

AACS Submission to the Consultation of the *Equal Opportunity (Religious Bodies) Amendment Bill 2020 (SA)*

27 November 2020

Dear Attorney General,

The Australian Association of Christian Schools (AACS) welcomes the opportunity to make a submission about the *Equal Opportunity (Religious Bodies) Amendment Bill 2020 (SA)* (the proposed Bill). Any proposed legislation which will impact upon the freedom of religious organisations is very important to us and we have serious concerns about the proposed Bill, as outlined below.

AACS represents over a hundred schools and thousands of families from a wide variety of backgrounds, cultures and religious denominations in every state and territory across the country; including the following schools in South Australia:

- Blakes Crossing Christian College
- Horizon Christian School
- Mid North Christian School
- Rivergum Christian School
- Seaview Christian College
- Torrens Valley Christian School

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Overview of Chief Contentions

1. The chief contentions made in this submission are:
 - a. Christian schools were established out of a desire by parents to see their children taught in a learning environment where they could be nurtured in their faith. Parents who enrol their children in our schools expect a religiously framed educational setting for their children. Our schools are focussed on the wellbeing and pastoral support of *all* students, irrespective of their gender or sexual orientation, within a Christian worldview. However, the proposed Bill will remove key protections that will adversely impact our ability to teach and support students within an authentic faith-based school community.
 - b. The issues arising from the proposed Bill were considered in detail in 2018 by the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs *Inquiry on Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (the Senate Inquiry).¹ That Inquiry was convened to consider a Bill proposed by the Australian Greens, titled the *Discrimination Free Schools Bill 2018*. The Australian Greens Bill proposed to remove the exemption for religious schools in respect of students in the *Sex Discrimination Act 1984* (Cth), and to that extent, it is substantively identical to the proposal of the South Australian Liberal Government in respect of religious schools.
 - c. The Liberal Senators on that Committee issued a dissenting report providing a thorough critique of the Australian Greens Bill, analysing how it failed to comply with international human rights law protecting religious educational institutions (the Coalition Senators' Report).² That report is annexed to ensure you are provided with a full opportunity to consider the full implications of South Australian Government's proposed Bill and how it fails to comply with international law.

¹ Commonwealth Senate Standing Committee on Legal and Constitutional Affairs *Inquiry on Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (26 November 2018), available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Schooldiscrimination/Report

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Schooldiscrimination/Report/d01

² Commonwealth Senate Standing Committee on Legal and Constitutional Affairs *Inquiry on Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff – Dissenting Report of the Coalition Senators* (26 November 2018), available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Schooldiscrimination/Report/d01

- d. Christian schools have no desire to expel students on the grounds of sexual orientation or gender identity. The Coalition Senators' Report addressed the chief presenting issue in this debate: 'why do religious schools seek the ability to "discriminate"?' The reply is essentially found in the wide-ranging technical scope of the legal definition of discrimination (both direct and indirect). Without exceptions, that definition is so broad as to capture what are ordinarily considered to be reasonable acts of differential treatment. In the absence of exemptions, schools have no adequate legal protection to:
- i. Teach in accordance with widely held Christian beliefs regarding sexuality, gender and relationships. Courts in Australia have found that in certain situations words can amount to "discrimination"; and
 - ii. Manage school community and student behaviour in ways that are appropriate to the faith of the school.
- e. Importantly, contrary to the apparent intention of the proposed Bill, the Coalition Senators' Report stated:
- In concluding that as 'the exemptions are not being used against students, there is no reason to maintain them', the majority report appears to misunderstand that, in certain circumstances, even the mere making of a request that a student or staff member respect the school's values could be an action that requires reliance on the exemptions to be lawful (at least on the law as it currently stands).³
- The Report concluded:
- This committee process has made it plain that in practice schools have been focussed on the pastoral support of all students, irrespective of their gender or sexual orientation. Our focus as a Parliament must be on ensuring that we set the conditions to ensure that religious schools remain able to do so in accordance with their religious ethos.
- f. The proposed Bill enshrines a reform that is directly inconsistent with the conclusions of the report of the Coalition Senators. It is instead entirely consistent with the attempt of the Australian Greens to undermine the ethos of religious schools. It is our fidelity to our teachings that have inspired the unique, loving, approach adopted within our schools. It is that ethos which is so valued by the parents that entrust their children to our schools. Yet it is that ethos which the proposed Bill directly targets.

