

Submission to the Department of the Attorney-General  
and Justice, Northern Territory Government.

In response to the Discussion Paper - Modernisation of  
the Anti-Discrimination Act September 2017

From the Presbyterian Inland Mission  
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## Who we are

The Presbyterian Inland Mission is a ministry of the Presbyterian Church of Australia and was found by the Rev. Dr John Flynn in 1912, and has continued to operate across the Commonwealth since that time.

The Presbyterian Inland Mission has operated in the Northern Territory for many decades and currently oversees the Alice Springs Presbyterian Church and, until recently also had oversight of the Darwin Presbyterian Church.

For further information about The Presbyterian Inland Mission, or this submission, please contact the Chief Executive Officer, Andrew Letcher on 0438 868 964 or by email [ceo@pim.org.au](mailto:ceo@pim.org.au)

## Our interest in this issue

The Presbyterian Inland Mission offers comments on the Discussion Paper (Modernisation of the *Anti-Discrimination Act*) for four reasons:

1. The Presbyterian Inland Mission, and the Presbyterian Church of Australia, values the freedoms of speech, association and religion that are available to all Australian citizens.
2. As a Christian organisation, we are involved in public speech in local settings and occasionally in mainstream and online media. Thus, we value the freedom of speech that is available to all Australians, and we value a balanced approach to the right to freedom of religion and the right to be free from discrimination.
3. We note that the proposals suggested in the discussion paper will have affected the right to freedom of religion, and so we have a natural interest in this issue.
4. As a body which has oversight of the Alice Springs Presbyterian Church and which may in the future have oversight of other Presbyterian organisations in the Northern Territory, we are concerned that some of the proposals for changes in the legislation will improperly restrict, or remove, rights to freedom of expression of religion, or will impose onerous regulations in the operation of these congregations or organisations.

## Our Position

The Presbyterian Inland Mission supports, in principle, the notion of amending Northern Territory anti-discrimination legislation in order that it be consistent with good anti-discrimination legislation in other Australian jurisdictions.

The Presbyterian Inland Mission urges the Government of the Northern Territory to pursue amendments that will protect its citizens from discrimination, while at the same time allowing them to freely express their religious convictions.

The Presbyterian Inland Mission supports in principle, *where appropriate balancing clauses to protect freedoms of speech and association and religion are included*:

1. Replacement of the term "sexuality" with "sexual orientation" (Question 1)
2. The addition of "gender identity" as a protected attribute (Question 2).
3. The addition of "intersex status" as a protected attribute (Question 3).
4. Amendments that provide rights for people experiencing domestic violence (Question 5).
5. Amendments that protect people from discrimination on the grounds of accommodation status (Question 6).
6. The inclusion of "lawful sex work" as a protected attribute (Question 7).
7. The inclusion of "socio-economic status" as a protected attribute (Question 8).
8. The inclusion of provisions that recognise broader use of assistance animals (Question 9).
9. Amendments that provide protection for workers providing a service on behalf of an employer (Question 13).
10. Amendments that clarify the positive obligations already implied in the Act (Question 17).
11. Amendments that replace "marital status" with "relationship status" (Question 21).

The Presbyterian Inland Mission recommends against amendments to the legislation that fail to provide balancing clauses that protect the freedom of speech, freedom of association and freedom to express religious convictions valued by Australians of all religious backgrounds. Specifically, we are very concerned about proposals to:

1. include as unlawful any acts that may "offend" or "insult" a person (Question 4).
2. introduce a representative complaint model that allows anti-discrimination complaints to be made without the individual consent of persons who may assist the subject of the complaint (Question 10).
3. remove of existing balancing clauses (exemptions) in the Act (Question 14).
4. include as requirement that religious organisation must seek an exemption by applying to an administrative body (Question 14).

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5. remove the exclusion of Assisted Reproductive Technologies from the provisions of the Act (Question 15).
  6. repeal the definitions of "man" and "woman" (Question 20).
  7. replace the term "parenthood" with "carer responsibilities" (Question 21).

