VICTORIAN CONFERNECE

Submission on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012

Executive Summary

This submission proposes some amendments to the *Human Rights and Anti-Discrimination Bill 2012* (Cth) ("the Bill") to clarify the relationship between the right to non-discrimination and other human rights which Australia is obliged to protect. It also highlights the serious regulatory burden that the Bill imposes on small not-for-profit organisations, and proposes some amendments to reduce that burden.

List of proposed amendments

The proposed amendments, in order, are as follows:

1. **Section 3(a)**: should be amended as follows:

   (a) to deal with discrimination, sexual harassment and racial vilification, consistently with Australia's obligations under the human rights instruments and the ILO instruments (see subsections (2) and (3)), and taking account of the other rights and freedoms protected by those instruments including freedom of speech, religion, and association.

2. **Section 6**: Remove 'voluntary or unpaid work' from the definition of employment.

3. **Section 14**: Amend to provide in a new subsection (2):

   'This Act is not intended to apply to any action that is not unlawful under any anti-discrimination law in force in the place where the action is taken.'

4. **Section 19**: Amend to include the requirement for a comparator.

5. **Section 19(2)(b)**: Remove the words "offends, insults or".

6. **Section 22**: Amend section to limit the scope to those in positions of authority such as employers.

7. **Division 4**: Amend the heading to say: 'When discrimination is not unlawful'.

8. **Subdivision A**: Amend the heading to say 'Reasonable grounds for differentiation'.

9. **Division 4:** Delete the word 'Exception' throughout the Division, with such consequential amendments as are required. Delete the requirement for a review of the exceptions after three years, or confine the review to those provisions that are currently defined as exceptions and which are not based on human rights.

10. **Section 23:** Add after subsection (3) -

    'Without limiting the generality of the previous subsection, the protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate aim.'

11. **Subdivision C**: Introduce a new section before section 32 as follows:

    (1) 'This subdivision is a means of giving effect to Australia's obligations under Articles 18 and 27 of the International Covenant on Civil and Political Rights, and to appropriately balance these rights with rights concerning non-discrimination.'
    (2) Additional protection for these rights is provided in section 23 (justifiable conduct).

12. **Section 33(2):** Amend as follows -

    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 a body that is intended to be conducted in accordance with religious doctrines, tenets, beliefs or teachings, or an officer, employee or agent of such a body; and

    (b) the discrimination is connected with the appointment or retention of persons to work within the religious body to ensure that they share the religious commitment of that body or are supportive of its religious purposes; or

    (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 exception applies.

Introduction

The Seventh-day Adventist Church (Victorian Conference) is grateful for the opportunity to respond to this Exposure Draft. Of particular interest to The Seventh-day Adventist Church (Victorian Conference is the level of protection the Bill offers religious freedom. In this The Seventh-day Adventist Church (Victorian Conference) notes with thanks the government's retention of religious

exceptions. Such exemptions ensure that the principle of non- discrimination is appropriately balanced with other human rights, including rights that are central to maintaining a healthy multicultural society. It is particularly important in a multicultural society such as Australia that cultural and religious minorities are able to retain their identity and values, even where the identity and values of a minority group may conflict with majority values. Articles 18, 19 and 27 of the International Covenant on Civil and Political Rights ("ICCPR") guarantee these important rights and freedoms.

This submission proceeds by addressing some issues which we see as particularly important to the Churches and other faith-based organisations.

1. The costs of the draft legislation to small, non-profit organisations

Many religious organisations are relatively small non-profit organisations that seek to maintain their religious identity while providing health, educational or welfare services to the general community. They have limited budgets and few financial reserves.

The Seventh-day Adventist Church (Victorian Conference) submits that the proposed legislation, if passed, would impose heavy regulatory burdens that many religious non-profit organisations are not equipped to manage. Such regulatory burdens would be caused by the Bill's expanded list of protected attributes, and also its extended reach into a great many areas of life which the Exposure Draft defines as 'public'.

