

1 July 2022

ACT Justice and Community Safety Directorate  
GPO Box 158  
CANBERRA ACT 2601

**BY E-MAIL:** [civilconsultation@act.gov.au](mailto:civilconsultation@act.gov.au)

Dear Sir/Madam,

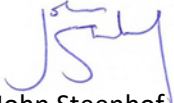
**DISCRIMINATION LAW REFORM – DISCUSSION PAPER**

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

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 *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 Discrimination Amendment Bill

## Summary Submission

1. HRLA does not support the amendments in the Exposure Draft Discrimination Amendment Bill (**Bill**) that amends the *Discrimination Act 1991* (ACT) (**Act**). The Bill should be abandoned as it unjustifiably interferes with fundamental rights of religious freedom, freedoms of speech and association, rights to privacy and rights of the family. The ACT Government should start again and consult with religious stakeholders first.
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**) and the *Siracusa Principles*.<sup>1</sup>
3. The Bill fails to uphold fundamental rights and freedoms in the following ways:
  - 3.1. The Bill implements an LGBTQI+ policy framework rather than a comprehensive human rights framework that will protect all human rights, including religious freedoms.
  - 3.2. The ACT Government has failed to consult with important religious stakeholders.
  - 3.3. The few religious voices who were consulted have been completely ignored.
  - 3.4. The Bill will allow Courts to adjudicate over church theology and clergy appointments. This turns judges into theologians.
  - 3.5. Courts are given jurisdiction to unjustifiably interfere in church practice and religious worship.
  - 3.6. The Bill exposes religious schools, churches and charities to strategic discrimination legal action in a way that is completely unjustifiable and unneeded.
  - 3.7. The Bill implements incoherent ideology by erasing sex as a meaningful category.
  - 3.8. The introduction of positive duties will arm the ACT Human Rights Commission with activist powers that unjustifiably constrain religious freedom.
  - 3.9. The Bill intrudes into the family home and interferes unjustifiably with limits the right of privacy.
  - 3.10. The Bill makes sports an ideological battleground for genderfluid ideology to the detriment of women.
  - 3.11. The Bill fails to protect parents' fundamental rights to educate their children in accordance with their religious beliefs.

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<sup>1</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.

3.12. 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

### The Failure of the Bill's Consultation Process

5. The ACT Government has failed to properly consult with churches, religious community groups and other religious stakeholders who will be severely impacted by this Bill.
6. The ACT Government's *Listening Report* outlines that only 25 submissions were received in response to the initial consultation round about the proposals put forward in the *Discussion Paper*.<sup>2</sup> None of these submissions were from churches or religious bodies.
7. At a public information evening at which HRLA presented on the Bill's proposed amendments to over 400 religious stakeholders comprising leaders from over 25 different churches of various denominations in Canberra, only one person indicated they had been involved in any consultation process on the Bill. It is unclear whether this person was religious.
8. This bill, which will have profound impact on religious freedoms in the ACT, has been pushed forward with virtually no consultation with the ACT's religious community. This is unacceptable.
9. The review of the Act is outlined as a key plank of the government's *Capital of Equality Strategy: Second Action Plan (Plan)*.<sup>3</sup> The Plan is solely focused on the promotion of LGBTQI+ rights in the ACT. The Plan's proposed discrimination law reforms seek to:
  - 9.1. embed LGBTQI+ ideology and language in the Act;<sup>4</sup> and
  - 9.2. prioritise LGBTQI+ rights over other human rights by removing essential balancing protections for other human rights from the Act.<sup>5</sup>
10. Law reform that prioritises one set of rights at the expense of others is unbalanced and inappropriate. The amendments proposed in the Bill do not sufficiently prioritise and protect all human rights. The Bill should be rejected.
11. HRLA is the only specialist religious freedom body to make submission to the government during consultation. HRLA's concerns outlined in our previous submission to the ACT Justice and Community Safety Directorate made on 28 January 2022 have not been addressed by the Bill. We append our previous submission.

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<sup>2</sup> ACT Government, *Listening Report*, (June 2022) 2.

<sup>3</sup> ACT Government, *Capital of Equality Strategy: Second Action Plan (2022-2023)* (2022) 9.

<sup>4</sup> ACT Government, above no.5, 32.

<sup>5</sup> ACT Government, above no.5, 33.

