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COMMENTS TO THE ATTORNEY-GENERAL'S
DEPARTMENT ON

THE CONSOLIDATION OF AUSTRALIA'S ANTI-DISCRIMINATION LEGISLATION DISCUSSION PAPER

CONTACT

Rev. Elenie Poulos
National Director, UnitingJustice Australia
National Assembly, Uniting Church in Australia
PO Box A2266 Sydney South NSW 1235
T 02 8267 4239 E unitingjustice@nat.uca.org.au
www.unitingjustice.org.au

1 | INTRODUCTION

UnitingJustice Australia is the justice unit of the National Assembly of the Uniting Church in Australia, pursuing matters of social and economic justice, human rights, peace and the environment. It sits within the mandate of Uniting Faith and Discipleship and works in collaboration with other Assembly agencies, Uniting Church synod justice staff around the country, and with other community and faith-based organisations and groups.

It engages in advocacy and education and works collaboratively to communicate the Church's vision for a reconciled world. It provides resources for the Church as it considers its position on issues of national and international importance and public policy.

UnitingJustice Australia exists as an expression of the Uniting Church's commitment to working toward a just and peaceful world. This commitment arises from the Christian belief that liberation from oppression and injustice is central to the incarnation of God through Jesus Christ. We welcome this opportunity to provide comment on the Discussion Paper released by the Federal Attorney-General's Department on the consolidation of Australia's anti-discrimination legislation, and we look forward to continuing our involvement in this process upon the release of draft exposure legislation for a consolidated Act.

The Uniting Church's support for human rights and the upholding of the dignity of all people was fully articulated in our 2006 statement on human rights, 'Dignity in Humanity: Recognising Christ in Every Person'.¹ In part, the statement reads

The Uniting Church in Australia believes that human beings are created in the image of God who is three persons in open, joyful interaction. The image of God that is reflected in human life, the form of life that corresponds to God, is the human community – all people – finding its life and sustenance in relationship.

Thus, the Uniting Church believes that every person is precious and entitled to live with dignity because they are God's children, and that each person's life and rights need to be protected or the human community (and its reflection of God) and all people are diminished.

In addition to laying out the theological basis of our commitment to human rights, this statement committed the Church to an ongoing assessment of Australian Government policy and practice against our international human rights commitments under United Nations treaties, and encouraged agencies and other groups within the Church to advocate for social policy consistent with these obligations:

We affirm our support for the human rights standards recognised by the United Nations. Everyone has a birthright to all that is necessary for a decent life and to the hope of a peaceful future. This birthright is expressed in UN human rights instruments which describe human rights as civil, political, economic, social and cultural rights. These instruments provide a valuable framework for assessing political, economic and social systems and are an important tool for peace.

¹ This statement is available at http://www.unitingjustice.org.au/images/pdfs/resources/UJA-booklets/dignityhumanity_web.pdf

The United Nations human rights instruments to which Australia is a party recognise the importance of non-discrimination in the realisation of the rights they describe. Discrimination is both a cause and consequence of poverty and social exclusion and a denial of human dignity. It should not be accepted in a democratic society and strengthening Australia's anti-discrimination legislation to ensure that it is not tolerated or encouraged should be the aim of this project.

2 | SUMMARY OF RECOMMENDATIONS

Recommendation 1: A unified definition of discrimination that avoids using the comparator test should be employed in the consolidated Act.

Recommendation 2: With a view to simplicity and clarity, a single special measures provision should be introduced and applied to all protected attributes. Care should be taken in this process to ensure that no existing protections are diminished, and that Australia's international legal obligations are met.

Recommendation 3: The consolidated anti-discrimination Act should prohibit harassment on all grounds protected by the Act.

Recommendation 4: Vilification should be unlawful on any of the grounds protected in a new consolidated Act with a corresponding offence created in the Commonwealth Criminal Code.

Recommendation 5: Australian federal anti-discrimination law should cover all grounds and characteristics described in the international human rights treaties to which Australia is party.

Recommendation 6: Religious belief and activity should be included as a protected attribute in the consolidated anti-discrimination legislation.

Recommendation 7: Care must be taken in the drafting of all legislation, including anti-discrimination law to ensure that freedom of religion is not undermined by such legislation.

Recommendation 8: Sexual orientation should be included as a protected attribute in the consolidated anti-discrimination legislation.

Recommendation 9: Gender identity should be included as a protected attribute in the consolidated anti-discrimination legislation.

Recommendation 10: Intersex status should be included as a protected attribute in the consolidated anti-discrimination legislation.

Recommendation 11: Homelessness should be included as a protected attribute in the consolidated anti-discrimination legislation.

Recommendation 12: The Australian Government should ensure that special measures in Australian law are in accordance with CERD General Recommendation 32.

Recommendation 13: The disclosure of criminal record information should be limited to offences relevant to the specific employment position. Irrelevant criminal record should be included as a characteristic for protection in the consolidated anti-discrimination legislation.

Recommendation 14: Victim/survivor of domestic or family violence status should be included as a characteristic in the consolidated anti-discrimination legislation.

