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Director, Legal Policy
Department of the Attorney-General and Justice
GPO Box 1722,
DARWIN
NT 0801

Re: Modernisation of the *Anti-Discrimination Act* in the Northern Territory

The Australian Christian Lobby (ACL) is grateful for the opportunity to comment on the Discussion paper concerning proposed changes to the Northern Territory's *Anti-Discrimination Act*.

ACL's vision is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With more than 100,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

Christian ethics and principles have shaped our Australian society that is the envy of the world. This applies to our legal and political system, our education and our healthcare sectors. Freedom of belief is our most important right in Australia and we believe it must be defended and protected.

Please feel free to contact me if I can be of further assistance in the consideration of this matter.

Regards,

Wendy Francis
Director for Queensland and the Northern Territory
Australian Christian Lobby

Executive Summary

It is concerning that many of the amendments under discussion contemplate policies that would compromise basic freedoms enshrined in the International Convention of Civil and Political Rights (ICCPR), to which Australia is a signatory. This international obligation recognises a duty incumbent on the State to secure human rights for its citizens, including freedoms of speech, religion and association. Importantly, the duty to uphold these human rights is not incumbent on citizens or groups. In a democratic society it is the job of the State to secure and defend the necessary freedoms for divergent views to be freely expressed, for groups to organise for peaceful purposes to pursue common interests and to follow the dictates of their faith. It is the duty of the State to ensure that fundamental freedoms of speech, assembly and association are enjoyed by every citizen without discrimination – rather than, as the *Discussion Paper* appears to contemplate – extending its protection only to those individuals who satisfy the requirements of an improvised list of special needs or protected attributes.

It is regrettable that the framing of this *Discussion Paper* appears to warrant this reiteration of the first principles of the human rights enshrined in the ICCPR. Indeed, so surprising is it that the Attorney-General's Department would seriously direct public discussion towards such fundamentally anti-democratic policies, that Territorians may well question how carefully the drafting of the *Discussion Paper* was scrutinised before it was released. The ACL is disappointed that so many of our responses must be directed at cautioning against policies that are inherently inimical to the freedoms necessary for a democratic society to function.

The disregard for human rights is only one of the aspects of the *Discussion Paper* that gives rise to concern. The second concerns the flawed postmodern ideology which informs this proposed blueprint for a genderless society. The redefinition of the human person, the family, and proposed legal protections for subjective and essentially individual understandings of gender identity (reframed now with no connection to biological sex), amount to radical, dangerous and irresponsible use of legislation to compel compliance with an agenda for social change in ways unimagined by the average Territorian constituent.

ACL's recommendations for the Territory's responses to some of the questions posed in the discussion paper are discussed in further detail in the submission that follows and our recommendations summarised below:

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

Recommendation: That the Territory does not include gender identity as a protected attribute, but that gender diverse people should obviously be protected by the same laws that protect everyone from violence.

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

Recommendation: Intersex conditions, narrowly defined in terms of medically-diagnosable disorders of sexual development and where these conditions result in sexual ambiguity that may cause practical problems for the life, work and integration of the individual, may benefit from clarification of the law. These conditions are not grounds for legally defining 'a third sex' or challenging the male/female binary for the population generally.

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

Recommendation: Vilification provisions should not be included in the Act.

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

Recommendation: A representative complaint model should not be introduced.

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

Recommendation: Broadening the definition of 'club' for the purposes of extending the reach of anti-discrimination legislation would undermine freedom of association. The definition of club should not be amended.

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

Recommendation: Exemptions for religious and cultural bodies should not be removed.

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

Recommendation: That ART should not be regarded in the same way as the provision of other commercial services. Differential treatment which prioritises the best interests of the child is entirely justified in regulating access to ART.

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

Recommendation: Changes in this area need to have proper regard for the preservation of the rights and freedoms of those who may be considered 'employers' or volunteer services. The rights of volunteers to be free from discrimination should not be prioritised over the internationally recognised human rights to freedom of speech, association and religion.

Question 17: Should section 24 be amended to clarify that it imposes a positive obligation?

Recommendation: Section 24 should not be redrafted to impose positive obligations on service providers.

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

Recommendation: The definitions of 'man' and 'woman' should not be repealed.

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

Recommendation: Do not delete parthood but include both "parenthood" and "carer responsibilities" in the Act.

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

Proposal

Including gender identity as a protected attribute would provide clarity that people of diverse gender are protected. These changes would also ensure that the Act is consistent with the Sex Discrimination Act 1984 (Cth) and ensure a more inclusive coverage.

