

Submission on the Second Exposure Draft of the Religious Discrimination Bill 2019 and other relevant Bills

Minister Christian Porter

Attorney General

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Dear Minister,

The Australian Association of Christian Schools commends the improvements to the first exposure draft in consultation the Australian community.

Where are we at?

In its current form, the Bill is a step towards our main priority: ensuring that parents retain the ability to educate their children at schools that accord with their faith.

Our schools provide Christ-focused educational environments and we welcome measures to preserve these as a choice for Australian families. Under this second draft, faith-based educational institutions are free to employ staff, contractors and volunteers, as well as preference the admission of students of the same faith, apply rules and hire out facilities - all in line with advancing the mission and operating ethos of their school.

At all times, we strive to nurture an environment that promotes excellent education within a Biblical worldview in partnership with parents. We believe that this is a unique and effective educational model. Our schools are very upfront about what will be taught, as well as the expected behaviour of students while enrolled, and it is our responsibility to maintain those commitments.

The Bill provides that there is no *religious discrimination* where a religious school engages in good faith in conduct that is in accordance with the beliefs and teachings of their religion. This allows us to maintain our schools' distinctive culture, ethos and pedagogy.

Such conduct includes maintaining student codes of conduct to uphold a school's religious beliefs and ethos, which is one of the main reasons that families choose to send their children to such schools. If a student persistently advocated for and practised Satanism at a Christian school (or a Muslim or Jewish school), the school should be able to use student codes of conduct and discipline to uphold the school's Christian ethos.

The Bill makes it clear that it is limited to issues of religious discrimination and is not addressing discrimination on other grounds like sexual orientation which is covered by the Sex Discrimination Act.

Our schools strive to provide a safe and supportive environment for all students. Our anti-bullying policies and Christian pastoral care approaches are well-known for giving young people space and safety to critically evaluate what they see and experience around them. We see this as crucial for young people as they explore questions about identity, belonging and their inherent worth as people.

Bipartisanship

As this Bill has far-reaching implications and touches the lives of ordinary people of faith, we see this as a complex cultural and democratic watershed moment. We hope that both major parties will recognise the improvements to the Bill as necessary - and AACS has welcomed their willingness to have open and frank discussions.

However, politically convenient bi-partisanship must not come at the cost of good public policy that advances social pluralism. While a degree of compromise is to be expected from political representatives as part of this process, the issue of religious freedom is too important and the ramifications too wide-ranging to be treated lightly.

Given the implications of this legislation, many people of faith will find it unacceptable to have their basic freedoms unprotected in Commonwealth law, despite the strong precedent in international law. A weak Bill would also inhibit people of faith from living and working according to their beliefs.

We encourage both parties to study deeply what it means for people to live a life of faith, so they can understand the profound ramifications of the decisions they are making. Understanding the nature of faith, and how it is expressed in a community, is key to establishing religious freedom for every Australian both now and into the future.

The Bill must be fit for purpose

Despite the advancements made in the second draft, there are still aspects that are unsuitable to the subject of religious freedom. Furthermore, Australia is at risk of not meeting its international obligations concerning Article 18 of the International Covenant on Civil and Political Rights (ICCPR), given some of the omissions and changes to the first draft. We believe that these do not serve a pluralist democracy as best as it could.

Our public policy arguments on the issue of religious freedom as set out in our first submission stand and this submission focuses on the new draft and changes. We highlight the following for inclusion in particular:

- 1) **The right of parents to educate their children in accordance with their beliefs and moral convictions should be enshrined in the Bill.** *Parents have prime responsibility for their children and this principle is at the core of the Christian schools' movement. It is a recognised human right that parents should be able to choose a school for their child and also remove them from teaching programs in public schools that conflict with their family's beliefs.*
- 2) **The Bill should reflect that forcing an individual or an entity to act against their conscience or making benefits conditional upon having to affirm or behave in a way that is against their religious beliefs is not acceptable.** *We do not want our schools, students or alumni to be compelled to do something against their faith, nor is this something that common law has ever permitted.*
- 3) **Both religious individuals AND organisations, whether companies or incorporated associations, should be protected from discrimination for their beliefs. They should not be subjected to a discrimination claim for simply making a statement of belief in word, symbol or deed in accordance with their beliefs.** *Individuals do not lose their religious motivations and character simply because they come together in an organisation for a common cause or charge for their services. Our schools could be discriminated against in the future because of our beliefs and have little recourse in law. Protection for organisations must be complete in the Bill. (Sections 5, 7, 8, 9 and 11)*
- 4) **The Bill needs to state the evidentiary requirements for determining and assessing an organisation or school's beliefs.** *Many of our schools are non-denominational and*

clarity is required as to how they are to evidence their beliefs for the purposes of a lodging or defending a discrimination claim. (Section 11)

