

Department of Justice and Community Safety  
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Dear Secretary,

**SUBMISSION TO DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY – PROPOSED CHANGES TO VICTORIA’S ANTI-VILIFICATION LEGISLATION**

Thank you for the opportunity to contribute to this important consultation process. The changes contemplated by the Department Justice and Community Safety in its Overview Paper will have significant impact on people of faith in Victoria.

This submission is made on behalf of, and co-signed by:

- Australian National Iman’s Council
- Australian Baptist Ministries
- Shia Muslim Council of Australia
- Presbyterian Church of Victoria
- Australian Christian Churches
- Seventh Day Adventist Church of Australia
- Hillsong Australia
- City on a Hill
- Full Gospel Australia
- Australian Association of Christian Schools
- Christian Schools Australia
- Freedom for Faith

We welcome the opportunity to make this submission and give consent for this submission to be published. We welcome any opportunity to speak to this submission if the Department decides to take oral submissions as part of its inquiry.

For further information, our contact details are as follows:

**Freedom for Faith**

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## EXECUTIVE SUMMARY

1. While we appreciate that the intent of this review and these proposals are to, “protect more people...[and] promote the full and equal participation of all Victorians in a society that values freedom of expression”,<sup>1</sup> we have serious concerns. Rather than protecting and promoting equal participation in Victorian society, we fear that these proposals risk stifling free speech and significantly limiting free religious expression and activity in Victoria.
2. The Overview Paper (**OP**) canvasses wide-ranging reforms to the Victorian Anti-vilification regime. The OP explains that the current *Racial and Religious Tolerance Act 2001 (RRTA)* would be repealed, with the criminal sections moved to the *Crimes Act 1958 (Crimes Act)* and the civil sections moved to the *Equal Opportunity Act 2010 (EOA)*. The changes canvassed in the OP provoke the following concerns:
  - 2.1 The proposed introduction of new criminal laws that prohibit incitement of hatred, serious contempt and revulsion could potentially criminalise legitimate, good-faith religious activity and speech, particularly through the introduction of the evidentiary standard of recklessness and the potential failure to provide protections for religious activity;
  - 2.2 The proposed modification of civil incitement laws could potentially sanction legitimate, good-faith religious activity;
  - 2.3 The proposed introduction of a new harm-based protection would introduce further serious risk of abuse and weaponisation of anti-vilification laws through focusing on the subjective experience of the complainant group;
  - 2.4 The proposals lack clarity on how exactly the ‘public vs private’ distinction will be amended and we are concerned that the civil prohibitions, once moved to the EOA, could target private activity within religious communities and schools;
  - 2.5 The proposed changes to the ‘genuine purpose’ exemption in the civil regime lack detail. Such a change would need to ensure that the genuine intent of the respondent is the relevant factor in a tribunal determining whether the activity is motivated by a genuine purpose in the public interest, otherwise, sincere religious activity could be sanctioned by policy considerations.
3. We set out below our brief submissions on each of these issues.

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<sup>1</sup> Department of Justice and Community Safety, *Overview of proposed anti-vilification protections for all Victorians – Implementing the legislative recommendations of the Victorian Inquiry into Anti-vilification Protections*, 6.

# CHANGES TO CRIMINAL OFFENCES

## New Incitement Offence

4. The OP proposes introducing into the Crimes Act a new serious vilification offence that would make it an offence to :

Incite hatred against, serious contempt for, revulsion towards or severe ridicule of, another person or a group of persons on the ground of a protected attribute.<sup>2</sup>
5. The introduction of this kind of offence could capture legitimate, good-faith religious activity, particularly in light of the expansion of the list of attributes that the offence seeks to protect from serious vilification.
6. To be clear, we are not advocating the right to incite severe ridicule, hatred, revulsion or contempt for another person or group of people. Our issue is one of semantics, where the proposed offence could extend far beyond what the popular conception of those terms could mean, capturing a scope of conduct that would severely limit good-faith religious activity.

