



Strategic Responsive Solutions

## **How to Avoid Contravention of Discrimination Laws**

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***Baptist Camping Workshop, Mooloolaba***

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## **1 WHAT IS DISCRIMINATION?**

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- 1.1 Discrimination is any distinction, exclusion, restriction or preference made on a particular basis, such as sex or religion. To discriminate requires a conscious decision to make a distinction between people<sup>1</sup>. Certain types of discrimination are prohibited at law.
- 1.2 The legislation on discrimination is varied. At the Commonwealth level, it includes the Age Discrimination Act, the Sex Discrimination Act, the Disability Discrimination Act, the Racial Discrimination Act, the Human Rights and Equal Opportunity Act and the Fair Work Act.
- 1.3 Each State and Territory also has its own discrimination legislation.
  - 1.3.1 Anti-Discrimination Act 1991 (Qld) (“**the Qld Act**”);
  - 1.3.2 Equal Opportunity Act 1984 (WA) (“**the WA Act**”);
  - 1.3.3 Equal Opportunity Act 1984 (SA) (“**the SA Act**”);
  - 1.3.4 Equal Opportunity Act 2010 (VIC) (“**the VIC Act**”);
  - 1.3.5 Anti-Discrimination Act 1977 (NSW) (“**the NSW Act**”).
- 1.4 Whilst each jurisdiction has legislation that is somewhat similar, there are also significant differences, particularly around the applicable exemptions. By way of example, the exemptions from discrimination for religious bodies in Queensland is more limited than other jurisdictions.
- 1.5 This paper will focus on the Commonwealth and Queensland legislation, but also make reference to the legislation in other jurisdictions where necessary.

## **2 THE LEGISLATION**

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- 2.1 As already noted, the Commonwealth discrimination legislation is spread across various statutes, depending on the type of discrimination alleged. For example, the Sex Discrimination Act prohibits discrimination on the basis of sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities. This includes discrimination of this nature in the education, employment and accommodation areas (plus additional areas).
- 2.2 Section 6 of the Queensland Act prohibits discrimination on the basis of the following attributes:

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<sup>1</sup> *Hodkinson v The Commonwealth* (2011) 207 IR 129 at 176.

- 2.2.1 Sex;
  - 2.2.2 Relationship status;
  - 2.2.3 Pregnancy;
  - 2.2.4 Parental status;
  - 2.2.5 Breastfeeding;
  - 2.2.6 Age;
  - 2.2.7 Race;
  - 2.2.8 Impairment;
  - 2.2.9 Religious belief or religious activity;
  - 2.2.10 Political belief or activity;
  - 2.2.11 Trade union activity;
  - 2.2.12 Lawful sexual activity;
  - 2.2.13 Gender identity;
  - 2.2.14 Sexuality (defined to mean homosexuality, heterosexuality or bisexuality<sup>2</sup>);
  - 2.2.15 Family responsibilities; and
  - 2.2.16 Association with, or relation to, a person identified on the basis of any of the above attributes.<sup>3</sup>
- 2.3 Discrimination on the basis of these attributes includes direct and indirect discrimination on the basis of:
- 2.3.1 A characteristic that a person with any of those attributes generally has; or
  - 2.3.2 A characteristic that is often imputed to a person with any of the attributes; or
  - 2.3.3 An attribute that a person is presumed to have by the person discriminating; or

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<sup>2</sup> *Anti Discrimination Act 1991* (Qld) Schedule – Dictionary.

<sup>3</sup> *Anti Discrimination Act 1991* (Qld) section 7.

- 2.3.4 An attribute that the person had in the past, even if the person did not have it at the time of the discrimination.<sup>4</sup>
- 2.4 The WA Act prohibits discrimination on multiple grounds including sex, marital status, pregnancy, breast feeding, sexual orientation, race, religious conviction, impairment and age. It differs to the Queensland Act in that it does not include all grounds of potential discrimination in one section, but addresses each ground extensively in a separate section.
- 2.5 The SA Act is again different in structure. It prohibits discrimination on the basis of sex, chosen gender, sexuality, race, disability and age. It notably does not provide for discrimination on the basis of religion.
- 2.6 The VIC Act is very structured. It prohibits discrimination on the basis of employment, education, the provision of goods and services, accommodation, sport and local government.
- 2.7 Finally, the NSW Act prohibits:
- 2.7.1 Racial discrimination;
  - 2.7.2 Sex discrimination;
  - 2.7.3 Discrimination on transgender grounds;
  - 2.7.4 Discrimination on the basis of marital or domestic status;
  - 2.7.5 Discrimination on the basis of a disability;
  - 2.7.6 Discrimination on the ground of homosexuality;
- 2.8 The legislation generally refers to two types of discrimination, direct discrimination and indirect discrimination.
- 2.9 Direct discrimination is where a person treats, or proposes to treat, a person with one of the attributes less favourably than a person without one of the attributes<sup>5</sup>. For example, if you refuse to accept a person at your campsite, because they are in a de-facto relationship, this would amount to direct discrimination.
- 2.10 Indirect discrimination is more subtle. It occurs where a person imposes, or proposes to impose, an unreasonable term or condition with which a person with an attribute is not able to comply, and with which a higher proportion without that attribute are able to comply<sup>6</sup>. For example, if you

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<sup>4</sup> *Anti Discrimination Act 1991* (Qld) section 8.

