



Australian Bahá'í Community

Submission by the Australian Bahá'í Community on the Consolidation of Commonwealth Anti-Discrimination Laws

The Australian Bahá'í Community welcomes this opportunity to respond to the discussion paper on the consolidation of Commonwealth anti-discrimination laws.

We support the Government's project to consolidate existing Commonwealth anti-discrimination legislation into a single, comprehensive law. As noted in the executive summary of the discussion paper, this project "provides an opportunity to consider the existing framework, and explore opportunities to improve the effectiveness of the legislation to address discrimination and provide equality of opportunity to participate and contribute to the social, economic and cultural life of our community".

The Australian Bahá'í Community was established in 1920 and its membership reflects the diversity of modern Australia. As members of the Bahá'í Faith—a worldwide religion, founded over 160 years ago, with more than five million members around the globe—we work together with others to build a global culture based on peace, justice and sustainable development.

This submission is based on the experience of the Australian Bahá'í Community, for almost a century, in advocating and working towards the elimination of all forms of prejudice, and the building of a community in which the human rights of all individuals are upheld, and all are empowered to recognise and develop their spiritual capacities and to channel their collective energies towards service to humanity. It also draws on our submission to the Senate Legal and Constitutional Affairs Committee's Inquiry on the Effectiveness of the Commonwealth Sex Discrimination Act, a copy of which is available on request.

Guiding principles

Prejudice and discrimination originate in the human mind. Remedies to redress them must accordingly address, first and foremost, the mental illusions that for thousands of years have generated false concepts of superiority and inferiority among human beings, whether based on the distinctions of race or ethnicity, sex or gender, age or class, or any of the myriad sub-groups into which humanity has been divided and accorded differing forms of treatment.

The reality is that there is only one human race. We are a single people, inhabiting one planet: one human family bound together in a common destiny. Recognition of this eternal spiritual truth is the antidote to racism, sexism, and all other forms of prejudice and discrimination.

A proper understanding of the oneness of humanity implies that any law, tradition or mental construct that grants superior rights or privileges to one grouping of humanity over another is

not only morally wrong, but fundamentally at odds with the best interests of even those who consider themselves to be in some way superior. It also implies that our nation, as a contributor to an emerging global civilisation, must hold common standards and take active steps to purge from our laws, traditions and practices any form of discrimination based on race, gender, age, religion, or any other individual characteristic or choice.

Accordingly, the Australian Bahá'í Community recommends that the oneness of humanity should be adopted as a guiding principle for the Consolidation project, and that the new consolidated law should include acknowledgement of the oneness and equality of all people in its statement of purpose or objects clause.

We further recommend that the consolidated law should be explicitly grounded in the international human rights instruments on which it is based, and should be interpreted consistently with those instruments. The Australian Bahá'í Community unequivocally affirms the universality of the rights articulated in the Universal Declaration of Human Rights, which, building on the United Nations Charter, underpins the United Nations human rights system. Over more than six decades since its adoption, the Declaration has been the basis for ongoing standard-setting in human rights, inspiring over sixty international treaties and conventions which in turn have acquired increasing authority through incorporation into national legal systems and through customary law. As the United Nations has repeatedly asserted, all human rights are universal, indivisible, interrelated and interdependent. All States, regardless of their political, economic and cultural systems, have the duty to promote and protect all the rights and responsibilities articulated in the Declaration. Any consideration of the protection and promotion of human rights in Australia, therefore, needs to be undertaken within the context of the framework and standards established by the Declaration and subsequently international agreements.

In this regard, we note and support the recommendation made by the Australian Human Rights Commission in its submission to this project: “The Commission recommends that a consolidated law state objectives of promoting the achievement of equality and the elimination of discrimination, and indicate clearly that it is intended to be interpreted in accordance with Australia’s international obligations on human rights.”

The meaning of discrimination

A unified definition

The Australian Bahá'í Community supports in principle the adoption of a unified definition of discrimination which incorporates the concepts of direct and indirect discrimination without making a legal distinction between them. The international human rights instruments on which the Australian law should be based do not explicitly refer to direct or indirect discrimination. As the discussion paper points out, “adoption of a unified test would avoid the confusing and difficult distinction between direct and indirect discrimination, make obligations under the consolidation bill clearer and more closely align Commonwealth anti-discrimination law with international law.” We further note the observation of the Australian Human Rights Commission, in its submission, that “In the Commission’s experience, legislative use of the terms direct and indirect discrimination, and separation of direct and indirect discrimination into different sections within the legislation, introduces unhelpful technicality and complexity and can be misleading.”