³ Ibid [49].

- g. Noting that under the current *Equal Opportunity Act 1984 (SA)* such acts are not *unlawful discrimination* because of the presence of exceptions granted to religious bodies at section 50, AACS recommends that new provisions in the Act should be introduced to remove any doubt that religious schools may also rely upon such exceptions through the introduction of equivalent provisions that are specifically addressed to religious schools.
- h. The proposed Bill is contrary to the relevant international human rights law enshrining the right to establish private schools, including that which Australia has ratified. By proposing the removal of the exception granted to religious institutions, the proposed Bill aims at the total removal of the ability of religious schools to offer students a holistic education in accordance with their religious convictions. It thus limits religious freedom and breaches the right to establish independent schools, protected in human rights law as a fundamental right central to the preservation of pluralistic democracy.
- i. In this light, the proposed Bill could breach what the European Commission on Human Rights has termed the ‘guaranteed ... right to think freely’;⁴ the human right that protects against the State imposed uniformity and guarantees pluralism in the provision of education as a means to ensure freedom of thought within a society. Instead, the proposed Bill, evinces, in our view, what that body has characterised as the notion that school children should be ‘led to think only in the directions that are decided by the political majority of the Parliament’.⁵

The Nature of Christian Schools

2. Our schools were established by Christian parents who desired to see their children grow up in a teaching and learning environment where they could be nurtured in their faith. Characterised as low-fee schools, our schools operate autonomously and are accountable to their parent and school communities. Parents who enrol their children in a Christian school have an expectation of a religiously framed environment for their children. They make a deliberate choice and financial commitment, to place their children in a school that teaches, nurtures and seeks to live out a value and belief system that is consistent with what is expressed in their home environment.
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3. Christian schools strive to be holistic learning communities in which everyone plays a part. All participants (parents, teachers, non-teaching staff, leaders and students), structures and practices, work together to provide a faith-based community within which learning takes place. Religion is not simply taught as a stand-alone subject but permeates every aspect of our life and is embedded within all parts of the teaching and learning program. The continued strength and growth of Christian schools across South Australia is a powerful testimony to value placed on this educational model by parents.
4. Respect for religious freedom is fundamental to the Australian way of life and is a well-established human right within our democratic context. It is supported in common and statute law and affirmed in international covenants to which Australia is a signatory, including the *International Covenant on Civil and Political Rights 1966*, which protects freedom of thought, conscience and religion. This freedom allows individuals and communities to exercise their faith within the framework of Australian law and civic life.
5. Parents who enrol their children in our schools understand that Christian faith is the foundation of our schools' mission. Many parents from different or no faith backgrounds choose to send their children to our schools because they recognise the benefits of a Christian education. They accept and desire for these beliefs and values to be taught and lived out by members of the school community. To us, our values and beliefs are intertwined.
6. Contrary to the Background information provided by the Government, our schools do not seek to maintain exceptions in anti-discrimination law 'to avoid offending members of the religion.'⁶ Rather, it is because we value our religious freedoms and the ability to teach our beliefs to the next generation through our schools. The greatest commandment given by Jesus is to: 'Love the Lord your God with all your heart and with all your soul and with all your mind. This is the first and greatest commandment. And the second is like it: Love your neighbour as yourself.'⁷ We aim for our schools to be warm and loving communities, where pastoral care is exceptional and Christian accountability is provided to each other.
7. All students enrolled in our schools are loved and accepted by staff. An attitude of respect is always adopted and encouraged: student to student, teacher to student and school to family. There are however, times where school staff may gently challenge ideas or behaviours that are inconsistent with the teachings of the Bible. This is how we demonstrate our love for God, by loving others and encouraging each other to live in a way that is pleasing to Him.

