Submission to the

Attorney-General's Department

International Human Rights and Anti-Discrimination Branch

January 2012

ACL National Office

4 Campion St

Deakin ACT 2600

Telephone: (02) 6259 0431

Fax: (02) 6259 0462

Email: natoffice@acl.org.au

Website: www.acl.org.au

ABN 40 075 120 517

Contents

SUBMISSION ON BEHALF OF THE AUSTRALIAN CHRISTIAN LOBBY

CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

Summary of submission

The Australian Christian Lobby supports the consolidation of Commonwealth anti-discrimination legislation. A consolidated Act would undoubtedly lead to greater comprehension and accessibility of anti-discrimination legislation.

In relation to the exceptions or exemptions that are in place to support freedom of religion, it proposes that a general limitation provision, subject to the qualifications elaborated below, be included as part of *the definition of* discrimination. This is to clarify, in line with UN Human Rights Committee reasoning, that certain conduct is not discrimination if the criteria applied are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the International Covenant of Civil and Political Rights (ICCPR). This is particularly necessary when the conduct in question is the legitimate enjoyment of another human right that is protected in international law. (The term "exception" is used here to refer to permanent statutory exclusions from discrimination prohibitions).

The Australian Christian Lobby also proposes that there be a duty on employers to make reasonable accommodation for employees based upon respect for their religious beliefs or conscience, where such an accommodation could be made without significant adverse impact upon the work of the employer.

The Australian Christian Lobby finally proposes that religion be a protected attribute against discrimination to remedy a substantial omission in the Commonwealth legislation.

Question 1. What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

(a) *What is the best way to define discrimination?*

For the reasons we give at length in response to question 20, the Australian Christian Lobby strongly supports a definition that defines the limitations of the term 'discrimination' (ie, with respect to the existing exceptions) at the same time as it defines its nature and scope. Put differently, the one definition ought to explain what is, and is not discrimination, within the same section of the Act.

b) *Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable?*

The Australian Christian Lobby considers it may be possible to have a unified test of discrimination, such as that adopted by the UN Human Rights Committee, that excludes from the definition of discrimination specific conduct, to accommodate fundamental freedoms, against criteria that are reasonable and objective where the aim is to achieve a purpose which is legitimate under the ICCPR. The most pertinent in this context are freedom of religion (eg where religious bodies are employers) and the enjoyment of minority rights (eg in the operation of clubs and associations). This could apply equally to direct and indirect discrimination.

The Australian Christian Lobby notes that the unified definition proposed by the Discrimination Law Experts' Roundtable, while concise, does not apply the same threshold as the UN Human Rights Committee, or that applied in numerous ILO and UN conventions. The Roundtable definition is:

> 'Discrimination includes any distinction, exclusion, preference, restriction or condition made on the basis of a protected attribute, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.'

Such a definition is much too broad in isolation. It is derived from Article 1 of the ILO Convention concerning Discrimination in Respect of Employment and Occupation, which importantly also states that '[a]ny distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination'.

The first point to note is that the conduct within the exception is not discrimination under the ILO convention. As detailed below, this is a matter of great consequence for the proper protection of *all* human rights guaranteed under the United Nations Conventions.

Secondly, by adopting an 'inclusive' definition, the Roundtable definition fails to articulate a proper threshold for the identification of prohibited discrimination. 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 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'. To say that discrimination 'includes' any such distinction (rather than 'means' any such distinction) takes the definition to an unspecified point beyond the threshold for the definition of discrimination laid down by the relevant UN Conventions.

Question 2. How should the burden of proving discrimination be allocated?