Comment

The concept of gender identity finds its genesis in post-modernist philosophy, which does not recognize the existence of objective truth. 'Truth' according to postmodernism, is relative. Different subjective individual 'truths' are equally valid. Knowledge can only be known by the 'knower'. Gender, therefore, can only be perceived by the individual themselves. Gender identity, then, is an individual's subjective perception of being either male, female, both or neither. Postmoderism also rejects the need for binaries to frame thinking: good/bad, male/female, up/down, black/white – all of these are equally guilty of cementing hierarchies and constraining diversity to a single axis. A truly 'egalitarian' approach to gender must therefore recognize genders that do not sit anywhere on a male–female spectrum.

It is unclear which definition of "gender identity" the Department of the Attorney-General and Justice is contemplating special protection for in the current proposal. Already the understanding of "gender identity" used by the transgender rights movement to argue that a subjective understanding of being the opposite sex (whereby a natal man can identify as a woman or transgender woman, for example) is outdated. Indeed, Tumblr, in researching all the genders currently in popular use has compiled these in a document revealingly entitled "Complete List of Tumblr Genders (SO FAR)"[1], in reference to the fact that understanding of 'gender' as a subjective identity is still expanding. The legal implications of protecting a subjective gender identity which is at variance with biological sex are potentially problematic, though the problems differ in type and degree depending on which working definition of gender identity is being contemplated.

If protection is only envisaged for diverse gender identities that exist on the male—female spectrum, this raises the now-familiar issues of enforced compliance with preferred pronouns and the dangers to women that arise from allowing natal men who identify as women to have access to private female spaces, such as bathrooms, changing facilities, prisons and domestic violence shelters. This has already split the LGBTI community in Norway (often held to be among the wold's most egalitarian society), where lesbians have officially withdrawn from the movement in protest over the subordination of women's safety to prioritise the 'right' of transgender women (biological men) to be treated in all practical ways as though they too have female bodies. Although the complications inherent in identifying as transgender necessarily rouse compassion, and the wish to identify as a gender at variance with one's natal sex may in many instances be accommodated as a matter of polite manners, the government cannot legislate to require Territorians to recognise a biological man, for example, as a woman without significantly compromising to the rights, freedoms and safety of other members of the community, particularly natal women.

[1] https://ageofshitlords.com/list-of-all-tumblr-genders-so-far. Retrieved 6 February 2018.

As mentioned previously, however, the idea that gender diversity only exists on a male—female spectrum is already outdated. If legislation is to keep pace with this particular social trend and adhere consistently to the demands of the postmodernist ideology informing modern understandings of "gender identity", it will need to contemplate protection for all "gender identities". This again poses problems for legislation, because many of the popularly-recognised "gender identities" defy definition.

Genders don't have to be genders at all

Some of the 'genders' identified include those that explicitly state they are not entirely genders and are not fully known, even by the person experiencing them. The following examples are drawn directly from Tumblr's list:

Apogender	A subset of agender in which you feel not only genderless, but entirely removed from the concept of gender.
Cassgender	Feeling as if the very concept of gender is unimportant to you.
Exgender	An outright refusal to accept or identify in, on, or around the gender spectrum
Gendercosm	A gender identity encompassing and surpassing the limits of the earth/society, but doesn't incorporate existing genders from society; a gender identity so grand and huge it cannot be explained by words.
Hemigender	Feeling half one gender, and half something else, ex. hemiboy, hemigirl, etc. The "something else" may or may not be known.
Jupitergender	A gender that is so large and present, one is not quite sure what it is because it's too big to see clearly, but it is definitely there and one knows that they're definitely not cis.

One significant problem with the proposal to enshrine protections for a subjective gender identity in law therefore, is the difficulty in defining what a 'gender identity' is and what it is not.

Genders don't have to be fixed

An individual's gender identity may be subject to fluctuation and change. The same postmodernist framework that proposes a subjective identity might be a protectable attribute (as being 'true' for the individual), will also confound any efforts to insist that it must be a fixed property.

Affectugender	A gender affected by mood swings.
Amicagender	A gender that changes depending on which friend you're with at the moment.
Anogender	A gender which fades in and out, but always comes back feeling the same.
Aquarigender	A gender which is fluid between infinite feelings. Sometimes, these feelings may be close to an existing term, and sometimes they are indescribable or abstract.

Some genders are defined by being undefinable

The very task of defining a gender identity may offend against those gender identities that define themselves (in whole or part) by being undefinable. Again, examples abound without even venturing out of 'A' in the whole alphabet of Tumblr genders:

Adamasgender	A gender which refuses to be categorized.
Agender	Having no gender or a lack of gender identity.
Anongender	A gender that is unknown to both yourself and others.
Apconsugender	A gender in which you know what it isn't, but not what it is, sort of like the gender is hiding itself from you.

