



**Anglican Church Diocese of Sydney**

Level 2, St Andrew's House  
SYDNEY SQUARE NSW 2000

Phone: 9265 1671

Fax: 9261 4485

Email: [rijw@sydney.anglican.asn.au](mailto:rijw@sydney.anglican.asn.au)

**Submission to the Attorney-General's Discussion paper on the  
*Consolidation of Commonwealth Anti-Discrimination Laws***

**By the Standing Committee of the Synod of the Anglican  
Church Diocese of Sydney**

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**1 Summary of Submission**

- (a) We appreciate the opportunity to comment on the proposed consolidation of the Commonwealth's anti-discrimination laws.
- (b) We submit that Commonwealth anti-discrimination law needs to better balance the legitimate right not to be unjustly discriminated against with other human rights, such as freedom of religion.
- (c) We therefore consider that the preamble ought to provide that the object of the Act is to give effect to Australia's international obligations to prevent unjustified forms of discrimination in a manner which upholds rights to freedom of religion, association and cultural expression, as well as other human rights.
- (d) We are concerned that proposals to –
  - (i) apply a detriment test in place of the comparator test,
  - (ii) put the burden of proof onto respondents,
  - (iii) make changes to the way costs are apportioned, and
  - (iv) allow representative actions,will, when taken together, lead to a process that unfairly disadvantages respondents. This may lead to an increase in speculative claims which are settled by respondents for commercial reasons rather than on the basis of merit.
- (e) We consider that the right to be free from discrimination should include an obligation on the part of employers to make reasonable accommodation for a staff member's religious beliefs, including in relation to matters giving rise to conscientious objection on the part of the staff member.

- (f) We support harassment on the basis of a protected attribute constituting a ground of unlawful discrimination. However in order to ensure that legitimate and reasonable conduct does not constitute harassment merely because offence is taken any limits placed on the expression of genuinely held opinions must be drawn broadly and specific protections put in place for genuine public debate on matters such as political opinion, religious belief and sexual orientation.
- (g) We support Commonwealth anti-discrimination law being extended to cover additional attributes listed under International Labour Organisation Convention No.111. We note that one attribute listed in the Convention is religion. We consider that discrimination on the grounds of religion is increasing. It would appear this is particularly so in circumstances where a person of faith holds to a moral code or has a conscientious objection to participation in some practice. We consider that consistent with Australia's commitment to multiculturalism there needs to be space for plurality in these matters. Our support is subject to a proviso that religious bodies (broadly understood) ought to be able to lawfully discriminate on religious grounds (particularly in the area of employment) to ensure the ethos and values of such bodies are maintained.
- (h) We support a general limitations clause provided that conduct and practices falling within the present exemptions in Commonwealth anti-discrimination law are expressly deemed to fall within its ambit thereby ensuring that the scope of the existing exemptions is not narrowed (consistent with the Government's stated intention in paragraph 146 of the discussion paper).
- (i) We consider that the inherent requirements of a position exception should be given a broad meaning so that roles within religious organisations (and any organisation that promotes belief or ideology) are not viewed purely in terms of their function but also in terms of their contribution to the culture and ethos of the organisation.
- (j) We consider that exemptions for religious organisations, however formulated, are of fundamental importance in protecting freedom of religion in Australia and should operate in tandem with positive recognition of rights to freedom of religion, association and cultural expression. We consider that a broad view should be taken as to what constitutes a religious organisation so that they are not confined to organisations which promote liturgical or ritualistic practice or doctrine and instead reflect the variety of organisations that are established by people of faith in furtherance of their religious beliefs, such as, for example, schools and welfare organisations.
- (k) We consider that, in furthering religious belief, there is a need for protections in Commonwealth anti-discrimination law to prevent individuals from being coerced into the active promotion of activities or practices that are contrary to their sincerely held

religious beliefs. We submit that people of faith ought not be coerced into accepting the liberal values of the majority.

