

Director, Legal Policy
Department of the Attorney General and Justice

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Dear Director

Discussion Paper
Modernisation of the *Anti-Discrimination Act*

On behalf of the members of Darwin Baptist Church, thank you for the opportunity to respond to the proposed Modernisation of the Anti-Discrimination Act. Darwin Baptist Church is an incorporated association in the Northern Territory and a Christian Church within the Baptist Union of the Northern Territory. This response has been endorsed by the Pastors and the Church Council and is consistent with the views held by other Baptist Churches in the Northern Territory.

As a general statement, we wish to emphasise that we affirm the beneficial role of the Anti-Discrimination Commission. We are also thankful for the thought that has gone into the proposed modernisation of the Act acknowledging there is much to be commended.

This submission does not seek to comment on each of the proposed changes. Rather, the intention is to address areas of significance to us.

Question 2: Should the attribute of 'gender identity' be included in the Act?

We are of the view that the fundamental biological identities of male and female are valid and that contemporary gender theory adds, rather than eliminates, confusion.

We acknowledge the rare occurrence where sex is indeterminate and that some special provisions may be necessary in such cases.

Not having 'sex' defined in the existing Act does allow space for various interpretations – including gender dysphoria or indeterminate sex.

If 'gender identity' is added as an attribute, 'sex' should still remain as an attribute and should allow for certain permitted discriminations such as the use of toilets or participation in activities that are specifically male or female.

Question 3: Should intersex status be included as an attribute in the Act?

If 'sex' is removed as an attribute, why then include intersex? If 'sex' is not removed as an attribute, and 'sex' is not currently defined, why can 'sex' not include intersex?

We are of the view that leaving 'sex' as an attribute will also provide cover for intersex when the ordinary meaning is applied.

Question 4: Should vilification provisions be included in the Act? Should vilification be prohibited for attributes other than on the basis of race, such as disability, sexual orientation, religious belief, gender identity or intersex status?

As members of a faith community we understand that the discrimination provisions seek to strike a delicate balance between the rights of individuals who potentially face discrimination and the foundational values of freedom of belief, opinion and expression. Our own members will, from time to time, experience conduct or comment in a way that offends, hurts or insults them - intentionally, incidentally or accidentally. However we acknowledge this can be an expected cost in a society that promotes open dialogue and robust and reasonable discussion on matters of significance.

We do agree that the state has a role to play in protecting individuals from conduct that is motivated by hatred and we support provisions that guard against conduct intended to humiliate, degrade or promote hatred towards protected groups.

We are concerned about the words "offend" and "insult". While there may be a growing body of case law helping to clarify the definitions of these words, they are nevertheless required to be interpreted subjectively and leave scope for frivolous claims. While we understand that many cases have been overturned where frivolous, it is not without substantial financial and emotional cost to those against whom the claims are made.

We believe this provision can remain robust even with the omission of the words "offend" and "insult". If these words are to remain, protections under the Act should be extended to statements made in relation to religious belief (such as a critique), understanding the limits of the proposed exemption for conduct undertaken "reasonably and in good faith".

We also agree that the protection for anti-vilification can appropriately be expanded beyond the attribute of race to include the other attributes as proposed.

Question 7: Should "lawful sex work" be included as an attribute under the Act?

As a general principle we do not believe people should be discriminated against because of the kind of work they do. Access to housing, for example, should not be impeded. However, religious institutions should not be compelled to make their facilities available to people whose activities are contrary to the religious beliefs of the entity concerned. As an extreme example, should a religious charity be obliged to lease property for the purposes of prostitution? Or what if a sex worker is also a teacher who wishes to be employed in a religious school? What protections are there for such organisations?

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We are also concerned about the use of the term “lawful sexual activity” because it implies conduct well beyond that of a sex worker. This is raised in the discussion paper as the approach taken in QLD, Tas and VIC - it is not entirely clear whether this term is actually being proposed as an option - the title of the section is “Lawful sexual activity”.

In our view, this goes much further than simply protecting the rights of sex workers and is already substantially covered by the provisions of sexual orientation and gender identity. This provision potentially goes much further in requiring us to accept and endorse the actual practice of all manner of lawful sexual activity. For example, asking a leader to step aside if engaging in a sexual relationship outside of marriage would offend the provision.

Question 10: Should a representative complaint model process be introduced into the Act? Should there be any variations to the process of the complaint model as described above?

The way the representative complaints model has been described in the discussion paper is not clear enough to be able to provide a conclusive comment on our view.

