

Submission

on the

Exposure Draft Human Rights and Anti-Discrimination Bill 2012

to the

Senate Standing Committee on Legal and Constitutional Affairs

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1. Introduction

On 21 November 2012 the Senate referred the *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* to the Legal and Constitutional Affairs Committee for inquiry and report.

The Bill would consolidate the existing Commonwealth anti-discrimination legislation - the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Australian Human Rights Commission Act 1986* - into a single Act. Additionally it would prohibit discrimination on the grounds of sexual orientation and gender identity.

The Committee has called for submissions which are due by 21 December 2012. The Committee is due to report by 18 February 2013.

2. Fundamental democratic freedoms

Laws against discrimination and vilification are in essential conflict with fundamental freedoms that have long been at the heart of free democratic societies: the freedom of expression, freedom of association and freedom of contract.

2.1 Freedom of expression

Freedom of speech or expression is considered one of the most cherished freedoms of democratic society. In a religious context it implies the freedom to proclaim religious convictions publicly.

Many religions, particularly Christianity and Islam, are proselytising and missionary in nature and essence. This is easily demonstrated by studying the claims in their respective sacred books, the Bible and the Quran. Any proselytising and missionary activity inevitably involves public discussion of the claims of different religions.

As Bishop Robert Forsyth has said, in a free and open society there is no right not to be offended.¹ On the contrary, debate of religious and other belief in our diverse society inevitably results in some people being offended. Without intending to give offence, attempts by believers to win converts to their faith may unintentionally offend some people.

In the political arena, politicians understand that a “right not to be offended” would stifle legitimate debate and limit political freedom. The same is true with religious beliefs. A “right not to be offended” would similarly undermine religious freedom.

2.2 Freedom of association

The fundamental democratic right of people to form voluntary associations dates back to ancient Greece.

The Athenians under Solon’s rule seem to have been free to institute such societies as they pleased, so long as their action did not conflict with the public law. The multitude of societies and public gatherings for the celebration of religious festivals and the carrying on of games or other forms of public recreation and pleasure, which flourished for so many centuries throughout ancient Greece, indicates that a considerable measure of freedom of association was quite general in that country.²

The Roman authorities were more restrictive: no private association could be formed without a special decree of the senate or the emperor. Yet numerous voluntary societies, or *collegia*, were approved for such activities as religion, entertainment, politics, cemeteries and trades.³

In the centuries following the fall of the Roman Empire, numerous voluntary associations emerged: religious, charitable, educational and industrial. Many of the great religious orders and universities originated during this period. These voluntary associations constituted a considerable restraint on the exercise of arbitrary power by sovereigns and secured a significant degree of social peace.⁴

The right of voluntary association is a natural right, not a privilege endowed by the state, arising from man's nature and deep need to live in society.⁵

This natural right has long been recognised in common law countries such as Australia, where voluntary societies could be established without legal authorisation to pursue any aim whatsoever, provided their members did not engage in conspiracy or acts violating public order.

The recent Western upsurge in laws bolstering individual rights has undermined the right of private organisations to control their own affairs. When an individual complains of discrimination or vilification, a greater burden has been placed on the private organisation to establish its innocence. This has contributed to a weakening of private organisations that depend on volunteers. Consequently, in Western societies the organisations that stand between the government and the individual are fewer and weaker.

Religions are inherently communal in nature and apply the fundamental right of freedom of association in a wide variety of ways. Such groups include churches, religious communities, schools, welfare agencies, hospitals, overseas mission agencies, specialist ministries such as Bible translators or children's camps, and businesses such as bookshops, restaurants, farms, manufacturers, publishers, accountants, broadcasters and air services. The list could cover almost every area of human endeavour.

Preservation of the ethos and character of religious educational and welfare organisations is crucial to their success and requires the freedom to employ those with similar beliefs. The freedom to favour those with similar beliefs must extend to jobs that are not directly connected with the carrying out of religious observances. In a religious school, for example, even staff whose duties are not directly religious, such as administrative and grounds staff, still contribute to the ethos of the school.

In some Christian traditions the biblical injunction, "Do not be yoked together with unbelievers," (2 Cor 6:14) is taken to mean not forming business partnerships with unbelievers - even for secular purposes such as building or manufacturing. Consider a group of men who together form a small business to support their families. For harmonious workplace relations, they want partners and staff who share their faith and values (whether Christian, Jewish, Muslim, Buddhist or atheist). They seek to exercise a fundamental human right: the freedom to associate as they choose without permission or interference from the state.

Upholding freedom of association is the best way of protecting religious freedom. Muslims and Christians, for example, should be equally free to establish businesses employing people of their own faith. Muslim businesses may want to close on Fridays, so their men can attend a mosque. Christian businesses may close on Sundays, so their staff can go to church. Anti-discrimination laws forcing both businesses to employ people of the other faith would interfere with the religious practice of both groups.

Religious practice is not just a private matter but has a vital communal nature. None of the great world religions such as Christianity, Judaism or Islam consider religious belief as purely private.

2.3 Freedom of contract

Freedom of contract is so central to modern life in a free society that it tends to be taken for granted.

People regularly make contracts without realising it. Consider someone who rings the doctor for an appointment, then catches a bus to the surgery, stopping on the way to buy a newspaper. Through these actions he has used his telephone rental contract, entered into a contract of carriage with the bus company through its agent the driver, and performed a contract for the sale and purchase of a newspaper. Even the receptionist's smile when he reaches the doctor's surgery may only be part of her contract of employment!

The freedom of individuals to make contracts has accompanied the development of modern democratic societies.⁶ The courts primarily uphold the freedom of persons to advance their own interests without supervising the substantive content of contracts. "Every person who is not from his peculiar condition under disability is entitled to dispose of his property as he chooses; and whether his bargains are wise and discreet or profitable or unprofitable or otherwise are considerations not for courts of justice but for the party himself to deliberate upon."⁷

The US Civil Rights Act of 1866 specifically listed the right "to make and enforce contracts" among the safeguarded liberties. The US Supreme Court has held that the right to enter contracts is among those liberties protected by the due process clauses of the Fifth and Fourteenth Amendments. Justice George Sutherland explained that "freedom of contract is ... the general rule and restraint the exception."⁸

Anti-discrimination laws conflict with the freedom of contract and interfere with Christians and others engaging staff, providing services and renting or selling properties. Such wide-ranging restrictions represent an unnecessary and draconian intervention by the state into the private lives of citizens.

