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**Comments to the Director of Legal Policy Department of the
Attorney-General and Justice on Discussion Paper
'Modernization of Anti-Discrimination Act'- September 2017**

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1. Introduction: Discussion Paper ‘Modernization on the NT Anti-Discrimination Act’ (1993)

The Catholic Advocacy Service (‘CAS’) welcomes the opportunity provided by the NT Director of Legal Policy Department of the Attorney-General to make comments on the Discussion Paper (the Paper) ‘Modernisation of the’ 1993 Northern Territory ‘*Anti-Discrimination Act*’ (the Act), released in September 2017. The Paper is proposing amendments to the Act that will heavily impact upon the fundamental right of freedom of religion and belief.

The CAS is an organisational unit within the Catholic Diocese of Darwin provided by a group of volunteers who are also members of the worldwide Order of Malta. The Service aims to provide assistance to the more vulnerable and marginalized sectors of our society, to promote social justice and to defend the sanctity of life and human dignity.

CAS’s comments are made in regards to that section of the Paper which contemplates removing from the Act content that would enshrine discrimination. Specifically, our submission will focus on section VI of the Paper which considers removing of the religious exemptions granted by the Act to religious and cultural bodies. They will be addressing the following question posed by the Paper:

Question 14

‘Should any exemptions for religious or cultural bodies be removed?’¹

1.1 ‘Removing Content that Enshrines Discrimination’

The Act grants exemptions to religious or cultural institutions from anti-discrimination laws and requires those institutions to demonstrate that the conduct is either:

- necessary to avoid offending the cultural or religious sensitivities of people of that particular culture or religion; and/or
- in accordance with the doctrines, beliefs or principles of people of that particular culture or religion.²

¹ Discussion Paper ‘*Modernisation of the Anti-Discrimination Act*’, Department of the Attorney General and Justice, September 2017, p. 21.

² *Ibidem*.

As the exemptions apply automatically for religious organisations and do not require any justification by the religious organisation as to why the exemption should apply, the Paper argues that 'to promote equality of opportunity for all Territorians, the removal of some of these exemptions is being considered'.³

In particular, the proposed amendment would 'remove the current exemptions for religious bodies in the areas of religious educational institutions, accommodation under the direction or control of a body established for religious purposes and access to religious sites. Religious and cultural bodies would instead be required to apply for an exemption with the ADC⁴ and justify why their service requires a particular exemption'.⁵

The exemptions that could be removed are the following:

- Section 30(2) that permits religious schools to exclude prospective students who are not of that religion.
- Section 37A that permits religious schools to discriminate against employees on the grounds of religious beliefs, activity or sexuality if done in good faith to avoid offending the religious sensitivities of people of the particular religion.
- Section 40(2A) that permits religious educational authorities as accommodation providers to restrict use of the accommodation to people of that religion.
- Section 40(3) that provides an exemption for discrimination if necessary to avoid offending the religious sensitivities of people of that religion.
- Section 43 that permits restricted access to land, building or place of cultural or religious significance on the basis of sex, age, race or religion if it is in line with the religious doctrine or necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.⁶

The main argument justifying the removal of these exemptions is that such a removal 'would 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'.⁷

³ *Ibidem.*

⁴ *NT Anti Discrimination Act (1993).*

⁵ *Ibidem.*

⁶ *Ibidem.*

⁷ *Ibidem.*

CAS is very concerned that the proposed amendments will result in significant encroachments by the NT Government upon the fundamental right of freedom of religion and belief. We set out our concerns under the following headings:

- Freedom of Religion in Australia and International Law
- Justifications for Laws that Interfere with Freedom of Religion
- Religious Freedom and Anti-Discrimination Law.
- Employment and Religious Institutions.
- Religious Freedom Should not be Limited to an Exemption to Another Right

2. Freedom of Religion, Article 116 of the Australian Constitution and the International Covenant on Civil and Political Rights

CAS's comments must be premised upon the fundamental observation that any consideration of the recognition of the religious freedom rights of religious organisations must take place in the centuries' old and ongoing dialogue concerning the separation of Church and State evidenced in the Western tradition.

This is necessary as it is often within the contemporary expression of that dialogue where the purported ability of the State to encroach upon the religious freedom of its citizens is asserted. However, the historical expression of that dialogue provides a record of the disastrous consequences of State incursions upon the individual's religious conscience that must not be overlooked.