The comparator test

The Australian Bahá'í Community also supports the removal from any definition of discrimination of the comparator test, by which complainants have been required to prove that they experienced differential treatment by reference to a person in comparable circumstances without a protected attribute. This test has given rise to significant difficulties, as the discussion paper points out, due to the fact that in many cases no suitable comparator can be identified – particularly in cases of intersectional or compound discrimination, where the complainant possesses more than one protected attribute, and it is impossible to distinguish on which attribute the discrimination is based, and thus to construct an appropriate comparator. We recommend consideration of the test provided by section six of the Disability Discrimination Act which may provide a more reasonable and fair approach to the establishment of indirect discrimination.

Special measures

The Australian Bahá'í Community supports the inclusion of a single provision in the new law for special measures covering all protected attributes.

The concept of special measures is recognised under international human rights conventions as a valid and effective means for promoting substantive equality. The Bahá'í Community supports, and strives to uphold in its own practices, the principle that if any discrimination is to be tolerated, it should be discrimination in favour of, not against, the disadvantaged. For example, in the process of electing members to our administrative institutions, tied votes are resolved in favour of a person who belongs to a minority.

Without special measures, social change will be too slow and the privileges of the dominant majority will continue to eclipse the rights of those from minority or oppressed sectors of society. Such programs are temporary measures to balance the ills produced by contemporary society and a history of injustice.

Reasonable adjustments and positive duties

The significance of Australia's anti-discrimination laws in achieving a greater level of equality in Australian society should not be underestimated. While the existing Acts play a useful role for the individual complainant, however, they are not without their limitations. With their focus on identified acts of discrimination within specified spheres of activity, they have tended to address discrimination as an isolated incident rather than as a systemic issue. Under the individualised, reactive, complaints-based model, discrimination will only be remedied in specific cases if the victim takes action. This concern was raised by a number of submissions to the Inquiry into the Effectiveness of the Sex Discrimination Act, including that of the Australian Bahá'í Community.

The challenge of creating a society in which all members of the community can develop to their full potential cannot be met by legal measures outlawing discrimination alone. It requires changes to legal, political and economic structures, as well as the transformation of individuals whose morals or values consciously or inadvertently sustain exploitative behaviour. We all share responsibility for supporting and implementing the changes required.

Based on these considerations, we support the inclusion in the new law of an explicit duty on the part of duty holders to make reasonable adjustments to address disadvantage faced by those possessing protected attributes, thus extending the duty that is currently contained in the Disability Discrimination Act to other protected attributes. We believe that such a measure would encourage the addressing of discriminatory policies and practices in a proactive way, rather than relying on someone to experience discrimination and make a complaint. We further

support the introduction of a positive duty for public sector organisations to eliminate discrimination and harassment, and promote equality. The Government’s commitment to make human rights education the centrepiece of Australia’s Human Rights Framework, including its education and training program to foster human rights awareness in the Commonwealth public sector, is an important step in this direction.

In this regard, we note that if the Australian Human Rights Commission is given the responsibility to provide education and guidance to organisations about complying with such a positive duty, commensurate resources will need to be allocated to the Commission to enable it to fulfil this responsibility adequately. We acknowledge and pay tribute to the important role that the Commission and its individual commissioners have played, over many years, in promoting a more equal society for all Australians, and we support its recommendation that “the Attorney-General’s Department commence discussions on transitional requirements for resourcing for information, education and compliance promotion activities related to introduction of a consolidated Commonwealth equality law.”

Harassment

The Australian Bahá’í Community supports the inclusion in the new law of a prohibition on harassment, based on any protected attribute, in all areas where unlawful discrimination is prohibited. This prohibition could be implemented either through a standalone prohibition, or by clearly including such harassment within the meaning of discrimination. Such prohibition should extend to harassment on the basis of religion which, as outlined below, we believe should be explicitly added as an attribute protected from unlawful discrimination.

Protected attributes

Religion or belief as a protected attribute

The Australian Bahá’í Community advocates the inclusion of religion or belief as one of the attributes protected from discrimination under the new Commonwealth anti-discrimination law. We believe that the inclusion of religion or belief will contribute towards Australia’s compliance with its international human rights obligations, address current inconsistencies, and overcome a significant gap in existing Commonwealth legislation.

The appropriate standard of protection for religion and belief is, in our view, that set out in article 18 of the Universal Declaration of Human Rights: “Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in teaching, practice, worship and observance.” The Australian Bahá’í Community has consistently recommended that this standard be embodied in Australian law.

Regarding religious discrimination in particular, article 4 of the “Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief”, proclaimed by the UN General Assembly in November 1981, clearly articulates the obligation of States:

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

Accordingly, the Australian Human Rights Commission has previously concluded in its *Article 18* report that to comply with international human rights commitments, Australia should enact federal legislation to make direct and indirect discrimination on the basis of religion and belief unlawful in all areas of public life in Australia.¹ The consolidation project provides a timely opportunity to implement this recommendation.

