

12 August 2022

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

**BY E-MAIL:** Policy.AGD@nt.gov.au

Dear Sir/Madam,

**DISCRIMINATION LAW REFORM – EXPOSURE DRAFT ANTI-DISCRIMINATION AMENDMENT BILL**

We refer to the NT Government's invitation for submissions in response to the Exposure Draft Anti-Discrimination Amendment Bill. HRLA welcomes the opportunity to provide submissions.

HRLA is Australia's only religious freedom law firm specialising in the areas of freedom of thought, speech and conscience. We regularly have carriage of matters in all States and Territories under Anti-Discrimination and Equal Opportunity Acts and legislation equivalent to the *Anti-Discrimination Act*.

We enclose our submission with this letter. We are happy to appear for any oral hearing to speak to our submission.

Yours sincerely,



John Steenhof  
Principal Lawyer

# Human Rights Law Alliance Submission on the Exposure Draft Anti-Discrimination Amendment Bill

## Summary Submission

1. HRLA does not support the amendments in the Exposure Draft Anti-Discrimination Amendment Bill (**Bill**) that amends the *Anti-Discrimination Act 1992* (NT) (**Act**). The Bill should be abandoned as it unjustifiably interferes with fundamental rights of religious freedom, freedoms of speech and association and privacy rights.
2. The proposed amendments in the Bill are inconsistent with Australia's commitments to human rights in the *International Covenant on Civil and Political Rights (ICCPR)*, ratified by Australia in 1980.<sup>1</sup>
3. The Bill fails to uphold fundamental rights and freedoms in the following ways:
  - 3.1. The Bill undermines the integrity of religious schooling and fails to protect parents' fundamental rights to educate their children in accordance with their religious beliefs.
  - 3.2. The Bill introduces harmful new hate-speech laws that will be easily weaponised by activists
  - 3.3. Courts are given jurisdiction to unjustifiably interfere in church practice and religious worship. This turns judges into theologians.
  - 3.4. The introduction of positive duties will arm the NT Anti-Discrimination Commission with activist powers that unjustifiably constrain religious freedom.
  - 3.5. The Bill implements incoherent ideology by erasing sex as a meaningful category.
  - 3.6. The Bill implements incoherent ideology by introducing a controversial new kind of institutional "systemic discrimination".
  - 3.7. The Bill exposes religious schools, churches and charities to strategic discrimination legal action in a way that is completely unjustifiable and unneeded.
  - 3.8. The Bill interferes with personal rights of privacy when procuring goods and services.
4. We expand on these flaws in our detailed submissions below.

## Detailed Submissions

### Removing Protections for Religious Schools

5. HRLA opposes the removal of crucial religious freedom protections for religious schools. Rather than removing protections, the Bill should include positive protections that allow Christian schools to operate in accordance with their doctrines, tenets and beliefs in accordance with parental rights under ICCPR Article 18.

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<sup>1</sup>*International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

6. The current Act provides limited protections for religious schools to conduct their affairs in accordance with their doctrines, tenets and beliefs. Section 30(2) allows religious schools to limit enrolments to only include children who share the religious beliefs of the school:

**30 Exemptions**

- (2) An educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion may exclude applicants who are not of that religion.

7. Section 37A allows religious schools to ensure that staff model and uphold the school's theology and doctrine with regard to sexual behaviour:

**37A Exemption – religious educational institutions**

An educational authority that operates or proposes to operate an educational institution in accordance with the doctrine of a particular religion may discriminate against a person in the area of work in the institution if the discrimination:

- (a) is on the grounds of:
  - (i) religious belief or activity; or
  - (ii) sexuality; and
- (b) is in good faith to avoid offending the religious sensitivities of people of the particular religion.

