

Submission of the Presbyterian Church of Victoria  
Church and Nation Committee  
to the  
Consolidation of Commonwealth Anti-Discrimination Laws  
Discussion Paper

*January 2012*



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## **EQUALITY STATEMENT**

*We believe*

- 1. that God has created human beings so that each person is unique with a personality and gifts different to that of any other person*
- 2. that although human beings are unequal in such qualities as giftedness and intelligence, God nevertheless loves everyone and treats them justly; as the Scripture says, he is 'no respecter of persons' and he 'judges men by their actions without the slightest favouritism'*
- 3. that because the content of the moral law ultimately originates in God it remains the same and cannot be altered by the passage of time, by a majority vote of citizens, by legislation introduced by governments, by concessions granted to special interest groups or by any other means*
- 4. that although there is only one moral law, people have different views about what constitutes ethical behaviour and therefore tolerance, that is the ability to live in peace with people whose views may be considered objectionable, is essential*
- 5. that therefore freedom of religion, speech and conscience are essential if people with diverse views are to be free to be themselves and to find life's purpose*
- 6. that therefore the state should not adopt, incorporate into legislation and impose on all its citizens any laws that undermine or take precedence over these fundamental human rights of freedom of religion, speech and conscience*
- 7. that although it is necessary for the state to prevent citizens from doing physical harm to each other, it should not pass laws that enable litigation over hurt feelings and alleged psychological harm, except in so far as it is possible under the laws of libel*

Presbyterian Church of Victoria  
Church & Nation Committee  
January 2012

## PREAMBLE

The Presbyterian Church welcomes the invitation to provide a submission to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper released by the Attorney General's department in September 2011.

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. The Presbyterian Church of Victoria supports attempts to reduce the suffering of the vulnerable in society. One of the core tenets of Christianity is,

*'to do justice, and to love kindness, and to walk humbly with your God (Micah 6:8b).'*

The Presbyterian Church of Victoria is actively involved in the lives of those who have been forgotten by society, those who are lost and seeking meaning, and those who do not fit with society's view of success.

However, we are deeply concerned about the changes proposed for inclusion in the Consolidated Federal Anti-Discrimination Act; particularly those which relate to reducing or removing existing exemptions and exclusions for religious organisations, and the restrictions this will place on the current freedoms we have to practice our belief. We firmly believe that freedom and equality need to be held in balance with each other, and in this matter equality is being sought at freedom's expense.

We maintain our general belief that newer and less fundamental societal rights, such as those pertaining to gender identity, are usurping our fundamental rights of freedom of thought, conscience and religion and freedom of belief. We wish to ensure that a hierarchy of rights does not develop where freedom of religion is marginalised in favour of other more recent rights like sexual identity. In fact, the specific flagging of 'sexual orientation' and 'gender identity' in the discussion paper is of particular concern to us as, out of all the other attributes, concepts of sexuality most meaningfully impact us as a Christian organisation. Indeed, even the terminology used to describe gender in the discussion paper is contrary to our biblical understanding of human sexuality. We believe the discussion paper fails to provide a compelling argument why gender identity and sexual orientation should be protected attributes in the same way as race, and therefore why these attributes should take precedence over religious freedom.

We are also concerned about the impact of the proposed changes on the right of parents of all backgrounds to choose educational facilities consistent with their faith, beliefs and values. We are disturbed by the potentially coercive nature of the propositions, the way in

which they force religious organisations into the precarious position of needing to choose whether they ought to deny their fundamental beliefs or defy the state.

We have a fundamental philosophical difference of opinion with the discussion paper on the interpretation and application of discrimination. The church is concerned that only the negative emphases of discrimination are being addressed, rather than the positives. If there is no room for various groups in society to legitimately and respectfully discriminate against those whose attributes or behaviour are at odds with the very fabric of their beliefs, then our society faces cultural and moral stagnation. Positive discrimination, positive selection and choice on matters that go to the core of religious belief are integral to maintaining a pluralistic society. We believe that the proposed changes go against the grain of our multicultural society and encourage division rather than harmony. We believe they will greatly diminish, if not completely eradicate, what is left of our religious protections under the law.

The word 'reasonable' has been used throughout the discussion paper as a measurement applied to religious organisations seeking exemptions to the proposed legislation, yet we cannot see the 'reasonableness' of the proposed changes. We do not think it is reasonable to expect religious groups, or other groups for that matter, to employ people or use volunteers who do not adhere to their belief-system. We also do not think it is reasonable to allow courts or unelected judiciary to decide what is 'appropriate' or 'legitimate' when it comes to religious matters.

Consequently, we argue that including a general limitations clause in the consolidated act is not an appropriate way of determining exceptions to the law. We oppose the idea of inherent requirements, particularly the way in which they are defined to exclude all elements of faith or belief. We stress that religious exemptions must remain in place as they are currently worded, to ensure that conscience, doctrines and religious beliefs are able to continue to play a role in the kinds of people religious organisations are able to employ.

