

5 November 2013



Rev. Martin Baker  
Assembly Executive Secretary  
Presbyterian Church of Aotearoa New Zealand  
PO Box 9049  
Wellington 6141

Dear Rev. Martin Baker

**Re Request for Advice**

1. Thank you for your letter dated 30 August 2013 requesting the advice of the Human Rights Commission (**Commission**). In light of the Marriage (Definition of Marriage) Amendment Act 2013 you have asked a series of questions relating to the application of the Human Rights Act 1993 (**HRA**) to the use of churches, hall buildings and grounds.
2. Complaints of unlawful discrimination are based on particular facts and dealt with on a case by case basis. For that reason, the Commission does not provide legal opinions on hypothetical scenarios. Rather, this letter sets out the way the HRA operates and how this may impact on the use of churches, hall buildings and grounds. It provides a principled framework for you to consider specific issues as they may arise.

*Unlawful Discrimination*

3. The HRA makes it unlawful to discriminate on certain grounds. Discrimination itself is not defined in the HRA. Rather the Act refers to treating people less favourably than others because of a prohibited ground.
4. Section 21 of the Human Rights Act 1993 (**HRA**) sets out prohibited grounds of discrimination, including sex<sup>1</sup> and sexual orientation. Specifically, section 21(1)(m) defines sexual orientation as meaning “a heterosexual, homosexual, lesbian or bisexual orientation”. It is unlawful to treat people less favourably than others because of their sexual orientation, in any of the areas of public life covered by the HRA.
5. The HRA applies to both the public and private sectors. Part 1A applies to persons or bodies carrying out a public function imposed by law. The test for discrimination that applies to Part 1A is the test in the New Zealand Bill of Rights Act 1990 (**BoRA**). That is, although a matter may be prima facie discriminatory, it may be able to be justified in terms of s. 5 of the BoRA. In deciding whether this is the case, the following issues will be taken into account:<sup>2</sup>

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<sup>1</sup> The definition of “sex” in the HRA has been interpreted by the Attorney General as including gender identity (and therefore transgender people) :

[www.agender.org.nz/articles/items/genderidentitybill/html](http://www.agender.org.nz/articles/items/genderidentitybill/html)

<sup>2</sup> *R v Hansen* [2007] 3 NZLR 1 (SC) at 28

- whether the limiting measure serves a purpose sufficiently important to justify curtailment of the right or freedom;
  - if so, is the measure is rationally connected with its purpose;
  - impairs the right or freedom no more than is reasonably necessary to achieve its purpose; and
  - Proportional to the importance of the objective.
6. Part 2 of the HRA applies primarily to the private sector and makes it unlawful to discriminate in the following areas:
- access to public places, vehicles and facilities;
  - access to education;
  - employment;
  - industrial and professional associations, qualifying bodies and vocational training bodies;
  - partnerships;
  - provision of goods and services; and
  - provision of land, housing and accommodation.
7. Each area includes exceptions linked to specific grounds which permit discrimination in prescribed situations.
8. The use of churches, hall buildings and grounds would be considered a private function for the purposes of the HRA and therefore would fall within Part 2.

*Balancing religious belief and the right to freedom from discrimination*

9. A number of the scenarios you have provided touch on the relationship between freedom of religion and freedom from discrimination.
10. The BoRA affirms the right to freedom of thought, conscience, religion and belief.<sup>3</sup> The right to freedom of religion and belief includes both the right to hold a belief, and the right to manifest that belief in public, through worship, observance, practice and teaching.
11. The more an activity is a core part of religious practice the more likely it will not be subject to the HRA. Religious ceremonies and services are not covered under the areas of public life in the HRA. Furthermore, the HRA does not cover instances where a religious organisation does not make its premises, including its ceremonial spaces, available to the public.
12. On this basis, it is hard to see how placing restrictions on the use of the Church sanctuary in order to comply with the tenets of a particular religion would be unlawful.

*Provision of goods and services*

13. The situation becomes more complicated when considering the use of other Church buildings, grounds and assets.

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<sup>3</sup> s13 New Zealand Bill of Rights Act 1990.

14. The further an activity is from the core practices of a religion, the more weight is likely to be given to anti-discrimination protections. Section 44 of the HRA prohibits discrimination in the provision of goods and services. It provides that it shall be unlawful for any person who supplies services to the public (or section of the public) to refuse to provide any other person with those services because of their sexual orientation, race or other prohibited ground of discrimination.
15. As a general principle, when religious organisations provide goods or services to the public they are held to the same non-discrimination standards as others. So, for example, if a church rents out its hall to members of the public it would be unlawful to refuse to rent the hall to a same-sex couple because of their sexual orientation.
16. The HRA does not preclude an organisation that provides goods and services to the public from determining and applying particular conditions of use or engagement. However, any conditions must themselves not discriminate. For example, it would be lawful to prohibit church halls from being rented for the purpose of a wedding. But it would be unlawful to prohibit a church hall from being rented for a same sex wedding, or for a Muslim or Buddhist ceremony.
17. Whatever the particular restrictions may be in a given case, it is important that they are clearly communicated to the public and applied consistently by the governing body.
18. Please do not hesitate to contact me should you wish to discuss your concerns further.

Yours sincerely



Michael J V White  
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