Although the Discussion Paper understandably focuses upon the burden of proving discrimination in the narrow sense of 'causation', adopting a unified definition of discrimination which incorporates not only direct and indirect discrimination, but also the limitations on its scope presently covered by the existing exceptions, makes a reconsideration of the allocation of the burden of proof unavoidable and necessary. This is because once a complainant has established the discriminatory effect of a facially neutral condition, requirement or practice, the current law relating to indirect discrimination requires a respondent to prove that the discriminatory condition was reasonable; and, likewise, a respondent bears the onus of proving the application of an exception to an alleged case of unlawful discrimination. Incorporating these aspects of the law into a unified definition means that the allocation of the burden of proof will necessarily have to be specified with great care.

The Discussion Paper draws attention to the difficulty that a complainant may face in establishing causation given that this may require proof of the state of mind of the respondent. In this connection it is pointed out that shifting the burden of proof to the respondent once the complainant establishes a *prima facie* case of discrimination is likely to make it easier in some circumstances for complainants to establish the existence of unlawful discrimination.

At the same time, the principle that an accused is innocent until proven guilty is a fundamentally important part of the law which applies not only to strictly criminal matters, but also to aspects of the law which provide for the imposition of civil penalties, involve respondents in considerable cost and can result in determinations that cast serious aspersions upon the character and reputation of the respondent. This is not to say that such penalties, costs and reputational implications are not warranted where cases of unlawful discrimination are established, but it does serve to underscore the importance of maintaining the principle that a respondent ought to be free of a finding of unlawful discrimination against them until all the elements of unlawful discrimination have adequately been proved.

For these reasons, the Australian Christian Lobby 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. However, given (as is here submitted) that the existing exceptions should be incorporated into the very definition of unlawful discrimination, a more fundamental analysis of the allocation of the burden of proof is required.

As is argued in more detail in response to question 20 below, the existing exceptions to unlawful discrimination exist in order to give due protection to important human rights. Once it is recognised that the law relating to discrimination has to strike an appropriate balance between all of the rights involved, it becomes clear that a complainant ought to continue to bear the full onus of establishing causation, just as a respondent bears the onus of establishing that an exception applies. Requiring both complainants and respondents to bear the full onus of proof in these respects is necessary to ensure that the law gives due weight to the human rights that are at stake on both sides of the equation. The onus on the respondent should only arise once proof on the part of the complainant to the requisite standard has been established.

It is acknowledged that this means that a complainant in some respects bears the onus of proving matters relating to the state of mind of the respondent, but it needs to be recalled that the standard of proof is only on the balance of probabilities, and in practical terms, a respondent will need to give evidence as to the reasons for the conduct in question, and the tribunal assessing the complaint will need to come to a determination on the balance of probabilities based on the evidence submitted by both the complainant and the respondent. Where a complainant submits objective and credible evidence to the requisite standard that supports the conclusion that unlawful discrimination has occurred (but for the operation of an exception), unless the respondent offers credible evidence to the contrary, there is every reason for the tribunal to conclude on the balance of probabilities that unlawful discrimination has occurred. But the onus must still rest primarily upon the complainant to establish unlawful discrimination for the reasons given above.

Question 4. Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?

The Australian Christian Lobby notes that typically, reasonable adjustment requirements apply only in relation to people with disabilities. There are good reasons why such requirements exist. However, there is no inherent reason why the positive duty to make reasonable accommodation should be confined to just one protected attribute if a case can be made out for others. There is a case, for example, to impose upon employers a duty to make reasonable accommodations to

support women with the primary care of pre-school children (as acknowledged for example in the recently enacted sections 17 and 19 of the Victorian Equal Opportunity Act 2010).

Experience both in Australia and overseas now indicates that there is a need to make reasonable accommodations for people based upon respect for their religion or their freedom of conscience. A recent example in Australia was the need of a Seventh Day Adventist, who wished to become a medical specialist, to be able to sit his professional examinations on a day other than Saturday (an issue that was only resolved with great difficulty, and after proceedings had commenced in a Tribunal). An issue has arisen in relation to another Seventh Day Adventist, who has only recently come to faith, and whose religious convictions prevent him from working on Saturdays. In this case, the question is whether his employer, with whom he has had a long career, ought to make reasonable accommodation for him in terms of rostering. This issue is of importance to all religions that require observance on particular days of the week. All those for which Sunday is not the relevant day of religious observance are minority religions in Australia.

