Queensland Human Rights Commission

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Review of the Anti-Discrimination Act

We thank you for the opportunity to make a contribution to this most important review.

Opening remarks

We start by expressing a disappointment with the discussion paper that first we acknowledge it shares with all the reports or discussion papers created for reviews of anti-discrimination laws that we have read.

There is a fundamental lacuna in the discussion in that it asks whether attributes ought to be removed or added. However nowhere does it grapple with the issue as to what are the criteria by which we should decide to include an attribute in this type of legislation.

It is respectfully submitted that unless you grapple with that question the results are likely to be entirely arbitrary.

One area of inequality is that of social status. Anti-discrimination law is directed at addressing inequalities of social status. It seeks to deal with the fact that some people in our society are denied "goods on the basis of the widely held view that certain facts about them, such as race, gender, or religion make them less entitled to those goods than others are. The fact people are subject to a widely held view of inferiority of this kind- of being less entitled to important goods and opportunities, and less suitable for valued forms of personal relationship-is a distinctive feature of discrimination[1]" A society committed to equality, would have a regime of equality that protects its members adequately against reasonable and undeserved feelings of loss of self-esteem through stigmatization and the like[2].

But most, if not all of us, suffer some degree of stigma in our lives. How do we identify the circumstances in which a feeling of stigma is unreasonable and undeserved?

One way of working out what the commitment to distributive equality entails is asking whether the person is suffering from a disadvantage for which they are not responsible[3] . If they are that establishes a prima facie claim to a remedy. As this is a claim for social justice, one of the things that means the person is not responsible is the fact that the source of the disadvantage is some social institution which of course includes institutions with rules, practices etc that are based on some widely held view that those persons are inferior by reason of some fact or belief about them.[4]

Take the case of shortsightedness, for instance. Is society obliged to provide every person who suffers from short sightedness with glasses? It is far from obvious that having marginally poorer eyesight than others in society obliges society to provide glasses when they are not so prohibitively expensive to be out of reach for persons with ordinary means[5].

But there is another, political point to be made. An ever-expanding list of attributes exposes the whole system to claims by ill-intentioned opponents of the movement to equality, whose numbers appear to be increasing. This is not to say that any of those groups listed in the discussion paper for possible

[1] TM Scanlon *Why Does Inequality Matter?* Oxford University Press 2018 page 26 and chpt 3 generally
[2] TM Scanlon *The Diversity of Objections to Inequality* Lindley Lecture University of Kansas 22 February 1996.
[3] This is to be distinguished from the choice/luck dichotomy. It is inappropriate to blame people, or to judge them responsible, for things that are beyond their control so that they have no relevant agency.
[4] Of course, even those responsible for their plight are at least entitled to entitled to assistance from the rest of society. People should not be left to perish just because of their imprudence.
[5] Of course, people who are not working would fall into a different category.

inclusion in the Act do not have meritorious cases. And it is easy to say that we should not allow the views of the ill-intentioned to divert us from our course of action if that is right. But it would be a tragedy for example should some marginally disadvantaged white group end up in the same category as that of indigenous people[6].

The balance of the submission will address, time permitting, the specific questions raised in the Discussion Paper

DISCUSSION PAPER: QUESTIONS AND ANSWERS

KEY CONCEPTS

Meaning of discrimination

- Should the Act clarify that direct and indirect discrimination are not mutually exclusive?

  Yes

Direct discrimination

- Should the test for direct discrimination remain unchanged, or should the 'unfavourable treatment' approach be adopted?

- Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?

  We agree that the requirement to identify a comparator places a limitation on the capacity of the legislation to attack disadvantage. We support the adoption of the approach in Victoria and the Australian Territory to substitute the concept of "unfavourable treatment".

Indirect discrimination

- Should the test for indirect discrimination remain unchanged, or should the 'disadvantage' approach be adopted?

- Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?

- Do you support a unified test for both direct and indirect discrimination? Why or why not?

  The most compelling definition of indirect discrimination comes from the American disparate impact approach which in a general way says that any practise or policy or rule which does not expressly discriminate against any protected class of people but which has a disparate impact on the protected class of people is unlawful if no objective justification for it can be shown to exist.

  Such a simple definition would create a very powerful tool for attacking discrimination[7].

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[6] For a completely different approach to this issue that would do away with attributes altogether see Iyiola Solanke *Infusing the Silos in the Equality Act 2010 with Synergy* Industrial Law Journal, Vol. 40, No. 4, December 2011 336

[7] But such a broad approach would bring us back to the issue raised at the start of this submission: what groups of people should be included in the protected classes?

Special services or facilities

- Should an exemption of unjustifiable hardship relating to the supply of special services or facilities be retained? If so, in which areas?
- Should the factors relevant to determining unjustifiable hardship be redefined, and if so how?
- How can the compliance costs for business and organisations be appropriately considered and weighed?

Reframing to a positive obligation

- Should the Act adopt a positive duty to make 'reasonable adjustments' or 'reasonable accommodations'?
- If you consider that this approach should be adopted:
- Should this be a standalone duty?
- What factors should be considered when assessing 'reasonableness' of accommodations?
- Should it apply to disability discrimination, other specific attributes, or all attributes?
- Should it apply to specific areas of activity or all areas? For example, should it apply to goods and services, work, education, and accommodation?
- How would any amendments interact with exemptions involving unjustifiable hardship? Would there be a need to retain the concept of unjustifiable hardship at all

  We support the imposition of a duty to make reasonable adjustments in all the areas covered by the legislation in relation to impairment/ disability. This duty will redress the power imbalance between employers or service providers and people with disability/impairment. People with disability are often excluded from society due to failure off other people to include them or make reasonable efforts to do so.

  In setting the extent of the duty we would adopt the Victorian model. But we would add that in framing the duty it should be necessary to consider the limited resources of small to medium sized businesses. If this is not considered, the risk is that those businesses will simply take steps to avoid being put into a position where they have to comply with the duty.

  This change and the imposition of a positive duty in certain areas, as argued for below, does not remove the need for the concept of reasonable adjustment.

Discrimination on combined grounds

- Is there a need to protect people from discrimination because of the effect of a combination of attributes?
- If so, how should this be framed in the Act?
- Should other legislative amendments be considered to better protect people who experience discrimination on the basis of combined grounds?

- What are some examples of where the current law does not adequately protect people from discrimination on combined grounds?

  Since it cannot be denied that people are discriminated against for more than one reason, the law should permit people to allege that they have been discriminated against for more than one reason. In our submission the simplest way to achieve that is to amend the law as it was done in the ACT.

Burden of proof

- Should the onus of proof shift at any point in the process?
- If yes, what is the appropriate approach?

  In 2013, the Executive of the Council approved the following statement of policy:

  > It is however recognised by the Council that there are certain positive right or liberties that are necessary for people to be able to lead a full life and in particular to exercise the negative liberties. Some of those rights are set forth in the Universal Declaration of Human Rights, including the right to adequate welfare, a proper health system, to join a trade union, and to education. The Council supports those rights as enumerated in the Universal Declaration of Human Rights whilst noting there may be others. However, sometimes it is argued that in order to achieve those positive rights restrictions on the negative liberties are required. The arguments for those restrictions are to be assessed on the same basis as set out above recognising that the need to ensure the people have the capacity to enjoy the negative liberties is an important factor to be weighed in assessing whether the proposed a law is reasonable, necessary, justified, and proportionate.