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## 2 Who we are

- (a) The name of our organisation is the Anglican Church Diocese of Sydney (**Diocese**).
- (b) This submission is made by the Standing Committee of the Synod of the Diocese. The Standing Committee is the executive of the Synod which is in turn the principal governing body of the Diocese constituted under the *Anglican Church of Australia Constitutions Act 1902* (NSW).
- (c) The Diocese is an unincorporated voluntary association comprising various bodies constituted or incorporated under the *Anglican Church of Australia Trust Property Act 1917* (NSW) and the *Anglican Church of Australia (Bodies Corporate) Act 1938* (NSW). These bodies, together with the diocesan network of 269 parishes, are accountable to the members of the Church through the Synod of the Diocese<sup>1</sup>.
- (d) More broadly, the Diocese, through its various component bodies and through its congregational life is a provider of a wide range of programs including in social welfare, education, health and age care, youth work and for the homeless. In addition to the congregational life of the Diocese, the bodies which provide services to the community across the Diocese include large social welfare institutions such as Anglicare<sup>2</sup> and Anglican Retirement Villages<sup>3</sup>, as well as other charitable institutions including Anglican Youthworks<sup>4</sup>, and 40 Diocesan schools<sup>5</sup>.
- (e) Our contact details are –

Mr Robert Wicks  
Diocesan Secretary  
Anglican Church Offices  
PO Box Q190  
QVB Post Office NSW 1230

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<sup>1</sup> In the last ABS Census 837,917 people in the Sydney region identified as being Anglican. The regular combined membership of our 269 parishes is about 80,000 people.

<sup>2</sup> **Anglicare** relates to approximately 40,000 clients on an annual basis with counselling, children and youth services, emergency relief, family relationships and aged care.

<sup>3</sup> **Anglican Retirement Villages** operates 37 residential facilities (both Independent Living and Residential Care) and 40 community based services throughout the greater Sydney region, caring for more than 6,000 residents and clients and regularly relating to a further 12,000 people (families, staff, volunteers) in the course of its service delivery.

<sup>4</sup> **Anglican Youthworks** is the co-ordinator of work amongst children and young people and provides materials to 300,000 students, supports 4,000 volunteer and employed scripture teachers, and 8,000 youth leaders attending training events. 50,000 mostly young people and children attend outdoor programs and centres.

<sup>5</sup> Attended by approximately 33,000 students.

Phone: (02) 9265 1671  
Fax: (02) 9261 4485  
Email: [rjw@sydney.anglican.asn.au](mailto:rjw@sydney.anglican.asn.au)

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### **3 Achieving a better balance with religious freedom and other human rights**

- (a) We comment on a broad range of issues in this submission. However a focus of the submission is encouraging the Government to ensure that there is a better balance between the legitimate expectation arising under international human rights instruments that a person will not be unjustly discriminated against with equally important human rights, such as those relating to freedom of religion, association and cultural expression.
- (b) Typically anti-discrimination laws prohibit certain forms of discrimination and then in separate parts of the statute allow certain exceptions or exemptions. It is in these exceptions that anti-discrimination laws currently make allowance for rights of freedom of religion, association and cultural expression.
- (c) However casting the protection of these rights negatively, in the form of 'exceptions', does not do justice to their importance. It suggests they are to be grudgingly tolerated rather than positively recognised as legitimate and acceptable.
- (d) We therefore submit that the preamble to the Act ought to provide that the object of the Act is to give effect to Australia's international obligations to prevent unjustified forms of discrimination in a manner which upholds rights to freedom of religion, association and cultural expression, as well as any other relevant human rights.
- (e) To give such a preamble meaningful effect, the Act ought to define discrimination so that selection on the basis of an otherwise protected attribute does not constitute discrimination against someone who does not have that attribute if the selection is based on a genuine occupational requirement or is for the purpose of supporting another human right, such as freedom of religion, cultural expression or association.
- (f) We return to this theme of achieving a better balance between the right not be unjustly discriminated against and other human rights such as religious freedom throughout this submission, particularly in part 6 when we consider the issue of exceptions and exemptions.

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## **4 Meaning of Discrimination**

### **4.1 Test for direct discrimination**

- (a) We support retaining the comparator test for direct discrimination.
- (b) Discrimination, by its very nature, involves differential treatment. We cannot see how this can be escaped by changing the test to one of detriment. Determining whether there is differential treatment will be an essential element in determining whether the detriment was caused by the protected attribute.
- (c) If this is not so, in a circumstance where all or a substantial proportion of the members of the community are equally exposed to some form of detriment, only those with particular attributes will have a right of action to remedy that detriment.
- (d) It may also be difficult for a person against whom a complaint has been made to prove that the detriment was not caused by the protected attribute if they cannot rely on evidence which demonstrates that they would have treated those without the protected attribute in much the same way.
- (e) We expect that a detriment test would be interpreted in the same way as a comparator test by the courts. It is preferable in our view that the law be explicit that discrimination involves consideration of whether there has been differential treatment.

