

# Ad Hoc Interfaith Committee

c/o Rev David Palmer, [REDACTED]

Monday, 7<sup>th</sup> January 2013

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
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Dear Sir/Madam,

## **Submission concerning the Exposure Draft of Human Rights and Anti-Discrimination Bill 2012**

The Ad Hoc Interfaith Committee was formed to provide an opportunity for people of different faiths to meet and to respond to the many social issues that are currently the subject of public policy formation. The membership of the Committee is by invitation to people who share similar ideas about being unafraid to give witness to faith and to seek respectfully to persuade others by that witness as well as by appeal to reason. We regard it as a civic responsibility to listen to what others are saying and to add our voices to the discussion on issues that shape the kind of community to which we belong.

The Ad Hoc Interfaith Committee has been active in the past in responding to requests for submissions touching on the interface between, on the one hand, measures to enforce non discrimination on the basis of protected attributes and on the other, rights well-established in international law and ratified by Australia, such as freedom of conscience, of religion, of free speech and of association. Our experience has been that those professionally involved in the administration and advocacy of human rights law including the Australian Human Rights Commission (AHRC) and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), whilst averring a determination to achieve balance between conflicting rights, in fact veer in the direction of sacrificing the a particular collection of rights including freedoms of conscience, religion, association and speech in favour of a more recent interpretation of equal opportunity rights that gives them a status that is to be virtually non-derogable.

Thus the Victorian Law Reform Act 2008 has a compromised freedom of conscience clause for those medical practitioners who have a moral objection to abortion. Section 8 of the Act required health professionals who have a conscientious objection always to cooperate with abortion by referring the woman to another health practitioner known not to have a conscientious objection. Many health practitioners find themselves unable to comply with these draconian provisions.

At the SARC Public Hearings, 4<sup>th</sup> and 5<sup>th</sup> August, 2009 into Exceptions and Exemptions to the Victorian *Equal Opportunity Act 1995*, Michael Gorton, then Chairman of VEOHRC, argued for doing away with exceptions and replacing them with exemptions that would have to be argued for at Victorian Civil and Administration Tribunal whilst the two lawyers at the same hearing representing the Public Interest Law Clearing House and Human Rights Law Resource Centre argued against any religious exception clauses in the Equal Opportunity Act 1995, asserted that ‘religion has to justify itself whereas equality doesn’t.

**We maintain that the exposure draft whilst including religious exception clauses acceptable to ourselves has *other provisions that tilt the balance heavily against established rights of freedom of conscience, of religion, of free speech and of association* and therefore needs to be substantially rewritten.**

Before proceeding to set out our concerns and recommended changes to the exposure draft we want to a) respectfully remind the Senate Committee of the extensive and longstanding human right to freedom of religion with the understanding that the associated rights to freedom of conscience, free speech and association are also being defended, and b) give clear expression to our motivation in making this submission. We note, however, that despite Australia ratifying the International Covenant on Civil and Political Rights which includes at Article 18 that “Everyone shall have the right to freedom of thought, conscience and religion”, and thus being obliged to legislate to protect the freedom, this freedom has never been enacted in Australian law. That does raise a question about the constitutionality of the current proposal to legislate in such a way that is contrary to that international obligation.

## **The defence of the human right to freedom of religion**

Freedom of religion is a fundamental human right.

Freedom of religion made its first tentative appearance in the British 1688 Bill of Right, which sought to bring about a situation where “religion, laws and liberties might not again be in danger of being subverted”.

Turning to more modern times, freedom of religion is expressed by the 1948 Universal Declaration of Human Rights and subsequently given status in international law in the 1966 International Covenant on Civil and Political Rights (ICCPR). The UN has given Article 18 of the ICCPR which includes freedom of thought, conscience and religion a non-derogable status even in circumstances of emergency<sup>1</sup>. Australia is a signatory to all these documents including the document recognising the non-derogable status of Article 18.