  One of the areas in which this conflict often arises is where it is argued that procedural safeguards contained in the law ought to be modified or dispensed with to advance some other interest.

  This is at its most acute in the area of the criminal law where there are series of rules described as the principled asymmetry of the criminal law, which is designed to offset the power and resource imbalance between the accused and the State. One of those items is that the burden of proof always lies on the Crown to prove its case.

  We accept that this principle is of less importance in the context of civil cases. But it is still an important point, particularly in the context of claims being made against small businesses with limited resources.

  The fact that the employer is in exclusive possession of certain facts relevant to an allegation being made against it is referred to in the discussion paper as an important reason for altering the rules on the burden of proof. Two points can be made about that. Firstly, it is not an unusual situation where one party has control of information necessary to prove the case that the other party does not. This is why of course in civil proceedings there is disclosure. In addition, in an ordinary civil case the Courts already recognise that a persuasive burden lies on a party to explain the situation when they are the only party capable of providing an alternative explanation[8]

[8] Although it is a criminal case, the decision of the High Court in *Weissensteiner v R* (1993) 117 ALR 545 goes into some detail about the operation of this principle both in the civil and the criminal context.

Secondly, we would submit that most people in our society would agree with the proposition that he or she who makes an accusation ought to prove the accusation.

For these reasons, we would not support an alteration of the burden of proof. However, if an alteration is to be made, we would support the American rule as described in the discussion paper, namely the complainant must establish a prima facie case, then the respondent must provide evidence which could support a finding that there was a legitimate and non-discriminatory reason for their actions, and then the onus shifts back to the complainant to show that the respondent's reason is a pretext for discrimination.

Finally, we would strenuously oppose any suggestion that the law be altered to allow for any departure from the principles laid down in the decision of the High Court in *Briginshaw v Briginshaw*

Meaning of sexual harassment

- Should the additional words 'in the presence of a person' be added to the legal meaning of sexual harassment in the Act? What are the implications of this outside of a work setting?

- Should a further contravention of sex-based harassment be introduced? If so, should that be applied to all areas of activity under the Act?

- Should the Act explicitly prohibit creating an intimidating, hostile, humiliating or offensive environment on the basis of sex? If so, should that apply to all areas of activity under the Act?

We do not support any changes to the law relating to sexual harassment for two reasons:

1. As noted in the discussion paper uniquely to Queensland sexual harassment is prohibited generally. The prohibition is not restricted to places of employment.

2. We have supported the introduction of a positive duty to prevent discrimination in the employment context, which will address the other issues raised in the discussion paper as needing a change to the law relating to sexual harassment.

Two-stage enforcement model

- Should the Act include a direct right of access to the tribunals?

- Should a complaint or respondent be entitled to lodge their complaint directly with a tribunal?

- Should a person be entitled to apply directly to the Supreme Court where circumstances raise matters of significant public interest matters? If so:

- Should it be confined to certain matters?

- What remedies should be available to the complainant?

- Who would have standing to bring the complaint?

- What are the risks and benefits of any direct rights of access?

- What circumstances could these amendments apply to? Please provide examples that may justify this approach.

- How could the process be structured to ensure that tribunals and the Supreme Court are not overwhelmed with vexatious or misconceived claims?

  When the *Anti-Discrimination Act* was first introduced there was very little pre-action compulsory settlement procedures. Since then, of course those requirements have been introduced in relation to personal injuries matters. And though they do not require formal settlement conferences, requirements to attempt to resolve a dispute prior to commencing proceedings are now found in the *Defamation Act* and in the *Civil Dispute Resolution Act* 2011. However, we note that the QCAT requires settlement conferences to be held before a matter proceeds to hearing. Accordingly, we support the right of the complainant to lodge their complaint directly with the QCAT, so long as the complainant continues to have the option to make use of the Commissions dispute resolution procedures. We say this because it seems to us that many complainants would prefer to use the less formal, hopefully faster and more private processes of the Commission. Again, we note the requirement for the government to fund an independent community legal service to provide advice to complainants and respondents. Furthermore, given the existing delays in the QCAT, far more resources will have to be devoted to that Tribunal if this procedure is to work effectively**.**

  It is not clear to us what benefit would be served by allowing for a direct application to the Supreme Court. We would have thought that a Court, as is traditionally the case, will be reluctant to deal with the matter in the absence of findings of fact. If a party has a straightforward point of law that needs determination than there should be adequate mechanisms for achieving that result under the existing *Uniform Civil Procedure Rules*

Terminology

- Should the 'complaint-based' terminology be changed?
- If so, what should it be replaced with?

  We see no reason to change this terminology

Written complaints

- Should non-written requests for complaints be permitted, for example by video or audio?

  We have no objection to complaints being in a video or audio form. Form does not matter, the question is whether or not the complaint was sufficiently detailed to meet the obligation to accord the respondent procedural fairness.

- Alternatively, should the Commission be allowed to provide reasonable help to those who require assistance to put their complaint in writing?

  In the writer's experience, many individuals facing complaints to the Commission are already of the view that the Commission has a conflict of interest in that in the perception of those individuals the Commission received the complaint, dealt with the complainant and then purports to conciliate the dispute. We are not suggesting any impropriety on the part of the Commission, but this is the perception in the minds of respondents. Therefore, it is our view, that the Commission should not be further involving itself in the complaints making process by actively assisting complainants to put together their complaint. If such assistance is needed, government ought to fund a community legal service or similar body to whom the Commission can refer complainants for assistance in this regard.

- How would this impact on respondents?

  See above

- How can the right balance be achieved between ensuring certainty for the respondent about the contents of the complaint while addressing the barriers to access?

  See above

Efficiency and flexibility

- How can the law be adapted to allow a more flexible approach to resolving complaints?
- Should the current provisions that require set notification and conference timeframes be retained, changed or repealed?
- Should all complaints proceed through the same conciliation model, or should early intervention be an option?
- What legislative or non-legislative measures should be in place to ensure procedural fairness, timeliness, and efficiency?

  The discussion paper refers to the current inflexibility of the procedures provided for under the Queensland Act for dispute resolution. Obviously, the Commission should not be placed in a straitjacket. We are happy of course that the Commission should be given more flexibility in how it deals with disputes including being able to use both conciliation and early intervention, as the latter term is described in the discussion paper. In that regard, it seems to us that division 1 of part 8 of the Victorian *Equal Opportunity Act* provides a series of model provisions that should be adopted into the Queensland Act.

  However, people dealing with the Commission are entitled to some level of certainty about how their complaints will be dealt with. We note that section 111 of the Victorian Act provides for their Commission to have as one of its functions, "to establish policies and issue procedures and directions on the manner in which dispute resolution" is to be conducted. When we visited the Commission's website during the preparation of this submission, we didn't see any documents which contained "procedures and directions". In our submission, the requirement for the Commission to issue policies procedures and directions and publish them should be made mandatory.

