

CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

Submission by

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The two authors of this submission are working together on a project funded by the Australian Research Council concerning the accommodation of minority cultures within the framework of a liberal democratic Australia.¹ Anti-discrimination law is a very important consideration in terms of Australian multiculturalism, for unless anti-discrimination laws are crafted with a proper respect for the diversity of beliefs and values in a multicultural society, then the impact of those laws will be to reduce diversity rather than enhance it.

The focus of this submission, for that reason, is how ‘equality rights’ can properly be balanced with other human rights that are recognised in the International Covenant of Civil and Political Rights. An introduction is provided setting the context of Australian multicultural policy before turning to the specific questions asked in the Discussion Paper.

1. ANTI-DISCRIMINATION LAW AND AUSTRALIAN MULTICULTURALISM

The central issue that multiculturalism raises, as the Australian Multicultural Advisory Council recently noted, is how to find an appropriate means for accommodating cultural diversity within a framework of shared values.² That task is made ever more pressing in Australia by demographic trends. Since World War II, Australia has experienced very high levels of net migration. One in four of the current Australian population was born overseas, and another quarter has at least one parent born overseas. The Australian population has a net gain of one international migrant every two minutes.³

The proportion of the population that originates from the Middle East, the Indian subcontinent and Asia is likely to grow over the next thirty years. This is not only because a substantial proportion of new migrants come from these countries, but because there is greater fertility in families from many of these countries compared to other Australians. Over time, the

¹ *A Federation of Cultures? Innovative Approaches to Multicultural Accommodation*, ARC Discovery Project DP120101590 (2012-2015).

² Australian Multicultural Advisory Council, *The People of Australia: The Australian Multicultural Advisory Council’s statement on cultural diversity and recommendations to government* (April 2010).

³ Australian Bureau of Statistics, Population Clock, <http://www.abs.gov.au>.

‘demographic advantage’ of these communities, in comparison with European Australians, is likely to lead to significant changes in the mix of the Australian population. Moreover, the demographic advantage is greatest for those who are religiously devout.⁴

The challenge for the future, then, is how to support the integration of minority ethnic and religious communities that will, over time, represent an increasing proportion of the Australian population, with growing electoral impact. That requires a coherent philosophy, developed in the context of Australian conditions, to balance assimilation and accommodation.

Supporting multiculturalism accords with government policy. The Minister for Immigration, the Hon. Chris Bowen, gave a speech in February 2011 in which he strongly affirmed the federal government’s commitment to multiculturalism, and differentiated ‘Australian multiculturalism’ from the European models that have welcomed guest workers without encouraging their assimilation as citizens.⁵

The full range of human rights that are protected under the International Covenant on Civil and Political Rights and other international human rights conventions⁶ offer a principled basis for determining an appropriate balance between the accommodation of ethno-cultural minorities and their assimilation to Australian values, particularly as they relate to anti-discrimination law. People from ethno-cultural minorities:

- (i) need to be protected from discrimination on the basis of various attributes including their race, ethnic origin or religious belief (Article 26, ICCPR);
- (ii) have the right to freedom of religion and conscience, alongside all other people of faith (Article 18, ICCPR; cf Article 5(d)(vii), CERD; Article 14, CRC);
- (iii) have the right to freedom of association (Article 22, ICCPR; cf Article 5(d)(ix), CERD; Article 8, ICESCR; Article 15, CRC);
- (iv) have the right to marry, to found a family and to educate their children in conformity with their religious and moral convictions, thus sharing in the common responsibility of men and women in the upbringing and development of their children (Articles 18(4) and 23, ICCPR; cf Articles 10, 11 and 13(3)-(4), ICESCR; Articles 3(2), 5, 8, 9, 10 and 18, CRC; Articles 5 and 16, CEDAW);
- (v) have the right to enjoy their own culture, to profess and practise their own religion,

⁴ Eric Kaufman, *Shall the Religious Inherit the Earth? Demography and Politics in the Twenty-First Century* (London: Profile Books, 2010).

⁵ <http://www.minister.immi.gov.au/media/cb/2011/cb159251.htm>

⁶ International Convention on the Elimination of All Forms of Racial Discrimination (1965) (CERD); International Covenant on Civil and Political Rights (1966) (ICCPR); International Covenant on Civil and Political Rights (1966) (ICCPR); International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW); Convention on the Rights of the Child (1989) (CRC).

and to use their own language in community with the other members of their group (Article 27, ICCPR; cf Article 15, ICESCR).