Atmosgender	Having a gender which is present, but unable to be grasped or firmly defined.
Autogender	A gender experience that feels deeply personal to one's self.

The problem with offering legal protections for subjective, fluid, imperfectly perceived, undefinable and essentially individual gender identities is obvious. Laws need to be defined, intelligible, clear and predicable. Citizens need to be able to understand what the law is and to be able to obey it with certainty. The problem with imposing the requirement that everyone recognize and adhere to postmodernist understandings of "gender identity", particularly where the bar for compliance is set as low as "offend", is inconsistent with the first principles of good law.

Recommendation: That the Territory does not include gender identity as a protected attribute, but that gender diverse people should obviously be protected by the same laws that protect everyone from violence.

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

Proposal

The Act could be amended to include intersex status as a protected attribute.

Comment

The problems that attach to legal protections for a subjective gender identity to not apply to intersex conditions since 'intersex' is an umbrella term used to encompass different disorders of sexual development. The definition of 'intersex' would, however, require careful consideration so that it is available only for those for whom it is intended and to ensure the definition is not expanded to argue for legal recognition of 'a third sex', for example. Intersex conditions are very rare and most individuals who suffer from them identify as either male or female. The existence of intersex conditions is not, as has been claimed, grounds to challenge the binary male/female distinctions between the sexes.

Recommendation: Intersex conditions, narrowly defined in terms of medically-diagnosable disorders of sexual development and where these conditions result in sexual ambiguity that may cause practical problems for the life, work and integration of the individual, may benefit from clarification of the law. These conditions are not grounds for legally defining 'a third sex' or challenging the male/female binary for the population generally.

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

Proposal

The Act could be amended to make it unlawful for a person to do an act, other than in private (for example at home), if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and the act is done because of a characteristic of that person or they are a members of the group on the basis of race, disability, sexual orientation, religious belief, gender identity or intersex status.

To balance these protections, the Act could also be amended by including appropriate exemptions to cover acts done "reasonably and in good faith" to allow for free and fair speech on related topics.

Comment

Vilification provisions of the kind described in the discussion paper are inconsistent with rule of law principles and place a burden on other rights and freedoms. The proposed language, "offend, insult, humiliate, intimidate" includes terms that are not clearly definable in a way that satisfies rule of law principles. The rule of law is a cornerstone principle of law in democracies. Emeritus Professor Geoffrey Walker summarises the rule of law under the following two statements:

1. That the people (including, one should add, the government) should be ruled by the law and obey it;
2. That the law should be such that people will be able (and, one should add, willing) to be guided by it.[2]

Several specific principles are applied in support of this aim. Lord Bingham set out eight such principles. The following two are significant for present purposes:

1. The law must be accessible and, so far as possible, be intelligible, clear and predictable;
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion.[3]

In this context there is a problem with the proposed language of the vilification provisions. For example, it is not possible for a person to know with certainty whether given speech or other conduct will "offend" or "insult." Both terms contain some subjectivity and are understood differently by different people. They also fail to accommodate the reality that discourse around controversial issues is often considered inherently offensive by some people, or is not able to be undertaken in a way that guarantees nobody will feel or otherwise be offended or insulted. The inevitable result of such unpredictable law is that certain controversial subjects will become off-limits altogether. Certainly, views on those subjects which dissent from mainstream opinion will be safer left unsaid. The law will become a weapon for censorship.

Justice Hayne commented in the 2013 case of *Monis v The Queen*:

> *The general law both operates and has developed recognising that human behaviour does not accommodate the regulation, let alone the prohibition, of conduct giving offence. Almost any human interaction carries with it the opportunity for and the risk of giving offence, sometimes serious offence, to another. Sometimes giving offence is deliberate. Often it is thoughtless. Sometimes it is wholly unintended. Any general attempt to preclude one person giving any offence to another would be doomed to fail and, by failing, bring the law into disrepute. Because giving and taking offence can happen in so many different ways and in so many different circumstances, it is not evident that any social advantage is gained by attempting to prevent the giving of offence by one person to another unless some other societal value, such as prevention of violence, is implicated.*[4]

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[2] Geoffrey de Q. Walker, The Rule of Law: Foundation of Constitutional Democracy, (1st Ed., 1988).
[3] Tom Bingham, *The Rule of Law* (Penguin, 2010).
[4] *Monis v The Queen* [2013] HCA 4, at [222] per Hayne J.