  We also repeat our long-standing position of objecting to provisions that restrict the right of people to have legal representation. For that reason, our starting position is that everyone involved in the complaint process under the Act should be entitled to legal representation. If that position is rejected, then the claimant should have a right to legal representation and the respondent should be able to seek leave from the Commission to be legally represented.

Time limits

- Is 1 year the appropriate timeframe within which to lodge a complaint? Should it be increased and if so, by how long?

  All systems of law recognise that there should be time limits placed on the capacity of one person to bring a claim against another. There are many good reasons for those time limits including the fact that the quality of evidence diminishes over time and people are entitled to get on with their lives with some degree of certainty. The exact period of any time limit on the bringing of a claim is always to some extent going to be arbitrary. As the discussion paper notes the one-year time limit is quite common in discrimination legislation in this country. Our view would be the current time limit should be retained given the need to have some degree of uniformity across the country. The Commission should retain its broad discretion to extend the time. A complainant upset with the refusal of the Commission to extend the time limitation should have a right of review before the QCAT. However, in

order to encourage settlement, the respondent should be required to elect between challenging an extension of time in the QCAT prior to conciliation or waiting until after conciliation. The test for an extension of time should be the same when the decision is made by the Commission as when it is made by the Tribunal.

- Should there be special provisions that apply to children or people with impaired decision-making capacity?

  The law should recognise, as the *Limitations of Actions Act* does that the limitation period does not run for minors and those who lack capacity.

- Should out of time complaints that have been accepted at the Commission as showing 'good cause' be subjected to the further requirement of proving 'on the balance of fairness between the parties, it would be reasonable to do so' before being dealt with by the tribunal?

  It is our view, that the test for extending the time should require that the Commission or the Tribunal be satisfied that there is both "good cause" and that, "on the balance of fairness between the parties, it would be reasonable to do so." We do so on the basis that there are two sets of interests at stake in considering any extension of the limitation period. Firstly, the rights of the complainant but equally the rights of the respondent to have a fair trial. The reasons for this are expressed very clearly in the oft quoted comments of Justice McHugh in the High Court in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at pages 551 and 555.

- Should the tribunal review the Commission's decisions to decline complaints instead of the Supreme Court?

  As noted above, it is our view that the review of decisions by the Commission relating to timing issues should take place in the QCAT.

Representative complaints

- Are there any changes that would improve the accessibility and utility of representative complaints?

  We agree with the comments in the discussion paper that representative proceedings would be useful in the context of discrimination law. We would suggest that the first thing to be done is to alter the criteria for a representative action to the criteria contained in section 103B of the *Civil Proceedings Act*. Adopting those criteria, we would submit will substantially broaden the circumstances in which such an action could be brought without resulting in unwieldy or ineffectual proceedings.

- What factors influence the capacity for affected people to assert their rights as a representative complaint?

  See the answer to the previous question.

Organisation complaints

- Should a representative body or a trade union be able to make a complaint on behalf of an affected person about discrimination? Why or why not?

  It is our view, that it would facilitate the use of the legislation if organisations, including trade unions, could make representative complaints. We note the comment in the discussion paper that it is argued against this position that the organisations may advocate for positions that are not in the best interests of individuals within the group of persons

they purport to represent. We would accept that this is a possibility but as the discussion paper posits, this issue can be overcome by making it a requirement for the organisation to represent a group, that the individual consents to the representation. On that basis, we would submit that the requirements of the Victorian legislation for representative bodies to make applications should be reflected in Queensland law.

- Should representative complaints be confined to the conciliation process, or should they be able to proceed to the tribunal?

  If the benefit of having representative bodies involved in the antidiscrimination process is to be fully realised, they must be allowed to attend not only the conciliation process but to appear in proceedings before the tribunal. We can see no issue with this because the requirements in the Victorian legislation will ensure that the body has a legitimate interest in the complaint and that the individuals, they represent both have made a complaint and consent to being represented by the body.

Complaints by prisoners

- Should the additional requirements for prisoners to make complaints be retained, amended, or repealed?

- Do the current provisions strike the right balance in ensuring access to justice while encouraging early resolution?

- Should any internal complaint requirements for prisoners be retained, and if so, how can they be simplified to overcome practical concerns?

  We opposed the measures introduced in 2007 which restricted the access of prisoners to the processes under the Act. We maintain our position and are of the view they all ought to be repealed. It is our position that the Commission has more than adequate power in section 168 to deal with frivolous or vexatious et cetera complaints.

Other dispute resolution issues

- Are there any aspects of the complaint (dispute resolution) process that should be considered by the Review?

- If so, what are the issues and your suggestions for reform?

  We have no further comments on the issue of dispute resolution processes

ELIMINATING DISCRIMINATION

Objectives of the Act

- What should be the overarching purposes of the Anti-Discrimination Act?

- Should an objects clause be introduced?

- If so, what are the key aspects that it should contain?

- If the purposes of the Act change, should the name of the legislation change to ensure it reflects those purposes?

  We support an objectives clause including all the items on page 68 of the discussion paper, though we query whether item 5 needs to be identified separately from the others. But this is a small quibble.

We see no reason to change the name of the Act. As noted above anti-discrimination deals with one aspect of inequality. To rename it the Equality of Opportunity Act would be to misname it.

Positive duties

- Do you support the introduction of a positive duty in the Anti-Discrimination Act?
- Should a positive duty cover all forms of prohibited conduct including discrimination, sexual harassment, and victimisation? Why, or why not?
- Should a positive duty apply to all areas of activity in which the Act operates, or be confined to certain areas of activity, such as employment?
- Should a positive duty apply to all entities that currently hold obligations under the Anti-Discrimination Act?
- What is the extent of the potential overlap between WHS laws and a positive duty in the Anti-Discrimination Act? If a positive duty is introduced, what considerations would apply to the interface between existing WHS laws and the Anti-Discrimination Act?
- What matters should be considered in determining whether a measure is reasonable and proportionate?

We agree that a positive duty to eliminate discrimination, as distinct from the requirement to make reasonable adjustments, ought to be imposed because the individual complaint process is inadequate to deal with systemic discrimination. A positive duty will put the focus on institutional issues which result in systemic discrimination.

However, you can only impose a duty on a person who has the necessary power and resources to comply with that duty. In our submission the only two areas of application currently listed in the Act which might have the power and resources are those in the areas of employment and education[9].

Furthermore, the law needs to recognise the difference in the capacity of employers and institutions of different size to be able to comply with the obligations. To that end, we support the approach taken in Victoria to defining the duty:

1. A person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible.

2. In determining whether a measure is reasonable and proportionate the following factors must be considered—

A the size of the person's business or operations;

B the nature and circumstances of the person's business or operations;

C the person's resources;

D the person's business and operational priorities;

[9] As we see it, the duty to make a reasonable adjustment is distinguishable because the category of disabled persons is a reasonably identifiable and much smaller than the society wide duty under discussion here

E the practicability and the cost of the measures.

In order to protect the important right or freedom of speech, a further criterion should be added namely, the right to freedom of expression found in section 27 of the Human Rights Act.