In the British common law, that dialogue traces back to the Magna Charta of 1215 AD, and further than that, the dialogue streams back to Emperor Constantine and the Edict of Milan in 313 AD.⁸ It leads us to consider whether the State should impose a religious belief on its citizens and the extent (and ability) of the State's power to regulate the Church's ability to act in accordance with its beliefs.

2.1. Religious Freedom and Article 116 of the Australian Constitution

The Australian Constitution, Article 116, enshrines the principle of non-interference by government in religious belief or practice:

⁸ Foster, Neil, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (Paper presented at the Magna Carta and Freedom of Religion or Belief Conference, St Hugh's College, Oxford, 21-24 June 2015) <http://works.bepress.com/cgi/viewcontent.cgi?article=1150&context=neil_foster>

“The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”⁹

Consequently, the Commonwealth Parliament:

- Cannot establish a State Church.¹⁰
- Cannot inquire into the status of the human right to freedom of religion or belief.
- Cannot enforce religious observance.¹¹
- Cannot prohibit religious observance.¹² and
- Cannot impose a religious test for public office.¹³

Further, CAS submits the following:

- The provisions of the Constitution apply to the whole of Australia.
- The Northern Territory is a completely subordinate area to which the Parliament has granted plenary powers of self-government pursuant to s.122 of the Constitution, however, the Commonwealth (and therefore the Territory) is unable to do indirectly what it is forbidden to do directly by s.116.
- Accordingly the NT Parliament may not make a law which prohibits the free exercise of any religion in breach of s.116. These proposals in our view do just that.

The High Court of Australia has confirmed, in its judgement in *Church of the New Faith v Commissioner for Pay-Roll Tax - the “Scientology case”*- that the legal definition of religion involves both belief and conduct. Justices Mason and Brennan held that “for the purposes of the law, the criteria of religion are twofold:

⁹ *Commonwealth of Australia Constitution Act 1900*, s116.

¹⁰ Countries that have established a religion include: the Church of England in UK, the Lutheran Church in Denmark, the Eastern Orthodox Church in Greece and the Roman Catholic Church in Argentina.

¹¹ Religious observance is enforced in Saudi Arabia, including five daily prayers, fasting during Ramadan and the modesty of women’s dress under *sharia* law by the religious police, or *mutawwiin*; see “Saudi Arabia Law Enforcement”, *Encyclopedia of the Nations* (Illinois: Advameg, 2007–2013). Religious observance is enforced in the West Bank: Eric Westervelt, “Police Enforce Ramadan Fasting Rules in West Bank”, *NPR* (Washington, DC, 11 October 2007). Religious observance is enforced in parts of Indonesia: Jane Perlez, “Spread of Islamic Law in Indonesia Takes Toll on Women”, *The New York Times* (New York, 27 June 2006).

¹² Prohibition of house churches in the People’s Republic of China has been reported. See “China—Son of Christian Leader Beaten Unconscious”, *Barnabas Fund Prayer Focus* Update, No 145 (November 2008).

¹³ A religious test for public office in Pakistan was imposed on Pakistan-born Daniel Scot, who had to pass an exam on Islam before gaining a lectureship in mathematics at the University of Punjab. See Roslyn Phillips, “Religious Vilification: The Daniel Scot Decision”, resource paper in *Light* (Adelaide, May 2005), 8–11.

- the belief in a supernatural Being, Thing or Principle; and
- the acceptance of canons of conduct in order to give effect to that belief...”¹⁴

Consequently, freedom of religion is defined by two distinct elements:

- the freedom to form, hold and change opinions and beliefs without government interference; and
- the freedom to manifest those beliefs and opinions in public or private through speech and actions.

Also, Mason ACJ and Brennan J emphasised the centrality of the freedom of religion and freedom of conduct giving effect to that belief. They held:

Freedom of religion, the paradigm of freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s.116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.

What a man feels constrained to do or to abstain from doing because of his faith in the supernatural is prima facie within the area of his legal immunity, for his freedom to believe would be impaired by restriction upon conduct to which he engages in giving effect to that belief. The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion than the belief itself.¹⁵

More recently, Redlich J has opined:

The precepts and standards which a religious adherent accepts as binding in order to give effect to his or her beliefs are as much a part of their religion as the belief itself... Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenant of their identity.¹⁶

¹⁴ *Church of the New Faith v Commissioner of Pay-Roll Tax* (Vic) [1983] HCA 40; (1983) 154 CLR 120.

