497

Northern Territory Opposition Submission Regarding the Proposed Modernisation of the Anti-Discrimination Act

Background

In September 2017, the Legal Policy division of the Department of Attorney-General and Justice released a Discussion Paper entitled Modernisation of the Anti-Discrimination Act (Discussion Paper) (the "Act").

The Discussion Paper puts forward 22 recommendations for proposed reforms to the Anti-Discrimination Act. These range from technical changes to substantive changes which would have a deleterious impact on religious institutions, community groups and individuals.

There have been a number of consultations across the Territory, many of which have been attended by the Opposition, community representatives and groups that may be affected by changes to the Act. The discussion below was informed by these consultations, as well as concerns raised with the Opposition outside of the consultations.

Reforms which the Northern Territory Opposition believes should be rejected

There are a number of proposed reforms which go far beyond a mere modernisation of the Act. Some of these could be construed as a form of social engineering. Others would render the Territory an outlier in Australia and potentially offend human rights conventions, the Constitution and other arrangements.

1. <u>Religious Exemptions</u>

The Discussion Paper suggests that the exemptions for religious educational institutions, accommodation under the direction or control of a religious body and access to religious sites be removed. Such reforms would likely have an unreasonably deleterious impact on the ability of Territorians to freely exercise their chosen religion.

a. Religious schools

The Discussion Paper suggests that the blanket exemption for religious schools be removed, both with regard to the hiring of staff and admitting students. This

proposed change to the Act is highly objectionable and would fundamentally change the nature of religious education in the Territory if enacted.

It is telling that no other state or territory in the whole of Australia has removed the exemption for religious educational institutions from its anti-discrimination legislation, with most states simply adopting the anti-discrimination legislation of the Commonwealth (which preserves the blanket religious exemption for employment at religious schools). See *Sex Discrimination Act 1984* (Cth) ss 38(1)-(2); *Australian Human Rights Commission Act 1986* (Cth) s 3(1); *Age Discrimination Act 2004* (Cth) s 35; Fair Work Act 2009 (Cth) ss 153(2)(b), 195(2)(b), 351(2)(c), 772(2)(b); *Equal Opportunity Act 2010* (Vic) ss 83(1)-(2); *Discrimination Act 1991* (ACT) s 44; *Equal Opportunity Act* (WA) s 66(1).

The Northern Territory would be a complete outlier and there is no precedent for such a change anywhere in the country.

Anti-Discrimination Commission and AGD representatives admitted at consultation sessions that this change is not based on evidence. Indeed, Opposition representatives were informed that there have not been any recorded complaints to the Anti-Discrimination Commission from any parent, teacher or other party concerning the religious exemption for schools in the Territory within the recollection of either the Commission or AGD.

If the exemption is removed, schools would likely be required to apply for an exemption on a case-by-case basis for each employee or student for which it denied a job/admittance. Ideological issues aside, this would represent a huge burden on schools and be quite expensive.

In addition, if such a change were implemented, the legal ramifications would be extensive and immediate. Both Catholic and Anglican officials have indicated their willingness to consider legal action in order to challenge any change to the Act along these lines. And they would have potentially meritorious claims.

Section 109 of the *Constitution* provides that when 'a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall to the extent of the inconsistency, be invalid'. This basic principle has been held to apply to the Territory with similar or equal force by a number of cases, including *AG v*

4 99

Minister for Aboriginal Affairs (1989) 25 FCR 345 (Lockhart J). The basic principle is that, because the Territory laws constitute subordinate legislation, they will be invalid to the extent that they either affect the operation of a Commonwealth law or destroy or detract from rights conferred by Commonwealth legislation. See *R v Kearney; Ex pt Japanangka* (1984) 158 CLR 395, 418 (Brennan J).

There will be a good argument that, if the Territory is to remove the exemptions for religious schools, they would be invalid to the extent that they detracted from the rights provided under Commonwealth law. An example of a potential conflict between Commonwealth and the proposed Territory scheme is illustrated by s 38(1) of the *Sex Discrimination Act 1984* (Cth), which states *inter alia*:

> Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

There is precedent for the proposition that, where a Commonwealth law confers a right that a state or territory law purports to take away, the latter will be held invalid. See *Colvin v Bradley Brothers Pty Ltd* [1943] HCA 41(Latham C.J., Rich, Starke, McTiernan and Williams JJ). Removing the religious exemption may very well present such a situation and, at the very least, will likely lead to costly litigation which may reach all the way to the High Court.