## Introduction of standard of ‘recklessness’

7. The above concern is best illustrated through the following discussion of the lowering of the mental element standard to ‘recklessness’.
8. The OP suggests that the mental element of the proposed criminal offences be changed to drop the requirement that the prosecution prove actual intent. Instead, the prosecution will merely need to prove that the accused was reckless.
9. There is no single statutory standard for ‘recklessness’ in Victoria, but in general, a person is considered reckless in Victoria (other than with respect to the offence of murder) if they know, or believe that a particular consequence will probably result from their action, but act anyway.<sup>3</sup>
10. Our concern for religious teaching and practices is best illustrated by example, if a religious preacher delivering a sermon or public address advocated that families should raise their children according to Scriptural teaching on gender identity and sexual morality, would this exhortation and its implications be considered reckless incitement of severe ridicule or revulsion towards another person or group? Even if the preacher or teacher did not intend to incite ridicule or revulsion, they cannot control the reactions of their audience, nor the socially-charged context in which certain topics can elicit heated and emotional responses. The standard of ‘reckless’ would endanger a preacher engaging in good-faith religious activity speaking on contentious topics.
11. Legitimate religious activity should not be threatened by criminal prosecution through the lowering of the standard of the fault element. If this standard is lowered, effective protections for religious activity must be introduced. However, even if the standard requires the prosecution to prove actual intent, we cannot rule out the possibility that a court would be persuaded that a

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<sup>2</sup> Ibid, 8.

<sup>3</sup> Department of Justice and Community Safety, above no.1, 9; Victorian Law Reform Commission, ‘Recklessness Issues Paper’, *Recklessness – the legal concept of recklessness* (17 January 2023) [10-25] <<https://www.lawreform.vic.gov.au/publication/recklessness-issues-paper-2/recklessness/the-legal-concept-of-recklessness/>>.

person who conveys traditional Scriptural teaching on gender identity and sexual morality intends to incite severe ridicule, hatred, revulsion or contempt for another person or group of people. Clarification should be provided that the law does not criminalise such teaching.

### **Offence applies to private conduct**

12. By proposing the new incitement offences while affirming that the preexisting application to private conduct remain, the OP has made the suggestion that religious speech on contentious issues that would likely incite serious contempt for a person on the ground of a protected attribute is to be treated with the same seriousness that demands the prohibition against incitement of physical harm against another person.
13. While it is understandable that the existing offence sanctioning incitement of physical harm apply to private contexts, it is unacceptable that the new proposed offences apply to private contexts, considering the ambiguity of the new offence's terms and scope and the differing views that may exist regarding religious beliefs and doctrine.

### **Religious purpose defence required**

14. In light of the above discussion, we consider it unacceptable that the OP proposes introducing a defence for conduct engaged in for a genuine political purpose, but not for a genuine religious purpose. Religious expression and communication is as much a part of the freedom of expression that all Australians should enjoy as freedom of political communication.
15. If this offence were introduced, suitable protections for religious activity must be included to protect religious belief and activity. For the reasons put at paragraph 56 below, that exception should avoid a broad 'reasonableness' test. Such a protection could be modelled on the exemptions for religious freedoms that came out of the consultation process on the federal Religious Discrimination Bill, which were modelled on phrasing from section 37 of the *Sex Discrimination Act 1984*. The exemption could be stated as follows:

Nothing in this Act affects any act or practice of a body established for religious purposes or an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being an act or practice that is in accordance with the doctrines, tenets or beliefs of that religion or is to avoid injury to the religious susceptibilities of adherents of that religion.

## **CHANGES TO CIVIL PROHIBITIONS**

### **'Hateful Conduct' and new protected attributes**

16. The OP proposes that the following attributes be included within the anti-vilification prohibitions that will be moved to the EOA:
  - 16.1 disability;
  - 16.2 gender identity;
  - 16.3 sex;
  - 16.4 sex characteristics;
  - 16.5 sexual orientation; and