2.4 Limitations on freedom

Speech in Australia has long been legitimately restricted by laws on such matters as defamation, sedition, obscenity, commercial confidentiality and national security. Both religious and political speech involve the expression of personally held beliefs, which may or may not be supported by evidence. Both religious and political ideas may be controversial and lead to vigorous debate.

The essence of freedom of expression, whether political or religious, is not merely the freedom to express ideas that are comfortable. It is the freedom to disagree, to dispute or to cause controversy. The *International Covenant on Civil and Political Rights* (ICCPR) recognises freedom of expression as a right in Article 19:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - (a) *For respect of the rights or reputations of others;*
 - (b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

The restrictions on freedom of expression set out in sections 3(a) and (b) are sufficiently limited in scope to preserve freedom to engage in vigorous or even hostile debate on political and religious beliefs.

Respect for the reputations of others is adequately protected in Australia by defamation laws, which since 2005 have been uniform. An important element of these uniform defamation laws is the provision for a defence against a complaint of defamation that the matter was “substantially true”.⁹ This rightly affirms truth as more important than reputation or offence.

Protection of national security and public order are essential for the preservation of civilised society and in Australia that protection is provided by the crime of sedition.¹⁰ Importantly, the law defines sedition in terms of the *action*, such as urging the overthrow of the government or urging violence within the community, *irrespective of whether the action is associated with race, religion, nationality or political opinion*.¹¹ This rightly affirms the *action* as primary, not the characteristics of those involved.

2.5 Draft Anti-Discrimination Bill

The *Exposure Draft Human Rights and Anti-Discrimination Bill 2012* would have the effect of restricting the fundamental democratic freedoms of Australians to a greater extent than any similar previous legislation in Australia.

The bill would give government unprecedented authority over the lives of Australians in new and unjustifiable arenas. Such an increase in state power is indefensible in a free and democratic society.

Objectionable and dangerous elements of the draft bill include:

- going beyond equal opportunity (or formal equality) to demand unrealistic “equal outcomes” (or substantive equality);
- authorising reverse discrimination;
- abusing the “external affairs” power of the Australian Constitution by purporting to legislate “matters of international concern” that are not the subject of any international treaty Australia has ratified;
- including new protected attributes of sexual orientation and gender identity;
- severely limiting freedom of speech by outlawing anything that “offends, insults or humiliates”;
- introducing a subjective test of what constitutes offensive speech;
- making it unlawful to offend someone on the basis of the religious or political opinion;
- failing to provide reasonable exemptions;
- denying respondents the right of legal assistance at conciliation conferences; and
- reversing the onus of proof onto the respondent.

Recommendation 1:

Since the Exposure Draft Human Rights and Anti-Discrimination Bill 2012 would seriously undermine the fundamental democratic freedoms of Australians, including freedoms of speech, association and contract, it should be rejected.

If the bill is not rejected by the Committee, the remainder of this submission addresses some serious deficiencies of the exposure draft that should be rectified.

3. Substantive equality (Clause 3)

The Bill would aim at a notion of equality that goes well beyond the widely accepted notion of equal treatment under the law or even equality of opportunity.

Clause 3 (d) (i) of the Bill would include as an object of the Act “*to promote recognition and respect within the community for the principle of equality (including both formal and substantive equality)*”.

The Explanatory Notes to the Exposure Draft explain:

*‘Formal equality’ requires that people be treated the same, regardless of their irrelevant personal attributes. ‘Substantive equality’ takes into account the effects of historical disadvantage and recognises that relevant personal attributes may need to be taken into account and accommodated in order to achieve equal opportunity.*¹²

The notion of substantive equality is linked by Clause 3 (d) (ii) of the Bill to the authorisation of so-called “special measures”.

To recognise that achieving substantive equality may require the taking of special measures or the making of reasonable adjustments.

This phrasing opens the way for affirmative action programs which give more favourable treatment to persons with particular protected attributes. By denying equal opportunity to those without the favoured protected attribute grave injustices could be done in pursuit of an idealised notion of “substantive equality”. For example, women could be favoured in admissions to some area of study or work held to be traditionally dominated by men. In giving women access on favourable terms to redress perceived historical disadvantage men are necessarily going to be disadvantaged.

Recommendation 2:

The notion of substantive equality is not helpful. The Bill should limit itself to aiming for formal equality, that is equality of opportunity.

4. External affairs power (Clause 11)

Clause 11 of the Bill is headed “**Main constitutional basis: external affairs**”.

The clause would provide as follows:

This Act has effect to the extent that it:

(a) gives effect to the human rights instruments and the ILO instruments; or

(b) relates to:

(i) matters of international concern; or

(ii) matters external to Australia.

As the Commonwealth has no general power to make broad anti-discrimination laws, any Commonwealth anti-discrimination law with broad application would need to derive its constitutional validity primarily from the external affairs power.

For the Commonwealth law to apply validly to particular protected attributes, a relevant foundation in external affairs would be needed.

The human rights instruments and ILO instruments referred to in this clause are specified by name in in Clauses 3 (2) and (3) of the Bill. None of these instruments specifically refers to sexual orientation or gender identity as grounds on which discrimination must be prohibited by States parties. Nor do any of the instruments extend the protections due to marriage to same-sex relationships.

4.1 International Covenant on Civil and Political Rights

Nothing in the text of the *International Covenant on Civil and Political Rights* (ICCPR) makes any explicit reference to sexual orientation or gender identity.

Some decisions of the Human Rights Committee have claimed to find implicit references in either Article 2(1) or Article 26. It is instructive that those members of the Committee who infer such references are divided over whether sexual orientation should be read into the word “sex” or into the phrase “*other status*”.

