EXECUTIVE SUMMARY

Response to ADA Discussion Paper by the Very Revd Dr Keith Joseph
Christ Church Anglican Cathedral, Darwin

This discussion paper concentrates on the issue of religious exemptions but also other relevant issues such as Assisted Reproductive Treatments, Vilification, and Clubs & Associations.

Religious Exemptions
The principle of Religious Freedom is central to a modern liberal democracy such as Australia. It is in the public interest that people should be allowed to practise religion and promote religious beliefs both as individuals and in the private sphere, but also communally and in the public sphere. Such practice of religious freedom is essential to a functioning and harmonious multi-cultural society, especially given that most cultures have deep and enduring spiritual roots. In any given instance the burden is on the state to show why the general principle of religious freedom should be abrogated in the public interest, rather than the burden being on the religious organisation to show why it should be given exemptions.

In the discussion paper the general exemption for religious organisation in relation to training and appointment of ministers and conducting worship remains. However it is proposed to remove this general exemption from places of worship, schools and accommodation services.

- Places of worship should continue to be exempt both on the principle of religious freedom and on practical grounds: there are at least 200 places of worship in the Northern Territory and requiring each of them to apply for exemption would be onerous. It would also involve the Anti-Discrimination Commission (ADC) in assessing the validity of religious beliefs relating to the place of worship to determine if there should be an exemption.
- Schools are often publicly funded and therefore it can be argued that religious schools should not be allowed to discriminate against those seeking admission, employment or accommodation. However government funding is given recognising the religious ethos of such schools. Potential employees are not disadvantaged through being denied employment at a certain school: there can choose to work elsewhere. However it is recognised that some students may be disadvantaged due to special requirements or geographical location and in that case they should be able to seek an exception to the general exemption so that they might obtain appropriate education. This also applies to school accommodation.
- Non-school accommodation operated by religious organisations should be exempt unless it is operated for commercial or public purposes.

Assisted Reproductive Treatment (ART)
Provision for conscientious objection to ART by health professionals on religious or philosophical grounds (similar to that in place in relation to termination of pregnancy) should be included.

Vilification
Provisions against vilification should be included in the ADA but care needs to be taken to exempt religious and philosophical discussions held in good faith. The “offence” provision of vilification should be clearly defined as serious offence as perceived by a reasonable person.

Clubs & Associations
The move to extend the ADA to cover all clubs and associations, not just those selling alcohol, is in error. It goes against the basic right of freedom of association and given that there are well over 3,000 clubs and associations in the Northern Territory would pose a huge administrative burden on the Anti-Discrimination Commissioner.

Response to Discussion Paper on Modernisation of the *Anti-Discrimination Act* September 2017

The Very Reverend Dr Keith Joseph
Dean of Darwin, Anglican Diocese of the Northern Territory

1. Introduction

This response is submitted both personally and on behalf of the Parish of Christ Church Cathedral, Darwin. It should not be taken as representing the views of the broader Anglican Diocese or Church.

Clearly there is a need to modernise the Anti-Discrimination Act (ADA) which in its current form is almost 25 years old. As noted in the Discussion Paper at various places some of the terms used in the legislation are now obsolete and definitions should be brought into line with current legal usage. It would also be sensible to expand the list of attributes which might receive protection from discrimination, such as victims of domestic violence. However some of the proposed changes are more problematic, especially those related to religious exemptions. This response will concentrate on the following issues:

Religious Freedom
- **Religious Exemptions – General**
- **Religious Exemptions – Appointment of Ministers and Conduct of Worship**
- **Religious Exemptions – Cultural or Religious Sites**
- **Religious Exemptions – Employment at Schools run by Religious Education Authorities**
- **Religious Exemptions – Admission to Religious Schools and Accommodation**

Assisted Reproductive Technology
Vilification
Definition of Associations
Other Issues

2. Religious Freedom

Unlike many other liberal democracies, Australia does not have a Bill of Rights. In Australia the legal implementation of human rights depends on various pieces of legislation, the common law, and other documents such as international treaties. In lieu of a Bill of Rights or some other overarching legislation, both the Commonwealth and the States and Territories have responsibilities for implementing human rights. One important way in which this is done is by Anti-Discrimination legislation.