It is interesting to note that the ACT actually provides additional protections for religious schools, allowing adverse employment decisions to be made for employment positions that involve 'the teaching, observance or practice of the relevant religion.' Discrimination Act 1991 (ACT) s 44.

Further, removing the exemption may violate various United Nations Conventions. As Article 14 of the United Nations Convention on the Rights of the Child provides:

> 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
>
> 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the

exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.[1]

Australia is a signatory to the Convention on the Rights of the Child, signing and ratifying the document in 1990.[2] There is an argument to be made that restricting the freedom of either schools or children to attend religious schools without limitation, would constitute a violation of the Convention.

Finally, it is still an open question whether various parts of the Australian Constitution, such as s 116, have application to the Territory through s 122. This question was posed to the High Court in *NAAJA v Northern Territory* (the 'paperless arrest' case) and was not definitively answered. [2015] HCA 41, [107]-[118] (Gageler J). Therefore, it remains an open question and a challenge under s 116 would be a distinct possibility (in addition to the other grounds outlined above).

b. Accommodation and religious sites

As far as accommodation and access to religious sites is concerned (other than Aboriginal sites, which are protected under the *Northern Territory Aboriginal Sacred Sites Act*), the removal of this exemption could be used by particular groups to intentionally intimidate, harass and disrupt the free exercise of religion. For example, take the instance of a religious group hiring out its accommodation to various organisations on a case-by-case basis. As the law currently stands, in the event that a group that was diametrically opposed to that religious group's beliefs—they could say no without running afoul of the Act. If this change takes place that would no longer be true.

The danger of this potential reform is that groups pushing a specific issue that is contrary to the beliefs of a group would intentionally attempt to rent accommodation in order to create controversy and 'manufacture' a violation of the Act. For instance, anti-Catholic group might seek to hire accommodation in a Catholic Church facility to

[1] *United Nations Convention on the Rights of the Child*, GA Res 44/25, UN GAOR, 44th sess, Treaty Series, vol. 1577 (20 November 1989).

[2] Similar protections are provided for in Article 18 of the International Convention on Civil and Political Rights, to which Australia is also a signatory.

501

hold a fundraiser or other event that would fundamentally offend the sensibilities of adherents. Removing the exemption along these lines would necessarily abridge the freedom of religious bodies to exercise their beliefs. In addition, such changes would likely be open to the same court challenges as outlined above.

2. Vilification

The Discussion Paper suggests that the Act should be changed 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 members of the group on the basis of race, disability, sexual orientation, religious belief, gender identity or intersex status.'

The only exemption suggested is for acts done 'reasonably and in good faith'.

This language is far too broad and vague and, on that basis the changes may have a detrimental effect on the exercise of certain freedoms that Territorians currently enjoy, such as the freedom to express political views in a public forum.

Other states include anti-vilification provisions in their anti-discrimination laws, but they are far more tailored and narrow than the proposed language in the Discussion Paper. For example, Victoria's *Racial and Religious Tolerance Act 2001* (Vic) makes it unlawful for a person to—on the basis of race or religion—'engage in conduct that incites hatred against, or serious contempt for, or revulsion or severe ridicule of' a person or group of persons.

However, the protections in the statute are very robust. Section 11 of the *Racial and Religious Tolerance Act 2001* provides that a person does not contravene that Act if the conduct was engaged in '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, or any other conduct engaged in, for—

(i) any genuine academic, artistic, religious or scientific purpose; or

(ii) **any purpose that is in the public interest**; or

(c) in making or publishing a fair and accurate report of **any event or matter of public interest**.

500

Therefore, the Victorian Act specifically protects the freedom of expression in, for instance, political matters—at least in theory.

This is essentially an extension of the implied right to political speech that has been outlined by the High Court in cases such as *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. As McHugh J described in *Levy v State of Victoria* (1997) 146 ALR 248, 274, the freedom protected by implication in the Constitution:

> is not ... a freedom to communicate. It is a freedom from laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution.

There would be a cogent (and perhaps compelling argument) that, if the changes to the Act were made in the manner suggested by the Discussion Paper, they would violate this implied freedom. Indeed, a similar conclusion was reached concerning Queensland's *Anti-discrimination Act 1991* (Qld) in 2001. In that instance, a candidate for federal office had expressed unfavourable views about Muslims in an election pamphlet. A complaint was made—because Queensland has similar vague language to that proposed by the Discussion Paper—and the Discrimination Tribunal was forced to consider the matter. The Tribunal ultimately found that there was no intent to incite hatred or contempt, but rather to communicate a political view on matters and, accordingly, dismissed the complaint. See *Deen v Lamb* (2001) QADT 20 (8 November 2001).