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<sup>1</sup> Human Rights Committee, General Comment 29: States of Emergency Article (4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001)

## ICCPR, Articles 18, 25 and 27

Article 18 provides:

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *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.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

The inclusion of religion recognises the importance of religious belief to adherents, the close linkage between religion and identity, and the importance of religion in the life of societies. Given that it has non-derogable status, freedom of conscience, thought and religion is one of the very few non-derogable human rights in international law. Article 4(2) of the ICCPR provides that governments may not dispense with it even in a time of national emergency which threatens the life of the nation.

**Article 18(1&2)** maintain that people have a right to both freely believe and practice their religion, whether individually or communally, irrespective of how offensive or unreasonable one faith may seem to another, as well as having the right to change their religion. In manifesting one's religion in teaching that religion's truth claims, it is inevitable and necessary to critique other religions' claims to truth. This needs to be understood as serving the propagation of a religion without necessarily being an attack on *persons* of another religion.

Furthermore, in relation to proselytising religions such as Christianity, Islam, Buddhism and Hinduism, it is sometimes difficult to draw a line between proselytism and teaching.

**Article 18(3)** adds a limitation on religious freedom, but is a very strict one. It requires that any such restriction be *necessary*. In other words in seeking to apply a restriction on freedom of religion it needs to be clearly demonstrated, by real evidence and not assertion, that, without the proposed restriction, damage would be caused to "public safety, order, health, or morals" or there would be a violation of "the fundamental rights and freedoms of others".

The Federal and State Government in fact have available the **Siracusa Principles**<sup>2</sup> which define the conditions and grounds for permissible limitations and derogations enunciated in ICCPR in order to achieve its aims. These are:

- 1. No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.*
- 2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.*
- 3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.*
- 4. All limitations shall be interpreted in the light and context of the particular right concerned.*
- 5. All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.*
- 6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.*
- 7. No limitation shall be applied in an arbitrary manner.*
- 8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.*
- 9. No limitation on a right recognized by the Covenant shall discriminate contrary to Article 2, paragraph 1.*
- 10. Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:*
  - (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,*
  - (b) responds to a pressing public or social need,*
  - (c) pursues a legitimate aim, and*
  - (d) is proportionate to that aim.*

*Any assessment as to the necessity of a limitation shall be made on objective considerations.*
- 11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.*

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<sup>2</sup> United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

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

**Article 18(4)** specifically protects the rights of parents “to ensure the religious and moral education of their children in conformity with their own convictions”.

**Article 19** provides for the right of everyone to hold opinions without interference subject to the requirement to respect the rights and reputations of others.

**Article 22** provides for everyone the right to freedom of association with others, whilst

**Article 27** provides *(i)n those States in which ethnic, religious or linguistic minorities exist as they surely do in Australia, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.* **Article 27** in fact reinforces **Article 18** in the protection of the communal expression of religious faith.

## **Our Motivation in Responding to the Exposure Draft**

Religion has had a long and close association with service delivery in Jewish, Christian and Islamic tradition.

There is a long history stretching back to Apostolic times of Christian involvement in works of charity including: poor relief, housing, health and aged care and education at primary, secondary and tertiary level, and of course this involvement goes further back to the giving of the law by God to Moses in Old Testament times. This involvement has been the practical outworking of the Biblical imperative, “You shall love your neighbour as yourself” (Leviticus 19:18, St Matthew 22:39).

Similarly, service of the poor and the development of professional health care have been a part of both Jewish and Islamic traditions. There is a long history of scholarship and service in health care being linked to faith and religious organisations.

At all times the Church has sought, though not always as successfully as it might have been expected, to operate its institutions for the delivery of these services on Christian principles. These principles, which have remained unchanged over time, may not always be in accord with everyone’s wishes, thus Christian hospitals will not endanger the life of the child in the womb unless it is necessary to protect the life of the mother.

A particular feature of faith based charitable enterprises has been the reliance upon volunteers.