## Removal of Protections for Religious Bodies

### Appointment and Training of Clergy

12. The current Act protects the religious freedom of churches and religious training bodies by providing absolute discretion with regards to training, appointment and ordination of priests and pastors.<sup>6</sup>
13. Clause 9 of the Bill severely limits this protection by subjecting these decisions to judicial oversight:

#### **32 Religious bodies**

- (1) Part 3 does not make it unlawful for a religious body to discriminate against a person in relation to the following if the discrimination conforms to the doctrines, tenets or beliefs of the body's religion:
    - (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
    - (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order;
    - (c) the selection or appointment of people to exercise functions for the purpose of, or in relation to, any religious observance or practice;
14. The Bill FAQ Sheet (**FAQ Sheet**) confirms that the proposed amendment to section 32(1) will mean that religious bodies will only be able to rely on protections in the Act when ordaining clergy if their decisions and actions are necessary to conform with their doctrines, tenets or beliefs.<sup>7</sup>
15. This is completely out of step with Australia's obligations under international human rights law and 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>8</sup>
16. Training and appointing people for positions of religious leadership goes to the very heart of religious freedom. Pastors, Churches and religious bodies know the content and application of their beliefs better than any secular judge can. Religious freedom protections should not be dependent on whether a Court thinks a religious body is acting in line with its own doctrine.
17. HRLA opposes in the strongest terms handing theological and doctrinal oversight to tribunals and courts.

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<sup>6</sup> *Discrimination Act 1991* (ACT), s32(1).

<sup>7</sup> ACT Government, "Public Exposure Draft: Discrimination Amendment Bill 2022" (June 2022) 2.

<sup>8</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.

## Recommendation

18. Clause 9 should be removed from the Bill.

## Interference in Religious Worship

19. HRLA opposes the interference in religious worship by further limiting protections for religious bodies.
20. The FAQ sheet explains that general protections for religious bodies when they act in accordance with their doctrines, tenets and beliefs will be significantly narrowed.<sup>9</sup> This is achieved by clause 9 in the Bill:

### 32 Religious bodies

- (1) Part 3 does not make it unlawful for a religious body to discriminate against a person in relation to the following if the discrimination conforms to the doctrines, tenets or beliefs of the body's religion:
- (d) an act or practice—
- (i) that is necessary to avoid injury to the religious susceptibilities of adherents of the religion; and
  - (ii) that is reasonable, proportionate and justifiable in the circumstances.
21. A religious body will now have to prove to a tribunal or court that its religious decisions are reasonable, proportionate and justifiable, even if they are in complete accord with their doctrines, tenets and beliefs.
22. This limitation on the free exercise of religious belief is completely out of step with international human rights standards and the recommendations made by the Ruddock Religious Freedom Review.
23. 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>10</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.

24. The international standard for the limitation of religious activity set out in the *Siracusa Principles* is that of *necessity* in exceptional circumstances. *Reasonableness* significantly lowers

<sup>9</sup> ACT Government, above no. 3, 2.

<sup>10</sup> Department of Prime Minister and Cabinet, *Expert Panel Report: Religious Freedom Review* (May 2018), 1.

this standard and is an unacceptable limit on the ICCPR Article 18 rights of churches to conduct all aspects of their worship in accordance with their religious doctrine.

25. The Fact Sheet gives an alarming example of what these amendments will allow:<sup>11</sup>

**Example:** *Under the proposed amendment, a religious body relying on this exception to justify excluding a same-sex couple from worship services would have to consider the human rights of the couple and demonstrate the discrimination was reasonable, proportionate and justifiable. What constitutes reasonable, proportionate and justifiable will depend on the circumstances of each matter.*

26. The exclusion of a same sex couple from a worship service is a caricatured example. However, a tribunal should not be able to tell a church how to conduct its worship. For example, a tribunal should not be able to tell a Catholic priest how to administer the sacraments. It is completely inappropriate for a tribunal or court to intrude on the sacred activity of a religious body.

### **Recommendation**

27. Clause 9 of the Bill should be rejected.

### **Religious Service Providers**

28. HRLA opposes removing protections for religious bodies when they are providing goods and services.

29. Clause 9 removes these protections by exempting the provision of goods and services from protections for religious bodies in section 32(1):

(2) Subsection (1) does not apply to—

(a) discrimination in relation to—

(iii) if the discrimination is not on the ground of religious conviction—the provision of goods, services or facilities;

30. As the FAQ Sheet explains, the protections for religious bodies providing goods and services have been limited by the Bill so that religious bodies may only refuse to provide goods or services on the grounds of religious belief rather than any other protected attribute.<sup>12</sup>

31. This approach woefully misunderstands the nature of religious belief and activity. It establishes religious freedom rights as second tier rights compared to all other rights protected under the Act. This allows every other right in the Act to prevail over religious rights, contravening foundational human rights principles.