<sup>5</sup> *Anti Discrimination Act 1991* (Qld) section 10.

<sup>6</sup> *Anti Discrimination Act 1991* (Qld) section 11.

require persons who share a twin room to be married, this would be a form of indirect discrimination against homosexual couples. The condition being imposed is that all occupants must be married. Homosexual couples are unable to be married, and are therefore unable to comply with this condition. A higher proportion of other couples are able to be married, and therefore able to comply with the condition.

### **3 DISCRIMINATION IN CAMPING (ACCOMMODATION)**

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3.1 There are also discrimination laws in specific relation to the camping context of this Workshop.

#### **Commonwealth**

3.2 Section 23 of the *Sex Discrimination Act 1984* (Cth) states that it is unlawful for a person to discriminate against another person in relation to accommodation on the ground of the other person's:

- 3.2.1 Sex;
- 3.2.2 Sexual orientation;
- 3.2.3 Gender identity;
- 3.2.4 Intersex status;
- 3.2.5 Marital or relationship status, pregnancy or potential pregnancy, or breastfeeding.

3.3 Accommodation is defined as including residential and business accommodation. In our view, camping would amount to "business accommodation", as a fee for service is charged for the accommodation.

#### **Queensland**

3.4 Section 83 of the Queensland Act states that a person must not discriminate against another person:

- 3.4.1 In any variation of the terms of which accommodation is supplied; or
- 3.4.2 In denying or limiting access to any benefit associated with the accommodation; or
- 3.4.3 In evicting the other person from the accommodation; or
- 3.4.4 By treating the other persons unfavourably in any way in connection with the accommodation.<sup>7</sup>

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<sup>7</sup> *Anti Discrimination Act 1991* (Qld) section 83.

- 3.5 “Accommodation” includes a caravan or caravan site, and a camping site<sup>8</sup>.
- 3.6 This means that the initial position of the Act is that organisation cannot “pick and choose” the camping bookings that they wish to take. The anti-discrimination provision in section 6 will also simultaneously apply, as refusing a camp booking essentially amount to discrimination against the individuals in that group.

### **Western Australia**

- 3.7 Part IIB and IV of the WA Act states that a person may not discriminate against another person on the ground of the other person’s sexual orientation or religious or political conviction in work, education, accommodation, land and clubs, among other grounds.
- 3.8 A person may not discriminate on the basis of sexual orientation in relation to accommodation.
- 3.9 The definitions state that “accommodation includes residential or business accommodation”. The use of the term “includes” incorporates camping facilities which may be classified as business accommodation for the purposes of holding conferences and camps.

### **South Australia**

- 3.10 Part 3 of the SA Act prohibits discrimination on the basis of a person’s sexuality in work, education, land, good, services or accommodation. “Accommodation” is not defined in the SA Act, however it uses almost the same language as the WA Act. It may therefore be deduced that the legislative intent of this definition also includes camping facilities.
- 3.11 The same definition is provided in respect of discrimination in relation to age, a disability etc.

### **New South Wales**

- 3.12 New South Wales is also similar to the above two jurisdictions. The NSW Act’s definition of “accommodation” “includes residential or business accommodation”.
- 3.13 The NSW Act states that a person may not discriminate against another person on the basis of homosexuality in work, education and accommodation, among other grounds.

### **Victoria**

- 3.14 The VIC legislation considers accommodation specifically as a form of prohibited discrimination in its own right. The definition of “accommodation” includes a campsite.
- 3.15 A person is prohibited from discriminating in:

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<sup>8</sup> *Anti Discrimination Act 1991* (Qld) Schedule – Dictionary.

- 3.15.1 Offering to provide accommodation (not accepting a person's application for accommodation, by processing such an application differently, or by the terms on which the accommodation is offered to another person).
- 3.15.2 In providing accommodation, including:
- a By varying the terms of accommodation;
  - b By denying/limiting access to the accommodation;
  - c By evicting the other person;
  - d By refusing to extend or renew the provision of accommodation;
- 3.15.3 Section 82 provides an exception for religious bodies from the obligation to conform with this anti-discrimination provision.
- 3.15.4 This exception will be discussed further in the next section of this paper.
- 3.16 I will discuss the major case law in the next section of this paper.

