

Consolidation of Commonwealth Anti-Discrimination Legislation Discussion Paper,
Attorney-General's Department, Parliament of Australia, September 2011

Submission from Australian Baptist Ministries



By Rev Rod Benson

Ethicist and Public Theologian, Tinsley Institute, Morling College

Mail: 120 Herring Rd, Macquarie Park NSW 2113

Telephone: 02 9878 0201

Facsimile: 02 9878 2175

Email: ethics@morling.edu.au

Website: <http://www.baptistnsw.asn.au>

31 January 2012

Introduction

In September 2011 the Commonwealth Attorney-General's Department issued a discussion paper seeking community views on the consolidation of Commonwealth anti-discrimination laws into a single Act as a key component of Australia's Human Rights Framework.¹ The stated rationale for such consolidation was an assumption that anti-discrimination laws had become too complex and that it was important for people to easily understand their rights and obligations.

Commonwealth anti-discrimination law is currently contained in four separate pieces of legislation, namely the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Age Discrimination Act 2004*. A fifth, the *Australian Human Rights Commission Act 1986*, establishes the Australian Human Rights Commission and provides mechanisms for resolving complaints of unlawful discrimination. On 21 April 2010, the government announced its intention to consolidate these Acts into a single, comprehensive law as part of Australia's Human Rights Framework.² The government also committed to extend the scope of the current laws by introducing new protections against sexual orientation and gender identity. The federal Attorney-General and the Minister for Finance and Deregulation are jointly responsible for taking the consolidation project forward.

This submission in response to the issues raised in the *Discussion Paper* is made on behalf of the National Council of Australian Baptist Ministries, previously known as the Baptist Union of Australia.³ The National Council comprises an executive and the principal officers of all State and Territory Baptist Unions and affiliated national agencies. Australian Baptist Ministries thanks the federal Attorney-General and her Department for the opportunity to respond to the *Discussion Paper*.

Meaning of Discrimination

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?

The current definitions of discrimination, and the current distinction between direct and indirect discrimination, should be maintained. Objective tests (supported by documented rules or ethical codes of conduct) should be applied in preference to subjective tests such as were used in the recent Wesley Mission case. Governments and courts must not deny human rights which people currently possess under Australian law. Freedom of religion should be recognised as a fundamental human right, not a favour or concession to religion and religious practitioners which might be withdrawn.

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

¹ The *Discussion Paper* (22 September 2011) is available at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(689F2CCBD6DC263C912FB74B15BE8285\)~Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.pdf/\\$file/Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(689F2CCBD6DC263C912FB74B15BE8285)~Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.pdf/$file/Consolidation+of+Commonwealth+Anti-Discrimination+Laws-Discussion+Paper.pdf).

² On the Australian Human Rights Framework (April 2010) see http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationAustralia's_Human_Rights_Framework

³ <http://www.baptist.org.au>

The Australian approach of imposing the full burden of proof on the complainant should be maintained.

Question 3. Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?

No.

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 duty to make reasonable adjustments in the DDA should not be applied to other attributes since the notion of “reasonableness” and the defence of “unjustifiable hardship” apply specifically to disability. Extension of this duty to other forms of discrimination would be resisted on theological and practical grounds and would create uncertainty for business and other sectors of the community.

Question 5. Should public sector organisations have a positive duty to eliminate discrimination and harassment?

Public sector organisations should have a positive duty to eliminate discrimination and promote fundamental human rights including freedom of religion and freedom of conscience in accordance with Australia’s commitment to international human rights conventions.

Question 6. Should the prohibition against harassment cover all protected attributes? If so how would this most clearly be expressed?

Yes. The prohibition of unlawful discrimination on the basis of harassment should be expressed in such a way as to ensure that there is no unlawful discrimination where a right to freedom of religion, freedom of conscience or freedom of speech is being legitimately exercised.

Protected Attributes

Question 7. How should sexual orientation and gender identity be defined?

Sexual orientation and gender identity should be defined in legislation according to the best available evidence-based research and the consensus of public sentiment.

Question 8. How should discrimination against a person based on the attribute of an associate be protected?

The current provisions relating to discrimination against a person based on the attribute of an associate should be maintained.