Great care needs to be taken to ensure that a focus on the first-mentioned right (freedom from discrimination) does not diminish the others (e.g. freedom of religion, association and cultural expression and practice). This can readily happen, for example, if freedom of religion is respected only grudgingly and at the margins of anti-discrimination law as a concessionary ‘exception’ to general prohibitions on discrimination. It can also happen if inadequate attention is paid to freedom of association and the rights of groups to celebrate and practise their faith and culture together.

These dangers are real. Some advocates for reform of anti-discrimination laws have a tendency to place a very high value on ‘non-discrimination’ and to concede ‘exceptions’ based upon freedom of religion, association or cultural expression only with great reluctance, if at all. Although they sometimes recognise that there is a need to give due weight to all human rights and to find an appropriate balance between them, it is generally not acknowledged that posing the question as one of identifying *exceptions* to the principle of non-discrimination prejudices the inquiry in favour of the right to be free of discrimination and against the rights to freedom of religion, association and culture, understood as both individual and group rights. Moreover, anti-discrimination laws tend to be highly individualistic in focus, and allow relatively little room for group rights, including the associational rights guaranteed and implied by Articles 18, 22, 23 and 27, ICCPR.

There is a need to ensure that in any rewriting of Commonwealth anti-discrimination laws these human rights that are in creative tension with one another are appropriately balanced. Indeed, it is arguable that Australia is not complying with its international obligations if this is not the case. The Australian Government has recently reaffirmed its commitment to review legislation, policies and practices for compliance with the seven core UN human rights conventions to which Australia is a party, and the current review of anti-discrimination laws is one of the ways in which the Government is seeking to fulfill that commitment.⁷

The Government’s commitment that it will not adopt any change to discrimination laws which diminishes protections (Discussion Paper, para 10) is laudable, but the somewhat weaker expressed commitment that the ‘policy’ expressed in existing exceptions under the current laws will be maintained (para 146) is a cause for grave concern if this means that the human rights to freedom of religion, association and cultural expression that are protected through the current exemptions are going to be undervalued in the reform process. We urge the Government to give proper and full respect for these rights alongside the right to be free from unjustifiable discrimination. This is an imperative driven not only by the requirements of international human rights norms, but also by Australia’s increasingly diverse mix of ethnicities, cultures and religions.

⁷ *Australia’s Human Rights Framework* (April 2010), p. 9.

Our responses to the specific questions raised in the Discussion Paper below are offered with just such a proper balancing of human rights in view.

2. RESPONSE TO QUESTIONS

Question 1

Combining direct and indirect discrimination within the same definition

We consider that it is possible to have a comprehensive definition that would cover direct and indirect discrimination but we do not think that it is possible to do so without reference to a comparator in some sense or another. Any attempt to redefine discrimination in order to avoid comparator tests would have a tendency to extend the prohibition too broadly. We do not see how any line can rationally be drawn between lawful and unlawful discrimination that does not involve some kind of comparison. This is because 'wrongful' discrimination must involve inequality of treatment and one cannot identify unequal treatment without comparing the treatment of a complainant with the treatment of some other person or class of persons, whether hypothetical or actual. Unavoidably, this will require judgments to be made about the characteristics of the comparator (about which views are liable to differ), but trying to reduce the leeway for judgment by ostensibly eliminating the requirement for a comparator is misconceived. The comparison will be undertaken, tacitly or otherwise; eliminating it from explicit consideration will tend to sublimate the real reasons for decision, undermining rather than promoting the law's clarity and predictability.⁸

We also think, for the reasons given below, that a comprehensive definition needs to address what is *not* discrimination as well (a language that is preferable to reference to 'exceptions').

We first set out our proposed definition and then explain the rationale for various elements.

⁸ The detriment test that operates in Victoria and the ACT arguably removes the need for a comparison of the treatment of the complainant with the treatment of a comparator who does not have the protected attribute (see *Re Prezzi and Discrimination Commissioner* (ACT) (1996) 39 ALD 729; [1996] EOC 92-803 at paras [24]-[25]), but it does not eliminate the need to determine whether the treatment has occurred 'because of' the protected attribute, and such a determination cannot sensibly be made without forming a view, either explicitly or implicitly, that a comparably situated person without the attribute would not have been treated in that way. Some form of comparison of treatment is necessarily implied in the very idea of equality of opportunity. Discrimination means treating a person differently from others. If comparison were to be eliminated from the inquiry, then the prohibition would often reach too far, for it would prohibit all detrimental treatment of persons who happen to have a protected attribute, whether or not the treatment was on account of the attribute or not. For if persons who do not have a protected attribute are treated no differently from those who do, there is no discrimination on the ground of that attribute because all are treated equally. Other difficulties with the application of comparator tests, although they have at times posed interpretive difficulties, have been resolved in a way that preserves the remedial intent of equal opportunity legislation: eg *IW v Perth* (1996-7) 191 CLR 1, 33-34 (Toohey J), 66-69 (Kirby J).