- 5) **Schools should be explicitly assured in the Bill that the scope of protected fields of services includes funding decisions and the granting of contracts by state and territory government.** *Faith-based schools should not be discriminated against in the granting of funds for new schools for example or for capital building works. (Section 21)*

- 6) **Qualifying bodies or accreditation authorities should not be able to discriminate against schools on the basis of faith.** *Faith-based schools are an expression of freedom of thought and are a valuable educational option for families. (Section 16)*

- 7) **‘Religious activity not involving a criminal offence’ should be preferred over the term ‘lawful religious activity’ to limit religious behaviour.** *The prospect of state and territory ‘Conversion-Therapy Bans’ that potentially mandate treatment pathways over the better judgement of a General Practitioner or school counsellor (i.e. “child-led affirmation” over “watch and wait”) through the threat of criminal charges and fines, will adversely affect young people’s lives. The Bill needs to address this emerging threat to clinical freedom and exploration when caring for young people. (Section 5)*

- 8) **Courts should not be tasked with engaging in theological questions or applying a hypothetical ‘reasonable believer’ test.** *Courts should determine or clarify an individual’s or entity’s genuine beliefs before deciding whether their expression is appropriate in a pluralist society. Theological disputes in court could play out very badly when secular lenses are placed over differing interpretations – potentially leading to the conclusion that the claim fails because there is no core doctrine on an issue, rather than addressing the individual’s personal religious beliefs for which they have been discriminated against. (Sections 11 and 5)*

- 9) **Using a test of ‘reasonableness’ when deciding whether there has been indirect discrimination on the basis of religious belief or activity falls short of the international law standard.** *It should be replaced by a test of whether the impingement upon religious freedom is ‘necessary’ instead. (Section 8(1)(c))*

Various additional amendments are also raised below that would ensure faith communities and individuals are free to live their lives within a fair legal framework.

1. PARENTAL RIGHTS

The Bill should enshrine the right of parents to educate their children in accordance with their beliefs and moral convictions.

Parents have prime responsibility for their children, and this principle is at the core of the Christian schools' movement. We affirm Article 26(3) of the Universal Declaration of Human Rights (UDHR), which states that parents have a prior right to choose the kind of education that shall be given to their children. We also advocate for the right of parents to remove their children from teaching programs in public schools that conflict with their family's beliefs.

Currently, the Bill is not protecting this principle explicitly, nor does it recognise parental authority and autonomy in the education of children from an implied philosophical position.

In addition to the UDHR, Article 18(4) of the International Covenant on Civil and Political Rights states that parents have the freedom to educate their children in accordance with their beliefs and moral convictions.

This right is manifested in the ability of Christians to associate in community and to operate authentic faith-based schools.

Parents and communities from all backgrounds send their children to our schools. All parents want to be assured that the school they send their children to are loving communities that will help form good character and prepare them for life.

*Our firm commitment to providing this education **will** continue regardless of the outcome of the public debate and legislative process. We do not see ourselves as victims of circumstances beyond our control, but rather tasked to do the best that we can with blessings and vision that we are given.*

Our average annual growth rate (which significantly outpaces the rest of the independent and public sectors) is a testament to the fact that an increasing number of parents want our model of educational community for their children.

Some of our schools offer streams tailored to school-aged parents, enabling them to complete their education with their children nearby. Other schools provide specific support

to children with disabilities, with specialised campuses creating a sensory paradise that intentionally give them their optimal learning environment.

Our schools have received Land Council requests to establish indigenous micro schools in their area to cater to the unique needs of young indigenous students. Furthermore, all our schools intentionally develop relationships with their local communities to explore how our students can serve the wider community.

These are our schools.

Their distinctive culture and mission are a result of our organisational ethos and beliefs put into action. Many parents select our schools because they want these values reinforced as part of their children's education. Our parents do not want schools to undermine the practices, beliefs and worldview they teach at home. At present, the Bill does not fully protect the rights of parents to seek schooling that suits their philosophical, ethical or religious beliefs.