The ordinary English meaning of offence alone covers conduct which is vexing, annoying, displeasing, angering, exciting resentment or disgust.[5] As a matter of public policy, therefore, the proposal sets the bar far too low.

This fact is amplified when one considers the important rights against which it ought to be balanced, found in both the common law and international norms. Former New South Wales Supreme Court Chief Justice, James Spigelman, has said:

> *The freedom to offend is an integral component of freedom of speech. There is no right not to be offended… When rights conflict, drawing the line too far in favour of one, degrades the other right.*[6]

Article 19(2) of the ICCPR provides that "everyone shall have the right to freedom of expression". As the United National Human Rights Council has stated:

> *The exercise to the right of freedom of opinion and expression is one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.*[7]

Adopting the same principle of democracy and similar language, the High Court of Australia has articulated its own doctrine of freedom of political communication on the basis of what is *"necessary for the effective operation of that system of representative and responsible government provided for by the Constitution."*[8]

Concerning freedom of speech, Lord Steyn has opined:

> *First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.' Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.*[9]

In relation to limitations on free speech, the UN Special Rapporteur for Freedom of Expression gives the following guidance: "permissible limitations and restrictions must constitute an exception to the

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[5] Chief Justice Robert French AC, 'Giving and Taking Offence - Sir Harry Gibbs Memorial Oration' (Speech delivered at the Samuel Griffith Society, Adelaide, 13 August 2016.)

[6] James Spigelman, '2012 Human Rights Day Oration' (Speech delivered at the Australian Human Rights Commission's 25th Human Rights Award Ceremony, Sydney, 10 December 2012.)

[7] UN Human Rights Council, Resolution 12/16, preamble.

[8] *Lange* (1997) 145 ALR 96, 112

[9] R v Secretary of State for the Home Department; Ex Parte Simms [2002] 2 AC 115, 126 (Lord Steyn).

rule and must be kept to the minimum necessary to pursue the legitimate aim of safeguarding other human rights."[10]

This refers to the obvious principle that human rights cannot be encroached upon other than by competing human rights, where the encroachments are appropriately balanced.

Given that there is no right to not be offended, as noted by Spigelman J above, the proposal represents a serious risk to the fundamental rights and freedoms of Territorians. It may be that, through its enforcement, the Northern Territory government is breaching the rights of its citizens. The section is therefore flawed in its construction and implementation.

Recommendation: Vilification provisions should not be included in the Act.

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

Proposal

A representative complaint model could be introduced that enables organisations to bring complaints about acts of systemic discrimination on behalf of groups who may be limited in their ability to bring an individual complaint. A representative complaint could be lodged without obtaining individual consent of each person who may assist the subject of the complaint.

Comments

A representative complaints model would empower a few activists, or a lobby group, to weaponise the law as a tool of power to serve their own agendas, even if their agendas are inconsistent with the majority of the class of persons for whom they purport to act. A few complainants is all that would be necessary to empower activists and lobbyists in this way. The law could become a political tool, used to serve political ends rather than as a means of remedying the actual injustices experienced by individuals.

Entrenching identity politics in law may work against the interests of individuals due to the risk that their identity will be hijacked by a few activists as a means to achieve a legal victory that makes a political statement.

The discussion paper refers to groups "who may be limited in their ability to bring an individual complaint" but is not clear concerning why that might be so. All persons are equal before the law, and where the Act enables an individual to make a complaint, there is certainly nothing stopping them from doing so. Even issues of literacy and so forth can be overcome by community legal centres and such services.

It would be better to ensure that appropriate legal services are available to communities where relevant disadvantages exist, empowering individuals to make their own complaints when actual

[10] La Rue, F, 2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion, op.cit, para 77.

injustice is suffered. This mitigates against the above risks whilst serving the problem outlined in the discussion paper.

Recommendation: A representative complaint model should not be introduced.

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

Proposal

The Act provides that a club cannot discriminate on any of the prohibited grounds such as race, sex, sexuality, age or marital status. Exemptions are permitted if the club is of a type only suitable to one particular sex, or if it is impracticable for there to be simultaneous enjoyment by club members of a different sex provided different sexes are provided for separately.

The Act defines clubs as ones established for social, literary, cultural, political, sporting, athletic, recreation or community service purposes or any other similar lawful purpose. The definition of club includes an association (either incorporated or unincorporated) with more than 30 members that sells or supplies liquor for consumption on its premises.

The definition of club could be amended to remove the requirement that clubs be limited to those who sell liquor. If this occurs, the Act will be broadened to cover a larger number of clubs and associations.