Neither claim is persuasive or decisive.

In *Toonen* (488/1992) the Committee confined “*itself to noting, however, that in its view the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.*” The Committee declined to comment on whether sexual orientation was included under “*other status*”.

In *Joslin* (902/1999) the Committee found that the right to marry under the ICCPR only established a right for a man and woman to marry and that there was no obligation for States to provide for same-sex marriage.

In *Danning* (180/1984) the Committee upheld the right of a State party to discriminate between married couples and cohabiting couples.

In *Young* (941/2000) the State party (Australia), because it held that Mr Young was not entitled to the veteran’s dependent’s pension on other grounds, simply failed to address whether denying the pension to the same-sex partners of veterans is reasonable. The individual opinion of Mrs Ruth Wedgwood and Mr Franco DePasquale is worth noting.

The current case of Edward Young v Australia poses a broader question, where various states parties may have decided views - namely, whether a state is obliged by the Covenant on Civil and Political Rights to treat long-term same-sex relationships identically to formal marriages and "marriage-like" heterosexual unions - here, for the purpose of awarding pension benefits to the surviving dependents of military service personnel. Writ large, the case opens the general question of positive rights to equal treatment - whether a state must accommodate same-sex relationships on a par with more traditional forms of civil union ...

In every real sense, this is not a contested case ...

In the instant case, the Committee has not purported to canvas the full array of "reasonable and objective" arguments that other States and other complainants may offer in the future on these questions in the same or other contexts as those of Mr Young. In considering individual communications under the Optional Protocol, the Committee must continue to be mindful of the scope of what it has, and has not, decided in each case.

In *X v Colombia* (1361/2005) a majority of the Committee adopted the view of the majority in *Young*, that Article 26 prohibited discrimination between married couples and same-sex couples in regard to

pension rights. However, in a dissenting opinion two members stated clearly that this view was overreaching in its interpretation of the text of the ICCPR:

It is not always easy to assess whether the grounds for distinction or differentiation are reasonable and objective or whether the aim is legitimate under the Covenant, and the difficulties involved are naturally of varying magnitude. This is an area where interpretation is dogged by the risk of subjectivity, particularly when - consciously or not - it is locked into a teleological approach, for the issues that arise may then be only marginal to the Covenant or even, in some cases, lie outside it, which may mean that legal discourse gives way to other types of discourse that legitimately belong in non-legal domains or at best on the boundaries of the legal domain. Thus the establishing of similarities, analogies or equivalences between the situation of heterosexual married or de facto couples and homosexual couples may well entail not only observation of facts but also interpretation, and can therefore be of no help in construing the law in a reasonable and objective manner.

Provisions of the Covenant cannot be interpreted in isolation from one another, especially when the link between them is one that cannot reasonably be ignored, let alone denied. Thus the question of "discrimination on grounds of sex or sexual orientation" cannot be raised under article 26 in the context of positive benefits without taking account of article 23 of the Covenant, which stipulates that "the family is the natural and fundamental group unit of society" and that "the right of men and women of marriageable age to marry and found a family shall be recognized". That is to say, a couple of the same sex does not constitute a family within the meaning of the Covenant and cannot claim benefits that are based on a conception of the family as comprising individuals of different sexes.

What additional explanations must the State provide? What other evidence must it submit in order to demonstrate that the distinction drawn between a same-sex couple and a mixed-sex couple is reasonable and objective? The line of argument adopted by the Committee is in fact highly contentious. It starts from the premise that all couples, regardless of sex, are the same and are entitled to the same protection in respect of positive benefits. The consequence of this is that it falls to the State, and not to the author, to explain, justify and present evidence, as if this was some established and undisputed rule, which is far from being the case. We take the view that in this area, where positive benefits are concerned, situations that are widespread can be presumed to be lawful - absent arbitrary decisions or manifest errors of assessment - and situations that depart from the norm must be shown to be lawful by those who so claim.

Similarly, and still in the context of interpreting Covenant provisions in the light of other Covenant provisions, we would point out that article 3, on equality between men and women, must be interpreted in the light of article 26, but cannot be applied to equality between heterosexual couples and homosexual couples.

None of these cases provides sufficient grounds under the external affairs power to found an alleged right to protection from discrimination on the grounds of sexual orientation or gender identity in the *International Covenant on Civil and Political Rights*.

4.2 A matter of international concern?

On 22 March 2011 a *Joint statement on ending acts of violence and related human rights violations based on sexual orientation & gender identity* was co-sponsored by 85 nations at the Human Rights Council.¹³

However, 54 nations remain opposed to the *Declaration on Sexual Orientation and Gender Identity* which was put to the UN General Assembly on 18 December 2008. These nations made a counter statement which read in part:

... we are seriously concerned by the attempt to introduce into the United Nations some notions that have no legal foundation in any international human rights instrument. We are even more disturbed at the attempt to focus on certain persons on the grounds of their sexual interests and behaviour while ignoring that intolerance and discrimination regrettably exist in various parts of the world, be it on the basis of colour, race, gender or religion, to mention only a few.

Our alarm does not merely stem from concern about the lack of legal grounds or that the statement delves into matters which fall essentially within the domestic jurisdiction of States, counter to the commitment in the Charter of the United Nations to respect the sovereignty of States and the principle of non-intervention. More important, it depends on the ominous usage of two notions. The notion of orientation spans a wide range of personal choices that expand far beyond the individual sexual interest in a copulatory behaviour between normal consenting adult human beings, thereby ushering in the social normalization and possibly the legitimization of many deplorable acts, including paedophilia. The second notion is often suggested to attribute particular sexual interests or behaviours to genetic factors, a matter that has repeatedly been scientifically rebuffed.

We affirm that those two notions are not and should not be linked to existing international human rights instruments.¹⁴

There is then no clear international consensus on prohibiting discrimination on the grounds of sexual orientation, gender identity or same-sex relationships.