8. Clause 16 of the Bill removes subsection 30(2) from the Act, and clause 17 removes subsection 37A(a)(ii). The effect of removing these crucial protections is that religious schools will not be able to ensure that students who share the religious ethos of the school are given priority enrolment. A religious school also will not be able to ensure that school staff will uphold the doctrines, tenets and beliefs of the school. The removal of these sections is completely unacceptable and undermines the fundamental human rights of parents and religious schools.
9. International human rights case law supports the objective of religious schools to promote their institutional religious ethos through making employment decisions and other organisational decisions that accord with the doctrines, tenets and beliefs of the school.<sup>2</sup>
10. The removal of crucial protections for religious freedoms for religious schools shows a lack of understanding concerning the scope of protection for freedom of religion, including the fact that article 18, which enshrines it, is non-derogable in its entirety, a privilege shared with very few other ICCPR rights, among them the right to life, freedom from torture and freedom from slavery.<sup>3</sup>

<sup>2</sup> Fernández Martínez v Spain, App. No. 56030/07, [2014] ECHR 615, [137]; Travaš v. Croatia, App.No. 75581/13, Judgment of 4 October 2016 [106], [112]; Nicholas Aroney and Paul Taylor, "The Politics of Freedom of Religion in Australia: Can International Human Rights Standards Point The Way Forward? (January 2020) Vol47:42 *University of Western Australia Law Review* 42, 58-59

<sup>3</sup> American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International covenant on Civil and Political Rights* (April 1985) <<https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>>, last accessed 18 January 2022, 12

11. The *International Covenant on Civil and Political Rights* states that parents should be able to ensure the religious and moral education of their child:

**Article 18**

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

12. The UN Human Rights Committee's General Comment 22, which provides clear guidance on the protection to be guaranteed by article 18, has recognised that the human right of parents to ensure religious and moral education of their children cannot be limited in any way.<sup>4</sup>
13. Comment 22 also deals with the practice and teaching of religion or belief more generally, confirming that it "includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or *religious schools* and the freedom to prepare and distribute religious texts or publications."<sup>5</sup>
14. Parental rights to educate their children at religious schools that reflect the religious conviction of those parents must therefore be protected. The protections that currently exist in sections 30 and 37A are minimal in allowing religious bodies to make hiring and governance decisions that accord with their doctrines, tenets and beliefs and should not only be retained but enhanced to bring them into line with international law.
15. In the area of sexuality the Act must not be amended in such a way as to produce inconsistency that engages s.109 of the Commonwealth Constitution.<sup>6</sup> The protections available for religious schools in section 38 of the Commonwealth *Sex Discrimination Act 1984*<sup>7</sup> are necessary to enable them to continue to provide an education that reflects the religious mission and identity that parents have specifically chosen for their children.
16. They ensure that religious schools can make employment decisions<sup>8</sup>, contract worker decisions<sup>9</sup> and student enrolment and discipline decisions<sup>10</sup> that are in line with the doctrines, tenets and beliefs of the school free from the possibility of a discrimination claim under the *Sex Discrimination Act*. This rightly recognises that when a religious school exercises its rights to religious freedom it is *prima facie* not unlawfully discriminating.

**Recommendations**

17. Subsection 30(2) and 37A(a)(ii) should be retained in the Act and more positive protections that strengthen and broaden the protections for religious schools should be introduced

<sup>4</sup> UN Human Rights Committee (HRC), *CCPR General Comment No.22: The right to freedom of thought, conscience and religion (Art. 18)*, CCPR/C/21/Rev.1/Add.4 (30 July 1993) (General Comment 22), [8].

<sup>5</sup> General Comment 22, [8].

<sup>6</sup> Commonwealth Constitution s. 109: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".

<sup>7</sup> *Sex Discrimination Act 1984* (Cth), s 38(3).

<sup>8</sup> *Sex Discrimination Act 1984* (Cth), s 38(1).

<sup>9</sup> *Sex Discrimination Act 1984* (Cth), s 38(2).

<sup>10</sup> *Sex Discrimination Act 1984* (Cth), s 38(3).

