Comment on Future Amendments to the Northern Territory *Anti-Discrimination Act* Discussion Paper

Introductory Statement

Dear Director of Legal Policy,

Thank you for the opportunity to comment on this timely discussion paper. My comment will address two issues: the removal of current exemptions for religious bodies, and the enactment of legislation making it unlawful to 'offend, insult, humiliate or intimidate' a person or group on the basis of identified attributes. In relation to the first issue, I will argue that the removal of exemptions for religious bodies is contrary to the stated purpose of making the system fairer and more inclusive, and is contrary to the principles undergirding the free exercise of religion clause in Section 116 of the Constitution. In relation to the second issue, based on the experience of equivalent Tasmanian legislation I will argue that the proposed amendment making it unlawful to 'offend' or 'insult' is far too broad. It will have an unduly stifling effect on freedom of speech and may infringe the implied freedom of political communication in the Constitution.

Thank you for your consideration.

Kind regards,

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Issue 1: Removing Current Exemptions for Religious Bodies

Contrary to Stated Purpose

The Discussion Paper claims removing these exemptions would 'make the system fairer by ensuring people of certain have the same opportunities', and make religious bodies 'more inclusive'.

However, removal of exemptions for religious bodies is not fair for religious bodies. Though anti-discrimination laws are directed at addressing inequalities such as discrimination against individuals based on sex or gender identity, religious individuals also have a relevant appeal to equality.[1] Generally applicable laws, such as anti-discrimination legislation, 'fall disproportionately' or unequally on those whose religious practices conflict with them.[2] Those who do not engage in religious belief or practice are not subject to the same practical restrictions resulting from the laws. The need to allow for religious liberty, as part of a functioning democracy, is precisely why there ought to be exemptions for religious bodies providing public services.[3] Such bodies are often direct embodiments of the identity of the owner/operator, and if they feel direct responsibility for conduct to which they object on religious grounds, accommodations should be provided. To refuse such exemptions is to imply that religion should not be connected to public services, and this imposes a considerable burden on those who wish to integrate their lives and identities.[4]

For example, the same features which support the legalisation of same-sex marriage also support exemptions for religious bodies, particularly the common desire for religious bodies and same-sex couples to express their commitments (which are fundamental to their identity) in a public, holistic way. For the same-sex couple it is their love and fidelity to their partner,

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[1] See Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239, 269-270.
[2] Thomas Berg, 'What Same-Sex Marriage Claims and Religious Liberty Claims Have in Common' (2010) 5(2) *Northwestern Journal of Law and Social Policy* 206, 225.
[3] Ibid 208.
[4] Ibid 227–28.

and for the religious body it is the love and fidelity to the object of their religion, but in both cases the parties are claiming a right beyond private behaviour which extends to all aspects of their public lives.[5] When religious bodies are prevented from publicly expressing their religion through conduct related to their social and business interactions, and when same-sex couples are prevented from publicly expressing their orientation and relationship, both are being 'told to keep their identities in the closet. Anyone who takes the claims of same-sex couples seriously must also give substantial weight to the religious objectors'.[6]

To give another illustration from Federal Politics: former Labor party Senator Joe Bullock retired and quit the party after revelations that support for same-sex marriage would be no longer be a conscience vote from 2019. If Bullock's opposition to same-sex marriage was based on religious beliefs (a protected attribute under the Northern Territory Anti-Discrimination Act), would it be fair to force the Labor party to support a member which disagreed with their fundamental policy platform by not allowing them to have exemptions through which they can discriminate in who they accept as members? If yes, how can the Labor party remain distinctively Labor? It would lose all its potency if it allowed persons espousing non-Labor principles into a prominent position in the party. If no, then the same principle applies for religious bodies.

Furthermore, removal of exemptions for religious bodies is not inclusive for the reasons alluded to above. If passed, these changes would effectively prevent religious bodies from operating to provide public services in accordance with their convictions, at least without what seems to be an onerous and potentially expensive application process which has no guarantee of being granted. (The Discussion Paper does not provide any detail on what the application process will involve or how it will be assessed.) The religious body then has a choice either to continue operating in accordance with their convictions and risk suffering legal penalty, compromise their convictions, or remove themselves from the area completely. The untenable nature of the first two options for many religious bodies may well produce a greater proportion choosing the third. Legislation which has the effect of excluding religious bodies from the public square is not inclusive. In most circumstances there are other

[5] Ibid 207–208, 215–16.
[6] Ibid 218.

equivalent options reasonably available for those discriminated against.[7] The harm against religious bodies is therefore likely to be much greater than that suffered by discriminated persons, which reiterates the first point – it is actually the religious bodies which are receiving unfair treatment.