Clause 11 (b) (ii) purports to found the Bill in the external affairs power insofar as the matters covered are “*matters of international concern*”.

The idea that the Commonwealth may have the power to enact a law just because it relates to a matter of international concern is very tenuous in the light of *XYZ v The Commonwealth*¹⁵.

In that case Callinan and Heydon JJ noted “*There is no case in this Court deciding that the international concern doctrine exists*”¹⁶ and “*the elusiveness connected with attempts to define ‘international concern’, strongly suggest that the international concern doctrine does not exist; for if it did, it would operate antithetically to the rule of law.*”¹⁷

Recommendation 3:

Clause 11 should be amended by removing the reference to “matters of international concern”, a notion of dubious constitutional validity in relation to the meaning of “external affairs” in Section 51 of the Constitution.

5. Sexual orientation and gender identity as protected attributes (Clause 17)

Laws which prohibit discrimination in the areas of employment, provision of goods and services and other areas of daily life necessarily impact on the general right of citizens to determine their own affairs.

In particular such laws necessarily trespass on the right to freedom of association and its co-essential corollary the right not to associate,¹⁸ the right to freedom of religion and belief and the right to freedom of expression.

The nature of sexual orientation and so-called gender identity are hotly contested issues in our society.

Many Australians, including but not limited to religious believers, continue to share the view that sexual acts between persons of the same sex are inherently disordered. In other words, such acts are contrary to the nature of human beings as male and female and the purpose of sex as directed at procreation and the unity of a man and a woman in the intimate, lifelong union of marriage. Until recent years, this view was virtually universal.

Australians who believe that homosexual conduct is unnatural, unhealthy or morally wrong should have the freedom to hold and express these views by disagreeing with or showing disapproval of others who hold contrary views. These are fundamental democratic freedoms. Laws that would prohibit Australians from expressing such views are undemocratic and unwarranted.

Similarly many Australians reject the notion that a third sex exists in addition to male and female. Many also deny that individuals may change their sex at will.

5.1 Freedom of religion

It is important to recognise that religion involves both *belief* and *conduct*. This follows from the legal definition of *religion* determined by the High Court of Australia in its judgement on the “Scientology case”.¹⁹ Justices Mason and Brennan held that “for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief...”²⁰

This judgement declares that a religion involves not merely *belief* but also *conduct giving effect to that belief*. Consequently, freedom of religion involves both *freedom of belief* and *freedom of conduct giving effect to that belief*.

Many parts of anti-discrimination laws represent a direct assault on religious freedom by proscribing some conduct that may be required to give effect to religious beliefs. Religious beliefs generally make moral distinctions between right and wrong, between good and bad, whereas anti-discrimination laws may declare conduct which gives effect to such moral distinctions to be unlawful.

Most anti-discrimination laws include provisions for “exemptions” or “exceptions” for religious bodies, educational bodies founded for a religious purpose and, in some cases, for individuals acting in accordance with their own genuine religious beliefs or principles.

However, these provisions have proved inadequate to protect religious believers from the costs and disruptions involved in dealing with complaints of discrimination on the grounds of sexual orientation.

5.2 Adverse decisions

The decision in 2008 by the Equal Opportunity Division of the Administrative Decisions Tribunal (NSW) against Wesley Mission, in a case dealing with the application of two homosexual men to act as foster parents, raises grave concerns about the interpretation of the religious exception in the NSW Anti-Discrimination Act 1977.²¹

The Tribunal’s findings that (a) the “religion” of the Wesley Mission was “Christianity” and (b) that “Christianity” has no doctrine that “‘monogamous heterosexual partnership within marriage’ is both the ‘norm and ideal’” are extraordinary.²²

Effectively the Tribunal set itself up as an authority on religious beliefs. There was no doubt that those persons engaged in the work of the Wesley Mission had a shared religious belief that precluded accepting a homosexual couple as foster carers. The Tribunal ruthlessly trampled on the religious freedom of these believers by purporting to know better than the persons themselves (a) what their religion is and (b) what its doctrines are.

Thankfully the Tribunal's decision was overturned on appeal in 2009, by the NSW Administrative Decisions Tribunal Appeal Panel. The Tribunal was ordered to re-determine the case on the basis that the "religion" of the Wesley Mission was "Wesleyanism".²³ When the matter was considered again in 2010 by the NSW Administrative Decisions Tribunal, the complaint was finally dismissed.²⁴

Although common sense finally prevailed, Wesley Mission was needlessly put to a great deal of trouble and expense in the process.

In Victoria the Victorian Civil and Administrative Tribunal has upheld a complaint from a homosexual support group Way Out against a campsite operated by the Christian Brethren for refusing to accept a booking from the group.²⁵ The decision in this case shows the failure of the apparently comprehensive exceptions in Victorian law to protect religious freedom. (Note that this case is still under consideration by the Victorian Court of Appeal.)

The totalitarian nature of discrimination law is evident in these decisions. Why should a Christian group be denied the freedom to own a campsite and rent it out selectively to groups that either share their mission or at least are not seen by the group to be engaged in promoting activity at odds with its mission?

Recommendation 4:

As any law prohibiting discrimination on the grounds of sexual orientation or gender identity would necessarily and without justification trespass on the rights to freedom of association (including the freedom not to associate), the right to freedom of belief and conscience and the right to freedom of expression, no such law should be proposed. The Bill should be amended to remove these proposed additional protected attributes.

6. Vilification laws by stealth (Clause 19)

Clause 19 of the Bill would provide that discrimination includes unfavourable treatment of a person "because the other person has a particular protected attribute". "Harassing the other person" and "other conduct that offends, insults or intimidates the other person" would be included in the definition of unfavourable treatment.

This proposed definition, combined with the expanded list of protected attributes, including sexual orientation, gender identity, religion and political opinion, give rise to a real risk that the Bill would interfere unjustifiably with the fundamental right to free speech.