A particular concern faith based institutions have is that the staff employed in these institutions abide by each institution’s “doctrines, tenets or beliefs”. In religious health care institutions it has not been thought necessary to require religious belief on the part of health professionals working within what is an environment with a commitment to give witness to religious beliefs, but they are required to respect the religious mission of the facility and therefore to abide by its code of ethics while engaged in employment within it, whether paid or voluntary. The Catholic Health Australia *Code of Ethical Standards for Catholic Health and Aged Care* expresses it:

*The Church recognises that it does not have a ready answer to every question that may arise, and it respects the competence and experienced judgment of professionals in their fields of expertise. In their turn, staff at all levels in Catholic health and aged care organisations should exhibit the professionalism expected of them, and should abide by this Code.*

A particular pressure point for faith based organisations concerns the importance of a religious foundation to the life of their educational institutions. Central to the notion of a faith-based school is that there is much more to a religious education than merely having lessons on the beliefs and doctrines of the faith. In a religious school, through the teaching and example of staff members who adhere to the religion, the codes of conduct that follow from the religious beliefs are taught and practiced. The pastoral care provided by the school is also an expression of the faith and moral values of the staff. A person who occupies a position of influence with the students in the school would be unable to meet the requirements of her employment if she were to make known that her lifestyle conflicted with the beliefs of the faith of the facility.

### **Statement of concern with respect to the provision of the Exposure Draft**

Our understanding was that the proposal to consolidate the anti discrimination provisions in Federal law, was just that: consolidation of existing law.

What has been proposed in the exposure draft is a massive and quite unacceptable expansion of anti-discrimination law which undoubtedly will lead to a more litigious culture and increased regulation of people's private lives. It is not difficult to view the outcome of the Bill if unamended, and substantially so, as a secular version of the Spanish Inquisition with its extraordinary over reach into the private lives of Australian citizens.

Most religious institutions including local churches are relatively small and under resourced to manage and respond to the heavy regulatory burdens that will inevitably arise from a) the many areas of life that will be defined, contra the current situation, as 'public', and b) the expanded list of protected attributes.

There has always been discomfort with handling the right to freedom of religion as an exception to provisions that are seen as being potentially in conflict with it. That approach does not provide adequate protection for freedom of religion. It only protects it from being overridden by equal opportunity provisions and it relies on those invoking the exception being able to establish the application of the exception. The issue is not whether freedom of religion has been violated, but whether the exemption provides a freedom of religion defence to a claimed violation of equal opportunity law.

Over time, the exemptions are continually under attack and the defence and its applicability open to interpretation that may narrow its applicability. This happened in Victoria under the previous government. A much more stringent standard of reasonableness was applied and it was clear that those responsible for administering the law would apply a secular standard to what is a religious matter.

**What the Senate Committee and indeed the Parliament needs to give serious consideration to is whether through enacting this proposed legislation it causes a situation to arise where persons and institutions find the only recourse open to them in a conflict with the law to be one of**

**engaging in civil disobedience based on conscience informed by their respective religious “doctrines, tenets or beliefs”. With no legislative protection of Article 18 of the ICCPR, religious people and religious agencies are at risk.**

## **Our Specific concerns with the Exposure Draft with recommended Amendments**

We are aware of other submissions from faith based groups, including the excellent submission of Freedom 4 Faith with whom we share many concerns. We would prefer the enactment of the original intent of the Bill: the consolidation of existing Federal anti-discrimination legislation, not what is obviously a proposed expansion of the provisions. That expansion threatens religious people and their agencies and the work that they do in providing services to the Australian community. That is not just a threat to religious people, but a threat to the whole Australian community because so much depends on service delivery by religious agencies. Second so much depends on volunteerism and religious people make up a major proportion of volunteers in service delivery organisations.

It is important to acknowledge the dependence of the volunteer sector on people with religious beliefs. As well as formally employing people in service delivery, it is important to note that religion is a strong motivation for volunteering to provide services in an unpaid capacity. This is an important aspect of being religious. Statistically, altruistic service to others has been shown to be an identifying feature of being religious.