Regulatory approach and the role of the Commission

- Should the statutory framework be changed to incorporate a role in regulating compliance with the Anti-Discrimination Act and eliminating discrimination?

- If so, do you consider that the Commission should undertake this regulatory role, or is there a more appropriate entity? What are the strengths and limitations of the Commission undertaking a regulatory role?

- What should be the core components of the regulatory model, and what mechanisms and powers should it include?

- What key features should a regulatory approach adopt to ensure it achieves the right balance between supporting organisations to comply with the Act and ensuring organisations, particularly small and medium-sized entities, are not unnecessarily burdened with regulation?

- If you recommend an expansion of the Commission's functions and powers, what is the justification for this expansion

  The only point that we wish to make on this topic is that the Commission should be given the power to initiate its own investigations. In its discussion paper the Western Australian Law Reform Commission[10] points to concerns that the positive duty in Victoria has not been as useful as it might have been in attacking systemic discrimination because the only enforcement mechanism is own motion investigations by the Commission and there is no right for an individual to make a complaint. It seems to us that breaches of the positive duty are best investigated by the Commission, but that individuals should be able to make a complaint to the Commission which can form the basis of an investigation by the Commission

Role of the tribunals

- Should there be a specialist list for the tribunals?

  In the writer's view, the case for specialist Courts or tribunals is grossly overstated. In fact, the creation of specialist Courts or tribunals results in the presiding officers developing tunnel vision and, in some cases, a jaundiced or cynical view of the matters before them. Members with appropriate skills, should, with assistance from experienced representatives, be able to deal adequately with the technicalities of the law before them. This is of course another reason for ensuring that there is legal representation before the tribunal and for there being adequate legal aid for these matters, for both sides

- If so, what would the appropriate qualifications be for a tribunal decision-maker?

  See above

[10] *Review of the Equal Opportunity Act 1984* Project 111 Discussion Paper-page 158

- Should a uniform set of procedural rules be developed to apply across both tribunals?

  Yes

- Should the tribunals be required to publish all decisions/ substantive decisions?

  Of course, as a matter of general principle all Courts or tribunals should publish reasoned decisions. We are surprised to see the comment in the discussion paper that the Tribunals are not publishing their reasons in written form. In our view that is entirely unsatisfactory. The law should be altered to require the Tribunal to publish their reasons in writing, unless one of the reasons traditionally recognised by the Courts for not doing so applies

- Could data sharing be permitted and encouraged between Commission and tribunals to form a better overall picture?

  We are somewhat perplexed as to why the data referred to in the discussion paper is not available on the public record, in for example the annual reports of the tribunals involved.

- On what basis should the Commission be permitted to intervene in proceedings under the Anti-Discrimination Act. Should leave of the Court or tribunal be required? Why or why not?

  We would support the Commission being able to intervene in proceedings without the leave of the Court or Tribunal where a question of law arises that relates to the application of the *Anti-Discrimination Act*. It is our view, that it would be of benefit to any Court or Tribunal to have the views of the Commission in appropriate cases on the operation of the legislation which it administers on a day-to-day basis. As the Commission is best placed to determine the issues in respect of which the development of the law may benefit from its intervening in any particular case, the leave of the Court should not be required. No doubt, with its limited resources, the Commission will not be intervening in Court proceedings except where clearly necessary.

- What other issues relating to the functions, processes, power and outcomes of the Tribunals should be considered by the Review?

  We have no further comments.

Non-legislative measures

- What non-legislative measures are required to ensure protections under the law are available to everyone?

Current attribute - impairment

- Should the attribute of impairment be replaced with disability?

- Should a separate attribute be created, or the definition amended to refer specifically to mental health or psychosocial disability?

- Should the law be clarified about whether it is intended to cover people who experience addiction?

- Should reliance on a guide, hearing or assistance dog be broadened to be reliance on an assistance animal? Should it only apply to animals accredited under law? How would this approach work with the Guide, Hearing and Assistance Dogs Act 2009?

We agree that the definition of this attribute should be altered to remove any doubt that it includes a mental health condition or an addiction. In relation to assistance animals, we support the amendment of the definition along the lines of that in the Australian Capital Territory.

Current attribute – gender identity

- Should there be a new definition of gender identity, and if so, what definition should be included in the Act?

  In our view, the traditional distinction maintained by feminists since the end of the Second World War between sex and gender continues to be valid.

  There is an obvious and, on current technology, ineluctable biological basis for the social recognition of difference in relation to reproduction.

  Gender describes the value system that prescribes and proscribes forms of behaviour and appearance for members of the different sex classes, and that assigns superior value to one sex class at the expense of the other.

  The philosopher Martha Nussbaum, when commenting on the views of the philosopher Judith Butler, expressed the situation this way[11]

  > Butler's brief exploration of Foucault on hermaphrodites does show us society's anxious insistence to classify every human being in one box or another, whether or not the individual fits a box; but of course it does not show that there are many such indeterminate cases. She is right to insist that we might have made many different classifications of body types, not necessarily focusing on the binary division as the most salient; and she is also right to insist that, to a large extent, claims of bodily sex difference allegedly based upon scientific research have been projections of cultural prejudice--though Butler offers nothing here that is nearly as compelling as Fausto Sterling's painstaking biological analysis.
  >
  > And yet it is much too simple to say that power is all that the body is. We might have had the bodies of birds or dinosaurs or lions, but we do not; and this reality shapes our choices. Culture can shape and reshape some aspects of our bodily existence, but it does not shape all the aspects of it. "In the man burdened by hunger and thirst," as Sextus Empiricus observed long ago, "it is impossible to produce by argument the conviction that he is not so burdened." This is an important fact also for feminism, since women's nutritional needs and their special needs when pregnant or lactating) are an important feminist topic. Even where sex difference is concerned, it is surely too simple to write it all off as culture; nor should feminists be eager to make such a sweeping gesture. Women who run or play basketball, for example, were right to welcome the demolition of myths about women's athletic performance that were the product of male-dominated assumptions; but they were also right to demand the specialized research on women's bodies that has fostered a better understanding of women's training needs and women's injuries. In short: what feminism needs, and sometimes gets, is a subtle study of the interplay of bodily difference and cultural construction. And Butler's abstract pronouncements, floating high above all matter, give us none of what we need.

  It now seems that we need a third category being gender identity. The difference between gender identity and gender appears to be that gender relates to how society perceives

[11] *The Professor of Parody - The hip defeatism of Judith Butler* New Republic 23 February 1999 pages 14-15

certain groups in it and gender identity relates to how the individual seeks to identify themselves.

Having said that, it may raise a difficult issue because up until now the law has approached discrimination based on sex as including discrimination on the basis of attributes commonly attributed to persons of that sex or gender.

We accept that sex, sexuality gender etc are fundamental aspects of what it is to be human, and that no reasonable person would reject the proposition that it is necessary to remove barriers to their expression. For that reason, we support the inclusion of a ground of discrimination namely gender identity

In terms of gender identity, it would be our submission that the first part of the current definition of gender identity remains appropriate. The second part of the definition could be deleted as that would now be covered by the category of "sex characteristic" dealt with below.

