considers that the term 'discrimination as used in the International Covenant applies the same qualification'. The unfavourable treatment threshold is well below that which applies to discrimination under the relevant UN Conventions. The comparator test should be preserved.

The extension of discrimination to policies in Clause 19 also gives rise to concerns about the ease with which claims may be brought, particularly with the references to 'or proposes to impose, a policy', and the policy 'is likely to have' the effect etc. Clause 19(3) is also opposed for the reasons set out above under the heading *'Clauses 7 and 22. Meaning of 'connected with any area of public life''*, concerning the scheme for defining discrimination.

Recommendation

Retain the comparator test in Clause 19(1).

Delete Clause 19(3).

Clause 19(2) Discrimination through offence

Clause 19(2) extends the meaning of 'unfavourable treatment' to include 'conduct that offends, insults or intimidates the other person'. Clause 19(2) has much in common with the vilification provisions of Clause 51, which are rightly confined to *racial* vilification. Clause 19 also extends with the sexual harassment provisions of Clauses 49 and 50 to other unspecified forms of harassment.

Clause 19(2) is in the form of a 'for the avoidance of doubt' provision yet it marks a radical extension to the meaning of discrimination. It would avoid doubt only if it simply stated that sexual harassment within Clauses 49 and 50, and racial vilification within Clause 51 are also capable of constituting discrimination within the meaning of Clause 19. However Clause 19(2) does not do this. Instead, Clause 19(2) extends unfavourable treatment without limit to harassment (without defining 'harassing' or confining that term to sexual harassment) and 'conduct that offends, insults or intimidates the other person', not even to the Clause 50 objective standard of 'reasonably likely to offend'. The extended meaning applies to all protected attributes.

The extension of vilification principles to the realm of discrimination generally has huge implications for freedom of speech, freedom of association and freedom of religion. It also raises serious

constitutional issues for political communication. The ACL opposes this extension. A deliberate policy step was taken to incorporate *racial* vilification measures some years ago. These are not controversial, in part because of ICCPR Article 20 which prohibits 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'; in part also because these measures were only confined to race. Among the significant areas of controversy concerning the extension of vilification laws to religion has been the impact that opening 'offence' claims to religious adherents would have on freedom of speech and freedom of religion. It is no answer to say that religion is not a protected attribute outside the work context. The fact that religion is not a protected attribute except for work-related purposes merely aggravates the exposure the Bill as a whole creates for religious groups in the conventional practise of religion.

The degree of controversy surrounding offence-based protection may be measured by the House of Lords' recent vote to remove the word 'insulting' from the Public Order Act s5 since its application, even in the limited criminal context, has caused much consternation and has attracted considerable criticism.

The controversy generated by offence claims outside race or religion is far greater still. Firstly, because of the sheer potential for such claims, where they are framed according to subjective criteria and a low threshold for offence. Secondly, because they are available to anyone who might wish to claim they are offended. It is an entirely uncontroversial but unfortunate fact of life that many people are offended, whether on the basis of protected attributes or other grounds. Offence should not be the subject matter of legal claims of discrimination.

Take for example the simple reading of Bible text in a church. Assume the operation of a church is connected with an area of public life (for example through the provision of goods, services or facilities or access to a public place (Clauses 7, 22)), and assume discrimination is constituted by 'unfavourable treatment' by virtue of 'conduct that offends' a person with a relevant attribute (Clause 19). The conduct is undoubtedly discriminatory and unlawful by virtue of the offence caused, even if it consists of no more than reading text from the Bible. Legislation that is capable of rendering that conclusion is patently in need of correction. Sermon notes that are distributed or posted publicly for download could also be caught by the publishing prohibition under Clause 53.

Take too the example of the Catholic World Youth Day gatherings. It is clear from the case of *Evans v State of New South Wales*,[7] as the Federal Court there acknowledged, that religious beliefs and doctrines frequently attract public debate, in that instance the attention of the No to Pope Coalition opposed to the teachings of the Catholic Church on sexuality, contraception and abortion. There may be any number of groups opposed to the Catholic Church's or any other denomination's or religion's teaching on any number of grounds, offence taken at those teachings being a primary reason. Freedom of expression, freedom of association and freedom of religion preserve the right to criticise other religions and religious teachings, and this submission does not oppose the exercise of these freedoms including the voicing of criticism against religion by lawful means. On the contrary, those freedoms are essential in a democratic society and must be safeguarded. At the heart of our concern about offence-related discrimination is the undermining of those freedoms. The Federal Court in *Evans* was rightly emphatic in ensuring that regulations under the World Youth Day Act

[7] *Evans v State of New South Wales* (2008) 168 FCR 576; (2008) 104 ALD 234; (2008) 250 ALR 33; [2008] FCAFC 130.

would not prevent or interfere with the exercise of the fundamental freedom of free speech (to protect those rights in the hands of the No to Pope Coalition). Yet the effect of enacting offence-based discrimination would be to severely limit the free speech and freedom of religion of the Catholic Church in a World Youth Day event (or any other religious group at a similar event). It would give anyone opposed to the Catholic Church's teachings a discrimination claim, that it does not currently have, on the basis of offence caused.