#### **4 POSSIBLE EXEMPTIONS - CAMPING ACCOMMODATION WITH RELIGIOUS PURPOSES**

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- 4.1 Christian Churches or Church-based organisations may conduct business activities where they provide camping facilities for hire. This will involve the taking of bookings from differing groups of people from different demographics. Sometimes, there may be booking requests from groups that do not conform to the Christian religion.

##### **Queensland**

- 4.2 While the legislation prohibits discrimination on the basis of the above specific attributes (including religious belief or religious activity), it does provide an exception to discrimination in section 90. This section states that it is not unlawful to discriminate in respect of accommodation that has religious purposes, where the following standards are met:
- 4.2.1 **LIMB 1:**
- a The accommodation must be under the direction or control of a body established for religious purposes; AND
- 4.2.2 **LIMB 2:**
- a The discrimination is in accordance with the doctrine of the religion concerned; AND

- b The discrimination is necessary to avoid offending the religious sensitivities of the people of the religion.<sup>9</sup>
- 4.3 The effect of this exception is that organisations that are classified as a “body established for religious purposes” may discriminate in terms of the bookings that they take at their camping facilities. The discrimination must be based on the religion or the religious content that will be taught at the camp or conference in question.
- 4.4 This is, however a very tenuous subject, and Churches must be extremely cautious when choosing to exercise this exemption. There is extensive case law and commentary to address these elements.
- 4.5 This particular exemption does not apply in the work and education areas.

### Victoria

- 4.6 There is a general prohibition in section 52 from discriminating against a person in relation to the provision of accommodation.
  - 4.6.1 Section 82, however, goes on to state that the above restriction does not apply to:
    - ... anything done on the basis of a person’s religious belief or activity ... by a religious body that*
    - (a) conforms with the doctrines, beliefs or principles of the religion; or*
    - (b) is necessary to avoid injury to the religious sensitivities of adherents of the religion.*
  - 4.6.2 The entity conducting the exempt discrimination must be a religious body. The definition of “religious body” was recently amended to reflect the major case law in this field. It means:
    - a A body established for a religious purpose; or
    - b An entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs, or principles.
  - 4.6.3 The important of differentiating a religious body from a secular body will be discussed further in this paper.

### New South Wales

- 4.7 Section 49ZQ of the NSW Act prohibits discrimination in relation to accommodation.

<sup>9</sup> *Anti Discrimination Act 1991* (Qld) section 90.

- 4.8 Section 56 further states that an exemption from the Act is “an act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion”.
- 4.9 The religious susceptibilities of adherents to the religion have been discuss in respect of the Queensland legislation above and will be discussed in relation to the case law below.
- 4.10 It is also important that the body conducting the exempt discriminating act is a “body established to propagate religion”. This may also be defined by reference to the case law below.

#### **South Australia**

- 4.11 Section 40 of the SA Act prohibits discrimination in relation to accommodation.
- 4.12 Section 50 states that an exemption from the Act is “practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion”.
- 4.13 The religious susceptibilities of adherents to the religion have been discuss in respect of the Queensland legislation above and will be discussed in relation to the case law below.
- 4.14 It is also important that the body conducting the exempt discriminating act is a “body established for religious purposes”. This may also be defined by reference to the case law below.

#### **Western Australia**

- 4.15 While discrimination is prohibited in the supply of accommodation, including camping grounds, under section 35Z of the WA Act, subsection (3)(b) states that accommodation provided by a religious body is exempt from the scope of that section.
- 4.16 This notably excludes the requirement found in the SA, NSW, VIC and Qld legislation that the discrimination must conform with the precepts of the religion and be necessary to avoid offence to the religious susceptibilities of the adherents to that religion.
- 4.17 This suggests that religious bodies are prima facie exempt from the scope of that section, I note, however, that the “religious body exemption” is only applicable to discrimination in accommodation on the grounds of sexual orientation. It does not apply, for example, to discrimination in accommodation on the basis of race.

#### **Commonwealth**

- 4.18 Section 23 of the *Sex Discrimination Act 1984* (Cth) exempts accommodation provided by religious bodies.

#### **Case Law**

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- 4.19 The most recent case on this issue is the Victorian case of *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd & Ors*<sup>10</sup>. In this case, a Church camp was found to have illegally discriminated against same-sex attracted persons by refusing a camping booking from a homosexual support group. Many of you will be familiar with this case.
- 4.20 By way of background, the request for accommodation was made by Cobaw, an organization concerned with youth suicide prevention. Cobaw focuses particularly on same-sex attracted young people. CYC, the Church camp, was established by the Christian Brethren Trust. The Christian Brethren Trust was established for purposes connected with the Christian Brethren Church.
- 4.21 This case was an appeal from a 2010 decision of the Victorian Civil and Administrative Tribunal (“VCAT”), which held that the refusal amounted to unlawful discrimination against same-sex attracted young individuals who would be attending the camp. They held that this was a contravention of the anti-discrimination provisions of the *Equal Opportunity Act 1995*, the Victorian version of Queensland’s *Anti-Discrimination Act 1991* (Qld). CYC appealed this decision to the Victorian Court of Appeal.
- 4.22 The Court of Appeal handed down its decision on 16 April 2014. It dismissed the appeal by the Church camp and found that:
- 4.22.1 The Church camp had unlawfully discriminated against same sex attracted young people on the basis of their sexual orientation; and
- 4.22.2 The Church camp’s actions did not satisfy either of the “religious freedom” exemptions in the section 90 equivalent. This is an important element for Churches to understand, so we will explore this point further now.

