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Assistant Secretary
International Human Rights and Anti-Discrimination Branch
Attorney-General's Department

Dear Sir/Madam,

Here is one response to some of the issues raised in the discussion paper on Consolidation of Commonwealth , Anti-Discrimination Laws and the points I make are matters of great concern in the areas where I am involved.

Dr David Claydon 8 Nov 2011

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Sections in bold are my recommendations

In the discussion paper under section: Executive Summary

24. "Direct discrimination occurs where a person is treated less favourably than another person in the same (or materially the same) circumstances on the ground of their protected attribute. For example, a club that imposes a policy that no people of an apparently Middle Eastern ethnicity are permitted entry would directly discriminate against a number of racial groups. "

It ought to be clearer by adding the following:

Decisions, debate, written comments or other critiquing material about an ideology or a religion or a world view or a philosophical commitment can be pursued without being characterised as discrimination so long as no individual person, no hypothetical person, and no group of persons is spoken against. Any such comment or critique should not in any way suggest that a person or group of persons be treated *unfavourably* on the ground of their religious or ideological or philosophical attribute.

Paragraph 24 above leaves this matter slightly open and thus it could become a court issue whilst the whole purpose of this legislation is to make the matter clearer. Freedom of speech is still a democratic value and the Act must indicate that this freedom is accounted as a right within the limits of the Act, thus comment on ideas/perceptions or commitments **is not a comment on the persons** who happen to hold to anyone of these views. Therefore the Act should also include the following sentence:

Freedom of speech is still a democratic value and this freedom is accounted as a right within the limits of the Act, thus comments on ideas or perceptions or commitments are not comments on the persons who

happen to hold to anyone of these views and therefore such comments maybe expressed.

Test for indirect discrimination

34. “Indirect discrimination occurs where an apparently neutral condition or requirement is imposed which has the effect of disadvantaging a group with a particular protected attribute and which is not reasonable in the circumstances. For example, a shop imposing a ‘no headwear’ policy would *indirectly* discriminate against members of religions that require its adherents to wear head coverings, such as Sikhs. Indirect discrimination recognises that apparently neutral conditions can have significant detrimental effects on, and be barriers to full participation for, some sectors of the community. There is scope for the test for indirect discrimination to be made simpler, easier to understand and more consistent across protected attributes.”

This is an acceptable paragraph but it needs to be clearer that **there are rules of entry in some circumstances which are not necessarily religious such as the rule that food cannot be eaten on a bus or in a shop, that tables on the pavement outside a café are only for the use of customers, that toilets provided by a restaurant are only for restaurant users and that faces need to be apparent by bus users and shop customers and faces are to be apparent to inspectors and police** (all religions allow for the face to be shown although some cultural groups seek to limit facial appearance)

Attribute-based harassment

2. Sections 67ff. and 82 & 83 “discrimination applies to a broader range of attributes than those covered by unlawful discrimination under the ADA, DDA, RDA and SDA. The additional attributes are:

- religion

3. These grounds are limited to **employment** only. Exemptions for inherent requirements of the job and religious belief also apply.”

Employment is a specific case requiring more definition.

Religious organisations/companies including independent schools, adoption agencies and retirement villages should be free to employ people and accept customers who accept the religious requirements of the institution. These organisations therefore should be able to advertise accordingly. Most religions have their own organisations such that individuals can be served within their own religious/philosophical context. Furthermore, all employers are free to reject an applicant for employment

who does not have the required capacities needed or where another person is considered to be more suitable or more prepared for training for the employment position.

As is already the situation, non-religious organisations/companies should not discriminate on the grounds of religion but can make specific requests about dress which is appropriate for the positions occupied. This needs to be specified otherwise it will end up becoming another (expensive) court decision.

Question 1. Should the prohibition against harassment cover all protected attributes? If so, how would this most clearly be expressed?

Harassment is a word with almost unlimited meaning. Almost any act can be identified as an harassment of some individual. So the act of harassment needs to be defined.

Harassment is a verbal, written or physical act which declares a person or group of persons to be of or to have a nature which attracts continuing abuse.

As opposing sporting teams are not included there will be the need to then add the attributes to be protected.

Question 2. How should sexual orientation and gender identity be defined?

Section 75 is acceptable. But religious organisations should be allowed to determine who they marry without such a decision being identified as discriminatory since anyone can be married by a secular celebrant. It is not possible for all religious organisations to be nominated under one rule as every religious group should be free to determine their own rules (some religious organisations are small in number and they should have the freedom of speech expressed in their limitation as to who they marry). The Act does need to specify this since it contains so much detail. Hence the following should be included:

Every Celebrant who is identified as being a marriage celebrant within a religious community is free to choose who he does or does not marry and the religious organisation to which each celebrant belongs may have its own ordinances outlining the categories of persons which its celebrants may marry.

#85 “Initial submissions on the consolidation bill have also recommended that victims of domestic violence should be protected from unlawful discrimination, particularly in the areas of employment and accommodation. There is currently no specific protection for

victims of domestic violence in either Commonwealth or State and Territory anti-discrimination law. ...”

This is very good, but in any explanation add after ‘women’ “and children”

Q17. Should discrimination in sport be separately covered? If so, what is the best way to do so?

Yes it should be separately covered in view of the type of activities, but this is not my area of expertise so I leave it to others to recommend sentences.

Q 20 and clause 148 “The main disadvantage of adopting a general limitations clause is that it could, at least initially, result in increased uncertainty as its application would depend on the interpretation and application of the test by the courts. The outcomes of court decisions would be dependent on the particular circumstances of each case. This could make it difficult to predict with absolute certainty whether particular conduct would be lawful. There is also a risk that complexity which previously existed in the legislation may re-emerge in the case law.”

General limitations are a problem and generate expensive court cases which the discriminated usually cannot afford. Do all that can be done to avoid generalisations so that Parliament and not the courts make the decisions.

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

Temporary exemptions for 5 years are unacceptable. Exemptions needed are detailed above.

Q 23 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?

Your section 186-189 is helpful and it should be clearer that initially complaints should be heard by a Commission and so avoid court involvement so long as both parties agree.

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

There needs to be a provision for the unavailability of a service when there is no appropriate space (eg no bed in a retirement village/nursing home. No table in a restaurant, no space in a bus/train or theatre). There have been cases over such matters.

#210 Human rights and other functions

“Human rights” is a term with unending meaning and needs to be limited to the Act. Otherwise persons can claim their human right to pursue a particular activity as their cultural right.

The definition of ‘human rights’ in the AHRC Act is a helpful way forward but is inadequate.

Q27 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?

The Commission ought to be able to mediate in respect to every aspect of this Act.

Q 30 Should the consolidation bill apply to State and Territory Governments and instrumentalities?

Yes.

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