18. Positive protections would properly reflect that religious schools do not discriminate at all, according to the threshold that exists under the ICCPR, when they conduct their affairs in accordance with their doctrines, tenets and beliefs, but are exercising a fundamental human right. That threshold is expressed in the principle 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.”<sup>11</sup>

### **“Offence” Based Vilification laws**

19. HRLA strongly opposes the introduction of new “offence”-based hate speech laws into the Act.
20. The Bill introduces vilification provisions in clause 11 that seem to be closely modelled on the controversial hate-speech provisions in the Tasmanian *Anti-Discrimination Act 1998*.<sup>12</sup> During the Same-Sex Marriage campaign in 2017 a transgender activist used these provisions to stop Catholic Archbishop Julian Porteous circulating a pamphlet merely expressing Catholic doctrine and teaching on marriage to members of the Catholic church. The law should never be used to suppress religious speech and viewpoint diversity on important public issues. Archbishop Porteous was under threat of anti-discrimination proceedings, which should never have been initiated, until the complaint against him was dropped. Tasmanians still live under the threat and uncertainty of those provisions, which is highly objectionable.
21. The suggested new vilification provisions frustrate free speech by setting a low bar for complainants to prove that someone has engaged in “offensive behaviour”:

#### **20A Offensive behaviour because of attribute**

- (1) A person must do an act that:
- (a) is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
  - (b) is done because of an attribute of the other person or some or all of the people in the group.
22. It is sufficient for liability merely to show that a person’s behaviour is reasonably likely to offend a hypothetical person or group of people.<sup>13</sup> This falls woefully short of the international standard set by ICCPR article 18.3 for limiting the freedom to express religion or belief, or for limiting freedom of expression under ICCPR article 19.3. HRLA would invite special attention to the following excerpts from the Human Rights Committee’s general comment 22 (on article 18.3), and general comment 34 (on freedom of expression), in conjunction with our italicised annotations where relevant to the text.

#### **General Comment 22 (article 18)**

8. Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others... Limitations imposed must be established by law and must not be applied

<sup>11</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989 [13].

<sup>12</sup> *Anti-Discrimination Act 1998* (TAS), s17.

<sup>13</sup> Exposure Draft Anti-Discrimination Amendment Bill, cl11.

in a manner that would vitiate the rights guaranteed in article 18...paragraph 3 of article 18 is to be strictly interpreted:.. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.

#### General Comment 34 (article 19)

23. States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression...Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression...be compatible with article 19. *[Bishop Porteous, and Katrina Tait (discussed below), were targeted by activists for exercising their freedom of expression, enabled by anti-vilification legislation, in the case of Bishop Porteous similar to that now proposed.]*
  25. For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public...Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not. *[The Tasmanian legislation did not, and still does not, satisfy this criterion for the law. “Reasonably likely to offend [or] insult” now proposed for section 20A render the application of the law especially unclear.]*
  26. Laws restricting the rights enumerated in article 19, paragraph 2...must not only comply with the strict requirements of article 19, paragraph 3 of the Covenant but must also themselves be compatible with the provisions, aims and objectives of the Covenant. Laws must not violate the non-discrimination provisions of the Covenant. *[Laws which enable complaints to be filed, and proceedings pursued, against individuals like Bishop Porteous, because of dislike for his message, are capable of discriminatory misuse by activists, contrary to the aims of the Covenant.]*
  34. Restrictions must not be overbroad...“restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law”. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain. *[The text proposed for section 20A is overbroad against this and any common-sense standard.]*
  35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat. *[What is the threat which justifies restriction in the case illustrations provided here?].*
23. In short, the proposed wording for section 20A is contrary to the above standards of limitation under the ICCPR.
  24. Existing criminal and defamation laws provide suitable protection against speech that causes harm and reputational damage. These existing laws deal with *real*, demonstrable and quantifiable damage suffered.

25. Vilification laws set a low bar for successful complaints and do not target demonstrable wrong, but allow hypothetical and subjective harms to be asserted by those claiming to be aggrieved. Key flaws include:
- 25.1. The standard is low and lacks precision and clarity – based on “insult” or “offence”. It is salutary to reflect on what the ALRC reported in its Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges:
    - 4.8 The ALRC has not established whether s 18C of the RDA has, in practice, caused unjustifiable interferences with freedom of speech. However, it appears that pt IIA of the RDA, of which s 18C forms a part, would benefit from more thorough review in relation to freedom of speech.
    - 4.9 In particular, there are arguments that s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to ‘offend’. In some respects, the provision is broader than is required under international law to prohibit the advocacy of racial hatred, broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.<sup>14</sup>
  - 25.2. Intent to vilify is irrelevant – a person could unwittingly vilify someone and face penalty;
  - 25.3. The exemption in section 20B is narrow, adding to the unwarranted exclusion zone around legitimate free speech;
  - 25.4. Harm is irrelevant – a complainant can bring a complaint regardless of whether a person has actually been incited to ridiculed by the conduct;
  - 25.5. Remoteness is irrelevant – a complainant, as a person aggrieved by prohibited conduct, does not need to show a causal link between themselves and the act of alleged vilification; and
  - 25.6. Truth is irrelevant – if a person makes a true statement, that is no defence to a claim of vilification.