⁶ <https://yoursay.sa.gov.au/decisions/religious-exceptions-changes-for-organisations/background>

⁷ Matthew 22:37-39

8. It is not uncommon for students enrolled at our schools to identify as LGBTQIA or to indicate that they are wrestling with the issue of their identity in regard to their gender identity. Wellbeing staff provide a safe environment where students can explore, discuss and consider issues of sexuality. Staff journey with students as they talk through their feelings and ideas. Staff create a culture of love and understanding where individuals are valued, and respect is shown for each young person. Bullying is never tolerated.
9. As Christians, we believe that each person is made in the image of God. Staff encourage students not to label themselves too early, but to allow themselves time to explore who they are in God's sight. Some examples of how our schools have responded to these issues in the past are provided below:
 - (a) In one case, a 15-year-old female student had been sexually abused as child. Coming into adolescence, she became aware that others in the year level had started dating, however, she was not attracted to boys. She began to question if she was asexual or same-sex attracted. She talked with staff about these matters, questioning her identity. Staff encouraged her not to label herself too early but to wait and think about who she was in God's sight. Over the period of several years, she came to realise that her past experiences and the pattern of abuse she had experienced were affecting her own feelings. She was gently supported on this journey and has now left school and is dating a young man.
 - (b) In another case a student began questioning their sexuality and identity following a disclosure at home that parents, previously in a heterosexual relationship, had later decided that they desired a homosexual relationship instead. Staff supported the student as they wrestled with this change to their family circumstance, providing a culture of understanding and respect for the student to talk, think, consider and evaluate their own sexuality and identity.
10. Our schools have no desire to mistreat or marginalise someone who identifies as LGBTQIA. Conversely, we do not wish to be marginalised by others for our faith and our biblical understanding on a wide range of issues. In holding a biblical position on marriage, sex, gender and sexuality, we are simply honouring what we believe is the truth as revealed by God's word. We believe that Christian schools should be able to promote, teach and expect a level of behaviour of students that matches the values and expectations of the faith that the school has been founded upon.

11. Ideally, we would prefer not to be grudgingly allowed an exemption where it appears to general society that we are given special treatment and allowed to ‘discriminate’ against people. We would much prefer to have our religious freedom rights expressed positively through a provision that allows faith-based schools the right to protect the integrity of their religious beliefs through preferencing staff and students who will uphold the beliefs and values of the school. We believe that:

Individual equality is best preserved by a plurality of institutions, whose capacity to advocate for the fundamental rights of their members enjoys strong protection at law. Narrowly interpreted exemptions have the potential to undermine equality, pluralism and diversity at the level of society as a whole.⁸

12. A government that upholds cultural and religious diversity, together with other forms of diversity, would ensure that pluralism can continue to thrive in South Australia. We have grave concerns that the proposed Bill will do the exact opposite.

Implications of the Equal Opportunity (Religious Bodies) Amendment Bill 2020

13. Under current laws, a religious school is able to preference enrolment offers to students of families who will support and uphold a school’s religious ethos and standards of behaviour. Sections 50(1)(ba) and (c) of the Act provide Christian schools with some protection from a claim under section 37 of unlawful differential treatment because of sex, sexual orientation, gender identity and intersex status. The suggested amendments will deny Christian schools this ability, with wide ranging implications.

14. By removing the protections against a claim under section 37, the Bill will put Christian schools in an extremely vulnerable position. If the proposed amendments were to be adopted, schools would likely be forced to accept and promote values and beliefs that are incompatible with their religious ethos or potentially face a discrimination claim.

15. The interaction between proposed section 50(1)(c) and the existing protection to religious schools in employment at existing section 34(3) is not clear. The two provisions are in direct conflict. Section 34(3) permits a religious school to ensure fidelity to its beliefs within its staffing complement, section 50(c)(ix) purports to take that ability away. In effect, this would cause schools to rely upon the exception at section 34(2), allowing the State—rather than parents or schools—to determine which positions do and do not require conformity to religion as a ‘genuine occupational requirement’.

