Submission

In response to

The Discussion Paper

on

The Modernisation of the Anti-Discrimination Act

Issued by the Director, Legal Policy
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by

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1. Introduction

The Department of the Attorney-General and Justice in the Northern Territory is seeking comments on possible amendments to the *Anti-Discrimination Act* (1993). Discrimination law is an evolving area of practice and should keep pace with contemporary standards and expectations. The Department of the Attorney-General and Justice has commenced a review of the Act to ensure it continues to meet the needs of the community.

FamilyVoice Australia is a national Christian voice – promoting true family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families can flourish, Australia's Christian heritage is valued, and fundamental freedoms are enjoyed.

We work closely with people from all mainstream Christian denominations. We engage with parliamentarians of all political persuasions and are independent of all political parties. FamilyVoice has a longstanding interest in anti-discrimination and anti-vilification laws and proposals for bills or charters of rights. We have made numerous submissions to inquiries touching on these matters, particularly in relation to freedom of religion in Australia.

2. Terms of Reference

A discussion paper outlining possible reforms to the Act was released in September 2017 by the Department of the Attorney-General and Justice. These possibilities include:

- Modernising gender and sexuality protections and language in line with the *Sex Discrimination Act 1984* (Cth);
- Changes to the law to support an end to discrimination against people of diverse sexualities accessing artificial fertilisation procedures;
- Introducing new protections under the Act such as domestic violence, homelessness, lawful sexual activity and socioeconomic status;
- Introducing specific anti-vilification laws prohibiting offensive conduct on the basis of race, religious belief, disability, sexual orientation, gender identity and intersex status;
- Extending coverage of the sexual harassment provisions to include all areas of public life;
- Introducing a representative complaints model that enables organisations to bring complaints about acts of systemic discrimination on behalf of groups who may be limited in their ability to bring an individual complaint;
- Removing some of the exemptions for religious and cultural organisations; and
- Broadening the scope of clubs by removal of the requirement for clubs to sell or supply liquor for consumption on its premises.

3. Overview

This submission commends a more appropriate balance between the right to be free from discrimination and other competing rights, such as freedom of speech, religion, and association that are enshrined in the International Covenant on Civil and Political Rights and associated agreements.

Australia has ratified the International Covenant on Civil and Political Rights (ICCPR), and needs to meet its obligations in this regard in relation to the drafting and amendment of legislation.

Some of the suggestions put forward in the discussion paper on NT anti-discrimination law focus on increasing the number of protected attributes under the Act, such as gender identity, while at the same time suggesting the removal of exception clauses that allow religious bodies to make operational decisions that are in keeping with their beliefs. In adopting this approach the NT government has failed to adequately consider the rights of religious and minority groups, which are protected under international human rights law. Instead, it highly favours ideologically based categories, such as gender ideology and sexual orientation, and suggests changes prejudiced against traditional freedoms, such as freedom of religion and freedom of expression. Such an approach favours certain minority groups over others, rather than upholding freedoms for all.

3.1. First principles

3.1.1. Commonwealth

In the 2012 Commonwealth inquiry into Australian anti-discrimination law, Professors Patrick Parkinson and Nicholas Aroney drew attention to the importance of the International Covenant on Civil and Political Rights and associated international conventions, to which Australia is a signatory.[1] These offer, in their opinion, a principled basis for "determining an appropriate balance" between minority voices in the community, including ethnic, religious and cultural groups, and values embodied in anti-discrimination law. These rights include:

- Protection from discrimination on the basis of various attributes including race, ethnic origin or religious belief (Article 26, ICCPR);
- freedom of religion and conscience, alongside all other people of faith (Article 18, ICCPR; c.f. Article 5(d)(vii), CERD; Article 14, CRC);
- freedom of association (Article 22, ICCPR; c.f. Article 5(d)(ix), CERD; Article 8, ICESCR; Article 15, CRC);
- the right to marry, to found a family and to educate their children in conformity with their religious and moral convictions, thus sharing in the common responsibility of men and women in the upbringing and development of their children (Articles 18(4) and 23, ICCPR; c.f. Articles 10, 11 and 13(3)-(4), ICESCR; Articles 3(2), 5, 8, 9, 10 and 18, CRC; Articles 5 and 16, CEDAW);
- the right to enjoy their own culture, to profess and practise their own religion, and to use their own language in community with the other members of their group (Article 27, ICCPR; c.f. Article 15, ICESCR).[1]