#### **Case Study: Katrina Tait – Threatened by Activists**



Katrina Tait is a professional photographer who lives in Queensland. Katrina signed an online petition promoted by the Australian Christian Lobby that opposed ‘Drag Queen Story Time’ in local Brisbane public libraries.

A NSW LGBT activist saw her post and connected it to Katrina’s photography business. The activist personally contacted Katrina by e-mail and threatened to make a homosexual vilification complaint under NSW laws even though Katrina lived in Queensland.

Katrina was initially distraught at the threatening messages she received. She was particularly disturbed by the fact that one of the e-mails contained a picture of her daughter. Katrina was very worried about her family’s safety.

<sup>14</sup> ALRC Report 129, p.79.

Katrina did not hear anything more until she received an e-mail from the NSW Anti-Discrimination Board a couple of months later enclosing a complaint from the activist. Rather than immediately dismiss what was obviously a worthless complaint, the Board accepted the complaint and had decided to investigate.

Thankfully, with HRLA's efforts and the increasing media attention on Katrina's story, the activist withdrew the complaint and the NSW Board had to drop their investigation.

The Board could have immediately dismissed the complaint for a variety of reasons:

- the complainant is a serial complainant known for bringing trivial and vexatious complaints;
- Katrina lives in Queensland not New South Wales and is not subject to their laws;
- Katrina was posting from Queensland on a local Brisbane issue that has no connection with NSW;
- Katrina made no reference to homosexuals in the post, only to adult entertainers; and
- Katrina had no connection to the complainant – there was no way he would be personally affected by her post.

Vilification laws present a low bar for complainants to abuse the complaints process and create a drain on the justice system's resources.

### **Recommendations**

26. The new offensive behaviour provisions in proposed section 20A should be removed from the Bill.

### **Interference in Religious Worship**

27. HRLA opposes the interference in religious worship which results from further limiting of protections for religious bodies.
28. The Bill significantly narrows protections for religious bodies when they act in accordance with their doctrines, tenets and beliefs. The current Act protects religious bodies when appointing



and training religious leaders and when engaging in worship or any other kind of religious observance:

**51 Religious bodies**

This Act does not apply in relation to:

- (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
- (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
- (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or
- (d) an act by a body established for religious purposes if the act is done as part of any religious observance or practice.

29. That protection is significantly narrowed by Clause 24 of the Bill through the amendments it makes to section 51:

**51 Religious bodies**

- (d) an act by a body established for religious purposes if the act:
  - (i) is done to conform to the doctrines, tenets, beliefs or teachings of the religion; and
  - (ii) is necessary to avoid offending the religious sensitivities of adherents of the religion.

30. Under this change a religious body will now have to prove to a tribunal or court that its religious decisions conform to its doctrines, tenets and beliefs. This is completely out of step with international human rights standards. General Comment 22 states that “Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms “belief” and “religion” are to be broadly construed. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts.”<sup>15</sup> It is inappropriate to condition the right to manifest religion or belief in institutional form upon such proof. The burden of proving any restriction on the freedom rests with the State.
31. In addition, such a requirement is at odds with Australian judicial doctrine on the competence of courts to decide issues of theology. Multiple Commonwealth Common Law courts have recognised that questions of theology are for theologians and not for judges to decide.<sup>16</sup>
32. This limitation on the free exercise of religious belief is also contrary to recommendations made by the Ruddock Religious Freedom Review.

<sup>15</sup> General Comment 22, [2], [4].