## Background to our response

### 1. The nature of freedom and equality

It would do well for the proponents of changes to anti-discrimination laws to consider the nature of freedom and equality. Freedom and equality, although often associated with each other, as in the French notion of *'Liberté, égalité, fraternité!'*, are actually diametrically opposed to each other. This at first seems like a contradiction, yet upon further perusal the tension between them can be seen, as noted by Peter Barclay on this topic. Barclay quotes Will and Ariel Durant as stating,

*'For freedom and equality are sworn, and everlasting enemies, and when one prevails the other dies.'*<sup>1</sup>

Freedom and equality are two characteristics highly prized in our society. It would be hard to find someone who preferred one to the other. As a result, when enshrined in legislation they need to be held together in a delicate balance, each one tempering the possible abuses of the other. It is possible to have both too much freedom and too much equality. The stronger the emphasis on equality, the more freedom is diminished, and vice-versa. By promoting equality over freedom, one risks impeding freedom; one of the underlying principles of a democracy.

Anti-discrimination laws, in their push to promote equality, can become a genuine threat to freedom. We believe that the proposals in the discussion paper do just that. Yet the irony is that true equality can never be really attained. Our different gifts, abilities, temperaments and ethical values will always ensure that this is the case.

Similarly, 'equality' and 'opportunity' are not analogous, but should be juxtaposed as competing ideologies. What our legislation should be doing is increasing opportunity, not *equality* of opportunity. The latter seeks to hold back some and the former seeks to lift up others. In our society, everyone should have *opportunity*, but the way in which that works out for each person will be different.

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<sup>1</sup> W & A Durant, *The Lessons of History*, Simon and Schuster, New York, 1968, cited in P Barclay, 'Is Equality Possible, or Even Desirable?', *Quadrant*, vol. LV, no.1, November 2011, p.97.

## 2 Fundamental Human Rights Concerns

### 2.1 Freedom of Thought, Conscience and Religion

The executive summary of the discussion paper gives the impression that any changes to the consolidated act will be in line with existing human rights frameworks and that, furthermore,

*'Australia's international law obligations provide support for the constitutional basis for the consolidation bill.'*<sup>2</sup>

Yet the link between the two is tenuous, and there is little further reference to them throughout the discussion paper.

This leads us to our first concern, which is that the proposals contained in the discussion paper *threaten* existing international human rights frameworks. If the church's current exemptions and exceptions are removed, we will lose many of our existing freedoms under various covenants, including:

- *the Universal Declaration of Human Rights (UDHR),*
- *the International Covenant on Civil and Political Rights (ICCPR),*
- *the International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *the Victorian Charter of Human Rights and Responsibilities (2006)*
- *the Australian Constitution*
- *the Siracusa Principles (1984)*

The discussion paper provides no rationale for why these important principles and widely-accepted documents should be dismissed, and instead simply ignores them.

The Universal Declaration of Human Rights clearly outlines parameters for ensuring religious freedom in society. Article 18 states that,

Everyone has **the right to freedom of thought, conscience and religion**; this right includes 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 word 'manifest' here indicates that religion is not simply a private activity, but is able to be manifested, and has real-life practical outworkings. As Christians, it means our faith guides our real-life activities. It is not simply a theoretical guideline for living, or psychological consolation in tough times.

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<sup>2</sup> Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, 2011, p. 5.

We are concerned that the fabric of religious organisations, whether they be churches, schools, charities, campsites, aged-care facilities or the like, are under threat by these propositions. Freedom to employ people who share our beliefs is a large part of what religion in practice is all about. Some want to argue that religion should be a private matter, relegated to the home and the church building. Such an argument profoundly misunderstands the role of faith in a Christian life; that faith is no faith at all unless it is manifested in the eating, sleeping, work-time and leisure of a Christian. James 2:17 encapsulates this, when it says, *'faith by itself, if it is not accompanied by action, is dead.'*

The International Covenant on Civil and Political Rights mirrors some of the fundamental rights contained in the UDHR, including Article 18, which reiterates the right to 'freedom of thought, conscience and religion', and the freedom to manifest one's religion. However, it goes one step further in point three, cautioning that,

*Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

It is unclear to us exactly what 'threat' religious bodies are posing to the fundamental rights and freedoms of others, which, as outlined above, is the only rationale available to reduce these rights. Certainly none are outlined in the discussion paper.

According to the above examples, it is clear that there are no more fundamental rights than the rights of freedom of thought, conscience and religion and the freedom to manifest them in practice. In other words, nothing can trump these fundamental rights.

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*'there are no more fundamental rights than the rights of freedom of thought, conscience and religion and the freedom to manifest them in practice. In other words, nothing can trump these fundamental rights.'*

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Yet this is exactly what is proposed; a reduction of the human rights of freedom of thought, conscience and religion in favour of more recent inclusions: in this case, gender identity and sexual orientation. Obviously there is a conflict here between the two, and it seems clear that the discussion paper favours the latter. This goes against documents such as the Siracusa Principles (1984), which outline the manner in which clauses of covenants may be limited or restricted. Principle 2 states that,



*'The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.'*

Principle 36 specifically guards against imposing other rights onto fundamental rights, stating that,

*When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that **the Covenant seeks to protect the most fundamental rights and freedoms**. In this context especial weight should be afforded to **rights not subject to limitations in the Covenant**.*

Therefore, any attempts to further curtail the rights of freedom of thought, conscience and religion must be rejected.