Conscience-based issues may also arise in relation to sensitive issues such as the provision of abortion services – a matter that caused considerable controversy when the Abortion Bill was making its way through Parliament in Victoria.

Issues have also arisen in the United States and Britain in relation to civil marriage celebrants who do not feel able to conduct ceremonies for same-sex partners, and relationship counsellors who feel uncomfortable with counselling same-sex couples.

The latter examples, concerning the delivery of a service, give rise to particular difficulties and sensitivities, and involve a tension between different human rights. How can these different rights be appropriately balanced? The Australian Christian Lobby accepts, as a fundamental premise, that a government organisation cannot discriminate in the provision of services or refuse to provide a service that it would ordinarily offer, because of a religiously based objection of a staff member. However, such organisations also need to make reasonable accommodations, especially for employees who are members of religious minority groups, and exempt them from the performance of particular duties that are contrary to their religious convictions provided the functions or services offered by the organisation can otherwise be provided without significant difficulties. Accommodation ought to be made for freedom of conscience only if it is reasonable.

That leaves room nonetheless for ‘back-office’ accommodation of religiously-based objections, where such objections can readily be dealt with through modest adjustments to rostering, discretion in the assignment of clients to staff members or scheduling of appointments. That is, as long as there are other people in the organisation who can readily perform the service to which an individual staff member objects, accommodation of the individual who has a conscientiously-based objection is respectful of that person’s faith and moral values while respecting fully the right of the person to whom the service is to be delivered.

As noted by Arcot Krishnaswami, when UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'since each religion or belief makes different demands on its followers, a mechanical approach to the principle of equality which does not take into account the various demands will often lead to injustice and in some cases discrimination'.[1]

An example of the text sought is found in section 28(3) of the New Zealand Human Rights Act 1993 which reads 'Where a religious or ethical belief requires its adherents to follow a particular practice, an employer must accommodate the practice so long as any adjustment of the employer's activities required to accommodate the practice does not unreasonably disrupt the employer's activities'.

Question 9. Are the current protections against discrimination on the basis of these attributes appropriate?

Religion as a protected attribute

Religion is not a protected attribute in the discrimination provisions of Commonwealth legislation except in the limited context of the Fair Work Act. It is difficult to sustain its exclusion. As a protected attribute, religion is given prominence in the general discrimination provisions of all of the significant international human rights documents. There is no satisfactory reason why religion has so far been given so little protection in Commonwealth legislation.

The Australian Christian Lobby advocates the inclusion of religion as a protected attribute. It sees no need for this attribute to be a 'symmetrical' one. The relevant human rights provisions protect religious belief because of the great importance of religion to many people who have a faith. While the freedom not to hold a religious belief is implicit in the idea of freedom of religion, there is no reason to suppose that, in modern secular Australia, absence of a religious belief needs protection in anti-discrimination law.

Obviously, religious exceptions would need to apply uniformly to discrimination on religious grounds as to other attributes. In other words discrimination in the appointment and training of religious leaders, the selection and appointment of those involved in religious observance or practice, in conforming to religious doctrine, to avoid injury to the religious susceptibilities of adherents, or where based on inherent requirements would all be outside the meaning of discrimination, in the same way as for other attributes, in the model proposed for a limitation provision below.

[1] A Krishnaswami,. 'Study of Discrimination in the Matter of Religious Rights and Practices', U.N. Doc. E/CN.4/Sub.2/200/Rev.1.