[1] International Convention on the Elimination of All Forms of Racial Discrimination (1965) (CERD); International Covenant on Civil and Political Rights (1966) (ICCPR); International Covenant on Civil and Political Rights (1966) (ICCPR); International Covenant on Economic, Social and Cultural Rights

Governments must exercise care in the drafting and amendment of legislation to ensure that the focus of freedom from discrimination does not diminish other important freedoms, such as freedom of religion, association and cultural expression and practice. Therefore:

- any re-drafting of laws must ensure that human rights that are in tension with one another are appropriately balanced;
- Australia may be non-compliant with its international obligations if this is not the case;
- The Federal Government recently reaffirmed its commitment to review legislation, policies and practices for compliance with the seven core UN human rights conventions to which Australia is a party; and
- This is also necessary in view of Australia's increasingly diverse mix of ethnicities, cultures and religions.[2]

Because Australia is a party to the ICCPR and other conventions, it has "committed to comply with their provisions in good faith and to take the necessary steps to give effect to those treaties under domestic law ... Australia has a duty to respect and apply its international human rights obligations to all individuals within its jurisdiction".[2]

3.1.2. State and Territory legislation

Mark Fowler, an adjunct professor of Law at the University of Notre Dame, has highlighted the inadequacy of various forms of state and territory anti-discrimination legislation in Australia to "acquit Australia's obligations to protect religious freedom under international law". These failures are seen in:

a. Victorian and ACT charters of human rights, which have declined to enact the protections of religious freedom contained in the International Covenant on Civil and Political Rights;

b. The ACT and Victorian charters draw the boundary much further into the heartland of an individual's rights, permitting "reasonable" state incursion; some of these rights may be limited by state incursion, but the ICCPR permits only "necessary" limitations, imposed through "no more restrictive means than are required";

c. Tasmanian Anti-Discrimination Act 1998 failed "to accord religious bodies their rights in respect of the protected attributes of marital or relationship status";

d. Threats by the University of Sydney Union to deregister the Evangelical Union on the basis of its "discriminatory" requirement that new members affirm that "Jesus is Lord". The concern arises as religious belief is not a protected attribute under the Anti-Discrimination Act 1977 (NSW).[3]

For a society to be construed as open and democratic, it must allow both individuals and associations to publicly provide their notion of truth to wider society: "Any removal of the ability of faith-based entities to determine and espouse their beliefs would be a restriction on these historically hard-won liberties, which arguably are characteristic of the Western legal tradition. It behoves state and territory institutions to review their practices to ensure compliance with international law".[4]

By following the example of existing State and Territory anti-discrimination legislation, the NT government is in danger of repeating the same failures that exist in other jurisdictions.

(1966) (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW); Convention on the Rights of the Child (1989) (CRC).

[2] *Australia's Human Rights Framework* (April 2010), p. 9.

Currently at the Federal level, a Statement of Compatibility in relation to all government and non-government bills must contain an assessment of the bill or legislative instrument's congruence with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. In the ICCPR, a number of important points must be noted:

- The international religious freedom protections contained at Article 18 are not limited to religious corporations, but also extend to individuals within society, regardless of their affiliation with any religious institution.
- Retention of traditional views of marriage, sexuality, gender etc. does not breach the right to equality because:
    i) The UN HRC determined under Article 23(2) that the right to marry under the ICCPR is confined to a right of opposite-sex couples to marry due to the interpretation that the terms 'men and women' restricted marriage, by definition, to opposite sex couples.
    ii) There is no international human right to same sex marriage. As Mark Fowler has demonstrated in his submission to the SSM inquiry both the UN Human Rights Committee in Joslin v New Zealand interpreting the ICCPR and the European Court of Human Rights in its decisions on the European Covenant on Human Rights establish that a state is not obliged by the equality rights in those instruments to introduce same sex marriage.
    iii) Religious freedom rights therefore cannot be limited by certain 'protected attributes' that are not enshrined in international human rights law.