The range of protected attributes

The number of attributes listed as 'protected' in clause 17 of the Bill comes to a total of eighteen. Among the listed attributes are those which have long been protected by the law, such as race, sex, religion and nationality. They were among the first to receive legislative protection back in the 1960s and 1970s because of the historical discrimination that persons possessing such attributes had suffered. Others such as disability, marital status and sexual orientation emerged later but are justified on similar grounds.

However, there are a number of attributes included in the Bill that are not justified on the grounds of historical discrimination i.e. there is no evidence that people possessing those attributes have suffered widespread and persistent discrimination. The case for regulation in relation to these attributes is not obvious. When one moves beyond justifying regulation based upon a past record of discrimination, there is no end to the number of attributes that might be added: e.g. weight, physical appearance or homelessness.

The Seventh-day Adventist Church (Victorian Conference) recognises that there was already a long list of attributes protected by section 351 of the *Fair Work Act 2009* (Cth). However, these only applied to the area of employment. The Bill proposes an even longer list of attributes and their protection extends to many more spheres of life than is the case in the *Fair Work Act*.

Furthermore, section 351 of the *Fair Work Act* provides that adverse action is not unlawful if it is 'not unlawful under any anti-discrimination law in force in the place where the action is taken.' This prevents confusion between the requirements of state and federal laws and reduces the regulatory burden on small organisations. The Bill enables religious organisations to rely on exceptions that cover some attributes. However, there are still many other grounds that might apply to these small non-profit organisations. These include, for example, age and medical history.

Organisations generally seek to obey the law if they know what it is. However obtaining good legal advice can be costly for small non-profit organisations. In any event it will be very difficult to advise churches and other organisations concerning their legal position if they have to be concerned about so many possible grounds for discrimination complaints. For example, it may be very difficult to provide any certainty to a Church about whether it may decline the volunteer services of an elderly woman who would like to continue teaching Sunday School, but whose mental condition has the effect of frightening some children.

The government needs to consider the regulatory burden of having so many new grounds for complaint against non-profit organisations that are often small, have a skeletal central administration, and run on tight budgets. This burden is in addition to those arising from the new Australian Charities and Not for Profits Commission ("ACNC") and the inclusion of all non-government organisations within the scope of the Royal Commission on Child Sexual Abuse.

The inclusion of volunteers

As the example above demonstrates, the adverse regulatory impact of this proposed legislation is greatly increased by the inclusion of volunteers within its scope. Applying anti-discrimination provisions to volunteers extends the reach of such laws considerably.

The definition of employment in section 6 of the Bill is as follows:

> ***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.*

One of the major interpretative questions is where the boundaries of work, leisure and community service lie. Does the woman who runs the Church playgroup as a volunteer engage in 'unpaid work'? What about the pastoral care team who faithfully visit those who are housebound or in hospital? Is running a youth group considered volunteer 'work'? What if, as in some church communities, the local church is run by elders who, on a voluntary basis, take turns to preach and carry out other leadership activities? Going beyond the sphere of religion, is a mother or father's work within the home 'voluntary or unpaid work'? If not, why not? What about another family member, such as a

brother-in-law or uncle, who might offer to provide handyman assistance around the home? Including volunteers within the definition is a recipe for enormous uncertainty.

It is far from clear that there is any problem with discrimination against volunteers in faith-based communities that requires legislative intervention, and if there is, there are likely to be issues concerning the freedoms of religion and association that need to be balanced against whatever claim of discrimination is being advanced. In practice, if people do not feel welcome in offering their assistance in such contexts then they will simply go elsewhere. The regulatory burden upon faith-based communities and non-profit organisations cannot possibly justify whatever benefits might accrue from the level of regulation proposed and which is characterised in the Bill, somewhat unconvincingly, as 'public life'.

Proposed solutions

Remove 'voluntary or unpaid work' from the definition of employment in section 6; and

Amend section 14 of the Bill so as not to make unlawful what is lawful within a person's State of residence, as is done in the *Fair Work Act*. This will at least mean that small organisations can deal with one set of protected attributes, not two. Section 14 should be amended to provide in a new subsection (2):

> 'This Act is not intended to apply to any action that is not unlawful under any anti-discrimination law in force in the place where the action is taken.'

