

**Submission of the
Presbyterian Church of Victoria
Church and Nation Committee
to the
Human Rights and Anti-Discrimination Bill Exposure Draft
January 2013**

- The Presbyterian Church of Victoria welcomes the invitation to provide feedback on the Human Rights and Anti-Discrimination Bill Exposure Draft released by the Attorney General's department in November 2012. The Presbyterian Church of Victoria represents around seven thousand people across the state, with 145 congregations organised into 5 metropolitan and 6 rural and regional presbyteries. We are a denomination that takes the Bible seriously, believing that it presents the final authority on morality and all-of-life issues.
- We, and many others, have some serious overarching philosophical concerns with the draft legislation. While the *Church and Nation Committee* of the *Presbyterian Church of Victoria* supports both the recognition and protection of human rights, we define human rights as those rights that are *universal, absolute* and *inalienable*. To be classified as a human right we hold to this threefold test:
 - It must belong to all humans, throughout all time (*universal*)
 - It is not to be limited, apart from when in conflict with another human right (*absolute*)
 - It cannot be surrendered (*inalienable*)

Historically, human rights have included such things as:

- Freedom of speech and religion
 - Right to life
 - Right to property and the
 - Right to a fair trial.
- Whilst we acknowledge other modern rights such as economic, cultural, societal and sexual rights, we believe it is imperative to affirm that in any hierarchy of rights, human rights must take precedence over any selective or differential rights, due to the inevitability of competing rights in the public sphere. We are concerned that the draft legislation is in danger of eroding well established *liberty rights* like freedom of speech and religion, in favour of *selective or group rights*.
 - Whilst the broader aims of Anti-Discrimination laws may be well-intentioned, their ever-reaching scope presents real concerns to *diversity and difference of opinion* in our community. Paradoxically, if this draft was written into law, it would actually *reduce* both diversity and difference in our community – it reduces the freedom to express a diverse range of opinions; it restricts the diversity of service-providers and other organisations that exist in our community; it heavily impedes people's ability to go about their daily business without burdensome 'red tape'; and it turns society into a monochromatic mass rather than a place where difference is tolerated and embraced.
 - In short, the proposed legislation represents a significant intrusion of the state into matters which properly and historically have been the concern of private citizens. It undermines the confidence of

citizens to manage their own affairs and solve their own problems without the unwieldy arm of government interference.

- The aim to eliminate ‘all forms of discrimination’ is neither attainable nor advisable, and the very *process* creates all sorts of headaches for businesses and organisations. By removing the ability to *positively* discriminate - that is, to make wise and sensible selections according to the context - the state removes legitimate choice and unnecessarily restricts individual and group freedom.
- Similarly, the aim to achieve what is described as ‘substantive equality’ is also misguided - it creates a ‘one-size-fits-all’ approach to employment and access to services which is neither desirable for the community nor achievable in any clearly-defined way. In the following pages we articulate particular concerns and offer proposed amendments.
- It is deeply troubling that the legislation is attempting to cover behaviour which may cause ‘offence’. Under this rule, any and every citizen would have reasonable grounds to take legal action numerous times in any given year, causing judiciary nightmares and increasing societal division. It creates a litigious culture that impedes community cohesion, only benefitting lawyers.
- Taxpayer-financing of complainants and the reversal of the ‘onus of proof’ makes a mockery of impartial justice. It reverses the *strongly-held and internationally-protected right to the presumption of innocence* and unfairly pits an individual or business against a state-financed opponent. It unfairly privileges the complainant and encourages frivolous litigation over real, proposed or non-existent treatment.
- The government must *significantly re-word much of this document for basic human rights to be upheld*. Indeed, very little reference is made to human rights at all in the draft, thereby allowing an unbalanced tilt towards anti-discrimination. In the process, many human rights have been trampled on. In our view, some significant rebalancing needs to occur before these proposed laws find community acceptance.

Our specific concerns about the draft focus on the following sections:

- A. Division 2, Section (6) – the dictionary definition of ‘employment’
- B. Division 2, Section 17 (1) (a-r) - the ever-increasing list of ‘protected attributes’
- C. Division 2, Section 19, (2) b – the attempt of the legislation to deal with conduct which ‘offends, insults or intimidates another person.’
- D. Division 2, Section 20 – ‘proposing to treat’ wording
- E. Division 3, Section 22, (b) (e) – institutions listed as public
- F. Division 4, subdivision A, 23 – the section dealing with exceptions
- G. Division 4, subdivision A, 24 – inherent requirements
- H. Division 4, subdivision A, 24 (2) - religious bodies
- I. Division 4, subdivision D, 34 – exceptions for charities
- J. Section 124 – Burden of proof requirements

A.