Contrary to the Principles of Section 116 of the Constitution

The relevant clause of Section 116 of the Constitution states 'The Commonwealth shall not make any law… for prohibiting the free exercise of any religion.' A threshold question is whether s 116 applies to the Territories, given that it says 'The Commonwealth' shall not make any law. At this stage there is no clear authority that s 116 does apply to the Territories.[8] The issue was considered by some justices in *Kruger v Commonwealth*.[9] Justices McHugh and Dawson held that it does not, but Justices Gaudron, Toohey and Gummow held that it does. In subsequent cases the High Court has held that the Constitution is a coherent document and constraints on Commonwealth legislative power contained in the Constitution should be extended to Section 122 (the power allowing the Commonwealth to make laws with respect to the territories) rather than having an arbitrary disjunct.[10] For these reasons I think Section 116 does apply to the territories under s 122.

However, these proposed amendments are made by the Territory itself rather than the Commonwealth. Therefore, technically, any amendments are not legally constrained by s 116. However, it should be noted that these changes directly target religious bodies and restrict the freedom of religious bodies by preventing them from acting in accordance with their religious convictions. Section 116 does extend to protect acts done in the practice of religion by religious bodies.[11] So although the free exercise clause cannot constrain the

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[7] See Deagon, above n 1, 285.
[8] See Reid Mortenson, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21 *Emory International Law Review* 167, 170–71; See also Carolyn Evans, 'Religion as Politics not law: the Religion Clauses in the Australian Constitution' (2008) 36(3) *Religion, State and Society* 283, 287.
[9] (1997) 190 CLR 1.
[10] See e.g. *Wurridjal v The Commonwealth* [2009] HCA 2
[11] See *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116; Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153.

Northern Territory, the principles undergirding religious freedom and anti-discrimination law are worthy of consideration. Professor Reid Mortensen articulates the relevant principles:

> [O]ne inherent paradox in *all* discrimination laws is that, although they aim to protect social pluralism, the principles of equality they usually promote also present a threat to the protection of religious pluralism in the political sphere. This occurs when, despite the traditional recognition of rights of religious liberty, the discrimination laws apply to religious groups that deny the moral imperatives of, say, racial, gender or sexual orientation equality. In this respect, Caesar has generally been prepared to render something to God through the complex exemptions granted in the discrimination laws to religious groups and religious educational or health institutions.[12]

Mortensen therefore claims that to 'honour rights of religious liberty, religious groups are probably entitled to broad exemptions from the operation of sexual orientation discrimination laws'.[13] More emphatically, the right to free exercise in the Constitution 'does not suggest a "balance" to be struck between anti-discrimination standards and rights of religious liberty, but a constitutionally required preference for religious liberty'.[14] This view is implicitly supported by a High Court which has expanded its interpretation of constitutional liberties such as the implied freedom of political communication.[15] If these principles are accepted, that implies exemptions are necessary at a minimum, not the mere ability to apply for exemptions. These proposed changes are by far the most extreme of any Australian Commonwealth, State or Territory and unduly restrict religious freedom.

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[12] Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208, 231.
[13] Ibid 228–29.
[14] Ibid 231.
[15] Ibid.

Issue 2: Making it unlawful to 'offend' or 'insult'

Tasmanian experience indicates this is too broad

It is certainly desirable to have limited vilification provisions designed to protect Territorians from 'harassment, psychological distress, hurt, anger and anxiety'. Section 17 of the Tasmanian Anti-Discrimination Act contains an equivalent provision to that proposed in the Discussion Paper, making it unlawful to engage in conduct which 'offends, humiliates, intimidates, insults or ridicules' another on the basis of protected attributes. In particular, the terms 'offend' and 'insult' have been the subject of a number of recent proceedings against individuals, with the Anti-Discrimination Commissioner determining that the individuals do have a case to answer. The individuals in question are religious people who have made statements supporting traditional marriage. Catholic Archbishop Julian Porteous released a pamphlet containing the Catholic teaching of marriage to Catholics, and church workers Campbell Markham and David Gee have also made public statements advocating for Christian teachings on marriage and sexuality. These were considered as 'offensive' and 'insulting' to the LGBTI community and all three had cases to answer (the latter two are pending and the former was dropped when it had no reasonable prospect of success).

The problem is the terms 'offend' and 'insult' are far too broad. They are subjective and based on individual feelings. Any person can claim they are offended or insulted and make a complaint to the Commissioner, at no expense to them. If the Commissioner determines there is a case to answer, the person who has allegedly engaged in the relevant conduct is summoned to the Commission at great expense and inconvenience. The system therefore encourages frivolous and vexatious complaints. It stifles freedom of speech by making people afraid to voice their opinions because they might be subject to a complaint. The Discussion Paper proposes exemptions on the basis that 'we live in a free and democratic society with a right to voice opinions in a respectful manner' and that is commendable, but exemptions are of little assistance because the process is the punishment. Even if the claim is unsuccessful because of an exemption, the person complained against has wasted significant money, time and resources, which may well discourage them from speaking up again –

contrary to the purpose of the exemptions. Removing the terms 'offend' and 'insult' and ensuring there is systemic prevention of frivolous and vexatious claims therefore need to be part of these proposed vilification provisions.