As we are here for generations to come and are a rapidly growing sector, we are concerned that the Bill is silent on how faith-based schools will be able to operate following their traditions and doctrines as they relate to other laws. Such ambiguity makes it even more important to recognise and respect parents as the natural authority for determining a child's education and environment.

Recommendation:

- *That the wording of Article 18(4) ICCPR be explicitly included in the Bill to cement the place of parental rights in matters of religious freedom.*
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2. FREEDOM OF CONSCIENCE

The Bill should reflect that forcing an individual or an entity to act against their conscience or making benefits conditional upon having to affirm or behave in a way that is against their religious beliefs is not acceptable. We do not want our schools, students or alumni to be compelled to do something against their faith.

Religious discrimination includes making an individual or an entity act against their conscience or attaching benefits that are conditional upon a religious body having to act contrary to their religious beliefs or affirm that which runs counter to their stated policies and principles. Acknowledgment of this should be included in the Bill. We do not want our

schools or students compelled to do something against their character by government. In turn, we have to be careful that religious discrimination law is not open to being 'read-down' in a way that reduces the effectiveness of its intended protection.

Recommendation:

- *That compulsion of individuals and entities to act contrary to their genuine beliefs or attaching certain conditional benefits for matters such as funding contracts, can be classified as religious discrimination.*
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3. CORPORATIONS AND GROUPS HOLD BELIEFS

Faith-based corporations, like schools, hospitals and aged-care homes, deserve protection from unfair treatment just as much as individuals. (Sections 5, 9, 7, 8 and 11)

As discussed in our first submission:

“Person’ generally includes a body politic or corporate as well as an individual, but what about when it comes to holding beliefs?”

We require greater certainty that our schools, many of which are associations and companies, will be classified as able to hold 'beliefs'. Case law at present does not allow this for the purpose of claiming discrimination and thus denies them the opportunity to incur damages as a result.

Lack of clarity in the Bill on how a religious body can prove its beliefs, opens up significant leeway for a court to deny legitimacy for a religious entity's action and conduct.

We are concerned that in the current draft, faith-based charities and corporations operating in furtherance of their religious beliefs, even those motivated by purely humanitarian concerns, will face a shortfall in legal protection. Religious individuals and organisations, whether companies or incorporated associations, should be protected from discrimination for their beliefs and should not be subjected to a discrimination claim for merely making a statement of belief in word, symbol or deed.

By replacing the term 'person' with 'individual' in section 5, corporations are no longer included as they could have been under 2C of the *Acts Interpretation Act 1901*. The removal of the term 'person' in the definition section creates uncertainty about whether schools,

who are not individual entities, will be deemed to be 'associated' to the people referred to and the lack of objects clause that protect faith 'in community'.

Corporations and unincorporated associations must explicitly be the beneficiaries of these protections and receive the same benefits as individuals. Corporations do not lose their religious motivations and character simply because they are a collective group or charge for their services.

There are two elements at stake: the ability of corporations and unincorporated associations to be exempt from religious discrimination claims for their unique context and purpose and the ability of the same corporations and unincorporated associations to be protected from unfair discrimination themselves, such as to affirm something they disagree with as a condition of funding.

Individuals also do not lose their religious motivations and character simply because they come together in an organisation for a common cause and charge for their services. In the future, such organisations have little recourse in law if facing discrimination.

It is not unrealistic to suggest that in the future, a state government may withhold funding unless a faith-based school changes aspects of curriculum to undermine or renounce aspects of its religious tradition or doctrine. In that instance, the Bill, in its current form, would not protect that school.

Even if such a law was found to be invalid, there would still be no recourse under the 'associates' section 9. The section is an inadequate provision to protect corporations, such as schools, given the nature of their operations. 'Associates' is not defined in the Bill and section 7 and 8 will not allow a school to bring forward a claim. The Principal and Board cannot lodge a discrimination claim for a school that has no cause of action against this type of unfair discrimination.

Protection for organisations must therefore be complete in the Bill.

Corporations and unincorporated associations that include religious activity in their operations (in the furtherance of a religiously motivated concern), many of which are schools, should be explicitly protected from discrimination claims on the basis of faith. Religion is not just an individual pursuit. Without this protection, faith groups' right to manifest their beliefs in community operations can be compromised by adverse action.

As objects inform the purpose and subsequent application of the Act, it would be remiss for freedom of association not to be included in order to protect religious entities, not just individuals.

If freedom of religion is conceptualised and limited to statements of beliefs and not organisations (such as schools, churches and welfare organisations, faith-based aged care

facilities and hospitals) that promulgate and practice those beliefs, there is insufficient protection in the Bill.