The *Deen v Lamb* matter illustrates the necessity of precise language—and sufficient protections for political speech—that should be included in any anti-vilification provision.

As a practical matter, if the provision is too broad (as the Discussion Paper seems to suggest) there will likely be a great deal of confusion in the community as to what is prohibited and what is not. This could lead to an excessive amount of complaints and legal challenges—as well as general uncertainty in the community about what is acceptable and what is not.

503

Therefore, any anti-vilification provision should—at the very least—include language, similar to that of Victoria, which specifically states that political/public interest speech is not prohibited in public or private.

3. **Broadening the coverage of clubs under the Act**

The Discussion Paper also suggests that the definition of clubs covered under the Act be expanded to apply to all clubs with more than 30 members. Section 4 of the Act currently applies only to clubs that sell or supply liquor for consumption on their premises.

The problem with broadly removing exemption for clubs that do not serve liquor is that could conceivably expand the definition to include all manner of 'clubs', such as **political parties**. This is due to the fact that 'club' is currently defined in the Act as any organisation that is 'established for social, literary, cultural, **political**, sporting, athletic, recreational or community service purposes or any other similar lawful purpose.' It would clearly be objectionable if a political party, such as the CLP, were not able to exclude applicants because they hold political beliefs that are contrary to the Party.

Additionally, it was suggested at a number of consultations that the exemptions that currently exists for clubs that are mainly for people of a single sex or to preserve a 'minority culture' may be removed. This would result in further problems, due to the fact that it would have a significant impact on sporting clubs (like AFLNT and NRL NT) that are organised on the basis of participants of a particular gender. Removing the 'minority culture' provision would also mean that Greek, Italian or Irish clubs might be required to admit members that do not belong to the cultural group that the club was formed to accommodate and/or advance.

As such, any change to the exemption for clubs should be accompanied by a commensurate exemption for clubs that have a rational basis for opening their membership to a particular group of people, including sporting clubs that are organised by gender, social clubs which promote a particular religious or ethnic group and political parties.

Due to the difficulties in drafting such an exemption template, it would be more desirable to simply allow the current exemption framework to remain in place.

504

4. Representative Complaints Model

The Discussion Paper suggests that a representative complaint model be adopted, whereby representative bodies (such as unions, peak bodies and others) would be able to lodge complaints on behalf of persons claiming they have been discriminated against.

The concern with this proposed change to the Act is the lack of detail and forethought that has gone into the proposal. There are no details on the standing requirements that would be required. For example, could a peak body bring a complaint on behalf of the public at large or would there have to be an identified aggrieved party? Also, would the aggrieved person need to be a financial member of the representative organisation or a member of a member organisation? These are all details that could have an enormous impact on the functioning and administration of the Act.

The danger is that a motivated interest group could push their agenda by systematically harassing individuals, businesses or organisations with serial complaints, without having to show that they have a personal stake in the matter (or a link to a member with a personal stake in the matter).

Other states, such as New South Wales, do allow representative complaints. However, there are strict standing requirements in order to ensure that the process is not abused. As section 87C of the *Anti-Discrimination Act 1977* (NSW) provides:

> (1) Before a complaint can be made by a representative body as referred to in section 87A (1) (c), the representative body must satisfy the President:
>
> (a) that each person on whose behalf the complaint is made consents to the complaint being made by the body on his or her behalf, and
>
> (b) that the body has a sufficient interest in the complaint, that is, that the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects, or has the potential to adversely affect:
>
> (i) the interests of the body, or
>
> (ii) the interests or welfare of the group of people it represents or purports to represent.

505

> (2) The President may require a representative body that has made a complaint to nominate a person to appear for the representative body in conciliation proceedings concerning the complaint before the President.

The NSW Act therefore strikes a balance between allowing representative complaints, but at the same time providing procedural protections to make sure that the party making the complaint has standing or 'sufficient interest in the complaint'. If the Territory is to allow such complaints, similar protections should be built into any analogous provision.

5. **<u>Failure to accommodate a special need</u>**

The Discussion Paper suggests that the presumption for accommodating special needs be reversed, so that an employer or other person would have to provide accommodation 'unless there [were] reasonable grounds upon which not to make the accommodation.'

