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SUBMISSION AS PART OF THE COMMUNITY ENGAGEMENT PROCESS AROUND THE DISCUSSION PAPER ON THE MODERNISATION OF THE NT *ANTI-DISCRIMINATION ACT*.

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January 31, 2018

1. We are grateful to the Northern Territory Government for the opportunity of providing a response to the September 2017 Discussion Paper on Modernisation of the *Anti-Discrimination Act*. Many of the potential changes described in the discussion paper are far-reaching, and would be likely regarded as new benchmarks around Australia in anti-discrimination legislation. Governments that genuinely seek input from their constituents regarding changes of this nature are to be commended.

2. For ease of reference, pages of the Government's discussion paper are given in bold print.

3. Before proceeding to the detail of the discussion paper, we note that its title and concept, 'modernisation' is couched in value-laden language. It assumes rather than argues that aspects of the current Act are out-of-date and inadequate, although it could be argued on the other hand that the current Act is well-founded, and that suggested changes to it are not simply to 'modernise' it, but to modify it in the direction of ideologically-driven goals, particularly relating to gender and sexuality. It is not clear what evidence is in fact drawn on to indicate that the current Act is not working well in Northern Territory governance. To oppose something that is presented as 'modernisation' is to risk being labelled as regressive, ignorant, reactionary and fear-driven. It might be more objective to have simply presented the discussion paper as 'suggested changes to the Anti-Discrimination Act'.

4 Modernisation Reforms: Gender and Sexuality Protections **(pp 9 to 11 of 29)**
We note that the suggested changes providing protection from discrimination are designed to correspond with the Commonwealth's *Sex Discrimination Act 1984* (as amended in 2013) by introducing gender identity and intersex status as protected attributes. We agree that people whose gender identity differs from their genetic sexual identity, and people whose genetic or anatomical sexual identity is not straightforward should not experience discrimination. At the same time, it is important to recognise that intersex status and gender identity are two very different phenomena, not just 'rare variants from the majority' that can be lumped together. Intersex identity is a complicated medical matter. Gender identity is a psychological and social phenomenon. There is evidence that young people who experience gender dysphoria usually move away from dysphoria as they mature into adulthood, and become happy in their genetic sexual identity. To present gender dysphoria as simply the way people 'are' risks denying the possibility of support that resolves the dysphoria, and risks young people being encouraged to take physical and medical steps towards transitioning to another gender that may not in fact lead to positive psychological

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outcomes.[1] The Archbishop of the Anglican Church in North America (ACNA) and other ACNA bishops issued a statement in December 2017 that helpfully said:

> A person's discomfort with his or her sex, or the desire to be identified as the other sex, is a complicated reality that needs to be addressed with sensitivity and truth. Each person deserves to be heard and treated with respect; it is our responsibility to respond to their concerns with compassion, mercy and honesty. As religious leaders, we express our commitment to urge the members of our communities to also respond to those wrestling with this challenge with patience and love.
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> Children especially are harmed when they are told that they can "change" their sex or, further, given hormones that will affect their development and possibly render them infertile as adults. Parents deserve better guidance on these important decisions, and we urge our medical institutions to honor the basic medical principle of "first, do no harm." Gender ideology harms individuals and societies by sowing confusion and self-doubt. The state itself has a compelling interest, therefore, in maintaining policies that uphold the scientific fact of human biology and supporting the social institutions and norms that surround it.
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> The movement today to enforce the false idea—that a man can be or become a woman or vice versa—is deeply troubling. It compels people to either go against reason—that is, to agree with something that is not true—or face ridicule, marginalization, and other forms of retaliation.
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> We desire the health and happiness of all men, women, and children. Therefore, we call for policies that uphold the truth of a person's sexual identity as male or female, and the privacy and safety of all. We hope for renewed appreciation of the beauty of sexual difference in our culture and for authentic support of those who experience conflict with their God-given sexual identity.

In the light of this, we argue that intersex status is a more relevant dimension to include as an attribute in an amended Act, and that gender identity should not be included. The risk in including gender identity arises where a stance that seeks to counsel a gender-dysphoric person towards accepting their genetic sex identity is perceived as either discrimination or vilification. There are also the practical problems that arise from the use of sex-based facilities (eg change-rooms, toilets), or single-sex movements (eg women's tennis competitions, single-sex gyms such as Fernwood), where claims of discrimination may lead to legal action that will be difficult and time-consuming to resolve, and which is unlikely to help the complainant move towards a more positive psychological state.