<sup>16</sup> *Church of the New Faith v Commissioner for Payroll Tax (Vic)* [1983] HCA 40, [14]; Neil Foster, “Respecting the Dignity of religious organisations: Courts deciding theology?” (2020) 47(175) *University of Western Australia Law Review* 175.

33. The Ruddock Review recommended that drafting of any limitation on religious activity in State or Territory law should have regard to the *Siracusa Principles*:<sup>17</sup>

### Recommendation 2

Commonwealth, State and Territory governments should have regard to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* when drafting laws that would limit the right to freedom of religion.

34. The international standard for the limitation of religious activity set out in the *Siracusa Principles* is that of *necessity* in exceptional circumstances, similar to the principles outlined above from General Comments 22 and 34. The terms of General Comment 22 are directly relevant as they apply to ICCPR article 18. Section 51(d) reverses the conventional position where the State must justify restrictions it imposes on freedom of religion to the standard of necessity. Section 51(d) requires a religious body to prove that “an act by a body established for religious purposes if the act is done to conform to the doctrines, tenets, beliefs or teachings of the religion; and is necessary to avoid offending the religious sensitivities of adherents of the religion.” The limitation in proposed section 51(d) therefore seriously undermines the Article 18 ICCPR rights of religious bodies.

### Recommendation

35. Clause 24 of the Bill should be rejected.

### Positive Duties not to Discriminate

36. HRLA opposes the introduction of positive duties not to discriminate into the Act that fail to recognise that the religious exemptions from the prohibitions against discrimination embody key fundamental rights, which already suffer from misconstruction by being expressed in negative form. The meaning of discrimination in the Act significantly diverges from discrimination under the ICCPR already mentioned. Under section 20 of the Act,
- (2) ...discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had:
    - (a) an attribute; or
    - (b) a characteristic imputed to appertain to an attribute; or
    - (c) a characteristic imputed to appertain generally to persons with an attribute, less favourably than a person who has not, or is believed not to have, such an attribute.
- 36.1. This definition does not admit “differentiation of treatment [where] 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 result is to accentuate the imbalance that already exists in the Act against proper recognition of freedom of religion. Positive duties are amorphous and difficult to define. They impose a disproportionate burden on

<sup>17</sup> Department of Prime Minister and Cabinet, *Expert Panel Report: Religious Freedom Review* (May 2018), 1.

the freedoms of thought, speech, expression, and privacy that give discrimination an outsized footprint in law.

- 36.2. A positive duty imposed on private and public religious institutions could be used to force religious bodies to act contrary to their deeply held religious beliefs; and
  - 36.3. The proposed regulatory powers to be given to the NT Anti-Discrimination Commission that would accompany positive duties should not be expanded, but rather reformed to reflect the recommendations made by the Commonwealth Parliamentary Joint Committee on Human Rights in *Freedom of Speech in Australia*.<sup>18</sup> These recommended changes had bi-partisan support.
37. Clause 9 of the Bill introduces a new part that imposes positive duties to take steps to eliminate discrimination, sexual harassment and victimisation:
- 18B      Duty to eliminate discrimination, sexual harassment or victimisation**
- (1) This section applies to a person who is prohibited under Part 3 or 4 from engaging in discrimination, sexual harassment or victimisation.
  - (2) A person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation to the greatest extent possible.
38. Clause 14 also amends section 24 to impose a duty to accommodate “special needs” that someone has because of an attribute:
- 24            Duty to accommodate special need**
- (1) A person must accommodate a special need that another person has because of an attribute.
  - (2) For subsection(1):
    - (a) accommodation of a special need of another person means making adequate or appropriate provision to accommodate the special need; and
    - (b) accommodation of a special need takes places when a person acts in a way that reasonably provides for the special need of another person who has the special need because of an attribute.
39. The positive duties imposed by the new Part 2 and section 24 will force religious bodies to undertake affirmative action in the promotion of ideologies and causes that are in conflict with their fundamental beliefs on issues of sexuality and gender identity.
40. A broad obligation to eliminate discrimination is a blunt instrument. If not contained within suitable parameters which recognise the extent to which all relevant rights are engaged, it would be fundamentally inconsistent with Articles 17 (right to privacy), 18 (right to freedom of religion, thought, speech, and conscience), 19 (freedom of expression), 22 (association), and 33 (family) of the ICCPR. Article 18 rights of religious bodies and individuals will be

<sup>18</sup> Parliament of Australia, *Freedom of Speech in Australia* (28 February 2017), <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights\\_inquiries/FreedomspeechAustralia/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Report)> last accessed 19 October 2021.

undermined by introducing much lower standards of limitation of religious belief and activity than those in the ICCPR.