*LIMB 1: Section 90(a)*

- 4.23 Limb 1 refers to the body undertaking the discriminatory conduct. It must be a body established for religious purposes. The entity must satisfy this Limb 1 first in order to satisfy Limb 2.
- 4.24 The unanimous view of the Court was that CYC was not “a body established for religious purposes”, despite possessing a number of religious features, and therefore it could not rely on the exemption which would have otherwise allowed it to discriminate in this way. One factor contributing to CYC’s exclusion from the category of being a body established for religious purposes was the fact that the advertising in its brochures and websites did not contain any clear references to Christianity, and it was regularly booked by secular groups that were not required to be teaching religious content.
- 4.25 This conclusion seems to challenge the influential High Court case of *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* [2008] HCA 55 (“**Word Investments**”). In that case, it was found that an entity can still be considered to be a body established for

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<sup>10</sup> [2014] VSCA 75.

religious purposes even if it engaged in secular commercial activities, provided that the income derived from those activities was put to the purposes of activities of a religious nature. The Court distinguished this case from *Word Investments* by saying that in *Word Investments*, the secular commercial activities were simply ancillary to the entity's intrinsically religious purposes. In the case at hand, the Court stated that the very purpose for which CYC existed was its secular commercial activity of providing a campsite to the public for hire. Therefore, the principles of *Word Investments* did not apply to this case.

*LIMB 2: Section 90(b)*

- 4.26 Limb 2 refers to the nature of the conduct itself. The refusal must be in accordance with the doctrines of the religion and it must be necessary to avoid offence of the religious sensitivities of people of that religion.
- 4.27 The Court held that CYC was operating as a corporation and not a body established for religious purposes, and that this exemption was not intended to apply to corporations. Because the Church camp was unable to satisfy Limb 1 as being a "body established for religious purposes", they were consequently unable to satisfy Limb 2, because corporations cannot hold religious beliefs. There was no indication in the Act that Parliament contemplated that a corporation would be deemed to be able to hold a religious belief and therefore the exemption could not apply to CYC.
- 4.28 The Court held that even if the Church camp had been a body established for religious purposes, the refusal of accommodation was not a necessary act to avoid injury to religious sensitivities. That is, the potential degree of offence or harm to the religious sensitivities of members of that religion was not of a sufficient extent to warrant the refusal of the booking.
- 4.29 This case is on appeal to the High Court and further developments in the law in this area are likely to occur.
- 4.30 This decision is inconsistent with the decision of the New South Wales Appeal Panel in *Members of the Board of the Wesley Mission Council v OV and OW (No 2)* (2009) NSWADTAP 57. In this case, a same-sex couple contacted the Wesley Mission to enquire about becoming foster-carers. They were told that, as a matter of policy, applications from same-sex couples were never accepted. They lodged a complaint with the Anti-Discrimination Board alleging discrimination on the ground of homosexuality. The Wesley Mission argued that they were exempt under section 56 of the *Anti-Discrimination Act 1977* (NSW) (as discussed above).
- 4.31 Key issues in this matter were the meaning of religion and the meaning of doctrine.
- 4.32 In the initial decision, the Tribunal considered whether "religion" was the "religion of the Wesley Mission", the "religion of the Uniting Church (which the Wesley Mission falls within)" or the "religion of Christianity".
- 4.33 "Religion" was not defined in the Act. The Tribunal therefore needed to consider what the "common" or "everyday" meaning of religion is. In considering this, the Tribunal considered the definition of "religion" in various dictionaries, all of which pointed to the conclusion that "religion" was not church or denomination based.