32. This amendment will allow ideological litigants to compel religious churches, charities and other religious bodies to act contrary to their deeply held beliefs and to use their property and

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<sup>11</sup> ACT Government, above no.3, 2.

<sup>12</sup> ACT Government, above no. 3, 2.

accommodation in ways that conflict with their religious conscience by taking vexatious discrimination claims against religious organisations.

### **Recommendations**

33. Clause 9 of the Bill should be deleted.

## **Introduction of Controversial Gender-Fluid Ideology**

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

34. 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 ACT.
35. The Bill erases sex as a meaningful definitional category. It does this in a number of sections, one example being in section 40 where it replaces the wording of “opposite sexes” with “different sexes”.<sup>13</sup> This implies that there are not only two sexes, but that sex exists on a continuum.
36. The Bill also erases the categories of male and female in section 37, replacing the categories of male and female with one category of “people”.<sup>14</sup> Section 37 provides protections for positive discrimination to the benefit of pregnant women. The erasure of men and women from this section implies that pregnancy is not a solely female experience.
37. 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.

### **Recommendation**

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

### **Protections for Children’s Sport**

39. Clause 5 introduces a new section 23A that prohibits discrimination on any ground in relation to participation in organised sport, this includes the ground of “gender identity”.<sup>15</sup> The Bill includes a narrow exemption that allows sex to be taken into account only if it is necessary to do so for fair, safe and effective competition.<sup>16</sup> However, this exception specifically excludes children’s sport under the age of 12 in proposed section 33B(2).
40. Discrimination laws should not extend to sports. Sporting bodies should not have the threat of potential litigation hanging over their heads when determining their own rules, procedures, and sporting divisions. This extension of discrimination law to sports is a triumph of ideology over common sense. It will hinder single-sex sports, especially for women. This proposal is

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<sup>13</sup> Exposure Draft Discrimination Amendment Act, cl 14.

<sup>14</sup> Ibid, cl 13.

<sup>15</sup> Exposure Draft Discrimination Amendment Bill, cl5; *Discrimination Act 1991* (ACT), s7(1)(g).

<sup>16</sup> Ibid, cl10.

unacceptable and implies that the only reason that girls should play with girls and boys play with boys is to ensure parity of physical ability.

## **Recommendations**

41. This Bill should be amended to remove sports from the jurisdiction of the Act.

## **Positive Duties not to Discriminate**

42. HRLA opposes the introduction of positive duties not to discriminate into the Act:
  - 42.1. Positive duties are amorphous and difficult to define. They impose a disproportionate burden on the freedoms of thought, speech, expression, and privacy that give discrimination an outsized footprint in law.
  - 42.2. 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
  - 42.3. The proposed regulatory powers to be given to the ACT Human Rights 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>17</sup> These recommended changes had bi-partisan support.
43. Clause 21 of the Bill introduces a new section that imposes positive duties to take steps to eliminate discrimination, sexual harassment and unlawful vilification:
  - 75 Duty to eliminate discrimination, sexual harassment and unlawful vilification**
    - (1) A person required under part 3, part 5 or section 67A not to engage in discrimination, sexual harassment or unlawful vilification must take steps to eliminate discrimination, sexual harassment and unlawful vilification that are reasonable, proportionate and justifiable in the circumstances.
44. The positive duties imposed by section 75(1) 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.
45. A broad obligation to eliminate discrimination is a blunt instrument. If suitable balancing provisions are not included, 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 undermined by introducing much lower standards of limitation of religious belief and activity than those in the ICCPR.
46. Furthermore, and even more troubling, are the proposed powers to be given to the ACT Human Rights Commission. The *Discussion Paper* and FAQ Sheet foreshadow even wider

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<sup>17</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.



powers to be given to the ACT Human Rights Commission to receive complaints and investigate and sanction religious bodies that cannot comply with the new imposed positive duties<sup>18</sup> Such powers have no place in Australian law in accordance with international human rights obligations.

### **Recommendations**

47. The proposed duties in clause 21 should not be introduced.
48. If positive duties are introduced, they should be accompanied by balancing provisions that protect ICCPR rights.
49. The ACT Human Rights 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:
  - 49.1. Requiring a complaint lodgement fee that the complainant loses if it is ultimately decided that the complaint does not have substance;
  - 49.2. Setting a higher standard for the substance of a complaint – it must include sufficient evidence of unlawful discriminatory conduct;
  - 49.3. 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;
  - 49.4. Limiting the assistance that the Commission can give to a serial complainant under section 44(3) and requiring the Commission to give equal assistance to respondents; and
  - 49.5. Allowing the ACT Civil and Administrative Tribunal (**ACAT**) to exercise discretion to award costs against the complainant if the complainant persists in pursuit of a claim that has already been determined vexatious or lacking in substance by the Commission and the ACAT confirms that it is so.