See below in item 4 for recommendations.

4. ORGANISATIONAL ETHOS

The ability to preference employees on religious grounds available to schools, should also be available to other religious bodies that happen to also undertake 'commercial activities'. (Section 11)

It would be unprecedented to exclude religious bodies that engage in 'commercial activities' from the ability to preference employees and members on the basis of religion and to act in accordance with their beliefs.

Vulnerable organisations include faith-based counselling organisations, childcare centres, religious book stores, creative groups and philanthropic bodies.

This gap means that such organisations' ability to maintain the religious ethos is at risk. There are many faith-based organisations that support both Christian schools and the wider community whose purpose will be undermined by their inability to exercise their complete discretion in the operation of their organisation.

The solution proposed in the second draft is most unsatisfactory given Public Benevolent Institutions (PBIs) are only a fraction of the broader faith-based charity population. Secondly, aged care homes and hospitals are prevented from acting in accordance with their religious beliefs. For a Christian nursing home to be forced to facilitate euthanasia or a Christian drama group exploring faith to not have a right to preference like-minded participants is against the identity of these organisations.

If the unprecedented demarcation between types of charities is allowed, it will spread to other laws.

Recommendations for 3 & 4:

- *That a definition of 'person' be returned to the Bill and explicitly defined to include all entities, including corporations, trusts and associations, and that they are capable of holding 'beliefs' as such entities.*
- *That section 11 extends to all entities conducted in accordance with, or in furtherance of, the doctrines, tenets and beliefs of a religion, ensuring corporations*

and unincorporated associations benefit from the same protections that individuals can.

- *That there be a definition of ‘associates’ that establishes a nexus between ‘incorporated and unincorporated bodies and their members and board members to protect schools for the religious views of their Principal and Board.*
- *That the ability to employ staff in furtherance of an organisations religious beliefs be reflected in the Fair Work Act 2009.*
- *That subclause 3(1)(c) be extended as follows:*

c) to ensure that people can, consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief and associate in ways to express and pass on faith and culture both as individuals and in community.

- *That the ‘commercial activities’ test be withdrawn.*
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5. EVIDENTIARY REQUIREMENTS

Many of our schools are non-denominational and clarity is required as to how they are to evidence their beliefs for the purposes of lodging or defending a discrimination claim when a) case law exists that states corporations are not capable of holding ‘beliefs’ and b) there is no explicit allowance for schools to lodge discrimination claims as a corporate or incorporated association entity.

The absence of explicit advice on this matter in the Bill will mean a high evidentiary burden will be placed on schools and corporations to prove their beliefs, resulting in long court cases and high legal and expert fees. Existing case law dictates that something explicit is required to suggest that a body is capable of and actually holds beliefs.

Schools should be able to employ people who support and endorse the mission and purpose of the organisation or school, in the same manner as a political party or union.

Recommendations:

- *That there be a new definition in section 11(5) and (6) as recommended by the Institute for Civil Society and the Human Rights Law Alliance:*

11 (5) Religious body means:

- (a) *a private educational authority that has adopted the doctrines, tenets, beliefs or teachings of a particular religion, or*
- (b) *a charity registered with the Australian Charities and Not-for-profits Commission under the Australian Charities and Not-for-profits Commission Act 2012 of the Commonwealth that has adopted the doctrines, tenets, beliefs or teachings of a particular religion, or*
- (c) *any other body that has adopted the doctrines, tenets, beliefs or teachings of a particular religion.*

11 (6) *A religious body may adopt a belief as a belief the religious body holds by:*

- (a) *including the belief in its governing documents, organising principles, statement of beliefs or statement of values; or*
- (b) *adopting principles, beliefs or values of another entity which include the belief; or*
- (c) *adopting principles beliefs or values from a document or source which include the belief; or*
- (d) *acting consistently with that belief.*

6. PROTECTED FIELDS AND SERVICES

Schools should be explicitly assured in the Bill that the scope of protected fields of services includes funding decisions and the granting of contracts by State and Territory governments. (Section 21)

Faith-based schools should not be discriminated against in the granting of funds for new schools for example or for capital building works.

Recommendation:

- *That section 21 include the determination of government funding and allocation of contracts.*
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7. RELIGIOUS ACTIVITY

‘Religious activity not involving a criminal offence’ should be preferred over the term ‘lawful religious activity’ to limit religious behaviour. It is not out of the realms of possibility that a State or Territory, could unfairly or radically deem a religious view as unlawful, thus removing the protections afforded in this Bill.