- 16.6 personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.
17. The OP proposes that the ‘existing broad definitions of these attributes under the *Equal Opportunity Act 2010* would apply.’<sup>4</sup> Meaning:
- ‘the definition of ‘disability’ would protect people with HIV or AIDS or mental illness, and
  - the definition of ‘gender identity’ would protect drag performers.’<sup>5</sup>
18. The interaction of these new included attributes and the existing prohibition on conduct that incites hatred, serious contempt, revulsion of or severe ridicule of, is a serious concern for religious groups and free speech in Victoria.
19. The existing vilification prohibitions in the RRTA prohibit the incitement of hatred. The OP proposes that the continuation of this prohibition in the EOA would prohibit conduct that is ‘hateful’. This is not the preexisting term used in the civil prohibitions in the RRTA and these terms are not semantically equivalent.
20. The semantic scope for “hateful” is wider than “hatred”. The ordinary English meaning of “hateful” includes:
- 20.1 arouses hate;
  - 20.2 deserves to be hated;
  - 20.3 full of or expressing hate; and
  - 20.4 unpleasant; dislikable; distasteful.
21. If the OP does propose that the prohibition be changed to prohibit ‘hateful’ conduct and this would include the new protected attributes within its scope, the amended preexisting prohibition will present a serious threat to genuine, good-faith religious speech on issues of serious disagreement in contemporary society.
22. In both the spheres of religion and sexuality, people hold their positions and identities very strongly, and disagreement or criticism would be considered “hateful”. Consider the following statements:
- 22.1 ‘Religion is for idiots’;
  - 22.2 ‘Jesus is just your imaginary friend’;
  - 22.3 ‘Christianity is a scam to get money’;
  - 22.4 ‘I hate the Church’;
  - 22.5 ‘God designed marriage as a lifelong commitment between one man and one woman’; and
  - 22.6 ‘God designed sex to be exclusively experienced within the context of marriage’.

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<sup>4</sup> Department of Justice and Community Safety, above no.1, 7.

<sup>5</sup> Ibid.

23. Under the current proposal, all these statements could be considered to be “hateful” and are therefore open to a complaint to the VEOHRC.
24. If these changes are to be made, the new laws must contain protections for religious speech and activity that will protect religious individuals and groups when engaging in activity that conforms with their religious doctrine and beliefs.
25. These changes also present further issues with regard to the introduction of a new harm-based prohibition, discussed below.

### **Modified ‘incitement’ prohibition**

26. The paper proposes to modify the existing incitement provision to prohibit conduct that would be *likely* to incite hatred against, serious contempt for, revulsion towards or severe ridicule of another person or group based on a protected attribute.<sup>6</sup>
27. This is an area of particular concern for religious institutions, where they hold traditional view on matters of morality. Take, for example, the following orthodox statement made by a Christian minister on social media:

Jesus said “I am the way and the truth and the life. No one comes to the Father except through me”. This is a claim to absolute truth with eternal consequence. However, God is a God of love and “desires that none should perish”.<sup>7</sup>

28. Prior to consideration of any religious exceptions, a Christian Minister would need to satisfy the threshold test that his or her claim does not incite hatred against, serious contempt for, revulsion towards or severe ridicule of another religious person or group. In the context of exclusive truth claims (which can be deeply offensive to those who disagree or hold competing exclusive truth claims) it is possible that expressions of religious belief that criticise or exclude other beliefs could be construed to incite severe ridicule of people that hold those competing views. Furthermore, the addition of the term ‘likely’ creates even more risk to the Minister as it lowers the threshold for the offence, not requiring proof of incitement.
29. The Civil regime must include protections for religious speech and activity that will protect religious individuals and groups when engaging in activity that conforms with their religious doctrine and beliefs.

### **Introduction of new ‘harm-based’ prohibition**

30. The OP proposes the introduction of a new prohibition that will prohibit ‘people from saying or doing things in public that harms others.’<sup>8</sup>:

‘A person or group would need to show that the conduct they experienced was:

- hateful, seriously contemptuous, reviling or severely ridiculing of them or their group, and
- said or done because of their or their group’s protected attribute. For example, because of their or their group’s race, religious belief or activity, disability, gender identity, sex, sex

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<sup>6</sup> Ibid, 14.

<sup>7</sup> *The Holy Bible: New International Version*, (Biblica, 2011), John 14:6, 2 Peter 3:9.