⁸ Fowler, Mark, ‘Identifying Faith-Based Entities for the Purpose of Anti-Discrimination Law’ in Neville G. Rochow and Brett G. Scharffs Paul T. Babie (eds), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar Publishing Limited, 2020), p. 228.

Inconsistency with the Report of Liberal Coalition Senators

16. The issues arising from the proposed Bill were considered in detail in 2018 by the Commonwealth Senate Standing Committee on Legal and Constitutional Affairs *Inquiry on Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (the Senate Inquiry).⁹ That Inquiry was convened to consider a Bill proposed by the Australian Greens, titled the *Discrimination Free Schools Bill 2018*.
17. The proposed Bill has the same practical effect upon the ethos of religious schools with respect to their student bodies as the proposed Australian Greens Bill. The Australian Greens Bills proposed to remove the exemption for religious schools in respect of students in the *Sex Discrimination Act 1984* (Cth), and to that extent, is substantively identical to the proposal of the State Liberal Government in respect of religious schools.
18. The Liberal Senators on that Committee issued a dissenting report providing a thorough critique of the Australian Greens Bill, analysing in detail how it failed to comply with international human rights law protecting religious educational institutions (the Coalition Senators' Report).¹⁰ That dissenting report is referenced below to ensure you are provided with a full opportunity to consider the full implications of South Australian Government's proposed Bill and how it fails to comply with international law.
19. The Coalition Senators' Report addressed the chief presenting issue in this debate: 'why do religious schools seek the ability to "discriminate"?' The reply is essentially found in the wide-ranging technical scope of the legal definition of discrimination (both direct and indirect). Without exceptions, that definition is so broad as to capture what are ordinarily considered to be reasonable acts of differential treatment.
20. Under the current *Equal Opportunity Act 1984* (SA) such acts are not *unlawful discrimination* because of the presence of exceptions granted to religious bodies at section 50. Indeed, to remove any doubt that religious schools may also rely upon such exceptions, the Act should be made clearer through the introduction of equivalent provisions that are specifically addressed to religious schools. These exceptions operate to preserve what are

⁹https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Schools_discrimination/Report

¹⁰https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Schools_discrimination/Report/d01

considered to be reasonable acts of differentiation, including acts of the mainstream religious faiths present within the Australian community since the arrival of European settlers.

21. In the absence of exceptions, discrimination law could remove the ability of religious schools to convey teaching on matters such as sexuality, marriage or gender identity, including teaching that is consistently held by the vast majority of adherents of the Abrahamic faiths. In the absence of appropriate exceptions, discrimination law can also remove the ability of religious schools to undertake a reasonable response where positions contrary to the school's teaching are advocated, even where such advocacy seeks to undermine a school's ethos.
22. The Coalition Senators' Report quoted our summary of the main issues that arise in the absence of exceptions in the following terms:

Christian schools have no desire to expel students on the grounds of sexual orientation or gender identity. However, in the absence of exemptions, schools have no adequate legal protection to:

1. Teach in accordance with widely held Christian beliefs regarding sexuality, gender and relationships;
2. Manage the school community and student behaviour in ways that are appropriate to the faith of the school; and
3. Employ only people who share their beliefs and manifest those beliefs in their own lives.¹¹

Adopting this numbering, the following section addresses the first two of these concerns, being the matters that are relevant to the proposed Bill.

Concern 1 - Impact on Teaching

23. Christian schools do not regard religion as a matter to be taught as a standalone subject. Rather it is to be modelled, taught and reflected in all levels of engagement with the student. The absence of 'exemptions' will impact on the ability of Christian schools to teach their view of marriage, biological sex and sexuality. Courts in Australia have found that in certain situations words can amount to "discrimination", as opposed to vilification. For example, in *Qantas Airways v Gama*,¹² the Full Court of the Federal Court held that "remarks [by fellow employees] ... could amount to discrimination" (see also *Singh v*

¹¹ Ibid [46].

¹² (2008) FCAFC 69 at [78].