Comment

The proposal to broaden the definition of clubs could almost entirely undermine freedom of association, which is a fundamental human right which Australia has committed to uphold.[11]

If the definition of clubs is to include more informal and unstructured gatherings or groupings within society, especially those formed around common interests and convictions, then the freedom of association of the individuals within them will be undermined.

Many clubs exist around gender-based, sexuality-based, religious, political and other interests which may be interfered with by over-burdensome discrimination laws. These include those clubs operated by minority groups for the benefit of persons with protected attributes as much as it does those of majority groups.

This is one of many instances in the discussion paper where the problem of over-legislating a single human right (in this case the right to non-discrimination) poses a real threat to the other rights and freedoms of many in the community. Human rights need to be held in balance, with their proper limits properly defined and respected. This applies to discrimination as much as it does rights such as freedom of speech, religion etc.

Recommendation: Broadening the definition of 'club' for the purposes of extending the reach of anti-discrimination legislation would undermine freedom of association. The definition of club should not be amended.

[11] International Covenant on Civil and Political Rights, Article 22.

Question 14: Should any exemptions for religious or cultural bodies be removed

Proposal

The Act could be amended to remove the current exemptions for religious bodies in the areas of religious educational institutions, accommodation under the direction or control of a body established for religious purposes and access to religious sites. Religious or cultural bodies would instead be required to apply for an exemption with the ADC and justify why their service requires a particular exemption.

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

Another exemption that could be removed is section 37A that permits religious schools to discriminate against employees on the grounds of religious beliefs, activity or sexuality if done in good faith to avoid offending the religious sensitivities of people of the particular religion. For example, under this exemption a religious school could justify not employing a prospective employee on the basis that they identify as LGBTI, if the religious doctrine does not support LGBTI relationships.

In the area of accommodation there are two exemptions that could be removed. Section 40(2A) that permits religious educational authorities as accommodation providers to restrict use of the accommodation to people of that religion and section 40(3) that provides an exemption for discrimination if necessary to avoid offending the religious sensitives of people of the religion.

In respect to access to cultural or religious sites section 43 could also be removed. Section 43 permits restricted access to land, building or place of cultural or religious significance on the basis of sex, age, race or religion if it is in line with the religious doctrine or necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion.

Comment

The removal of religious exemptions poses a threat to the freedom of thought, conscience and religion or belief.

Human rights represent a balance of competing interests. When the balance is not respected, some rights are degraded because others are weaponised against them.

Former New South Wales Supreme Court Chief Justice, James Spigelman, has said:

> *When rights conflict, drawing the line too far in favour of one, degrades the other right.*[12]

In approaching the question of where the balance should be struck in relation to two rights such as freedom of religion and the right to non-discrimination, international standards provide significant clarity.

[12] James Spigelman, '2012 Human Rights Day Oration' (Speech delivered at the Australian Human Rights Commission's 25th Human Rights Award Ceremony, Sydney, 10 December 2012.)

Freedom of Religion

Freedom of thought conscience and religion or belief is a fundamental human right. It is one of the only positive rights specifically contained in the Australian Constitution at section 116. A strong and inclusive statement of the right is also made under Article 18 of the International Covenant on Civil and Political Rights (ICCPR) to which Australia is signatory. Article 18 is one of a small collection of non-derogable rights in times of public emergency[13] and limitations upon are only permissible so far as is "necessary."[14] This is a high legal standard that goes beyond thresholds such as "reasonable" or "reasonably necessary," for example.

Freedom of religion in particular has a long history in free democracy and common law. The first clause of Magna Carta was a freedom of religion clause. Australia's own High Court has said:

> *Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society*[15]

Consistent with Article 18 of the ICCPR and section 116 of the Constitution, their honours went on to clarify that the content of the freedom not only extends to belief, but also practise.

> *What a man feels constrained to do or to abstain from doing because of his faith in the supernatural is prima facie within the area of his legal immunity, for his freedom to believe would be impaired by restriction upon conduct to which he engages in giving effect to that belief.* ***The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion than the belief itself.***[16] *(emphasis added).*

The belief and practice elements of religious freedom were recently acknowledged by Redlich J of the Victorian Court of Appeal. His honour also clarified that the right was fundamental to a pluralistic society and was a central tenet of a person's identity:

> *The precepts and standards which a religious adherent accepts as binding in order to give effect to his or her beliefs are as much a part of their religion as the belief itself. The obligation of a person to give effect to religious principles in everyday life is derived from their overarching personal responsibility to act in obedience to the Divine's will as it is reflected in those principles. Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity. The person must, within the limits prescribed by the exemptions, be free to give effect to that faith.*[17]

It is important to note that the freedom of thought, conscience and religion or belief is not merely a right to believe. If that position is accepted, then it is no right at all. Governments cannot regulate to control the secret, internal thoughts and beliefs of any citizen, but only manifestations of those beliefs.