This however has very important ramifications for the protection of religious freedom:

- Religious freedom protection under Article 18 of the ICCPR can only be limited by other fundamental rights;
- Absence of a right to same sex marriage in international law has consequences for the ability to limit religious freedoms;
- Rights to religious freedom can only be limited where '***necessary***', not only where 'reasonable';
- It is often assumed that to be compatible with human rights, any limitation on religious freedom must be 'reasonable, necessary and proportionate'. However, Article 18(3) of the ICCPR only permits limitations on religious freedom to the extent that they are ***'necessary'***.

Limitation clauses under the ICCPR, including religious freedom in Article 18(3) are required to be interpreted in accordance with The United Nations Economic and Social Council's ***Siracusa Principles*** on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights:

- The Principles provide that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue';
- 'Whenever a limitation is required in the terms of the Covenant to be "***necessary***," this term implies that the limitation:
    - is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant;
    - responds to a pressing public or social need;
    - pursues a legitimate aim;
    - is proportionate to that aim.

The Siracusa Principles also require that 'in applying a limitation, a state shall use no more restrictive means than are required'. This means that:

- where consideration is being given to the implementation of a fundamental right that conflicts with the right to religious and conscientious freedom, consideration of alternative means for progressing that fundamental right must be undertaken;
- A weighing of the relative burden placed upon religious and conscientious freedom amongst the alternatives is then required in order to identify the means that are the least restrictive.

Recommendation: that the NT government give proper and full respect to Australia's international human rights commitments, particularly in relation to freedom of religion, alongside the right to be free from unjustifiable discrimination.

Recommendation: that the NT government, in accordance with the Siracusa principles, only limit religious freedoms where this is 'necessary' in responding to genuine public or social need, in pursuit of a legitimate aim, and in proportion to that aim; and that the least restrictive means and/or alternative means of progressing conflicting rights be considered before curbing religious freedoms.

Recommendation: That the NT government issue statements of compatibility with all legislation, to test whether the proposed legislation is compatible with the International Covenant on Civil and Political Rights.

4. Other Attributes

4.1. Identifying protected attributes

FamilyVoice urges the NT government to seek to protect objective and verifiable attributes, such as those that exist under international anti-discrimination law, as reflected in the ICCPR: race, sex, marital status etc.

Professor Joel Harrison has argued that we have begun to see a shift in our understanding of the purpose of anti-discrimination laws. Where we used to focus on access and distribution, anti-discrimination laws are now increasingly focused on self-identity. Indeed, it has been argued that identity politics has been the major driver of the growth of antidiscrimination law.[5] Harrison states:

> *The rise in this tension between equality norms and religious freedom in Australia has much to do with a transformed understanding of the purposes of anti-discrimination law. We contend that there has been a shift away from focusing on questions of access and participation towards a particular notion of dignity or identity. On this view, equality law should be increasingly universalised, that is applied to all groups, in order to protect individuals against 'status harms'. We argue that this shift underlies arguments, seen recently in Australia, to limit or remove religious exceptions to the reach of anti-discrimination law.*

As a result of this shift, an increasing number of 'attributes' are being added to anti-discrimination law, many of which reflect self-identity such as sexual orientation or gender identity, rather than verifiable objective attributes, such as race or marital status.

4.1.1. Example: Gender identity

As the discussion paper highlighted, sex refers to the body's physiological composition, while gender *can* be associated with identity and how a person 'feels' on the inside. This is by no means an exhaustive definition of the meaning of 'gender', however; gender can carry with it certain characteristics determined, at least in part, by biological makeup.[6] However, 'gender ideology' actually functions as a belief system; it rests upon the notion that gender is 'fluid' and can be chosen. Its origins are not found in science, but in philosophy. Judith Butler, a major proponent of gender theory, states that:

> *Gender is in no way a stable identity or locus of agency from which various acts proceed; rather, it is an identity tenuously constituted in time - an identity instituted through a stylized repetition of acts... Feminist theory has often been critical of naturalistic explanations of sex and sexuality that assume that the meaning of women's social existence can be derived from some fact of their physiology. In distinguishing sex from gender, feminist theorists have disputed causal explanations that assume that sex dictates or necessitates certain social meanings for women's experience.*[7]

Note the use of the word 'theory' here: it is not appropriate that theories and undefined characteristics be included as protected attributes in legal frameworks, particularly anti-discrimination law, nor an attribute that has 'no scientific basis', is 'in no way stable', but rather is an 'identity tenuously constituted over time'.