*Shafston Training One Pty Ltd and Anor*¹³ and *Nationwide News Pty Ltd v Naidu*,¹⁴ both of which matters are authority that remarks, as opposed to actions, may amount to discrimination).

24. The concern that mere statements of traditional doctrine may be made illegal by discrimination law in the absence of exemptions was acknowledged by the Coalition Senators' Report, citing one submission that:

the proposal would limit the ability of faith-based schools to teach in accordance with their beliefs: "One of our concerns in this area relates to the teaching of a Biblical view of sexuality and sexual conduct which could be argued to constitute indirect discrimination."

The Coalition Senators also cited a submission that:

emphasised the need to ensure teaching within faith-based schools can continue to conform to the relevant belief systems: "The changes that have been proposed would also make it unclear whether a school could teach a historic, Biblical view of sexuality and relationships."

25. A fundamental component of education, as understood within Christian schools, is the ability to demonstrate that the Bible offers God's intended best for humanity, modelled through the application of our religious teaching. The proposed removal of exemptions will withdraw this ability. It is through our faithfulness to our Christian teachings that our unique character is formed. And yet it is precisely our ability to authentically represent and model those teachings which the proposed Bill puts at risk. This leads us to our second major concern.

Concern 2 – Impact on the Ability to Maintain a Religious Ethos

26. Several submitters to the Senate Inquiry also highlighted the kinds of considerations that may arise where religious schools are left with no discretion to exercise reasonable discipline in respect of conduct that undermines the religious ethos of a school. For example, the Institute for Civil Society stated:

A student may assert the right to take a same sex partner to a school dance or to run and publicise a student club celebrating the gay lifestyle ... If the school is unable to set and enforce behaviour standards and limit the promotion of views which are antithetical to the religion because of the threat of discrimination lawsuits by the

¹³ [2013] QCAT 008 (ADL051-11) 8 January 2013.

¹⁴ [2007] NSWCA 377 at [378].

student, the school is unable to maintain its religious ethos and modelling of the beliefs and values of the religion... If the Bill is enacted, a student who wanted to start a Gay Pride Club or a Gay Pride page on the student intranet to promote LGBTI lifestyles in a traditional Muslim, Jewish or Christian school could claim that a refusal by the school was prohibited discrimination under the Sex Discrimination Act and take the school to the Human Rights Commission and the Federal Court.

27. Professor Patrick Parkinson also clarified:

... Is it unlawful to continue referring to the boy by the first name under which he was enrolled or which is recorded on his birth certificate? If the child is in a mixed gender school, must it, as a matter of law, allow the child to wear the girls' uniform to the extent that it is different from the boys' uniform? In high school, does non-discrimination require allowing a child who feels and identifies as being of the opposite sex, to participate in sex-segregated sports competitions organised for that opposite sex?

28. Importantly, contrary to the apparent intention of the proposed Bill, the Coalition Senators' Report stated:

In concluding that as 'the exemptions are not being used against students, there is no reason to maintain them', the majority report appears to misunderstand that, in certain circumstances, even the mere making of a request that a student or staff member respect the school's values could be an action that requires reliance on the exemptions to be lawful (at least on the law as it currently stands).¹⁵

29. The Report concluded:

This committee process has made it plain that in practice schools have been focussed on the pastoral support of all students, irrespective of their gender or sexual orientation. Our focus as a Parliament must be on ensuring that we set the conditions to ensure that religious schools remain able to do so in accordance with their religious ethos.

30. The ability to retain discretion over conduct within Christian schools is fundamental to the educational experience offered. The proposed Bill enshrines a reform that is directly inconsistent with the conclusions of the report of the Coalition Senators. It is instead entirely consistent with the attempt of the Australian Greens to undermine the ethos of religious schools. It is our fidelity to our teachings that have inspired the unique, loving, approach adopted within our schools. It is that ethos which is so valued by the parents that entrust their children to our schools, yet which the proposed Bill directly targets.

¹⁵ [49].