A study undertaken by the Australian Bureau of Statistics reported:

*Of the 23% of Australian adults who had participated in church or religious activities within the three months prior to interview in 2002, just over a half (52%) had also done unpaid voluntary work for an organisation within the previous 12 months. In comparison, less than a third (29%) of adults who had not participated in church or religious activities had done such voluntary work.*

*There was a clear difference in the likelihood of having done unpaid voluntary work for a religious organisation between adults who had participated in church or religious activities and those who had not. Of those who had participated in church or religious activities, 30% had also done some unpaid voluntary work for a religious organisation within the 12 months prior to interview, compared with just 1% of those who had not participated in church or religious activities.<sup>3</sup>*

### **1) Section 3 Objects of this Act**

The problem with section 3 is that in its exclusive focus is on the elimination of discrimination, sexual harassment and racial vilification and the promotion of recognition and respect within the community for the principle of equality, it virtually excludes consideration for Australia’s obligations to protect other at least equally important human rights, such as freedom of religion, conscience,

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<sup>3</sup> Australian Bureau of Statistics, Australian Social Trends, 2004; Accessed 7<sup>th</sup> January 2012 from <http://www.abs.gov.au/ausstats/ABS@.nsf/2f762f95845417aeca25706c00834efa/fa58e975c470b73cca256e9e00296645!OpenDocument>.

association and speech. Defining the objects of the Bill in terms of non discrimination fails to reflect the naming of the Bill as the *Human Rights and Ant-Discrimination Bill*.

Whilst serious in itself, the difficulty with section 3 is compounded by the note added under section 3(1) that “in interpreting a provision of this Act, the interpretation that would best achieve the objects of this Act is to be preferred to each other interpretation”.

What needs to occur in section 3 is 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, freedom of association and freedom of speech.

### **Proposed Amendment**

Accordingly we recommend that Section 3(1)(a) be amended to read:

- (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, conscience and association;

A second note be added to Section 3(1) as follows,

In considering the conditions and grounds for permissible limitations and derogations on human rights enunciated in the International Covenant on Civil and Political Rights, consideration must be given to the Siracusa Principles which define permissible limitations and derogations on human rights in order to achieve the aims of the International Covenant on Civil and Political Rights.

These amendments 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, 22 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.

### **2) Section 47 The requirement that religious ‘exceptions’ be reviewed after 3 years**

Section 47 requires the Minister to arrange for a review of the exceptions in Division 4 dealing with exceptions to be conducted, with such review to be commenced within 3 years of the enactment of the Bill.

This requirement will give no confidence to faith based organisations that the proposed exceptions are anything other than a stepping stone to the stripping away, if not elimination of the religious ‘exception’ sections.

Faith based organisations have considerable experience of having to rebut a very determined constituency calling for the elimination of religious exceptions as occurred in the 2009 review of exceptions in the *Victorian Equal Opportunity Act*.

No doubt these calls will be occurring again in a number of submissions to this enquiry. Whilst we are grateful that the government has demonstrated its continuing respect for religious freedom by retaining the exceptions afforded to religious bodies and educational institutions, yet the concern is that it has conceded ground to those arguing for the elimination of religious exceptions by providing for a review after 3 years.

To ask for a review of the religious exceptions, logically, is tantamount to arguing for a review of the entire Act after 3 years.

### **Proposed Amendment:**

We support the proposed solution offered by Freedom 4 Faith in their submission.

**Section 47:** Confine the review within 3 years to provisions other than sections 32 and 33, or review the entire Act and operation of the Australian Human Rights Commission within this time.

### **3) Religion as ‘lawful discrimination’, not an ‘exception’**

The use of the term ‘exception’ is inappropriate in respect of religion for it implies that an exception is being made for what might otherwise be referred to as unlawful discrimination. These ‘exceptions’ in fact give expression to fundamental human rights, such as freedom of religion, association and the rights of cultural minorities.