Recommendations 15: Political belief and practice should be a protected attribute in the consolidated anti-discrimination legislation.

Recommendation 16: Membership of a trade union should be a protected attribute in the consolidated anti-discrimination legislation.

Recommendation 17: Family and carer status be included as a protected attribute in the consolidated anti-discrimination legislation.

Recommendation 18: The definition applied to 'family' should be broad enough to recognise and respect Indigenous concepts of kinship groups.

Recommendation 19: Broad and inclusive definitions of both 'gender identity' and 'sexual orientation' should be adopted in the consolidated anti-discrimination legislation.

Recommendation 20: Intersex status should be explicitly acknowledged in the consolidated anti-discrimination legislation.

Recommendation 21: Specific protections against intersectional discrimination should be offered by the consolidated anti-discrimination legislation.

Recommendation 22: A general provision requiring equality before the law across all protected attributes should be included in the consolidated anti-discrimination legislation.

Recommendation 23: Volunteers should be given the same protection as paid employees under a consolidated Act, with consideration given in the form of an exemption based on the notion of ‘unreasonable hardship’ for community organisations that would be financially disadvantaged by this change.

Recommendation 24: The consolidated Act should contain the exemptions currently in the Sex Discrimination Act Section 37 parts (a), (b) and (c).

Recommendation 25: The consolidated Act should contain an exemption in relation to employment, where discrimination is necessary in cases where applicants are unable to fulfill the inherent requirements of the role.

Recommendation 26: We do not believe that religious organisations should be granted an exception for their activities in the provision of services, including education and accommodation services. As such, we do not believe that exemptions such as those granted in Section 38 (c) of the Sex Discrimination Act should be included in a consolidated Act.

Recommendation 27: We oppose all harmful racial discrimination in any circumstances (regardless of an exemption).

3 | MEANING OF DISCRIMINATION

Question One: *What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?*

Direct discrimination refers to a situation where someone is treated unfairly because of their sex, race etc., compared to someone else who does not have that characteristic, in the same or similar circumstances. Indirect discrimination is when

there is a requirement or rule which appears to apply to everyone equally but in fact when applied has the effect discriminating against people on the basis of particular characteristic.² Difficulty in determining which type of discrimination is applicable has led to instances of complainants pleading both types, and legal findings that may be considered contrary to the overarching intentions of the current anti-discrimination laws.³

As acknowledged in the Discussion Paper, the definitions of discrimination currently employed by existing anti-discrimination laws have made the legislation ‘unnecessarily complex.’⁴ To eliminate the ‘inconsistent, complex and uncertain’⁵ definitions of direct and indirect discrimination, we recommend a single definition be used, in which discrimination be characterised as

any distinction, exclusion, preference, restriction or condition made on the basis of a protected attribute, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.⁶

Currently, the ACT is the only jurisdiction in Australia that does not employ a comparator test for direct discrimination.⁷ The problematic nature of this test is well-known and has been extensively debated, particularly in relation to attributes associated with women, such as pregnancy, breastfeeding and family responsibilities borne by mothers.⁸

2 NSW Attorney-General’s Department Anti-Discrimination Board, ‘Discrimination & the Anti-Discrimination Board of NSW,’ http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_general

3 Equal Opportunity Commission, ‘Submission of the Human Rights and Equal Opportunity Commission (HREOC) to the Senate and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Elimination Discrimination and Promoting Gender Equality,’ September 2008.

4 Attorney-General’s Department (Cth), ‘Consolidation of Commonwealth Anti-Discrimination Laws, Discussion paper,’ September 2011, p. 9.

5 Ibid.

6 Discrimination Law Experts’ Roundtable, ‘Report on recommendations for a consolidated, federal anti-discrimination law in Australia,’ November 2010, p.6. This definition is based on the International Labour Organisation Convention 111 and the Convention on the Elimination of All Forms of Discrimination Against Women.

7 S.8(1) of the Discrimination Act (ACT) defines discrimination as when a person treats or proposes to treat the other person unfavourably because the individual has a (protected) attribute.

8 See, for instance: Barbaro, M, ‘Limited protection under the Sex Discrimination Act 1984 (Cth) for women on maternity leave,’ Law Society Journal, July 2008, pp. 42 – 43.

The NSW Law Reform Commission, in its review of the Anti-Discrimination Act 1997 (NSW), recommended a ‘detriment test’ to replace the comparator test, as the latter, it argued, led to excessively onerous difficulties for complainants.⁹ The International Centre for the Legal Protection of Human Rights, Interights, notes that:

appealing to substantive standards has several advantages over other methods of establishing a case. It eliminates the need to find a similarly situated individual or group for individual or statistical comparison. This approach also helps raise human rights standards by focusing on higher standards rather than relative standards of comparison.¹⁰

Recommendation:

A unified definition of discrimination that avoids using the comparator test should be employed in the consolidated Act.