The perverse result would be that while the No to Pope Coalition and others opposed to religious teaching and offended by it are afforded a discrimination claim, for those who are offended because of their religious beliefs there is no redress whatsoever. This bias cannot possibly have been intended. There is failure to achieve equality before the law for religious groups (which is not confined to the issue of offence).

The fact that religion is only a relevant attribute for work-related forms of discrimination is significant in demonstrating how the Bill weighs heavily against the protection of religion. In the context of public debate, anyone in the world may deliberately criticise and denigrate religion, as well as religious adherents and particular doctrines, subject to the limits imposed by other legislation. ACL does not seek to make specific changes to that position. ACL is, however, opposed to the words "other conduct that offends, insults or intimidates the other person" in Clause 19(2)(b). With their inclusion, if religious teaching causes offence because the other person has a particular protected attribute then it constitutes discrimination, even if this occurs incidentally and unintentionally and in pursuit of the fundamental freedom of religion. The effect of the Bill is to restrict religious and other freedoms well beyond the scope of the ICCPR limitations in Article 18(3).

To be clear, this submission does not argue for offence-based discrimination to be extended to religion. It opposes offence-based discrimination altogether (beyond the existing scope of racial vilification). It seeks to safeguard fundamental freedoms of speech, association and religion and related freedoms, which are at risk if they can be limited by the occurrence (or even risk) of offence, and it seeks to have those freedoms better reflected in the proposed legislation. It is not our aim to support those who cause offence, but public debate, political communication and freedom of religion are not given sufficient space in Clause 19(2) or elsewhere in the Bill.

Recommendation

Replace Clause 19(2) with 'To avoid doubt, unfavourable treatment of the other person may be constituted by sexual harassment under sections 49 -50 and racial vilification under section 51'.

Clarify in more explicit terms in Clause 51(2) that an objective test is to apply under Clause 51(2).

Clause 23 Exception for justifiable conduct

The exceptions related to religion in Clauses 32 and 33 more or less replicate the existing Commonwealth provisions and are confined to the operation of religious institutions. Participation in religious life through attendance at a mosque, temple, church or through other forms of institutionalised religion constitutes only one aspect of religious practise 'connected with an area of

public life'. Clauses 32 and 33 operate for the benefit of religious institutions in that they apply only to the appointment of priests, ministers etc and religious bodies and to educational institutions. The reality is that for the most part religious practise will depend on the *general* exception for justifiable conduct in Clause 23.

The explanatory notes state that Clause 23 'is intended to align with the international human rights concept of 'legitimate differential treatment'.' A central feature of that concept under the ICCPR is that the term 'discrimination' has its own limits, described by the UN Human Rights Committee in paragraph 13 of General Comment 18 in terms that differentiation of treatment will not 'constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'. The term discrimination under Article 14 of the European Convention similarly excludes from scope differences in treatment which have objective and reasonable justification in pursuit of a legitimate aim and where there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised (*Belgian Linguistics case*). (Even the exception in Article 1.2 of the ILO Convention concerning Discrimination in Respect of Employment and Occupation excludes from the meaning of discrimination conduct falling within the exception.)

In short, according to the international human rights concept of 'legitimate differential treatment' there is no discrimination at all within the meaning of that term. It is not merely that there is 'discrimination' that is rendered lawful by being within a justifiable exception, with all the stigma that that entails. The point is that both the objects of the legislation *and* the terms that guide the evaluation of conduct falling within the exceptions are integral to the question of whether discrimination should be concluded to be unlawful.