One issue that is of prime concern here is Religious Freedom or the right to exercise one's religion. The individual right to religion is not a direct concern of the ADA: all individuals ought to have the right to believe and practice what they like provided it does not break the reasonable laws of the country. But religion is not just individual and private but is also corporate and public and this is where tension comes in relation to the ADA. To what extent can the state legislate to limit or regulate the exercise of religious freedom in the public sphere?

In Australia religion is voluntary: no one can be forced to participate in religious activities. Such religious activities should be in principle privileged as a right: if religions choose to discriminate internally (for example in selecting only males as priests) then that is entirely the right of that religion and its participants. No one is required to join the religion, and those who do join do so voluntarily knowing that certain discriminations are entrenched. Many Christians have significant reservations about discrimination inside the church in areas such as gender and sexuality but we would not welcome state intervention in an attempt to change Church practice in those areas. Religions must

work these issues out for themselves so that it marks a true change in religious understanding. The state has no business interfering in the internal workings and doctrines of a religion where those practices pose no significant harms.

However, where the religion takes part in the public sphere there are stronger arguments for the role of the state in limiting religious freedom and in imposing anti-discrimination legislation. For example:

- A religion or its adherents operate commercially (therefore enjoying all the benefits and protections that the state gives to commerce)
- A religion or its ministers are given special privileges or are employed by the state (such as chaplains in the military or government institutions; or ministers of religions performing marriage ceremonies as agents of the state)
- A religion or its institutions receive government funding (such as schools or charitable institutions)

Often this tension is expressed in terms of being an issue of balancing religious freedom with public interest. But this is the wrong way of viewing the issue. Religious freedom is also in the public interest: society benefits by a diversity of cultural, religious and philosophical viewpoints. Indeed multi-culturalism depends on religious freedom as many of the cultures which contribute to the rich fabric of Australian society have a deep religious or spiritual dimension at the core of their very being. Spirituality is particularly important to Aboriginal and Torres Strait Islander culture and arguably the suppression of indigenous spirituality is one of the greatest causes of dislocation for indigenous culture. Multi-culturalism without religion becomes a parody. Therefore religious freedom and the public expression of religious practice is clearly in the public interest.

Accordingly if religious freedom is in the public interest, then the onus is not on people of faith to demonstrate why they should be allowed to practice religion publicly. Rather the onus is on the state to show why it is in the public interest in any given case to restrict religious freedom. This becomes a key point in working our way through reforms to the ADA.

2.1 Religious Exemptions – General

The discussion paper lists 22 questions. Question 14, *Should any exemptions for religious or cultural bodies be removed?*, is probably the most contentious. There are broadly seven areas in which religious bodies currently have exemptions:

1. Training, ordination and appointment of ministers
2. Conduct of religious services
3. Places of Worship and other property owned by religious authorities
4. Admission of students in schools conducted by religious authorities
5. Employment in schools conducted by religious authorities
6. Provision of accommodation in schools conducted by religious authorities
7. Provision of other accommodation services

2.2 Religious Exemptions – Appointment of Ministers and Conduct of Worship

The general exemption for items (1) and (2) is covered in Section 51 of the ADA:

> **51 Religious bodies**
>
> This Act does not apply to or in relation to:
>
> (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
>
> (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
>
> (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or

(d) an act by a body established for religious purposes if the act is done as part of any religious observance or practice.

The discussion paper does not propose any change to this section. In general this section is appropriate but there are a couple of weaknesses that could be remedied which directly relate to the internal administration and functioning of religious bodies. First there is a weakness here in that lay ministers (non-ordained persons) are not clearly covered and it may be appropriate to do so. Not every religion has ordained persons or clergy and many Christian denominations employ lay persons within their church structures for a number of roles which may not be directly connected to religious observance or practice. For example, the national President of the Uniting Church is a Territorian who is not an ordained minister of religion.

It is also noted that theological colleges (such as Nungalinya) are not clearly covered; likewise Sunday Schools and Muslim Saturday Schools are not clearly included in the general exemption. Again it would be appropriate to broaden Section 51 to bring specifically religious education under the umbrella of the general exemption.

2.3 Religious Exemptions – Cultural or Religious Sites

The discussion paper suggests that the general exemption for access to cultural and religious sites be removed (Item 3 above). At present this is contained within Section 43 as follows:

> **43 Exemptions – cultural or religious sites**
> A person may restrict access to land, a building or place of cultural or religious significance by people who are not of a particular sex, age, race or religion if the restriction:
> (a) is in accordance with the culture or the doctrine of the religion; and
> (b) is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.