Question Three: *Should the consolidation bill include a single special measures provision covering all protected attributes? If so, what should be taken into account in defining that provision?*

All state and territory anti-discrimination laws (with the exception of the NSW Act) contain a distinctive type of exemption that allows positive measures to be taken to benefit specific groups if they have the objective of creating substantive equality.¹¹ These ‘special measures’ are positive actions designed to eliminate or diminish conditions which serve to perpetuate discrimination prohibited in the International Covenant on Civil and Political Rights (ICCPR) and other human rights treaties. Generally speaking, special measures must be ended after the objectives for which they were taken have been achieved.

⁹ NSW LRC 1999 paras 3.51 – 3.53.

¹⁰ Interights, The International Centre for the Legal protection of Human Rights, ‘Handbook for Practitioners on International Discrimination Law,’ London, 2005, p.118.

¹¹ Equal Opportunity Act 1995 (Vic), ss 19, 61, 82; Anti-Discrimination Act 1991 (Qld), ss 104, 105; Equal Opportunity Act 1984 (SA), ss 47, 85ZB(2), 85ZK; Equal Opportunity Act 1984 (WA), ss 31, 35ZD; Discrimination Act 1991 (ACT), s 27; Anti-Discrimination Act 1992 (NT), s 57; Anti-Discrimination Act 1998 (Tas), ss 25, 26.

Recommendation:

With a view to simplicity and clarity, a single special measures provision should be introduced and applied to all protected attributes. Care should be taken in this process to ensure that no existing protections are diminished, and that Australia’s international legal obligations are met.

Question Six: *Should the prohibition against harassment cover all protected attributes? If so how would this be clearly expressed?*

Federal anti-discrimination legislation prohibits harassment only on the grounds of sex and disability, however there is no apparent policy basis for these limitations. The Tasmanian Anti-Discrimination Act 1998, for instance, prohibits harassment on the grounds of gender, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities.

Recommendation:

The consolidated anti-discrimination Act should prohibit harassment on all grounds protected by the Act.

The States and Territories prohibit vilification on many grounds, including religion, sexuality, gender identity, HIV/AIDS status, and disability. Vilification on the grounds of race is unlawful at the Commonwealth level and in all States and Territories (except the NT although the Commonwealth civil prohibition applies here).

A single definition of vilification with respect to all attributes will avoid the difficulties of meeting different ‘harm thresholds’ for a complaint, and a clearly expressed defence will enable respondents to understand and comply with their obligations.

Most State and Territory jurisdictions have criminalised vilification on specific grounds if the vilification has a serious or aggravating element, while Western Australia deals with racial vilification as a separate criminal offence. Commonwealth laws currently include no criminal sanctions for vilification. Australia’s reservation to Article 4(a) of CERD stated that legislation specifically implementing the terms of Article 4(a) would be introduced ‘at the first suitable moment’.

In Victoria, the Racial and Religious Tolerance Act prohibits racial and religious vilification. The Act is in two sections. One section allows for complaints to be made in cases where people believe that others have sought to incite 'hatred against, serious contempt for, or revulsion or severe ridicule' of them on the basis of their race or religion.

The other section provides for criminal prosecution of those that 'intentionally engage' in activities that 'incite hatred' and 'threaten, or incite others to threaten, physical harm towards' people or their property on the basis of their race or religion or 'intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule' of a person on the basis of their race or religion.

Recommendation:

Vilification should be unlawful on any of the grounds protected in a new consolidated Act with a corresponding offence created in the Commonwealth Criminal Code.

4 | PROTECTED ATTRIBUTES

Under current federal anti-discrimination law, sex, race, age and disability are all protected attributes, although the level and type of protection for each of these categories varies greatly. This is a narrower set of grounds than what is proscribed by the UN treaties to which Australia is a party, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which state that Covenant rights and freedoms are to be enjoyed

without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

There are no provisions at the Commonwealth level, for instance, that render discrimination on the grounds of sexuality, gender identity or relationship status unlawful,¹² nor protection against discrimination on the basis of religion.

¹² Australian Human Rights Commission (2010), 'Protection from discrimination on the basis of sexual orientation or sex and/or gender identity in Australia', Research Paper prepared by Anna Chapman, University of Melbourne, available: http://humanrights.gov.au/human_rights/lgbti/lgbticonsult/research_paper.html, p.19

It is not sufficient to rely on state and territory legislation to provide adequate anti-discrimination protection, as the Commonwealth and its agencies (such as Centrelink) are not bound by these laws. The UN Human Rights Committee has expressed concern that:

the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law. [We recommend that the Government] adopt Federal legislation covering all grounds and areas of discrimination to provide comprehensive protection for the rights to equality and non-discrimination.¹³

In addition to the attributes already protected in existing legislation, we believe the consolidated Act should include a non-exhaustive list of protected attributes that explicitly includes: religious beliefs and practices; gender identity; sexual orientation; intersex status; homelessness; non-relevant criminal record; victims/survivors of domestic violence status; trade union membership; political beliefs and practices; and, family and carer status.

Recommendation:

Australian federal anti-discrimination law should cover all grounds and characteristics described in the international human rights treaties to which Australia is party.