2. The cost of nuisance claims

The Seventh-day Adventist Church (Victorian Conference) is also concerned about the possibility of a considerable increase in nuisance claims, or claims that, while they may have substance, are of a relatively minor nature. This concern arises from the inclusion of 'offend, and insult' as a form of 'unfavourable treatment' when there are so many grounds on which offence may be taken that are not covered by the religious exceptions.

Clause 19(1) of the Exposure Draft defines discrimination in the following way:

> *'A 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.'*

Clause 19(2) explains that unfavourable treatment 'includes (but is not limited to) the following:

a) harassing the other person;
b) other conduct that offends, insults or intimidates the other person.'

This definition proposes a test for discrimination that is entirely subjective. Any person who feels they have been harassed, offended, insulted or intimidated on the basis of a protected attribute has

grounds to lodge a complaint. In practice this might mean that a person who feels insulted by a conversation in the work lunch room relating to politics may lodge a complaint for being treated 'unfavourably' on the basis of their political opinion. This provision is to be contrasted with section 51 of this Bill concerning racial vilification, which imposes an objective test that the behaviour is 'reasonably likely' to offend, and requires other matters also to be demonstrated before the conduct can be said to be unlawful.

While clause 19 lowers the threshold for what constitutes discrimination, clause 22 drastically expands the number of people against whom a complaint can be lodged. Clause 22(1) reads:

> *'It is unlawful for a person to discriminate against another person if the discrimination is connected with any area of public life.'*

'Public life' is defined in clause 22(2) as extending (but is not limited) to the following areas*:*

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.'

This broad definition of 'public life' means that a complaint can be lodged against *any* person engaged in one of the aforementioned activities.[1] This represents a significant expansion in the scope of anti-discrimination law.

At present, anti-discrimination legislation tends to regulate people in positions of power e.g. an employer or an educational authority. Clause 22 does not impose such restrictions, but rather invites employees to take action against other employees or one club member against another. This is likely to lead to a greatly increased number of complaints, and time spent sifting between the few meritorious and the many unmeritorious complaints.

The Seventh-day Adventist Church (Victorian Conference) acknowledges there are mechanisms built into the Bill that protect reasonable conduct and that the Commission will have discretion to reject complaints that are 'frivolous, vexatious, misconceived or lacking in substance'.[2]

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[1] Sub-clause (c) and (e), however, only makes it unlawful for a 'provider' of goods, services, facilities or accommodation to Discriminate

[2] See clause 117(2)(c) of the Exposure Draft.

While the power to dismiss frivolous or vexatious claims is useful, experience suggests that courts and tribunals are very reluctant to exercise such a power, and if they do so, it tends to be only after the complaint has gone some way through the complaints process and it has become clear that it has no prospect of success. Before that can happen, a complaint must go through a preliminary assessment process, causing respondents unnecessary angst, inconvenience and cost.

There are numerous examples of groundless complaints causing such unnecessary grievance. Take for example *Fletcher v Salvation Army Australia.*[3] In that case a prisoner who attended a Christian course called 'Alpha' complained he had been 'vilified' because the program implied that witches are 'Satanists'. Professor Patrick Parkinson explains that the case concluded in the following way:

> 'Justice Morris summarily dismissed the application, regarding the complaint as "quite hopeless." Nonetheless, it took a hearing to determine this. While the respondent appeared in person (by video link from jail), two different barristers were instructed by the two defendants, and a third appeared for Corrections Victoria.'[4]

While this case concerned religious vilification legislation in Victoria, it is likely that the proposed legislation could operate in a similar way. This case is just one example of how offence-based laws can invite the instigation of unmeritorious complaints which can unfairly burden the respondent.