Under the proposal in the discussion paper this exemption will be removed, meaning that exemptions will need to be applied for on a case-by-case basis to allow for discrimination in relation to religious sites. It is assumed in the discussion paper that Aboriginal sacred sites will not be affected as they are covered by the *Aboriginal Sacred Sites Act* but all other cultural and religious sites would no longer have a general exemption.

There are many objections to such a move. First there is the general principal of religious freedom: the onus is on the state to show why there is a public interest in such a move and none is proposed. Second it would be a bureaucratic nightmare – there are at least 200 places of worship in the Northern Territory leaving aside sacred sites and other areas used by Aboriginal people for conducting ceremonies. Many religions have constraints on admission to their places of worship: for example mosques and many Christian churches segregate their congregations by gender. Would each place of worship need to apply for exemption? Would they apply for an exemption in general, or only for specific occasions or types of exemption? Would an exemption be allowed for a moral objection: for example a church which did not want to lease its hall for the use of lawful sex work? Clearly a general exemption is much more practicable.

But more importantly, if the Anti-Discrimination Commissioner was involved in granting exemptions it would require the Commissioner to judge the reasonableness or sincerity of religious convictions and doctrines. The Commissioner would need (for example) to decide if it was reasonable for a mosque to have separate areas for men and women. Undoubtedly decisions would be appealed into the court system. In a society which state and religion are separated it is a dangerous precedence to have agencies of the state deliberating on the validity of religious beliefs and deciding as to which beliefs are to be granted privilege and which are not. It would be an administrative mess and would

contravene basic principles of the right to religious freedom. Accordingly Section 43 should be retained.

2.4 Religious Exemptions – Employment at Schools run by Religious Education Authorities

At present Religious Education Authorities are permitted to discriminate on grounds of religion, sexuality and to prevent offence to religious sensitivities, as in Section 37A:

> **37A Exemption – religious educational institutions**
> An educational authority that operates or proposes to operate an educational institution in accordance with the doctrine of a particular religion may discriminate against a person in the area of work in the institution if the discrimination:
> (a) is on the grounds of:
> (i) religious belief or activity; or
> (ii) sexuality; and
> (b) is in good faith to avoid offending the religious sensitivities of people of the particular religion.

The Discussion paper proposes removing this exemption. There is a reasonable argument to be made for this on the grounds that schools (unlike their parent churches and mosques) receiving substantial public funding. It could be argued that there is a public interest in ensuring non-discrimination in schools receiving public funding. But the ADA is the wrong instrument in this case. Governments fund a whole number of institutions with limited or specialist interests who may choose to restrict admission or access: for example Headspace limits it services to those under 25 years of age and Veterans Counselling Services restrict their services to those who have served in the armed forces. Presumably therefore Government funding of private schools (including religious schools) is done for many good reasons, including the perceived benefit for society of education being available in a religious environment.

It seems basic to religious freedom that religious schools ought to be allowed to maintain a religious ethos not just in what they teach but also in how the school is conducted. This would include the employment of not just of chaplains and principals but of everyone: maintaining the religious ethos of schools is not just the preserve of senior leadership. The religious ethos should be lived out in the life of the school by all of those working in the institution. In this case it is not appropriate to use the ADA to determine if discrimination is allowable in certain cases. Rather, issues of discrimination can be tied to funding grants. This is already done elsewhere (for example Church-owned universities receiving public funding cannot discriminate in admission or employment).

Those seeking employment at religious schools are free to choose employment elsewhere. In seeking to work in a religious school they are accepting the religious ethos of the school. If the Government wants religious schools to offer non-discriminatory employment then it can stipulate so as part of the grants structure: if the school chooses not to accept the funding then it is free to do so. The ADA is not the appropriate vehicle for sorting this matter out. Religious schools are funded in large part because they are religious and those seeking employment there are free and able to seek employment elsewhere.

2.5 Religious Exemptions – Admission to Religious Schools and Accommodation

The discussion paper also recommends the removal of the ability of religious education authorities to discriminate in the admission of students (Item 4 above), presently covered by Section 30(2):

> **30 Exemptions**
> (1) ...

(2) An educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion may exclude applicants who are not of that religion.
(3) …

Unlike churches, schools receive substantive public funding. It could then be argued that there is a public interest in ensuring non-discrimination in admission to schools receiving public funding. There is a distinction here between employment and admission. Adults are free to seek employment in a variety of places but the ability of students to seek admission can be restricted.

