



Anglican Diocese of Tasmania

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**A SUBMISSION IN RESPONSE TO THE
CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS
DISCUSSION PAPER**

January 31, 2012

General Comments

Consolidating federal anti-discrimination legislation would be of benefit if and only if it can achieve increased efficiency and consistency, and thereby relieve unnecessary burden on organisations and the general public.

The cost of consolidation should also be weighed. The main potential cost is that of *uncertainty*. Anti-discrimination law must interact with the realities of society, with their attendant grey areas, competing valid assertions, and hard-to-define senses of value and reasonableness. Precedent has allowed the current legislation to become settled around these realities; a significant adjustment in the structure of the legislation is likely to require costly legal processes to clarify. The impact of this on the protections and freedoms of Australian society needs to be taken into account.

This submission is made as a response to a number of the discussion paper questions. The answers are informed by a position based on the following understanding:

1. Anti-discrimination law is a necessary component in the mechanisms of a decent, civil society. The Christian ethic includes a fundamental understanding of equality. The application of the gospel undoes inequality as the writings of Paul teach: “There is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus.” (Galatians 3:28)
2. Anti-discrimination law is necessarily an *assertion*, indeed often a positive *imposition*, of values. Ideally the legislation should reflect widely-held and justifiable values in society in determining what attributes should be protected, and how they should be protected.
3. As the class of attribute described as “protected” is extended it becomes less simple and less uniformly absolute. This increases complexity, but it is a complexity that must be recognised and embraced if anti-discrimination law is not to be misapplied.
4. In particular, protections must be adequately balanced with freedoms otherwise the protections themselves can become unjustifiably discriminatory.
5. Certain freedoms must be clearly recognised and accommodated in the legislation. For instance, and in particular:
 - a) Freedom of speech.
 - b) Freedom of religion. Including the freedom to change religion, practice religion both individually and corporately, and espouse religious thought publicly.
 - c) Freedom of association.

The Discussion Paper Questions

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?

1. A test unifying direct and indirect discrimination would not be preferable.

One of the key differences between direct discrimination and indirect discrimination relates to the notion of *intent*. In the test for direct discrimination the key aspect is that of *detriment* and intent can be assumed because the differentiation is directly related to a protected attribute.

However, indirect discrimination necessarily involves a “neutral act” and the reasonableness of that act, or a willingness to amend that act – broadly speaking a test of intent – should be taken into account.

The unforeseen consequences of a neutral act by a well-intentioned party should not elicit the same response as a deliberate act by a malicious party.

2. The test for detriment should be primarily objective.

For instance, someone's speech may cause a person to experience subjective negative effects – insult, disagreement, offence, frustration, or emotional hurt. This is a normal aspect of human interaction and should not be considered detrimental in terms of this legislation. The point at which offensive speech becomes harassment or incitement is the point at which an objective test can and should be used.

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?

- ⤴ A single special measures provision is unwise.
- ⤴ Special measures are “for implementing positive actions in some circumstances” (para 54 of discussion paper). Special measures are therefore dependent upon those circumstances and should be considered on a case-by-case basis.
- ⤴ Special measures are a form of positive discrimination. They are a deliberate step from protection to imposition. This is a powerful provision which should only be used when clearly justified by circumstances. Generalising the application of special measures runs the risk of undermining the necessary checks and balances.

Question 4: Should the duty to make reasonable adjustments in the DDA be

clarified and, if so, how? Should it apply to other attributes?

- ⤴ With regard to the application of the duty to other attributes, this should not happen automatically.
- ⤴ The application of reasonable adjustments with regards to accommodating persons with a disability is justifiable, widely understood and accepted. Extending the application to other attributes should occur only if there is a proven need and after consultation.
- ⤴ The reasonable adjustments provision is a powerful measure which goes beyond protection to enforced accommodation. The danger if such a measure is misapplied is that a form of reverse discrimination may be established – a person with a protected attribute may inappropriately demand that they be differentiated by insisting on adjustments being made.

For instance, could a person demand adjustments of a financial institution so that sharia-compliant financial products are provided if this provision is extended to attributes such as religion or ethnic identity?

Any provision that allows a person to demand that they be treated differently runs the risk of separating sections of our community from one another.

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

- ⤴ The concept of harassment needs to be clearly defined and limited to that which can be objectively observed or tested.
- ⤴ An expression of harassment might be: “an act or series of acts that actively disrupts a person's exercise of their social freedoms.”

For instance: disagreement is not harassment whereas threats or incitements to violence are harassment. Communication is not harassment, persistent interruption and the making of clearly unwanted contact is.

If harassment is expressed this way it clearly reflects behaviour that we would want to eliminate in all aspects of life, not just those areas covered by anti-discrimination law.