<sup>8</sup> Department of Justice and Community Safety, above no.1, 15.

characteristics, sexual orientation or their personal association with a person with a protected attribute.<sup>9</sup>

31. The conduct outlined above would amount to vilification if 'it is reasonably likely to be considered harmful from the perspective of a person or a member of a group with that attribute.'<sup>10</sup>
32. The OP gives the following example of what a group would need to demonstrate to satisfy the test:

'...if a group believed they were targeted because of their sexual orientation, they would need to demonstrate that an ordinary or reasonable person from the same targeted group would consider the conduct to be hateful, seriously contemptuous, reviling or severely ridiculing of their group.'<sup>11</sup>
33. We are opposed to the introduction of this prohibition for two main reasons:
  - 33.1 the definition and concept of harm is subjective and could include the concept of psychological harm or distress rather than being restricted to physical injury; and
  - 33.2 the test looks to the subjective experience and apprehension of the alleged target group when applying the reasonableness test.

#### *Definition of 'harm'*

34. The concept of 'harm' could be interpreted to include psychological injury or mental distress. For example, if an Imam maintained a rule in his mosque that leadership in all positions had to maintain certain standards of sexual conduct, and that those who did not couldn't hold a leadership position, would a reasonable member of the LGBTIQ community consider such a rule or exclusion to be psychologically harmful? On that basis, the rule could be captured by this new harm provision.
35. Sincere expressions of faith and doctrine should not be included within the concept of harm merely because another group that does not share the same beliefs or perspectives disagrees with those views or erroneously apprehends some kind of threat from those ideas or beliefs.

#### *Subjectivity of the reasonableness test*

36. Furthermore, the definition of "harm" is defined entirely subjectively so that it includes 'conduct that is reasonably likely to be considered harmful from the perspective of a person with that attribute.'<sup>12</sup>
37. This puts the power entirely in the hands of the individual or group claiming offence. It reverses the meaning of the 'reasonable person' test in other laws, which were created to ensure that neither side in a dispute is favoured and to ensure that the law will operate as fairly and objectively as possible between two parties.

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

38. Significantly, for a so-called ‘harm-based’ provision, actual harm does not need to have occurred. It is enough that a member of the category *would likely consider* the conduct hateful, reviling, seriously contemptuous, or seriously ridiculing.
39. Harm does not even need to be intended by the speaker, or even for the speaker to be reckless (as in the criminal provision). A person could be in violation of the civil harm-based provision even if they did not intend to cause harm, did not have reason to believe they would cause it, and indeed did not cause any harm.
40. This proposal poses real risks of being weaponized by one minority group against another. The scope of what is *considered* to be hateful, etc., varies dramatically between sections of society. Would a reasonable Christian person consider a Muslim teaching that ‘Christians are wrong and risk going to hell’ to be ‘hateful’ or ‘seriously contemptuous’ – or vice versa?
41. This proposal will not be a protection for minorities. Instead of being a shield, it creates a sword for one group to use against another.
42. Shockingly, in the context of the subjective test in the harm-based test and the proposal equating ‘harm’ with subjective apprehension of incitement, the additional ambiguity of “harmful” widens the test further to conduct that is “reasonably likely to be considered ... hateful”.
43. If any form of a harm-based provision is introduced, and the term “hateful” is used, it will need to be defined clearly and tightly in terms of inciting hatred. When the UK enacted prohibitions in the *Public Order Act 1986* on conduct which stirred up religious hatred or hatred on the grounds of sexual orientation, they recognised the risk to freedom of expression and included some broad exemptions to protect freedom of expression. In particular, the UK recognised that religions (and other belief systems) make mutually exclusive truth claims and will engage in criticism and rebuttal of each other’s beliefs, sometimes expressed as dislike or antipathy to those beliefs or practices, and that this is legitimate expression in a liberal democratic society as long as it is not threatening or stirring up hatred.
44. The Victorian law should include the same exemptions – see s.29JA below. If it does not, the Victorian law cannot claim to be a necessary and proportionate limitation on freedom of expression under ICCPR Article 19 because plainly it would not be using the least restrictive means available (as shown by the UK Act) to achieve the goal of limiting hateful conduct.
45. The UK *Public Order Act 1986* provides

**29B Use of words or behaviour or display of written material**

A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred or hatred on the grounds of sexual orientation.

...

**29J Protection of freedom of expression**

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or



practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

#### **29JA Protection of freedom of expression (sexual orientation)**

- (1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.
- (2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.