At this point we think it appropriate to address the issue of the potential conflict that may arise between the rights of transgender women and women. Once you accept that biological sex is a real thing this issue must be dealt with. You do not have to accept the whole argument of gender critical theorists to acknowledge that we have single sex facilities and programs. Those facilities and programs exist for legitimate reasons.

These reasons were recently set out, in the case of facilities, by the Queensland Civil and Administrative Tribunal[12] in deciding an application by the Fernwood gyms to continue their exemption which permits them to operate female only gyms:

> The purpose of the limitation, which benefits women who for medical, religious or psychological reasons, wish to attend and exercise at a female only fitness centre, is consistent with a free and democratic society based on human dignity, equality and freedom. The exemption decision and its necessary limit on the right of men not to be discriminated against, is necessary to achieve the purposes behind the exemption. There are no less restrictive or reasonably available ways to achieve the purpose. The reasons for the limitation coincide with the reasons for the women only centre and I have above accepted those reasons to be reasonable and appropriate. In my view, although a person's right to equal and effective protection against discrimination is important, any limit on that right resulting from the exemption is reasonable and justified. I am satisfied, accordingly, that the exemption is compatible with human rights.

The decision recognises as legitimate some of the key arguments advanced to restrict access by transwomen to women only places: privacy and a sense of safety[13]

The tribunal decision recognises the fact that there are in certain circumstances conflicting rights. In our submission, the Act ought to recognise that there are potentially conflicting interests between trans women and women. Obviously, the measures to address that conflict should be narrowly tailored to achieve the protection of the legitimate interests of women using single sex facilities

The *Equality Act* in the United Kingdom enables service providers to offer separate or differing services to males and females, or to one sex only, subject to certain criteria. We

[12] *Fernwood Womens Health Clubs (Australia) Pty Ltd* [2021] QCAT 164 (14 April 2021) para 35

[13] See paras 13 and 35 the "reasons why women may not wish to exercise in the presence of men. These include religious reasons, for example Muslim women, as well as psychological reasons due to having been subjected to rape, or to sexual or physical assaults. There may also be reasons associated with body image and a lack of self-confidence."

would submit that the Queensland Act should be amended to include a general exemption which permits providers of single sex services and programs to provide different services to transgender women, to borrow the language of the tribunal, where it is necessary to achieve a legitimate purpose and there are no less restrictive or reasonably available ways to achieve that purpose.

Although reliance on this exception should be rare[14], it is most likely to be needed in particularly difficult and sensitive areas, such as domestic violence refuges. Whether it is reasonable to exclude a trans person would have to be judged by the service provider on a case-by-case basis, considering the trans person's needs and the impact on other service users.

The UK *Equality Ac*t also allows communal accommodation, such as dormitories, to be provided for one sex only and for trans people to be provided with separate accommodation or not to be admitted. The rule argued for above should also be applied in this category

As noted above, the case for exemptions in these circumstances is usually based on either some sort of privacy consideration or some consideration of possible violence.

In relation to possible violence, we are not aware of any evidence that transgender women are more violent or commit more offences in these facilities than anybody else. Consequently, to demonstrate compliance with the proposed test, any service provider seeking to exclude a transgender woman on this basis would be required to demonstrate that such issues cannot be dealt with in the risk assessment procedures which are ordinarily undertaken by such bodies.

Privacy considerations are of course much different but would presumably require taking into account the views of those already using the facility as against the rights of the transgender person.

In the case of sex specific programs limited resources and historical disadvantage would appear to be the key issues. Men who transition late must, at least keep both the physical and some of the psychological advantages of having lived as a man[15].

For the record, we note our view that such laws are unlikely to make it lawful to exclude transgender women from public toilets because:

1. the notion of the transgender predator is baseless because experts agree that criminals who sexually assault victims will likely enter any bathroom to attack“ regardless of if it corresponds to their gender.”[16]

2. the discomfort caused by coming across an obviously transgender individual in the toilet is a minor harm in comparison to the results of the discrimination for that trans-gender individuals

3. public toilets already protect privacy by providing individual cubicles.

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[14] *Reform of the Gender Recognition Act-Government Consultation* July 2018 page 45. We note the Scottish Government has chosen to implement the changes recommended by this review but will not be amending the provisions we are discussing.

[15] M. Nussbaum *Identity, Equality, Freedom: McClosky's Crossing and the New Trans Scholarship* open (2020) 140 Journal of Contextual Economics 251 at 275

[16] Ayana Osada *Obergefell Liberates Bathrooms* 62 NYLS Law Review 304

4. social norms already require people to keep their eyes to themselves when in public toilets

5. toilets are increasingly unisex.

6. such a law presupposes that it will be enforced by means of the incredible civil liberties denying process of requiring people to produce papers to prove their sex or gender[17]

In the end this is a classic situation where rights are in conflict and the law needs to a arrive at a reasonable compromise between them.

Current attribute – sexuality

- Should there be a new definition of sexuality, and if so, what definition should be included in the Act?

  Sexual orientation is at the core of self-identity, and if its expression is denied it leaves a gap in life that cannot be filled in any alternative way[18]. The centrality of sexual orientation to our lives dictates that barriers to its expression be removed. To that end, we support the amendment of the Act to replace the current definition of sexuality with that contained in the *Public Health Act* 2005 as that definition more accurately reflects the varieties of sexual orientation today.

Current attribute – lawful sexual activity

- Should there be a new definition of lawful sexual activity, and if so, what definition should be included in the Act? Should the name of the attribute be changed, and if so, what should it be?

  We read with interest in the discussion paper that the issue of the reform of the law relating to sex workers has been referred to the Queensland Law Reform Commission. It would be our view that the interests of sex workers would be much better advanced by a comprehensive reform of the law, including the complete legalisation of sex work. In other words, this issue should be deferred until the outcome of that process

Specific attributes

- Does the terminology used to describe any existing attributes need to be changed?

- For attributes that have a legislative definition in the Act, do those definitions need to change?

- For attributes that do not have a legislative definition, should a definition be introduced?

- We have nothing to say in response to these questions

- Should the Act separately prohibit discrimination because a person with a disability requires adjustments for their care, assistance animal, or disability aid?

  We note that the ACT Law Reform Advisory Council in its review of the *Discrimination Act* came down on balance in support of the view that the definition of disability should be

[17] See generally Barnett etal *The Transgender Bathroom Debate at the Intersection of Politics, Law, Ethics, and Science* The Journal of the American Academy of Psychiatry and the Law · June 2018
[18] See Barry *Justice as Impartiality* Oxford University Press 1995 pp 82-86

amended to incorporate discrimination on the grounds of possessing an assistance animal or other aid. We see no reason to depart from their position

Additional attributes

- Is there a need to cover discrimination on the grounds of irrelevant criminal record, spent criminal record, or expunged homosexual conviction?

- How should any further attribute(s) be framed? Should they apply to all areas?

- What are some examples of how people who have had interactions with law enforcement experience discrimination, including by whom and in what settings?

- How would the inclusion of these attributes interact with the working with children checks (Blue Cards)?