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[13] Clause 2, Article 4 ICCPR.
[14] Clause 3, Article 18 ICCPR.
[15] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at [6] per Mason CJ & Brennan J.
[16] Ibid.
[17] *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 at [561].

That is why the history of this freedom bears out the reality that it is a right not merely to belief, but to practise. The ICCPR is clear:

> *This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.*[18]

Clause 4 of the Article goes on to extend the right to parents to ensure the moral and religious education of their children in accordance with their own convictions.

An important characteristic of religious freedom is its fundamental nature. It is often said that freedom of thought, conscience and religion or belief is the most fundamental freedom of all. This is reflected in the primacy given to religious freedom as the right protected by the First Amendment in the US Constitution and one of the only rights positively granted by the Australian Constitution.

All of the democratic freedoms, including speech, expression and association, depend on freedom of thought, conscience and religion or belief. When a citizen is free to speak, they speak their beliefs and convictions. When free to express, they live out their convictions in practice. When free to associate, they form official and unofficial groups around common causes borne out of their beliefs and convictions. Freedom of thought, conscience and religion or belief is therefore most fundamental. To revive the words of Mason CJ and Brennan J, it is for this reason *"the essence of a free society."*

Freedom of religion also has a limiting effect on the power of governments, guarding against instincts of totalitarianism, censorship and control. If citizens are free to locate their beliefs and convictions outside of the state itself and give effect to them, then the state concedes that certain things lie outside of its jurisdiction. This paradigm guarantees freedom and promotes the autonomy, self-determination and flourishing of the people which has long been a treasured and relatively unique feature of Western-style democracy.

Finally, freedom of religion, like all human rights, is held by every individual. It does not accrue to a person by virtue of their holding office as clergy or some other religious role. It is not dependent on a person's attachment to an institution, whether a church, mosque or temple. It is a human right that goes to the core of every person's identity; the realm of belief and conscience. If freedom of religion is the essence of a free society, it is also the essence of individual freedom. The realm of the mind, its convictions and conscience is one into which no State authority should treat lightly.

Non-Discrimination

The right to non-discrimination and equality before the law is a right to protection from unjust discrimination. Unjust discrimination is a differentiation of treatment having its basis in a wholly arbitrary, subjective or unreasonable justification.

The United Nations Human Rights Committee, in General Comment 18 on Article 26 of the ICCPR (the non-discrimination article), has said:

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[18] Clause 1, Article 18 ICCPR.

> *…the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.*

The reasonable and objective criteria test is often enlivened where legal rights or immunities apply to a particular category of person. For example, the criteria to be an aged-pension recipient ought only to be a person's age. It is not unjust discrimination to exclude a 64-year old from aged pension entitlements on the basis that they are too young to qualify because the relevant criteria for the differentiation of treatment is age and the relevant benefit is an aged pension. If, however, the criteria were to be expanded so as to limit the aged pension to persons who are over the age of 65, are not lesbians and are not of Chinese descent, then two of the three criteria are unjustly discriminatory. This is because neither Chinese descent nor a lesbian sexuality can have any conceivable relevance to the criteria for receiving an aged pension. The criteria are arbitrary.

The legitimate purpose criteria is often enlivened where rights may be perceived to clash. For example, the criteria that a person employed by a political party be a member of that party may appear to limit equal opportunity for employment candidates, infringing their right to non-discrimination. The legitimate purpose test applies in such a case, however, because the political party in question is pursuing its own right to freedom of association. Such norms are widely understood and legislated for.

The proposal

Some effort has been made in the current Anti-Discrimination Act to acknowledge that freedom of religion must be balanced against the right to non-discrimination. This is reflected in the adoption of exemptions for religious organisations and religious schools, which particularly focus on freedom of religion in its associational (as opposed to individual) expression.

The exemptions are highly inadequate. An exemption-based approach has been criticised often, but perhaps most notably in the Australian Law Reform Commission's Freedom's Inquiry (ALRC Report Number 129), which recommended that consideration be given to an alternative model known as a "general limitations clause." The Report also notes that this is not a new idea, having been recommended before.

To remove the exemptions altogether would make the problem worse by altogether ignoring the right to freedom of religion, even in its associational expression.