#### **Public conduct scope too broad**

46. These provisions are limited to ‘public conduct’. However the definition of ‘public’ is expanded wide enough to cover a wide range of religious practices. As the paper states:

Conduct might be considered public even if it occurs on private property or at a place not open to the general public. This might include public conduct that occurs in a school or workplace.<sup>13</sup>

47. This would appear to also encompass religious teaching to the faithful in a church, mosque, synagogue or temple. The paper also includes social media posts.<sup>14</sup>
48. This expansive definition of ‘public’ means that a wide range of religious teaching and practice will be captured. The definition of ‘public’ should be limited so that it does not capture religious teaching in semi-private settings, such as a church, mosque or private educational institution. However, we acknowledge that given the vast majority of religious services within Australia are open to members of the public, even limiting the notion of ‘public conduct’ will not be sufficient. As we have said above, an exception for religious speech is required.

#### **Protections for religious speech and activity and changes to the public interest test**

49. The *Racial and Religious Tolerance Act 2001* (RRTA) s. 11 provides as follows:

Exceptions—public conduct

- (1) A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith—
  - (a) in the performance, exhibition or distribution of an artistic work; or
  - (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for—
    - (i) any genuine academic, artistic, religious or scientific purpose; or
    - (ii) any purpose that is in the public interest; or
  - (c) in making or publishing a fair and accurate report of any event or matter of public interest.

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<sup>13</sup> Department of Justice and Community Safety, above no.1, 16.

<sup>14</sup> Ibid.

- (2) For the purpose of subsection (1)(b)(i), a religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising.
50. The DJCS paper proposes changing the inclusive definition of a religious purpose to make it consistent with Victoria's *Charter of Human Rights and Responsibilities Act 2006*. The paper says that the proposed amended definition of religious purpose would include, but not be limited to, worship, observance, practice and teaching (for example, proselytising).
51. The paper does not provide the drafting of the proposed amendment. The current exception in the RRTA covers any conduct engaged in reasonably and in good faith in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in for any genuine religious purpose.
52. However, the DJCS paper's proposed definition of religious purpose to 'include, but not be limited to, worship, observance, practice and teaching (for example, proselytising)<sup>15</sup> risks narrowing the existing exemption. As the current exemption in the RRTA (introduced by the Bracks ALP government) recognises, conveying a religion, teaching a religion and proselytising are distinct religious activities.
53. There are several major flaws within the proposal. First, proselytising should not be treated as a subset or example of teaching as the DJCS wording proposes. Proselytising is attempting to persuade a person to convert from one religion, belief, or opinion to another. Proselytising may involve teaching the beliefs of a religion, but it will also involve reflection and discussion of the person's existing beliefs (religious or otherwise) and other possible beliefs and evidence for their truth. Proselytising goes well beyond teaching the beliefs of the religion.
54. Secondly, adopting the wording from the Charter as DJCS suggests will not cover proclamation or affirmation of religious beliefs outside of a religious teaching context. This is as much an issue of freedom of expression (ICCPR Article 19) as it is of freedom of religion and belief (ICCPR Article 18). For example, stating a religious truth on a T-shirt or bumper sticker or desk or wall calendar at work, or just informally stating a belief in a conversation with a friend or colleague, doesn't neatly fit into the words 'worship, observance, practice and teaching' but is precisely the type of expression of a religious belief which should be protected by an exemption and is protected by the current exemption in the RRTA for conduct engaged in for any genuine religious purpose.
55. The conduct for a genuine religious purpose exemption must cover all of these things and not be limited by wording from the Charter. Noting that we have set out above the need for a religious exception that operates in a similar fashion to section 37 of the *Sex Discrimination Act 1984* (Cth), that same exception should apply to protect teaching by religious institutions. In respect of other forms of religious teaching we support retaining the current form of the exemption in RRTA s.11(1) for any conduct engaged in reasonably and in good faith in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in for any genuine

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<sup>15</sup> Department of Justice and Community Safety, above no.1, 18.

religious purpose. The inclusive definition of religious purpose can include the full Charter wording but should be expanded to:

a religious purpose includes, but is not limited to, conveying or teaching a religious belief or proselytising or manifesting a religious belief in worship, observance, practice or teaching, either individually or as part of a community, in public or in private.