By way of a second example, consider the case of Dr David van Gend, a medical practitioner from Queensland, who was forced to attend a compulsory mediation arranged by Queensland's Anti-Discrimination Commission concerning an article he wrote on gay marriage for the Brisbane Courier-Mail. The Courier-Mail had invited Dr Karen Brooks and Dr van Gend to submit opinion pieces on the case for and the case against gay marriage. Dr van Gend wrote the following in his case against:

> "If you hold the old-fashioned idea that a baby deserves both a mother and a father, (Queensland ALP President) Andrew Dettmer, calls your views 'abominable'.
>
> "Yes, it is discrimination to prohibit the "marriage" of two men, but it is just and necessary discrimination, because the only alternative is the far worse act of discrimination against children brought artificially into the world by such men, compelled to live their whole lives without a mother. Now that approaches the abominable."

The case brought against Dr Van Gend was reported as follows:[5]

> 'A member of Gay Dads NSW filed a complaint under the Queensland Anti-Discrimination Act, forcing van Gend to mediation. The complaint was withdrawn but van Gend is still irate.
>
> "I had to cancel a dozen patients to front up and it cost me thousands in legal advice," he says. "It cost him (the complainant) an email and a conference call."
>
> The complaint was "utterly worthless (but) the problem of these laws is they cost innocent people lots of money and time".

People have strong views on subjects such as gay marriage; in a healthy democracy that respects the human right of free speech, it ought to be possible to articulate the different arguments without being subject to civil litigation. This case illustrates the cost and inconvenience for a respondent even where a complaint is closed or withdrawn. It also shows how creating remedies against other people based upon nothing more than subjective 'offence' can be a weapon of warfare used by different advocacy groups.

The *Human Rights and Anti-Discrimination Bill* is so broadly drafted that it is possible that someone would fall foul of the law by inadvertently insulting someone or causing offence without the slightest intention of doing so. This was evidenced recently in the United Kingdom where a pub singer was arrested for singing the song "Kung Fu Fighting" because a Chinese man who walked past the pub claimed to have been offended.[6]

Making it unlawful to offend someone when there are so many protected attributes is likely to lead to a large increase in the number of disputes being taken to the Commission for which the law is unable to provide a suitable or appropriate dispute resolution process. Most problems of this kind ought to be sorted out with some education, explanation and goodwill – or just tolerance for the expression of different opinions in a democratic society. Relationships will not be improved or harmony promoted by civil litigation based upon claims of being offended. Indeed it is likely that being 'offended' will become a weapon of war which will be used by one interest group against another as happened in the 'Catch the Fire' case.[7]

It is also doubtful that it is a good use of taxpayers' money to have to deal with such matters. There are many deserving calls upon public expenditure that are currently unfunded and which ought to take a much higher priority than doubling the funding and staff of the Australian Human Rights Commission to deal with complaints about conduct that causes offence.

Proposed solution

1. Remove the words "offends, insults or" from section 19(2)(b).
2. Amend section 22 to limit the scope of the section to those in positions of authority such as employers.

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[3] [2005] VCAT 1523.

[4] Parkinson, P 'Religious Vilification, Ant-Discrimination Laws and Religious Minorities in Australia: The Freedom to be Different' Australian Law Journal (2007) 81, 954 – 966.

[5] http://www.heraldsun.com.au/opinion/gays-must-curb-vile-vitriol/story-e6frfhqf-1226167514970

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[6] 'UK Pub singer arrested for performing Kung Fu Fighting Song' *The European Union Times* 3 May 2011: http://www.eutimes.net/2011/05/uk-pub-singer-arrested-for-performing-kung-fu-fighting-song/

[7] Discussed in Parkinson, above n.3.

3. The Objects Clause and Religious and Cultural Minorities

Section 3 clearly sets out the objects of the proposed legislation. The objects clause plays a fundamental role in the interpretation of the bill.[8] The clause outlines seven key objectives of the bill, which include the following:

- to 'eliminate discrimination' (clause 3(a));
- 'in conjunction with other laws, to give effect to Australia's obligations under the human rights instruments and the ILO instruments' that are listed in the draft legislation (clause 3(b)); and
- 'to promote recognition and respect within the community for the principle of equality' (clause 3(d)(i)).