A religious school exists to ensure the that the education of children is undertaken in a particular moral and religious framework. The right of parents to have this option is captured by Article 18(4) of the ICCPR.

If a school or religious organisation is to maintain its faith-based character, it is reasonable to expect that its personnel should be required to uphold it. An analogous example is the discrimination by political parties by employing staff who share their political beliefs or are not members of rival parties. The religion criteria (or, in the case of the example, the political criteria) is not unreasonable or arbitrary. It is reasonable an objective in light of the context.

Further, religious freedom is a legitimate purpose against which the right to non-discrimination ought to be balanced. The protection of religious freedom is necessary to comply with international standards and including some protection in the Act is appropriate in acknowledging the presence of competing rights.

Recommendation: Exemptions for religious and cultural bodies should not be removed.

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

Proposal

The Act prohibits discrimination from occurring in the provision of services. ART is a service that is specifically exempted in the Act. This means that providers of ART services in the NT are permitted to discriminate against people on the basis of sex, gender identity or marital status.

The Act could be amended to remove the current exemption that the provision of a service does not include the carrying out of an artificial fertilisation procedure.

Comment

The wording of the proposal seems to suggest that "discrimination" is not justified in deciding who should and who should not have access to assisted reproductive technology (ART). To approach such an ethically complex subject with the blunt instrument of anti-discrimination law demonstrates a remarkable lack of sensitivity to the bioethical concerns involved. ART is highly regulated precisely because it involves the creation of a human being, a child. To propose that ART should be considered "a service", covered by the same prohibitions against discrimination as the provision of any other service is to propose that the creation of a child should be subject to marketplace principles of fairness, as though children were any other commodity and ART was simply a commercial service. Everyone adult has the right to expect equitable access to services, but no one who cannot conceive a child through natural processes has the right to claim the State is guilty of discrimination in not filling the gap left by nature: no one has the right to demand that the State provide them with the means to get a child.

The State's obligation to ensure the welfare of children is rightly far more burdensome than such notional claims of 'discrimination', which subsists through biological, not regulatory, impediments. Where adoption is concerned, for example, the State's responsibility to consider the best interests of the child as paramount far outweighs the idea that adoptive children should be distributed "equitably" between different identity groups. In the same way, the best interests of the child are the paramount concern in the provision of ART. Where access to ART is made available at all, it needs to be made available with the same careful consideration given to the welfare of the child thus created as would apply in cases of adoption.

The use of ART for non-infertile single adults, adults living in same-sex couples or same-sex polyamorous groupings, is particularly concerning because it prioritises the desires of adults to have children over the multiple implications of this arrangement for the child. ART enables children to be conceived who have no genetic relationship to one or both of their parents and who will never have a social relationship with one or both of their genetic parents. It fragments the traditional nuclear family, disconnecting genetic, gestational and social child-parent relationships, which have typically been one and the same.[19] The rights of the children conceived in this way to grow up knowing the love

[19] "Reproductive Technology", Adelaide Centre for Bioethics and Culture. Available at: http://www.bioethics.org.au/Resources/Resource%20Topics/Reproductive%20Technology.html

and protection of their mother and father – an arrangement that children should ideally be able to take for granted – is entirely disregarded.

Recommendation: That ART should not be regarded in the same way as the provision of other commercial services. Differential treatment which prioritises the best interests of the child is entirely justified in regulating access to ART.

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

Proposal

The definition of "work" could be amended to clarify that it includes a "volunteer", shared workplaces and anything akin to a work arrangement … Volunteers give their time freely and should not be subjected to discrimination.

Comment

Changes to the legal framework around volunteer work would need to be carefully worded in order to ensure that 'employers' of volunteer services were not open to claims of discrimination if they refuse to 'employ' individuals who may volunteer or if they dismiss existing volunteers. For example, faith-based groups may choose to limit their volunteer base to include only those who share their faith. Political parties should not be obliged to accept the volunteer services of someone they know adheres to contrary political viewpoints.

Recommendation: Changes in this area need to have proper regard for the preservation of the rights and freedoms of those who may be considered 'employers' or volunteer services. The rights of volunteers to be free from discrimination should not be prioritised over the internationally recognised human rights to freedom of speech, association and religion.

Question 17: Should section 24 be amended to clarify that it imposes a positive obligation?

Proposal

Section 24(1) of the Act provides that "A person shall not fail or refuse to accommodate a special need that another person has because of an attribute." Whether a person has unreasonably failed to provide for a special need depends on the relevant circumstances of the case including but not limited to:

- *the nature of the special need;*
- *the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;*
- *the disruption that accommodating the special need may cause;*
- *the nature of any benefit or detriment to all persons concerned.*

Section 24 creates a positive duty on the employer, service provider, educator and accommodator etcetera. The wording of the section should be amended to clearly articulate this.