The move towards changing the term 'sexuality' to 'sexual orientation' without further labels is in our view non-controversial and to be welcomed.

5. Vilification **(pp 11 to 15 of 29)**

The desire to extend provisions against vilification is commendable. All people should be able to live their lives without fear of hatred or violence being stirred up against them. The expansion of the protected attributes to include domestic or family violence status, accommodation status and socioeconomic status, are desirable.

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[1]See, for example, the American College of Pediatricians statement *Gender Ideology Harms Children.*

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The inclusion of the words offend and insult in the definition of vilification is problematic. The concept of giving offence is too subjective, and likely to limit genuine freedom of expression. There are valid differences of opinion about various matters, including religious beliefs, and their expression might lead to claim of taking offence. Muslims, for example, might claim offence at the Christian claim that Jesus Christ is divine. Christians, as another example, might claim offence at the Muslim claim that Jesus Christ neither died on the cross nor was resurrected. A person experiencing gender dysphoria might claim offence at the suggestion that the majority of people experiencing gender dysphoria will come to be comfortable in their genetic sexual identity.
The concept of insulting is too closely related to the concept of offence, and should be rejected for the same reasons as offence. An insult might be regarded as a statement or action that causes offence. It is difficult to be objective about what constitutes an insult, whereas an incitement to hatred or violence is much more easily recognised.

To seek to 'balance protections' by introducing exemptions seems misconceived, as though it is acceptable to vilify somebody through, for example, a 'genuine academic' interest. The genuine expression of academic or scientific interests should be provided for as a matter of course – surely this is the way human knowledge advances! – not by way of an exemption. It would be better to have a more restricted definition of vilification, with fewer categories of exemption.

To imagine that a government can legislate to give people freedom from hurt, anger and anxiety seems a serious case of political over-reach.

6. Lawful sexual activity as a protected attribute **(p. 14 of 29)**
The suggested addition of lawful sexual activity seems to make a number of benign assumptions about the sex industry and about its acceptability. While there may be sex workers who have without coercion chosen this work to earn income, there are many who are caught up in it for bad reasons, including desperation and human trafficking. These people need protection, but specifically naming this work in the Act lends the industry legitimation which is unwarranted.

More specifically for churches as stakeholders, it raises the possibility that churches would be liable to a discrimination charge if they disallowed a sex worker from renting and using church-owned premises for sex work. This would infringe the rights of churches to prevent activity that contradicts their ethical codes on property they own.

7. Removing Content that Enshrines Discrimination: Religious Exemptions **(pp.21-22 of 29)**
It is worth noting at the outset that freedom of religion is enshrined in Australia through the provisions of the constitution in combination with international covenants to which Australia is a signatory (e.g. the International Covenant on Civil and Political Rights [ICCPR], particularly Article 18). It seems inadequate that religious freedom is expressed legislatively merely in terms of exemptions, such as in the current Anti-Discrimination Act.

The discussion paper also expresses religious freedom in unhelpful terms as though it is simply a matter of not 'offending the cultural or religious sensitivities of people of that particular culture or religion'. To frame the discussion in terms of the avoidance of offence

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rather than religious freedom as a universal human right misses the importance in our society of such universal rights, and paves the way for the suggested alternative approach, which we oppose. The alternative approach seems designed to deliberately reduce the freedom of religious expression that Territorians currently enjoy, and moves beyond what other Australian jurisdictions have established in the same direction.

Apart from limiting religious freedom, the process in the suggested alternative approach of having to regularly reapply for exemptions raises bureaucratic problems that must be considered and addressed. For example, the government would be required to arbitrate on whether or not an exemption related to 'any religious observance or practice' or not. Religions like Christianity and Islam have a 'whole-of-life' view – they are not a matter of engaging in 'religious observance' such as a church service or mosque attendance and then practitioners return to the secular sphere. Everything that is done in life is done in a sense as a 'religious observance'. To have a government bureaucrat who may be comparatively unfamiliar with religions of this kind making decisions as to what is or is not part of the 'religious sphere' is not just unacceptable to people of faith, but imposes an invidious burden on the bureaucrat. To have to repeat this again and again as exemptions are regularly reapplied for multiplies the problem.

The discussion paper suggests that removing exemptions would make religious bodies more inclusive. It is hard to understand the logic of this suggestion. Religious bodies exist because of shared beliefs. They should be free to express and enact these beliefs, providing they do not bring harm to others. The suggestion sees to indicate that the government would see it as beneficial if a religious body went against its own beliefs for the sake of (undefined) inclusivity.