### **Protections for Parental Rights to Religious Education**

50. The *Discrimination Act* contains the weakest protections in Australia for the religious freedoms of parents to educate their children at religious schools in Australia. The Bill should include positive protections that allow Christian schools to operate in accordance with their doctrines, tenets and beliefs as required under ICCPR Article 18.
51. The current Act severely limits the ability of religious schools to conduct their affairs in accordance with their doctrines, tenets and beliefs. Section 46(1) limits the discretion of

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<sup>18</sup> ACT Government, “Public Exposure Draft: Discrimination Amendment Bill 2022” (June 2022) 5; ACT Justice and Community Safety Directorate, “Discussion Paper 1: Extending the Protections of Discrimination Law” (October 2021) 45.

religious schools to only be able to refuse enrolment applications on the ground of religious belief:

**46 Religious educational institutions**

- (2) Section 18 does not make unlawful discrimination on the ground of religious conviction in relation to a failure to accept a person's application for admission as a student at a religious educational institution that is conducted solely for students having a religious conviction other than that of the applicant.
52. Furthermore, the protections for religious school staffing decisions are severely limited by restricting protections to decisions that are made on the ground of religious belief of the staff member:
- (3) Section 10 or section 13 does not make unlawful discrimination on the ground of religious conviction in relation to staff matters at a religious educational institution if—
    - (a) the institution is conducted in accordance with the doctrines, tenets, beliefs or teaching of a particular religion or creed; and
    - (b) the discrimination is intended to enable, or better enable, the institution to be conducted in accordance with those doctrines, tenets, beliefs or teachings.
53. These sections fail to provide proper balancing provisions against competing rights in the Act, such as sexuality and gender identity. This makes religious belief and activity a second-tier human right in the Act.
54. This shows a fundamental lack of understanding concerning the human right of religious belief and activity as a non-derogable right that is afforded the same kind of privilege and protection in international law as the right to life, freedom from torture and freedom from slavery.<sup>19</sup>
55. Parental rights to educate their children at religious schools that reflect the religious conviction of those parents must be protected. Better protections are essential for allowing religious bodies to make hiring and governance decisions that accord with their doctrines, tenets and beliefs so that ICCPR Article 18(4) so that parental rights are protected.

**Recommendations**

- 56. Positive protections that strengthen and broaden the protections for religious schools in section 32, 44 and 46 should be included in the Bill.
- 57. Positive protections would properly reflect that religious bodies do not discriminate when they conduct their affairs in accordance with their doctrines, tenets and beliefs, but are exercising a fundamental human right.

**Protections for the Family Home**

- 58. HRLA opposes any change to the exception for employment of workers in private homes. Parents should have absolute discretion over who enters their home and works for them in a

<sup>19</sup> American Association for the International Commission of Jurists, above no. 1, 12.

domestic setting. This is an impermissible burden on the rights protected by Articles 17, 18, 29 and 23 of the ICCPR.

59. The Bill extends discrimination law impermissibly into the private sphere in section 24 by qualifying the absolute discretion of persons to choose who is employed as a contract worker in their home. A person will now have to show that their decision not to employ someone was reasonable, proportionate and justifiable in the circumstances.<sup>20</sup>
60. This change attacks a person's fundamental right to privacy. The family home is at the very centre of someone's private life and should not be made a forum for potential litigation via discrimination complaints.
61. Section 11 of the *Human Rights Act* states that the family is the natural and basic group of society and is entitled to be protected, and section 12 states that every person has the right not to have their privacy or family home interfered with unlawfully or arbitrarily.<sup>21</sup>
62. Watering down the protections in the Act for families and the sanctity of their home undermines these fundamental privacy rights and completely undermines the ICCPR Article 18(4) rights of parents to educate their children in the religious teaching and beliefs of their choosing.
63. Changing this protection and performing a balancing test on competing rights could deny families the right to choose the religious environment within their home.
64. The family home is not part of the public sphere and should not be subjected to the imposition of ethics and values by the State.

