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GPO Box 2388  
Darwin NT 0801Level 3, 9 Cavenagh Street  
Darwin NT 0800

Director Legal Policy  
Department of the Attorney-General and Justice  
GPO Box 1722,  
DARWIN NT 0801

T (08) 8981 5104  
F (08) 8941 1623

lawsoc@lawsocietynt.asn.au  
www.lawsocietynt.asn.au

[Policy.AGD@nt.gov.au](mailto:Policy.AGD@nt.gov.au)

ABN 62 208 314 893

## MODERNISATION OF THE ANTI-DISCRIMINATION ACT

Law Society Northern Territory (the Society) welcomes the review into the *Anti-Discrimination Act* (the Act). The promotion of equality and the need for adequate protection against discrimination have been key components of the Society's advocacy for many years.

The Society considers that reforms are necessary to the anti-discrimination regime to promote substantive equality in society and considers that the issues raised in the Discussion Paper represent a good start towards achieving this aim. We are generally supportive of most of the ideals that have been articulated. However, the scope of the issues and the complexity of some of the issues require further consideration by the Society. The Society advocates for evidence based policy and, as such, we are disappointed that the Discussion Paper did not provide any analysis of the evidence to support the changes.

The Society supports policy that is appropriate for a modern society and steps taken toward achieving jurisdictional consistency. The Society strongly supports the enactment of protections against discrimination on the grounds of sexual orientation, gender identity, intersex status and relationship status. Further, as the Northern Territory is the only jurisdiction without protections against vilification, we broadly support the introduction of laws that protect our individuals in society from vilification. However, while we consider the provisions could be based on the *Racial Discrimination Act 1975* (Cth) (RDA)<sup>1</sup> we recommend that the words 'insult' and 'offend' and 'humiliate' not be included. Even though the provisions of the RDA have been interpreted by the courts in a way that balances free speech interests, these words have been the subject to considerable debate on a national level.

In this context, the Law Council of Australia (Law Council) when discussing the debate around the removal of the word 'insult' in the context of Part IIA of the RDA submitted that they considered that, from a civil and political rights perspective, there was a case for amending the current provisions<sup>2</sup>. The Society notes the Law Council's submission<sup>3</sup> to the Commonwealth Attorney-General's Department outlined the importance of applying a proportionality approach that is, "is the law directed to a pressing and substantial public interest". This test requires

<sup>1</sup> We note the Discussion Paper outlines an approach which is slightly broader in operation than the Commonwealth approach.

<sup>2</sup> <https://www.lawcouncil.asn.au/resources/submissions/traditional-rights-and-freedoms---encroachments-by-commonwealth-laws-2>

<sup>3</sup> <https://www.lawcouncil.asn.au/resources/submissions/traditional-rights-and-freedoms---encroachments-by-commonwealth-laws-2>

those analysing policy to have regard to the surrounding circumstances and only apply reasonable limits which can be demonstrably justified in a free and democratic society. The Society is acutely aware that amendments of this nature are multidimensional and complex and, as such, demand a reasoned and clearly articulated analysis of what often appears to be polarised positions about the value of free speech and the effect of unrestricted speech on social equality. In our view, including these words may derail the other urgent areas of reform outlined in the Discussion Paper.

The Society would support a single, simplified test for discrimination and vilification (that avoids references to conduct which 'offends', 'insults' or 'humiliates').

The Society has concerns around the removal of some of the religious exemptions due to the lack of analysis in the Discussion Paper. Further consideration around removal of broad scale religious exemptions is particularly important in light of the recent UN Human Rights Committee's report<sup>4</sup>. The report raised concerns about Australia's anti-discrimination laws, including the lack of direct protection against discrimination on the basis of religion. Further, the Federal Government is currently conducting a review of religious freedoms and the report is due to be handed down in March 2018. The Society recommends this report be taken into account prior to the withdrawal of any religious exemptions.

In 2004 the Northern Territory expanded and simplified its general religious exemption provision<sup>5</sup> which previously allowed for discrimination if it was in accordance with the doctrine of religion concerned and was necessary to avoid offending the religious sensitivities of people of that religion. As there is a 'conflict' between religious freedoms and equality before the law, the right to discriminate on religious grounds may be justified, but only when and if necessary. The approach taken in *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors*<sup>6</sup> shows how a 'balance' can be struck and the Society recommends consideration be given to this approach. The Society strongly recommends that any exemptions be clearly outlined in the legislation.

In summary the Society would support evidence based measures that:

- expand the current list of attributes that require protections under the Act;
- protect against direct and indirect discrimination;
- protect against vilification;
- apply to the full range of areas of work and public life;
- apply reasonable exemptions taking into account the sensitivities around religious freedoms and religious educational institutions; and
- provides a low cost, non-litigious avenue to seek redress.

The Society looks forward to addressing these issue more thoroughly once a draft Bill is released for consultation.

Yours faithfully

  
**KELLIE GRAINGER**  
 CHIEF EXECUTIVE OFFICER  
[ceo@lawsocietynt.asn.au](mailto:ceo@lawsocietynt.asn.au)

<sup>4</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CCPR/COC/AUS/29445&Lang=en&utm\\_content=buffer605d8&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CCPR/COC/AUS/29445&Lang=en&utm_content=buffer605d8&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer)

<sup>5</sup> Changing to the current requirement that 'the act is done as part of any religious observance or practice': *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT) s 24

<sup>6</sup> [2014] VSCA 75