Whilst we acknowledge that the term ‘exceptions’ has gained currency through incorporation in bills such as this one, the hostility to any form of ‘exceptions’ from certain quarters, particularly ‘religious exceptions’ only compounds the difficulty in the use of the term. Religious ‘exceptions’ are not special concessions to placate religious interests. To repeat, **religious ‘exceptions’ give expression to fundamental non-derogable human rights, such as freedom of religion, association and the rights of cultural minorities, highly valued and tenaciously held, and part of Australia’s international obligations, having ratified the ICCPR.**

It is our view that the distinction is not exceptions grudgingly given to unlawful discrimination but to recognise that discrimination can be either unlawful or lawful, illegitimate or legitimate. Thus General Comment 18 of the Human Rights Committee, states: “[T]he Committee observes that not every differentiation will constitute 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 [ICCPR].”

Just as section 3 includes as an object of the Bill the promotion of “recognition and respect within the community for the principle of equality”, so also the autonomy of religious organisations to differentiate between people should be respected, as allowable under international law, where this is in accordance with requirements of “doctrines, tenets or beliefs”. We allow political parties to discriminate in their choice of staff, why not religious organisations?

### **Proposed Amendment**

We support the proposed solution offered by Freedom 4 Faith in their submission.

Replace the current headings in Part 2-2 with

## **Division 4—When discrimination is not unlawful**

### **Subdivision A—Reasonable grounds for different treatment**

and then delete the word ‘exception’ throughout Division 4. 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’.

**Section 23:** Insert 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 justifiable conduct.’

#### **4) Inclusion of religion as a protected attribute**

We welcome 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. This is no doubt because history is replete with examples of groups or individuals who have suffered discrimination on the grounds of their religious 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.

In Victoria, we are particularly sensitive to this issue having seen the *Abortion Law Reform Act 2008* have such a devastating impact on health care professionals. The new law overrides the existing codes of ethics of the Australian Medical Council and the State Medical Boards, the National Health and Medical Research Council protection for freedom of professional conscience in its ethical guidelines, and the position statements of the major medical and nursing professional bodies.

However, in relation to the *Human Rights and Anti-Discrimination Bill 2012*, we are mystified as to why religion should only be a protected attribute only in connexion 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.

Also, religion should be understood to be as much a communal matter as an individual matter, as ICCPR Article 27 makes clear.

#### **Proposed Amendment**

We support the proposed solution offered by Freedom 4 Faith in their submission.

**Subdivision C:** Insert a new section before **section 32** as follows:

‘This subdivision is a means of giving effect to Australia’s obligations under Articles 18, 19, 22 and 27 of the International Covenant on Civil and Political Rights, and to appropriately balance these rights with rights concerning non-discrimination.’

Note: Additional protection for these rights is provided in section 23 (justifiable conduct).

**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:

(i) 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

(ii) consists of conduct, engaged in good faith, that:

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

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

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

**5) Section 19 When a person *discriminates* against another person, and related concepts and Section 22 When discrimination is unlawful**

Sections 19 and 22, as currently written, cast the net far too wide both as to what constitutes discrimination against another person and the circumstances under which discrimination can occur.

Section 19(2)(b) includes conduct that offends or insults as unfavourable treatment of the other person amounting to unlawful discrimination.

The inclusion of giving offense or insult as grounds for unlawful discrimination can be likened to Pandora's box. As a test for discrimination, giving offense or insult is entirely subjective and will inevitably lead to a rash of nuisance and trivial claims that will need to be dealt with.

We note that in the case of racial discrimination, section 51 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. Nevertheless, the words 'offend' and 'insult' are likely to suffer from a lack of agreed meaning even where an objective test is applied. Furthermore, it is questionable whether this clause is within federal constitutional power or is consistent with Australia's international human rights obligations. Section 51 is also problematic because it proscribes a much wider range of conduct - conduct "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people" - than its equivalent provisions in article 20(2) of the ICCPR and article 4 of the International Convention on the Elimination of Racial Discrimination – both of which prohibit conduct that actually incites discrimination, hostility or violence.