F4F acknowledges that the elimination of discrimination and the advancement of the principle of equality are important social values and play a key role in anti-discrimination legislation. However, the scope and limits of the right to non-discrimination needs to be clearly articulated, because *differentiation* is both lawful and appropriate in a great many circumstances. This is why eight year olds are not allowed to drive cars, hospitals are sometimes established to serve only women, and members of the Liberal Party do not have a 'right' to equal employment opportunity as political advisers in the office of a Labor government minister. Furthermore, the right to non-discrimination needs to be balanced with other human rights including freedom of association. A fan club for the Australian cricket team ought to be able to exclude diehard South African supporters from membership and voting rights.

If the objects clause focuses only on the elimination of discrimination and says nothing about the limits of the right or how it is to be balanced with other rights, then there is a risk that other human rights will be violated.

An example of the importance of the objects clause in this regard is the right of a cultural and religious minority (for religion and culture often go together) to form a club which meets the need of that ethno-religious community. Clause 35(2) of the Bill provides:

> (2) The exception in this section applies in relation to a club or member-based association:
>
> (a) if membership of the club or association is restricted wholly or primarily to people (the ***target group***) who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and
>
> (b) restricting membership to the target group is consistent with the objects of this Act.

The test is a cumulative one. Both (a) and (b) must be satisfied. However, as presently drafted, it is very difficult indeed to see how restricting a club or association to an ethno-religious minority could be said to be consistent with the objects of the Act. The formation or continuation of such a club is

[8] The note under clause 3 instructs: 'In interpreting a provision of the Act, the interpretation that would best achieve the objects of the Act is to be preferred to each other interpretation: see Clause 15AA of the *Acts Interpretation Act 1901.'*

not a special measure in the usual sense of that term for it is not a measure to achieve 'substantial equality'. Such clubs exist to promote and preserve a cultural and religious identity, not to promote substantial equality. The only possible basis might be the reference in (b) to: "in conjunction with other laws, to give effect to Australia's obligations under the human rights instruments and the ILO instruments". However that is both broad and vague, and it cannot readily be known how the courts will interpret it.

The Bill is appropriately named the *Human Rights and Anti-Discrimination Bill*. However, the objects of the Bill only relate to the second part of that title. They need also to reflect the first part of the title. This involves a recognition that the right to non-discrimination is, and has always been, a qualified right. It needs to be balanced with other rights and principles such as the right to religious freedom and freedom of association, and subject to appropriate legal limits which arise from the natural limitations that are inherent in youth, old age, mental illness, disability and even the later stages of pregnancy. For a great variety of legitimate reasons, people with certain protected attributes are not able to work in every job available or to perform every task normally required by that job.

Proposed solution

The Seventh-day Adventist Church (Victorian Conference) proposes that the first object should be amended as follows:

(a) to deal with discrimination, sexual harassment and racial vilification, consistently with Australia's obligations under the human rights instruments and the ILO instruments (see subsections (2) and (3)), and taking account of the other rights and freedoms protected by those instruments including freedom of speech, religion, and association;

This would serve as a reminder of the need to balance competing rights when interpreting provisions of the Act. Without such a reference, courts may construe the objects clause as granting an elevated status to the right to non-discrimination and determine that the legislation puts a low value on other rights and freedoms, confining them to exceptions that should be narrowly construed. Without recognition of Articles 18, 19 and 27 of the ICCPR in particular, courts may neglect to give adequate weight to these freedoms since they are not otherwise implemented into domestic law.[9]

4. Religion as a protected attribute

The Seventh-day Adventist Church (Victorian Conference) welcomes the inclusion of religion as a protected attribute. Religion has been a protected attribute in the USA as far back as the *Civil Rights Act* 1964. It was among the first attributes to be protected in international human rights law.[10] This is no doubt because history is replete with examples of groups or individuals who have suffered discrimination on the grounds of their religious

[9] The words 'in conjunction with other laws' in s.3(b) might suggest that only the clauses of human rights instruments that have been implemented into Australian law ought to be given effect.