There are a number of scientific facts that need to be considered:

A comprehensive review conducted by Lawrence S. Mayer, of the Department of Psychiatry at the Johns Hopkins University School of Medicine and Paul R. McHugh, professor of psychiatry and behavioural sciences at the Johns Hopkins University School of Medicine, showed that:

1. The hypothesis that gender identity is an innate, fixed property of human beings that is independent of biological sex — that a person might be "a man trapped in a woman's body" or "a woman trapped in a man's body" — is not supported by scientific evidence;
2. Studies comparing the brain structures of transgender and non-transgender individuals do not provide any evidence for a neurobiological basis for cross-gender identification;
3. Only a minority of children who experience cross-gender identification will continue to do so into adolescence or adulthood.[8]

The category of "sex" remains biologically and objectively definable; this is true at a chromosomal level, and cannot be altered. We are born with, and retain XX or XY chromosomes (although very rare chromosomal disorders do exist).[9]

It is appropriate that 'sex' remains the protected attribute under NT anti-discrimination law; gender identity is too subjective and unscientific to include in legislation of this nature. 'Sex' is the protected attribute under ICCPR, and NT anti-discrimination provisions should reflect this.

Recommendation: That 'sex' remains the protected characteristic under anti-discrimination law.

Recommendation: That the NT government seek to protect only those attributes that are verifiable on an objective or scientific basis; as a result, all language in the act must be consistent with this reality, i.e. use of 'man' and 'woman' language reflects a reality that can objectively verified.

4.1.2. An alternative approach

Anti-discrimination laws actually have historically failed to deliver the outcomes sought for protected sections of the population. For example, prior to the passing of the Sex Discrimination Act 1983 (Cth) the wage gap between men and women was improving, but progress diminished after the enactment. Disability discrimination laws have found similar problems: "they have been shown to actually reduce workforce participation among the disabled both in Australia and abroad".[10]

The NT government should work towards defining 'discrimination' and attributes protected under the law, as narrowly as possible. Although this may sound like a reduction in the protection of rights, it is in fact creating an expansion of the space for the protection of rights by allowing freedom for 'organic solutions' to flourish. Systems of values may come into conflict with one another, but these clashes need not be solved through legislation and litigation. Solutions achieved by the actions of civil society (such as debate and education) often yield more lasting and resilient outcomes because they are not forced, but freely chosen. No anti-discrimination laws should be added or expanded unless there is certainty that the expansion will accomplish some specific goal—and unless there is reason to doubt that Australian citizens operating within civil society will find solutions on their own.[11] The example of 'gender identity is 'case in point'; the government must reconsider protecting attributes that have no basis in scientific fact, and are instead based on highly contentious social theories, and personal feelings about identity.

Recommendation: That the NT government seek to find alternative, non-legislative, ways to address discriminatory practices, through encouraging/augmenting already existing initiatives driven by broader civil society.

4.2. Vilification

The discussion paper suggests that: "protection under the Act from vilification will provide legal redress against extreme or pervasive vilification that is essential for Territorian's to maintain the right to live their lives free from harassment, psychological distress, hurt, anger and anxiety that exists in society" (p.12).

The major problem with this approach is that these experiences are internal and subjective in nature, and are not necessarily concomitant with the experience of actual harm. In addition, based on the experience of equivalent Tasmanian legislation, the use of language making it unlawful to 'offend' or 'insult' is far too broad. It has an unduly stifling effect on freedom of speech and may infringe the implied freedom of political communication in the Constitution.