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- 4.34 The Tribunal concluded that:
- 4.34.1 “religion” was not a “church or a denomination itself, much less one of a number of churches which espouses and propagates the same fundamental belief system, but the “complex of faith and conduct” to which adherents of the religion subscribe and commit themselves to practice.”
  - 4.34.2 “it is common knowledge that within Christianity there are a number of streams all springing from the same source ..... That there are various streams within Christianity does not however turn each into a separate religion.”
  - 4.34.3 the relevant “religion” was “Christianity”, and not the religion of the “Uniting Church”. It rejected an argument that “religion” could be “denomination based”.
  - 4.34.4 “this may not have been the intention of the Parliament when section 56 was first drafted. Nevertheless, the Tribunal concluded that any other reading would require a warping of the plain language of the statute where it uses the word “religion”.
- 4.35 The Appeal Panel decided that the Tribunal’s definition of religion was too narrow and that Wesleyanism did indeed fall within the meaning of ‘religion’. Their reasoning was that where more than one definition of a word exists, the definition which gives accord to the purposes of the legislation in question should be used. As a result, the question of religion will be reconsidered by the Tribunal.
- 4.36 “Doctrine was also not defined in the Act, and again the Tribunal needed to consider what the “common” or “everyday” meaning was.
- 4.37 The Tribunal noted that “the essence of the concept of a religious doctrine is that it is a principle or set of principles taught by the religion in question, in relation to some issue of real significance to the faithful ... it must have a source in some religious text or oral tradition regarded as authority within the religion itself, or come from a person or group recognised as having authority within the religion to interpret the religious text or tradition in the light of new circumstances.”
- 4.38 The Wesley Mission argued that the relevant doctrine of the Church was the belief that “monogamous heterosexual partnership within marriage is both the norm and ideal”, and that the act of preventing homosexual persons from being foster-carers conformed to this doctrine.
- 4.39 However, the Tribunal was unable to accept that this was a “doctrine” of Christianity, as there was a diversity of views and beliefs within the Christian religion on the issue of homosexuality (the Tribunal also commented that this diversity was also present in the Uniting church).
- 4.40 The success of the appeal on this point came down to a procedural technicality. The Tribunal relied on a definition of “doctrine” without giving the parties a chance to comment on its reliability and veracity (truthfulness of the source). Accordingly, the Appeal Panel held the decision by the Tribunal was not in itself incorrect, but required the decision to be reconsidered in accordance with proper procedure.

- 4.41 A further question was whether the act of the Wesley Mission necessary to avoid injury to the religious susceptibilities of the adherents of the Christian religion.
- 4.42 The Tribunal noted that “injury” requires more than mere offence. This “injury” must be caused to “the adherents”, and not just “some or an unknown proportion of the adherents”.
- 4.43 Again, the Tribunal noted that there was a diversity of views among adherents of the Christian religion about homosexuality. Indeed, the Tribunal received evidence that another agency of the Uniting Church had allowed homosexual persons to be foster-carers. Even if actual injury could be proven, this injury would only be to “some or an unknown proportion” of the adherents of the Christian religion, and not to all adherents.
- 4.44 The Appeal Panel however concluded that the Tribunal’s decision that, when an ‘unknown proportion’ of adherents is affected, the exemption is excluded, is incorrect. The Appeal Panel decision also found that the Tribunal’s definition of ‘adherents to the religion’ was too narrow, causing an error of law. This resulted in the Appeal Panel requiring this aspect of the decision to be reconsidered as well.
- 4.45 The principal difficulty for religious bodies was the Tribunal’s interpretation of “religion” (i.e. the Christian religion). Because of the diversity of views within the Christian community, it would be very difficult for a respondent to a discrimination complaint to ever prove that their act of discrimination is exempt. The appeal decision resolved these concerns in the favour of the religious bodies.
- 4.46 Given the significant difference between the NSW and Victorian decisions (which are both of superior and equal courts, religious bodies are in a state of limbo. Until the High Court make a determination, it is difficult to say where this will go. In the interim, the take-home for Churches is that they must be very intentional about whether they, as a religious group, intend to operate as a commercial entity or as a body established for religious purposes. If they operate as a commercial entity, they will not be able to discriminate on the basis of the doctrines of their religion. If they operate as a “Church”, that is, a body established for religious purposes, they will be able to discriminate where it is necessary to uphold the principles of their religion.

## **5 DISCRIMINATION IN CAMPING BOOKING PRACTICES**

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- 5.1 Based upon the above CYC case law, it appears that the permitted discrimination in booking practices must be divided into two categories:
- 5.1.1 If Churches are operating as commercial entities, they may not be protected from discrimination in their booking practices.
- 5.1.2 If Churches are operated as a body established for religious purposes, they may have an exemption available that allows them to discriminate in their booking practices. However, this exception is limited and should be carefully assessed before it is exercised.