[10] For example the *Civil Rights Act 1964* (US) and the *Universal Declaration of Human Rights 1948* (UDHR).

belief. Discrimination on the basis of religious belief continues to be a live issue around the world today – not just in Communist and Islamic countries, but also in the West.

Clause 22(3) of the bill states that discrimination on the ground of religion will only be unlawful if the discrimination is connected with work and work-related activities. This limitation means that it would be lawful to deny a person access to public goods, services, education, training, facilities on the basis of their religion. F4F recognises that the reason for this might be to do with limitations of constitutional power (since the protection of these attributes presumably relies on the *Discrimination (Employment and Occupation) Convention 1958* (No. 111)), but perhaps this issue could be clarified.

5. Religion as an 'exception'

The Seventh-day Adventist Church (Victorian Conference) recognises that the government has demonstrated its continuing respect for religious freedom by retaining the exceptions afforded to religious bodies and educational institutions (clause 32 and 33).

F4F expects that these clauses will attract much debate, as there is a determined constituency arguing for the elimination of religious exceptions. Many view such exceptions as unjust concessions granted as some form of political compromise.[11] There are repeated calls for the abolition of all exceptions and while the government has not acceded to those demands, it has acknowledged the arguments of those lobby groups by providing that the exceptions should be reviewed after three years (clause 47).

This misunderstands the place and importance of religious exceptions. These exceptions do not exist as a means of justifying what would otherwise be unlawful discrimination. Rather, they give expression to fundamental human rights, such as freedom of religion, association and the rights of cultural minorities.[12]

For this reason, F4F is deeply concerned that religious freedom and freedom of association are protected only by means of 'exceptions'. We recognize that it is a standard form of drafting for anti-discrimination statutes to define discrimination and then to identify exceptions. However, in the modern climate where there is a new hostility to any form of exception, it is no longer appropriate to protect fundamental human rights by reference only to exceptions from other applicable laws which might be narrowly construed. The language of 'exceptions' compounds the perception that religious organisations receive special concessions.

The Seventh-day Adventist Church (Victorian Conference) is of the view that addressing issues of religious freedom only by way of a narrowly construed exception could be seen as being in violation of Australia's international human rights obligations. It is also inconsistent with the UN Human Rights Committee's definition of discrimination in paragraph 13
of General Comment 18 which states that differentiation of treatment will not 'constitute

[11] See generally: Thornton, Margaret (2011) 'Christianity 'Privileged' in Laws protecting Fairness' *Viewpoint,* 5.
[12] See for example article 18, 19 and 27 of the International Covenant on Civil and Political Rights (ICCPR).

discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.[13]

Measures that respect the autonomy of religious organisations to differentiate between people where this is in accordance with requirements of faith, doctrine, moral teaching and religious observance fall outside the definition of 'discrimination' in international law.

This problem could be rectified, within the structure of the current exposure Bill, in the following ways:

1. Amend Division headings

   Currently, the headings provide:

   > Division 4—Exceptions to unlawful discrimination
   >
   > Subdivision A—Main exceptions

   It would do much to alleviate the concerns of Christian churches and faith-based organisations if these Division heads were changed to say:

   > Division 4—When discrimination is not unlawful
   >
   > Subdivision A—Reasonable grounds for differentiation

   And then delete the word 'Exception' throughout the Division. So for example, section 23 could be headed 'justifiable conduct' and 23(1) could begin: "This section applies…" . There would need to be other amendments to the Division consequent to the deletion of the language of 'exceptions'. The requirement for a review of the exceptions after three years should be deleted or confined to those exceptions (as currently described) that are not based on human rights.

2. Amend section 23

   Clause 23(2) states:

   > 'It is not unlawful for a person to discriminate against another person if the conduct constituting the discrimination is justifiable.'