### **4.2 Separate tests for direct and indirect discrimination or a unified Test**

- (a) We support retaining separate tests for direct and indirect discrimination.
- (b) The argument in favour of eliminating the separate tests would appear to be that they are artificial and unnecessarily complicate anti-discrimination laws. However with simplicity will come uncertainty, particularly for indirect discrimination. Australia has a well developed jurisprudence around direct and indirect discrimination and we submit this ought not be unsettled without there being a compelling reason for doing so.
- (c) We consider that certainty as to the forms of conduct constituting discrimination is essential for both potential complaints and respondents.

### **4.3 Burden of Proof**

- (a) We support allocating the full burden of proof to the complainant consistent with the existing approach in Commonwealth anti-discrimination laws and those of the States and Territories.
- (b) We submit that the person making a complaint ought to be required to prove the allegation. As a matter of principle a person should not be required to prove their

innocence. A reversal of this onus may lead to complainants making allegations based merely on suspicion without any evidence of whether there is in fact a discriminatory basis to the course of action taken by the respondent. A respondent may incur significant expense and reputational damage in disproving a suspicion.

- (c) Paragraphs 203 and 204 of the consultation paper put forward possible changes to the allocation of costs so that they are not necessarily borne by the unsuccessful party. Such a change to costs allocation combined with a shift in the burden of proof would likely encourage a respondent to settle a complaint for commercial reasons even if the respondent reasonably considers he or she has acted legitimately. Such an outcome would be unfortunate.
- (d) The consultation paper notes that it may be difficult for a complainant to prove the state of mind of the respondent. We submit that it may be similarly difficult for a respondent to prove their state of mind at a particular point in time in the past. It could be suggested that respondents are able to maintain records that could be brought as evidence of their state of mind. However that presupposes the respondent is alive to the possibility of a discrimination claim at the time the decision in question is taken and therefore the importance of good record keeping.

#### **4.4 Duty to make reasonable adjustments (or accommodation)**

- (a) We submit that the right to be free from discrimination should include an obligation on the part of employers to make reasonable accommodation for a staff member's religious beliefs. An employee should not be required by their employer to undertake particular tasks or provide services in a particular context that are contrary to the employee's genuinely held religious convictions where this is reasonable.
- (b) There have been examples in the United Kingdom where employees have been forced to undertake tasks that are contrary to their religious beliefs or face discipline.<sup>6</sup> Often the matters giving rise to conscientious objection are a minor part of the person's employment and it would be quite feasible for another employee in the workplace to undertake those tasks without disruption to the business of the employer. Not to allow

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<sup>6</sup> Some examples: 1. Dr Sheila Matthews, a paediatrician and member of the Northhamptonshire county council's adoption panel, was forced to resign because her employer refused to accommodate her request to abstain from voting on the placement of children with same-sex couples. The UK Employment Tribunal dismissed her claim of religious discrimination on 16 November 2010. 2. Mr Gary McFarlane, a relationship counsellor, whose employment was terminated when he refused to confirm that he would provide sex therapy to same-sex couples. The Employment Tribunal in Bristol dismissed Mr McFarlane's application for unfair dismissal and discrimination on 5 January 2009. On 30 November 2009 that decision was upheld by the Employment Appeal Tribunal. The matter is before the European Court of Human Rights. 3. Ms Lillian Ladele, a registrar, whose employment was forced to resign when she refused to conduct civil partnership ceremonies involving same-sex couples. On 3 July 2008 the Employment Tribunal in London found that Ms Ladele had been discriminated against but this was overturned by the Employment Appeal Tribunal on 19 December 2008. Ms Ladele was refused leave to appeal to the Supreme Court on 4 March 2010. She has taken her case to the European Court of Human Rights. See statement of facts of the European Court of Human Rights for further details on the McFarlane and Ladele cases - <http://www.bailii.org/eu/cases/ECHR/2011/737.html>.

reasonable accommodation in this regard would constitute an unwarranted limitation on freedom of religion.