  The issue of including criminal convictions in the *Act* introduces several cross-cutting considerations. Firstly, under the spent convictions legislation in Queensland a person is in fact entitled to lie and deny that they ever had a conviction. Similarly, once a homosexual conviction has been expunged then again people should be able to say that they have no conviction because they don't. Based on the principles being advanced here many would argue that a criminal is morally blameworthy for their situation. However, the Council would argue that the punishment for the offence ends when the person leaves prison or completes whatever other punishment may be imposed. Furthermore, excluding convicted persons from employment and the like is not going to assist in their rehabilitation, quite the contrary it's going to increase their risk of reoffending. Finally, society still has an obligation to meet the basic interests or needs of its citizens.

  For these reasons come up we support the inclusion of this attribute.

  As the discussion paper notes, an attribute limited to the spent convictions' provisions will have very narrow application. If there is to be such an attribute it should extend to irrelevant convictions. But it would be our submission then it should be limited to the area of work and the area of accommodation.

  In relation to blue cards, whilst we consider it to be a departure from the principles relating to a spent conviction, we have accepted that the need to protect children justifies that departure.

- Is there a need for the Act to cover discrimination on the grounds of irrelevant medical record?

  It seems to us, there is no need to deal with this topic in this Act given that it is no doubt dealt with adequately in other areas of the law.

- Is there a need for the Act to cover discrimination on the grounds of immigration status? If so, should it stand alone or be added as another aspect of 'race'?

  The first question raised by this proposal is to what extent are people being discriminated against based on their immigration status as opposed to their race, nationality or national origin. The ACT Law Reform Advisory Council in its report refers to evidence from the ACT Human Rights Commission that it is a significant issue in that territory. We see no reason to think it is not then an issue in Queensland. So, we would support the introduction of such an attribute so long as it adopts the ACT model which provides that it is not unlawful to discriminate against a person on the ground of immigration status if the discrimination is reasonable, having regard to all the relevant factors. This is of course to deal with the

situation of a person who has a visa which does not permit them to work or the situation where a visa is going to expire, and the employer is after a long-term employee.

- Is there a need for the Act to cover discrimination on the grounds of employment activity?
- Is this an unnecessary duplication of protections under the Fair Work Act?

  In our view, this topic is adequately covered by the *Fair Work Act*.

- Is there a need for the Act to cover discrimination on the grounds of physical features?

  This is an extraordinarily broad concept. The term is defined in the ACT to mean "a person's height, weight, size or other bodily features." In the discussion paper there is a reference to a Victorian case in which a person was found to have been discriminated against because they had a loud voice.

  Presumably, this ground could extend to for example ugliness. Disability is a legitimate subject of anti-discrimination legislation because society has built institutions which fail to deal with it properly. But ordinary ugliness is not a natural trait that institutions in our society turn into actual social disadvantage for people. Such people may be less happy, but this is not necessarily an issue of justice. It would be absurd if society were obliged to provide those who think themselves ugly with publicly funded plastic surgery.

  We can look at it from the other side. People object to the preferences that might be received by those who are considered beautiful. This objection usually seems to be based on the feeling that in the case of those who are not considered beautiful, their skills and abilities are being ignored. And, alternatively in the case of beautiful people their lack of skills and ability is being ignored because of their attractiveness. It obviously would be preferable when choosing between candidates for a job to select the appropriately qualified person. But to suggest that to care about beauty when we deal with humans is morally bad then it must be morally bad to have regard to it in all other circumstances. But we admire a beautiful sunset or a beautiful painting, admiring a beautiful person is not different.

  As Janet Radcliffe Richards puts it, "of course beauty is often of a low priority, and it is morally good to care relatively little about it when people are hungry, or unjustly treated, or unhappy in other ways. Most of us, however, would like people to have beauty as well as other things, because for most of them it is one of the delights of life[19]…Of course, it is unfair in some sense that some people are born more beautiful others, just as it is unfair that some are cleverer than others, or have parents who brought them up to be pleasant rather than unpleasant... Of course, we should see what can be done to make things less unjust. However, it is not the solution to the cosmic unfairness of the distribution of things to prove that they do not matter, or that they matter because of the evils of society. It is not an evil in society that beauty matters: other things being equal, it is impossible that it should not matter[20]

  To borrow the phrase from Scanlon quoted at the start: what physical attributes are subject to widely held views that that attribute makes them less entitled to social goods than others? It is difficult to point to such views about people with loud voices

  In short, unless it is possible to create a definition which links physical attributes to a social institution which has generated disadvantage in respect of those attributes, there should be no such provision in the *Act*.

[19] Janet Radcliffe Richards *The Sceptical Feminist- A Philosophical Inquiry* Penguin Books 1980 page 232
[20] Ibid 234

Gender

- Should an additional attribute of 'gender' be introduced? Should it be defined, and if so, how?

  Please see our discussion under the heading "gender identity".

Sex characteristics

- Should an additional attribute of sex characteristics be introduced? Should it be defined, and if so, how?

  As we read the discussion paper this class is intended to cover intersex individuals. We support the inclusion of this ground.

Subjection to domestic violence

- Should an additional attribute of subjection to domestic violence be introduced? Should it be defined, and if so, how?

  In order to complement other measures being implemented to combat the scourge of domestic or family violence in our society, we would support an amendment to the Act along the lines of that in the ACT to include "subjection to domestic violence" as a protected attribute.

Accommodation status

- Should an additional attribute of accommodation status be introduced? Should it be defined, and if so, how?

  This attribute is directed at addressing disadvantage caused by homelessness. Again, it seems to us that most of the work to address this area of disadvantage must take place in other arms of policy. However, we do not doubt that, as was found in the Victorian review of their Equal Opportunity Act, that the experience of homelessness produces a specific and pervasive set of discriminations which entrench homelessness unemployment and poverty[21]. However, it is our view that the Act should follow the ACT model and contain an exception in the case of the offering of accommodation, for a situation where the discrimination is, "reasonable having regard to all the facts". This is intended to recognise that there may be situations where a person's accommodation status is a relevant consideration in offering a person accommodation under a lease. This view appears to be endorsed by the Law Reform Commission of Western Australia[22]

Other additional attributes

- Should any additional attributes, including those highlighted above, be included in the Act?
- If so, what evidence can you provide for why these attributes should be protected?
- How should they be defined?
- How would inclusion of the attribute promote the rights to equality and non-discrimination?

[21]Julian Gardner, *An Equality Act for a Fairer Victoria (Equal Opportunity Review Final Report*, June 2008) paragraphs 5.97-5.100

[22] *Review of the Equal Opportunity Act 1984* Project 111 Discussion Paper-pages 125-126

We have no suggestions for further attributes.

EXEMPTIONS

General exemptions - sport

- Should the sport exemption be retained, amended, or repealed?
- Should competitive sporting activity be more clearly defined?
- Is strength, stamina or physique the appropriate consideration when restricting access to competitive sporting activity based on sex, gender identity, and sex characteristics? If not, what would be an alternative test to ensure fairness and inclusion in sporting activities?