The Presbyterian Inland Mission offers qualified support for the expansion of the definition of "work" to include volunteers (Questions 16).

## Our Reasons

### Christian convictions on protecting freedom of religion in general

Christians believe that all people are made in God's image and should be treated with respect and dignity. This should include protection from victimisation, bullying and sexual harassment, and from being discriminated against. Because of this we fully support the provisions of the *Anti-Discrimination Act* (the Act) that relate to these areas.

Further, we acknowledge that one way in which people are treated with dignity is by enabling them to express themselves according to their deepest convictions and beliefs (whether they be religious or not). For this reason, Christians support freedom of thought, conscience and religion for *all* people, not just for the adherents of our own faith. Defence of these freedoms is an expression of the Christian calling to "love your neighbour" (Mark 12:31).

Since its formation, the Presbyterian Church of Australia, of which The Presbyterian Inland Mission is a ministry, has been committed to freedom of religion. This includes freedom of public speech, as well as freedom of conscience. The Declaratory Statement adopted by the Church on its formation in 1901 expresses this commitment when it states that the Church disclaims ... "intolerant or persecuting principles" and upholds "the liberty of conscience and the right of private judgment."

We recognise that many religious people, whether Christian or not, hold deep convictions in respect of many matters, including for example, decisions about how and where their children will be schooled (including whether their children are part of a school community that share their beliefs); decisions about how they will engage in business; and decisions about who has access to their sacred religious sites. These convictions and decisions should be respected.

Further comment that is specific to several questions in the Discussion Paper is given in detail on the following pages.

## Specific reasons for objections to some questions in the Discussion Paper

### Question 4: Vilification

In a pluralist society, it is important that all people, whatever their political, ideological or religious convictions, should have reasonable freedom to present their views. Christians regard public speech as central to our mission. We have a message to proclaim, and we value the opportunity to be able to do so freely. We also value dialogue and so seek to protect the voices of those who speak against our faith, even though what they say may cause offence to us.

We are very concerned about the proposal to include as unlawful any acts that may “offend” or “insult” a person. We note, and agree with, the argument of Hayne J of the High Court of Australia in *Monis v The Queen* (2013) 249 CLR 92 (paras 221-222) that it is not humanly possible to regulate or prohibit conduct that gives offence, and that “it is not evident that any social advantage is gained by attempting to prevent the giving of offence by one person to another unless some other societal value, such as prevention of violence, implicated.”

We seek a society that is marked by harmony. We do not believe that harmony is best promoted by legislation that allows for subjective interpretation of feelings such as “offence”, and which could be used to restrict the legitimate expressions of points of view.

### Question 10: Representative Complaint Model

We note the comments made in the discussion paper about the nature of the representative complaint model and are concerned about the possibility of complaints being brought by lobbyists or activists without the consent of individuals. We are also concerned that such a model may breach the provisions of existing privacy legislation, and may also make possible frivolous, vexatious and misguided complaints “on behalf” of individuals who do not in fact believe themselves to have experienced discrimination. Consequently, we cannot support this proposal.

### Question 11: Broadening the scope of clubs

We note the history of the existing legislation, the existing exemptions, and the intent of the proposed amendment, and we support in general the notion of broadening the scope of the definition of “clubs” (through removal of the liquor licence qualification and membership threshold) so that protections against discrimination are available to more people.

However, we urge the government to provide appropriate balancing clauses so that freedom of association is not rendered meaningless by taking away clubs' rights to determine who and who may not reasonably be allowed to join as members.

## Question 14: Religious Exemptions

We are very concerned about the Discussion Paper's proposal to curtail the right to freedom of religion through removal of the existing balancing clauses, which are the exemptions in ss 30(2), 37A, 40(2a), 40(3) and 43 of the Act. We are further concerned by the onerous requirement for religious institutions to apply to the Anti-Discrimination Commission for an exemption, with the requirement that they justify why their services should be granted a particular exemption. Our detailed reasons are set out below.