## 2.2 Freedom of Belief

Article 27 of the UDHR outlines, among other things, the right of people *'to enjoy their own culture, to profess and practice their own religion.'*

The Victorian Charter clearly states one's freedom *'to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.'*

Section 19 of the ICCPR also outlines *'the right to freedom of expression'* and, coupled with the Victorian Charter in section 15/1, that,

*'Every person has the right to hold an opinion without interference.'*

These statements clearly outline the parameters and protections of the space where belief and public life intersect. Yet the discussion paper seems to ignore these freedoms.

We as Christians believe that the full development of the human personality cannot be undertaken without reference to our inherent spirituality. The proposed changes to anti-discrimination laws will impact on the kind of spiritual witness Christian organisations provide to their members; the kind of authentic spirituality which is reflected, not only in a person's outward actions, but also in their beliefs, their integrity and their character.

According to the benchmarks listed above, the Christian community has a right to continue a long-held and Scripturally-founded belief that we are made in the image of God, male and female, and that male to female and female to male sexual attraction is the norm. We have a right for our children not to be exposed to teaching about homosexuality contrary to our beliefs. We have a right not to employ lesbian, homosexual or trans-gender persons, because their behaviour and lifestyle is inconsistent with the clear biblical teaching upon which our values are founded (see Appendix).

It must be said, at this juncture, that Presbyterians have no more abhorrence for homosexual practice than they do for other sexual sins, such as premarital or extramarital heterosexual practice. Many Christian schools, for example, would not employ an unmarried sexually-active person, as their behaviour is inconsistent with Christian teaching on the exclusivity of marriage for sexual expression. Therefore, it cannot be argued that our requirements of positive selection are inconsistent with our beliefs.

## 2.3 Freedom of parents to choose education for their children

Section three of Article 26 of the UDHR speaks of the right to education, namely that,

*‘Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.’*

Section two points out that, *‘Parents have a prior right to choose the kind of education that shall be given to their children’* and the ICCPR speaks of *‘the liberty of parents ... to ensure the religious and moral education for their children in conformity with their own convictions.’*

A large percentage of the Australian population aligns itself with Christianity. In the 2006 census, nearly 64% of the population indicated an affiliation with a Christian denomination.<sup>3</sup> Many people in Australia respect institutions aligned with or run by churches or Para church bodies, including welfare agencies, disability support services, not to mention the thousands of small organisations that contribute to our society in a myriad of ways. Many parents turn to church-based schools for the education of their children, choosing a religious framework for their child’s upbringing in preference to the secularised governmental sector. This is true for Christian organisations, but the same could be said for other religions.

As outlined above in the various covenants, it is an important human right that parents be able to choose schools which reflect the beliefs and values that most closely mirror their own. There are a plethora of schools across Australia, both in country towns and cities, of various philosophical underpinnings, providing a wide range of choice to Australian parents, and, equally, for those seeking employment. Attempts to ‘force the hand’ of these educational facilities when it comes to employment of staff, whether they be gardeners or graphics teachers, impedes their right to choose staff that best reflect the beliefs, values or philosophy of the organisation. This is especially important in education, where the very transmission of values is undertaken in a constant and consistent way, day after day, year after year. Yet it also applies to other faith-based organisations.

The philosophy outlined in the discussion paper seeks to make everything ‘vanilla’ and therefore has the effect of reducing choice and opportunity, both for parents and staff of all schools. It is difficult to believe that the wider population would support this outcome.

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<sup>3</sup>Australian Bureau of Statistics, *Religious Affiliation, Australia*, retrieved 3 November 2011, <[www.abs.gov.au/ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/6ef598989db79931ca25730600d52b4!OpenDocument](http://www.abs.gov.au/ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/6ef598989db79931ca25730600d52b4!OpenDocument)>.

## 2.4 Freedom from coercion

Another freedom that will be severely eroded if proposed changes go ahead is the right to freedom from coercion, either by the state or another body. No.14/2 of the Victorian Charter outlines that,

*'A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.'*

Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that,

*the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting **the general welfare** in a democratic society.*

The Australian Constitution, in section 116, defines the parameters of the state with respect to religion. It states that,

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, **or for prohibiting the free exercise of any religion**, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*

The Siracusa Principles add extra requirements, noting that the state may not restrict rights that underpin democratic operation. Principle 20 states that,

*'The burden is upon a state imposing limitations so qualified to demonstrate **that the limitations do not impair the democratic functioning of the society.***

It is not in the interest of the state to proceed with proposals that do away with or reduce religious exceptions or exemptions, as they do not promote the general welfare of the population, but are instead divisive and controversial. Nor is it in the state's interest to contemplate legislation that is unconstitutional. The state must allow for religious freedom within a secular state, or risk impairing 'democratic functioning.'