There is no right in Commonwealth legislation that equates to that under Article 18 of the ICCPR. Since the context of this review is discrimination laws, this is not the place to promote such a provision, except to make room for the exercise of such a right within the limitation clause or other exceptions. The full text is footnoted here as a reminder of the importance and scope of that right.[2]

Freedom of religion is a self-standing right quite separate from freedom from discrimination on the basis of religion. Many religious groups represented in this country are from minority religions fleeing persecution in other countries. Australia is proud to be a multicultural society yet this omission does religious adherents a serious disservice. While it is accepted that there are limits to what can be achieved to address this in consolidated Commonwealth discrimination legislation, at the very least religion should be added as a protected attribute and the limitation clause should give full and proper recognition to freedom of religion to demonstrate the value of religious diversity in Australian society. A failure to adequately value so prominent a fundamental human right both in the exceptions and as a protected attribute would send a grave message.

Question 20. Should the consolidation bill adopt a general limitations clause? Are there specific exemptions that would need to be retained?

General limitations clause

The Discussion Paper suggests at paragraph 145 that an alternative approach to the current method of specifically providing for a wide range of permanent exemptions would be to introduce a general limitations clause which would clarify that conduct which is necessary to achieve a legitimate objective and is a proportionate means of achieving that objective is not discrimination.

This is strongly supported for a range of reasons, subject to the significant qualifications made below. In general terms, the Australian Christian Lobby considers it important to include as

[2] 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.

examples of the application of such a limitation provision, those exceptions that are already well established under Commonwealth law and to which the Government remains committed. This is to avoid leaving entirely to the courts the decision about what is and is not legitimate and proportionate without any legislative guidance, and creating unnecessary uncertainty in the community.

The Australian Christian Lobby considers that the language of 'exceptions' needs to be removed from the legislation, and instead the limitation clause, together with specific applications of that limitation, should be included in the section or Part of the Act that defines what is, and is not, discrimination.

The Australian Christian Lobby 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 existing religious exceptions (such as those for religious bodies) 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 are 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 limitation clause, 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 they have in international law.

These arguments will be developed further below.

Australia's compliance with the ICCPR

The Australian Christian Lobby supports a general limitation clause, appropriately expressed, because it would be the most effective means of achieving compliance with the non-discrimination provisions of articles 2, and 26 of the ICCPR, in conjunction with the other rights set out in the ICCPR, of which Article 18 is among the most important to religious communities throughout Australia. Australia is open to serious and justified criticism where discrimination laws unduly restrict the exercise of the fundamental human rights guaranteed in the ICCPR. This is most likely where 'exceptions' to antidiscrimination laws do not adequately protect or cover particular rights, or are too narrow. A general limitation clause with the components suggested in the Discussion Paper would, in principle, express the appropriate balance in accord with ICCPR obligations, subject to the following further comments.

The underlying principle for the proposed model is paragraph 13 of the Human Rights Committee's General Comment 18 (Non-Discrimination).

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'.

Adopting permanent statutory exclusions from discrimination prohibitions that give effect to the principle of paragraph 13 would achieve substantive conformity with the ICCPR articles 2, 18 and 26.

The Australian Christian Lobby submits that a general limitation provision based on the principle of paragraph 13 of the Human Rights Committee's General Comment 18 should be of general application. It notes that the Canadian occupational requirements exemption referred to in the Discussion Paper is appropriate only to the workplace/employment context. To be consistent with paragraph 13 the general limitation provision should not be confined to workplace discrimination.

Definition of discrimination or limitation?

The Discussion Paper proposes that the general limitation clause would 'clarify' that conduct which is necessary to achieve a legitimate objective and is a proportionate means of achieving that objective 'is not discrimination' (paragraph 145). The Australian Christian Lobby agrees that this is the appropriate way of understanding the role of a general limitation clause.

There is a material difference between discrimination as applied under the ICCPR and in Commonwealth legislation. Under the ICCPR, discrimination *does not occur at all* if the conduct meets the limitation criteria. That is, the behaviour complained of does not constitute 'discrimination' within its legal meaning. In Australian legislation discrimination is defined and prohibited in very general terms; particular exceptions do not operate as part of the definition of what is and is not discrimination but rather operate only to exempt from the legal prohibition. This is a difference of substance. The approach under the ICCPR, to which Australia is bound, is the appropriate one.