#### 4.5 Attribute based harassment

- (a) Subject to certain provisos, we support in principle the harassment of a person based on their protected attribute constituting a ground of unlawful discrimination. However the definition of what constitutes harassment needs to be drafted carefully to ensure that legitimate and reasonable conduct does not fall within its ambit merely because the complainant finds it offensive. In a liberal democracy people must be able to express their genuinely held opinion on a matter without being fearful that it may be construed as offensive and constitute harassment. Any limits on the expression of genuinely held opinions must be drawn broadly.
- (b) Particular care also needs to be taken to ensure that genuine public debate on matters such as political opinion, religious belief and sexual orientation can continue. Laws which open the possibility of successful claims being made merely because debate on such matters causes offence will have a chilling effect on freedom of speech. For the good of society we need to continue to be able to robustly debate these matters.
- (c) Many religious bodies hold to particular doctrines concerning matters of sexual practice and it is possible for the exposition of such doctrines or even the public reading of religious texts<sup>7</sup> (such as in the workplace) to cause offence and give rise to a harassment claim. This may be increasingly so if the inherent requirements of a position are construed narrowly and religious bodies are forced to employ people who may not share their values and beliefs.
- (d) We suggest a provision similar to that in section 49ZT(2)(b) of the NSW Anti-Discrimination Act 1977 is needed which provides positive protection for –

“a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter”.

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<sup>7</sup> On 20 April 2010 Mr Dale McAlpine, a street preacher, was held in a cell for several hours and charged with an offence under the Public Order Act (UK) for listing homosexuality as a sin among others when expounding chapter 1 of 1 Corinthians from the Bible. [<http://www.dailymail.co.uk/news/article-1270364/Christian-preacher-hooligan-charge-saying-believes-homosexuality-sin.html>.] There is also the case of Mr Jamie Murray, owner of the Salt and Light Café in Blackpool, who was approached by police on 19 September 2009 and told that it was in breach of the Public Order Act for him to use a set of DVDs in the café through which successive verses from the New Testament were displayed on a screen in the café on the basis that some verses were homophobic and insulting. [<http://www.dailymail.co.uk/news/article-2041504/Police-tell-cafe-owner-Stop-showing-Bible-DVDs-arrest-you.html?printingPage=true>]. Although the both matters arose under public order legislation rather than equality laws and did not result in prosecutions, they are nonetheless pertinent examples of freedom of religion and speech being unreasonably curtailed due to inadequate protections in the law.

- (e) Although section 49ZT(2)(b) deals with vilification, we consider that such protection is equally applicable in the context of harassment to ensure that certain forms of legitimate and reasonable conduct which may cause offence do not constitute harassment.

#### **4.6 Recognising religious freedom and other human rights**

- (a) As indicated in part 3 above, we consider that discrimination should be defined so that selection on the basis of an otherwise protected attribute does not constitute discrimination against someone who does not have that attribute if the selection is based on a genuine occupational requirement or is for the purpose of supporting another human right such as freedom of religion, cultural expression or freedom of association. The means by which such a “carve out” from the definition of discrimination might be achieved is considered in the context of a general limitations clause in part 6 below.

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## **5 Protected Attributes**

### **5.1 Sexual Orientation and Gender Identity**

- (a) We support in principle the extension of commonwealth anti-discrimination law to cover sexual orientation and gender identity on the understanding that there is sound evidence that such persons suffer unfairly in society as a result of these attributes.
- (b) Having said this, we do recognise that anti-discrimination law can be a blunt instrument which does not properly distinguish contexts in which discrimination ought to be lawful. Section 6 of this submission outlines our position on the religious exemptions that we submit ought to apply to these attributes consistent with our earlier comments that the Act ought to give due recognition to religious freedom and other human rights.

### **5.2 Attributes covered by States and Territories, the Fair Work Act and the AHRC Act**

- (a) We note consideration is being given to extending Commonwealth anti-discrimination law to cover additional attributes listed under the International Labour Organisation Convention No.111.
- (b) We note that these are presently covered under the AHRC Act and also the Fair Work Act 2009 in relation to employment. However the Australian Human Rights Commission does not have coercive powers in relation to the ILO complaints stream. Furthermore pursuant to section 351(2)(a) of the Fair Work Act the adverse action provisions of the Act do not apply to action that is not unlawful under any State or Territory anti-discrimination law in force in the place where the action is taken. Therefore the additional

attributes under the ILO Convention have had limited application in Australia as they have not been broadly taken up by the States and Territories in their anti-discrimination laws.