At the present time, there is considerable inconsistency in the protection offered from discrimination on the basis of religion in Australia. Some State and Territory anti-discrimination laws provide coverage for discrimination on the basis of religion or belief, while others do not. The Australian Human Rights Commission Act defines “human rights” as including the rights and freedoms recognised in the Declaration on the elimination of all forms of Intolerance and of Discrimination based on Religion or Belief, even though there is no Commonwealth law protecting these rights and freedoms. Further, the Act gives the Commission the function of seeking to conciliate complaints of discrimination in employment on the basis of religion, in order to meet Australia’s obligations under International Labour Organization Convention No. 111 – but not in other areas of public life.² Nor does the Act enable Court ordered remedies to address and act as a deterrent to unlawful discrimination. The explicit inclusion of religion or belief as a protected attribute under the new law would address these inconsistencies and afford all Australians the protection to which they are entitled under international law.

We note that this recommendation is consistent with the Australian Human Rights Commission’s recommendation, in its submission, that “the Government give favourable consideration to inclusion within a consolidated Commonwealth equality law of attributes covered by the Commission’s existing ILO jurisdiction under the Australian Human Rights Commission Act and by the Fair Work Act.”

Other protected attributes

The Australian Bahá’í Community supports the recommendation of the Equality Rights Alliance, in its submission, that “survivor of domestic and family violence” also be included in the list of attributes upon which it is unlawful to discriminate. We recognise that a relentless epidemic of violence against women and girls exists in every corner of the world, including in Australia, where it is estimated that one in three women will experience physical violence in their lifetimes, and a significant proportion of this violence occurs at home. Those who are survivors of such violence should be protected from unlawful discrimination and adverse treatment. We note that a similar recommendation has been put forward by the Australian Human Rights Commission in its submission.

Discrimination based on more than one attribute

The issue of discrimination based on more than one attribute requires particular attention under the new law. It is well established that individuals who possess more than one of the protected attributes, such as Indigenous or disabled women, frequently suffer from a compounded form of discrimination. The submission from the Equality Rights Alliance sets out this issue in some detail, observing that:

¹ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, 1998, available on-line at http://www.hreoc.gov.au/pdf/human_rights/religion/article_18_religious_freedom.pdf

² As the discussion paper notes, 16.8 % of the ILO complaints received by the Commission in 2009-2010 related to discrimination on the basis of religion, demonstrating that this is a significant issue.

Intersectional discrimination recognises that a person may be subject to discrimination based on several aspects of their identity. As each woman's experience of life is different, a woman may simultaneously experience discrimination in one or more aspects of her life including gender, race, class, ethnicity, sexual orientation, ability, age, language, and religious beliefs. Intersectional discrimination acknowledges that discrimination can be experienced as a combination of many factors rather than one factor at a time. Intersectional discrimination cannot be distinguished as the sum of its parts; rather it is a compounded discrimination which is unique compared to discrimination based on a single factor.

Individuals experiencing compound discrimination should not be required to prove which attribute is the cause of their disadvantage, provided they can establish that they were subject to discrimination based on one or more of the protected attributes. The Australian Bahá'í Community supports the recommendation of the Australian Human Rights Commission that “a consolidated Commonwealth equality law apply to discrimination based on one or more protected attributes or a combination of protected attributes.”

Protected areas of public life

The Australian Bahá'í Community supports extending a general right to equality before the law, which currently exists in relation to people to different racial or ethnic groups, to all protected attributes under the new legislation. Such a measure would give effect to a principle that has been clearly articulated in international law, and can be traced back to article 7 of the Universal Declaration of Human Rights, which states:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

We further support a general provision prohibiting discrimination and harassment in any area of public life – as recommended by the Report on the Effectiveness of the Sex Discrimination Act – rather than making it unlawful in specific activities in specific areas of public life. Such a measure would also be helpful in addressing the gaps and inconsistencies that currently exist between the Acts, including those related to voluntary workers, small partnerships and member based organisations.

Exceptions and exemptions

The Australian Bahá'í Community recognises that the inclusion of permanent exceptions and exemptions in anti-discrimination law has a number of drawbacks, including introducing inconsistency, undermining the spirit and intention of the law, and weakening its moral authority. At the same time, we acknowledge that there are cases in which blanket implementation of the laws may produce a result which is unjust, interferes with other human rights (such as the right to freedom of religion and belief), or undermines the fundamental purpose of the law in creating substantive rather than formal equality.

In the light of these considerations, we support the introduction of a general limitations clause clarifying that conduct which is necessary to achieve a legitimate objective and is a proportionate means of achieving that objective is not unlawful discrimination.