It hardly needs to be pointed out in this context how profound and important freedom of religion is within international human rights law. It is therefore inappropriate for discrimination laws to describe conduct comprising the proper exercise of freedom of religion in terms of otherwise unlawful discrimination which is legitimised only by virtue of such an exception to the general rule. The existing religious exceptions also support the rights of minority groups under Article 27 of the ICCPR.

The inappropriateness of treating fundamental rights merely as exceptions in discrimination legislation, would be exacerbated by existing statutory provisions applicable to the interpretation of statutes (eg Act Interpretations Acts), which prefer a construction that would promote the purpose or object underlying an Act (in this case the prohibition of discrimination) as opposed to a construction that would not promote that purpose or object (such as the exercise of rights recognised within the exceptions).

For these reasons the Australian Christian Lobby supports drafting which would settle unambiguously that conduct is not discrimination if based on reasonable and objective criteria and if the aim is to achieve a legitimate purpose (or which otherwise constitutes conduct covered by an existing religious exemption) as suggested in paragraph 145 of the Discussion Paper. The definition of "discrimination" should exclude conduct covered by the limitations provision.

"Necessary to achieve a legitimate objective" or "The most appropriate method of achieving an objective"

At paragraph 147 the Discussion Paper notes that its proposed limitation clause "would give the courts the ability to consider whether a practice or action was the most appropriate method of achieving an objective". With respect, the role of the court should not be to apply the limitation clause only where the relevant conduct is the most appropriate method.

The use of the term 'necessary', which is appropriate to a conventional limitation clause, is not appropriate in the context of discrimination. The ICCPR does not subject non-discrimination rights in Articles 2 and 26 to the 'limitation' formula applicable to other rights. Nor does the European Convention. This is deliberate. Instead, the term 'discrimination' has its own limits, described by the UN Human Rights Committee in General Comment 13 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'. For this reason, the standard of 'necessity' is inconsistent with the UN Human Rights Committee's formula and should not be applied.

The European Convention similarly does not subject exceptions to discrimination to a limitation provision based on necessity but a formula similar to that of the UN Human Rights Committee. The term discrimination under Article 14 of the European Convention 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*). The same is true of the UK Human Rights Act 1998.

No objection is made to the use of the term 'limitation clause' if it is simply a formula for describing what does not constitute discrimination, provided the restrictive features of a limitation clause noted above are not adopted.

To make clear that the standard to be applied is not one of strict 'necessity' and that the test does not require an adjudicating tribunal or court to substitute its own opinion about 'the most appropriate method' of achieving a legitimate objective, the Australian Christian Lobby submits that the test expressed in the legislation should require that the measures adopted may be considered to be reasonable, appropriate and capable of serving a legitimate objective. The intention is *not* to require or empower the adjudicating body to apply its own view of what the 'most appropriate' measure would have been in the circumstances. It aligns with the approach of the Australian High Court to the domestic implementation of international treaties under the external affairs power, where the test the court has adopted is one of asking whether the implementing law is 'reasonably capable of being considered appropriate and adapted' to the fulfilment of Australia's obligations under the treaty treaty (see, eg, *Industrial Relations Act* case (1996) 187 CLR 416 at 431, 486-8).

Such a test is necessary to provide adequate protection to the several rights guaranteed under the ICCPR, in particular the rights guaranteed in article 18 of that Convention. The measures that are appropriate and adapted to enabling persons, either individually or in community, to have or to adopt a religion or belief and to manifest that religion or belief in worship, observance, practice and teaching is something that must be determined in a manner that fully respects the rights of those persons to adopt a religion or belief *of their choice* and to manifest that *particular* religion or belief in worship, observance, practice and teaching *appropriate to that religion or belief*. It would be inconsistent with the rights guaranteed in article 18 if an adjudicating body were required or empowered to substitute its own view of what would be 'necessary' in order to 'most appropriately' possess, enjoy or exercise the rights guaranteed in article 18. The test proposed above will ensure that the rights guaranteed in article 18 are not unfairly constrained.