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

Yes.

Question 10. Should the consolidation bill protect against intersectional discrimination? If so, how should this be covered?

No.

Protected Areas of Public Life

Question 11. Should the right to equality before the law be extended to sex and/or other attributes?

The right of equality before the law for people of different racial or ethnic groups should be extended to include equality before the law in relation to other attributes including sex, disability, and religion and belief. People should not be treated as unequal before the law on the basis of their decision to live in community in accordance with their particular convictions, beliefs and customs.

Question 12. What is the most appropriate way to articulate the areas of public life to which anti-discrimination law applies?

The most appropriate way forward would be to affirm the approach generally taken in Commonwealth anti-discrimination law (i.e. to make discrimination unlawful in specific activities and in specific areas of public life) and extend this approach to other relevant areas of public life.

Question 13. How should the consolidation bill protect voluntary workers from discrimination and harassment?

The human rights of voluntary workers should normally be protected in the same way as those of other workers are protected in the workplace.

Question 14. Should the consolidation bill protect domestic workers from discrimination? If so, how?

The consolidation bill should limit its jurisdiction to matters relating to public life.

Question 15. What is the best approach to coverage of clubs and member-based associations?

The best approach would be to seek to extend relevant anti-discrimination provisions to clubs and member-based associations while also seeking to accommodate legitimate exceptions to such provisions as requested by the group, where these exceptions are based on established principle rather than expediency or commercial advantage.

Question 16. Should the consolidation bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?

No comment.

Question 17. Should discrimination in sport be separately covered? If so, what is the best way to do so?

The provisions of the Victorian Act as outlined on page 33 of the *Discussion Paper* are to be preferred since they appear to address relevant matters in a comprehensive and fair way.

Question 18. How should the consolidation bill prohibit discriminatory requests for information?

The consolidation bill should consider the approach taken in Victoria and Queensland (i.e. prohibiting requests for information that could be used to discriminate against a person on the basis of a protected attribute), which places the onus on the person requesting the information to prove that it is required for non-discriminatory purposes. However, the bill should also consider an approach which provides for reasonable requests for information about a person's protected attribute where there is legitimate reason to do so.

Question 19. Can the vicarious liability provisions be clarified in the consolidation bill?

No comment.

Exceptions and Exemptions

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

The consolidation bill should not adopt a general limitations clause for the reasons outlined on page 37 of the *Discussion Paper* (paragraph 148). Parliaments, not the courts, are the appropriate institution for determining the appropriateness of exceptions and exemptions from anti-discrimination provisions with respect to particular persons or groups. Recent experience in Australia indicates that, where religious anti-discrimination legislation is in force, the outcome is excessive restriction on religious freedom. Freedom of expression and freedom of association are also in danger of erosion through the apparently unintended consequences of religious anti-discrimination legislation. The legal and personal costs associated with anti-discrimination hearings and appeals on the grounds of religion and belief are extremely onerous and serve to further restrict religious freedom.⁴ In recent years, human rights charters in Victoria and the ACT, and religious anti-vilification legislation in Victoria, Queensland and Tasmania, have all possessed counterproductive intent or have facilitated undesirable outcomes with respect to religious freedom.

The specific exemption for inherent requirements and genuine occupational qualifications should be retained in legislation. However, it should be emphasised that freedom of religion and freedom of conscience are fundamental human rights, and the rhetoric of exceptions and exemptions on religious grounds wrongly implies that religion and conscience are not fundamental human rights.

All individuals and groups in Australia should uphold freedom of religion, including the right to not hold religious beliefs, as a fundamental human right and a major contributor to a free and democratic society. Those societies which have severely restricted or outlawed religious freedom (such as the USSR, Nazi

⁴ Note, in particular, *Catch the Fire Ministries Inc. & Ors v Islamic Council of Victoria Inc.* [2006] VSCA 284 (14 December 2006), available at <http://www.austlii.edu.au/cases/vic/VSCA/2006/284.html>

Germany, China, North Korea, Kampuchea, and certain contemporary Islamic states) have been among the most repressive and undemocratic societies, and the locus of significant human rights abuse.