41. Furthermore, and even more troubling, are the proposed powers to be given to the NT Anti-Discrimination Commission. The proposed section 18C gives the Commissioner power to do anything he thinks fit after conducting an investigation.<sup>19</sup> Such powers have no place in Australian law in accordance with international human rights obligations.

### **Recommendations**

42. The proposed duties in Part 2 and amended section 24 should not be introduced.
43. If positive duties are introduced, they should be accompanied by balancing provisions that protect ICCPR rights.
44. The NT Anti-Discrimination Commission should not receive expanded powers of investigation and oversight. Rather, the Commission should have its powers reformed in line with suggestions made by the Parliamentary Joint Committee:
- 44.1. Requiring that the complainant lose their lodgement fee if it is ultimately decided that the complaint does not have substance;
- 44.2. Setting a higher standard for the substance of a complaint – it must include sufficient evidence of unlawful discriminatory conduct;
- 44.3. Requiring the Commission to bundle multiple complaints into one proceeding where the complainant lodges multiple complaints against the same respondent, and to require the Commission to decline complaints that are of the same substance and subject matter as earlier complaints from the same complainant;

### **Erasure of sex-based language in the Bill**

45. HRLA strongly opposes the introduction of controversial gender-fluid ideology into the language of the Act. This will be a triumph of ideology over reality, entrenching an ideological viewpoint into the Bill which will prejudice religious freedom in the NT.
46. The Bill erases sex as a meaningful definitional category. It does this, for example, by erasing the binary sex distinction in section 54, which deals with protections for pregnant women.<sup>20</sup> This implies that there are not only two sexes, but that sex exists on a continuum. The erasure of men and women from this section implies that pregnancy is not a solely female experience.
47. This change of language in the Bill is completely inappropriate. Not only does it frustrate clear language and therefore efficient and effective operation of the law, but it inherently prejudices Australians who cannot affirm controversial gender-fluid ideology.
48. The reality of binary sexes has also been erased from the protections for Sport in section 56. This is inappropriate. Discrimination laws should not extend to sports. Sporting bodies should

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<sup>19</sup> Exposure Draft Anti-Discrimination Amendment Bill, cl9.

<sup>20</sup> Exposure Draft Anti-Discrimination Amendment Bill, cl 25.

not have the threat of potential litigation hanging over their heads when determining their own rules, procedures, and sporting divisions.

49. This extension of discrimination law to sports is a triumph of ideology over common sense. It will hinder single-sex sports, especially for women. The erasure of sex in sport implies that the only reason that girls should play with girls and boys play with boys is to ensure parity of physical ability.

### **Recommendation**

50. The Bill should not include incoherent amendments that erase sex.

### **New Definition of “Systemic Discrimination”**

51. HRLA opposes the introduction of a new type of discrimination called “systemic discrimination” in the Act. This new type of discrimination is open to ideological abuse by activists against religious organisations that hold to doctrine and beliefs that do not accord with gender-fluid ideology.
52. The Bill introduces this new kind of discrimination in clause 5:
- systemic discrimination* means behaviour, practices, policies or programs of an organisation that have the effect of creating or perpetuating disadvantage for a group that shares a protected attribute.
53. This new definition is completely unnecessary, and the way in which this new definition is incorporated in the Act makes its impact on the overall operation of NT discrimination law unclear. It would effectively supplant the already narrow religious exemptions.
54. Section 20 has not been amended to include “systemic discrimination” within the definition of discrimination in the Act. The result is that it remains unclear whether “systemic discrimination” is a kind of discrimination prohibited in all the areas such as accommodation and goods and services under Part 4, or whether it is only relevant as the substance of a “representative complaint” under the new proposed section 62A.
55. As discussed below, the new representative complaints regime, combined with the new type of “systemic discrimination”, will be easily abused by activist complaints targeting religious organisations.