As the ACL explained in its 2011 submission, it does not agree that legislative provisions which exist in order to support fundamental human rights should be classified as merely 'exceptions' to a general prohibition that exists to promote freedom from discrimination. The religious exceptions (within Clause 23 and Clauses 32 and 33) should not be seen as compromising a strict entitlement to a discrimination prohibition. Those exceptions give modest and very confined recognition to the fundamental right to freedom of religion, guaranteed under article 18 of the ICCPR. If construed restrictively, the exceptions will be inadequate to protect fundamental and non-derogable rights. Different human rights are often in tension with one another and need to be appropriately balanced. The Commonwealth should ensure that an appropriately generous zone of protection is given, through the exceptions, to those human rights that are identified in the ICCPR as both 'fundamental' and non-derogable. Defining them in terms of 'exceptions' does not accord them the appropriate status that they rightly have in international law.

It would be helpful if this could be explained also in the Explanatory Memorandum and Second Reading Speech. In particular, it should be made clear that non-discrimination and freedom of religion are both fundamental human rights and their co-existence is expressed in the exceptions to confirm that certain conduct within the scope of the freedom of religion does not amount to discrimination. Freedom of religion is a guaranteed right that has significance extending far beyond discrimination legislation. This too needs to be recognised in the consolidated legislation to avoid freedom of religion being perceived simply as an irritating and unjustified restriction on the legitimate prohibition of all forms of discrimination.

Clause 23(4) states that in determining whether discrimination is justified the objects of the Act are to be taken into account. All of the comments made above in relation to *Clause 3 Objects of this Act* are repeated in this connection. The objects as currently drafted are powerfully directed at the elimination of discrimination without qualification. The recognition for freedom of religion (and other ICCPR freedoms) sought in the objects clause is required to give effect to the intention behind Clause 23 'to align with the international human rights concept of 'legitimate differential treatment', in other words to acknowledge that the prohibitions in the Act do not extend to 'legitimate differential treatment'.

It is clearly appropriate to make reference to freedom of religion in the Explanatory Memorandum and Second Reading Speech in connection with the exceptions relied on for that freedom. The exceptions are Clauses 32 and 33 for institutionalised religious practise, and Clause 23 for the remaining forms of religious practise (in practical terms of greater importance) but Clause 23 should also refer to the freedoms of assembly, expression (including political communication), and association..

The following are considered essential for the exceptions related to religion in non-institutionalised form.

Specific reference should be made to freedom of religion in Article 18 of the ICCPR within the objects Clause and the notes within Clauses 23 and 32/33. The courts will otherwise be unassisted in their assessment of issues affecting religion outside the confined scope of Clauses 32 and 33 (which offers its own guidance), in particular whether the alleged unlawful conduct is justifiable.

As to the form of that reference, given the quite appropriate listing of the ICCPR among the instruments to which the Act is intended to give effect, and given that Australia's obligations under the ICCPR include freedom of religion under Article 18 (which is not otherwise protected in Commonwealth or state legislation), it is submitted that Article 18 should be specifically acknowledged as the basis of Australia's obligations. This should be done in the objects clause, as well as the exceptions relating to religion and, more importantly, in Clause 23. The courts will thereby be guided, in the content and public face of the freedom and in what is justified, by reference to the scope of Article 18 authoritatively provided by the United Nations Human Rights Committee. If some other standard of protection for religion is intended within the exceptions then this instead should be stated in the clearest terms (presumably the European Convention concept of differential treatment is not invoked because it has no application to Australia).

If there is any doubt about the yardstick for determining whether conduct is justified within the exceptions (general or religious), those relying on the exceptions will be further prejudiced by the onus of proving the conduct is justifiable (on which more is said below).

Recommendations

Specific reference should be made to the need to maintain adequate protection for freedom of religion as articulated in Article 18 of the ICCPR within the objects Clause and Clauses 23 and 32/33, or, at the least, in the explanatory notes within those Clauses. In particular:

In Clause 23 add 'Freedom of religion, freedom of expression and other human rights under the International Covenant on Civil and Political Rights are fundamental human rights and their exercise within the limits of those rights constitutes a legitimate aim'.

Retitle Part 2.2 Division 4 'When discrimination is not unlawful'.

Retitle Part 2.2 Division 4, Subdivision 'Reasonable grounds for differential treatment'.

Throughout Part 2.2 Division 4 avoid references to exception.

Clause 23 objective standard

The terms of the religious exceptions are particularly important given that the general exception Clause 23 requires in all circumstances that the conduct must be engaged in for the purpose of a particular (legitimate) 'aim', and that '*a reasonable person in the circumstances of the [person who engaged in the conduct] would have considered that engaging in the conduct would achieve that aim*. The objective reasonable person is increasingly unlikely to be familiar with the practices and purposes of religious groups.