In line with the above concern expressed by the Human Rights Committee, we have taken the opportunity in this submission to provide comment on several areas of potential discrimination that are not currently covered by existing legislation.

Religious beliefs and practices

The right to religious freedom is enshrined in a number of international human rights treaties. Article 18 of the UN Declaration of Human Rights states

¹³ 'Concluding Observations: Australia,' (2009), UN CCPR 59th Session, 12 CCPR/C/AUS/CO/5

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.¹⁴

We note that conversations around the consolidation project have referenced the need to protect freedom of religion and the threat posed to religious organisations in any process to enhance anti-discrimination legislation. We do not believe that there is currently sufficient protection for freedom of religion, or against discrimination based on religious belief or activity in Australia. In accordance with the right articulated in ICCPR 25, all persons should have the right to participate fully in public life and policy debates in Australia. In the absence of a federal Human Rights Act, we anticipate that public and parliamentary discussion about legislation which may infringe freedom of religion, conscience and belief will occur through the proposed Parliamentary Joint Committee on Human Rights, acknowledging that these conversations will be had in the context of the need to balance rights in a secular, democratic society.

The right to freedom of religion should not be construed as solely applicable to displays of religious belief in recognised places of worship. Rather, it should be extended to both recognise and protect places and objects of religious significance, such as sacred spaces of Indigenous peoples.

Recommendations:

Religious belief and activity should be included as a protected attribute in the consolidated anti-discrimination legislation.

Care must be taken in the drafting of all legislation, including anti-discrimination law to ensure that freedom of religion is not undermined by such legislation.

Gender identity, Sexual orientation, Intersex status

In Australia, individuals are subject to persistent discrimination on the basis of their actual or perceived sexual orientation and/or gender identity. While Commonwealth legislation has offered protection against dismissal in employment on the ground of ‘sexual preference’

Commonwealth recognition remains limited, with the Commonwealth lagging a long way behind state and territory parliaments in recognising the rights of LGBTI people. In particular, Commonwealth marriage law discriminates against same sex relationships, Commonwealth industrial law fails to prohibit discrimination on the ground of gender identity, and Commonwealth anti-discrimination law is virtually non-existent.¹⁵

Protection at the Commonwealth level would provide much-needed consistency with state and territory legislation. In accordance with Australia’s obligations under the International Covenant on Civil and Political Rights, and as an adherent to the UN General Assembly Statement of Human Rights, Sexual Orientation and Gender Identity, we support the inclusion of sexual orientation and gender identity amongst the protected attributes to be included in the consolidated Act. To ensure that a suitably broad protection is offered, we support the widening of the current binaries used in Australian legislation, and the specific inclusion of intersex status as a protected attribute.

Recommendations:

Sexual orientation should be included as a protected attribute in the consolidated anti-discrimination legislation.

Gender identity should be included as a protected attribute in the consolidated anti-discrimination legislation.

Intersex status should be included as a protected attribute in the consolidated anti-discrimination legislation.

¹⁵ Chapman, A. (2010). ‘Protection from discrimination on the basis of sexual orientation or sex and/or gender identity in Australia,’ Australian Human Rights Commission, p. 17.

¹⁴ <http://www.un.org/en/documents/udhr/>

Homelessness

In 2007, the UN Special Rapporteur on the Right to Adequate Housing recommended that Australian governments take positive steps, including changing legislation, to address discrimination on the basis of inadequate housing and other forms of social status.¹⁶

People who are experiencing homelessness are not only discriminated against in their attempts to secure access to accommodation, but also in their interactions with social security and the electoral systems and in accessing healthcare, education and employment opportunities. Furthermore, the criminalisation of certain activities in public spaces also has significant implications for people experiencing homelessness.

The Committee on Economic, Social and Cultural Rights has commented that:

Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping which can lead to the refusal of or unequal access to the same quality of education and health care as others, as well as the denial of or unequal access to public places.¹⁷

Both the ICCPR and ICESCR state that the rights contained in each Covenant are to be enjoyed 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.'¹⁸ International jurisprudence has found that 'other status' refers to a definable group of people connected by their common

status.¹⁹ Attributes are 'commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation'.²⁰ A number of other countries have recognised 'homelessness' as a 'social status', 'housing status' or 'employment status' within the prohibition on discrimination.²¹ However, Australia's current anti-discrimination laws do not prohibit discrimination against homeless people on any of these grounds.

Recommendation:

Homelessness should be included as a protected attribute in the consolidated anti-discrimination legislation.

Rights of Indigenous Australians

Australian law governing special measures currently falls short of the Committee on the Elimination of Racial Discrimination's (CERD) requirements contained in its General Recommendation 32, including that affected communities participate in the design and implementation of the proposed special measures.²² The use of income management, first in certain Aboriginal communities under the Northern Territory Emergency Response, and now implemented more widely throughout the Northern Territory has been criticised for violating of the rights of Indigenous Australians, including contravening the CERD Committee's requirements for participation and consultation (similarly enshrined in the UN Declaration on the Rights of Indigenous Peoples).