4.2.1. Freedom of speech

The essence of freedom of speech is not merely the freedom to express ideas, but the freedom to disagree, dispute or cause controversy - an idea often witnessed in our political arena. Indeed, a right not to be offended would stifle legitimate debate and limit political freedom – an important concept in a functioning democracy. Freedom of speech also includes expression of personal beliefs which might not be supported by evidence, and may be controversial, leading to robust debate.

While freedom of expression is understood as a *natural right* beyond the authority of governments, it is not an absolute right. Free speech is legitimate for the pursuit of truth and the common good. Most of the debate about freedom of speech centres on identifying legitimate limitations.

4.2.2. Justifiable limitations

The primary justifiable limitation on freedom of expression is harm to other individuals or society, generally known as the *harm principle*.

The English philosopher John Stuart Mill addressed the relationship between authority and liberty in his seminal work *On Liberty*, published in 1859. There he proposed that the only legitimate limitation on free expression is that now usually described as the *harm principle*:

> *the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.*[12]

Application of this principle to freedom of expression requires clarification of two concepts:

- The nature of the *harm* envisaged; and
- Identification of the *others* in consideration.

Given the importance of freedom of expression as a natural right flowing from being human, only serious *harms* would justify limiting this freedom, such as serious risks to life, health or property. The *others* who might be harmed should include both individuals and society and a whole.

Reasonable restrictions on freedom of speech are articulated well in the International Covenant on Civil and Political Rights (ICCPR), Article 19:

> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) For respect of the rights or reputations of others;*
>
> *(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

These limitations helpfully address harms both to individuals and to society. But they are to be provided by law, and must be ***necessary***.

Breaches legal certainty

An internationally recognised principle for the rule of law is *legal certainty*. Professor Cameron Stewart, Pro Dean at Sydney Law School, explains that (emphasis added):

> *the rule of law principle requires that the legal system comply with minimum standards of **certainty**, **generality** and **equality**. The rule of law is a fundamental ideological principle of modern Western democracies...*[13]

The opportunity for a citizen to know *in advance* whether an intended action is lawful or not, is crucial for a free society. Arbitrary law, which leaves citizens uncertain about the legality of their actions, is the device exploited by tyrants. At its core, legal certainty recognises the importance of human dignity and enables citizens to live autonomously in a community with mutual trust.[14]

An example of ambiguity has arisen by the application of a number of sections in the Tasmanian *Anti-Discrimination Act 1988*, but particularly sections 17(1) & 19. Section 17(1) states:

> ***17. Prohibition of certain conduct and sexual harassment***
>
> *(1) A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.*

This section was used by transgender activist Martine Delaney to bring an action against the Catholic Archbishop of Hobart Julian Porteous for distributing a booklet entitled *Don't Mess with Marriage*.

Same-sex marriage campaigner Rodney Croome had earlier encouraged people to use the law to stifle the Church's views when he said in a media release:

> *The booklet likely breaches the Anti-Discrimination Act and I urge everyone who finds it offensive and inappropriate, including teachers, parents and students, to complain to the Anti-Discrimination Commissioner, Robin Banks.*[15]

The law should not allow one side of a debate to censor those who disagree with their views. But that is exactly what such legislation does.

The Institute of Public Affairs rightly pointed out at the time that the action was an attack on freedom of speech:

> ***Tasmanian anti-discrimination complaint shows freedom of speech is under attack***
>
> *Martine Delaney, Greens candidate for the federal seat of Franklin, has complained to the Tasmanian Anti-Discrimination Commission this week that pamphlets produced by Catholic Archbishop of Hobart Julian Porteous are offensive and breach the Anti-Discrimination Act 1998 (Tas). Following amendments passed in 2013, the act makes it a crime for a person to "engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person" on the basis of a range of attributes, including sexual orientation.*
>
> *"This attack on free speech is facilitated by Tasmania's anti-discrimination laws, which are the most restrictive in the country," says Mr Breheny.*
>
> *"As I argued in an article for the Sunday Tasmanian in November 2012, the 2013 amendments would have 'a crippling effect' on freedom of expression and stifle public debate."*
>
> *"This confirms our worst fears about the law, and shows why the act should never have been amended."*
>
> *" ... the fact that the legislation contemplates such a complaint on a topic of genuine and significant public and political debate shows the overreach of the Tasmanian regime."*