- 5.2 “Body established for religious purposes” is not defined in the Act, however we can ascertain from the judgment in the CYC case that such a body is one which is actively pursuing religious goals as its main activity, rather than running a business with a religious worldview. We consider this is, however, in direct contraction of the High Court’s decision in Word Investments, and hopefully will be corrected by the High Court.
- 5.3 Churches, and their associated entities, should still take purposeful steps to communicate a consistent position of their religious status to the public, such as Indicating on their website, brochures and other advertisements that they are a Christian organisation, dedicated to a specific statement of faith and that they operate in accordance with this statement of faith.
- 5.4 However, simply being categorized as a body established for religious purposes does not give an entity the ability to refuse any booking at its own discretion. It must only decline bookings which satisfy section 90(b) of the Act. As demonstrated in the above case, the standard imposed by the legislation is very high.
- 5.5 They should assess each limb of that section separately and assess the booking’s impact on them, that is:
- 5.5.1 Defining what the doctrines of their religion are;
  - 5.5.2 Determining the doctrines of the group who is seeking to book the site, and the doctrines that they intend to teach at the proposed camp or conference;
  - 5.5.3 Determining whether the doctrines are consistent or opposed to one another;
  - 5.5.4 Determining what the religious sensitivities of the people of the religion are;
  - 5.5.5 Determine the scope or reach of those sensitivities (including an acceptable point at which to justify declining a booking);
  - 5.5.6 Determine whether the content to be taught at the camp will:
    - a Offend the sensitivities of the people of the religious;
    - b Offend those sensitivities to an extent which justifies declining the booking.

## **6 DISCRIMINATION IN EMPLOYMENT**

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- 6.1 I will now consider the Employment practices of Churches or Church-based organisations. Employment practices covers both the act of employing Employees, and the treatment of Employees in their employment.
- 6.2 In relation to Employment, the main governing legislation is the *Fair Work Act 2009* (Cth).
- 6.3 I note, however, that volunteers are caught by the state legislation.

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- 6.4 Employees are given protections called “general protections” in the workplace. These general protections were introduced to protect workplace rights, provide protection from workplace discrimination, and to provide relief for employees who have been discriminated against<sup>11</sup>.
- 6.5 A number of general protections aim to protect employees from adverse action taken because of a particular reason.
- 6.6 “Adverse action” can occur by an Employer against an Employee, or by a prospective Employer against a prospective Employee.
- 6.6.1 Where by an Employer against an Employee, adverse action may be taken if an Employer dismisses the Employee, doesn’t give an Employee legal entitlements such as pay or leave, alters the Employee’s position to the Employee’s disadvantage, or treats an Employee differently to others.
- 6.6.2 If by a prospective Employer against a prospective Employee, it can occur if a prospective Employer refuses to employ a prospective Employee or offers a prospective Employee employment on terms that are different and unfair terms and conditions compared to other Employees<sup>12</sup>.
- 6.7 One such protection is concerned with the exercise of workplace rights. Employers are prohibited from taking adverse action against an Employee **because** the Employee:
- 6.7.1 Has a workplace right;
- 6.7.2 Exercises, or does not exercise, a workplace right; or
- 6.7.3 Proposes to exercise, or not exercise, a workplace right<sup>13</sup>.
- Workplace rights includes the rights to make a complaint or make an inquiry in relation to conditions of Employment.
- 6.8 Another general protection is in regard to discrimination. Section 351 of the *Fair Work Act 2009* (Cth) prohibits Employers taking adverse action against Employees, or prospective Employees, **because** of one or more of the following attributes:
- 6.8.1 Race;
- 6.8.2 Colour;

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<sup>11</sup> *Fair Work Act 2009* (Cth) section 336.

<sup>12</sup> *Fair Work Act 2009* (Cth) section 342.

<sup>13</sup> *Fair Work Act 2009* (Cth) section 340.

- 6.8.3 Sex;
  - 6.8.4 Sexual orientation;
  - 6.8.5 Age;
  - 6.8.6 Physical or mental disability;
  - 6.8.7 Marital status;
  - 6.8.8 Family or carer's responsibilities;
  - 6.8.9 Pregnancy;
  - 6.8.10 Religion;
  - 6.8.11 Political opinion;
  - 6.8.12 National extraction; or
  - 6.8.13 Social origin.<sup>14</sup>
- 6.9 The above attributes are not defined in the *Fair Work Act 2009* (Cth). As such, they should be defined according to their ordinary meaning.
- 6.10 Although section 351 concerns "discrimination", it does not expressly prohibit discrimination. It simply prohibits adverse action which is motivated by any one of the list of prohibited reasons. The definition of what may constitute discriminatory conduct under the anti-discrimination legislation is not imported into section 351<sup>15</sup>.
- 6.11 The other general protections are in regard to industrial activities<sup>16</sup>, temporary absence in relation to illness or injury<sup>17</sup>, and coverage by particular instruments such as the National Employment Standards<sup>18</sup>.
- 6.12 You will note that the use of the word **because** in these provisions means that the main question in a general protections dispute will be **why** the adverse action was taken. There must be a link

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<sup>14</sup> *Fair Work Act 2009* (Cth) section 351(1).

<sup>15</sup> *Hodkinson v The Commonwealth* (2011) 207 IR 129 at 140-141.

<sup>16</sup> *Fair Work Act 2009* (Cth) section 346.

<sup>17</sup> *Fair Work Act 2009* (Cth) section 352.