Experience with Victoria's *Racial and Religious Tolerance Act 2001*, which penalises speech that "incites hatred against, serious contempt for, or revulsion or severe ridicule of" a class of persons based on religious belief or activity, illustrates the negative impact of vilification provisions on fundamental freedoms.²⁶

The prolonged action against pastors Daniel Scot and Danny Nalliah in relation to a religious seminar on Islam represents a low point of freedom of religion in Australia. The initial adverse decision by Judge Higgins illustrated the profound hazards to religious freedom posed by laws prohibiting religious vilification.

Judge Higgins ordered Pastor Daniel Scot to publish, in a large newspaper advertisement, a statement including these words;

VCAT found the seminar was not a balanced discussion, that Pastor Scot presented the seminar in a way that was essentially hostile, demeaning and derogatory of all Muslim people, their

*God, their prophet Mohammed and in general Muslim beliefs and practices, that Pastor Scot was not a credible witness and that he did not act reasonably and in good faith.*²⁷

Pastor Scot was also prohibited from repeating in speech or writing anywhere in Australia or on the internet any of the statements, and, or alternatively, information, suggestions and implications, to the same or similar effect as those found by the Tribunal to have breached the *Racial and Religious Tolerance Act 2001* (Vic).

If Pastor Scot had breached this order he could have faced imprisonment.

The financial burden (of over \$500,000), time and stress imposed on these two pastors were an intolerable assault on freedom of religion.

Notably, the VCAT findings and orders against the pastors were eventually quashed by the Court of Appeal of the Supreme Court of Victoria.²⁸

The Court found that Judge Higgins had made numerous errors in his consideration of strictly religious matters and at times had completely misrepresented Pastor Scot's comments. For example, the Court of Appeal found that Judge Higgins had wrongly asserted that Scot had claimed that "Muslims are demons". Judge Higgins had failed to understand Scot's citations from the Quran about *jinn*s (demons) becoming Muslims.

The Supreme Court also found that Judge Higgins had ignored significant sections of Pastor Scot's seminar which were favourable to Muslims "and *ex facie* calculated to persuade an audience of non-Muslims to love ... Muslims".²⁹

If the pastors had not had the courage, determination and financial support to initiate a court appeal, Judge Higgins' orders would have had a chilling effect on any future public statements about Islam, whether accurate or not. The freedom to make statements of a religious nature, not in breach of the provisions of the *Racial and Religious Tolerance Act 2001*, would have been severely inhibited.

Other cases brought under the *Racial and Religious Tolerance Act 2001*, if less well-known, are just as disturbing. For example, a case was brought by a self-identified witch, against the Salvation Army for delivering an introductory course on Christianity to prisoners who freely chose to participate.³⁰

Although this case was dismissed reasonably quickly, it nonetheless involved an unnecessary imposition of time, stress and legal costs for the Salvation Army.

Religious vilification laws potentially have a chilling effect on freedom of religion as well as the freedom of expression. They are intolerable in a free society.

The same conclusion applies to laws prohibiting vilification on the grounds of sexual orientation, gender identity or political opinion.

The right to freedom of religion, as well as the right to freedom of expression, must include the right to hold, express and act on views that generate controversy. Freedom of expression is not merely the freedom to express widely accepted views; it is the freedom to dispute the opinions of others. People should be free to argue that homosexual behaviour is unhealthy and morally and socially undesirable; that being male or female is biologically fixed and not alterable merely by surgery that mutilates existing genital and other sex characteristics of the male or female body; that certain political opinions are silly, wrong or abhorrent.

The possibility that the expression of such views "*offends, insults or intimidates*" another person should not be the concern of the law.

There is a real danger that in a misguided attempt to protect some groups from being offended, insulted or intimidated other groups will be marginalised and persecuted merely for expressing their views in a robust manner.

Recommendation 5:

Clause 19 should be amended by removing the reference in the definition of unfavourable treatment to “conduct that offends, insults or intimidates the other person”.

7. Special measures (Clause 21)

Clause 21 of the Bill would provide for “special measures to achieve equality” as follows:

a law, policy or program made, developed or adopted, or other conduct engaged in, by a person or body is a special measure to achieve equality if:

(a) the person or body makes, develops or adopts the law, policy or program, or engages in the conduct, in good faith for the sole or dominant purpose of advancing or achieving substantive equality for people, or a class of people, who have a particular protected attribute or a particular combination of 2 or more protected attributes; and

(b) a reasonable person in the circumstances of the person or body would have considered that making, developing or adopting the law, policy or program, or engaging in the conduct, was necessary in order to advance or achieve substantive equality.

Clauses 79-82 would give the Australian Human Rights Commission extensive powers to determine policies, programs and other conduct by any person or body to be a “special measure to achieve equality”. Such determinations can be made with effect for as long as 5 years and can be renewed for further 5 year periods indefinitely.

These powers would allow the Australian Human Rights Commission to promote affirmative action programs for groups with protected attributes that it favours.

In short, this provision would authorise reverse discrimination, thereby allowing people to be penalised for no other reason than they do not belong to a group favoured by the Australian Human Rights Commission. It is reminiscent of George Orwell’s *Animal Farm* in which the “seventh commandment” changed from “All animals are equal” to “All animals are equal but some animals are more equal than others.”

The Australian Human Rights Commission has a history of disapproving of special measures that do not fit in with its prejudices. For example, the Commission’s *Gender Equality Blueprint 2010* focuses solely on increasing the percentage of women in various areas of employment.³¹ Recommendation 7 of that report is as follows:

To strengthen the representation of women at decision-making levels:

- *a minimum target of 40% representation of each gender on all Australian Government Boards within three years should be set, publicly announced and progress should be reported annually*
- *a minimum gender equality target in the Senior Executive Service in the Australian Public Service should be set, publicly announced and progress should be reported annually*

- *all publicly listed companies providing goods or services to the Australian Government should be certified by the Equal Opportunity in the Workplace Agency*
- *a target of 40% representation of each gender on all publically listed Boards in Australia, to be achieved over five years should be promoted. If progress is not made, the Australian Government should consider legislating to require publicly listed companies and other large employers to achieve a mandatory gender diversity quota of a minimum of 40% of both genders within a specified timeframe, failing which penalties will be imposed.*³²

And yet the Commission has refused to allow educational bodies to offer scholarships specifically to increase the number of male primary school teachers, notwithstanding the evidence that the scarcity of male primary school teachers is having a detrimental effect on boys' education.