A proposed comprehensive definition

(1) Discrimination means any distinction, exclusion, preference, restriction or condition made or proposed to be made which has the purpose of disadvantaging a person with a protected attribute or which has, or is likely to have, the effect of disadvantaging a person with a protected attribute by comparison with a person who does not have the protected attribute, subject to the following subsections.

(2) A distinction, exclusion, preference, restriction or condition does not constitute discrimination if:

- (a) it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
- (b) it is made because of the inherent requirements of the particular position concerned; or
- (c) it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
- (d) it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.

(3) The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection (2)(a).

(4) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of freedom of religion if it is made by a religious body, or by an organisation that either provides, or controls or administers an entity that provides, educational, health, counselling, aged care or other such services, and either:

- (a) it is reasonably necessary in order to comply with religious doctrines, tenets, beliefs or teachings adhered to by the religious body or organisation; or
- (b) it is reasonably necessary to avoid injury to the religious sensitivities of adherents of that religion or creed; or
- (c) in the case of decisions concerning employment, it is reasonable in order to maintain the religious character of the body or organisation, or to fulfil its religious purpose.

(5) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of ethnic minorities to enjoy their own culture, or to use their own language in community with the other members of their group, if it is made by an ethnic minority organisation or association intended to fulfil that purpose and has the effect of preferring a person who belongs to that ethnic minority over a person who does not belong to that ethnic minority.

(6)[the exercise of other protected human rights the exercise of which do not amount to discrimination against others, or the enumeration of other legitimate objectives that ought to be given specific legislative expression]

This definition explains what discrimination is without the need to categorise direct and indirect discrimination separately. Importantly, what it also does is to define what is not discrimination within the definitional section itself, rather than as a ‘limitation’ or an exception or exemption that is given by way of departure from an otherwise general norm. This is very important in

relation to freedom of religion and the rights of ethnic minorities, for the protection of these human rights ought to be an objective of government legislation rather than a concession by way of ‘exception’ to otherwise applicable rules of law. The detail of the proposed definition is explained further below.

(2)(a) A general limitation provision

The proposed subsection (2) includes a general limitation clause that conforms with the idea expressed in para 145 of the discussion paper. However the language used deliberately reflects the language of the UN Human Rights Committee in paragraph 13 of the Human Rights Committee’s General Comment 18 (Non-Discrimination), which states 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’.

That is not qualified by the word ‘necessary’ and nor does the Human Rights Committee suggest that the differentiation must be the most appropriate means of achieving that purpose. It is enough that the *aim* is to achieve a legitimate purpose.

This strikes an appropriate balance between freedom and regulation. It would be oppressive for organisations to have to justify to courts or tribunals that whatever decision they have made represents “the most appropriate” means of achieving a purpose. That would invite a level of intrusion into the affairs of organisations that are acting bona fide in pursuit of a legitimate objective and could not be justified socially or economically by the gains to be made from such a high level of regulation. It must be remembered that many of the organisations to which these anti-discrimination laws apply will be small businesses, clubs or non-profit organisations which run on very restricted budgets. Their capacity to provide often very critically needed services to what are sometimes the most marginalised in our society will be threatened or undermined through over-regulation.

(2)(b) Genuine occupational requirements

If something is a genuine occupational requirement, it should not be characterised as discrimination. This represents the current law.

(2)(c) Not unlawful in the state where it occurs

This clause is taken from s 351 of the Fair Work Act. Commonwealth law is intended to operate concurrently alongside State and Territory anti-discrimination laws. It follows that federal law needs to preserve the exceptions, exemptions and defences available under relevant State and Territory legislation. There will be a lot of confusion if something that is specifically permitted by the law of the relevant State or Territory is, or might be, deemed to be unlawful under the law of the Commonwealth.

If in any newly enacted federal anti-discrimination law it is necessary as a matter of drafting to deal with the preservation of state and territory laws in a separate section, we submit that the

principle of preserving the existing state and territory exceptions or exemptions should be maintained.

(2)(d) Special measures

This clause makes clear that special measures are not discrimination. The meaning of ‘special measure’ could be further amplified in a later subsection if need be.

(3) Balancing different human rights

Subsection (3) makes clear that the protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective. This is to make explicit the balance that the Human Rights Committee has struck between different human rights in General Comment 18. It leaves open the possibility that there could be other legitimate objectives such as health and safety (in relation to indirect discrimination).