- ⤴ The purpose of applying the concept in anti-discrimination law to protected attributes would be to articulate specific ways in which harassment discriminates. To that end it should be expressed on a specific basis, not a general basis covering all protected attributes.
- ⤴ Of particular concern is the need to avoid harassment being misused so as to curtail public speech and vigorous debate. The value of freedom of speech must be protected in this regard.

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

- ⤴ These particular attributes should be recognised on their own terms within the range of protected attributes. Particular protections for one attribute should not apply to these attributes without justification.
- ⤴ With regards to sexual orientation some care is needed in not only defining the scope of this attribute but also how it relates to the causative test for discrimination. When would a differentiating act be deemed to have occurred?

In this regard the distinction between sexual orientation and sexual behaviour is important. Differentiation based on behaviour should be treated differently to discrimination based on orientation.

For instance, an insistence in some circumstance that sexual behaviour should be restricted to marriage between a man and a woman should be treated differently to causing someone detriment simply because they identify as being attracted to the same-sex.

- ⤴ The definition of “sexual orientation” should be carefully bounded. Sexual orientation is a highly subjective concept and could be misused by those seeking to apply anti-discrimination protection to themselves beyond the intent of the legislation.

For instance, other jurisdictions have had cause to consider the status of people of polyamorous and multi-partnered orientations. The intent of the government should be made clear here and not left to the courts to extrapolate.

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

- ⤴ The exemptions with regard to religious belief should continue to apply to religious organisations.
- ⤴ Limiting those exemptions to positions of employment relating to leadership or teaching of the faith is purely arbitrary. The exemptions should apply to all forms of employment.

The freedom to practice religion should include the freedom to exercise religious beliefs within a community environment. A community is a diverse network of relationships incorporating a sense of shared identity and purpose. Employment relationships should not be excised from the expression of that identity and purpose.

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

- ⤴ The question refers to Section 10 of the Racial Discrimination Act which “operates by modifying any law of the Commonwealth, States or Territories which denies or limits the

rights of people of a particular race...” (para 92 of the discussion paper). This is a powerful provision which allows the intent of the anti-discrimination legislation to be imposed in other parts of the legislative corpus and in other jurisdictions.

- ⤴ In the case of the RDA the provision is justifiable. However, other protected attributes should be considered on their own merits and the provision should not be extended to other attributes without consideration of the grounds for doing so, and with the appropriate checks and balances that should be in place.
- ⤴ This provision may cause the bypassing of necessary public debate if it is applied to other attributes.

An example is the debate surrounding the definition of marriage in the Marriage Act. This debate should come to its natural resolution within parliament and not be bypassed by administration provisions or even the exercise of judicial discretion.

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

- ⤴ Irrespective of how the specifics are articulated, the application of anti-discrimination law should apply to specified areas, not generally with specified exceptions.
- ⤴ Discrimination itself is a morally neutral concept. People discriminate everyday as they make choices both small and large.
- ⤴ It is appropriate to regulate some aspects of human behaviour with regard to certain attributes. A general application, however, runs the risk of over-regulation of normal, neutral human behaviour in the making of choice.

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

- ⤴ In principle it is appropriate to protect voluntary workers on the same basis as paid workers.
- ⤴ In practice there is some complexity in how a position is perceived.

A paid position can be seen in terms of opportunity cost; a limited resource means that there is a financial need to distinguish who is best suited for the job.

A voluntary position does not have a financial opportunity cost; refusing someone the opportunity to do voluntary work is often more readily taken as a negative comment on the person and could more easily be perceived as relating to a protected attribute.

The legislation should ensure that while a person has a right to not be unreasonably excluded on the grounds of their protected attribute, there is no absolute right to hold a

voluntary position.

- ⤴ Anti-discrimination compliance should be bound by an appropriately different reasonableness test when applied to voluntary organisations. While it may be reasonable for a place of business to be expected to make costly accommodations, it may not be reasonable for a charity or other voluntary organisation to be obliged to meet the same cost of such a requirement.

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

- ⤴ For religious freedoms to be meaningful the exemptions for religious organisations should allow organisations to request information directly related to a persons adherence to the doctrinal and moral values of the organisation.

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

- ⤴ As a general rule it is appropriate to implement principles in legislation rather than specific regulations.
- ⤴ However, in this case, specific limitations would be beneficial and should be retained, because:
 - Specific exceptions give security to those to whom they apply. Their standing before the law is clear.
 - A new general limitation clause would likely require judicial interpretation and costly court cases in order to cement application.

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 ensure that religious belief and practice is retained as an inherent requirement that can be insisted upon by religious organisations for all positions of employment.

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

- ⤴ There is no reason why the attributes of sexual orientation and gender identity should be excluded from the exemptions afforded to religious organisations.

- ✧ A religious organisation should have the ability to discriminate on the basis of demonstrably espoused doctrine and morality. The exclusion of sexual behaviour from the application of this principle would be unreasonable.