   Section 23(3) goes on to say that conduct is justifiable if:

   a) the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim;
   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.'

[13] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument

The Seventh-day Adventist Church (Victorian Conference) proposes an additional clause to be inserted after subsection (3), (based upon the recommendation made by Professor Patrick Parkinson and Professor Nicholas Aroney in their original submission responding to the Discussion Paper)[14]:

> 'Without limiting the generality of the previous subsection, the protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate aim.'

This proposed inclusion reflects the UN Human Rights Committee General Comment 18 which states the circumstances in which differentiation of treatment will not constitute 'discrimination'.[15] Because subsection (4) refers to the Objects of the Act, it is also important that these objects are amended to take a broader view of the protection of human rights.

6. Subdivision C and the 'religious exceptions'

The subdivision really needs a new explanatory section to be introduced before section 32 on the following lines.

(1) This subdivision is a means of giving effect to Australia's obligations under Articles 18 and 27 of the International Covenant on Civil and Political Rights, and to appropriately balance these rights with rights concerning non-discrimination.'
(2) Additional protection for these rights is provided in section 23 (justifiable conduct).

The proposed subsection (2) could alternatively take the form of a note.

Furthermore, The Seventh-day Adventist Church (Victorian Conference) considers that it is now time to rewrite the religious exceptions in a manner which more closely aligns with the purposes that they serve and to avoid sometimes complex and fruitless arguments about what is and is not required by the doctrines of the religion or a group within a religious tradition.[16]

No faith-based organisation seeks to discriminate against anyone else but many choose staff, or at least prefer staff, who adhere to the beliefs of the organisation, because such beliefs are central to the expression of the organisation's work and purpose.

Accordingly, we propose the following amendment to section 33(2) in order to clarify this.

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

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[14] Parkinson, P and Aroney, N 'Submission to Consolidated Commonwealth Anti-Discrimination Laws' (2012), which is available on the Attorney General's website.
[15] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument
[16] See e.g. *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155; *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293.

(b) the first person is a body established for religious purposes, or a body that is intended to be conducted in accordance with religious doctrines, tenets, beliefs or teachings, or an officer, employee or agent of such a body; and

(b) the discrimination is connected with the appointment or retention of persons to work within the religious body to ensure that they share the religious commitment of that body or are supportive of its religious purposes; or

(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 exception applies.

7. The definition of 'discrimination'

The Seventh-day Adventist Church (Victorian Conference) supports the government's attempt to simplify the test for discrimination in principle, but has concerns about the current definition. Section 19(3) provides:

> A person (the ***first person***) ***discriminates*** against another person if:
>
> (a) the first person imposes, or proposes to impose, a policy; and
> (b) the policy has, or is likely to have, the effect of disadvantaging people who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and
> (c) the other person has that attribute or combination of attributes.

This definition for discrimination is problematic because there is no requirement to have a comparator. This means that a tribunal or court, in determining whether or not discrimination has occurred, need not compare the treatment of the complainant with the treatment of some other person, real or hypothetical, who does not have the protected attribute. As the Exposure Draft's Explanatory Notes indicate: 'It is sufficient that the treatment is detrimental to the person.'[17] Neither the bill nor the Explanatory Notes further explain what constitutes detriment for the purposes of this section.

The Seventh-day Adventist Church (Victorian Conference) considers that the insertion of a comparator is essential to ensure greater objectivity in the application of this test. Any organisation against which a complaint of discrimination may be brought is entitled to know in advance what conduct might constitute discrimination so that it can avoid crossing that line inadvertently. Saying that a general policy is discriminatory just because it has the effect of disadvantaging a person with a protected attribute, without more, is a recipe for uncertainty
and confusion and could lead to a multiplicity of unreasonable complaints.

[17] See clause 106 of the Explanatory Notes.

Proposed solution

Amend section 19 to include the requirement for a comparator.

Conclusion

The Seventh-day Adventist Church (Victorian Conference) is grateful for the opportunity to respond to this Exposure Draft .