- (c) We note in particular that discrimination on the grounds of religion is not unlawful under the anti-discrimination law in New South Wales and South Australia. Therefore if a provision similar to that in section 351(2)(a) of the Fair Work Act 2009 is not included in any consolidated Commonwealth anti-discrimination legislation, religion will become a protected attribute for the first time in these States. This will be a significant development for people of faith and for faith-based organisations in these States.
- (d) Subject to some provisos, we support extending Commonwealth anti-discrimination law to cover the additional attributes listed under the ILO Convention.
- (e) It is becoming increasingly apparent that people of faith are being discriminated against on the basis of their religious beliefs. Most commonly discrimination arises due to those religious beliefs entailing judgment on matters of morality or where the person of faith has a personal conscientious objection to participation in some practice. We are concerned about an apparent rising expectation that all in society must abide by the liberal values of the majority. Consistent with the Government's commitment to multi-culturalism, there needs to be space for plurality in terms of moral codes. Including religious belief as a protected attribute will go some way to ensuring such space.
- (f) This said, we provide our support cautiously noting that including religion as a protected attribute has the potential to in fact limit freedom of religion in Australia by preventing bodies constituted to give effect to religious beliefs and values from selecting staff who share such beliefs and values. In the same way that political parties are able to discriminate on matters of political opinion and ideology, we submit that bodies which are constituted to give effect to religious beliefs and values ought to be free to organise themselves accordingly without being accused of unlawful discrimination.
- (g) We are concerned that the traditional exemptions given to religious bodies concerning matters of doctrine and matters which may injure the susceptibly of adherents may not be sufficiently broad both in terms of how such bodies are defined and in the capacity of such bodies to exercise positive selection in their recruitment practices based on their religious beliefs and values.
- (h) We also note the potential for the inherent requirements of the position exemption to be construed narrowly. We submit that jobs within religious organisations must not be viewed purely in terms of their function but also in terms of their contribution to the culture and ethos of the organisation.
- (i) Our support for extending protected attributes to include religious belief is therefore subject to a proviso that religious bodies (broadly defined to include bodies that operate

in accordance with certain religious beliefs such as religiously based private schools, welfare agencies, nursing homes, hospitals and so forth) ought to be able to lawfully discriminate on the grounds of religion (particularly in the area of employment) to ensure the ethos and values of such bodies are maintained.

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## **6 Protected Areas of Public Life**

### **6.1 Mechanism for specifying areas of public life in which discrimination and harassment are prohibited**

- (a) We support continuing to make discrimination unlawful in specific activities in specific areas of public life rather than expanding the approach taken in section 9 of the Racial Discrimination Act to all forms of discrimination.
- (b) There is almost universal acceptance within the community that all forms of discrimination on the grounds of race which cause detriment are wrong. It is therefore appropriate that a broad approach be taken to the matters that may constitute racial discrimination rather than limiting it to particular areas and activities.
- (c) There are sincerely held differences of opinion in the community on matters of sexual practice. There is no where near universal acceptance that it is wrong to discriminate on the grounds of sexual orientation, gender identity or marital status in all contexts. It is important that the areas and activities of public life to which anti-discrimination law applies in relation to protected attributes related to sexual practice are expressly clear so that –
  - (i) specific consideration can be given as to whether it is appropriate for those areas and activities to be so regulated, and
  - (ii) members of the community are clear about the areas and activities of public life to which anti-discrimination laws apply.

### **6.2 Requests for information**

- (a) We submit that there should be no prohibition on requests for information about whether a person has a protected attribute where discrimination based on that attribute is or would not be unlawful.
- (b) Exemptions (such as those applying to religious bodies) are granted in recognition that the body may discriminate in order to further some legitimate and reasonable purpose. A body entitled to act on the basis of an exemption therefore ought to be permitted to make requests for information to determine if a person has a particular attribute. For example, a religious body ought to be able to confirm the sexuality or marital status of

an applicant before offering the person employment in order to ensure its doctrines are not compromised and injury is not caused to the sensitivities of those who adhere the religious beliefs the religious body represents.

- (c) A provision such as that in section 30(3) of the Disability Discrimination Act may provide sufficient protection in that it allows requests for information if the information is not used with the intention of unlawfully discriminating against the person. Since an entity acting in reliance on an exemption would be lawfully discriminating the request would be permitted.