<sup>18</sup> *Fair Work Act 2009* (Cth) section 354.

between the adverse action taken and the general protections in the Act, such as the protections from discrimination, or the protection to be able to exercise a workplace right. Unless the adverse action was taken “because” of a proscribed reason, there will be no breach of the general protections provisions.

- 6.13 Where a general protections application is made to the Fair Work Commission (the governing body of such disputes), there will be a presumption that the person taking the action took such actions for a reason or with an intent that would contravene the general protections provisions. That is, the person who took the action bears the onus of proving that the action was not taken for a prohibited reason. They must rebut the presumption.
- 6.14 Section 360 deals with situations where there are multiple reasons for the taking of adverse action. If one of the reasons for taking the action was a proscribed reason, then there will be a breach of the general protections. The proscribed reason does not have to be the sole, or even the dominant reason. It must, however, be a substantial and operative reason<sup>19</sup>.
- 6.15 Section 351(2)(c) of the Act does, however, provide an exemption for adverse action that is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion, if the action is taken in good faith and is necessary to avoid injury to the religious susceptibilities of the people of that religion<sup>20</sup>.“
- 6.16 What this exemption has the effect of doing is *permitting* adverse action, as long as the action is taken to comply with the requirements I have just mentioned, namely:
- 6.16.1 Taken in “good faith”. Good faith is not defined in the *Fair Work Act 2009* (Cth) as is defined according to its ordinary meaning. The Court has accepted the proposal that good faith can be a “state of mind consisting in honesty in belief or purpose” and “faithfulness to one’s duty or obligation”<sup>21</sup>.
- 6.16.2 Be necessary to avoid “injury to the religious susceptibilities of adherents to the religion”. The standard requires more than simply offending the members of the religion. A proportion of adherents must be affected, but not necessarily injured, for this limb to be satisfied<sup>22</sup>.

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<sup>19</sup> *Board of Bendigo Regional Institution of Technical and Further Education v Barclay* (2012) 220 IR 445 at 102-104.

<sup>20</sup> *Fair Work Act 2009* (Cth) section 351(2)(c).

<sup>21</sup> *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105 at 88.

<sup>22</sup> *Members of the Board of the Wesley Mission Council v OV (No 2)* (2009) NSWADTAP 57 at 54.

- 6.17 A case example is *Hozack v Church of Jesus Christ of Latter-Day Saints*<sup>23</sup>. The applicant was a member of a Church which was also her Employer. A condition of her employment was that she must remain “temple-worthy”. The applicant was expelled from her Church and her employment was terminated because it was found that she was in a relationship with a man whilst she was separated, but not divorced, from her husband. The Court held that the Church’s decision to terminate her employment was made in good faith for the purpose of avoiding injury to the religious susceptibilities of its adherents.
- 6.18 Therefore, to satisfy this exception when taking adverse action against Employees, Churches should consider the following general guidelines:
- 6.18.1 The religious beliefs of people of the religion should be ascertained;
- 6.18.2 All action taken should demonstrate an honest belief that such action is necessary to offend the beliefs of the members of the religion to such a degree that justifies the action.

We suggest seeking legal advice prior to taking action that you believe to be adverse action.

- 6.19 The above matters have generally been in relation to the treatment of Employees in their Employment. I will now specifically consider the Employment of prospective Employees by Churches.
- 6.20 It is important to note that discrimination in the area of employment is also included in the various State legislation. Additionally, in the Queensland legislation, employment extends to “volunteer work”. Exemptions are generally similar in the State legislation (although note that the “religious body” exemption in the Queensland legislation does not extend to the work area, and the exemption is therefore somewhat narrower).

### Employment by Churches

- 6.21 Adverse action taken on the basis of religion under the *Fair Work Act 2009* (Cth) is problematic for hiring practices of Churches who wish to employ only Christians. As mentioned above, not hiring a prospective employee on the basis of their religion, or non-religion, may constitute adverse action. Religious discrimination includes distinctions made on the basis of expression of religious beliefs or membership in a religious group. This also includes discrimination against people who do not conform to a particular religious belief (including atheists).
- 6.22 However, section 351(2) states that such discrimination is not unlawful if the discrimination is allowable under an anti-discrimination legislation. Subsection (3) states that the Act is one such legislation. Therefore, Churches may rely on an exception provided under the Act.
- 6.23 The initial position of the Act in relation to the hiring and treatment of Employees is codified in sections 14 and 15. These sections prohibit a person from discriminating:

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<sup>23</sup> (1997) 79 FCR 441.