The Presbyterian Church of Victoria is concerned that in promoting absolute equality, the state, through these proposals, is seeking to forcibly construct a society of identical values. The diversity in our community precludes this from ever taking place. There will always be variety and difference of opinion in the community about a range of issues, and compulsory conformity to one groups' ideals is inconsistent with democratic freedom. There is room in society for a variety of people and for difference of opinion and expression, without it being discriminatory.

Even though it is stated in the discussion paper that the consolidated act will not change 'current protections' in relation to the church and church-related bodies, the proposed changes demonstrate that this will not be the case. This is why we argue that room for religious exceptions and exemptions is mandatory to protect our fundamental human rights.

### 3 Theoretical problems with discrimination

- 3.1 As stated in our equality statement, we believe that all people are created in God's image, and are precious and important to Him. We also believe that all people are unique – no one is the same as another, and each have been given talents and abilities to contribute to society. So we are equal in our imperfect humanness, but in practicalities we gifted in both different ways and different amounts.
- 3.2 All citizens require the protection of the state in basic ways so that they can function effectively. We agree with the notion of equality before the law and the presumption of innocence. However, the changes proposed in the discussion paper overstep this mark. We do not accept a clone-mentality or a 'one size fits all' approach where everyone must be treated identically in every situation. Not only is the idea unreasonable, it is unworkable. It fails to recognise the uniqueness of each individual; their various strengths and weaknesses.
- 3.3 Philosophically, we have problems with anti-discrimination legislation per-se. While in the negative sense some discrimination is unjust, in the positive sense discrimination discerns the better of two things. As we see it, not all choice is unjust discrimination. Employers should have a legitimate right to select persons who they feel will be best suited to the task. Indeed, human beings discriminate on a daily basis in their lives, making wide ranges of choices to suit their requirements. This freedom should not be limited solely to private life.
- 3.4 It is our concern that by attempting to make all citizens 'equal', the government is attempting to make us fit the same philosophical pigeonhole. Yet we are a diverse society, with different cultural, religious and faith backgrounds. We are not a homogenous mass which can be 'consolidated' into a single entity. We are concerned that the flagged changes to the Consolidated Anti-Discrimination Act 2012 do just that.

## 4 Multiculturalism, minority groups & the freedom to be different

4.1 We live in a diverse, multicultural society where all members currently have the freedom to pursue their own paths in various areas; whether in employment, leisure, religion, parenting or social areas. A diverse society is one where difference and variation is not just tolerated, but embraced.

4.2 A true multicultural society is just that – made up of many cultures or minority groups. We are not a monoculture, where all members of society believe exactly the same thing, and therefore act in the same way. Such a cultural makeup requires freedom for various groups within society. As Patrick Parkinson states,

*A healthy multiculturalism allows minority communities the freedom to be different - the freedom to have different beliefs, the freedom to have different moral standards, the freedom to believe in absolute truths, the freedom to debate with others. On that freedom to be different and for different communities to have different values, the health of our society depends.<sup>4</sup>*

4.3 A multicultural society is made up of a range of different religious faiths. Most, if not all, of these faiths run organisations such as charities and schools in which they manifest their faith in a practical way. The operational behaviour of these types of organisations reflects the values and beliefs of their members; to do otherwise would not only be hypocritical, but inconsistent with the values that underpin our liberal democratic society.

4.4 Anti-Discrimination legislation claims to be designed to protect minority groups in the community; those whose freedoms are in danger of being trespassed. Yet paradoxically, the proposed changes to anti-discrimination laws do little more than impinge further on individual and group rights of those in the community who have a clear understanding of what gender means. As Parkinson outlines, legislation contains the potential,

*to oppress minorities rather than to protect them, to divide communities rather than to promote harmony, and to destroy that which is most precious in a diverse and pluralistic society: the freedom to be different.<sup>5</sup>*

4.5 We believe the suggested proposals cut deeply into the fabric of religious identity, and are at odds with the underlying values of pluralistic society. A society that will

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<sup>4</sup> Parkinson, P, 'Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia: The Freedom to Be Different', *Australian Law Journal*, vol. 81, no. 12, 2007, p. 966.

<sup>5</sup>Parkinson, p. 955.

not countenance difference, without proper justification as to why that difference is harmful, is indeed coercive.

## 5 The importance of a 'generous zone' of operation for religious organisations

5.1 Any society that wishes to operate as a multicultural entity must allow what Parkinson calls a 'generous zone of operation' for religious organisations, outlining that,

*This recognizes the very important part that religious belief should be allowed to play in the lives of a large number of Australians, and the nature of freedom of religion as one of the most fundamental human rights.<sup>6</sup>*

He outlines that this generous zone should include such areas as:

- *Freedom to manifest a religion through religious observance and practice*
- *Freedom to appoint people of faith to organisations run by faith communities*
- *Freedom to teach and uphold moral standards within faith communities*
- *Freedom of conscience to discriminate between right and wrong*
- *Freedom to teach and persuade others*

As Christians, we have to respect and accommodate the ways in which other community groups operate their organisations, and we ask for the same in return.