Division 2—Interpretation

6 The dictionary

employment means:

- (a) work under a contract of employment (within its ordinary meaning); or
- (b) work that a person is otherwise appointed or engaged to perform; or
- (c) voluntary or unpaid work;

whether the work is on a full time, part time, temporary or casual basis.

We strenuously object to the scope of the term ‘employment’ covering ‘voluntary or unpaid work.’ The inclusion of voluntary work, workers and organisations in this section is completely unnecessary and will unhelpfully restrict the options of those in the community who give their time without pay, thus *reducing diversity*. Such voluntary groups provide and maintain much-needed community programs in addition to existing government services, and contribute positively to society without the need for undue regulation. It concerns us that Playgroups and even Sunday Schools will come under the legislation. The legislation should only define employment as that for which remuneration is paid.

B.

Division 2—The protected attributes

17 The protected attributes

(1) The protected attributes are as follows:

- (a) age;
- (b) breastfeeding;
- (c) disability;
- (d) family responsibilities;
- (e) gender identity;
- (f) immigrant status;
- (g) industrial history;
- (h) marital or relationship status;
- (i) medical history;
- (j) nationality or citizenship;
- (k) political opinion;
- (l) potential pregnancy;
- (m) pregnancy;
- (n) race;
- (o) religion;
- (p) sex;
- (q) sexual orientation;
- (r) social origin.

We believe that if the state feels that some personal attributes absolutely need protection in this law, they should be limited to those which are core or universal attributes – those such as:

- age

- ability
- race
- religion
- sex

Once the list of protected attributes extends beyond this requirement, the concept of protected attributes becomes a meaningless, ever-expanding ‘free-for-all’ of alphabetical proportions.

In particular, we believe attribute (e) “gender identity”, (g) “industrial history”, (k) “political opinion”, (q) “sexual orientation”, (r) “social origin” are most unhelpful, being vague and speculative terms which will contribute to unforeseen difficulties for individuals, organisations and businesses.

If businesses and organisations are too tightly restricted in employment or service-providing areas, this will affect the efficient functioning of our society and stifle growth. It also makes it difficult to employ anyone at all, without exposure to some form of adverse response from one or more unsuccessful applicants. We recommend they be removed.

C.

Division 2—Meaning of discrimination

19 When a person discriminates against another person, and related concepts

Discrimination by unfavourable treatment

(1) *A person (the first person) discriminates against another person if the first person treats, or proposes to treat, the other person unfavourably because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes.*

Note: This subsection has effect subject to section 21.

(2) *To avoid doubt, unfavourable treatment of the other person includes (but is not limited to) the following:*

(a) *harassing the other person;*

(b) *other conduct that offends, insults or intimidates the other person.*

‘Unfavourable treatment’ does not in our view necessarily constitute discrimination. Any business or group *positively discriminates* for a plethora of values or attributes they believe are desirable to further the purposes of their business or organisation. One of the cornerstones of living in a free, democratic society is that there is scope to operate a business without undue interference from the state. We reject the premise that unequal or unfavourable treatment is by definition ‘discrimination’ and recommend its removal. We suggest instead that the word ‘detrimental’ be substituted for ‘unfavourable’, since it denotes more of an idea of real offence, rather than simply an undesirable outcome.

The Presbyterian Church of Victoria does not condone harassment; however we believe that this issue can be dealt with by existing civil or criminal laws.

However, we do have strong objections to the fact that this legislation attempts to deal with ‘conduct that offends, insults or intimidates the other person,’ as the terms ‘offend’ and ‘insult’ are highly ambiguous and open to wide interpretation in our community. Most of us in society encounter offence or insult in various ways and to varying degrees of regularity throughout life. This is a part of living with other human beings who have different ideas and opinions due to their upbringing, background, life experiences, life-stage or world-

view. Offence can sometimes be completely unintended, and some humans are experts at misconstruing a remark or an action as ‘intending to offend’ when in reality this was not the motivation.

The Australian parliament should not attempt to legislate in this area unless it can be proven that such offence or insult results in *substantial harm* to another person – in which case it should come under our current civil and criminal laws – such as the laws of libel and slander. We do not need new laws to deal with these issues.