- 6.23.1 In deciding who should be offered work;
  - 6.23.2 In failing to offer work;
  - 6.23.3 In treating employees unfavourably;
  - 6.23.4 In varying terms of work; or
  - 6.23.5 In dismissing a worker.
- 6.24 Section 24 of the Act, however, states that “it is not unlawful to discriminate in the work or work-related area if an exemption in [section] 25 ... applies”. Section 25 states that “a person may impose genuine occupational requirements for a position”.
- 6.24.1 The same section allows a “body established for religious purposes” to discriminate in a way that is otherwise prohibited, if the work genuinely requires adhering to or communicating the body’s religious beliefs<sup>24</sup>.
  - 6.24.2 As such, the body can reasonably discriminate against a person, during the selection process or during employment, if:
    - a the person “act in a way that they know to be contrary to the Employer’s religious beliefs”<sup>25</sup>; or
    - b it is a genuine occupational requirement that the person acts in a way that is consistent with the Employer’s religious beliefs.
- 6.25 Genuine Occupational Requirement has been judicially considered in various matters, to mean requirements that are essential to the position.
- 6.26 A Church may choose to only employ Christians to work in a Church that is established for adherents to the Christian religious. Therefore, it could impose a genuine occupational requirement that all Employees must be adherents to the Christian religion.
- 6.27 However, a para-church body may have greater difficulties in demonstrating that Christian faith is “essential” to the position, particularly if it has not been consistently enforced by the body.

## **7 MINIMISING THE RISK OF CONTRAVENING DISCRIMINATION LAWS**

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- 7.1 There are a number of things that all Employers can do to avoid and manage unlawful discrimination in the workplace, whether in a camping context or not. Most of these steps will

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<sup>24</sup> *Anti-Discrimination Act 1991* (Qld) section 25(2)(b).

<sup>25</sup> *Anti-Discrimination Act 1991* (Qld) section 25(3).

center around formulating effective workplace policies and procedures. A general rule of thumb is that the larger the business is, the more the business will have to do to educate its Employees and avoid workplace discrimination.

7.2 Employers should take the following practical steps in the workplace:

- 7.2.1 Create clear policies about unlawful discrimination. Make sure these policies address the requirements of all anti-discrimination laws that apply, including the *Fair Work Act 2009* (Cth);
- 7.2.2 Have a formal complaints and dispute resolution procedure in place. This may be codified in a company policy;
- 7.2.3 Provide staff with compulsory training on workplace discrimination, including managers and supervisors;
- 7.2.4 Review their policies regularly to make sure they comply with the law and address the specific needs of staff;
- 7.2.5 When drafting or updating policies, consult with employees and seek advice from organisations such as the Fair Work Ombudsman and anti-discrimination bodies. Consider also seeking independent advice from a law firm or employer association
- 7.2.6 Make sure the policies addressing unlawful discrimination and the complaints and dispute resolution procedure are well known and understood by Employees.
  - a An effective way to achieve this is to include a clause in all Employees' employment Contracts to the effect that all Employees must regularly review these policies, and that a breach of the policies may result in termination of employment.
- 7.2.7 Provide counselling or assistance programs for alleged unlawful discrimination victims and offenders;
- 7.2.8 Always keep written records of any employee concerns, complaints, or requests;
- 7.2.9 Ensure that they are providing a supportive and inclusive workplace culture;
- 7.2.10 Have merit based procedures for changing rosters and altering the working hours of Employees;
- 7.2.11 Support Employees in relation to parental leave and returning to work, and develop clear policies surrounding this;
- 7.2.12 Be aware of their obligations in relation to the provision of flexible working arrangements, notice of termination and redundancy pay;

- 7.2.13 In relation to recruitment and performance management, Employers should:
- a Have a written policy on merit-based recruitment procedures and decisions;
  - b Include in their policies a prohibition on asking prospective or current Employees irrelevant personal questions (e.g. about their race or age);
  - c Have measures in place to recruit the most suitable individuals for the job;
  - d Ensure fairness and consistency when determining Employee wages;
  - e Follow a consistent and transparent procedure when Employees are selected to be promoted, transferred, demoted or terminated;
  - f Ensure that performance management decisions are merit based and transparent; and
  - g Have managers who demonstrate fair workplace behaviour.
- 7.3 If they wish to hire only Christians, they should consider the reason for imposing the genuine occupational requirement that Employees be adherents to the Christian religion. This will depend on the nature and the purpose of the organisation.
- 7.3.1 If the organisation is a body established for a religious purpose, it is likely that they will be permitted to impose these requirements.
- 7.3.2 If the organisation is a secular organisation, or a business simply operating via a Christian worldview, it is more difficult to impose this genuine occupational requirement.
- 7.4 In relation to camp booking practices, the organisation running the camping ground must consider:
- 7.4.1 What kind of organisation they are.
- a If they are not a body established for religious purposes, they must lawfully take all reasonable booking requests or risk contravening anti-discrimination laws.
  - b If they are a body established for religious purposes, they should consider the reasons for potentially declining camp booking requests, and ensure that the decline conforms with section 90. We strongly suggest seeking legal advice in these circumstances prior to declining a booking.

## **8 QUESTIONS?**

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