According to Jon Pike et al in *Fair Game* December 2021[23]

> the male-to-female gap in track sprinting is 12 percent. This translates into approximately 10,000 males having a personal best 100m sprint time faster than the current female Olympic champion, Elaine Thompson (World Athletics, personal communication). Thompson's 2016 gold medal performance was, within the year, slower than not just elite senior male sprinters, but also slower than schoolboys, Master's category males, Paralympic males and males whose primary sport is not track sprinting (World Athletics 2021) …
>
> the majority of male athletic advantage appears to be acquired at puberty, when males experience a surge of testes-derived testosterone that results, in adulthood, in circulating testosterone ranging from 8.8-30.9 nanomoles per litre (nmol/l), while female testosterone remains low, ranging from 0.4-2.0 nmol/l (Clark et al. 2019). Thus, from puberty into adulthood, testosterone levels between males and females form a non-overlapping, bimodal distribution (Handelsman et al. 2018). (P 14-5)

World Rugby has, for safety reasons prohibited trans women participating in rugby[24].

The difference between the physiology of people who have been through male puberty and those who have not mean that concerns of safety and fairness will dictate restrictions on the participation of trans women in women's sports. Those restrictions will vary from sport to sport. But the current exemption must continue to address these issues where they legitimately arise.[25]

The exemption currently does not apply to sport involving those under 12 years of age. We would submit that a more appropriate marker is whether a person has gone through male puberty.

General exemptions - religious bodies

- Should the scope of the religious bodies' exemption be retained or changed?
- In what areas should exemptions for religious bodies apply, and in relation to which attributes?

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[23] Found at https://macdonaldlaurier.ca/biology-fairness-trans-inclusion-sport-paper/

[24] https://www.world.rugby/news/591776/world-rugby-approves-updated-transgender-participation-guidelines

[25] For an illuminating discussion of the conflicting values of safety fairness and diversity in sport see Jon Pike *Safety, Fairness and Inclusion -Transgender athletes and the essence of rugby.* Journal of the Philosophy of Sport 2021 48 page 155.

- Should religious bodies be permitted to discriminate when providing services on behalf of the state such as aged care, child and adoption services, social services, accommodation and health services?

- Should religious bodies be permitted to discriminate when providing accommodation on a commercial basis including holiday, residential and business premises?

Freedom of Association

Freedom of association is a core liberal value and it protects the freedom of groups whose norms mandate among other things the unequal treatment of men and women. "The only condition on a group being able to impose norms on its members is that the sanctions backing the norms must be restricted to ones that are consistent with liberal principles. What this means is primarily that, while membership of the group can be made contingent upon submission to these unequal norms, those who leave or are expelled may not be subjected to gratuitous losses"[26]

For example, Jewish and Muslim divorce laws treat men and women differently. It is beyond the scope of a liberal State to be rewrite those rules so long as the only reason anybody is adhering to them is the wish to remain a member of the community. What a liberal State cannot do however is to give legal force to religious rules that contravene liberal principles of equal treatment.[27]

Individuals should be free to associate together anyway they like so long as they do not in doing so break the ordinary laws of the land of general application and in particular laws designed to protect the rights and interests of those outside the group[28]. There are two provisos. The first is that all the participants should be adults of sound mind. The second is that their taking part in the activities should come about as a result of their voluntary decision and they should be free to leave whenever they want to.[29]

The condition upon which Churches can legitimately tell members what to do is that those members are free to obey without being liable to any penalty except expulsion. In contrast a Church that would call on the State to punish heresy or disobedience would clearly be unacceptable. Equally unacceptable on liberal principles would be a Church whose members could inflict punishment on dissenters without legal sanction.

Based on these principles' sections 48 and 80 of the current Act are entirely appropriate.

We would, however, submit that consideration should be given to a general freedom of association provision along the lines of section 39 of the Commonwealth Sex Discrimination Act.

Religious bodies providing services

We turn now to situations involving religiously affiliated institutions that open their doors to provide services but object to serving certain categories of persons such as gay and lesbian people.

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[26] ibid 127-8
[27] ibid pages127-8
[28] Of course, parents should be allowed a good deal of discretion in bringing up their children. It is also important that the raising of children does not become an excuse to reduce adults to the status of children. However, the power of parents in relation to their children has to be limited. Children need to be protected against parents who would inflict physical harm on them even if this is prescribed by the parents' beliefs or customs. The classic example being parents who would withhold life-saving medical treatment from their children. In the same category falls female genital mutilation. Egalitarian liberals also wish to insist that children must be brought up in a way that will eventually enable them to leave behind the groups into which they were born if they so choose.
[29] ibid page 148

An argument of increasing use in this context is the proposition that by providing the service the person is sending out a message in support of the particular lifestyle of which they disapprove. This ought to be rejected as by requiring people to provide services in these circumstances no more implicates them in endorsing the lifestyle of these people then in any other situation when they provide a service to another person.

In *Bull v. Hall,* a UK case, a bed and breakfast denied a same-sex couple lodging because of the owners' religious beliefs. The couple brought a case against the bed and breakfast owners, claiming that their conduct amounted to unlawful discrimination, and the U.K. Supreme Court upheld the couple's claim. In doing so, the Court stated that, while freedom of religion includes the right of a person to manifest his or her beliefs, the right is limited where it conflicts with the rights of others. As Lady Hale stated in her judgment:

"The trend in the case law is to resist these claims and to do so without regard to whether LGBT people could have obtained the good or service elsewhere." She went on to identity past and continuing discrimination as reasons "that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion."

Lady Hale also noted that the owners were "free to manifest their religion in many other ways," including "by the symbolism of their stationery and various decorative items in the hotel, by the provision of bibles and gospel tracts, and by the use of their premises by local Churches."[30]

A case in this area from Australia is called *Christian Youth Camps.* The Court of Appeal of Victoria held that because the youth camp operated as a commercial entity they did not qualify for an exemption. Because the camp chose voluntarily to enter the market for accommodation services and participate in the market in a commercial way it is in all respects indistinguishable from the other participants in the market. In the circumstances the fact the camp was a religious body could not justify its being exempt from the prohibitions on discrimination to which all other accommodation providers are subject.[31]

On the other hand, we can see no objection to religious bodies being able to discriminate in the provision of camp and conference facilities which are intended to be used for the purposes of religious retreats, which is a common practice in many religions. We can accept that there is a case, as there is in relation to churches, that such spaces are kept exclusively for the believers and would be believers. Again, it is our position, that should the religious body make these facilities available on a commercial basis, they lose the right to avail themselves of this exception.

On this basis section 90 of the current Act is in our submission too broad and needs to be narrowed. As noted above the appropriate result could be achieved by a general freedom of association provision such as that in section 39 of the Commonwealth Sex Discrimination Act [32]

Employment

What rights do religious and religious affiliated institutions have to discriminate in employment?

In the *Church of Jesus Christ of Latter Day Saints vs Amos*, Mr Amos had worked for 16 years as a janitor in a gymnasium open to the public that was owned by the Mormon Church. He was fired for not complying with the eligibility test for attendance at a Mormon temple. The American Supreme Court held that if the exemption for religious organisations from the discrimination statue did not extend to this "it would be an interference with the autonomy of religious

[30] [2013] UKSC 73 [2013] 1 WLR 3741
[31] *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75
[32] We note there is no equivalent provision in the Commonwealth *Race Discrimination Act*. We support that principle

organisations." The Court held that if there no exemption the religious community's process of self-definition would be determined at least in part by the Courts.