5.2 Christian denominations such as the Presbyterian Church were some of the first organisations to set up schools, charities and aged care facilities in our nation, due to their concern for education and the provision of services to and for the community based on Christian values. These organisations should not now be forced to conform to thoroughly secular ideologies for no convincing reason. Indeed, Siracusa Principle 7 states,

*'No limitation shall be applied in an arbitrary manner.'*

5.3 If this protected zone of operation for religious organisations is diminished, it will impact unreasonably on them, and may force them to choose between a state ideology they find morally repugnant and their own deeply-held, non-negotiable

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<sup>6</sup> P Parkinson, 'A National Agenda for Religious Freedom,' *Ethos*, 2011, retrieved 15 January 2011, <[www.ea.org.au/Ethos/PublicTheology.aspx](http://www.ea.org.au/Ethos/PublicTheology.aspx)> p.4.



beliefs. It is in no-one's interest to confront Christians and other like-minded citizens with such a dilemma.

## 6 Lack of compelling argument to change laws

- 6.1 There is no real evidence provided that the proposed changes to the Act are desired by the community as a whole. Instead, the whole premise to incorporate gender orientation in the discussion paper is based on an election promise to a small section of the community. Such a promise, without underlying foundation or widespread community support, should never have been undertaken by the government.
- 6.2 In addition, there is no evidence that existing laws need changing. There are no studies or cases offered that would suggest the existing laws are inadequate. Neither is there any real examples given of individuals or groups who have suffered real harm from the 'inadequacy' of existing laws.
- 6.3 There is no *proof* that any amendments to the Act would improve prospects for homosexuals, lesbians or transsexuals in employment. There is no overseas evidence to show that these groups have been able to seek better employment prospects as a result of changes to the law.
- 6.4 There is nothing in the discussion paper that indicates that there is widespread support for the proposed legislation by businesses, sporting clubs or charity groups. In fact, the Australian Human Rights Commission (AHRC) Consultation Report, which informed this legislative process, was oriented towards *changing* societal attitudes towards sexual orientation and gender identity<sup>7</sup>. We question whether laws should be proposed to *change* public opinion, as opposed to *reflecting* public opinion, particularly in such a contested area.
- 6.5 In addition, when the AHRC reported back on the issue of religious exemptions, it mentioned that 'the majority of the participants who commented on the issue opposed [religious] exemptions.'<sup>8</sup> Yet a closer look at the participant list reveals that the majority of these groups are pro-homosexual, pro-feminist and equal-opportunity groups, representing only a small proportion of the population.<sup>9</sup>
- 6.6 We believe that even current discrimination laws are too limiting, in that employers are unduly restricted in whom they can employ. As noted in many highly respected journals such as *Harvard Business Review*, many a successful secular business

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<sup>7</sup> Australian Human Rights Commission Consultation Report 2011, 'Addressing sexual orientation and sex and/or gender identity discrimination', p. 17.

<sup>8</sup> AHRC Consultation Report 2011, p. 33.

<sup>9</sup> AHRC Consultation Report, Endnotes nos. 226-229, p. 59.

employs the practice of ‘employing for character and then training for skill’<sup>10</sup>, and ‘hiring for cultural fit.’<sup>11</sup>

6.7 As pointed out in Siracusa Principle 8, it is up to the state to demonstrate that legislation is required, not for other groups to prove that it is not:

*‘The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.’*

We do not believe that in this instance the state has adequately justified the limitation of rights of freedom of thought, conscience and religion, freedom of belief, freedom of parents to choose education for their children, or freedom from coercion.

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<sup>10</sup> See for example, B Taylor, ‘Hire for Attitude, Train for Skill’, *Harvard Business Review*, retrieved 25 January 2012, <[blogs.hbr.org/taylor/2011/02/hire\\_for\\_attitude\\_train\\_for\\_sk.html](http://blogs.hbr.org/taylor/2011/02/hire_for_attitude_train_for_sk.html)>

<sup>11</sup> J Bickerstaff, ‘We find it really hard to hire the right people. Help!’, *Smart Company*, retrieved Jan 6 2012, <[www.smartcompany.com.au/profitable-growth/we-find-it-really-hard-to-hire-the-right-people-help.html](http://www.smartcompany.com.au/profitable-growth/we-find-it-really-hard-to-hire-the-right-people-help.html)>

## 7 Protected attributes & legislating behaviour

7.1 We see no reason that sexual orientation should be a ‘protected attribute,’ in the same manner as race, because the two are entirely different. Colin Powell once stated,

*Skin colour is a benign, non-behavioural characteristic. Sexual orientation is perhaps the most profound of human behavioural characteristics. Comparison of the two is a convenient but invalid argument.*<sup>12</sup>

7.2 There is no consensus in the community, or basis in science, that gender orientation is innate and that it requires legislation to protect it in the same manner as race or age. Therefore it should be able to be interpreted in relation to one’s conscience.