56. Furthermore, there are judicially recognised issues that already exist with ‘reasonably and in good faith tests’ that highlight that if the proposed changes were to at a bare minimum keep the existing protections in the RRTA, risks for religious individuals still remain. In *Catch the Fire Ministries* Nettle JA stated ‘objective standards will be brought to bear in determining what is reasonable’ under the exception. Appeal Judge Nettle formulated the test as follows:

where as here the conduct in question consists in the making of statements for a religious purpose, the question of whether it was engaged in reasonably for that purpose must be decided according to whether it would be so regarded by reasonable persons in general judged by the standards of an open and just multicultural [moderately intelligent...tolerant] society.<sup>16</sup>

57. According to Nettle JA, the standard for determining the exception is the view of ‘reasonable persons in general’. According to this law anything said by a preacher must not go beyond what is ‘proportionate to what is necessary to carry out’ the ‘religious discussion or instruction’. It is an extraordinary proposition that all religious teaching in this State will need to prove to a judge that it is ‘proportionate’ in this manner. The inclusion of the words ‘religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising’ will not alleviate the concern (as it remains subject to the overarching condition of ‘reasonableness’). The experience in the United Kingdom has shown that ‘hate speech’ laws have given rise to prosecutions where traditional truth claims concerning marriage or the exclusivity of religious beliefs were made.<sup>17</sup> These concerns underpin our position that an exception modelled on section 37 of the *Sex Discrimination Act 1984* should apply to teaching provided by religious institutions. Provided the clarifications outlined below are made, the standard exception for a religious purpose that is reasonable and in good faith could apply to statements by individuals. That would reflect the law in Queensland, New South Wales and the Northern Territory consequent on reforms adopted by Labor Governments in the last two years.

58. In *Bropho v Human Rights & Equal Opportunity Commission* (‘*Bropho*’) French J recognized the vagaries of the good faith test when his Honour said (with reference to s 18D of the *Racial Discrimination Act 1975*):

... the judgment which the Court is called upon to make in deciding whether an act falls within s 18D has the character of judicial opinion and assessment in the application of legal standards of ill-defined content. In difficult or borderline cases judicial opinions may differ.<sup>18</sup>

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<sup>16</sup> *Catch the Fire Ministries* (n 3) [94] (Nettle JA).

<sup>17</sup> See, for eg, <https://christianconcern.com/news/another-street-preacher-victory-after-police-arrest-for-hate-speech/>; <https://christianconcern.com/comment/as-long-as-i-breathe-i-will-tell-the-world-the-glorious-gospel/>; <https://christianconcern.com/ccpressreleases/police-drop-case-against-tory-councillor-arrested-for-hate-crime-for-supporting-christian-free-speech/>; <https://www.dailymail.co.uk/news/article-7293257/Police-arrest-preacher-64-grab-Bible-promoting-Christianity.html>.

<sup>18</sup> *Bropho v Human Rights & Equal Opportunity Commission* (‘*Bropho*’) [2004] FCAFC 16 (6 February 2004) [76] (French J).

59. Similarly, in declining the appeal from the Federal Court, Gleeson CJ stated '[t]he issue of whether the conduct in question in this case was reasonable and in good faith involved a matter of judgement on which minds might differ.'<sup>19</sup> Religious institutions should not be subject to such an indeterminate test in order to be exempt from anti-vilification provisions. As noted above, further improvements on the protections for religious speech should be modelled on the already existing protections in 37(1)(d) of the *Sex Discrimination Act 1984* (Cth), which applies currently to religious statements that would otherwise be discriminatory under that Act. Drafting that would give effect to this standard is provided above at paragraph 15. Note also that, appropriately, that exception does not apply a 'good faith' or 'reasonableness' requirement.
60. In addition to the 'reasonableness' test the OP also proposes that the 'good faith' be retained as a condition of the religious purpose exception. We have said that this requirement could apply to statements by individuals, as is the position in Queensland, NSW and the NT. In *Bropho*, as Bathurst CJ notes, '[s]o far as good faith was concerned, French J took the view that it required more than subjective honesty and legitimate purpose but rather, under the aegis of loyalty to the relevant principles of the Act, a conscientious approach to the task of honouring the values asserted by the Act which are to be assessed objectively'.<sup>20</sup> Both Nettle JA and Bathurst CJ refused to follow this view, preferring a test that has regard to whether the act is engaged in 'honestly and conscientiously for that purpose'. Indeed, it would be extraordinary to require religious teaching to at all times demonstrate 'loyalty to the principles of' Victorian legislation. Rather, the following comments of Nettle JA in *Catch the Fire Ministries* should apply to the good faith test under the proposed Victorian vilification prohibition:

Despite what has been held under s.18D of the *Racial Discrimination Act*, I see no reason to load objective criteria into the conception of good faith in s.11, or otherwise to treat it as involving more than a 'broad subjective assessment' of the defendant's intentions. In my view, the requirement that conduct have been engaged in bona fide for a genuine religious purpose within the meaning of s.11 will be established if it is shown that the defendant engaged in the conduct with the subjectively honest belief that it was necessary or desirable to achieve the genuine religious purpose.<sup>21</sup>

It should be clarified that this remains the effect of the 'good faith' test.

61. The protection proposed in the OP is further undermined by the new qualifier added to the conduct. Existing exemptions are already limited to conduct 'engaged in reasonably and in good faith'. The paper proposes further qualifying that to include 'for a genuine purpose in the public interest':
- The added requirement of 'genuine' means that a person would only be able to rely on the exception where their purpose for engaging in the conduct was truly in the public interest.<sup>22</sup>
62. We are concerned by the wording used in this paper. It is difficult to determine who determines the public interest, and whether conduct was in the public interest, or intended to be so.
63. An atheist may consider that it is genuinely in the public interest to 'save' people from the 'scourge' of religion, and so teaches offensive things about Jesus or Mohammed. Equally a

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<sup>19</sup> *Bropho v Human Rights & Equal Opportunity Commission* HCA Transcript 9 (4 February 2005) (Gleeson CJ).

<sup>20</sup> *Sunol* (n 13) [35] (Bathurst CJ).

<sup>21</sup> *Catch the Fire Ministries* (n 3) [92].

<sup>22</sup> Department of Justice and Community Safety, above no.1, 17.

religious person might consider it to be in the public interest that people live a certain way, and so teaches that certain behaviour is sinful and wrong and leads to hell.

64. Each of these examples the speaker genuinely believes they are acting for the public interest. However, other people might believe that they are acting exactly opposite to the public interest. On what basis will the Commission or a judge determine this in the case of a complaint?
65. We are concerned that this genuine purpose test will not take into account the genuine intent of the person engaging in the conduct. If someone is engaging, in good faith, in religious conduct that seeks to exhort their beliefs or encourage others to adopt them they should not be held to engaging in disingenuous conduct if a tribunal does not agree that what they consider is in the public interest, is not in the public interest. It should also be made clear that the key question within the 'reasonableness' test within the exception section is whether the statements were made reasonably for a religious discussion or instruction purpose, not whether the religious belief statements themselves are reasonable according to general community standards. Accordingly, the Government should clarify that nothing is therefore intended within the amendment that would limit claims that a religion offers the ultimate and exclusive form of truth, or that immoral behaviour can have eternal consequences. As Justice Morris stated in *Fletcher v Salvation Army* ('*Fletcher*') a 'genuine religious purpose may include asserting that a particular religion is the true way, and that any way but the true way is false.'<sup>23</sup> As His Honour recognised, 'criticism of a religion or religious practice is not a breach of the Act; the Act is concerned with inciting hatred of people on the basis of race or religion.'<sup>24</sup> These judicial statements should be directly referenced as examples of permitted conduct in the legislation.
66. Accordingly, particular examples should be provided to clarify the scope of the prohibition and clearly delineate the forms of religious teaching that will not be subject to complaint under the provision. One helpful clarification was provided by Appeal Judge Neave in *Catch the Fire Ministries*: '[t]he legislation aims to strike a balance between protecting freedom of speech and protecting people from vilification on the grounds of their ... religious belief. It would be inconsistent with this aim to interpret the legislation so as to make it impossible for people to proselytise for their own faith or to criticise the religious beliefs of others.'<sup>25</sup>
67. Thank you for the opportunity to make this submission. We would value the opportunity to answer further questions and participate in any hearings.

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<sup>23</sup> *Fletcher v Salvation Army Australia* (Anti-Discrimination) [2005] VCAT 1523 [18] (*Fletcher*) [9].

<sup>24</sup> *Ibid* [14].