As a result, we propose the following re-wording:

Division 2—Meaning of discrimination

19 When a person discriminates against another person, and related concepts

Discrimination by detrimental treatment

- (1) A person (the first person) discriminates against another person if the first person treats the other person in a detrimental way because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes, and that
- (2) The other person can prove that substantial harm ensued.

D.

Division 2—Meaning of discrimination

20 Proposing to treat a person unfavourably, or to impose a policy

- (1) This section applies to conduct of a person (the first person) that consists of:
 - (a) proposing to treat another person unfavourably; or
 - (b) proposing to impose a policy.
- (2) The question whether the conduct is discrimination (or unlawful discrimination) is to be determined in the same way as it would be if the first person had actually treated the other person, or had actually imposed the policy, as proposed.

We wonder how simply *proposing to treat another person unfavourably* can be constituted as an offence. We think it is better that our laws deal with acts that have actually taken place, not those that are merely an idea. In such a way, the law purports to cover the realm of intentions and aims, something we have already seen as being open to varying interpretation which may or may not be correct. We recommend that ‘proposing to treat’ be removed from this and other sections.

E.

Division 3—When discrimination is unlawful

22 When discrimination is unlawful

(1) It is unlawful for a person to discriminate against another person if the discrimination is connected with any area of public life.

Note: For exceptions to when discrimination is unlawful, see Division 4.

- (2) The areas of public life include (but are not limited to) the following:
 - (a) work and work related areas;
 - (b) education or training;
 - (c) the provision of goods, services or facilities;
 - (d) access to public places;

- (e) provision of accommodation;*
- (f) dealings in estates or interests in land (otherwise than by, or to give effect to, a will or a gift);*
- (g) membership and activities of clubs or member based associations;*
- (h) participation in sporting activities (including umpiring, coaching and administration of sporting activities);*
- (i) the administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs.*

We believe the scope of this legislation is too expansive, denoting areas as ‘public’ which by their nature could also be considered to be ‘private.’ For example, those who provide accommodation in their own home or premises of residence, such as a ‘Bed and Breakfast’, should be exempt from this legislation. (See also F. for what should constitute legitimate discrimination)

F.

Division 4—Exceptions to unlawful discrimination

Subdivision A—Main exceptions

23 Exception for justifiable conduct

Protected attributes to which this exception applies

- (1) The exception in this section applies in relation to all protected attributes.*

Exception for justifiable conduct

- (2) It is not unlawful for a person to discriminate against another person if the conduct constituting the discrimination is justifiable.*

When conduct is justifiable

- (3) Subject to subsection (6), conduct of a person (the first person) is justifiable if:*

- (a) the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim; and*

- (b) that aim is a legitimate aim; and*

- (c) the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and*

- (d) the conduct is a proportionate means of achieving that aim.*

- (4) In determining whether subsection (3) is satisfied in relation to conduct, the following matters must be taken into account:*

- (a) the objects of this Act;*

- (b) the nature and extent of the discriminatory effect of the conduct;*

- (c) whether the first person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect;*

- (d) the cost and feasibility of engaging in other conduct as mentioned in paragraph (c).*

- (5) Any other matter that it is reasonable to take into account may also be taken into account.*

In our initial submission to this draft legislation in January 2012, we argued against the inclusion of the words ‘legitimate’ and ‘proportionate’ in this section on exceptions, as the interpretation of such terms is ambiguous and open to a wide range of interpretation.

Discrimination should be lawful if an organisation can set out that it has good reason to discriminate based on (but not limited to) the following criteria:

- a) The ethos of the organisation
- b) The stated aim or mission of the organisation

- c) The staff employed by the organisation
- d) The activities undertaken by the organisation
- e) The intended clients of the organisation

For example, if a campsite is set up with the stated aim to provide accommodation for backpacking tourists, it should be allowed to positively select those who fit its ethos. It may choose to broaden its clientele if it so desires, but it should be under no compulsion to take any or every client that asks for admittance.

Similarly, a cleaning company may, by choice or mere coincidence, employ mainly Islamic women, and as such may feel that its clientele should be mainly people of the Islamic faith. Such a company should feel no compunction to provide services to those outside of those parameters if it so chooses. Those who have taken on board the financial risk of running such a business or not-for-profit deserve to have the most say in how the business runs and who is involved in its operations.