7.3 We understand that members of the gay and lesbian community have historically received injurious treatment in the community and this is regrettable. The Church does not condone this behaviour in any way. However, nothing in these proposed changes to legislation provides a panacea for this issue. Harassment and legitimate discrimination are two separate issues which should not be grouped together. Current exemptions for religious groups are designed to protect their freedom of conscience, not to deliberately exclude for the sake of exclusion.

7.4 It is our opinion that legislating ‘behaviour’ is highly problematic and leads to confusion, rather than the ‘clarity’ sought by the proponents of proposed Act, and sets a dangerous precedent for the future.

7.5 We do not accept the description of ‘sexual orientation’ and ‘gender identity’. These expressions are not consistent with our beliefs based on biblical doctrines (see Appendix). We are not convinced that sexual orientation is innate or unchangeable as there seems to be a plethora of factors at play, including cultural, environmental and psychological influences.

7.6 Given that the government has already committed to adding gender identity and sexual orientation to the existing attributes, this raises the question of other attributes recognised in international human rights law, including religion. It is significant in the discussion paper that ‘religion’ is not a protected attribute.

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<sup>12</sup> C Powell, *My American Journey*, Random House Publishing Group, 1995, p. 533.

## Response to questions asked by the discussion paper

The Presbyterian Church of Victoria wishes to address three main areas of the proposed legislation that relate to religious organisations.

### 8 General Limitations Clause

*Question 20: Should the consolidation bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?*

*PCV: No, the consolidation bill should not include a general limitations clause. We argue in favour of retaining existing exceptions for religious organisations.*

The Presbyterian Church of Victoria is opposed to the inclusion of a general limitations clause into the consolidated act for many reasons outlined below:

8.1 Current protections for religious organisations will be lost, despite assurances in the Attorney General’s discussion paper to the contrary.

8.2 A general limitations clause will too tightly restrict the freedom of religious organisations to employ staff suitable to the task. Such a clause clearly constrains those bound by it, in this case religious organisations, to actions which the *state* believes is ‘conduct which is necessary to achieve a legitimate objective’ and which is ‘a proportionate means of achieving that objective’<sup>13</sup>. This wording is far too limited, and does not allow organisations to employ for character as well as for skill-based aptitude.

*a) ‘Conduct which is necessary to achieve a legitimate objective ...’*

This is a form of state interference, where the state itself decides what ‘conduct’ is deemed appropriate to achieve a ‘legitimate objective.’ As other general limitation clauses outline, an objective is only legitimate if it directly relates to the task at hand – not the character of the person, not their background, not the values of the employer or the employee.

*b) ‘A proportionate means of achieving that objective ...’*

Again, the emphasis is on the state imposing what activity is ‘proportionate’. It reduces the act of hiring someone as a simple transaction of service, an impersonal,

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<sup>13</sup> Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, 2011, p.37.

automated task that is simply a matter of fitting a person into a proverbial jigsaw like a puzzle piece. Even secular organisations would find this language untenable.

c) *'Appropriate ...'*

If people take Christian organisations to court for supposed discrimination, the courts will decide whether the action was 'appropriate'. Since there is nothing enshrined in law as to what 'appropriate' or 'legitimate' means, and since everyone has their own opinion as to what constitutes 'appropriateness', it will depend on the opinions of an unelected judge. This is completely unacceptable, as it places the burden of interpreting the legislation on the judiciary, resulting in unhelpful partiality and an untenable amount of power. As a result, outcomes are likely not to reflect community standards, but the judiciary's, as seen in *Cobaw v Christian Youth Camps*.<sup>14</sup> As judicial responses are made on a case-by-case basis, outcomes could vary widely and result in increasing uncertainty for the general population, for both organisations and employees.

d) *Bona Fide requirements*

8.3 The discussion paper gives an example of a bona fide occupational requirement test, currently used in section 15 of the Canadian Act, as an example of how a general limitations clause might work. The concerning issue of 'bone fide' is that like 'inherent requirements' it relates specifically to the task required, rather than to the qualities of the person or the qualities of the employment environment. It could result in a situation where religion is completely excluded from any work position, as revealed in this example from the *Religion or Belief Guidance Notes* applied to the UK Equality Act 2010:

*'for positions at a church such as janitors, discrimination based on religious denomination would be illegal because religion has no effect on a person's ability to fulfill the duties of the job.'*<sup>15</sup>

Technically, anyone can mop a floor. However, a janitor comes into contact with others in the organisation, and his or her character will either be aligned with that organisation or work contrary to it, adding to or detracting from that organisation's culture. It is not just the quality of his or her task that is important; but also the manner in which they conduct themselves. As outlined in the discussion paper, the Productivity Commission<sup>16</sup> recommended retaining specific exceptions – on the basis that they provide greater clarity as to the intent of the legislature regarding the scope of the Act. We concur with this for the reasons listed above.

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<sup>14</sup> Discussed in P. Barclay, 'Homosexuality Trumps Christianity', *Quadrant*, June 2011, vol. LV, no. 6.

<sup>15</sup> 'Occupational Requirements – Guidance', *The UK Equality Act 2010 (Religion or Belief Guidance Notes)*, Appendix 1 p.19-20.