> *"This complaint is a clear example of the chilling effect that legislation can have on speech," says Mr Breheny.*[16]

Criticising section 17(1), Campbell Markham wrote in *The Mercury:*

> *For the same words that may insult one person, may be simply laughed off by another. What may be felt as ridicule by one may make another simply think again. What is perceived as intimidating by one person may be perceived as "robust debate" by another.*
>
> *So who draws the lines of what speech is right and what speech is wrong? And who decides what a "reasonable" person is?*
>
> *The answer is: whoever is loudest, cleverest, the one with most access to political power and media publicity, whoever has the dominant ideology on their side.*[17]

The complaint against Archbishop Porteous was eventually withdrawn but it should never have been entertained in the first place. Part of the punishment in such matters is the process – the time and money expended in defending oneself.

> ***Recommendation: that the NT government reject unjustifiable restriction on freedom of speech by the use of broad terms such as 'offend' and 'insult' within anti-vilification legislation.***

Section 19 of the Act severely restricts freedom of speech also:

> ***19. Inciting hatred***
>
> *A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –*
>
> *(a) The race of the person or any member of the group, or*
>
> *(b) Any disability of the person or any member of the group, or*
>
> *(c) The sexual orientation or lawful sexual activity of the person or any member of the group, or*
>
> *(d) The religious belief or affiliation or religious activity of the person or any member of the group.*[18]

Exactly what constitutes "hatred", "serious contempt" or "severe ridicule" is extremely subjective. Recently, mere support for the traditional definition of marriage has been labelled hatred.

The use of terms such as *insult* and *offend*, etc. does not fall within the justifiable limitations of protecting personal reputation, national security, public order, public health or public morals contained in the ICCPR and, on this basis is an unjustifiable limitation on freedom of speech. The language is broader in its terms than Article 20 of the ICCPR, which states that 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. The language of any NT vilification law should be confined in this way and "not extend to matters likely only to offend".[19]

> ***Recommendation: That the NT government avoid enacting vilification laws, especially laws including vague language such as 'hatred', 'severe ridicule' or 'contempt'; if***

vilification laws are deemed necessary, the NT should enshrine language that reflects that used in article 20 of the International Covenant on Civil and Political Rights.

4.3. Access to Assisted Reproductive Treatment (ART)

While same sex couples cannot have children within the context of natural sexual reproduction, greater numbers are seeking to obtain children through assisted reproductive treatment. The state has generally considered sexual reproduction to be a private matter that lies outside regulatory boundaries, but artificial forms of sexual reproduction are highly regulated by both governments and medical bodies. This is because the state has a clear interest in restricting access, based on the needs of children (yet to be conceived), and aspects of public interest, such as protecting traditional family structures, and the best use of medical and financial resources.[20]

Despite some assertions to the contrary[21], there is a vast body of sociological and psychological evidence that shows that children do best when raised by their biological father and mother in the context of a long-term heterosexual marriage relationship.[22] "Research findings linking family structure and parents' marital status with children's well-being are very consistent".[23] Article 23 of the ICCPR states the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. This provision highlights the importance of the natural family in particular.

On this basis, in the best interests of children and the community, access to assisted reproductive treatment should be restricted in accordance with the policies of service providers, to the extent that they restrict service to married couples.

Recommendation: That the NT government continue to allow services to restrict access to artificial reproductive treatment to married heterosexual couples in the interests of both children, and the state.

5. Exemptions

5.1. Should any exemptions for religious or cultural bodies be removed?

Any removal of exemptions for religious bodies in the Northern Territory would defy Australia's obligations under the various international human rights agreements to which it is a signatory. Australians generally, and Territorians specifically, must be allowed to maintain and express their beliefs not only in private, but in public, and the removal of exemptions presents a threat to public religious expression.

The discussion paper proposes amending the Act to 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 or cultural bodies would instead be required to apply for an exemption with the ADC and justify why their service requires a particular exemption.

The discussion paper suggests:

One of the exemptions that could be removed is section 30(2) that permits religious schools to exclude prospective students who are not of that religion.

