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Gillard government misleads public over proposed anti-discrimination law

“The Gillard government has misled the public over proposed changes to anti-discrimination law,” said Simon Breheny, Director of the Legal Rights Project at the free market think tank the Institute of Public Affairs.

The Attorney-General’s Department has made a written submission to the Senate inquiry into the exposure draft *Human Rights and Anti-Discrimination Bill 2012*, along with over 400 other individuals and organisations, including the Institute of Public Affairs. The exposure draft of the Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee on 21 November 2012. The committee is expected to report by 18 February 2013.

“With this submission to the inquiry the Gillard government has misled the public about the dangerous provisions contained within the exposure draft legislation. The Gillard government is now actively defending a massive threat to freedom of speech,” said Mr Breheny.

Analysis undertaken by the IPA has uncovered several inaccuracies in the submission:

- The claim that the exposure draft would have “minimal regulatory impact” is grossly misleading. Several aspects of the exposure draft will result in an increase in discrimination litigation and compliance costs
- The suggestion that these changes will “simplify the law” does not correspond with the complex nature of a reverse burden of proof and a subjective test for discrimination, both included in the exposure draft
- The submission also misleads the public by comparing the exposure draft with current discrimination provisions under the *Fair Work Act 2009* because the proposed definition for discrimination has been radically expanded under the exposure draft.

“The exposure draft is a radical attempt by the Gillard government to control the lives of Australians. The Coalition should immediately oppose the exposure draft and commit to repealing it in government,” said Mr Breheny.

Attached: IPA FreedomWatch Factsheet: The *Human Rights and Anti-Discrimination Bill 2012*

To download a copy of the Institute of Public Affairs’ submission visit: freedomwatch.ipa.org.au

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The Human Rights and Anti-Discrimination Bill 2012

An unprecedented threat to freedom of speech and thought

On 20 November 2012, the Commonwealth Attorney-General made public an Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* ('the Bill'). The Bill was referred to an inquiry of the Senate Legal and Constitutional Affairs Committee. Submissions to the inquiry close on 21 December 2012, with its report due by 18 February 2013.

The Human Rights and Anti-Discrimination Bill 2012 makes a number of significant changes to anti-discrimination law in Australia, including:

- broadening the definition of discrimination to include conduct that 'offends' and 'insults' (clause 19-2)
- making it easier for a person to claim they were discriminated against, by requiring them to establish only that they were personally offended, not that a reasonable person would have been offended (cl 19-2)
- expanding the range of personal characteristics against which it is unlawful to discriminate, to include not only matters such as disability, race, and religion, but also 'political opinion' and 'social origin' (cl 17-1)
- reducing the legal protection of a person accused of discrimination, by:
 - declaring them guilty unless they prove their innocence, i.e. the 'onus of proof' is reversed (cl 124-1)
 - restricting their right to legal representation (cl 110-4)
 - requiring them to pay all the costs of their own defence even if they are found to be innocent (cl 133)

If passed into law, the consequences of the Bill are far-reaching.

Impact on freedom of speech and thought

- Almost any comment about anything has the potential to offend someone under the Bill. There would be a chilling effect on freedom of speech and thought if someone could claim the expression of a political viewpoint insulted them and was therefore discriminatory.
- The consequences of the Bill go beyond restricting speech. Flying the Australian flag would be unlawful if a person felt such an action insulted them on the basis of their political opinion.

Impact on freedom of religion

- The Bill would make it unlawful for a person to publicly express their religious belief (for example, by wearing a crucifix) if another person was offended because of that other person's religion.
- The Bill would also make it unlawful to debate religion and religious practices if another person was offended because of their religion.

Government officials gain enormous power

- Both the potential grounds of discrimination in the Bill—such as a person's political opinion or their social origin—and the defences against claims of discrimination—such as the conduct being 'in good faith' and having a 'legitimate aim' (cl 23-3)—are unclear and vague. These ambiguous terms give bureaucrats and judges broad discretionary power to determine the boundaries of lawful behaviour.
- Discrimination on the grounds of political opinion and social origin is unlawful if it is in connection with 'work and work-related areas' (cl 22-3). These terms are so broad as to potentially apply to spheres of activity well beyond the workplace. Furthermore, the government intends to take a 'broad' interpretation of what constitutes 'work-related areas' (Explanatory Notes, p 31).

Process and penalties

- An accusation of unlawful discrimination starts a legal process that could last years. Complaints are heard by the Australian Human Rights Commission, the Federal Magistrates Court, or the Federal Court of Australia. Penalties for unlawful discrimination range from a forced apology, to the payment of monetary damages, to court-ordered censorship (cl 125).