In particular, the suggestion **(p.21 of 29)** that religious schools should have exemptions removed regarding restrictions on employment, opposes religious freedom as set out in ICCPR 18(4), where parents have the right for their children to be educated according to their religious convictions. A school is not just a series of lessons but a community. Students are shaped not just by classrooms, but by many interactions with fellow-students, teachers and non-teaching staff. To preserve religious freedom, religious schools should continue to be able to employ people according to criteria that relate to their religious beliefs and values.

The suggestion that section 43 of the Act could be removed also impinges on religious freedom and creates bureaucratic problems. Notwithstanding the provision of the *NT Aboriginal Sacred Sites Act*, many religious practices in Aboriginal communities (such as the preparation of ceremonial paraphernalia in the lead-up to a ceremony) do not take place on registered sacred sites. Under the suggested change, Aboriginal people would have to apply for an exemption to permit women's business or men's business to exclude the other sex from being present. Bureaucrats would again have to arbitrate about religious and anthropological matters that they could lack knowledge of. Similarly in Christianity, activities of the faith community take place frequently outside what might be regarded as 'a building or place of cultural or religious significance'. It is not workable to arbitrate on whether these should be regarded as 'part of any religious observance or practice', when as stated earlier, the whole of life for many people of faith is part of religious practice.

8. Assisted Reproductive Treatment Exclusion from Services
The discussion paper notes that the current situation in the NT is governed by South Australian legislation because Repromed is the service provider, and raises the question as to whether provisions should be made to conform with current SA legislation.

ART was developed as a remedy for situations where natural conception was not possible for various, usually medical, reasons. However, to extend its provision to situations where natural conception is ontologically impossible (eg same-sex couples) is to put the desires of adults (noting that it is not a universal human right to be a parent) before the needs, rights or desires of the child. Unfortunately, the literature on the effects on children of surrogacy, same-sex parenting and transgender parenting is often coloured by ideological considerations, and so there are contradictory reports. But until the situation is clearer, it would be better to take a conservative course. For that reason, it would be unhelpful for the NT Act to mirror the SA Act. ART should continue to be excluded from services.

9. Work includes Volunteers and Modern Workplaces **(p. 24of 29)**
The Church has for a number of years treated volunteers as workers (for example in the requirements of adherence to ethical codes of conduct) and it would be appropriate for the Act to extend the definition of work so that it encompasses volunteers.

10. Modernising language: 'man' and 'woman' **(pp.27 to 28 of 29)**
The concern of the discussion paper seems to be that the terms 'man' and 'woman' are defined by reference to sex [presumably meaning genetic identity and therefore problematic for transgender people]. The discussion paper refers to the 'ordinary meaning' of 'man' and 'woman' without saying what this ordinary meaning is. It seems likely that for most people, the ordinary meaning would conform to the definitions in the current Act. For the reasons given above with regard to transgender issues, it would be better to maintain the current definitions.

11. Modernising language: 'parenthood' and 'carer responsibilities'; 'marital status' and 'relationship status' **(pp. 28 to 29 of 29)**
The concern of the discussion paper seems to be to bring all kinds of caring relationships under one label, rather than appearing to give particular status to biological or adoptive parenting. We acknowledge the value of including other kinds of caring relationships in the terms of the Act, but argue that parenting is such a foundational part of what is good for our society's well-being that rather than removing the word 'parenthood', it should be retained alongside the other term, so that the wording would be 'parenthood and other carer responsibilities'.

Similarly, the place of marriage is significant in our society (as the recent postal survey demonstrated), and is rightly distinguished from other kinds of relationship. It would be better to retain the term marriage so that the wording is 'marital or other relationship status'.

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Wording like this seems trivial at one level, but the wording of legislation is not only communicative but also educative. It says something about the values and beliefs of the society that it is designed to serve and guide.

12. In concluding, we note again that to oppose suggestions which have been framed as 'modernising' runs the risk of appearing old-fashioned, reactionary, or governed by conservative self-interest. This submission genuinely seeks to provide feedback that will help the NT Government legislate in ways that will be most effective in preserving and further developing a society which is free, fair and compassionate, and where all the dimensions of human flourishing are strengthened in ways that draw on shared experience, transparent evidence and the right balancing of individual and community freedoms.