

**Australian Catholic
Bishops Conference**

**Response to
Consolidation of Commonwealth
Anti-Discrimination Laws
Discussion Paper**

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To:
Assistant Secretary
International Human Rights and Anti-Discrimination Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600
Email: antidiscrimination@ag.gov.au

Contact:
Fr Brian Lucas
General Secretary
GPO Box 368 Canberra ACT 2601
T: [removed] F: [removed]
Email: [removed]

Introduction

The Australian Catholic Bishops Conference (ACBC) is a permanent institution of the Catholic Church in Australia and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The Catholic Church contributes in a wide variety of ways across the spectrum of Australian society. As an integral part of its core mission, the Church seeks to assist people experience the fullness of life. It is concerned with all that impacts on human wellbeing. It comprises many thousands of different entities which have different purposes and modes of governance.

Anti-discrimination laws, appropriately applied, can contribute to security, freedom and opportunity for fulfilment in a wide range of human endeavours. The laws developed by the Commonwealth, State and Territory Governments over recent decades have contributed to civil life in many spheres of Australian society.

The proposed consolidation of anti-discrimination laws across four Commonwealth acts relating to discrimination on the grounds of race, sex, disability and age¹ has the potential to introduce consistency in the application of anti-discrimination laws across jurisdictions and in relation to the rights of complainants, applicants and people in positions of authority in business and the welfare sector. If drafted with enhanced clarity, simplicity and objectivity, consolidated laws have the potential to enable more efficient and cost-effective interpretation and application of the law. This reduces the compliance costs of employers and service providers who currently have to contend with multiple discrimination statutes. The ACBC recommends that the consolidation regulate this area of law nationally.

The Government's Consultation Paper makes reference to the current range of general and specific exemptions relating to religious organisations. It is important to keep in mind that these exemptions exist to preserve and foster religious freedom – for both religious organisations and their members. Many people who adhere to religious belief exercise their religious freedom to promote the common good.

Religious Freedom

Freedom of religion is a fundamental human right. Its existence and importance is acknowledged in international covenants to which Australia is a signatory. It is a freedom that cannot be ignored. Governments are obliged to ensure that freedom of religion and the freedom to manifest religious beliefs in public is recognised and protected in law. It applies equally to participation in religious observance and to the delivery of services by religious people and agencies.

The right of religious freedom is captured in the *International Covenant on Civil and Political Rights* (ICCPR):

¹ This response recognises that the Acts proposed for consolidation are: *Racial Discrimination Act 1975 (RDA)*, *Sex Discrimination Act 1984 (SDA)*, *Disability Discrimination Act 1992 (DDA)* and the *Age Discrimination Act 2004(ADA)*.

- *Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion; and political or other opinion, national or social origin, property, birth or other status. (ICCPR, Article 2(1)); and*
- *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (ICCPR, Article 26)*

The right to religious freedom (ICCPR, Article 18) is a “non-derogable” right under Article 4(2), meaning that governments may not act to restrict or suspend this right even in times of public emergency. It may also be helpful to explain that while the right to religious freedom may be subject to certain restrictions, *“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”* (ICCPR, Article 18(3)).

While the right to religious freedom may be subject to certain restrictions, *“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”* (ICCPR, Article 18(3)).

While the rights of everyone must be respected, including the right to be protected from unjust discrimination, this should not be pursued in a way which undermines religious freedom.

The language of exemptions and exceptions is misleading and fails to recognise that religious freedom is not a special permission to discriminate granted by government but a fundamental human right that government is obliged to protect. To make this clear and to remove the potential for misunderstanding, consideration should be given in any draft legislation to replacing the language of *exemptions* and *exceptions* with that of *protections* for the right to religious freedom. This change in the language used in legislation should also be applied to other fundamental rights, such as the right to freedom of association.

While one of the Commonwealth Government’s principles in the consolidation of laws is no reduction in existing protections in federal anti-discrimination legislation, the consolidation of anti-discrimination laws should not lead to any reduction of accepted freedoms celebrated in Australia. One way of helping to ensure this is to call protections of other rights in any draft legislation *protections*.

When Churches and Church members express their religious freedom and their cultural, ethnic and religious identity through acts of worship or charity, they continue and celebrate traditions dating back centuries. These expressions of identity arise not only in ceremonial activities of worship and devotion in churches, but also, under the auspices of the Catholic Church, in the treatment of staff and students in schools, staff and patients in hospitals, staff and residents in aged care facilities and staff and clients of services for people experiencing homelessness. As human beings endowed with

religious freedom people have the right to contribute to society and serve humanity in accordance with those beliefs.