Recognition of the need to balance different human rights in consolidated legislation

The consolidated legislation should acknowledge in the Preamble that the purpose of the legislation is to give effect to the obligations of Australia under the ICCPR and to balance the different rights of individuals under that Covenant, including the right to equal treatment and freedom from discrimination.

This acknowledges that giving effect in legislation to rights of equality and non-discrimination involves a sometimes complex process of balancing those rights with other rights and freedoms including freedom of religion (Article 18), freedom of association (Article 19) and the rights of minorities (Article 27). This is the basis for excluding certain conduct from the meaning of discrimination.

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 limitation

clause 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 proposed 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.

The limitation provision must provide scope for the essential operation and assertion of certain fundamental rights and freedoms. As such the limitation provision is not to be construed restrictively.

Clarification of issues of uncertainty

If there is any concern that there might be uncertainty in the application of a limitation provision incorporating a formula based on criteria that may be regarded as reasonable and objective and in pursuit of a legitimate purpose, it has not been an obstacle to the UN Human Rights Committee's consideration of issues of discrimination over more than 40 years in both the criminal and civil contexts, spanning issues of gender discrimination, minority rights, age discrimination, racial discrimination, disability discrimination, sexual discrimination, special measures/affirmative action, children, employment, equality in the workplace, family, standards of living, education, effective remedies, health, family planning, indigenous peoples, maternity and pregnancy, freedom of thought, conscience and religion. (The same is true of discrimination under Article 14 of the European Convention which has applied the *Belgian Linguistics* formula for over 40 years.)

This track record of the formula should be sufficient to meet concerns over uncertainty. Further clarity may be achieved in the consolidated legislation through the usual practice of providing examples of exempt conduct consistent with the policy of the current exceptions in Commonwealth discrimination legislation.

Specific exceptions inadequate

Specific exceptions in Commonwealth laws cannot do justice to the range and complexity of issues that arise when freedom of religion intersects with discrimination.

A general limitation provision is considered to be better capable of providing just resolution of conflict between non-discrimination and other rights than specific exceptions. A general provision would be able to keep step with contemporary demands (though it is anticipated that the requirements in the limitation clause for the freedom of religion are expected to be relatively

stable and unchanging). There will also be less demand for future reforms as outmoded exceptions no longer serve contemporary purposes.

Are there specific exceptions that would need to be retained?

In order to promote certainty, it is submitted that the existing religious exceptions should be incorporated into the consolidated legislation in the form of statutory examples clarifying the intended operation of the limitations provision (see Questions 21 and 22 below for further submissions).

In short, the Australian Christian Lobby submits that a general limitation provision adopting the language of paragraph 13 of the Human Rights Committee's General Comment 18, similar to that proposed in paragraph 145 of the Discussion Paper, should have general application.

Question 21. How should a single inherent requirements / genuine occupational qualifications exemption from discrimination in employment operate in the consolidation bill?

Question 22. How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

Questions 21 and 22 are answered together by a single proposal advanced by the Australian Christian Lobby for the adoption in consolidated legislation of a general limitation clause, with additional text confirming by way of illustration that conduct within the existing religious exceptions in Commonwealth legislation meets the criterion for the limitation clause suggested above.

The most significant departure from existing legislation posed by a single limitation clause would be that the relevant attribute, the scope of permitted discrimination and particular area of permitted discrimination would not be specified. At present, one of the most difficult aspects to comprehend in Commonwealth discrimination laws is the detailed intersection of these elements within the exceptions. There is much to be commended in a limitation clause that is able to operate according to a simple criterion, supported by legislative illustrations of practical examples representing at least the coverage of existing exceptions.