### 1. The proposals deny expression of religious belief apart from "worship practices"

We note the Discussion Paper proposes that "permitted discrimination" be restricted to

1. the areas of education, training, selection or appointment of certain categories of religious workers; and
2. the conduct of acts done as part of a "religious observance".

This proposal betrays a narrow understanding of religious expression, and denies the reality that individuals, and also organisations such as schools and charities, actively express their religious beliefs in contexts beyond what might be generally perceived as "worship practices".

The effect of these proposals would be that certain categories of persons and certain organisations would not have the right to freedom of religion *inherently* but would have to apply to an administrative body to access that right. In our view, the proposed approach is demeaning, and insofar that other categories (such as ministers of religion) have their rights unfettered, is also unfair. It is particularly objectionable that they would be expected to apply for an exemption to the very administrative body that doubts their inherent right to freedom of religion.

### 2. The removal of existing exemptions is unfair when other rights remain

It is furthermore unfair that the exemptions protecting the right for the freedom of religion are being removed while other analogous exemptions protecting other rights remain. Consider the proposal to remove s 30(2) of the Act. That section enables religious schools to exclude applications for enrolment from students who are not of that particular religion. The exemption exists to allow a religious school to provide a

service the nature of which is such that it can only be provided to adherents to that religion. It is in the same category of exemptions as, for example, s 42 of the Act that allows single-sex gyms to discriminate on the basis of sex. *Mutatis mutandis*, this is also true for s 40(3) of the Act.

It is, in our respectful submission, plainly unfair to remove exemptions protecting the freedom of religion but to leave provision like s 42 unchanged.

3. Existing legislation adequately protects other rights.

In circumstances when there are competing rights with the right to freedom of religion, we recognise that a balance must be struck. It is our view that balance is not achieved by treating freedom of religion as a *privilege* that needs to be applied for, when it is arguably a fundamental *right*. In our view, the current legislation adequately achieves the balance of protecting competing rights.

Section 37A of the Act protects the rights of equality and the rights to work in the context of employment at religious schools by requiring the discrimination to be made in "good faith". In circumstances where the discrimination is not made in "good faith", a complaint may be made against the religious school to the Anti-Discrimination Commission. The "good faith" requirement, in our view, is in itself adequate for keeping religious schools accountable.

We are not aware of any complaints having been brought against religious schools in the Territory for breaching s 31 of the Act, nor any cases testing the effectiveness of s 37A of the Act in balancing parties' rights.

This being said, cases such as *Islamic Council of Victoria Inc v Catch the Fire Ministries Inc* [2004] VCAT 2510 demonstrate that "good faith" requirements in anti-discrimination legislation adequately protect and balance competing rights. In that case, the respondent, Pastor Scot, was called in proceedings before the Victorian Civil and Administrative Tribunal to give evidence in respect of a complaint of hate speech made by the Islamic Council of Victoria. Pastor Scot sought to rely on the exemption under s 11 of the *Racial and Religious Tolerance Act 2001* (Vic), which provides that the unlawful conduct is exempt if engaged in "good faith". The Tribunal assessed the evidence given by Pastor Scot and upon finding that he was evasive and was not a credible witness, determined that s 11 did not apply to him (see [273] and [385]). Had he been regarded as a credible witness, the "good faith" defence would have applied. Thus the value of the "good faith" defence was affirmed. Cases like *Burns v Sunol* [2015] NSWCATAD 131 also demonstrate that respondents to a complaint must produce positive evidence to prove that conduct was done in "good faith" (see [86]).

Similarly, should a complaint be made against a religious school in the Territory for breaching s 31 of the Act, the school would be required to produce evidence to show that that act of discrimination was done in good faith and the complainant

would have the opportunity to test that evidence in proceedings before the Anti-Discrimination Commission.

As the requirements for the exemptions under are even more stringent to meet for ss 40(2a), 40(3) and 43 of the Act, *a fortiori*, the proposed amendments are unnecessary.

