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GetUp FAQ - **Human Rights and Anti-Discrimination Bill 2012**

What is anti-discrimination law?

Anti-discrimination law aims for people to be treated equally. Anti-discrimination law makes it unlawful to discriminate against people because of particular aspects of their identity that are recognised and protected by the law. Aspects of a person's identity that are protected are called protected attributes and include race, sex, ability and age.

Australian anti-discrimination law is based on UN treaties that Australia has made with other countries and fits within a framework of international human rights law.

At the moment Commonwealth anti-discrimination law is governed by five different pieces of legislation, which have different provisions:

1. *The Racial Discrimination Act 1975;*
2. *The Sex Discrimination Act 1984;*
3. *The Disability Discrimination Act 1992;*
4. *The Age Discrimination Act 2004; and*
5. *The Australian Human Rights Commission Act 1986*

Since their introduction, anti-discrimination laws have contributed to massive changes in Australian workplaces, institutions, government and society.

What are the proposed changes?

The government has created a draft bill that consolidates the five existing pieces of legislation into a single act. The government says that its intention is to lift protections to the highest standard where standards differ, make laws clearer and more efficient, enhance protections where the benefits outweigh the negative outcomes, and introduce voluntary measures to increase compliance by business and simplify the dispute process. They have also proposed protection from discrimination on the basis of sexual orientation and gender identity for the first time at the Federal level. However, the draft bill would also remove the complaint mechanism for discrimination on the basis of a criminal record.

Doesn't the Bill reverse the burden of proof, so that alleged discriminators are treated as guilty unless proven innocent?

No. The burden of proof is not being reversed. The presumption of innocence is a feature of criminal law and does not apply in civil law including discrimination matters. The legislation does ensure the burden of proof is shared, so that the respondent (the party responding to the discrimination claim) will need to provide evidence that they did not discriminate, once a prima facie case for discrimination is established by the complainant (the person who says they have been discriminated against). That's consistent with many other areas of civil law, including consumer matters, where the person with access to the relevant information has an obligation to provide that information.

In this case the person with the information about why a particular action, policy or decision that is alleged to be discriminatory was made is the respondent. In many cases the complainant won't have access to this information to make out their case. It makes sense that the more powerful party should be required to provide that evidence. This "shared" burden of proof is already in use under the Fair Work Act 2009 in relation to discrimination in the workplace. Almost all businesses are already subject to this standard of proof in relation to discrimination claims from their employees.

Won't this legislation limit free speech?

No. The draft bill does not change the provision related to racial vilification, which strikes an appropriate balance between freedom of speech and protection from racial vilification. The exceptions available to protect free speech have not been changed either.

While the definition of discrimination has changed in order to combine two existing definitions of discrimination into one and to remove the need for a comparator, we don't think this change will have an impact on free speech.

The new definition of discrimination is the "unfavourable treatment" of another person because they have a particular attribute. This definition of "unfavourable treatment" includes "other conduct that offends, insults or intimidates the other person."^[1] Some media outlets and critics have taken this to mean that any conduct, which insults or offends someone, could be unlawful discrimination. This is not the case. The new definition of discrimination is not likely to expand the definition of discrimination in a way that would limit freedom of speech. The government has indicated clearly that it has no intention of broadening the definition of discrimination so it is highly unlikely that a court would interpret the clause as making any conduct which only insults or offends someone unlawful discrimination.

Doesn't the religious exemption protect freedom of religious expression?

There is no doubt that freedom of expression of religion is an important human right that needs to be protected. However, the exemption for religious organisations is not limited to the practice of religion. It applies to schools, hospitals and community services that are run by religious organisations. Across Australia hundreds of thousands of people are employed by church linked schools, hospitals and community services and many more rely on services that these organisations provide. Most organisations receive some Federal government funding to provide these services. The exemption in the draft bill is far broader than it needs to be in order to protect freedom of religious expression and it means that huge numbers of people have no protection from discrimination. The state of Tasmania has had no exemption for religious organisations under its own anti-discrimination laws and has struck an appropriate balance between the freedom of religion and other human rights.

[1] Sub-section 19(2) Human Rights and Anti-Discrimination Bill 2012 (Cth).