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## **7 Exceptions and Exemptions**

### **7.1 General limitations clause**

- (a) Subject to two important provisos, we would support a general limitations clause which would provide that conduct which is necessary to achieve a legitimate object and is a proportionate means of achieving that objective is not discrimination.
- (b) We recognise the benefit in having flexibility to allow conduct which may not fall within the existing exemptions but which is nonetheless in furtherance of a legitimate object.
- (c) Another benefit is that it will provide positive recognition for such conduct by providing that it does not constitute discrimination in the first place as opposed to a form of discrimination that is exempt.
- (d) However we would only support a general limitations clause if conduct falling within the present exemptions in Commonwealth anti-discrimination legislation was expressly deemed to fall within its ambit. If such a deeming provision were not included, there would be a risk conduct that is presently lawful under an exemption or an exception would become unlawful depending on how the courts applied the general limitations test. Paragraph 146 of the discussion paper makes clear that the Government will not countenance a general limitations clause that may have this effect. We welcome that commitment.
- (e) Such a deeming provision would also preserve the existing Australian jurisprudence on the scope and effect of the exemptions and thereby would go some way to addressing the concerns expressed by the Productivity Commission that a general limitations could may lead to ambiguity and unnecessary legal processes and transaction costs.
- (f) The second proviso in supporting a general limitations clause would be that it operate in addition to a provision which expressly excludes religious organisations from the

application of religious belief as a protected attribute (see our comments in 5.2(i) above).

## **7.2 Inherent requirements and genuine occupational qualifications**

- (a) We support a broad inherent requirements exception applicable to all attributes that is in similar terms to that in the Fair Work Act 2009.
- (b) If the government sees fit to take a more limited approach we suggest that the attributes of race/ethnicity, disability, age, religion, sexual orientation, sexual identity, gender identity, marital status and political opinion at least be covered by the exception since these are the most obvious attributes which may conflict with the inherent requirements of a position.
- (a) We note that the Australian Human Rights Commission and others have argued in other contexts that the inherent requirements exception ought to be interpreted narrowly, including in relation to the recruitment practices of religious bodies and schools. We do not share this view.
- (b) We submit that organisations that have been established for particular legitimate purposes ought to be able to positively select staff who share their values and beliefs who will further their purposes. This is uncontroversial in other areas of society. An environmental group would not be expected to employ people who do not believe in climate change and a political party would not be expected to employ staff who do not share its ideology, whether in a front-line position or otherwise.
- (c) As we have said elsewhere in this submission, jobs within religious organisations (and indeed any organisation that exists to promote belief or ideology) must not be viewed purely in terms of their function but also in terms of their contribution to the culture and ethos of the organisation. The staff of an organisation determine its culture and identity, particularly over time. Many of the Christian charities that have maintained their Christian identity overtime have done so because they have strict recruitment practices. We submit that a broad meaning needs to be given to the inherent requirements of the position that would include alignment of the beliefs and values of employees and the organisation.

## **7.3 Exemptions for religious organisations**

- (a) We note and welcome the statement in paragraph 161 of the discussion paper that the Government does not propose to remove the current religious exemptions. However we do note the further comment that consideration will be given to how they may apply to discrimination on the grounds of sexual orientation or gender identity.

- (b) We reiterate our comments in section 3 of this submission that there is a need to positively recognise freedom of religion in the preamble to the Act and in the way that discrimination is defined. This is necessary to ensure that freedom of religion is not merely something that exists on the margins in the form of excepted conduct. That said, there is also a need for exceptions or exemptions to work in tandem with such positive recognition.
- (c) The principal application of religious exemptions at the State and Territory level has been to discrimination related to matters of sexuality or sexual practice (such as marital status and sexual orientation). It has also had some application in relation to sex, particularly in relation to the ordination and the appointment of Ministers of religion and so forth.
- (d) The exemption, and in particular its application to sexual orientation and marital status (in so far as they relate to matters of sexual practice), is of fundamental importance to the protection of religious freedom in Australia.
- (e) We also submit that a broad view should be taken on the bodies that constitute religious organisations. In some quarters religion has been construed as the observation of liturgical or ritualistic practices or the promotion of doctrine. Such a construction fails to properly understand religious belief for that is not how people of faith typically view themselves. Religious belief affects the whole person and all aspects of life. It is expressed corporately and personally. It is often expressed corporately by establishing organisations to pursue a variety of purposes in furtherance of those religious beliefs.
- (f) To this end we submit that religious schools and welfare organisations (among others) are religious bodies. They exist to undertake a variety of charitable purposes and to do so in a manner that upholds and promotes certain religious belief. They ought to have the benefit of exemptions that allow them to positively select staff who share their beliefs and values and to undertake practices that are necessary to conform to doctrine or avoid injury to the susceptibilities of adherents of the religious beliefs they exist to further.
- (g) Although sexual orientation, marital status and sex are the key attributes so far as the religious exemptions are concerned we submit that the religious exemptions ought also to apply to gender identity if this is included as a protected attribute in Commonwealth anti-discrimination law. Gender identity is a more complex issue as it involves consideration of the elements that make a person male or female and, so far as religious belief is concerned, the proper context for sexual relations by those individuals. There will no doubt be religious bodies that have doctrines on these matters and adherents whose sensitivities will potentially be injured if exemptions are not available.