Recommendation:

The Australian Government should ensure that special measures in Australian law are in accordance with CERD General Recommendation 32.

¹⁶ Special Rapporteur on the Right to Adequate Housing (2007) *Report of the Special Rapporteur on the Right to Adequate Housing as a Component of the Right to an Adequate Standard of Living: Mission to Australia*, UN Doc A/HRC/4/18/Add.2, Recommendation 130

¹⁷ Committee on Economic, Social and Cultural Rights, General Comment 20 on Non-Discrimination, 10 June 2009, [35].

¹⁸ Emphasis added.

¹⁹ See, generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights; Cases, Commentary and Materials* (2nd ed, 2004) at 689, which discusses UN Human Rights Committee decisions suggesting that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'.

²⁰ Committee on Economic, Social and Cultural Rights, *General Comment 20 on Non-Discrimination*, 10 June 2009, [27].

²¹ Australian Human Rights Commission (2008), 'Homelessness is a Human Rights Issue', available: http://humanrights.gov.au/human_rights/housing/homelessness_2008.html

²² Paragraph 18 of General Recommendation 32.

Non-relevant criminal record

While we acknowledge that certain aspects of an individual's criminal record are indeed relevant in particular contexts, when criminal record information is misused, it leads to a range of serious problems, including barriers to employment, accommodation, health care and other essential goods and services.²³ The European Court of Human Rights has interpreted non-discrimination on the grounds of 'other status' in international human rights accords to include non-discrimination on the basis of criminal record.²⁴ Australia has ratified the International Labour Organisation Convention 111 (the Discrimination (Employment and Occupation) Convention 1958) which imposes an obligation on our governments to pursue policies that ensure discrimination on the ground of criminal record is eliminated.²⁵ At the federal level, the Australian Human Rights Commission Act (Cth) provides for a pathway for complaints to the Australian Human Rights Commission. However, there are no enforceable remedies if the AHRC establishes discrimination on the basis of irrelevant criminal record.²⁶

Recommendation:

The disclosure of criminal record information should be limited to offences relevant to the specific employment position. Irrelevant criminal record should be included as a characteristic for protection in the consolidated anti-discrimination legislation.

Victim/survivor of domestic violence

While domestic violence against women rarely takes place in the workplace itself, there are important and serious consequences on workplaces and their employees, a fact endorsed by Elizabeth Broderick of the AHRC²⁷

Almost one in three women who experience domestic and family violence are in the workforce, so there is no question that the issue of violence affects many of our workplaces... Violence has serious implications for individual women's short and long term financial security. Domestic and family violence can disrupt women's work and can cause women to incur a range of additional costs and debts... We must develop better workplace responses to domestic and family violence to ensure that women can stay attached to the workforce.

Currently, there is no legislative framework that deals specifically with discrimination in the form of unfair or less favourable treatment of those who are victims of domestic violence, and existing workplace laws 'fail to provide effective or specific redress for victims/survivors of domestic violence who are treated adversely on the basis of this violence'.²⁸ There is a compelling need for specific clauses in the consolidated legislation to capture the range of issues facing victims of domestic abuse, particularly when we consider that claims utilising existing provisions that are designed to cover areas of life such as family responsibilities, are generally weak. This is clearly articulated by the AHRC when they noted

23 Pilch / Vacro, Joint Submission to the Standing Committee of the Attorneys-General Draft Model Spent Convictions Bill, January 2009.

24 See *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97.

25 ILO 111 was ratified by Australia in 1973 and incorporated into domestic law by virtue of the Human Rights and Equal Opportunity Commission Act 1986 (Cth). In addition to specifying certain grounds of non-discrimination, including race, colour, sex, religion, political opinion, nationality and social origin, the ILO 111 allows for States parties to add further grounds of non-discrimination. In 1989, Australia added a number of further grounds, including criminal record: Human Rights and Equal Opportunity Commission Regulations 1989 (Cth).

26 S. 31 Australian Human Rights Commission Act 1986 (Cth)

27 Broderick, E. (2010), Speech to forum on domestic violence clauses in enterprise agreements, an Australian first at UNSW, 15 April 2010. Available at http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2010/20100415_violence.html

28 Heffernan, A. & Matahaere, L. (2010), 'Domestic violence discrimination in the workplace: Is statutory protection necessary?' Our Work, Our Lives Conference 2010, Queensland Working Women's Service Inc.

It may not always be possible for an employee to link adverse action or a dismissal which is in truth based on domestic violence to a ground of discrimination covered by the FWA. For example, an individual who is discriminated against because she or he requires time off work to attend court or to relocate to escape violence may be unable to make a claim under any ground covered by the FWA.²⁹

Recommendation:

Victim/survivor of domestic or family violence status should be included as a characteristic in the consolidated anti-discrimination legislation.

Political beliefs and practices / Trade union membership

The International Covenant on Civil and Political Rights establishes protection from discrimination on the grounds of political beliefs.³⁰ While the Australian Human Rights Commission may conduct an investigation if a complaint is received, there are currently no enforceable remedies in place. Additionally, employment is the only domain of public life in which the protection is offered.³¹ The Fair Work Act 2009 offers protection on the grounds of membership in a trade union organisation. For the sake of consistency and clarity, this protection should be extended to the consolidated Act.