¹⁵ *Ibidem*.

¹⁶ *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 at [561].

Further, the High Court has also displayed a strong appreciation of the dangers involved in tailoring legal protection according to the views of the prevailing majority.¹⁷ As highlighted in ex curial commentary by Malcolm CJ:

One of the problems with claims to necessity is that what is considered necessary usually depends on the experience and values of those who impose the relevant restriction. In these circumstances, as Brennan J observed in *Goldman v Weinberger*,¹⁸ one of the tasks of the courts must be: "... to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar."

In making this reference to the "quiet erosion" of the right freely to exercise a religion, Brennan J highlights the ever-present potential of the majority, indirectly and unthinkingly, to discriminate against the religious practices of a minority. Regulations and restrictions which are not intended to discriminate against religious practice, and are applied uniformly, may nevertheless in their effect discriminate to the extent of imposing an intolerable burden on the adherents of a particular religion.¹⁹

Brennan's statement underlines the foundational importance of religious freedom within Australian society and can be assumed as a suitable standard against which to demonstrate the extent of incursion upon that freedom within the current potential proposal of amendments to religious exemption proposed in the Paper.

Further, it is within this doctrinal framework from which the paramount need for protection of religious freedom flows.

2.2 Religious Freedom, International Covenant on Civil and Political Rights and Anti-discrimination law.

CAS submits that the proposal calling for removal of exemptions for religious institutions from anti-discrimination law, calls for Australia to breach its obligations under international human rights instruments.

The International Covenant on Civil and Political Rights ('the ICCPR'), to which Australia is a signatory, recognises the rights within Article 18 of the same.

Article 18(1) of the ICCPR provides:

¹⁷]. See *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 131.

¹⁸ *Goldman v Weinberger*, 475 U.S. 503 (1986).

¹⁹ The Hon Mr Justice David Malcolm AC, 'Religion, Tolerance and the Law' (1996) 70 *Australian Law Journal* 976.

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
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.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

The development of anti-discrimination legislation in Australia has followed a path of legal reform that does not adequately reflect the balance struck by the ICCPR. An overly expansive understanding/interpretation of unjust discrimination has had the related effect of locating fundamental rights below the right to non-discrimination.

The right to be free from discrimination is but one of many rights and freedoms enumerated under the ICCPR.

Regarding the actual limits to discrimination, the United Nations Human Rights Committee specifically notes that the scope of the right to be free from discrimination is intended to be carefully defined. It is not intended to displace other rights and freedoms under the Covenant. The Committee's General Comment 18 states, at paragraph 13:

Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant.

The right to non-discrimination is similarly a right that has a defined scope.

In light of that, non-discrimination's approximate limits lie at the point where differentiations of treatment occur in the reasonable and objective pursuit of other fundamental rights, including freedom of thought, conscience and religion or belief (article 18).

This is not reflected in Australia, where anti-discrimination law has become the dominant lens through which rights are viewed. The concept of discrimination envisaged by international treaties is not given expression in Australian law.

There is a need to correct the imbalance in current anti-discrimination law to bring it closer to the ICCPR construction. The right to not be discriminated against based on religion must be compatible with the right to freely practice religion.

3. Employment and Religious Institutions

In respect of education, removal of any exemption from anti-discrimination regimes may breach Article 18(4) which provides for the right of parents to educate their children in these terms:

The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The ability to model faith is essential to the teaching of faith.

The proposed amendments to the Act as regards to religious exemption has the potential to heavily impact upon the religious freedom of religious institutions in the area of employment of staff and engagement of volunteers. The call for the removal of exemptions in these areas, disregards traditional protections to religious freedom for millennia within the Western tradition. The first clause of the 1215 Magna Charta states, '*quod Anglicana ecclesia libera sit*' ('the English Church shall be free'). In its historical context, this clause was directed at preserving the Church's rights to determine appointments to bishoprics, and hence the right to independently determine doctrine. These are not historical curiosities, as the principle of separation between State and Church respective jurisdictions is still applicable today. In this regards, Chief Justice Roberts in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) has observed:

Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of Magna Carta. There, King John agreed that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." The King in particular accepted the "freedom of elections," a right "thought to be of the greatest necessity and importance to the English church." J. Holt, Magna Carta App. IV, p 317, cl. 1 (1965).²⁰

In that decision the U.S. Supreme Court unanimously upheld the right of a religious school to determine appointments to its staff as a fundamental expression of the right to religious freedom. Where a religious body operates an institution for the education of children, any removal of the ability to determine and teach doctrine in accordance with its teaching would

²⁰ *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) 565 U.S

be a restriction on these historically hard won liberties, which arguably are characteristic of the Western legal tradition.