Another exemption that could be removed is 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. For example, under this exemption a religious school could justify not employing a prospective employee on the basis that they identify as LGBTI, if the religious doctrine does not support LGBTI relationships.

5.1.1. Problems with this approach

When religious freedoms and equality norms clash, Australian commentators and policy makers increasingly question the place of 'exceptions' for religious groups in anti-discrimination law.

Australia is a multicultural society, and when it comes to issues around sexuality and marriage, as the recent same sex marriage postal vote demonstrated, people have deeply held beliefs and values that oppose those espoused by equality advocates. The NT government needs to therefore ensure that different values and beliefs around personal "morality and religious faith are respected, while maintaining the most important aspect of the principle of non-discrimination — that in our shared communal life as a society, differences in race, gender, sexual orientation, and other personal attributes are not grounds for exclusion". Therefore, the push to expunge religious exemptions within anti-discrimination law:

- risks a failure to balance different human rights and to make room for different moral values and views on sex and family life in a multicultural society;
- fails to admit that respect for human rights requires a respect for freedom of religion and association which allows voluntary groups, at least to a significant extent, to be governed by their own shared values and beliefs;
- Does not appreciate where the "commons" exists in the life of a community, and what lies outside of the" commons", that the balance between religious freedom and equality is to be found. [24]

5.2. Problems with exemption removal

With these principles in mind, it is clear that the NT government's suggestion to remove religious exemptions would be highly problematic:

- Such a removal would undermine the free speech of faith-based schools, or their employees and governing members. There is thus a real question as to whether such bodies will lose the ability to teach their view of morality, marriage and sexuality. Instead, the government should enhance current protections for religious freedom, not reduce them by removing exemptions.

The changes would also fail to protect parental choice in the religious and moral education of their children. This would undermine our international obligations as follows:

- Article 18(4) of the ICCPR provides that States Parties must ensure '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';
- Articles 13(3)-(4) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) reinforce that right;

- Children, as autonomous individuals, enjoy the freedom of thought, conscience and religion in their own right. Article 14 of the Convention on the Rights of the Child (CRC) which Australia has ratified, provides:
    - States Parties shall respect the right of the child to freedom of thought, conscience and religion;
    - 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;
    - Inclusion of teaching on the virtues of same-sex activity in public education would amount to a limitation on the Article 18(4) rights of the parents to 'ensure the religious and moral education of their children in conformity with their own convictions' and the religious freedom rights of the child;
    - Importantly, it would also amount to a limitation on the right of educators to express or act upon their own religious beliefs.

In addition to the above legal argument, Professors Harrison and Aroney have warned that:

To uphold Australia's international obligations, the Northern Territory government should apply a 'no detriment' clause to anti-vilification law, which would prohibit both governments and private sector organisations from acting detrimentally towards a person or an organisation simply because they hold or express a view that marriage is between a man and a woman, that homosexuality is morally unacceptable, or that gender is not fluid, or who are perhaps associated with a group that holds that view."

Recommendation: That the NT government enhance current protections for religious freedom, through inscribing a 'no detriment' clause within anti-discrimination legislation; this would prohibit both governments and private sector organisations from acting detrimentally towards a person or an organisation simply because they hold or express a view that marriage is between a man and a woman, that homosexuality is morally unacceptable, or that gender is not fluid, or who are perhaps associated with a group that holds that view.

5.2.1. Conclusion to arguments against removal of exemptions

A leading Catholic theologian sums up the case nicely:

> *Should the Greens have the right to prefer to employ people who believe in climate change, or should they be forced to employ sceptics? Should Amnesty International have the right to prefer members who are committed to human rights, or should they be forced to accept those who admire dictatorships? Both cases involve discrimination and limiting the freedoms of others, and without it neither organisation would be able to maintain their identity or do their job effectively.*

6. Conclusion

The possibilities for change described in the Attorney General's discussion paper are weighted too heavily in opposition to freedom of religion and associated rights like freedom of expression, association and culture, in terms of both individual and corporate rights. FamilyVoice Australia

encourages the government to focus on ways it may appropriately balance the law in accordance with international human rights law, and in particular with the International Covenant on Civil and Political Rights.