While there may be circumstances where individuals are too afraid, too oppressed, or not sufficiently aware of the protections in the Act to be able to bring their own complaint, we do have concerns that a representative complaints model may cause what is for all intents and purposes a restorative legal process, into an overly adversarial process.

Of particular concern is the ability to bring a complaint on a party's behalf without their consent. There also is a lack of clarity around what would constitute a representative body able to bring a complaint.

Question 11: Should the requirement for clubs to hold a liquor licence be removed?

Our response depends on the rigor of other exemptions. It appears that this will mean that churches may be considered clubs. As such, will exemptions be given to enable churches to appropriately discriminate (or more properly, exercise freedoms)? For example, will our church be able to require adherence to our doctrinal statement in order for someone to become and remain a member? Will gender specific activities remain permissible?

Question 12: Should the restriction of areas of activity on sexual harassment be removed?

We agree they should. There is no room for harassment in our society.

Question 14: Should any exemptions for religious bodies be removed?

In our view, the heading to this section “Removing content that enshrines discrimination” is misleading. The religious exemptions exist to enshrine a human right NOT to enshrine discrimination. Without a charter of religious freedom, the only way such freedoms are given expression, in this instance, is by exemption.

It is sometimes said that religious groups want 'a licence to discriminate'. Whilst there may be rare examples where religious entities may be characterised in such terms, for the most part it is a huge distortion of the issue. In employment for example, the most important issue is not the freedom to discriminate but the freedom to select on the basis of religious belief and practice and freedom to take adverse action against an employee, if necessary, where issues of personal conduct are incompatible with the values of the organisation.¹

We do not believe these exemptions should be removed. Religious freedom should be seen as a right and not a privilege for which an entity must apply. The question then begs: What capacity does the State have to make deliberations based on religious grounds?

Therefore, if exemptions are removed and religious bodies are required to apply for an exemption there must be specific guiding factors or principles outlined which guide the exercise of the Commissioner's 'discretion' in this area. Specifically there should be a principle that an exemption should be granted if there is a close or direct nexus between the foundational or central doctrinal documents of that religious body such that the body would not continue to be able to operate or uphold their faith values if the exemption were not granted. An unguided 'discretion' to approve exemptions is problematic and rests entirely on the persuasion of the Commissioner.

As it has not been made clear how the exemption process is to be applied in the draft Bill, in the event this pathway is decided upon, further opportunity for input and comment should be afforded the organisations affected once the process is clarified.

Question 15: Should the exclusion of assisted reproductive treatment from services be removed?

We do not believe this exclusion should be removed. Our view is that a child should have a right to be raised by both a mother and a father ... preferably their biological parents. Service providers should be afforded the opportunity to refuse to provide services on a conscientious basis.

Question 16: What are your views on expanding the definition of "work"?

We agree that volunteers play an important, possibly vital, role in various services and industries and it is important to protect volunteers from unnecessary discrimination.

However, similar to other comments made elsewhere in this response, we feel it remains important to allow appropriate discrimination in the process of choosing and maintaining volunteers to serve in religious organisations. This will ensure the volunteers are appropriately aligned with the organisation's underlying values and ethos (eg volunteer boards).

¹ Protecting Diversity – Towards a better legal framework for religious freedom in Australia. Submission of Freedom for Faith to the Religious Freedom Review, January 2018.

Question 20: Should definitions of 'man' and 'woman' be repealed?

It is a sad reflection on our times that the terms "man" and "woman" could be regarded as "offensive". However, it seems repealing the definitions will have little impact on the effect of the Act, understanding their ordinary meanings will apply.

While it does not appear to be intended by the discussion paper, if, in an attempt to make the Act "gender neutral", it is proposed to replace terms such as man, woman, men and women from the Act, care should be taken to ensure appropriate exemptions remain for activities that are appropriately gender specific (for example in training/conferences (where personal sharing might be impeded if members of the opposite sex are present), sporting (where physical inequalities are present and should be protected) and in toilet and change room facilities).


Question 21: Should the term "parenthood" be replaced with "carer responsibilities"?

In our view the attribute of parenthood should remain as an attribute, demonstrating the significant role that this relationship has in our heritage and in what we believe regarding the raising of children.

It is acknowledged there are various other forms of caring relationships within our society that should also be protected and we agree that the term "carer responsibilities" should also be included as an attribute.

We appreciate the opportunity to have open discussion and to provide feedback on this important piece of legislation. We request that any report following the feedback period be made publicly available. We also request that there be further opportunity for public comment when the specifics of the draft Bill are more firmly understood.

Sincerely



Mal Sercombe
Senior Pastor

On behalf of the Pastors, Council and Members of Darwin Baptist Church