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17 January 2018

Response to the Discussion Paper

on the Modernisation of the Anti-Discrimination Act

In a briefing in November last year, our group was advised that the deadline for responding to the Discussion Paper on the Modernisation of the Anti-Discrimination Act has been extended until the end of January 2018. I submit these comments for your consideration.

Whilst agreeing with many of the suggested changes to the Anti-Discrimination Act, there are some suggested changes that I see as problematic.

I do agree that **vilification** provisions should be included in the Act, but there are four comments in relation to the suggested changes:

1. Legislation will not protect Territorians or ensure "the right to live their lives free from harassment, psychological distress, hurt, anger and anxiety that exists in society" (p.12). Teaching emotional intelligence, communication skills and problem-solving skills in schools would be a more direct and successful method of achieving these desired outcomes.
2. Including the terms "offend" and "insult" in the proposed amendments are problematic, in that they are too broad. They are subjective and based on individual feelings rather than measurable fact, and would create a great deal of work to investigate and substantiate. How would an exemption actually work? Again, there would need to be substantial resources (people, time and money) to investigate satisfactorily.
3. In a meeting last November with representatives from the Anti-Discrimination Commission and Matt Punch from the Hon Natasha Fyles' office, it was stated that the wording of any amendments would make it clear that an offence would have to be of a "high level" in order for a complaint to proceed. Again, however, this is very subjective.
4. The negative effect on freedom of speech, a key feature of Australia's democracy, would outweigh any positive intended outcomes.

The section on **additional attributes**, extended to include domestic violence, accommodation status, lawful sexual activity, and socioeconomic status seems unnecessary in light of data in the Anti-Discrimination Commissioner's Annual Report 2016-2017. In that report, none of these attributes is specifically mentioned, even in the section on "Not Under the Act". Even if these attributes did warrant special mention, the Annual Report comments: "*Common enquiries of this nature are bullying and harassment issues where the behaviour is not because of a particular attribute.*

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The general enquiry process is a valuable process for people to discuss these types of issues, as we are able to refer them to other services to address their concerns, rather than requiring them to go through a more formal process when it is not a matter we can accept a formal complaint about." In other words, there are other avenues for people to follow, rather than beginning to name new attributes within the Anti-Discrimination Act.

I can see issues arising if the **representative complaint model** is included within the Act. It is very heavy-handed, and verges on Big Brother surveillance. The model assumes that all people think the same whereas all people do not think the same. For example, a person experiencing discrimination may not want to make a complaint for a variety of reasons. If this person's wishes are not sought or considered, and a complaint is made by an observer group, that is actually taking away the rights and freedoms of that individual. The discussion paper acknowledges "an individual complaint model does not suit all complaints or all complainants". The proposed addition of a representative complaint model, likewise, will not suit all people. Non-litigious people could be steam-rolled into a process they don't want. Before any complaint is made on behalf of another person, there should be conversation, consultation, explanation and permission. Then there is the potential for it to become an individual complaint, which is already covered under the Act. Perhaps the Public Education and Training function of the Anti-Discrimination Commission could be utilised to empower individuals to recognise their responsibilities to assist "victims" on a personal level.

In the meeting last year with representatives from the Anti-Discrimination Commission and Matt Punch from the Hon Natasha Fyles' office, it was stated that the proposed amendments were intended to be systemic, and about an issue, rather than based on an individual's experience. If this is the case, the draft discussion paper does not make this clear.

In the area of **religious exemptions**, there are three comments I'll make:

1. Where is the evidence in the Anti-Discrimination Commission Annual Report 2016-2017 that there is a problem with religious exemptions for educational institutions or accommodation under the control of a body for religious purposes? Why target religious and cultural bodies, and a system that is working effectively for a large percentage of the NT population, particularly in the delivery of education?
2. The suggested changes do not achieve the desired goal i.e. "*to promote equality of opportunity for all Territorians*" and "*to make the system fairer by ensuring people of certain attributes have the same opportunities under the Act. It would also ensure that cultural and religious bodies are more accountable for their actions and more inclusive*". Some of the changes would, in fact, discriminate against religious institutions and individuals who have a right to equality in our Australian democracy. The example given in the Discussion Paper, of a religious school choosing not to employ someone identifying as LGBTI, does not represent the complexity of this and similar situations. A person applying for a position within a religious organisation – or any organisation for that matter - would do so in the knowledge that they accept the "terms and conditions"

of that workplace. The tail does not have the right to wag the dog. Religious institutions do have the right to select employees on the basis of their suitability for the position they apply for. Section 37A is a fundamental right of religious institutions, as are Section 40(2A) and Section 40(3).

3. The application for an exemption with the ADC for particular services offered by a religious institution, on a case-by-case basis, is cause for concern for two reasons. Firstly, religious freedom is being challenged. Applying for an exemption requires a government authority to make a decision on a religious matter – something it is not qualified to do. Secondly, applying for an exemption implies a process: a process that may or may not result in a positive outcome for that institution. The Discussion Paper does not provide any detail on what the application process would involve, or how it would be assessed. It would present an absolute nightmare for the administration of religious schools, for example. A logical response could be that whole organisations withdraw from the delivery of educational services. In this scenario, it is religious bodies that are being discriminated against.

Modernising Language

On page 27 of the Discussion Paper, it states "*References to 'man' and 'woman' as they appear in the Sex Discrimination Act 1983 (cth) are now to take their ordinary meaning".* What is "their ordinary meaning"?

"Parenthood" is a valuable role within our society, and should not be lost. Whilst agreeing that "many people have caring relationships outside this paradigm" (p. 28), the Act could be modernised by adding "carer responsibilities" and not subtracting "parenthood".

Thank you for your consideration of these comments.

Regards

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