Especially in the Northern Territory with its small and dispersed population it may be that the religious school is the only school offering specialist services (such as boarding for indigenous students or services for disabled students). Possibly a religious school is the only geographically proximate school in a remote area. In both types of cases it would be remiss for students to be excluded simply because of religious belief or other attributes. However, the appropriate way of dealing with such unusual circumstances is not to remove the general exemption. The presumption in favour of religious freedom should be maintained. Rather there are two ways of dealing with this type of issue.

First, the Government in funding such institutions could set a condition of funding including the admission of isolated students regardless of attributes. Second, it should be possible for students or parents or guardians to apply for an exception to the general exemption: that is, they apply to the Anti-Discrimination Commissioner to be admitted to the school citing public interest or arguments of reasonableness. This would put the onus on the applicant rather than on the school and would preserve the policy that religious freedom is generally in the public interest unless specifically indicated otherwise. In practice (as has occurred to date) religious educational authorities have been very flexible on these issues and the author of this paper has no knowledge of any students denied reasonable access to education due to discrimination by religious educational authorities. But there are arguments for allowing a legally enforceable avenue to seek an exception to the general religious exemption for admission.

The issue of accommodation at religious schools (Item 6) is closely linked to that of admission policies and similar considerations apply. It is recommended that the policy on accommodation at religious schools be the same as the policy for admission.

Accommodation outside religious schools (Item 7) is more vexed. Where the accommodation is provided on identifiably religious premises (for example on church grounds; a monastery or retreat centre; or a church campground) then it seems appropriate that the religious freedom principle should be applied. In such cases there should be a general exemption from the requirements of the ADA. However if the accommodation is provided as a commercial enterprise (such as the operation of a motel or apartment building) or is provided as a public charity funded by tax deductibility and public funding (such as a hostel for the homeless) then it is no longer in the public interest to allow discrimination apart from those forms of discrimination normally allowed to commercial enterprises or charitable foundations. Commercial entities conducted on commercial lines should be treated the same as any other commercial enterprise regardless of ownership.

3. Assisted Reproductive Treatment

It is proposed to remove discrimination in relation to access to Assisted Reproductive Treatment (ART). However, there needs to be protection for health care workers who object to ART on religious, philosophical or cultural grounds. They ought to be allowed to refuse to take part in ART on the grounds of conscientious objection. It is recommended that provisions like those in the *Termination of Pregnancy Law Reform Act 2017* (Sections 11 & 12) be used.

4. Vilification

The Discussion Paper comments at page 11:

> The Act could be amended to make it unlawful for a person to do an act, other than in private (for example at home), if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and the act is done because of a characteristic of that person or they are a members of the group on the basis of race, disability, sexual orientation, religious belief, gender identity or intersex status.

Clearly this is modelled on Section 18C of the Commonwealth *Racial Discrimination Act 1975*:

> (1) It is unlawful for a person to do an act, otherwise than in private, if:
>
> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
>
> Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.
>
> (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
>
> (a) causes words, sounds, images or writing to be communicated to the public; or
>
> (b) is done in a public place; or
>
> (c) is done in the sight or hearing of people who are in a public place.
>
> (3) In this section:
>
> ***public place*** includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

There has been much discussion of Section 18C including an inquiry into freedom of speech by the Commonwealth Parliament Joint Committee on Human Rights in 2017. There is a view (not shared by the Joint Committee) that legislation restricting vilification is a threat to human rights such as freedom of speech and freedom of religion. Similar concerns will doubtless be raised on vilification being included in the ADA. For example a robust public debate between a Christian Priest and a Muslim Imam might be seen by some Christians and some Muslims as causing offence. These are legitimate concerns but can be allayed by consideration of the operation of 18C and by appropriate drafting of legislation in the Northern Territory.

There are some limitations on the operation of Section 18C as set out Section 18D dealing with exemptions:

> Section 18C does not render unlawful anything said or done reasonably and in good faith:
>
> (a) in the performance, exhibition or distribution of an artistic work; or
>
> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
>
> (c) in making or publishing:
>
> (i) a fair and accurate report of any event or matter of public interest; or
>
> (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

The issue of offence has also been dealt with by the High Court: it must be offence as experienced by a "reasonable victim" (*Corunna v West Australian Newspapers* (2001) EOC 93-146 at 8.4). Therefore the concern about the broadness of a Section 18C style of vilification is valid but it is possible to draw up robust protections within legislation, including a codification of judicial restrictions.