<sup>16</sup> Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, 2011, p.38.

8.4 Instead of increasing clarity, we believe a general limitations clause will increase the level of uncertainty as to what constitutes discrimination. At the moment the exceptions are reasonably clear and understandable, even if they are not consistent across all the different acts.

8.5 If a general limitations clause is imposed, courts could be clogged up with trivial complaints consisting of vexatious litigation intended to cause harm. As stated earlier, the current situation is self-regulating in that Christians would not apply for positions that compromise or offend their beliefs, just as atheists would not ordinarily apply for employment in a church.

8.6 We do not believe that general community standards are being reflected in this proposal. Community standards may change, but we as a denomination believe that Christian ethical beliefs embody the will of God for human behaviour and therefore do not change. Therefore, freedom of conscience will always be an important value for us.

8.7 We are also disturbed by the practical implications of Acts with existing general limitation clauses. *Religion or Belief Guidance Notes* applied to the UK Equality Act 2010 clearly outline that exceptions will only be made to discrimination if the protected requirement is:

*a) crucial to the post, and not just one of several important factors*

A person's gender preference does not wholly define a person and is only part of a wider package which would need to be taken into account by the employer.

*b) relating to the nature of job in question, rather than the nature of the employing organisation*

We wholly oppose the impractical idea that a person's qualities have nothing to do with the employing organisation. No-one would expect a political party, for example, to ignore the personal attributes of a potential employee and assess whether that applicant was suited to the climate, values or ethics of the employment environment. In the same way, a Christian organisation must have the ability to reject an applicant if their lifestyle inconsistent with the beliefs of the organisation.

8.8 It is incumbent upon us to point out that Section 7 of the Charter of Human Rights and Responsibilities 2006 (Victoria) in setting out in which ways human rights may be limited, states:

*(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—*

*(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

*(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.*

In addition, Siracusa Principle 14 states that any limitation clauses,

*‘shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding on the State.’*

We believe that the proposal to insert a general limitations clause infringes these three Charter provisions and many of the Siracusa Principles.

8.9 In conclusion, a general limitations clause would decrease the protection that we currently enjoy. There are less restrictive means reasonably available to achieve the purposes of providing employment to homosexuals, lesbians and bisexuals.



## 9 Inherent Requirements

*Question 21: How should a single inherent requirements / genuine occupational qualifications exception from discrimination in employment operate in the consolidation bill?*

*PCV: It should not operate at all.*

- 9.1 This question is closely related to the concept of the general limitations clause, which essentially involves limiting options of employment to those matters that are seen to directly relate to the task for which a person is employed, and precludes discrimination of protected attributes.
- 9.2 This question is worded as if it is a foregone conclusion that inherent requirements/genuine occupational requirements are going to be enacted, rather than sounding out community attitudes and collecting evidence to determine whether such a proposal is warranted. We believe inherent requirements or general occupational qualifications are inappropriate for determining exceptions from discrimination.
- 9.3 We regard it as imprudent and unworkable to disallow the careful selection of a person's attributes in relation to employment, and we believe that many employers in non-religious organisations would also consider this to be so. A person's attributes, attitudes and characteristics are not able to be teased out from the overall package they are offering to an employer, and it is naïve to think that only qualifications such as task-suitability are valid. Unlike race or age discrimination, discrimination which is based on, or relative to, belief, is directly related to the occupation at hand. For example, in a Christian school context, the beliefs of a teacher have a direct impact on their work and impacts whether faith is transmitted from teacher to student.
- 9.4 Many Christian organisations consider belief and personal characteristics such as gender to be 'genuine' requirements, since that person's character is exhibited through their work, whether they work in an office or in the community. However, it has been made clear in the proposals that such a worded concept of requirements will not be enacted. We see the use of the 'inherent requirements' and 'general occupational requirements' test as an attempt to remove from private organisations

the power to employ their own staff. This is an unwarranted, and indeed unnecessary, intrusion of the state into the business affairs of its citizens.

9.5 As with a general limitations clause, we are opposed to the idea that the state or an unelected judiciary should impose what it deems to be 'inherent' or 'genuine' occupational requirements or qualifications.

9.6 It is our opinion that faith and personal characteristics are equally important in employment as skill-based requirements. As mentioned earlier, there is a plethora of research to suggest that 'employ for character, train for skill' approach operates in the workforce today, and that employers are more interested in the character of a person than their task-based abilities.

9.7 Therefore, we reject the notion of inherent requirements/genuine occupational qualifications. Rather, we argue for a whole-person approach that allows religious groups to employ those who support its aims and values. This seems to us to be a foundational principle in any society that wishes to espouse democratic values.

9.8 Currently, the Sex Discrimination Act (1984) provides exemptions in section 37/38 for activities such as

- *the appointment of priests, ministers or members of any religious order, or acts and practices 'that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion'*
- *educational institutions established for religious purposes in relation to the employment of staff and the provision of education and training, provided the discrimination is in 'good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.'*

The Age Discrimination Act (2004) allows for any acts or practices of a body established for religious purposes that,

- *conform to the doctrines, tenets or beliefs of the relevant religion*
- *are necessary to avoid injury to the religious sensitivities of adherents of that religion*

We believe that exceptions that retain these wordings should remain in place.