### **Recommendation**

65. Clause 6 should be completely removed from the Bill.

### **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 4 introduces a new subsection 20(2) 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 Goods, services and facilities**

- (2) It is unlawful for a consumer of goods or services, or a user of facilities, to discriminate against a provider of the goods, services or facilities—
  - (a) by refusing to accept the goods or services or use the facilities; or

<sup>20</sup> Exposure Draft Discrimination Amendment Bill, cl6.

<sup>21</sup> *Human Rights Act 2004*, ss11 & 12.

- (b) in the terms or conditions on which the goods or services are accepted or the facilities are used; or
- (c) in the way in which the goods or services are accepted or the facilities are used.

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 4 should be removed from the Bill.

**CONCLUSION**

71. We thank the ACT Justice and Community Safety Directorate for the opportunity to make a submission. We would welcome any opportunity to appear in support of this submission.

## Appendix

28 January 2022

ACT Justice and Community Safety Directorate  
GPO Box 158  
CANBERRA ACT 2601

**BY E-MAIL:** [civilconsultation@act.gov.au](mailto:civilconsultation@act.gov.au)

Dear Sir/Madam,


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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 ACT Discrimination Law Reform

### Summary Submission

1. HRLA does not support the law reform proposals in the ACT Justice and Community Safety Directorate's 'Discussion Paper 1: Extending the Protections of Discrimination Law' (**Discussion Paper**). While good reform of the *Discrimination Act 1991* (ACT) (the **Act**) would be welcome, the suggested changes in the Discussion Paper are almost entirely bad and unhelpful and will further erode protections of fundamental rights and freedoms of thought, speech, expression and religion in preference of LGBT rights.
2. Currently, Discrimination Law's protections for religious freedom are out of step with Australia's international treaty obligations and in particular those contained in the *International Covenant on Civil and Political Rights (ICCPR)* and the *Siracusa Principles*.<sup>22</sup> Any changes to Discrimination Law in the ACT must ensure that all human rights are provided equal protection under the law. HRLA is concerned that the proposed changes put forward by the Law Reform Advisory Council in 2015 seriously prejudice religious freedom rights and would remove essential protections from the ACT's Discrimination Law:
  - 2.1. **Broadening the coverage of the Act to all of public life** will expand the scope for activist complaints and cancel culture litigation;
  - 2.2. **Narrowing protections for religious schools, bodies, services providers and individuals should be avoided.** Discrimination law currently falls far short of Australia's commitment to the international standard of protection for religious freedom. Protections for religious schools, bodies, service providers and individuals should be strengthened not narrowed.
  - 2.3. **Replacing specific exceptions with a general exception of justification**, is a terrible proposal that will allow courts and judges to judge any conduct by the arbitrary ideological fashions of the time of decision when assessing whether it is discriminatory.
  - 2.4. **Exceptions for employing workers in private homes should not be narrowed.** The ACT Government should respect that a family and their home is the foundational unit of society and a private matter. The state should not be able to interfere in who a family invites into their home for whatever reason.
  - 2.5. **Positive duties to eliminate discrimination should not be included in the Act.** The suggested changes give too much power to the government to investigate and compel compliance with ideologically motivated dictates. Without the introduction of appropriate balancing provisions this would negatively affect the ability of religious individuals and groups to conduct their affairs in accordance with their religious beliefs.

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<sup>22</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.

## Coverage of the Discrimination Act

*Question: What concerns or consideration would be required in extending coverage to areas of public life including organised sport, competitions open to the public and government functions?*

3. HRLA cautions against implementing recommendation 6.1 from the final report of the ACT Law Reform Advisory Council Review of the *Discrimination Act 1991* (ACT) (the **Report**) – that the Act should be amended to prohibit discrimination generally in all areas of public life with an exception for private conduct.<sup>23</sup>
4. The Act currently prohibits discrimination in specific areas of public life, such as in the provision of services<sup>24</sup> and education<sup>25</sup>. By identifying the discrete areas in which discrimination is prohibited, the Act provides clarity for both claimants and respondents. The selection of specific areas also appropriately balances the private autonomy and right of individuals to be free from interference from the State and the rights of individuals to be free from discrimination when participating in public life.
5. Dispensing with specific categories and extending the coverage of the Act to all of public life tips this balance and would have severe negative consequences for the ICCPR Article 18 rights of religious individuals and groups to practice their religious beliefs in public and in private.
6. Freedom of religious belief and activity is a unique and extensive right. Any change to Discrimination Law must ensure that protections afforded to religious freedom reflect the full extent of the scope and nature of the right as articulated in the ICCPR<sup>26</sup>:
  - 6.1. **Freedom of religious belief and activity is both an individual and collective right.** It is an individual right because religious belief is a matter of an individual's personal conscience and as part of the individual's motivating conscience, governs their private life and activity. It is a collective right because individuals express their religious belief through forming religious communities. Religious communities are integral to the manifestation of religious belief through communal worship, observance, practice and teaching of the faith.
  - 6.2. **Freedom of religious belief and activity is both a private and a public right.** It is a private right because, as a matter of personal conscience and communal practice, people of faith should be able to live in accordance with their religious belief and conscience both privately and within their communities with limited interference by the State. Religious belief and activity is a public right because of religious individuals and religious communities must be able to manifest their religious belief through public religious activity.
  - 6.3. **Freedom of Religion should only be limited in exceptional circumstances.** The ICCPR sets a very high bar for interference with this right – limiting interference to what is