CAS also submits that the proposed amendments ignore the importance of 'mission fit' to institutions/associations generally. No suggestion is made that an organisation with purposes to promote indigenous culture should be required to employ persons from a differing culture. Nor is it suggested that an environmental organisation should be required to employ a climate change denier. No one would argue that a sitting member of a mainstream political party should be required to offer employment to a member of an opposing party in the interests of promoting equality.

Whilst the suggestion of any of these proposals would be treated rightly as absurd, the Paper's proposal calling for the removal of associational freedoms from religious organisations extend the same reasoning. There is no logical reason to limit such a withdrawal of exemptions from religious institutions from indigenous cultural organisations, environmental organisations, political parties or any other form of associational engagement. All of these associational bodies are defined by their unifying attributes, being adherence to a legitimate common philosophy, worldview, culture or cause. As Parkinson has observed: 'A right of positive selection is rather different from discrimination ...'²¹ Selection based in part on a characteristic which is relevant to the employment is not discriminatory and any demands to remove the ability of religious institutions to determine their membership, their representatives and their leadership substantiate a violation of the foundational principle of separation between State and Church.

4. Justifications for laws that interfere with freedom of religion

Under international norms the right to freedom of thought, conscience and religion is absolute whilst the manifestation of that religion or belief is subject to defined limitations.

Article 18 of the ICCPR draws distinction between belief (the right to freedom of thought, conscience and religion) and the manifestation of that religion or belief (in teaching practice, worship and observance).

This is explained succinctly in General Comment 22 paragraph 3 which states:

Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the

²¹ Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 94.

*freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1.*²²

This distinction between belief itself and the manifestation of belief is further drawn out in paragraph 8 of General Comment 22 which highlights that whilst the manifestation of religious belief is subject to defined limitations, the right to be free from coercion of belief itself can never be restricted in any way.

UNHRC General Comment 22 at Paragraph 8 states:

*Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant [emphasis added].*²³

The grounds on which freedom of religion may be restricted are therefore to be limited to those that are set out in Article 18 paragraph 3. In summary, they are:

- if the limitation is prescribed by law; and
- are necessary to protect public safety; or
- order; or
- health; or
- morals; or
- fundamental rights and freedom of others.

²² UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion) 30 July 1993 accessed 02 October 2015
[.http://www.refworld.org/docid/453883fb22.html](http://www.refworld.org/docid/453883fb22.html)

²³ *Ibidem.*

The clarification makes it clear that these limitations must be “strictly interpreted” and that no other grounds other than those just articulated are permissible grounds on which to limit a person’s freedom to manifest religion or belief.

The limitations on religious freedom that are permissible under the ICCPR are thus narrow in scope. They also need to be understood in light of the fact that other rights are also subject to limitations and a defined scope, including the right to non-discrimination and equality before the law.

In addition, religion is itself a protected attribute in respect of non-discrimination and equality before the law under articles 2, 4 and 26 of the ICCPR.

Further, CAS suggest that a consideration of the '*Siracusa Principles' on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*'²⁴ at some point in the Paper might have also been of assistance to understand what conditions and grounds would be necessary for permissible limitations and derogations enunciated in the International Covenant.

The *Siracusa Principles* provides that ‘all limitation clauses shall be interpreted strictly and in favour of the rights at issue’. The Principles provide: ‘Whenever a limitation is required in the terms of the Covenant to be “necessary,” this term implies that the limitation:

- (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
- (b) responds to a pressing public or social need,
- (c) pursues a legitimate aim, and
- (d) is proportionate to that aim.’

A proportionate approach to the resolution of the boundary of competing rights requires investigation of means to accommodate competing rights without unduly burdening the right to religious freedom.