However, the janitor's liberty, which includes the right not to believe, was clearly burdened by the Churches exemption as was the religious liberty of any other non-Mormon potential employees.

Many voluntary associations do not have internal rules satisfying the demands that liberal principles make on political bodies. That of course does not just apply to Churches. Other kinds of organisations are often not run democratically and there is no objection to this provided that membership is voluntary. The consequence of this is that anti-discrimination laws must allow Churches to apply religious criteria to ordination *at the least.* For example, for a Court to intervene on the side of a woman who wishes to be ordained as a priest of the Catholic Church would be for the State to settle what is an entirely internal dispute in that Church.[33]

However, this principle does not extend to employment in ordinary capacities as was found in Canadian case concerning a woman who alleged that she was discriminated against by a Christian social services organisation on the basis that she was a lesbian. The Court rejected the organisation's argument that a "religious ethos infuses the very work that support workers do and, therefore, the Christian ministry and how the work is carried out cannot be distinguished in any meaningful way. Instead, the Court concluded: "There is nothing about the performance of . . . helping residents to eat, wash and use the bathroom, and taking them on outings and to appointments [] that requires an adherence by the support workers to a lifestyle that precludes same sex relationships."[34]

Existing sections 25(2) and 3 is consistent with these views. We support the retention of section 109 (1)(a)-(c) and (d) as the latter subsection does not apply to the work and education areas

Work exemptions – religious educational institutions

- Should the religious educational institutions and other bodies exemption be retained, changed, or repealed?

- If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race, or impairment)?

  For the reason set out above, exemptions from anti-discrimination law which allow religious schools to refuse to employ people on the basis of their sexuality should be removed. Schools of course should be entitled to insist that those who teach religion should be believers.

  As leaders of the institution the school should be entitled to insist that the Principal and Deputy are adherents. But beyond those categories[35] there is no justification for granting religious schools' exemptions from general laws.

  The starting point must be that you don't need to be a believer to teach mathematics

  Having said that, those who run religious schools are entitled to prevent proselytizing by staff, against the views of the world they hold. This follows from the employee having accepted a position in a school that holds to and seeks to inculcate certain worldviews. Equally this does not mean that staff cannot be prevented from discussing the fact there

[33] Barry *Culture and Equality 166-7*
[34] *Ontario Human Rights* Commission *v. Christian Horizons* [2010] ONSC 2105 at para 104 ("Christian Horizons")
[35] And it is possible a case might be made for others having similar roles to be excluded that we have not thought of. But these give a clear indication of the types of position we have in mind, which we expect to be small in number

are individuals and other religions within society that hold beliefs or principles different from those of the school's operators. Religious schools should be entitled to discipline staff who actively campaign against the views and beliefs of the religion of the school in which they are teaching. In our view, subsections 25(2) and (3) of the Queensland *Anti-Discrimination Act* deal appropriately with this topic

Work exemptions - working with children exemption

- Are there reasons why the work with children exemption should not be repealed?

  In our view, this exemption should be repealed

Goods and services exemption – assisted reproductive technology

- Are there reasons why the Act should not apply to provision of assisted reproductive technology services?

  No, the exemption should be removed.

Accommodation exemption – sex workers

- Should the sex worker accommodation exemption be retained, changed or repealed?

  We opposed this change to the law when it was introduced and remain opposed to it. Obviously, if the activities of a sex worker in a particular premises are interfering with other people on those premises or neighbours or are in violation of local Council rules relating to the use of the premises, the accommodation owner should be allowed to remove them. But the fact that they are being used by a sex worker should not be a ground. Once again, we would be hopeful that the upcoming review of the law relating to sex workers might result in changes to the law which will make it unnecessary for them to use motels and the like.

State laws and programs – prisoners

- Should the Corrective Services Act modifications be retained, changed or repealed?

  For reasons set out previously, it is our view that these exemptions should be repealed. There is absolutely no justification in our submission for an exemption from the provisions against indirect discrimination in the corrective services context. The provisions dealing with reasonable adjustment etc are more than adequate to balance the circumstance that the alleged discrimination is taking place inside a prison.

State laws and programs – citizenship and visa status

- Should the citizenship/visa status exemption be retained, changed, or repealed?

- Are there certain groups in Queensland that are being unreasonably disadvantaged by this exemption?

  Our comments on the visa status ground, apply to this issue

Superannuation and insurance

- Should the insurance and superannuation exemptions be retained or changed?

  Insurance premiums must be assessed by reference to risk. That reality is recognised in the provisions which allow insurers to discriminate where actuarial requirements require

them to do that. To alter that principle risks doing damage to the insurance market in the form of destabilising insurers or increasing premiums.

To the extent that the discussion paper suggests there is a systematic level of overcharging not justified by actuarial data, the better way to address that issue would be for the Commission to be given powers to conduct its own motion investigations rather than individuals having to take on insurance companies in their own particular cases.

Other exemptions

- Should any other exemptions be changed or repealed? What evidence justifies the continued need for these exemptions?

- Should further exemptions be created? What evidence justifies the need for further exemptions?

We have no further comment in response to these questions

Areas of activity

Goods and services

- Should the definition of goods and services that excludes non-profit goods and service providers be retained or changed?

- Should any goods and services providers be exempt from discrimination, and if so, what should the appropriate threshold be?

Based on the principles set out above, our position is as follows:

1. there should be an exemption for voluntary associations as described in the discussion paper and mentioned previously

2. we see no reason why not for profit associations providing services to non-members should not be subject to the Act.

Club memberships and affairs

- How should the Act define a 'club'?

- How would this interact with a potential further 'sport' area of activity?

The discussion paper mentions the fact that this legislation is meant to apply to public affairs and not private matters. This is of course another way of expressing the proposition that the law should support freedom of association. Again, we repeat our support for a general exemption from the law for voluntary associations. We would support an exemption from the voluntary associations rule for clubs as they are defined in the Commonwealth *Sex Discrimination Act*, namely an association (whether incorporated or unincorporated) of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other

(a) provides and maintains its facilities, in whole or in part, from the funds of the association; and

(b) sells or supplies liquor for consumption on its premises.

It seems to us, that when an organisation has a liquor licence and is selling liquor from its premises it is dealing with the public and providing services to them and so should become subject to the Act.

Sport

- Should a separate area of activity for sport be created?
- What are examples of where the sport area would cover situations not already covered in other areas?
- What exemptions should apply (if any) to sport if, it were to become a new protected area of activity?

In our view, the discussion paper does not make out the case for creating another area of application for the Act. As the discussion paper notes sporting bodies must be providing goods or services. The difficulties in applying the Act to sporting bodies referred to in the discussion paper are all attributable to the fact that not for profit organisations are excluded from the goods and services area

Therefore, it is our view that alterations to the definitions of goods and services area to include not for profit organisations and reform of the definition of club should address the issues. Should this failed to do so the question can be revisited at another time.

We trust this is of assistance to you in your deliberations

Yours Faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
1 March 2022