Infringes Implied Freedom of Political Communication

The implied freedom of political communication operates as a limit on Commonwealth, State or Territory legislative power which restricts political communication in a way which undermines the Constitutional requirement that members of the Parliament and the Senate be freely chosen by the people.[16]

In *Lange v Australian Broadcasting Corporation*,[17] the High Court articulated the precise test for determining whether a law breaches the implied freedom: First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. If the first question is answered 'yes' and the second is answered 'no', the law is invalid.[18]

In *Coleman v Power*[19] a majority of the High Court recast the second limb of this test (the compatibility and proportionality aspects) to state that the question is whether the impugned law is 'reasonably appropriate and adapted to serve a legitimate end *in a manner which* is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government…' Most recently in *McCloy v New South Wales*, the majority of the High Court (French CJ, Kiefel, Bell and Keane JJ) observed that the test from *Lange* remained authoritative, but articulated three specific criteria to give substance and objectivity

[16] See Deagon, above n 1, 253-255.
[17] (1997) 189 CLR 520.
[18] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–68 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[19] (2004) 220 CLR 1.

to the proportionality analysis – the law must be suitable, necessary and adequate in its balance; all three criteria must be satisfied. The law is suitable if it has a rational connection to the purpose of the provision; the law is necessary if there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom; and the law is adequate in its balance if a value judgment consistent with the judicial function describes the importance of the purpose served by the restrictive measure as greater than the extent of the restriction it imposes on the freedom.[20]

A law which renders 'offensive' or 'insulting' acts as unlawful certainly burdens communication about political matters. The examples cited above serve to highlight how such provisions might operate to restrict speech (this was also seen in application of similar provisions in the Commonwealth *Racial Discrimination Act* to render speech by Andrew Bolt unlawful). 'Political matters' is interpreted very broadly to mean any subject matter which may affect voting on any subject matter, which virtually covers every conceivable subject matter.[21] Communication can include speech or conduct (acts).[22] Therefore the first part of the test is satisfied.

There is no doubt protecting Territorians from hateful speech is a legitimate end. There is, however, a real question as to whether this legitimate end is served in a manner which is compatible with the maintenance of Australia's system of representative democracy. This means facilitating a space for people to freely communicate politically relevant views. However, the proposed vilification law renders acts which are likely to 'offend' or 'insult' as illegal. The High Court and other academic commentators acknowledge that 'disagreement', 'offence' and 'irrationality' are necessary elements of a functioning democracy and are consistent with the Constitutional framework.[23] This implies restricting such acts may not be

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[20] Ibid 18, [2] (French CJ, Kiefel, Bell and Keane JJ).
[21] See Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 *Melbourne University Law Review* 374; Nicholas Aroney, 'The Constitutional (In) Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287.
[22] *Levy v State of Victoria* (1997) 189 CLR 579.
[23] Arthur Glass, 'Freedom of Speech and the Constitution: *Australian Capital Television* and the Application of Constitutional Rights' (1995) 17 *Sydney Law Review* 29, 32; *Levy v State of Victoria* (1997) 189 CLR 579, 622–23 (McHugh J); *Roberts v Bass* (2002) 212 CLR 1, 44 [110] (Gaudron, McHugh and Gummow JJ).

compatible with the maintenance of our constitutionally prescribed system of representative democracy.

Finally, in terms of the proportionality analysis, the law is obviously suitable. A law which restricts vilification has a rational connection to the purpose of protecting Territorians from harmful speech. The law may not be adequate in its balance. The burden is extensive due to the broad nature of 'offend' and 'insult' as discussed above. However, this burden is decreased due to fairly comprehensive exceptions. The object of protecting Territorians from harmful speech is important so this element is arguable. However, the law is clearly not necessary. An obvious and compelling, reasonably practicable alternative is to remove the words 'offend' and 'insult' from the proposed law. This would achieve the object of protecting Territorians from objectively harmful acts seeking to intimidate, humiliate, incite or harass while decreasing the burden on political speech.

Therefore, the proposed law arguably infringes the implied freedom of political communication because it is not reasonably appropriate and adapted (i.e. is disproportional) and does not achieve its object in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Removing 'offend' and 'insult' will address this issue and also help to address the problem of frivolous and vexatious claims.

Thank you for your consideration.