The Commission's view is that the lack of men in teaching was not due to discrimination but to other factors such as low pay and status, and issues around child protection. For this reason the Commission considered that special measures exempting scholarships for male primary school teachers from anti-discrimination law were not justified as a special measure to achieve substantive equality.³³ (The Commission later approved a measure to offer equal number of scholarships to men and women. There was no evidence that there was any shortage of women student teachers!)

The Commission's ideological prejudices render it unfit to make determinations about special measures.

Recommendation 6:

- (a) *The notion of special measures to achieve substantive equality is rooted in an ideological approach that supports affirmative action for favoured groups. Such reverse discrimination has the effect of penalising people unreasonably, has no place in anti-discrimination laws and should be opposed.*
- (b) *The Australian Human Rights Commission is an unsuitable body for making determinations about special measures given its ideological prejudices and should not be given any authority to determine favoured groups.*
- (c) *The notion of special measures is unnecessary given the general exception provision in Clause 23 of the Bill. All references to "special measures" should be removed from the bill.*

8. Discrimination and exemptions (Clauses 22 and 23)

Clause 22(1) of the exposure draft Bill makes the following assertion:

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

The underlying assumption seems to be that discrimination in any area of public life is always unacceptable, or at least almost always so. Such an assumption is false, since freedom to discriminate is often necessary and desirable.

8.1 Discrimination as a virtue

Discrimination has a long and distinguished history as a virtue. Dictionary definitions of *discrimination* refer to the act of perceiving or making fine distinctions or differences. The word derives from the Latin *discriminare* meaning “distinction” and *discernere* meaning “discern”.³⁴

Discrimination plays a vital role in competitive sport. When a team is selected for a series of cricket matches, the selection board discriminates in favour of players with great sporting ability.

Discrimination is also an important element of education, both in helping students learn to be discriminating and in discriminating between students in examinations and assessments. Prestigious Adelaide public school, Unley High School, (attended by Prime Minister Julia Gillard years ago) states that a key aim for integrating technology into the teaching and learning program is “to ensure that all students have the opportunity to become competent, discriminating and creative users of a range of technologies.”³⁵ A patient facing an operation relies on a university medical faculty somewhere having discriminated in favour of students with surgical ability.

To be described as having discriminating tastes is a compliment. A Brisbane restaurant promotes its cuisine menu as “sure to please even the most discriminating taste buds.”³⁶ A craft service commends a sewing machine offering “unsurpassed level of quality, reliability and flexibility ... desired by the most discriminating sewers and quilters.”³⁷ A luxury car club (“For Those Who Demand Excellence”) says: “The choice to purchase a luxury car ... displays your distinctive sense of style, your discriminating taste, and your desire for excellence in personal and professional endeavours.”³⁸

One of the hallmarks of an advanced society is the specialisation of its workforce. Individuals achieve success by identifying and cultivating their personal abilities, skills and interests. This requires careful discernment and discrimination of each person’s unique qualities. Thus discrimination makes a desirable, important and positive contribution to modern society.

8.2 Discrimination as a vice

Why then in modern law, is discrimination often presented as a vice?

The view of discrimination as wrong has been fostered by a rash of anti-discrimination conventions sponsored by the United Nations. The underlying motivation for such conventions is seen, for example, in the preamble to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (commonly abbreviated as CEDAW). The preamble affirms the so-called “principle of the inadmissibility of discrimination ... of any kind.”³⁹

This “principle of non-discrimination”, as it might be called, is asserted as a kind of ultimate truth. It is essentially a religious statement that people are apparently expected to accept without reasons, as an article of faith.

How does the supposedly universal United Nations principle of non-discrimination work in practice? The outworking of “non-discrimination” in Australia can be seen in the numerous state and federal anti-discrimination laws, such as South Australia’s Equal Opportunity Act 1984. This Act is inconsistent and self-contradictory. On one hand it prohibits discrimination on the many grounds: sex, sexuality, marital status, pregnancy, race, impairment or age. On the other hand it allows discrimination on many of the same grounds through affirmative action schemes.

In relation to employment, discrimination on the ground of sex is both prohibited and allowed. Discrimination is prohibited generally and allowed when there is a “genuine occupational requirement” for a particular sex. How can people know which rule applies in a particular case?

In contradiction of the general ban on sexual discrimination, the Act specifically allows sexual discrimination in a variety of situations where the ban is acknowledged as undesirable or unworkable. These situations include competitive sport, clubs and schools, and the provision of accommodation and services for one sex only.

Another inconsistency is evident in the disposal of land. A living person is not allowed to discriminate on the basis of sex but a deceased person can do so through a will. Insurance policies and superannuation schemes may discriminate on the basis of sex when actuarial data provide evidence of differences between the sexes.

How is a law to be unambiguously interpreted and consistently applied when the action involved, namely discrimination, is both prohibited and permitted in the same legislation? This is arbitrary control - not the rule of law that has been a precious part of our common law heritage. The inconsistencies and contradictions show that the assumed principle of non-discrimination is not universal and not practical.

In his book *The Rule of Law*, Geoffrey Walker quotes a House of Commons petition to King James I in 1610:

*Amongst the many other points of happiness and freedom, which your Majesty's subjects of this kingdom have enjoyed under your royal progenitors, kings and queens of this realm, there is none which they have accounted more dear and precious than this, to be guided and governed by certain rule of law ..., and not by any uncertain or arbitrary form of government...."*⁴⁰

Since the supposed principle of non-discrimination results in uncertain and arbitrary government, it should be rejected. It is an unsatisfactory basis for law.

8.3 Examples of non-discrimination injustice

Equal opportunity and anti-discrimination tribunal hearings are generally confidential, so full details of complaints and their outcomes (apart from sanitised summaries in annual reports) are usually only known by those intimately involved in the process.