#### 7.4 Further comment - International human rights instruments and exemptions for religious organisations

- (a) At times it would appear that religious freedom is treated as a mere concession to be tolerated (and increasingly not tolerated) when it is in fact a fundamental and non-derogable human right to be valued and upheld for the good of human society. We submit that it should be respected as such.
- (b) We submit that Commonwealth anti-discrimination law must uphold religious freedom to the extent contemplated by international human rights instruments, in particular the *International Covenant on Civil and Political Rights* and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*.
- (c) We submit that the scope of the exemptions should match the broad mission of religious organisations, and reflect the liberality of ICCPR Article 18.3 and the Religion Declaration's Article 6.
- (d) We submit that active consideration must be given to how to give full effect to Article 18 of ICCPR and Article 6 of the Religion Declaration, neither of which, in any way, justify wide-sweeping limitations on freedom of religion in Australia through anti-discrimination law.
- (e) The United Nations Human Rights Committee has also noted in comment 18 that: "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".
- (f) There is also nothing in the ICCPR that in any way justifies a hierarchy of rights where the right to non-discrimination is at the top and freedom of religion is at the bottom. The United Nations Human Rights Committee, in its comment 24 on the Covenant has noted that there is no hierarchy of rights under the Covenant. If exemptions do not give proper accord to freedom of religion a de facto hierarchy will in effect have been created.
- (g) We are aware that some submissions to the Australian Human Rights Commission on its discussion paper on "Protection from discrimination on the basis of sexual orientation and sex and/or gender identity" argued that religious exemptions should not apply to organisations in receipt of government funding. We submit that position is defective in at least three respects -
  - (i) Firstly, it assumes that the religious basis to these organisations has only a loose connection at best to their service delivery. That may be correct in some cases, however for many organisations their religious basis is the driving factor

behind their work and is of fundamental importance to the quality and nature of their service delivery. These organisations do not succeed despite their religious basis but because of it. It is no coincidence that many of Australia's longest serving and largest charities are religiously based.

- (ii) Secondly, the Australian government funds organisations and activities on a regular basis that are directed to particular segments of the community or which are undertaken on the basis of particular social or cultural norms. There is no apparent reason for singling out religiously based organisations as somehow needing to become monochrome in their recruitment and service delivery.
- (iii) Thirdly, it is often because of the religious identity of the organisation (be it a hospital, nursing home or school) that a person chooses that organisation to provide care, residential services, education and so forth. Often this is because the organisation espouses values and principles with which the person is aligned even if not themselves a member of the religion that the organisation represents. These organisations need to exercise positive selection in who they recruit and so forth in order to maintain their culture and identity.
- (h) Religious bodies do not construe their mission expressly in terms of 'excluding' people. They simply include and work with those who uphold the world-view and moral framework of the body. All are free to participate on that basis or to go their separate way. (Likewise, religious people often have to accept that they do not really belong in some settings that espouse a different world-view and moral framework.)