In making this recommendation, we assume that conduct exercising the right to freedom of religion and belief – including conduct by a religious institution in conformity with the inherent

doctrines, tenets or beliefs of its religion – would be considered conduct necessary to achieve a legitimate objective under a general limitations clause. The right of individuals and groups to practice their religion in accordance with its laws and teachings is clearly protected under the international covenants to which Australia is a party, and it should be similarly protected under domestic law.

In the view of the Australian Bahá'í Community, no attempt to address equality can ignore religion and the role of religious leaders. Indeed, given the defining role of religion in cultivating the values of communities, the support of religious leaders and people of faith needs to be harnessed in ending all forms of discrimination. It must be acknowledged, however, that some voices raised in the name of religion constitute a formidable obstacle in this path. To counter this negative influence, religious practices and doctrines in flagrant violation of international human rights standards must be subject to deeper examination and scrutiny.

Complaints and compliance framework

Integral to any long-term approach to establishing equality is the measurement of progress towards stated goals and the use of monitoring tools and systems to gauge the impact of laws and policies. The development of indicators is essential to determine the effectiveness of initiatives to end discrimination.

Without regular monitoring and reporting against key indicators, Australian governments are not held accountable to their obligations to achieve equality in key areas, such as workforce participation and promotion, pay equity, leadership, harassment and violence. Such reporting can also play an important role in public education and awareness-raising.

Accordingly, the Australian Bahá'í Community recommends that under the new law, the Australian Human Rights Commission and/or its individual commissioners be given a statutory responsibility to independently monitor and report to Parliament on progress towards equality in Australia.

It is our view that human rights mechanisms are generally most effective if clear benchmarks are established against which their effectiveness can be measured. Benchmarks which set forth practical objectives and include specific detail, rather than providing only theoretical or general statements of intent, can assist in ongoing measurement and evaluation of the progress Australia makes in promoting and protecting human rights domestically. We note that the submission by the Equality Rights Alliance proposes minimum key performance indicators for the measurement of progress towards gender equality, and we commend these for consideration.

Preventing discrimination, including by educative means

Reforming laws and legal systems is one vital avenue to achieving equality. Enacting and enforcing legal protections for equality and freedom from discrimination are unquestionably essential to human rights and human dignity. But prejudice and inequality is stubbornly surviving legal reforms, in Australia and internationally. In the Bahá'í Community's view, ending discrimination is part of a broader exercise. There are other processes that should accompany the establishment of any legal mechanism seeking to protect and promote equality and human rights in Australia.

Full equality not only requires deliberate attempts to change the legal, political and economic structures of society, but, equally importantly, the transformation of individuals whose values, in different ways, sustain inequalities. It requires a new understanding of who we are, our purpose in life, and how we relate to one another – an understanding that will compel us to

reshape our lives and thereby our society. From the Bahá'í perspective, the essence of any program of social change is the understanding that the individual has a spiritual or moral dimension. This shapes their understanding of their life's purpose, their responsibilities towards the family, the community and the world.

We appreciate that promoting specific morals or values may be controversial, as such efforts have often been associated with repressive practices and narrowly defined visions of the common good. But moral capabilities, when articulated in a manner consistent with the ideals of the Universal Declaration of Human Rights and aimed at fostering the spiritual, social and intellectual development of all persons, represent a key element of the kind of transformation required for a society in which there is true equality to take shape. Such capabilities must be anchored in the central social and spiritual principle of our time, namely the interdependence and interconnectedness of humanity as a whole.

These capabilities can and should be taught in schools, but also need to take root in the family and the community. Neighbours, educators, health workers, employers, politicians, religious leaders, police, media professionals – all share responsibility for the promotion of equality and the prevention of discrimination.

Accordingly, we believe that systematic programs of human rights education are indispensable to the realisation of full equality in Australia. We have welcomed the Australian Government's commitment to make human rights education the centrepiece of Australia's Human Rights Framework, and we acknowledge the efforts of the Australian Human Rights Commission and its Commissioners over many years in this field. All Australians need not only to learn about their own rights, but to develop respect for the rights of humanity in general. Education that instils in hearts and minds an awareness of and sensitivity to the human rights of all persons constitutes an essential tool for the promotion and implementation of international human rights standards. In the final analysis, individuals are respected – or discriminated against – by other individuals, even if they are acting in an official capacity. Accordingly, it is essential to put in place, and provide adequate resources for, educative programs that touch the hearts, and elevate the behaviour, of all members of the community.

*

The Australian Bahá'í Community thanks the Government for the opportunity to make a submission to the consolidation project. We look forward to the opportunity to comment on the exposure draft legislation when it is released for public consultation in early 2012.

Australian Bahá'í Community
January 2012