5. Religious Freedom Should not be Limited to an Exemption to Another Right

²⁴ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, E/CN.4/1985/4 (28 September 1984). Further consideration of these principles is given by Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' 40(2) *Monash University Law Review* 413.

CAS submits that the misapprehension of the nature of religious freedom as 'special treatment' is principally grounded in the language and structure of exemptions.

When legislation frames religious freedom as an exception, it conveys the message that special treatment is afforded to a certain group. As a matter of fact, the rights to non-discrimination and religious freedom exist concurrently and within prescribed limits or accommodations. In the Australian context, where the single right of non-discrimination has been over-legislated, most other fundamental rights and freedoms start to look like special pleading to an established rule. This includes infringements on freedom of speech by laws like section 18C of the *Racial Discrimination Act 1975* (Cth) and section 17(1) of the *Anti-Discrimination Act 1998* (Tas) as much as freedoms like conscience, religion and association. This is a fundamentally incorrect narrative that is not supported in international human rights law or common law.

The language of exemptions sends a message of "special pleading" or preferential treatment towards religious bodies. Rather than being the rule, or the assumption, freedom of religion is relegated to being the exception, or the special accommodation. This is a reversal of the place of fundamental freedoms in a free society such as Australia.

CAS submits that the correct framing of the above issue around religious organisation exemptions is vital to ensure a correct perspective is given to the significance of religious freedom as a fundamental human right, rightfully placed amongst other fundamental human rights. The alternative would be to incorrectly view religion as an encroachment on law.

As noted by Neil Foster:

The danger is that in a "secular" Western society where religion is often perceived as archaic and anachronistic, freedom of religion rights will be restrictively construed, ignored or reduced to a merely formal principle and automatically subordinated to other rights and interests.²⁵

6. Conclusion

Freedom of religion is infringed when a law prevents individuals or religious institutions from practicing their religion or requires them to engage in conduct which is prohibited by or runs contrary to the fundamental tenets of their religion.

²⁵ Neil Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (Paper presented at the Magna Carta and Freedom of Religion or Belief Conference, St Hugh's College, Oxford, 21-24 June 2015) <http://works.bepress.com/cgi/viewcontent.cgi?article=1150&context=neil_foster> 3.

The proposed amendments to the Act are a denial of religious conscience and religious practice. They represent a direct assault on religious freedom by prohibiting conduct that may be required to give effect to religious beliefs.

As noted by Parkinson 'The concern is that in a situation where the prevailing intellectual fashions of the day tend towards a disregard for religious freedom, a narrow interpretation may be given to what it means to practice religion, confining it to private belief and worship.'

²⁶ The correct interpretation however is that religious freedom is a right independent and equal to other rights, and that where the right to religious freedom conflicts with another rights, the relevant boundary between the two rights is to be determined by reference to the appropriate reach of each right. This focus should be on the maximum preservation of each right, not the subjugation of one right to the other. Arguably the focus on recognising religious freedom through the vehicle of exemption fuels the current calls for removal of exemptions, as are reflected in the proposal amendments put forward in the Paper.

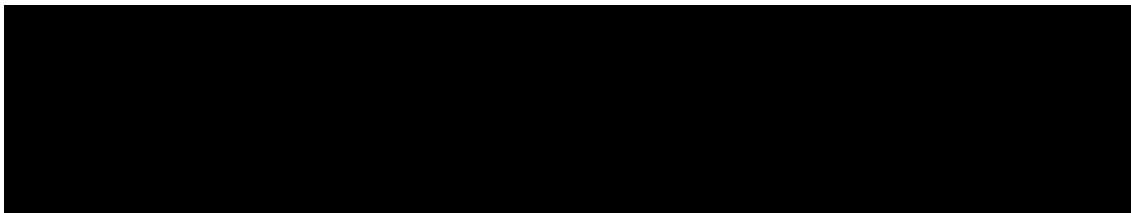
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On behalf of the CAS, I wish to thank the Director of Public Policy for the opportunity given to offer comments in respect of the Discussion Paper on Modernization of Anti-Discrimination Act.

We trust that the issues our submission seeks to raise are given thoughtful consideration and we look forward to ongoing involvement in this discussion.

Darwin, 30th of January 2018

Yours sincerely,



²⁶ Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 94; Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 88.