<sup>23</sup> ACT Law Reform Advisory Council, "Review of the *Discrimination Act 1991* (ACT): Final Report" (18 March 2015) LARC 3 FP, 55; ACT Justice and Community Safety Directorate, "Discussion Paper 1: Extending the Protections of Discrimination Law" (October 2021) 9.

<sup>24</sup> *Discrimination Act 1991* (Act), s 20.

<sup>25</sup> *Ibid*, s 18.

<sup>26</sup> *Human Rights Act 2004* (ACT), s 28(2)(a).

*necessary* for the protection of public safety, health, morals or the fundamental rights and freedoms of others. The Siracusa Principles outline that freedom of religious belief and activity is a non-derogable right, meaning that the right to freedom of religious belief is absolute, and that the right to freedom of religious activity is only to be limited in the most extreme of circumstances.<sup>27</sup>

- 6.4. **Freedom of religious belief and activity includes the right of parents to educate their children in conformity with their own convictions.** Article 18(4) ensures the religious liberty of parents to educate their children in accordance with their deeply held religious convictions. A law that protects religious belief and activity must ensure that parents may manifest their religious belief through the education of their children in conformity with their beliefs.
7. Extending the coverage of the Act will disproportionately interfere with the corporate and public aspects of religious freedom. The Report cites the case of *Bakopoulos* as an example of why such interference would be supposedly beneficial.<sup>28</sup> In that case Bakopolous attempted a claim against the Greek Orthodox Parish of Mildura for sex discrimination due to her being denied financial membership to the Parish. Her claim failed because the Tribunal did not find that her denial of membership had been a denial of service and her claim did not fall into any other area under the *Equal Opportunity Act*. The Report makes the point that cases like this would not fail for lack of a suitable prohibited area if coverage of the Act were extended – meaning that church governance and life would fall within ‘public life’.
8. This example is deeply concerning. *Bakopoulos* did not involve an issue of theological controversy.<sup>29</sup> However, given the breadth of Christian denominations and theology, increasing the coverage of the Act into all of public life will necessarily bring the corporate worship, governance and other public features of the right to religious belief and activity in similar cases within oversight of Tribunals and Courts. Adjudicating theological controversies and issues of doctrine should remain the private preserve of faith communities. Tribunal and court oversight would be inappropriate and completely at odds with comments made by Mason A.C.J. and Brennan J. in the *Scientology Case*.<sup>30</sup>
9. The Act’s coverage should not be extended to all of public life and the discrete areas where unlawful discrimination is prohibited should be maintained.

### **Narrowing protections for religious schools, bodies, service providers and individuals**

*Questions: The section provides a general response to questions 7-13 of the Discussion Paper.*

10. Protections for religious schools and other religious bodies should not be narrowed, but strengthened in any reform of Discrimination Law.

<sup>27</sup> American Association for the International Commission of Jurists, above no. 1, 12.

<sup>28</sup> ACT Law Reform Advisory Council, above no. 2, 51; *Bakopoulos v Greek Orthodox Parish of Mildura* [2014] VCAT 323.

<sup>29</sup> *Bakopoulos v Greek Orthodox Parish of Mildura* [2014] VCAT 323, [4].

<sup>30</sup> *Church of the New Faith v Commissioner for Payroll Tax (Vic)* [1983] HCA 40, [14].