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

The consolidation bill should define what is meant by “inherent requirement,” and specifically allow exceptions for religious bodies and educational institutions without any diminution of the protection accorded to freedom of religion, association and cultural expression. Further, Commonwealth laws should not override provisions in State anti-discrimination laws that protect religious freedom.

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

Australian Baptist Ministries acknowledges the right of every person to pursue a sexual identity and to engage in lawful sexual practices. However, Christians who accept the Bible as the supreme authority for faith and conduct will normally identify certain sexual practices and social arrangements as inappropriate on the basis of biblical teaching, traditional wisdom and experience. Religious organisations (e.g. churches, schools, theological colleges, hospitals, aged care organisations, counselling agencies) possess the right to pursue their religious activities according to conscience. Any action by the state that has the effect of restricting or curtailing these rights, such as imposing requirements or restrictions on employment, is an abrogation of both religious freedom and freedom of association. Rules pertaining to the employment of staff by a religious organisation ought to be considered on similar grounds as employment of staff by a political organisation. There should be formal recognition of the freedom of persons and groups to provide and have access to goods and services in accordance with conscience and religious belief.

Question 23. Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

Temporary exemptions should continue to be available according to established guidelines provided that they do not affect the application of permanent exemptions from anti-discrimination legislation such as on the grounds of freedom of religion and freedom of conscience which are fundamental human rights.

Complaints and Compliance Framework

Question 24. Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?

Consideration should be given to strengthening the Australian Human Rights Commission’s support for religious freedom and freedom of conscience by appointing a full-time Religious Freedom Commissioner to address matters relating to the practice of religion and belief.

Question 25. Are any changes needed to the conciliation process to make it more effective in resolving disputes?

No comment.

Question 26. Are any improvements needed to the court process for anti-discrimination complaints?

No comment.

Question 27. Is it necessary to change the role and functions of the Commission to provide a more effective compliance regime? What, if any, improvements should be made?

See comment on question 24.

Interaction with Other Laws and Application to State and Territory Governments

Question 28. Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?

No comment.

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

No comment.

Question 30. Should the consolidation bill apply to State and Territory Governments and Instrumentalities?

Commonwealth laws should not operate so as to override provisions in State anti-discrimination laws that protect religious freedom.

Conclusion

Historically Baptists have played an important role in defining and defending human rights, in particular the notion of the inherent dignity of the individual human person, and the insistence on freedom of religion and freedom of conscience as fundamental rights. Baptists do not conceive of rights in isolation but respect the need to strike a balance between asserted rights and other concerns such as duties toward God and other persons. Baptists also generally regard human rights as a means to an end, such as freedom to respond to divine revelation or freedom to follow the way of Jesus Christ.

Normative Christian values have profoundly shaped Australian society and its public institutions, have a central place in Australian life today, and will continue to shape this nation for generations to come. Any threat to the exercise of those values should be viewed as a threat to our established way of life, our cherished national culture and heritage. Australian Baptist Ministries believes that the existing legal provisions for addressing alleged discrimination serve Australians well. The human rights of all Australians are adequately protected by Federal and State laws, with recourse to international law and conventions where

appropriate, such as the Universal Declaration of Human Rights and associated instruments. Where the effectiveness of Australian human rights law is disputed, or where political or bureaucratic failure leads to alleged injustice, there are appropriate processes in place for appeal and resolution.

Whereas some Baptists and Baptist churches and affiliated agencies in Australia would support reforms aimed at strengthening Commonwealth anti-discrimination legislation along the lines of the proposed consolidation bill, there is significant opposition to any legislative or regulatory reform which would have the effect of undermining freedom of religion or freedom of conscience as fundamental human rights deserving of the strongest advocacy and support. Any proposed amendment or consolidation of existing anti-discrimination laws must be judged on the basis of the extent to which it will protect these fundamental rights. Unless carefully constrained by key players and community groups, such consolidation, though well intentioned, may result in outcomes which erode or deny the fundamental human rights of Australians. Australian Baptist Ministries therefore recommends a cautious and minimalist approach to the reform of Australia's anti-discrimination laws, and welcomes the opportunity to consult further on these important issues.

Rod Benson
on behalf of the National Council, Australian Baptist Ministries
31 January 2012