Recommendations:

Political belief and practice should be a protected attribute in the consolidated anti-discrimination legislation.

Membership of a trade union should be a protected attribute in the consolidated anti-discrimination legislation.

Family and carer status

Article 3(1) of the ILO C156 Workers with Family Responsibilities Convention 1981, states:

With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.³²

While Australia's obligations under the ILO C156 and other international human rights treaties (such as the CEDAW) were partially met through the introduction of the Fair Work Act 2009 (Cth), the improvements are still generally regarded as modest.³³ Requests for flexible working arrangements as they currently stand under the Fair Work Act 2009 and the accompanying National Employment Standards state:

An employee who is a parent, or who has responsibility for the care of a child, may request a change in their working arrangement. This request may be made by an employee to assist them to care for the child if the child is

- a. under school age
- b. under 18 and has a disability.³⁴

As it stands, the Fair Work Act 2009 does not protect casual workers, those with less than twelve months of continuous service, or those with diverse carer's responsibilities.

The issue of protection in the workplace is one that impacts both men and women, however there is a strong gendered slant to potential discrimination that serves to stand in the way of attaining substantive gender equality:

29 Australian Human Rights Commission, Submission CFV 48, 21 April 2011.

30 Article 26.

31 Section 31, Australian Human Rights Commission Act 1986 (Cth).

32 Available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C156.htm>

33 Human Rights Law Centre (2012), 'Realising the Right to Equality,' available at http://www.hlrc.org.au/files/HRLC_Submission_Realising_the_Right_to_Equality.pdf

34 <http://www.fwa.gov.au/index.cfm?pagename=legislationfwaact>

While women bear the major responsibility for unpaid caring work, their ability to engage in the paid workforce will be artificially limited. This unequal burden will mean that paid work and family balance will continue to be a 'women's issue', resulting in women's continuing disadvantage and discrimination in the workplace.³⁵

As such, the claim that there is an element of "choice" when it comes to domestic arrangements and carer responsibilities appears overstated. Laws that seek simply to prevent discrimination have been deemed insufficient to ensure gender equality in the workplace; rather, what is required is 'a shift from laws that prohibit discrimination to laws that provide for a positive duty to prevent discrimination.'³⁶

Including family and carer status as a protected attribute in the consolidated Act would allow for a strengthening of the provisions under the Fair Work Act 2009 in accordance with Australia's obligations under international human rights statutes.

Recommendations

Family and carer status be included as a protected attribute in the consolidated anti-discrimination legislation.

The definition applied to 'family' should be broad enough to recognise and respect Indigenous concepts of kinship groups.

Question Seven: How should sexual orientation and gender be defined?

The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity offer the following definitions:

³⁵ Australian Human Rights Commission (2005), 'Striking the Balance: Women, Men, Work and Family,' p. 5.

³⁶ Report of the Director-General (2003), 'Time for Equality at Work: Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work,' International Labour Conference, 91st Session.

Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender.

Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.³⁷

In order to ensure that the consolidated legislation provides protection for a wide range of identities, we support an inclusive and broad definition of both "sexual orientation" and "gender identity", which takes into account the self-identification of an individual. As noted in the Discussion Paper, employing a conceptual definition would

encompass the broad concept of a person's sexual attraction to, and sexual activity with, people of a particular gender.³⁸

Of particular concern is the status of intersex individuals, who fall outside of the binaries that pervade current legislation. We support explicit acknowledgement of intersex status to ensure greater protection under the consolidated Act.

Recommendations:

Broad and inclusive definitions of both "gender identity" and "sexual orientation" should be adopted in the consolidated anti-discrimination legislation.

Intersex status should be explicitly acknowledged in the consolidated anti-discrimination legislation.

³⁷ Available at http://www.yogyakartaprinciples.org/principles_en.pdf, p. 6.

³⁸ Attorney-General's Department (Cth), 'Consolidation of Commonwealth Anti-Discrimination Laws, Discussion paper,' September 2011, p. 21.

Question 10: *Should the consolidated bill protect against intersectional discrimination? If so, how should this be covered?*

Intersectional, or compound, discrimination acknowledges that individuals may experience inequity based on more than one aspect of their identity, and

reveals both the structural and dynamic consequences of the intersection between two or more system of subordination.³⁹

Existing legislation fails to adequately address the complexities of intersectional discrimination:

The compartmentalised approach adopted by legislation suggests clear lines and sharp edges between discrete categories, rather than a blurred morass of proscribed and extraneous reasons which more closely approximate the reality.⁴⁰

The Human Rights Committee has noted that discrimination is

often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴¹

Importantly, we recommend that the approach taken in the Equality Act 2010 (UK)⁴² be adopted in the consolidated Act, in which a complainant does not have to establish discrimination on discrete attributes, but rather, may have his or her claim addressed in the context of their whole identity.