The 2002-3 report of the SA Equal Opportunity Commission (EOC) describes four cases determined by the Equal Opportunity Tribunal.⁴¹ Three of the complaints were dismissed - but at some cost to the respondent companies.

The one complaint which was upheld (to some degree) was not clear-cut. A woman who was dismissed from a clerical job after a three month probation period complained that her dismissal was unfairly based on physical impairment. However the evidence suggested that her employer had found that "she was too direct with clients and her forceful nature impacted adversely on other workers in the office". She was also a smoker, had a hacking cough, and had not been open in her job application about a back problem.

The employer, no doubt wishing to soften the blow, unwisely told the woman that her employment would not continue beyond the probation period because of her health - but other issues such as customer and staff relations may have been a more significant factor.

At issue is the employers' freedom of contract. Employers as a group are most reluctant to dismiss good employees who have a physical impairment. They often go out of their way to assist such employees so that they can continue. But staff who disrupt the harmony of the workplace, with or without a physical impairment, are a liability. Why was this firm forced to spend time and money to defend an action which had been done in the best interests of the firm and the rest of its staff, and to pay compensation for so doing?

The report also cites applications by the Salvation Army and the SA Police for Equal Opportunity Act exemptions. The Salvation Army wanted to be able to employ only women to work at a refuge for victims of domestic violence and to offer only indigenous people a traineeship to work with indigenous clients. The SA Police wanted to be able to employ only female officers to work with (mainly female) victims of sexual assault.⁴²

The “common sense” exemptions were granted - but why were these bodies forced to spend time and money on seeking exemptions from the Act?

These examples suggest that the SA Equal Opportunity Act is imposing an unnecessary bureaucratic burden on citizens, organisations and businesses that interferes with freedom and efficiency.

The Wesley Mission case in NSW, described in section 5.2 above, provides another example of an unnecessary and unreasonable bureaucratic burden due to anti-discrimination laws. In this case, the time, trouble and expense burden was imposed on a charity. This could only hinder its work for the benefit of the needy.

Another example of injustice from anti-discrimination or equal opportunity law occurred in the US in 1999. A complaint of unfair discrimination on the ground of disability was made against Federal Express, a delivery firm with a large fleet of trucks. The firm had refused to employ drivers who were blind in one eye. The Washington Times noted that although the complaint was ultimately dismissed, “Federal Express was introduced to a round of unnecessary and counter-productive costs...”⁴³

8.4 Areas of public life

Clause 22(2) of the Bill defines the areas of public life where discrimination would be unlawful:

- (2) *The areas of public life include (but are not limited to) the following:*
- (a) *work and work-related areas;*
 - (b) *education or training;*
 - (c) *the provision of goods, services or facilities;*
 - (d) *access to public places;*
 - (e) *provision of accommodation;*
 - (f) *dealings in estates or interests in land (otherwise than by, or to give effect to, a will or a gift);*
 - (g) *membership and activities of clubs or member-based associations;*
 - (h) *participation in sporting activities (including umpiring, coaching and administration of sporting activities);*
 - (i) *the administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs.*

The intended reach of this Bill into the lives of ordinary Australians is breathtaking. It would be hard for a person to leave their home without coming under the influence of this Bill, whether their purpose was to work, train, educate, go shopping, join a club, play sport, or have a holiday. This is an excessive and unjustifiable bid for power by the federal government, of the kind that might be expected of an authoritarian regime – not a democratic country.

The Bill is in direct conflict with the fundamental democratic value of freedom of association.

The International Covenant on Civil and Political Rights provides in Article 22 as follows (bold added):

- 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
- 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

In order to respect the right to freedom of association, the Bill should limit unlawful discrimination to situations where it is required for the protection of national security, public order, public health or morals, or the rights and freedoms of others.

Recommendation 7:

In order to respect the right to freedom of association, the Bill should be amended to limit unlawful discrimination to situations where it is required for the protection of national security, public order, public health or morals, or the rights and freedoms of others.

9. Religious bodies providing aged care (Clause 33)

Clause 33(3) of the Bill would deny aged care service providers which receive Commonwealth funding the right to provide services in accordance with the doctrines of the religion whose purpose they were established to serve.

This provision would force such aged care service providers to accommodate non-married couples, including both male-female and same-sex de facto couples, in shared accommodation on the same terms as married couples.

The Explanatory Notes attempt to justify this proposed provision:

There was significant feedback during consultations of the discrimination faced by older same-sex couples in accessing aged care services run by religious organisations, particularly when seeking to be recognised as a couple. When such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate. This applies regardless of whether the Commonwealth is the sole or even dominant funder of these services (that is, this applies even if the services are provided with a combination of Commonwealth and other resources). This position is also consistent with the Government's broader aged care reforms.

This proposal is a direct assault on religious freedom. It is likely to force many religious-based aged care facilities to decline Commonwealth funding in order to maintain their integrity. This could lead to a reduced availability of aged care – at a time when it is needed more than ever to cater for an ageing population.

The rationale underlying this provision could easily be expanded to other services provided by religious bodies in receipt of Commonwealth funding such as schools.

Recommendation 8:

Clause 33 (3) of the Bill should be removed from the Bill as it would violate religious freedom.

10. Representation at a conference (Clause 110)

In a bill to prohibit discrimination, it is ironic or hypocritical that Clause 110 prohibits some people from being represented at a conciliation conference (Clause 110(4)) while permitting others to do so (Clauses 110(5) and (6)).

There may be a variety of reasons for a person wanting to be represented at a conference, apart from a disability. Furthermore, who would decide whether a claimed disability qualifies a person to make use of the provision in Clause 110(5)?

The proposed Clause 110(4) would deprive ordinary people, who are required to attend a conference, of the ability to manage their own affairs. When confronted by the complex legal regime proposed, many people would feel intimidated and in need of legal assistance.

A better approach would be to remove Clauses 110 (4), (5) and (6) and replace them with a general provision to give any person required to attend a conciliation conference a right to be represented.