(4) Freedom of religion

This paragraph expands upon the legitimate objective provision by clarifying how it applies to religious organisations. It includes provisions regarding religious organisations that already exist in the Fair Work Act and under other Commonwealth laws. The provision that the differentiation is “reasonably necessary in order to comply with religious doctrines, tenets, beliefs or teachings adhered to by the religious body or organisation” is sufficient to cover religious bodies such as the Catholic Church and the Muslim community that believe on religious grounds that only men can be priests or Imams.

The subsection about offence to adherents is also sufficient to deal with issues about residential accommodation provided by a religious body, for example in a theological college.

The provision concerning employment in a religious organisation allows organisations that have been established for a religious purpose to give preference to adherents of that religion or group in employment. This reflects the long-standing position in relation to faith-based organisations such as schools, in the law of the various states and territories. For example, Catholic schools ought to be permitted to have a preference for employing teaching staff who are practising Catholics or Christians of another faith who support the ethos of the school. Jewish and Muslim schools ought likewise to be able to prefer staff of their faith. The qualification is that the preference must be “reasonable in order to maintain the religious character of the body or organisation or to fulfil its religious purpose.” We consider that the formulation proposed is a much more appropriate way of expressing the applicable principle than the formulation in SDA s.38(1) to the effect that the ‘discrimination’ is in good faith and to avoid injury to religious susceptibilities. This is not an adequate or accurate explanation for why it is that faith-based organisations want to employ staff who share that faith.

(5) Rights of ethnic minorities

This provision expands upon the notion of legitimate objective in relation to ethnic minorities. Such minorities ought to be permitted to have a preference for employing staff in their social

clubs or cultural organisations who belong to the ethnic minority for which the club or cultural association exists. So, for example, a Greek social club ought legitimately to be able to choose staff of Greek ethnic origin, without offending against anti-discrimination laws. Such provisions are important to recognise and strengthen the position of Australia as a multicultural society that affirms ethnic minorities within an overall commitment to shared values and citizenship.

(6) Other exceptions

It may well be that other exceptions that are of long-standing in anti-discrimination legislation, and which retain broad acceptance, can be included in this definition of what is not discrimination.

Question 4

There is a strong case, in a multicultural society, for employers to have to make reasonable accommodations for staff on the basis of their cultural traditions or religious beliefs. The emphasis here is on the word 'reasonable'. There is a certain level of flexibility that ought to be expected of employees, and Australia has an interest in encouraging some measure of assimilation. Even still, if Australia is to welcome 'diversity' in the employment sphere then an aspect of this must be showing appropriate respect for the culture and faith of ethnic minorities and others whose religious beliefs create issues that can be accommodated without undue difficulty in the workplace.

The kinds of issues where employers may need to show some flexibility and tolerance include corporate dress requirements, rostering to allow employees to keep a particular day as a rest day for religious reasons, and acceptance of conscientious objection where people have genuine difficulties in providing a service for a gay or lesbian couple on the basis of religious beliefs, or in doing something that they would perceive as aiding or abetting the procurement of an abortion.

Balancing respect for freedom of conscience (a human right protected as non-derogable in the ICCPR) with the human rights of others is not necessarily straightforward. There are those who would argue that if one accepts a position of employment in a secular organisation one must be prepared to do all that the employment entails.

However it is not always as simple as that. Jobs change, throwing up difficulties that could not have been contemplated years earlier when the person commenced employment in that field or began that career. A good example from the UK is the *Ladele* case,⁹ currently before the European Court of Human Rights. Ms Ladele was a registrar, employed by Islington Council in London. Among her functions she celebrated marriages. She began in that position some years before legislation was enacted permitting same sex couples to enter into civil partnerships that had all the same legal effects as marriages, and which could involve a marriage-like ceremony. Ms Ladele was comfortable registering the civil partnership, and providing all other services for

⁹ *Ladele v London Borough of Islington* [2010] IRLR 211, [2010] 1 WLR 955 (CA).

gay and lesbian couples. She had a religiously based objection to celebrating a civil partnership. There was absolutely no shortage of others who could perform those ceremonies. Indeed there were same-sex attracted registrars on staff. Reasonable accommodation could have been made for Ms Ladele's genuinely held religious objections by exempting her from performing these ceremonies without in any way affecting the service the Council provided. Same sex civil partnerships represent a very small part of the workload of registry offices nationally.