Recommendation

Amend Clause 23(3)(c) to read 'the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim, save that where the aim is the exercise of a freedom in a human rights instrument a reasonable person in the circumstances of the first person is attributed with familiarity with the aims and importance of such a freedom'.

Clauses 32 and 33 Exceptions related to religion

Exceptions that accommodate certain limited aspects of the freedom of religion in the confined way that Clauses 32 and 33 do should reflect and be sympathetic to the requirements of religious groups.

Without appropriately drawn exceptions for religious bodies Clauses 53 (publishing etc material indicating intention to engage in unlawful conduct), 54 (liability for unlawful conduct of directors, officers, employees and agents etc) and 56 (causing etc unlawful conduct) would carry unsupportable risks for churches.

Clause 33(2) is too narrow

Clause 33(2) (the exception for conduct of a body established for religious purposes) is misconceived in its emphasis on conformity to doctrine and religious sensitivities. It is too narrow in excepting only conduct that *conforms* to the doctrines, tenets or beliefs of religion (the susceptibilities exception though necessary in some circumstances will be of little value generally) and will lead to sterile and misplaced debate about whether the particular

conduct was mandated by the doctrine or ancillary to it. This is where the objective standard of Article 18 of the ICCPR should play a role within Clause 33.

Also, Clause 33(2) juxtaposes discrimination and doctrine etc in a way that is far removed from the rationale for the exception, and it does so in a way that is not constructive to Australian society and in a way that encourages hostility in the resolution of disputes under the Act.

What is really needed is straightforward recognition and exclusion for a range of religious practices.

Recommendation on Clause 33(2)

Clause 33(2) should be expressed positively and simply to exempt, consistent with Article 18 of the ICCPR, the practise of religion by a body acting in conformity with its doctrines, tenets or beliefs etc.

Clause 33(4) does not fit its intended purpose

Clause 33(4) contains the exception for educational institutions conducted in accordance with the tenets etc of a religion It is important to grasp what is at the heart of this exception. As noted in the ACL's 2011 submission those exercising their freedom of religion do not seek to discriminate but rather seek to employ staff most suited to the religious environment of the employer. What is sought here is freedom to positively select individuals for employment on the basis of the particular religion of the employer, as appropriate to support the religious aims of the religious body. Depending on the position, it may require employees to be practising members of the employer's religion. Discrimination for many religions is not in fact doctrinally mandated or driven by religious sensitivities in the literal sense and it is more constructive and appropriate not to contend for justification on those specific grounds.

Clause 33(4) would more closely fit the intended purpose of the exclusion for religious educational establishments if it followed the model of the Tasmanian Anti-Discrimination Act 1998 s 51(2),[8] which covers '*discrimination in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or*

[8] Anti-discrimination Act 1998 s 51:
Exceptions relating to religious belief, affiliation or activity 51. Employment based on religion
(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.
(2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.

better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices'.

The Clause 24 exception for inherent requirements of work is of little practical use for religious schools or other religious employers, largely as a result of the requirements first, that the 'other person' must be '*unable* to carry out the inherent requirements of the job' and, second, 'the discrimination' must be '*necessary* because the other person is unable to carry out those inherent requirements'.

Recommendation on Clause 33(4)

Clause 33(4) should follow the substance of the Tasmanian Anti-Discrimination Act 1998 s 51(2) to enable employment of staff most suited to the religious environment of the employer.

Other recommendation on Clauses 23, 32 and 33

Clauses 23, 32 and 33 should include recognition of the freedom of religion in a neutral form such as 'It is acknowledged for the purposes of Clauses 23, 32 and 33 that freedom of religion under Article 18 of the ICCPR is the foundation of such exceptions and includes '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'.'

Clause 124 Burden of proof

In its 2011 submission the ACL indicated it would oppose any proposal that the burden of proof shift to the respondent once a complainant merely *alleges* that an act of unlawful discrimination has occurred. At the very least, the burden should shift to the respondent only where the complainant has established to the full standard of proof that all the elements of unlawful discrimination are present but for the application of an exception. Clause 124(2) places the burden of proving that conduct is not unlawful on the person relying on the relevant exception if the applicant merely 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. It should be made explicit that this burden only arises once these elements of unlawful discrimination have all clearly been made out on the balance of probabilities.

