

CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

A SUBMISSION FROM

THE SEVENTH-DAY ADVENTIST CHURCH - AUSTRALIA

Preamble

The Seventh-day Adventist Church in Australia wishes to express appreciation to the government and the Attorney-General's Department for the opportunity to contribute to the discussion on the proposed consolidation of Commonwealth anti-discrimination laws, referencing the Discussion Paper of September 2011.

The general intent of actually consolidating the current Commonwealth anti-discrimination laws is supported, noting that such consolidation is not to weaken current provisions. The Seventh-day Adventist Church, as a Christian movement, is strongly of the view that human beings of all races, ages, abilities (or lack thereof), gender and persuasion should enjoy the respect of others.

MEANING OF DISCRIMINATION

Anti-discrimination legislation should ensure that the definition of discrimination is stated so as to clarify that it is not unlawful discrimination where a right to freedom of religion, association and/or cultural expression is being legitimately exercised - positive discrimination, as opposed to negative discrimination. Such definition should clarify that selection on the basis of an attribute does NOT constitute discrimination against someone who does not have that attribute, so long as such selection is for the purpose of supporting another human right or for genuine occupational requirements.

PROTECTED ATTRIBUTES

The complexity of human life, whether global or in local community, does mean the inevitable differences will at some point in time come into conflict. The challenge for legislators is to adequately protect the fundamental human rights of individuals and communities while still providing for open discussion, debate and difference.

And what are those 'fundamental' human rights? Current legislation highlights race, sex, disability and age for protection. The Discussion Paper notes the intention to add sexual orientation and gender identity as protected attributes, thus signifying that it is the view of the government and Attorney-General's Department that these are also of such a fundamental nature that they need to be specifically protected from discrimination. In extending the protected attributes with just these new elements, there is a strong implication that Commonwealth legislation has now captured all the fundamental human rights so as to protect them from negative discrimination.

Freedom of Religion and Belief

Nowhere in Australian legislation is the fundamental human right of freedom of religion and belief referenced positively in its own right. It is only protected through exception and exemptions. If, in fact, sexual orientation and gender identity is of such fundamental importance that they are to be protected attributes, why would not freedom of religion and belief receive at least that measure of value?

The Discussion Paper (Executive Summary #6) confirms the government's intention to review legislation, policies and practices for compliance with the seven core United Nations human rights treaties to which Australia is a party. These, along with the Universal Declaration of Human Rights, underscore the fundamental nature of freedom of religion and belief. Yet in Australia, this fundamental human right is increasingly required to defend itself for legitimacy. While exceptions

and exemptions alone have adequately addressed this fundamental human right till now, a minority but LOUD voice is calling for restrictions to freedom of religion and belief for individuals and communities. Even the Discussion Paper (paragraph 166 under Question 21) acknowledges this reality.

Interestingly, the Canadian government gives freedom of religion such a high level of importance in their society that they have announced their intention to establish an Office of Religious Freedom, and have reiterated that commitment at the United Nations General Assembly in September 2011.

In view of the changing circumstances of modern society it is time that Australian legislation overtly declares freedom of religion and belief as a protected attribute. This is essential to protect that particular fundamental and non-derogable human right for all Australians into the future as well as ensuring the ongoing compliance of Australia with its international obligations to those human rights treaties to which it is a signatory.

The inevitable question is, *How might the fundamental human right of freedom of religion and belief be expressed in the context of anti-discrimination legislation?* Once the principle of inclusion is addressed, the matter of detail should be subject to further consultation.

Inclusion of volunteers (Question 12)

The principle of inclusion of volunteers in anti-discrimination legislation is supported. The issue this submission raises here is not so much whether to include but that much thought must be given to the impact of regulatory impositions on volunteer organisations, noting that these organisations and their volunteers are such a valuable asset to Australian life and society.

EXCEPTIONS & EXEMPTIONS

The many differences between human beings, highlighted even more in multi-cultural contexts, make for a fascinating and interesting society. At times, those differences inevitably compete, which is a normal part of living together. It is recognized by all involved in equal opportunities and human rights issues that there is a point where competing rights and equality at times will need an umpire. Legislation is one way to formally protect fundamental human rights, with anti-discrimination legislation being one such form.

In view of the responsibility of the Australian government to its own citizens as well as its international obligations, exceptions must remain in order to make allowance for rights to freedom of religion, association and cultural expression. While this method of approach does not adequately recognize the fundamental and extensive nature of these freedoms, it remains the minimalist approach. In consolidating Commonwealth anti-discrimination legislation, exceptions and exemptions for religious bodies and institutions operated by religious organisations in accord with their religious beliefs should be fully preserved. The proposed new legislation must come about without any diminution of the protection afforded to freedom of religion, association and cultural expression. Such rights and freedoms must be accorded all religious organisations no matter the service, whether education, aged care, counseling, health, or any other.

There should be no reference to “inherent requirement” in exceptions and exemptions as this dualistic approach is opposed to the holistic approach to life held by most religions. Any anti-discrimination legislation forcing such a worldview on religious bodies has itself become discriminatory.

Temporary exemptions are not satisfactory in matters of religious belief and practice. By their very nature, such beliefs are longstanding. Temporary exemptions would create uncertainty and most certainly would not adequately address the obligations of the Australian government to ensure the fundamental nature of religious freedom.

The principles noted above cannot be limited to organisations. The individual must also have freedom to be true to their genuine religious convictions without threat to their person or position. Thus individual employees should also be afforded freedom from discrimination by their employer. Employers should extend reasonable accommodation to their employees on the basis of their religious belief (or even cultural traditions). This should include the employer not requiring an employee to undertake particular tasks or provide services in a particular context that is contrary to the employee's genuine religious convictions. The essence of this perspective is echoed in paragraph 57 of the Discussion paper, but that paragraph is only referring to protected attributes. (Thus the need to consider including freedom of religion and belief, as stated in the relevant United Nations covenants and declarations, as a protected attribute.)

COMPLAINTS & COMPLIANCE

Burden of Proof (Recommendation 22)

This submission strongly protests any thought of the burden of proof being fully that of the respondent once a discrimination complainant comes forward, such as is the approach of the Fair Work Act. Our democratic freedoms are constructed on such principles as innocent until proven guilty. Such an approach to burden of proof may encourage mischievous claims.

The burden of proof being fully on the complainant has its challenges, especially where the respondent might be a large and powerful organization. But, in its favour, it would require the complainant to be sure of their case and serious.

The UK model, where the burden of proof shifts to the respondent once the complainant has established a *prima facie* case of discrimination, is much more preferable to the horrific approach taken in the Fair Work Act. But it does still leave itself to out-of-court settlements rather than solutions, thus never getting to the heart of whatever the issue was that caused the alleged discrimination.

In considering the above, the current approach, while variations may still exist, is likely the best for now.

CONCLUSION

The definition of discrimination might be reviewed in light of the need to overtly provide for legitimate positive discrimination.

The proposed addition of sexual orientation and gender identity as a protected attribute, with all the implications that arise from such protection, raises the need for other far more fundamental human rights that should be placed within Commonwealth anti-discrimination legislation as protected attributes, such a freedom of religion and belief.

Volunteers need protection, but so do volunteer organisations. In developing this legislation, be sure to take into account the impost it might have on organisations, especially those that are more vulnerable.

The current exceptions and exemptions for religious entities most certainly should remain.

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