Parents choose Catholic schools for their children because they expect that this education will be provided by teachers in a manner consistent with the doctrines, beliefs and practices of the Catholic Church. If a teacher in a church school publicly argues against church teachings or lives in such a way to challenge those teachings, the school should have the freedom to refuse to employ that person. The Catholic Church does not impose its beliefs on anyone and no one is obliged to work for a church agency. The expectation that those working in a Catholic agency will support its mission applies to everyone without discrimination.

People considering a move into a church aged care facility have an expectation that the particular ethos of that church will be reflected in the operation of the facility. If a resident or staff member is publicly advocating against or working in a way contrary to that ethos, the Church should have the freedom to refuse to accept that person.

In each situation, school education and aged care, Catholic organisations meet all regulatory requirements for eligibility to offer educational and aged care services, and also manage the culture of the organisations and the treatment of individuals, whether employees or clients, consistent with the doctrines and practices of the Catholic Church.

In the consolidated legislation, recognition should be given to the exercise of rights to religious freedom embodied in law and as encapsulated in statements of mission, values, philosophy or a code of conduct of religious organisations.

Attributes

The ACBC supports the retention as protected attributes of the following attributes listed in paragraph 71 of the Discussion Paper:

- race
- immigrant status
- pregnancy or potential pregnancy
- breastfeeding
- family responsibilities
- disability, and
- age.

The ACBC expects the consolidated bill to uphold the right to religious freedom in relation to the following attributes:

- religious belief or activity,
- sex, sexual orientation and lawful sexual activity,

- marital status and parental status, and
- gender identity.

Specific Issues

Sexual Orientation and Gender Identity

There is scope for matters relating to sexual orientation and gender identity to conflict with the right of people to practise their religion and to live, educate and serve others in accordance with their most deeply-held beliefs and values.

If protection as afforded to the current range of attributes is going to be extended to new attributes, this may give rise to potential conflicts with Church teachings, and therefore the freedom of religious persons and bodies to act consistently with their religious beliefs needs to be recognised and protected.

The critical role of Volunteers

Volunteers are the backbone of the church. Every activity of the church relies on the generous support of volunteers. Numerically a typical parish may well have over 100 volunteers supporting church and school activities and visiting the elderly, sick or poor. Across the Church nationally, tens of thousands of volunteers are involved in the activities of the Church across Australia. Any new legislation that diverts managerial and financial resources away from service delivery to managing risk, litigation and developing protocols to serve new anti-discrimination laws, risks jeopardising the services provided by Church agencies and volunteers. Therefore, the ACBC does not support the application of anti-discrimination to the acceptance of and treatment of volunteers in the same way as applied to employees.

A regulatory or financial burden placed on churches or charities should not be so high as to hinder the recruitment and retention of volunteers, as the costs will fall on those people the organisations care for.

Responses to Individual Questions

Responses to selected individual questions and selected clusters of questions are contained in APPENDIX A.

APPENDIX A

Comments on Selected Individual Questions Listed in the Discussion Paper

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

The ACBC supports the retention of existing arrangements for proving discrimination contained in Clause 48 of the Discussion Paper. The Church and the not-for-profit sector generally are significant employers in the community. There would be a significant and unnecessary financial burden if the reverse onus was applied to them.

The burden of proof issue is very important. Already because of the standard set by the *Ellenbogen* decision, the Australian Human Rights Commission must accept any complaint which, taken at its highest, would amount to discrimination under the legislation. In effect, this creates a situation where complaints that are lacking in substance and therefore have no reasonable prospects of success are accepted, proceed to conciliation and must be responded to by employers. Complainants therefore already have a significant advantage in having matters conciliated because they allege discrimination on a ground in the legislation when there is little or no evidence to support the allegation. Complainants should continue to be put to the task of having to make out their claim.

The current approach of allocating the full burden of proof to the complainant should remain because this is consistent with the existing approach in Commonwealth anti-discrimination laws. It will be a burden for employers to achieve compliance under the consolidated laws without the challenge of having to satisfy a reverse onus of proof.

In addition, a change in burden of proof with the introduction of any new attributes would generate considerable challenges and costs for organisations across society.

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?

Special measure provisions need to reflect the nature of the discrimination and disadvantage.

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

Positive initiatives are at the heart of much of the mission of the Church in its charitable works in education, health, aged care and with the poor in the community. The valuable outcomes achieved with scarce resources in these activities may be jeopardised if additional costs of uncertain magnitude are placed on the churches and not-for-profit sector to comply with anti-discrimination laws.

While the reasonable adjustments test has a place in the DDA, generalising its application across all attributes carries with it a risk of adding uncertainty and significantly to costs for churches and the not-for-profit sector. From a practical perspective, the “reasonable adjustments” test is not one that can or should be applied to any other protected ground.