Recommendation 9:

Clauses 110 (4), (5) and (6) should be replaced with a general provision giving any person required to attend a conciliation conference a right to be represented.

11. Reversing the burden of proof (Clause 124)

Clause 124 would, once any plausible evidence pointing to possible discrimination is adduced, shift the burden of proof onto the respondent to prove that the alleged discrimination was not a reason for the conduct that is the subject of the complaint.

This is quite contrary to the long established principle that the one who brings the case has to prove the charge. In civil matters this means the onus is rightly on the complainant to prove all aspects of the complaint on the balance of probabilities.

Of course it may be difficult in some cases to prove the reason for an action but reversing the onus of proof simply shifts this difficulty onto the respondent.

How can a respondent prove that it was not because of a protected attribute that a person was not given a job or not promoted? Proving a negative is notoriously difficult.

Recommendation 10:

Clause 124 should be removed from the Bill and the normal rules in civil law as to the burden of proof should apply.

12. Endnotes

1. Robert Forsyth, Anglican Bishop, South Sydney, “Dangerous Protections: How some ways of protecting the freedom of religion may actually diminish religious freedom”, *Acton Lecture on Religion and Freedom*, sponsored by The Centre for Independent Studies, Shell Theatre, Melbourne, 21 Nov 2001.
2. James Ryan, “Right of Voluntary Association”, *The Catholic Encyclopedia*, Volume II, 1907, Online Edition, 1999.
3. *Ibid.*
4. *Ibid.*
5. *Ibid.* The right of voluntary association is defended by Pope Leo XIII in his encyclical *Rerum Novarum*: “To enter into private societies is a natural right of man, and the state must protect natural rights, not destroy them. If it forbids its citizens to form associations, it contradicts the very principle of its own existence; for both they and it exist in virtue of the same principle, namely, the natural propensity of man to live in society.”
6. Henry Sumner Maine, 1861, *Ancient Law*; reprint, London: J. M. Dent, 1954, p 100: “the movement of the progressive societies has hitherto been a movement from Status to Contract.”
7. Joseph Story, 1918, *Commentaries on Equity Jurisprudence*, 14th ed. (Boston: Little, Brown), vol. 1, p 337.
8. Justice George Sutherland, 1923, *Adkins v. Children’s Hospital*, 261 U.S. 525, 546.
9. For example, the *NSW Defamation Act 2005*, s 26: “It is a defence to the publication of defamatory matter if the defendant proves that: (a) the matter carried ... imputations ... that are substantially true...”
10. *Cth Criminal Code Act 1995*, s 80.2.
11. *Ibid.*, s 80.2(5).
12. Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Human Rights And Anti-Discrimination Bill 2012: Exposure Draft: Explanatory Notes*, November 2012, p 11.
13. <http://geneva.usmission.gov/2011/03/22/lgbtrights/>
14. For the full text of this statement see: http://www.undemocracy.com/generalassembly_63/meeting_70
15. *XYZ v The Commonwealth* (2006) 227 CLR 532.
16. *Ibid.*, at 217.
17. *Ibid.*, at 218.
18. Detrick, S., *A commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff, 1999, p 261, citing Karl Joseph Partsch, “Freedom of Conscience and Expression, Political Freedoms”, in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p 235.
19. *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40; (1983) 154 CLR 120.
20. *Ibid.*, para 17; their judgement was qualified by also holding that “though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.”

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21. *Anti-Discrimination Act 1977 (NSW)*, s 56.
 22. *OV and anor v QZ and anor (No.2) [2008] NSWADT 115*, at 119, 126-128.
 23. *Members of the Board of the Wesley Mission Council v OV and OW (No 2) [2009] NSWADTAP 57*.
 24. *OW & OV v Members of the Board of the Wesley Mission Council [2010] NSWADT 293*.
 25. *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination) [2010] VCAT 1613* (8 October 2010); <http://www.austlii.edu.au/au/cases/vic/VCAT/2010/1613.html>
 26. *Racial and Religious Tolerance Act 2001 (Vic)*, Section 8.
 27. *Islamic Council of Victoria v Catch the Fire Ministries Inc (Anti Discrimination - Remedy) [2005] VCAT 1159* (22 June 2005), Annexure <http://www.austlii.edu.au/au/cases/vic/VCAT/2005/1159.html>
 28. *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc [2006] VSCA 284* (14 December 2006): <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html>.
 29. *Ibid.*, para 77.
 30. *Fletcher v Salvation Army Australia (Anti Discrimination) [2005] VCAT 1523* (1 August 2005), <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2005/1523.html>
 31. http://humanrights.gov.au/sex_discrimination/publication/blueprint/Gender_Equality_Blueprint.pdf
 32. *Ibid.*, p 16.
 33. http://humanrights.gov.au/legal/exemptions/sda_exemption/exemption/decision.html
 34. "Discrimination" in *The Australian Concise Oxford Dictionary* (Melbourne: Oxford University Press) 1987.
 35. <http://www.uhs.sa.edu.au/about-unley/learning-technologies/>
 36. The restaurant at Mt Gravatt, Brisbane, promotes its cuisine menu on its website as "sure to please even the most discriminating taste buds."
 37. The craft service, billed as "Australia's No.1 craft source" on its website, commends a sewing machine offering "unsurpassed level of quality, reliability and flexibility ... desired by the most discriminating sewers and quilters."
 38. The car club ("For Those Who Demand Excellence") says on its website: "The choice to purchase a luxury car ... displays your distinctive sense of style, your discriminating taste, and your desire for excellence in personal and professional endeavours."
 39. Such as the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979 (CEDAW).
 40. Geoffrey de Q Walker, 1988, *The Rule of Law: Foundation of Constitutional Democracy*, (Melbourne University Press), p 2.
 41. South Australian Equal Opportunity Commission, *Annual Report 2002-2003*, pp 35-38.
 42. *Ibid.*, pp 32-34.
 43. Peter Ferrara, *The Washington Times*, 22 Jun 1999: www.cato.org/dailys/06-26-99.html