## 10 Addressing exemptions for religious organisations

*Question 22: How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?*

*PCV: In the same manner in which they are currently worded.*

10.1 The Presbyterian Church of Victoria believes that current exemptions for religious organisations are absolutely essential for protecting our freedom of belief, particularly since state and federal laws do not explicitly protect freedom of religion. As Barclay enunciates,

*The categorisation of the right to religious freedom as an exemption to the anti-discrimination right has two effects. It puts the right to religious freedom at a disadvantage and gives the impression it is a special privilege graciously granted by the State rather than a fundamental human right acknowledged as such in International Human Rights documents.<sup>17</sup>*

This exacerbates the idea that, at best, religion is viewed as an unnecessary inconvenience that is barely tolerated, rather than a fundamental human right.

10.2 Current religious exemptions are presumed by some to be ‘problematic’ instead of beneficial to society, and yet they perform a valuable function of allowing the state to fulfil its international human rights obligations and to safeguard a pluralistic society.

10.3 The Presbyterian Church of Victoria believes that the current exemptions in place in the Sex Discrimination Act (1984) are prudent and necessary to protect religious freedom in Australia; in particular, section 37 and 38 which deal with religious bodies and educational institutions established for religious purposes, and which relate to,

*any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.<sup>18</sup>*

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<sup>17</sup> P Barclay, ‘Is Equality Possible, or Even Desirable?’, *Quadrant*, vol. LV, no.1, November 2011, pp. 94-101.

<sup>18</sup> Sex Discrimination Act 1984, section 37.

Any further restrictions in the consolidated bill would entail breaches of every applicable human rights document currently in effect.

10.4 In fact, the Presbyterian Church of Victoria argues that a widening of existing exemptions be implemented to include non-educational facilities such as charitable institutions, aged-care homes, mission groups, campsites and other service providers so that they also have freedom to make choices in areas of belief and faith when it comes to their activities.

10.5 The curious paradox about proposals to curtail exceptions and exemptions is highlighted further by Professor Parkinson who states that,

*'It requires anti-discrimination provisions to be justified in their application to minority groups, rather than requiring minorities to make out a compelling case for an exemption.'*<sup>19</sup>

We know there are those who believe that there should be no exemptions for religious organisations, citing the fact that many religious organisations receive government funding and should thereby be 'secularised.' Yet, there is no reason given in these proposals for why this should be the case, other than allegedly 'simplifying' protections. Yet, as we have argued, the proposed changes will not achieve this, but will instead cause greater uncertainty and lack of clarity for all citizens.

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<sup>19</sup> P Parkinson, 'Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia: The Freedom to Be Different', Australian Law Journal, vol. 81, no. 12, 2007, p. 965.

## 11 Conclusion

In our view, we have not been presented with a compelling case as to why the laws need to be changed, nor why gender identity and sexual orientation should be 'protected attributes' in the same way as race.

We are uncomfortable, therefore, discussing the merits or otherwise of exemptions and exceptions predicated on a premise which we would reject. Moreover, we believe that any new protected attributes like 'gender identity' or 'sexual orientation' must not curtail the fundamental human rights of freedom of thought, conscience and religion.

To this end, we are opposed to both a general limitations clause and the concept of inherent requirements. It is our belief that their enactment would eviscerate our current rights to exercise our religious beliefs making them subject to the state through the mechanism of the judiciary who will be left in the invidious position of deciding what is or is not reasonable or acceptable.

It is our belief any changes would be a diminution of our current freedoms at best and a rejection of our fundamental rights to freedom of freedom of thought, conscience and religion at worst.

Consequently, we as a Christian body will act, where appropriate, to strenuously argue for our fundamental rights of freedom, thought, conscience and religion.

## Appendix

*Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh. (Genesis 2:24)*

*He [Jesus] answered, "Have you not read that he who created them from the beginning made them male and female, and said, 'Therefore a man shall leave his father and his mother and hold fast to his wife, and the two shall become one flesh'?" (Matthew 19:3-4)*

*You shall not lie with a male as with a woman; it is an abomination. (Leviticus 18:22)*

*Therefore God gave them up in the lusts of their hearts to impurity, to the dishonoring of their bodies among themselves, because they exchanged the truth about God for a lie and worshiped and served the creature rather than the Creator, who is blessed forever! Amen. For this reason God gave them up to dishonorable passions. For their women exchanged natural relations for those that are contrary to nature; and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in themselves the due penalty for their error. (Romans 1:24-27)*

*Or do you not know that the unrighteous will not inherit the kingdom of God? Do not be deceived: neither the sexually immoral, nor idolaters, nor adulterers, nor men who practice homosexuality, nor thieves, nor the greedy, nor drunkards, nor revilers, nor swindlers will inherit the kingdom of God. (1 Corinthians 6:9-10)*

All biblical quotes are taken from the English Standard Version (ESV).



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