The way the scheme works now, a person would only be in violation of the Act if they 'unreasonably fail' to accommodate a special need. Section 24 of the Act then goes on to define what constitutes unreadable failure, depending on factors, such as: (a) the nature of the special need; (b) the cost involved; (c) the financial circumstances of the person; (d) the disruption that might occur; and (e) the nature of any benefit or detriment to persons concerned.

The way the Act operates now probably strikes the appropriate balance between the needs and expectations of employers and service providers and those of persons with special needs. To flip the presumption may cause financial hardship or undue burden to affected parties. For example, a small business may not have the financial ability to accommodate a particular need—or the disruption that accommodation would cause may severely disrupt their business. To require them to comply without regard to those factors would be unreasonable and inequitable.

6. **<u>Adding protection for those engaged in lawful sexual activity (sex workers)</u>**

The Discussion Paper proposes adding 'lawful sex work' to the list of protected attributes. At base, this means that a person or business would not be able to discriminate against a person that has worked as a sex worker in the past or present.

506

While it is admirable and necessary to protect workers of any industry, either past or present, there are a number of theoretical problems with this approach. For instance, there are various professions that take into consideration an applicant's 'good fame and character', such as medical and legal fields, which may include past work experience or current vocation. This change would effectively prohibit any consideration of past sex work which could prove problematic and invite legal challenges.

Also, there may be a public interest in allowing—for example, those renting homes or apartments—to consider whether a person is a sex worker in deciding to rent a dwelling. It could be highly objectionable under certain circumstances to have a sex worker renting an apartment across the hall or street from a home where sex work is being performed, particularly where there are children in the immediate vicinity.

As such, it may be more desirable to instead alter the current rules and regulations concerning sex work in the Territory. The example above could, for example, be ameliorated if laws concerning legal sex work in the Territory were altered to clarify the particular locations where lawful sex work may take place (perhaps only in certain business districts, rather than in residential areas).

Neutral reforms which appear unobjectionable to the Opposition

A number of the proposals in the Discussion Paper are rather benign and appear to be unobjectionable. There are questions as to the implementation of these provisions and the precise way in which they are drafted will be of utmost importance. However, on the face of the recommendations they seem acceptable. These include:

- The addition of socioeconomic status to the list of protected attributes (so long as there is an objective measure, such as the receipt of Commonwealth benefits or the like);
- Accommodation status being added to the list of protected attributes (again, so long as there is an objective way to verify this);
- Domestic violence victim being added as a protected attribute, which would allow victims to take time off work, seek treatment or obtain accommodation, education or employment (so long as it is backed up by a police report, DVO or the like);
- Rights for carer and assistance animals, which would allow carer animals (beyond just guide dogs) to be allowed in public buildings and the like (so long as the carer animal is certified by a reputable body);

- Expanding the circumstances in which sexual harassment can be established to service industries and expanding the definition of 'services' to the providers of those services, such as taxi drivers and restaurant servers;
- Including volunteers as protected workers under the Act;
- Renaming the Anti-Discrimination Commissioner the 'Equal Opportunity Commissioner';
- Extending the term of appointment for the Commissioner to five years;
- Expanding the definition of carers to include spouses and parents; and
- Substituting 'marital status' with 'relationship status' (so long as it is limited in some way to a romantic or de facto partnership-type relationship).

Of course, in the event that significant comment is enlivened by the public or other parties involving these seemingly benign provisions, these issues should be revised and considered accordingly.

Proposed reforms which merely implement Commonwealth legislation provisions

As set forth above, pursuant to s 109 of the Constitution, Territory law would likely be held invalid to the extent that it either affect the operation of a Commonwealth law or destroys or detracts from rights conferred by Commonwealth legislation. See *R v Kearney; Ex pt Japanangka* (1984) 158 CLR 395, 418 (Brennan J).

A number of the proposed modernisation reforms fall into this category. The *Sex Discrimination Act 1984* (Cth) was amended in 2013 to make discrimination against persons on the basis of gender identity, sexual orientation or intersex status illegal. On that basis, the Opposition does not oppose:

- Changing the term 'sexuality' to 'sexual orientation';
- Changing the attribute of 'sex' to 'gender identity';
- Adding 'intersex status' as a protected attribute;
- Amending the Act to ensure that all persons, regardless of sex, gender identity or marital status have access to IVF treatment in the Territory.