A clear statement of this kind encourages a proactive response to equal opportunity rather than a reactive response. It means the starting point is that the accommodation is required unless there are reasonable grounds upon which to not make the accommodation. It will mean that action taken is not limited to complaints made to the ADC.

Comment

The list of 'attributes' which the *Discussion Paper* proposes to protect is significant. The understanding of 'special needs' that attach to these protected attributes, though broad-ranging, is declared by the document itself not to be exhaustive. The proposal therefore appears to anticipate imposing positive obligations on service providers, educators and those working in the hospitality industry to predict and cater for a range of unspecified special needs in order to avoid falling foul of anti-discrimination laws.

Again this fails the principles of good law, enumerated above. Laws need to be defined, intelligible, clear, unambiguous and predicable. Citizens need to be able to understand what the law is and to be able to obey it with certainty. The effect of the creation of positive obligations in this way creates an impossible burden on service providers, who would need to demonstrate they had reasonable grounds for failing to provide for unspecified and possibly unanticipated special needs.

Recommendation: Section 24 should not be redrafted to impose positive obligations on service providers.

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

Proposal

The Act could be amended by repealing the definitions of "man" and "woman". …

Repealing the definitions will allow for the ordinary meaning of "man" and "woman" to be applied to the Act. This is a flexible way of allowing the Act to accommodate a changing society ***as the ordinary meaning*** *will naturally incorporate those changes.*

Comments

It is most unclear what the writer of the discussion paper intends to communicate by using the phrase "the ordinary meaning of 'man' and 'woman'". Most Territorians would consider the "ordinary" meaning of man (as a member of the male sex) and woman (as a member of the female sex) was currently enshrined in the Act. So the proposal to repeal these definitions in order to allow the "ordinary meaning" to "naturally incorporate" new understandings of these matters assumes 1) that "society" is changing in the ways supposed, 2) that there is widespread agreement that man and woman now have new meanings and 3) that these new understandings will be 'naturally' apparent to the populace. ACL suggests than none of these assumptions is justified.

The proposal to enshrine in law the postmodernist view that biology is irrelevant to identity and that sexual orientation and a subjective gender identity are the only significant aspects of the human person, panders to a transitory fashion which stands in marked contrast to understandings of the human person as embodied and either male or female, that has existed for millennia. The *Discussion Paper* appears to suggest that anything other than gender neutral language is now to be regarded as "offensive". This is particularly of concern since the same *Discussion Paper* proposes that "offense" should be sufficient to trigger the proposed protections against "vilification". If these recommendations are enacted as the *Discussion Paper* proposes, it becomes possible for anyone who recognises and adhers to "traditional notions" of the human person as embodied and either male or female, to fall foul of laws which impose a new normal by dint of legislation, punishing any who dare to disagree or fail to comply with government-imposed language- and thought-cleansing policies.

This may cause concern for every ordinary citizen who values basic democratic freedoms but it poses particular problems for faith-based groups and cultures (most importantly, indigenous cultures) which

adhere to the disparaged, "offensive" traditional "notions" that a man is someone with a male body and a woman is someone with a female body. The removal of the definition of "man" and "woman," which currently links the meaning to biological sex would cement in law the ideology that "gender is a social construct" and weaponize political movements that are openly hostile to diversity of opinion or belief.

Recommendation: The definitions of 'man' and 'woman' should not be repealed.

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

Proposal

The Act currently protects discrimination experienced because of parenthood which is defined as "whether or not a person is a parent" and includes a step-parent, adoptive parent, foster parent, guardian and a person who provides care, nurturing and support to a child. While the definition is quite broad, it fails to take into account that many people have caring relationships outside this paradigm that impacts on their ability to participate equally in life. Examples include caring for a spouse or parent. Carers perform an important role for the community and it is important that they are protected under the Act.

Comment

Given the clear direction of these recommendations toward diminishing the family, fragmenting parent-child bonds and blurring distinctions of gender and sex, the ACL is reluctant to agree with any changes that would decrease recognition of the particular importance that applies to parenthood. This is not incompatible with the recognition that not all forms of carer responsibility take this form and that all types of carer should be protected from discrimination. It would seem sensible to include references to both "carer responsibilities" and "parenthood".

Recommendation: Do not delete parthood but include both "parenthood" and "carer responsibilities" in the Act.