Just as the equal treatment of people with a same-sex orientation justifies anti-discrimination laws to protect them from unfair treatment or exclusion, so respect for freedom of religion and conscience requires that reasonable accommodation be made for those who have a genuine objection to same-sex relationships on religious grounds, provided that this can be done without a gay or lesbian couple being denied a service by a secular organisation established to provide a service for all.

Multiculturalism requires that at least some room be made for different moral values grounded in religious faith or cultural tradition. For religious schools, for example, this means the freedom to employ individuals who adhere to the religious faith and practices of the school in order to provide parents with the opportunity to ensure the religious and moral education of their children in conformity with their convictions (Article 18(4), ICCPR). For religious employees of public bodies, such as Ms Ladele, it means the freedom to manifest and practise one's religious beliefs at work, and thus not be compelled to provide services where one has conscientious objections against doing so and where the services can readily be provided by other employees who do not have the same religious convictions (cf Article 18(1) and (3), ICCPR). These issues are dealt with further in Prof. Parkinson's article (attached).¹⁰

Question 9

The question of whether the Commonwealth should add to the list of protected attributes is a difficult one. It is part of a larger question of why the Commonwealth sees the need to duplicate the work of the states and territories in this area. There is a larger question still. Is anti-discrimination law the best way of bringing about the desired social change, and what is the likely impact on small businesses and non-profit organisations, of increasing the extent of regulation of employment and the provision of goods and services?

The s 351 Fair Work Act list of protected attributes is now a long one: race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. To this, some want to add victims of domestic violence, homelessness and 'cognitive diversity' – differences in the way people think and reason. There are no doubt other candidates for inclusion, such as weight and physical appearance. It is likely that however extensive the list becomes in future, there will still be those who advocate for yet more protected attributes in the name of protecting people

¹⁰ P. Parkinson, "Accommodating Religious Belief in a Secular Age: The Issue of Conscientious Objection in the Workplace" (2011) 34 *Univ. of NSW Law Journal* 281.

from ‘discrimination’. There must, for this reason, be rational criteria established for the inclusion of a new protected attribute. A sensible balance needs to be found.

Anti-discrimination law started out as social justice legislation to enhance equal opportunity for groups against which there has been historical discrimination (e.g. women, ethnic minorities, and people with disabilities). This is well justified, but it comes at the expense of liberty rights. Furthermore, anti-discrimination laws have regulatory costs.

We suggest that before the list is expanded, the Commonwealth asks the following questions:

- 1) How strong is the evidence that including this new protected attribute will address a significant social problem?
- 2) How strong is the likelihood that legal regulation will make a major contribution to addressing that social problem?
- 3) Can the group that needs protecting be identified with sufficient clarity and particularity that the law is not over-inclusive or likely to fall into disrepute?
- 4) Is the group adequately protected under existing state or territory laws, or other Commonwealth laws?
- 5) What might be the adverse outcomes of regulation other than regulatory cost?
- 6) What problems can be foreseen for employers, non-profit organisations and others with the addition of this new protected group and how, if at all, can those problems be addressed?

The proposal to include victims of domestic violence as a protected group raises some of these issues. How strong is the evidence that employers and others are insensitive to victims of domestic violence? Will anti-discrimination laws be the most effective way of dealing with this problem or are there better ways? Can the group that needs protecting be identified with sufficient particularity? There may be evidential issues involved, particularly where the violence has been denied. Apprehended violence orders may be consented to without admissions, or may be made against both partners to the relationship with the consequence that both are deemed to be victims and perpetrators simultaneously. The grounds on which apprehended violence orders may be made vary significantly from one state to another. None of this is to suggest that victims of violence shouldn’t be protected through anti-discrimination laws; but these and other difficult issues need to be carefully considered.

We do, nonetheless, propose the inclusion of adherence to a religious belief as a new protected attribute for the following reasons:

- (i) This has been a historic ground of discrimination in the past in Australia;
- (ii) There is reason to think that discrimination against adherents to a religious belief will be a continuing problem in a secular society in which hostility to people of faith is becoming increasingly apparent;

- (iii) It is a ground for discrimination in the law of some states and territories but not all;
- (iv) It provides support for multicultural policy.

We do not see any need to protect non-belief through anti-discrimination laws. It is hard to discern any such policy considerations that would justify this as a protected attribute.

Question 28

If one of the purposes of this review is to bring about a consolidation of anti-discrimination laws, it would make sense for the provisions currently within the Fair Work Act to be eliminated to the extent that they represent an unnecessary duplication of the provisions contained in anti-discrimination legislation. It may be that provisions concerning termination because of a protected attribute need to remain in the Fair Work Act, but the definition of a protected attribute could be contained in the anti-discrimination legislation.

January 2012