This inclusion of provisions in relation to causing offence are not only a problem with respect to freedom of religion. They would obviously impact on freedom of speech. As religious people we and our agencies are often the target of commentary directed to or about us that is offensive. However, we do not wish to see such commentary made unlawful and martyrs created. We would much rather see it exposed for what it is, and see it dealt with in robust debate. Further, it does happen that some religious beliefs are held to be offensive by some members of the community. Biblical teaching on homosexual sexual intimacy, for instance, is likely to be seen as offensive by some in the community. In a polite society, that one might cause offence is a reason why one might adjust one's words so as to at least acknowledge the feelings of those who might be offended or to mitigate or avoid the possibility of causing offence, but this should not be a matter for the law and the creation of legal offences. There does need to be the possibility of robust discussion and debate in which propositions can be tested for their veracity, balance, relevance and appropriateness. No-one should feel constrained by risk of legal sanction for seeking to express an opinion, merely because someone else might find that opinion offensive.

From a Victorian perspective we have actually been down this path before with the enactment of the *Racial and Religious Tolerance Act 2001* (RRTA) and a subsequent VCAT ruling by Justice Higgins in the case of *Catch the Fire Ministries v Islamic Council of Victoria* that, "Pastor Scot (the seminar leader), throughout the seminar, made fun of Muslim beliefs and conduct. It was done, not in the context of a serious discussion of Muslims' religious beliefs; it was presented in a way which is essentially hostile, demeaning and derogatory of all Muslim people, their God, Allah, the prophet Mohammed and in general religious beliefs and practices." This decision was reversed in the Court of Appeal.

In a parallel case *Fletcher v Salvation Army Australia*, a prisoner who attended a Christian course called 'Alpha' took offence and complained he had been 'vilified' because the program implied that witches are 'Satanists'. His complaint was dismissed by Justice Morris who described the claim as "preposterous", but not before two different barristers were instructed by the two defendants and a third appeared for Corrections Victoria.

In actual fact section 8 of RRTA restricts religious vilification to "conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons".

In 2006 the Australian Christian Lobby held a meeting for a group of Australian Church leaders with the then Opposition Leader, Mr Beasley's shadow cabinet. Amongst other matters, it was pointed out to Mr Beasley's shadow cabinet that the Christian Community was opposed to Federal law reflecting RRTA2001, the then shadow Attorney General, Nicola Roxon assured the church leaders present at the meeting that this was not Labor's intention drawing attention to a Bill she had earlier presented to Parliament – Crimes Act Amendment (Incitement to Violence) Bill 2005 (<http://www.comlaw.gov.au/Details/C2005B00193>). This Bill limited the offence to, "A person must not threaten to cause physical harm to another person or a group because of the religion of the other person or of some or all of the people in the group" (section 59), with a similarly worded clause for threats to property.

To now propose such a significant lowering of the barrier for unlawful discrimination to the giving of offense and insults is not just to encourage complaints that are 'frivolous, vexatious, misconceived

or lacking in substance”, but would be a massive breach of trust with the Christian Community on the part of the Attorney General.

We also note that in section 124, burden of proof in proceedings lies heavily upon the person against whom a complaint is made. We would like to see a requirement that the applicant needs to provide proof that they have a protected attribute and that they have been subject to unfavourable treatment. These are well within the applicant’s capacities to demonstrate.

### **Proposed Amendment**

We support the proposed solution offered by Freedom 4 Faith in their submission.

**Section 7:** Delete as a consequence of proposed amendment to section 22 (see below).

**Section 19:** Amend as follows:

- (1) A person (the **first person**) **discriminates** against another person if the first person exercises, or proposes to exercise, a power to affect the interests of the other in such a way as 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.
- (2) The exercise or proposed exercise of a power includes, but is not limited to, the making of a decision in relation to employment or the refusal to provide a service.
- (3) In determining whether a person is treated, or proposed to be treated, unfavourably, comparison may be made with the treatment of someone who does not have the protected attribute.
- (4) For the avoidance of doubt, **unfavourable** treatment of the other person includes (but is not limited to):
  - a. conduct that sexually harasses the other person;
  - b. conduct that intimidates the other person.
- (5) The expression of an opinion does not constitute unfavourable treatment.