11. The Act currently protects the religious freedom rights of religious schools and other religious bodies by providing “exceptions” for certain activity that would otherwise be unlawful discrimination under the Act, in sections 32, 44 and 46.<sup>31</sup> This protection is inadequate and couches positive religious rights widely recognised in international law as “exceptions”, as if they were a kind of special treatment.
12. The rights of religious adherents to communally operate according to the doctrines, tenets and beliefs of their religion in their religious schools and bodies is a fundamental human right that is already poorly served by the exemptions. The Discussion Paper myopically mischaracterises these important rights and seeks to further erode them.
13. It is unfortunate that the Safety Directorate’s discussion paper echoes this sentiment and views the protection for religious rights as limits on the right to non-discrimination.<sup>32</sup> This is not the case. The “exceptions” in the Act are vital balancing provisions and protections for religious rights against competing rights in the Act.
14. The limited protections that currently exist in the Act are essential for ensuring that religious schools can continue to provide an education that reflects the religious mission and identity that parents have specifically chosen for their children. The protections are also essential for allowing religious bodies to make hiring and governance decisions that accord with their doctrines, tenets and beliefs
15. These “exceptions” should not be narrowed, but re-framed as positive protections that strengthen and broaden the protections that are already afforded by these sections. Positive protections would properly reflect that religious bodies do not discriminate when they conduct their affairs in accordance with their doctrines, tenets and beliefs – but are in fact exercising a fundamental human right.
16. Any narrowing of these protections in the Act will undermine the protection of religious freedom rights in the Act, which already does not afford these rights the proper protection they should receive in light of their broad, expansive and non-derogable character under international law.<sup>33</sup>

*Question: Should the exception protecting religious observances (e.g. appointment of ministers, etc) be refined so that discrimination is only permitted where necessary to conform with the doctrines of the relevant religion).*

17. It is extremely important that religious communities are able to train, ordain and appoint their own priests, ministers of religion or officiating religious members in accordance with the doctrines, tenets and beliefs of their religion.
18. The requirements for these appointments and the theological and doctrinal considerations involved are the preserve of religious communities and, as discussed above, should not be assessed by courts or tribunals. Courts (and judges and lawyers) are often religiously illiterate

<sup>31</sup> *Discrimination Act 1991 (ACT)*, ss32, 44 & 46.

<sup>32</sup> ACT Justice and Community Safety Directorate, above no.2, 20.

<sup>33</sup> American Association for the International Commission of Jurists, above no.1, 26.

and come from an elite class of Australian society which has little understanding or regard for religion which makes courts a poor jurisdiction to be deciding the beliefs and practices of religious organisations. Courts make very poor theologians.

19. This exception should not be watered down.

*Question: Should religious bodies be permitted to discriminate against members of the public on some grounds, and not others? If so, which grounds should be permissible?*

20. Any changes to the Act should reflect recommendations from the 2018 *Report of the Expert Panel* on the Religious Freedom Review of 18 May 2018 (Ruddock Review about necessary protections necessary for religious belief that are often misdescribed as “permission to discriminate”.
21. The right to freedom of religious belief and activity must be treated as equal to other attributes protected by the Act. If religious belief and activity is deemed to be subordinate to any other competing right under the Act by removing certain grounds against which the positive right of religious belief activity can be exercised – this will cause freedom of religious belief and activity to be a ‘second tier’ right.
22. It should be recognised that when religious bodies conduct their affairs in accordance with their doctrines, tenets and beliefs they are exercising their religious freedom rights and are prima facie not unlawfully discriminating.
23. Religious organisations cover a broad range of aims, objects and purposes and no blanket approach in legislation would achieve a sensible balance of rights. Some religious bodies (e.g. a Jewish care provider that runs a rest home for people of the Jewish faith) should be able to discriminate in employment and provision of services for Jews only, but the same will not necessarily be the case for a religious charity that operates commercial services.
24. All religious organisations advancing religion should be able to prefer or exclusively hire staff of the same religion to ensure that the ethos of the organisation is maintained.

### **Replacing specific exceptions with a general exception of justification**

*Questions: Should the exceptions in the Discrimination Act*

- (a) *be removed and replaced with a general limitation / single justification defence that applies where discriminatory conduct is reasonably justifiable, or*
- (b) *be refined to make them simpler, stronger, and better aligned with our human rights framework?*

*What concerns or considerations would be required in introducing a single justification defence to replace existing exceptions as applicable to:*

- (a) *Religious bodies*

25. HRLA does not support the removal of specific defences/exceptions in the Act and replacing this with a general justification defence.<sup>34</sup> The Discussion paper suggests that such a defence would be modelled on the test in section 28 of the *Human Rights Act* – where the respondent claiming the defence would have to show that their actions were a legitimate and reasonable limit on the right to non-discrimination.<sup>35</sup>
26. This is nonsense. This kind of balancing regime elevates non-discrimination rights to a much higher status than afforded them in international law. It also makes parties forced to rely on an imprecise and nebulous exemption that is subject to the whims and particular ideological persuasions of bureaucratic and judicial decision makers.
27. Such a change will seriously limit the protections for other freedoms and particularly religious freedom rights in the Act. Any protection for religious rights would be completely dependant on the interpretation of religious freedoms rights by tribunals and courts, which have traditionally narrowly construed the importance of these rights, and who are badly placed to adjudicate religious belief and practice.<sup>36</sup>
28. This proposed change should be rejected.