By this means the existing religious exceptions (for example in the Sex Discrimination Act sections 37 and 38, and Fair Work Act sections 153, 194-5, 351, 772) would be preserved. The most important exceptions specifically crafted for religious bodies are those relating to the appointment and training of religious leaders, the selection and appointment of those involved in

religious observance or practice, and acts or practices conforming to religious doctrine or to avoid injury to the religious susceptibilities of adherents. Equally important but not specific to religious organisations are exceptions based on the inherent requirements of the particular position concerned in the Fair Work Act. All these considerations apply to workplace decisions. The consolidated legislation should affirm these existing exceptions among those applicable to religious bodies.

The Australian Christian Lobby notes the wording of the occupational requirements text found in the European *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.* That directive is fully supportive of measures directed against every internationally recognised form of attribute-based discrimination. It lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in European Member States the principle of equal treatment.[3] It is clear from the recitals that the terms of the Directive are consistent with and in furtherance of: principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law; principles of equal treatment between women and men; the right of all persons to equality before the law and protection against discrimination; recognition that employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential; and the need to prohibit any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation. The Australian Christian Lobby considers this a valuable reference point for the drafting of the inherent requirements/genuine occupational qualifications exception.

[3] Article 4 reads: "Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

The Government is committed to introducing sexual orientation and gender identity as new protected attributes. This is understandable. The Australian Christian Lobby does not raise any opposition to this on freedom of religion grounds. It only seeks to ensure that the limitation clause applies in such a way as to express positively and unambiguously the right of religious groups and individuals to practise their religion freely. For religious groups as employers this should, for example, allow them to prefer employees of faith, based on inherent requirements and other faith stipulations, as noted above. Those exercising their freedom of religion do not seek to discriminate on the basis of sexual orientation or gender identity but rather seek to employ staff most suited to the religious environment of the employer. What is sought 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. The limitation clause should clearly embrace this. To make specific reference to sexual orientation and gender identity would be divisive and would miss the point. The goal of every employer is to recruit those who best support and serve the organisation's aims.

There is of course a possibility that issues may arise where a person's publicly known sexual behaviour contradicts the values and teachings of a religious organisation notwithstanding that the person, when employed, professed adherence to those values. This will not only be an issue with homosexual behaviour but with heterosexual relations outside marriage as well. That issue can be dealt with if, as we recommend, the limitation clause is brought within the definition of discrimination and provides specific examples of actions that are not 'discrimination' including where taken by an organisation that directs, controls or administers an entity which is intended to be conducted in accordance with religious doctrines, tenets, beliefs or teachings and either:

> (a) it is reasonably necessary in order to comply with the doctrines, tenets, beliefs or teachings of a particular religion or creed; or
> (b) it is necessary to avoid injury to the religious sensitivities of adherents of that religion or creed.

Question 29. Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?

It is the Government's intention, quite properly, that State and Territory anti-discrimination laws should operate concurrently, with complainants being able to proceed under either state or federal law in cases where the conduct complained of violates both state and federal prohibitions.

It follows that if State and Territory anti-discrimination laws are not to be displaced by federal law, then federal 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 are there in order to help to secure certain fundamental freedoms, including the right to freedom of thought, conscience and religion guaranteed in article 18 of the ICCPR.

Conclusion

The Australian Christian Lobby supports the consolidation of anti-discrimination legislation, as a consolidated Act would lead to greater clarity of anti-discrimination law.

However, ACL urges a cautious approach, having regard to the potential ramifications a new Act may have, particularly for religious freedom.

ACL reiterates its proposal that a general limitation provision, subject to the qualifications elaborated as discussed, be included as part of the definition of discrimination. Certain conduct should not be considered discrimination if reasonable and objective criteria are employed to pursue legitimate purposes.

ACL also proposes that there be a duty on employers to make reasonable accommodation for employees based upon respect for the religious beliefs or conscience.

ACL also proposes that religion be a protected attribute against discrimination in a consolidated anti-discrimination Act.