**Section 22(1):** Amend as follows:

‘It is unlawful for a person to discriminate against another person if the discrimination occurs in the course of the following:’

Then list the areas currently in subsection (2). Renumber the remainder of the subsections accordingly.

**Section 22(3)** – remove the reference to religion (whether section 3 should be removed in its entirety should be given consideration)

**Section 51(2)(a):** Amend clause 51(2)(a) to state: ‘the conduct incites unlawful discrimination, hostility or violence.’

**Section 124:** Amend as follows:

If, in proceedings against a person under section 120, the applicant:

- (a) proves that he or she has a protected attribute;
- (b) proves that he or she has experienced unfavourable treatment because of the exercise of a power by another person or that such treatment is proposed;

- (c) alleges that the other person engaged, or proposed to engage, in such conduct because of the protected attribute and
- (d) adduces evidence from which the court could decide, in the absence of any other explanation, that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct; it is to be presumed in the proceedings that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct, unless the contrary is proved.

## **6) Voluntary and Unpaid Work**

We note that the definition of employment in section 6 of the Bill is extended to voluntary or unpaid work. Again this is another example of Pandora's Box where the law of unintended consequences will throw up confusing issues around the boundaries of work, leisure and community service. As mentioned above, the ABS data indicates that participation in religious practice and association with a religious faith are significant factors leading to high representation of such people amongst volunteers in Australia. Many services depend on the religious motivation of people for volunteerism as the numbers quoted indicate. The numbers indicate that being associated with other like-minded religious people and sharing with them an adoption of the mission of the religious agency are important elements for many volunteers in religious service delivery, though most are proud of the fact that they serve anyone in need and do not discriminate in relation to those to whom they provide services. However, for those joining as volunteers, it is important to recognise the nature of volunteerism and the frequency with which religious beliefs are a factor, according to the ABS data, including, presumably, the desire to be associated with others who share the beliefs of the religious agency. To prohibit that desire to associate with others who share religious beliefs would risk harm to many religious agencies because it would affect the motivation of many volunteers.

There is, in fact, no evidence of any problem with discrimination against volunteers in faith-based communities that warrants legislative intervention. Even if examples could be produced, there are likely to be issues concerning freedom 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 religious contexts, then they will simply go elsewhere, or worse still, cease volunteering.

Furthermore, in many cases where a volunteer makes a claim of unfavourable treatment, it is likely to be against another volunteer. That may well deter people from volunteering not only in charitable organisations but also in running sports programs for children or acting as an umpire. We note in passing that participation in sporting activities (including umpiring, coaching and administration of sporting activities) are included in the definition of public life.

The regulatory burden upon faith-based communities, other not-for-profit organisations and individual volunteers who may be accused of 'unlawful discrimination' cannot possibly justify whatever benefits might accrue from the level of regulation proposed. It is unconvincing to characterize all voluntary activity as 'employment' or 'public life'.

While some not-for-profit organisations will have no choice but to navigate these difficulties, many are likely to cease engaging volunteers altogether rather than risk claims of discrimination being made against them. Should voluntary and unpaid work remain within the definition of employment then the Government needs to be aware of the consequent damage to the existing culture of voluntary work in the not-for-profit sector as an unintended outcome of the Bill. Furthermore such an outcome flies in the face of the Prime Minister's oft repeated statement of support for community initiatives which rely so heavily on voluntary and unpaid work.

### **Proposed Amendment**

We support the proposed solution offered by Freedom 4 Faith in their submission.

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 as follows:

- (1) This Act is not intended to exclude or limit the operation of a State or Territory antidiscrimination law.
- (2) This Act does not apply to any action that is not unlawful under any anti-discrimination law in force in the place where the action is taken.

The Ad Hoc Interfaith Committee welcomes the opportunity to respond to this Exposure Draft and would appreciate the opportunity to discuss the contents of this submission with the Senate Committee or the Attorney-General's Department.

Yours Sincerely, and on behalf of the Ad Hoc Interfaith Committee

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