International Human Rights Law

31. The following section demonstrates how the proposed Bill is contrary to the relevant international human rights law enshrining the right to establish private schools. That right is protected by Article 18(4) of the *International Covenant on Civil and Political Rights 1966*, that Australia has ratified. That Article states:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

32. As Nowak clarifies '[w]ith respect to the express rule in Art.13(3) of the International Covenant on Economic, Social and Cultural Rights and the various references to this provision by the delegates in the 3d Committee of the General Assembly during the drafting of Article 18(4), it may be assumed that the parental right covers the freedom to establish private schools.'¹⁶

33. Turning to the jurisprudence of the European Court of Human Rights, in *Kjeldsen, Busk Madsen and Pedersen v Denmark* the ECHR held that the right to ensure a child's education in conformity with the philosophical and religious convictions of their parents will be breached where a state's education system fails to make reasonable provision for parental convictions across the entire education system. Therein the Court held that that this right 'aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society"'.¹⁷ In that judgement, the presence of alternative private religious schools was held to be a critical component of a state's ability to satisfy the requirements of this right. Subsequently, in *Ingrid Jordebo Foundation of Christian Schools v Sweden*¹⁸ the European Commission on Human Rights held that 'the principle of the freedom of individuals, forming one of the corner-stones of the Swedish society, requires the existence of a possibility to run and to attend private schools'.¹⁹

34. For the reasons set out in this submission, by proposing the removal of the exception granted to religious institutions, the proposed Bill aims at the total removal of the ability of religious schools to offer students a holistic education in accordance with their religious

¹⁶ Manfred Nowak, *CCPR Commentary, 2nd revised edition* (Kehl: N P Engel, 2006), 443.

¹⁷ *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 Eur Court HR 711, 21. Also affirmed in *Case of Folgero and Others v Norway* (European Court of Human Rights, Grand Chamber, Application No. 15472/02 29, 29 June 2007) at para 84(b).

¹⁸ *Ingrid Jordebo Foundation of Christian Schools v Sweden* (European Commission of Human Rights, Application No. 11533/85, 06 March 1987).

¹⁹ *Ibid.*

convictions. It thus limits religious freedom and breaches the right to establish independent schools, protected in human rights law as a fundamental right central to the preservation of pluralistic democracy.

35. To that extent, the proposals also limit the legitimate expression of the rights of children and their parents to ensure the religious and moral education of their children. The proposed Bill would remove the ability of parents to choose a school consistent with the ethical and religious values of themselves and their children. By removing the ability of religious adherents to operate educational bodies consistent with their religious values, the proposed Bill also limits their right to freedom of association.
36. The proposed Bill risks removing the unique identity of Christian schools as it would breach what the European Commission on Human Rights has termed the 'guaranteed ... right to think freely';²⁰ the human right that protects against the State imposed uniformity and guarantees pluralism in the provision of education as a means to ensure freedom of thought within a society. Instead, the proposed Bill, evinces, in our view, what the European Commission on Human Rights has characterised as the notion that school children should be 'led to think only in the directions that are decided by the political majority of the Parliament'.²¹

Conclusion

37. **In sum, we believe that this Bill is a flawed legislative proposal that should be rejected by the South Australian Government.** By removing exceptions for religious institutions, such as Christian schools, the *Equal Opportunity (Religious Bodies) Amendment Bill 2020* could expose our schools to stressful and malicious claims of discrimination. The proposed Bill will remove the ability of Christian schools to offer students a holistic education in accordance with their beliefs and values; limiting religious freedom and breaching the right to establish independent schools, which is protected in human rights law as fundamental to the preservation of pluralistic democracy.
38. **AACS recommends that the South Australian government consider introducing new provisions in the Equal Opportunity Act 1984 (SA) to remove any doubt that religious schools may rely upon such exceptions through the introduction of equivalent provisions that are specifically addressed to religious schools,** noting that currently such acts are not *unlawful discrimination* because of the presence of exceptions granted to religious bodies at section 50 of the Act.

²⁰ Ibid.

²¹ Ibid.

39. Thank you for the opportunity to provide a submission to this Review. AACCS would welcome the opportunity to elaborate further on any of the points outlined above.

Yours faithfully,



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