#### 4. The Anti-Discrimination Commission is not a proper body to determine religious matters

The Discussion Paper does not detail grounds the Anti-Discrimination Commission would consider in its decision to grant exemptions. If one or more of those grounds require the Anti-Discrimination Commission to consider the basis of religious convictions held by applicants, it is our respectful submission that it would be wholly unnecessary and inappropriate to appoint the Anti-Discrimination Commission for the role.

It would be inappropriate that a secular government body determine matters such as whether religious convictions are reasonably held since only people of the same religious persuasion are best suited to consider that question.

In particular, it would be inappropriate for the Anti-Discrimination Commission to determine which jobs at a religious school should be granted an exemption. The proposal assumes that a person's beliefs or convictions may be irrelevant to the services that person provides to the school community. In our view, from our experience in the context of Christian communities, the receptionist or sports coach can have just as much influence on a school community as does a chaplain.

Furthermore, expanding the functions of the Anti-Discrimination Commission to process applications for exemptions would be costly to the government and in our view this is an unwise use of public resources.

#### 5. Negative Consequences

Rather than creating more opportunities for Territorians, the proposals would have the opposite effect. When cultural or religious institutions are forced to do something against their deeply held convictions or beliefs, they sometimes find themselves in the unenviable position of having to cease to provide their services rather than compromise their beliefs. It is well known, for example, that in many countries around the world, Roman Catholic adoption agencies have ceased to operate because of their inability to function under government requirements that they put aside their religious convictions about families in order to accommodate requests for service from people who do not share those convictions.



Under the proposals in the Discussion Paper, religious educational institutions and religious bodies providing accommodation services will be at risk of closing down due to an overreach of government into their religious affairs. Should these bodies close down, the Territory would lose employers of teachers and social workers, and, more importantly, lose the services those organisations provide to children and accommodation seekers.

### Question 15: Assisted Reproductive Treatment Exclusion From Services

We are concerned about the implications of removing the existing exclusion of Assisted Reproductive Technologies from the provisions of the Act. While we support in principle provisions that protect people from discrimination on the basis of sex, gender identity or marital status, we note that the intent of the proposal is to remove the barriers placed on “people who are in same sex or de facto relationships, single and transgender people.”

In our view, governments should enact public policy that is good for families, and we doubt that this proposal satisfies that criteria. Our view, which is supported by research, is that children fare better in families where they are raised by both a mother and a father, and we cannot support a policy that stands against that view.

### Question 16: Work includes volunteers and modern workplaces

We support in principle the notion of providing protections from discrimination to volunteers and to people who work in modern workplaces (such as sheltered workshops). However we are concerned that the widening of the definition of “worker” to include “volunteers” may have the unintended consequence of denying religious organisations their existing rights to expect volunteers to share the ethos of the organisation in the same way that employees are.

### Question 20: Repeal the definitions of “man” and “woman”

We note that the intent of the proposal - to repeal the existing definitions so that they are no longer connected to the concept of biological sex, but instead “allow the ordinary meaning of ‘man’ and ‘woman’ to be applied to the Act - is to “accommodate a changing society as the ordinary meaning will naturally incorporate those changes”.

While we support in principle provisions that protect transgender and intersex people from discrimination, we cannot - because of our Christian convictions -

support a proposal that would disconnect a legal definition of “man” and “woman” from the biological realities.

In our view, rather than repeal the existing definition, it would be better to insert new categories for transgender and intersex people.

### Question 21: Carer responsibilities

We note the intent of the proposal, to take into account the many different relationships that exist where one person has the responsibility of care for another, and we support the notion of protecting all carers from any form of discrimination.

However, our Christian convictions about the importance of the families, lead us to express concern about the erasure of the concept of “parenthood” from a document as influential as the Act.

We respectfully suggest that the term “parenthood” be retained, and the term “carer responsibilities” be added as a new category of person against whom it would be unlawful to discriminate.

### **Conclusion**

We respectfully submit the proposed changes in fact do not promote equality of opportunity for all Territorians, but have the effect of taking away fundamental rights such as the freedoms of speech, association and religion from which Territorians have historically benefited.