**Exceptions for employing workers in private homes should not be narrowed**

*Question: What limitations should apply to people hiring workers to perform domestic duties or provide childcare in private homes?*

29. HRLA opposes any change to the exception for employment of workers in private homes. A person should have absolute discretion over who comes into their home or works for them in a domestic setting, and this forum should not be opened up for activists to take claims of discrimination. It would be a direct attack on a person's right to privacy if the jurisdiction of discrimination legislation extended to the domestic sphere. This too is a bad idea.
30. The Report and the Discussion paper propose that this exception should be amended so that the exception for domestic duties is available only for conduct that can be justified as a reasonable limit on the right to equal and effective protection against discrimination.
31. Section 11 of the *Human Rights Act* states that the family is the natural and basic group of society and is entitled to be protected, and section 12 states that every person has the right not to have their privacy or family home interfered with unlawfully or arbitrarily.
32. Watering down the protections in the Act for families and the sanctity of their home undermines these two rights and furthermore directly undermines the ICCPR Article 18(4) rights of parents to educate their children and inculcate them with the religious teaching and beliefs of their choosing.

<sup>34</sup> ACT Justice and Community Safety Directorate, above no.2, 13.

<sup>35</sup> Ibid.

<sup>36</sup> Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards Point the Way Forward?' (2020) 47(1) *University of Western Australia Law Review* 42, 45; *Krygger v Williams* (1912) 15 CLR 366.

33. Changing this protection and performing a balancing test on competing rights could potentially deny families the right to choose what kinds of beliefs, ethics and values enter their home and have influence on their children.
34. The family home is not part of the public sphere and should not be subjected to the imposition of ethics and values by the State.

**Positive duties to eliminate discrimination should not be included in the Act**

*Questions: Should a positive duty to eliminate discrimination be introduced into the Discrimination Act?*

*Should the duty apply to public bodies, or private businesses and organisations, or both, and how should this be implemented?*

*What additional functions and powers would the Human Rights Commission need to monitor organisations to ensure they are meeting the positive duty?*

35. HRLA opposes the introduction of positive duties into Discrimination Law for two reasons:
  - 35.1. A positive duty imposed on private and public religious institutions could force religious bodies to act contrary to their deeply held religious beliefs; and
  - 35.2. The proposed regulatory powers to be given to the ACT Human Rights Commission that would accompany positive duties should not be expanded, but rather reformed and narrowed to reflect the recommendations made by the Commonwealth Parliamentary Joint Committee on Human Rights in Freedom of Speech in Australia.<sup>37</sup> These recommended changes had bi-partisan support.
36. No one wants an ever growing and over-intrusive bureaucracy. No compelling need has been demonstrated which would justify imposing a positive duty on organisations to eliminate discrimination.
37. Any introduction of positive duties must include balancing provisions for religious organisations so that they are not required to undertake affirmative action in the promotion of causes or beliefs that do not accord with their own religious doctrines and beliefs and practices.
38. If suitable balancing provisions are not included, this would undermine the Article 18 rights of religious individuals and groups to be able to freely practice their religious beliefs.

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<sup>37</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 28 January 2022.

39. The ACT Human Rights Commission should not be handed expanded powers of investigation and oversight. Rather, the Commission should have its powers reformed in line with suggestions made by the Ruddock review:
- 39.1. Requiring a complaint lodgement fee that the complainant loses if it is ultimately decided that the complaint does not have substance;
  - 39.2. Setting a higher standard for the substance of a complaint – it must include sufficient evidence of unlawful discriminatory conduct;
  - 39.3. 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;
  - 39.4. Limiting the assistance that the Commission can give to a serial complainant under section 44(3) and requiring the Commission to give equal assistance to respondents; and
  - 39.5. Allowing ACAT to exercise discretion to award costs against the complainant if the complainant persists in pursuit of a claim that has already been determined vexatious or lacking in substance by the Commission and the ACAT confirms that it is so.

#### **CONCLUSION**

40. We thank the ACT Justice and Community Safety Directorate for the opportunity to make a submission and welcome any opportunity to appear in support of this submission.