Recommendation:

Specific protections against intersectional discrimination should be offered by the consolidated anti-discrimination legislation.

5 | PROTECTED AREAS OF PUBLIC LIFE

Question 11: *Should the right to equality before the law be extended to sex and/or other attributes?*

The right to equality before the law is enshrined in Article 26 of the ICCPR:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴³

In spite of Australia's obligations under the ICCPR and other international human rights instruments, the Senate Inquiry into the Sex Discrimination Act 1984 noted that the right to equality before the law is not in fact protected, and recommended that this gap in Australia's human rights laws be rectified by the inclusion of a general equality before the law provision.⁴⁴

Recommendation:

A general provision requiring equality before the law across all protected attributes should be included in the consolidated anti-discrimination legislation.

39 United Nations Division for the Advancement of Women, (2000), 'Gender and Racial Discrimination, Report of the Expert Group,' NY, United Nations.

40 Thornton, M. (1990). 'The Liberal Promise: Anti-discrimination legislation in Australia,' Melbourne: Oxford University Press, p. 96

41 Human Rights Committee, (2000), 'General Comment 28, Equality of Rights between Men and Women,' UN Doc CCPR/C/21/Rev.1/Add.10, p. 30.

42 Section 14.

43 <http://www2.ohchr.org/english/law/ccpr.htm>

44 Modeled on s. 10 of the RDA, Recommendation 10.

Question 13: *How should the consolidation bill protect voluntary workers from discrimination and harassment?*

Federal anti-discrimination law does not currently extend to volunteers. Under the current system an employer is not allowed to carry out harmful discrimination against paid employees, while at the same time being permitted to carry out any form of discrimination against their volunteers. It would seem simpler to apply the one standard to all those that contribute to the work of the organisation, as well as generating a more positive culture towards the use of volunteers in the community.

Under the Queensland Anti-Discrimination Act 1991, volunteers have the same protection against discrimination and harassment as paid employees,⁴⁵ which we believe is a suitable model for the consolidated Act.

The Uniting Church, across the life of its councils, congregations and agencies relies enormously on the contribution of volunteers. It is estimated that across the UnitingCare network alone, 24,000 volunteers are supporting the provision of community services. We well understand, therefore, that widening the coverage of anti-discrimination legislation to volunteers could add a significant regulatory burden on organisations. Recently, the UK Court of Appeal ruled that volunteers without contracts are not covered by anti-discrimination legislation for workers. A case was brought by a woman who claimed disability discrimination after she was asked to stop volunteering for the Mid Sussex Citizens Advice Bureau. In the words of the barrister who represented the Citizens Advice Bureau,

because much of the sector is reliant on volunteers, and cannot shoulder the financial burden that enhanced rights for volunteers such as X would bring... The need to make adjustments for the disabled, and the cost of litigation, successful or otherwise, that would be generated from the extension of anti-discrimination rights, would be too great a financial burden for many of them to bear.⁴⁶

This issue could be addressed with the provision of an exemption to be applied where an organisation would suffer unreasonable hardship were it to comply with the anti-discrimination protections. In addition, providing not-for-profit organisations with assistance to understand and implement their obligations under the consolidated legislation may lessen the burden. The Uniting Church is committed to continually improving our own workplace practices to ensure that all people, employees and volunteers, are treated with dignity and respect.

Recommendation:

Volunteers should be given the same protection as paid employees under a consolidated Act, with consideration given in the form of an exemption based on the notion of ‘unreasonable hardship’ for community organisations that would be financially disadvantaged by this change.

6 | EXCEPTIONS AND EXEMPTIONS

As a religious organisation, we believe it is appropriate, when providing comments on this section of the Discussion Paper, to veer from a strict adherence to the listed questions. Rather, we provide the following comments to ensure that we are able to fully articulate the Church’s position on the issue of religious exemptions, and provide adequate justification for our beliefs on this matter.

⁴⁵ Queensland Government, ‘Volunteering: Managing legal obligations,’ available at <http://www.communityservices.gov.au/volunteering/managers/tips-and-tools/managing-legal-obligations.html#discrimination>

⁴⁶ Third Sector Online (UK), ‘Volunteers not covered by anti-discrimination law, says Court of Appeal,’ <http://www.thirdsector.co.uk/news/Article/1051812/Volunteers-not-covered-anti-discrimination-law-says-Court-Appeal/>

Exemptions for religious organisations

Christians and Christian churches have, all too often, been responsible for colluding in and perpetrating violence and oppression. Church history is tragically scarred by prejudice and fear. However, there have always been Christians committed to ending violence, prejudice, discrimination and poverty. The World Council of Churches, of which the Uniting Church in Australia is a member, has a strong and proud history of advocacy on human rights issues, and churches internationally were involved in the establishment of the United Nations and the adoption of the Universal Declaration of Human Rights.