### **Recommendation**

56. The new definition of “systemic discrimination” should not be included in the Bill.

### **New Representative Complaints Regime**

57. HRLA opposes the introduction of new representative complaints provisions that will encourage activist complaints and hand unnecessary investigative powers to the Commissioner.

58. The Discussion Paper acknowledges that a representative complaint model allows organisations to bring complaints on behalf of members who have a protected attribute and may not be able to bring a complaint on their own behalf.<sup>21</sup> HRLA welcomes the introduction of provisions that will allow religious organisation to make complaints on behalf of their members when the organisation has been subjected to discrimination.<sup>22</sup>
59. However, the amendments made by the Bill go far beyond merely allowing organisational complaints.
60. Clause 28 inserts a troubling new section 62A in the act that:
- 60.1. Does not require the complainant to name the individuals who are the victims of supposed “systemic discrimination”;
  - 60.2. Does not require the complainant to identify the number of the individuals affected; and
  - 60.3. Does not require the complainant to require the consent of the alleged victims of the discrimination.
61. The potential for this section to be abused by activist complaints against religious organisations is alarming. The definition of “systemic discrimination” is open to ideological abuse by activists against religious organisations that hold to doctrine and beliefs that do not accord with gender-fluid ideology.
62. The Bill also hands inappropriate new powers of investigation to the Commissioner in new proposed Division 4B. These powers are far too broad and allow the Commissioner to:
- 62.1. Investigate a complaint of “systemic discrimination” in any way she thinks fit;
  - 62.2. Order the production of documents and other information; and
  - 62.3. Interrogate individuals about alleged “systemic discrimination”.<sup>23</sup>
63. The Commissioner should not be given broad and extensive powers of investigation on top of such a permissive complaints regime. As stated above, the Commissioner’s powers should be reformed and brought in line with recommendations made by the Parliamentary Joint Committee.

### **Recommendation**

64. The Bill should retain provisions that allow religious bodies to bring representative complaints on behalf of their members when discriminated against.

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<sup>21</sup> Department of the Attorney-General and Justice, above no.10, 16.

<sup>22</sup> Exposure Draft Anti-Discrimination Amendment Bill, cl27.

<sup>23</sup> Exposure Draft Anti-Discrimination Amendment Bill, cl43.

65. However, representative complainants

65.1. must be able to name the individuals who have been discriminated against, or alternatively, show that the organisation itself has been discriminated against because of its doctrines, tenets or beliefs;

65.2. the Commissioner should not be given new extensive powers of investigation, but should have their powers reformed in line with recommendations made by the Parliamentary Joint Committee.

**Intrusion into Private Contracting**

66. HRLA cautions against introducing new provisions that will make it unlawful for a member of the public to choose not to patronise a business because they disagree with a stance taken by that business on a moral issue.

67. Clause 19 amends section 41 that effectively forces a person to procure goods from a business once it becomes known by the business that they are morally or politically opposed to the business:

**20 Discrimination in goods, services and facilities area**

A person who supplies or receives goods, services or facilities (whether or not for reward or profit) shall not discriminate against another person:

- (a) by failing or refusing to supply or receive the goods, services or facilities; or
- (b) in the terms and conditions on which the goods, services or facilities are supplied or received; or
- (c) in the way in which the goods, services or facilities are supplied or received; or
- (d) by treating the other person less favourably in any way in connection with the supply or receipt of the goods, services or facilities.

68. This provision will override the religious or moral conscience of people who choose not to procure a service for moral, political or religious reasons. An example is a café that puts up a sign saying that they support a political party. A customer might strongly object to that party's policies, but under this new section it could be unlawful for them to choose to buy coffee elsewhere.

69. This suggested clause intrudes on the autonomy and right of persons to spend their resources how they choose.

**Recommendation**

70. Clause 19 should be removed from the Bill.

**CONCLUSION**

71. We thank the NT Department of the Attorney-General and Justice for the opportunity to make a submission. We would welcome any opportunity to appear in support of this submission.