#### **7.5 Further comment - protection against individuals being compelled to support the pursuit of activities or purposes that conflict with their genuinely held religious beliefs**

- (a) Many of the principles outlined above apply equally in the case of individuals.
- (b) We note that the Victorian *Equal Opportunity Act 1995* contains an exemption in section 84 which allows a person to discriminate where it "is reasonably necessary" for the person to do so in order to comply with the "doctrines, beliefs or principles of their religion".
- (c) We support the inclusion of the same exemption in Commonwealth anti-discrimination law because it would prevent a person from being coerced into the active promotion of activities or practices that are contrary to the person's sincerely held religious beliefs. This is an important plank in protecting religious freedom in Australia.
- (d) Such an exemption would not justify acts unless they were necessary to prevent a person's from acting contrary to their genuinely held religious beliefs. For example, a shop keeper refusing to sell food or drink to a person based on their sexual orientation

would not to be covered by the exemption because such refusal is not necessary for the person to genuinely comply with their religious beliefs. On the other hand, the exemption should ensure that a Christian sex therapist, who believes that marriage is the proper environment for sexual relations, can refuse to assist an unmarried couple with the sexual aspects of their relationship.

- (e) We are concerned that unless an exemption similar to that contained in section 84 of the Victorian *Equal Opportunity Act 1995* is included in federal anti-discrimination law and in the anti-discrimination law of other States and Territories, people of religious faith will be coerced into supporting activities and purposes that are contrary to their religious faith and conscience. Such an outcome is not consistent with the protection afforded to freedom of religion in both the ICCPR and the Religious Declaration.
- (f) We submit that the law should not operate to coerce acceptance of the moral correctness of behaviour that is contested in the community where those views are sincerely held on the basis of religious belief.

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## **8 Complaints and Compliance Framework**

### **8.1 Representative Actions**

- (a) We accept that the complexities of the court system can be difficult and costly for complainants, however we are concerned that in removing barriers by allowing representative actions, in conjunction, potentially, with reversing the burden of proof and lowering the risk of a costs order for an unsuccessful claim, that there will be a spike in unmeritorious and speculative actions. We submit that if the barriers to litigation are removed or lowered there needs to be an efficient but thorough process put in place to ensure that there is sufficient evidence for an arguable case that unlawful discrimination has taken place before the matter can be litigated.

### **8.2 Litigation costs**

- (a) We submit that it should remain the case that the unsuccessful party pay the costs of the successful party (subject to court discretion). It is a fundamental tenant of litigation that costs follow the event unless it can be shown that the successful party has caused an increase in costs due to acting unreasonably.
- (b) Whether or not costs will be paid is a significant consideration for a respondent in deciding whether to defend an action brought against them. If respondents are in a position where they consider they have acted lawfully but will not have their costs paid even though successful, many will make a commercial decision to settle, unless there is

some matter of principle that justifies the cost of defending the action. We would regard this outcome as unfortunate.

### **8.3 The role and functions of the Australian Human Rights Commission**

- (a) We submit that the present conciliatory process undertaken by the AHRC to discrimination is appropriate and should not be changed to empower the AHRC to bring matters before a court or tribunal to seek orders for enforcement.
- (b) An overreliance on law to arbitrate conflict does not enable a populace to navigate their differences civilly. Invoking a third party to arbitrate causes the parties to the dispute to avoid engaging with and understanding each other. Furthermore enforcement is unlikely to lead to change on the part of a respondent; in fact the opposite may be true.
- (c) We endorse the views of Professor Patrick Parkinson when he argues,

‘Where ... governments impose standards of behaviour through law on a reluctant population, they risk more than they gain. Compliance is coerced rather than voluntary and the legislation undermines belief in a shared community of interest between governors and governed. ... Legislation defines legality and illegality, but legitimacy is something different. ... It is the legitimacy of law, and not its constitutional legality, which matters most for stable and harmonious societies’<sup>8</sup>
- (d) AHRC has an impressive record in social cohesion initiatives that do not always require powers of enforcement. A good example is the Unlocking Doors report of 2007, which began meaningful engagement between local communities and police.
- (e) We also consider that the good work the AHRC is undertaking in conciliating complaints will be undermined if it is given an enforcement role. Respondents are likely to be guarded in conciliation with the AHRC if it has enforcement powers, even if information disclosed at conciliation is not able to be formally tendered as evidence in litigation.
- (f) Furthermore there is no apparent need to duplicate the work undertaken by the Fair Work Ombudsman in relation to employment. Arguably the FWO is a more neutral body to undertake enforcement given that the AHRC has a policy advisory role.

31 January 2012

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<sup>8</sup> Patrick Parkinson, 'Enforcing Tolerance: Religious Vilification Laws in Australia.' Paper delivered to the Eleventh Annual International Law and Religion Symposium: Religion in the Public Sphere: Challenges and Opportunities, Provo, Utah, October 2004, pp. 14-15.