My own experience in dealing with racial vilification (and which were expressed in my testimony to the sitting of the Joint Committee in Darwin on 20 February 2017)[1] lead me to think that the inclusion of vilification is a good thing. It is accordingly recommended that the ADA should include a section against vilification but at the same time include exemptions as set out in Section 18D and further exemptions for religious and philosophical discussions carried out in good faith. The meaning of "offence" should be defined to include only serious offence which would be discerned as serious offence by a reasonable person. It is recommended that such matters be codified so that difficulties are acknowledged and dealt with *a priori* rather than left for a determination in court.

5. Clubs and Associations

At present only a club or association with more than thirty members and which sells or supplies liquor for consumption on its premises is subject to the ADA. The discussion paper proposes the removal of the requirement as regards licensed premises, so that any club or association with more than thirty members is subject to the ADA. According to the Australian Charities Report 2016[2] (published by the Australian Charities and Not-for-profits Commission, or ACNC) there are 3,349 registered charities and not-for-profit organisations in the Northern Territory. Presumably most of these fit within the definition of a club and association and there would be other less formal groups not registered with the ACNC that might also fit within the definition. Most of these groups would have been formed for a specific purpose (such as sports, scouting, lodges, cultural or national associations, support groups and religious organisations) and most would currently not be subject to the ADA.

This proposal is problematic both on grounds of freedom of association and on practical administrative grounds. Most clubs and association do not sell alcohol and are formed for a specific purpose and often for a specific group. It is essential to a well-functioning democracy that people are free to form associations for specific purposes and groups: the ability to control membership is central to their ability to function for those purposes. The presumption is that such discrimination should be allowed unless there is a significant public interest to the contrary. That is why licensed premises are subject to the ADA because there is a sad history of people not being allowed into licensed premises due to race or gender. Licensed premises should be open to all adults subject to usual restrictions related to behaviour and criminal law: it is in the public interest to do so.

However most clubs and association are not offering the public services provided by a licensed premise. They are formed for specific purposes that would be undermined if they were not allowed to discriminate against prospective members. For example the RSL Sub-branch is open only to returned and other ex- and currently serving Defence members (whereas the RSL Club which is licensed is open to all). Masonic Lodges only admit males who believe in God. Gay and lesbian support groups tend not to allow heterosexual homophobes into their membership. Aboriginal sporting associations tend to favour aboriginal members. National Associations tend to admit only members of their nationality: one suspects that the local Croatian Society might be shy of admitting a Serbian

[1] Commonwealth Parliament Hansard: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommjnt%2Fc3ed356a-0582-4e1e-9364-52a56d4bd7d2%2F0007;page=2;query=(Dataset%3Acommsen,commrep,commjnt,estimate,commbill%20SearchCategory_Phrase%3Acommittees);rec=6

[2] Australian Charities Report 2016, Table 3.2 at page 21: http://australiancharities.acnc.gov.au/wp-content/uploads/2017/12/Australian-Charities-Report-2016-FINAL-20171203.pdf

nationalist. Churches prefer only to admit to full membership those who profess their faith, and the Islamic Society would probably prefer to restrict its membership to Muslims. The list goes on. The main point here is that administratively it would be a shambles to sort out exemptions for over 3000 clubs and associations in the Northern Territory. It is in the public interest to allow a general exemption both on administrative grounds and on the principal of freedom of association.

6. Other Issues

The other issues raised in the Discussion Paper are for the most part unproblematic. On issues such as gender identity and sexual orientation the ADA needs to reflect current social and scientific understanding and should also be in line with other legislation, even though many people will have religious or cultural reservations about such matters. Indeed, extending the ADA to protect victims of domestic violence and the homeless is a very good thing.

On a minor note, broadening the ADA to cover therapeutic animals might be problematic, in so much as it might imply rights for those animals which would be inconsistent with scientific and cultural norms and the general thrust of law in Australia. It might be better to extend the ADA to cover their owners and human companions as the objects of protection, rather than the animals themselves.

An executive summary is attached as the front sheet. Please feel free to contact me if any matter requires clarification or if I can provide any further information.

Keith Joseph PhD MA