While we believe that the right to freedom of religion is of vital importance, and its recognition necessary, we do not believe that this is an absolute right. We acknowledge, then, that the exercise of religious freedom is subject to the regulatory norms that govern Australian society. Importantly, we support the ICCPR statement that discussions in this area must consider whether an exemption is 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.⁴⁷

We also believe, as recognised by the President of the Australian Human Rights Commission, that there is, in anti-discrimination legislation, 'the need for some level of exemption, to allow faith-based organisations to maintain their integrity according to the tenets of the relevant communities' faiths'.⁴⁸

Ordination

We believe that religious organisations require an exemption in relation to the ordination or appointment of their religious leaders. The act of ordination is core to the integrity of a religious community and we believe it is appropriate that religious organisations are given the freedom to appoint their leaders in keeping with their religious traditions and beliefs.

⁴⁷ Article 18(3).

⁴⁸ The Honourable Catherine Branson QC, President of the Australian Human Rights Commission, (2010), 'Religion in the Public Square,' speech delivered at the 'Religion in the Public Square Colloquium,' available at http://www.hreoc.gov.au/about/media/speeches/speeches_president/2010/20100723_religion.html

We suggest that the wording used in section 37 parts (a), (b) and (c) of the Sex Discrimination Act be used in the consolidated legislation, so as to state that nothing in the Act affects:

- the ordination or appointment of priests, minister of religion or members of any religious order;
- the training or education of persons seeking ordination or appointment as priests, minister of religion or members of a religious order;
- the selection or appointment of persons to perform duties or functions for the purpose of or in connection with, or otherwise participate in, any religious observance or practice.

Recommendation:

The consolidated Act should contain the exemptions currently in the Sex Discrimination Act Section 37 parts (a), (b) and (c).

Employment and other activities

We have concerns with s.37(d) of the SDA, and feel that it gives too wide an exemption to the activities of religious organisations. We do not believe that it is necessary, in light of the need to balance the rights of the greater community with the freedoms to be afforded to religious organisations, to grant an exemption to cover

Any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

When religious bodies are given a blanket exemption, there is no incentive for that body to ensure that it does not discriminate, and no incentive to promote equality in areas of employment and representation other than those leadership positions necessary to maintain the integrity of the religious organisation.

Sections of legislation granting exemptions to religious organisations which reference concepts such as “doctrine”, “tenets of the faith” and “injury to religious sensitivities” are, in many cases, unhelpful. This language is contested even within religious communities themselves, and so to require participants in court proceedings to present and decide on a definitive definition of any of these terms is problematic.

In its submission to the Australian Human Rights Commission’s Freedom of Religion and Belief in the 21st Century project, the Uniting Church National Assembly stated our support for

federal legislation prohibiting religious discrimination, including a specific provision which allowed for discrimination on the basis of religion by faith communities in the area of employment in leadership and teaching positions, where it is reasonably necessary for maintaining the integrity of the religious organisation.⁴⁹

In 2010, the Uniting Church Synod of Victoria and Tasmania passed a resolution on religious exceptions in the Victorian Equal Opportunity Act, which states

The Synod resolved (resolution 10.7.10.2.6):

(i) To support the UN Convention on the Elimination of all Forms of Racial Discrimination in its assertion that “any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous” and therefore to oppose all forms of harmful racial discrimination and all laws that legalise harmful racial discrimination, even when such discrimination is religiously motivated;

(ii) To recognise that all people are created in the image of God and therefore to oppose all forms of harmful discrimination against people with disabilities, even when religiously motivated, except

where not discriminating would place unreasonable costs on a body to accommodate such persons and, in the area of employment, where a person with a disability is unable to fulfill the genuine inherent requirements of the role;

(iii) While noting that the current polity of the Uniting Church would not allow discrimination in ordination in any of the areas below, to oppose harmful discrimination and laws that accommodate harmful discrimination in education, clubs and club membership, sport, provision of goods and services, local government, accommodation, employment and employment-related areas, excluding ordination, on the grounds of:

- (a) age
- (b) breastfeeding
- (c) industrial activity
- (d) status as a carer
- (e) physical features
- (f) political belief or activity
- (g) parental status
- (h) pregnancy
- (i) gender identity
- (j) marital status
- (k) sex
- (l) sexual orientation

even where such discrimination is religiously motivated. The only exception to this opposition to discrimination on the above grounds is in the area of employment where, as a result of one of the above characteristics, the person is unable to fulfill the inherent requirements of the role.

Recommendation:

The consolidated Act should contain an exemption in relation to employment, where discrimination is necessary in cases where applicants are unable to fulfill the inherent requirements of the role.

⁴⁹ Uniting Church in Australia National Assembly, (2009), ‘Submission to the Australian Human Rights Commission Freedom of Religion and Belief in the 21st Century Project,’ available at http://www.unitingjustice.org.au/images/pdfs/issues/human-rights/submissions/uca_freedomofreligion_ahrc_submission0309.pdf

We do not believe that religious organisations should be granted an exemption for their activities in the provision of services, including education and accommodation services. As such, we do not believe that exemptions such as those granted in Section 38 (c) of the Sex Discrimination Act should be included in a consolidated Act.

We oppose all harmful racial discrimination in any circumstances (regardless of an exemption).