As such, if there must be discrimination laws, they should only apply to areas of very little choice or access, not to most areas of public life where there are a plethora of choices and options relating to both employment and services.

G.

24 Exception for inherent requirements of work

Protected attributes to which this exception applies

- (1) *The exception in this section applies in relation to all protected attributes.*

Exception for inherent requirements of work

(2) *Subject to subsection (4), it is not unlawful for a person (the first person) to discriminate against another person on the ground of a particular protected attribute, or a particular combination of 2 or more protected attributes, if:*

- (a) *the discrimination is connected with work and work related areas; and*
- (b) *the other person is unable to carry out the inherent requirements of the particular work because he or she has that protected attribute or combination of protected attributes; and*
- (c) *the discrimination is necessary because the other person is unable to carry out those inherent requirements.*

(3) *In determining whether the other person is unable to carry out the inherent requirements of the particular work, the following matters are to be taken into account:*

- (a) *the other person's past training, qualifications and experience relevant to the particular work;*
- (b) *the other person's previous performance (if any) in working for the first person;*
- (c) *any other factor that it is reasonable to take into account.*

In our previous submission we argued against the use of 'inherent requirements' in determining whether discrimination takes place, because:

- a) it unnecessarily restricts the scope of what is considered 'work' or 'work-related', and because
- b) the acceptance of what is deemed 'inherent' cannot be adequately determined by a third-party, but *must be something determined by the workplace or organisation itself.*

Moreover, the concept of inherent requirements excludes valid reasons for selecting one applicant over another, such as a person's character, beliefs and worldview.

This could be achieved by the following wording:

2(b) *the other person is unable to carry out the inherent requirements of the particular work, stated clearly in the job description by the organisation when the job is advertised, and*

3(c) *any other factor that it is reasonable to take into account, such as a person's character, beliefs and worldview.*

H.

Exception for conduct of body established for religious purposes

(2) *Subject to subsection (3), it is not unlawful for a person (the first person) to discriminate against another person if:*

(a) *the first person is a body established for religious purposes, or an officer, employee or agent of such a body; and*

(b) *the discrimination consists of conduct, engaged in in good faith, that:*

(i) *conforms to the doctrines, tenets or beliefs of that religion; or*

(ii) *is necessary to avoid injury to the religious sensitivities of adherents of that religion; and*

(c) *the discrimination is on the ground of a protected attribute to which this exception applies, or a combination of 2 or more protected attributes to which this exception applies.*

(3) *The exception in subsection (2) does not apply if:*

(a) *the discrimination is connected with the provision, by the first person, of Commonwealth funded aged care; and*

(b) *the discrimination is not connected with the employment of persons to provide that aged care.*

Exception for conduct of educational institution conducted in accordance with tenets etc. of a religion

(4) *It is not unlawful for a person (the first person) to discriminate against another person if:*

(a) *the first person is an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or an officer, employee or agent of such an institution; and*

(b) *the discrimination is connected with employment by the educational institution, or with the provision of education or training by the institution; and*

(c) *the discrimination consists of conduct, engaged in in good faith, that:*

(i) *conforms to the doctrines, tenets or beliefs of that religion; or*

(ii) *is necessary to avoid injury to the religious sensitivities of adherents of that religion; and*

(d) *the discrimination is on the ground of a protected attribute to which this exception applies, or a combination of 2 or more protected attributes to which this section applies*

We commend proponents of this legislation for retaining religious exceptions that deal with the doctrines, tenets or beliefs religious groups, and conduct that avoids injury to religious sensitivities. It is important to remember that such exceptions provide *the only protection in this legislation of the fundamental freedom of belief which cannot be trumped by any newer laws*. If this section were to be removed, it would seriously impinge on freedom of belief and freedom of conscience in this country, and go against most international human rights covenants including:

- the Universal Declaration of Human Rights
- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights

I.

Subdivision D—Other exceptions

34 Exception for registered charities

Protected attributes to which this exception applies

- (1) *The exception in this section applies in relation to all protected attributes.*

Exception for registered charities

- (2) *None of the following is unlawful discrimination:*

- (a) *a provision of the governing rules (within the meaning of the Australian Charities and Not for Profits Commission Act 2012) of a registered charity, if the provision:*
- (i) *confers charitable benefits; or*
- (ii) *enables charitable benefits to be conferred;*
- (b) *conduct engaged in to give effect to such a provision.*

We applaud the fact that charities may freely discriminate in their operations. We believe that all institutions, not just charities, should have these privileges.