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

As long as the positive duty is applied to behaviours within entities owned and operated by the Government, the ACBC is in support of attempts to eliminate *unjust* discrimination. However, it would be inappropriate for this duty to extend to non-government organisations that engage with Government through purchasing contracts or as recipients of grants.

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

The ACBC supports the prohibition against harassment.

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

For the information of the Department the ACBC refers to the key principles relating to these definitions as explained by Archbishop Silvano Tomasi (Holy See Permanent Representative to the United Nations in Geneva) in his speech to the UN during the debate on the recent UN resolution on sexual orientation. Archbishop Tomasi notes there is confusion over the meaning of the terms ‘sexual orientation’ and ‘gender identity’ and they are not defined under international law. The terms relate to thoughts and feelings rather than what governments can regulate, which is behaviour. Human sexuality is not an identity, but is a gift expressed in actions which necessarily have a moral dimension. The Church sees human sexuality “... expressed in the complete and lifelong mutual devotion of a man and a woman in marriage.”²

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

Question 22 How might religious exemptions apply in relation to discrimination and gender identity?

In relation to Questions 11 and 22, the right to freedom of conscience and religion should be upheld as there is scope for the attributes of sexual orientation and gender identity to undermine the freedom of Catholic bodies to have the right to employ or admit those who are committed to Catholic teachings and beliefs.

The ACBC would want further opportunity to provide comment if detailed legislative drafting is undertaken to pursue greater anti-discrimination protection in relation to sexual orientation and gender identity.

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

² Link to Archbishop Tomasi’s speech at the 16th Session of the Human Rights Council – General Debate Geneva, 22 March 2011: <http://www.radiovaticana.org/EN1/articolo.asp?c=471925>

The ACBC supports in principle the concept of protection for associates for protected attributes. However, the application of this principle should not go beyond the attributes of race, immigrant status, pregnancy or potential pregnancy, breastfeeding, family responsibilities, disability and age.

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

The idea that domestic violence victim status and victim or survivors of domestic violence are recognisable and definable attributes has not been explained. The discussion on domestic violence victim status raises an important issue of public policy that requires a concerted approach by all levels of government.

The ACBC maintains that the right to religious freedom and freedom from discrimination on the basis of religious belief or affiliation should be protected.

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

The ACBC echoes the concern in clause 104 of the Discussion Paper that the protection of volunteers would place an unreasonable burden on non-government organisations with a significant volunteer workforce. There is merit in public sector organisations which engage a large volunteer workforce, such as fire authorities and state emergency services being subject to anti-discrimination legislation.

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

The ACBC supports the retention of the existing exceptions to the prohibition against discrimination for domestic duties or employment in a private dwelling.

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

The ACBC supports clarification and the adoption of a single test for determining vicarious liability. The ACBC supports employers having as a defence that they took reasonable precautions and exercised due diligence to avoid the conduct.

Questions 20, 21,³ and 23 - Exceptions and Exemptions

The ACBC cannot envisage a general limitations clause that would not generate considerable uncertainty among churches and charities in relation to the terms of compliance requirements or the risk of litigation. The ACBC supports the maintenance of the existing protections for acts that conform to the doctrines, tenets or beliefs of the Catholic Church or if the acts are necessary to avoid injury to the religious susceptibilities of adherents of Catholicism. Recommend it should also state that this should be extended to any further protected grounds such as sexual orientation, gender identity and religion (mentioned at paragraph 82 of the Discussion Paper as a potential protected ground).

Therefore the ACBC is of the view that:

³ Comment on Question 22 occurs earlier alongside comment on Question 7.

1. there should be no general limitations clause; (Question 20)
2. an inherent requirements test should not be included in the consolidation bill, because, among other things, across the wide range of entities within the Catholic Church, it would lead to uncertainty and therefore increased cost in determining its application to each employer and position.

Questions 24, 25, 26 and 27 Complaints and Compliance Framework

If the consolidation reflects mostly the protections currently in place, as is ACBC's position by and large, there should be minimal need to alter or enlarge existing conciliation processes, court systems or dispute resolution bodies beyond current arrangements.

The ACBC is opposed to representative bodies being able to bring actions in the federal courts because of the shift against employers. Many employers, particularly in the not-for-profit sector, are small and without access to significant financial resources.

The ACBC supports the Productivity Commission recommendation that each party to a discrimination case should bear their own costs.

The ACBC supports the Australian Human Rights Commission retaining its existing limited powers to avoid the development of a conflict of interest with its core function as a neutral conciliator.

Questions 28 29 and 30 Interaction with Other Laws and Application to State and Territory Governments

There does not appear to be any urgent imperative requiring the States and Territories to hand over existing responsibilities to the Commonwealth.