This recommendation is made in the context of the comments under the earlier heading *Clause 23 Exception for justifiable conduct.*

As noted above, paragraph 13 of the Human Rights Committee's General Comment 18 (Non-Discrimination) states that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'. The adoption of limited statutory exclusions from discrimination prohibitions, which are under periodic review, in which the burden of justification is

on the person engaging in the conduct gives the impression that only grudging effect is given to the exceptions and it falls short of achieving substantive conformity with the ICCPR articles 2, 18 and 26.

Recommendation

The onus of proving that conduct is not unlawful should only arise once the elements of unlawful discrimination have been made out by the complainant on the balance of probabilities.

Clause 53 Publishing etc material indicating an intention to engage in unlawful conduct

The extension of existing provisions in Commonwealth legislation from advertisements to 'material' generally represents an added burden and risk, and in particular a further restriction on freedom of speech. For freedom of religion, the risks already mentioned in the context of religious teaching would extend to sermon notes and other material made available to church members or on the web. This cannot seriously be intended but is symptomatic of the enhanced liability for discrimination under the proposed legislation. It would also extend to equivalent material produced by volunteer or community endeavours with all the disincentives that result.

Recommendation

Confine Clause 53 to advertisements and in particular exclude other forms of publication.

Clauses 56 to 58

The accessorial and vicarious liability provisions in Clauses 56 to 58 only serves to enhance the concerns already expressed. It is accepted that similar provisions are contained in existing Commonwealth discrimination legislation. However the burden on businesses, particularly small businesses and voluntary organisations, is accentuated by the heightened risk of discrimination claims being brought and made out.

If offence-based discrimination is incorporated, to return to the example of the World Youth Day event, arguably every person in attendance in support of the Catholic Church's teachings at the event and lending support to it (including participants in the crowd) potentially 'aids' the act of discrimination by causing offence. Where does liability end? It would seem to extend to the Church itself, to organisers of the event, to those who speak. It would also extend to directors, officers, employees and agents even if unwittingly involved and to those simply obeying their employer's or principal's instructions. But it could still go further. Nevertheless, concerns for the risk, cost and burden of the proposed legislation, and effect on other human rights, apply to the Bill's scheme of discrimination without the offence provisions.

Recommendation

Confine Clauses 56 (causing etc unlawful conduct), 57 (liability for unlawful conduct of directors, officers, employees and agents etc), 58 (liability of partnerships, unincorporated associations and trusts for unlawful conduct) to instances of clear knowledge of unlawful conduct and active participation in it.

State and territory laws

As noted in the ACL's 2011 submission, if State and Territory anti-discrimination laws are not to be displaced by Commonwealth law, then Commonwealth law needs to preserve the exceptions, exemptions and defences available under relevant State and Territory legislation. This is the case currently in section 351 of the Fair Work Act which provides that the relevant subsection does not apply to action that is not unlawful under any anti-discrimination law in force in the place where the action is taken.

Including a provision of this kind is necessary not only to avoid confusion about what is needed to comply with the law in each State and Territory, but also because the exceptions and exemptions under State antidiscrimination laws provide support (albeit limited) for fundamental freedoms, including aspects of the right to freedom of thought, conscience and religion which would otherwise now be removed.

Recommendation

Amend Clause 14 to provide in a new subsection (2):

'This Act is not intended to apply to any action that is not unlawful under any anti-discrimination law in force in the place where the action is taken.'

Clause 47 Review of Exceptions

Those exceptions noted above that are firmly established in the freedom of religion are non-derogable. They already lack generous support within the Bill and should not be subject to review under Clause 47. Not subjecting key ICCPR rights to review would be in recognition, and incomplete recognition at that, of Australia's obligations under the ICCPR.

Recommendation

Expressly exclude from Clause 47 those exceptions based on the exercise of rights within the freedom of religion (Clauses 23, 32 and 33) and other rights under the ICCPR.

Conclusion

Although simplified and consolidated human rights and anti-discrimination laws are supported, the Australian Christian Lobby is deeply concerned by a number of aspects of this Bill. There are a range of potential unintended consequences that may arise if the Bill in its current form is passed, many impacting on basic fundamental freedoms of both individuals and organisations. Freedom of speech and freedom of religion will be particularly vulnerable, and although the Bill purports to eliminate discrimination, it may have the unintended result of increasing religious discrimination. Greater acknowledgement of the importance of freedom of religion, a fundamental right under the ICCPR, is required to ensure that all Australians continue to benefit not only from non-discrimination but from freedom to practise their religion.

We call on the Committee to note our recommendations in this submission, which we see as essential to ensure that the legislation's object of removing discrimination does not introduce the same against those of faith.

Yours Sincerely

Jim Wallace
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