J.

47 Review of exceptions

(1) *The Minister must arrange for a review of the exceptions in this Division to be conducted, and for a written report on that review to be given to the Minister.*

- (2) *The review must be commenced within 3 years of the commencement of this section.*

(3) *The Minister must cause a copy of the report on the review to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the report.*

- (4) *The report on the review is not a legislative instrument.*

We are concerned that exceptions will again be reviewed within three years. The current exceptions are *absolutely mandatory* to protect religious freedom in Australia and their place in the legislation should be non-negotiable. If such protections for religious organisations are removed, the state will be unlawfully interfering with the fundamental right to freedom of belief and freedom of conscience. The state cannot technically grant or withdraw religious freedom as it is a universal, absolute and inalienable human right that existed before the construction of the state.

We believe the fact that it is the *exceptions* that are to be reviewed in three years, not the new legislation or protected attributes, indicates a bias within the legislation towards selective rights to the detriment of liberty rights.

K.

124 Burden of proof in proceedings under section 120 etc.

Burden of proof for reason or purpose for conduct

- (1) *If, in proceedings against a person under section 120, the applicant:*

(a) *alleges that another person engaged, or proposed to engage, in conduct for a particular reason or purpose (the alleged reason or purpose); and*

(b) *adduces evidence from which the court could decide, in the absence of any other explanation, that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct;*

it is to be presumed in the proceedings that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct, unless the contrary is proved.

When a claim of discrimination is made and a prima facie case is established, before hearing from the defendant, the onus of proof switches from the complainant to the defendant. This is a dangerous and unprecedented situation where a defendant is considered guilty until proven innocent. This legislation unacceptably and disproportionately favours the complainant and disadvantages the defendant. It unfairly assumes that the defendant *did* discriminate and that the complainant always has reasonable grounds to bring a case forward. It goes against all other civil and criminal laws of our country, and violates the human right of 'equality before the law' contained in international rights covenants such as:

The Universal Declaration of Human Rights:

Article 7 - 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.

Article 8 - Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10 - Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11 -

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12 -

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The International Covenant on Civil and Political Rights:

Article 14 -

(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Therefore, this draft legislation needs amending so that *the onus of proof rests on the complainant to prove that he has received detrimental treatment worthy of redress*. There is little reference in the legislation to laws that protect the human rights of the defendant, and this needs to be urgently addressed.

Moreover, given that the complainant will incur no costs, the legislation as it stands will *no doubt encourage frivolous or vexatious claims*. There seems to be no disincentive for making a vexatious claim, and this is

disturbing. There should be some mechanism by which the ‘first person’ needs to provide compensation or make restitution to the defendant for claims that prove to be unfounded. The defendant should not be able to be dragged into court over a minor issue or a misinterpretation of what someone allegedly said or did.

It is also very important to note that, if it is too easy to bring a charge against an individual or business, *the process itself becomes the punishment*. This means that, without any real proof of evidence required by the complainant, an individual or organisation needs to temporarily suspend their employment, hire legal representation and appear before a court *being prepared to give evidence that s/he did not unfairly discriminate in the said case*. Here, the shoe is fairly and squarely on the wrong foot. It is the complainant who must provide the evidence, and the defendant is then given right of reply.

Conclusions:

We ask the government to carefully consider the concerns outlined in this submission and examine more fully the repercussions of its implementation. We believe a more ‘common-sense’ approach would remove some of the more restrictive and stifling aspects of this legislation.

Most people in the community do not want their freedom of choice sacrificed for a long and ever-increasing list of attributes which may or may not be a factor in choosing the staff they require for their organisation, or in choosing a business or service to fill their requirements. Most Australians do not desire to live in an overly-litigious culture where their freedoms are increasingly restricted. Nor do they want the threat of litigation for the slightest ‘whiff’ of offence hanging over their workplace. In a community as diverse as ours, the emphasis must remain on freedom of choice – both for those within an organisation or business and those selecting their business.

Some of these propositions represent serious intrusions into the fundamental freedoms of all in the community, as well as the harmonious functioning of our society. The government must consider their mandate to protect, not just those who feel they have been unfairly marginalised, but the average business-owner who is simply trying to employ staff who best fit the requirements of their business or service to the community.



Church & Nation Committee
Presbyterian Church of Victoria
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