The very real prospect of State and Territory ‘Conversion-Therapy Bans’ that potentially mandate treatment pathways over the better judgement of a general practitioner or school counsellor (i.e. “child-led affirmation” over “watch and wait”) through the threat of criminal charges and fines, will adversely affect young people’s lives. The Bill needs to address this emerging threat to clinical freedom and exploration when caring for young people.

As discussed in our first submission:

‘The definition of ‘lawful religious activity’ in section 5 is problematic, as it could potentially allow a State or local council to determine certain religious activity as ‘unlawful’, thus removing the Commonwealth discrimination protection. What of behaviour that the States unfairly and radically deem ‘unlawful’ in an unfair imposition on religious freedom?’

If school funding from a State Government was conditional on the school teaching social or gender theories that went against the beliefs of the school, the Act as it presently stands would not protect the school.

The definition of religious belief and activity limits protections only to ‘lawful’ activities in sections 5, 26 [now 27] and 29(3) [now 30].

Religious activity also should not be constrained to merely ‘freedom to worship’ principles, but to recognise that freedom of religion is the ability to express and manifest one’s beliefs in word, thought and deed – across all aspects of life.’

Recommendation:

- *That ‘lawful religious activity’ in section 5 be replaced with ‘religious activity that is not involving a criminal offence’.*
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8. REASONABLE BELIEVER TEST

Courts should not be given the task of engaging with matters of theology or applying a hypothetical 'reasonable believer' test. Courts should determine or clarify genuine beliefs held by an individual or entity before deciding whether their expression is appropriate in a pluralist society. (Section 11 and 5)

Courts are not qualified to resolve theological disputes. If they chose to apply secular interpretations to nuanced and complex issues, this could lead to discrimination claims erroneously failing based on the belief that there is no relevant core doctrine guiding the matter. Instead, courts need to address the individual's personal religious beliefs for which they have been discriminated.

The genuinely-held belief should be determined first, then the court should decide whether it is an acceptable belief in a pluralist society.

The 'statements of belief' definition should be a test of genuine belief. The court should not be in a position where it adjudicates theological disagreements. This could lead to a situation where it finds that claims are not legitimate if there is the appearance of inconsistency with religious tradition or doctrine or if there are several possible conclusions to a doctrinal question.

A court may even interpret a lack of uniformity within a specific religion as a reason not to protect certain statements of belief if they do not appear to be 'core' beliefs.

Freedom of belief is being able to choose what you believe. A test of 'genuine belief' would be in line with well-regarded and strong precedent in Australia, the United Kingdom, Canada and the United States, which affirms that courts should not decide theological matters.

Section 11 articulates the test for determining whether a religious body, such as a school, discriminates against a person on the basis of religion. If another person of the same religion as the religious educational body could reasonably consider the conduct to be in accord with the doctrines, tenets, beliefs or teaching of that religion then it will not be considered discrimination.

As discussed above, many Christian education schools are non-denominational. As such, it is unclear what evidence a court would require to be satisfied that such a school was operating according to its faith. Which faith, stream or tradition will it look too? Would it look beyond what is set out by the school itself? If so, to what degree of detail? Will it deem a lack of uniformity as a lack of core belief for the school to pin its protections on under the Bill?

Furthermore, the current draft does not take into account the ability of diverse interpretations to exist comfortably within a single religious tradition. As Mark Sneddon from the *Institute for Civil Society* has noted:

'The history of church relations within the West demonstrates that reasonable people can hold reasonable disagreement on the requirements of a given religious text when applied to a specific set of circumstances, but still affirm each other as fellow-believers. The Bill fails to appreciate this possibility, in fact, it potentially undermines this ability.'

Given these concerns, we recommend that the test be changed to the well-respected common law test of genuineness of belief (whether the person/body genuinely believed that their actions or belief was in accordance with the particular religion).

This will affect not just religious bodies, but employees, professionals and tradespeople who make statements outside of their workplace, conscientious objectors and those making statements of belief that are the subject of a discrimination claim.

A test of sincerity allows the actual religious beliefs to be proven, then the imposition of any limitations – which is more logical than a belief first 'failing' because of a doctrinal dispute and therefore the premise not being allowed as a religious discrimination claim despite the subjective genuineness of holding the belief.

See recommendation under item 11 – *Statements of Belief*.

9. REASONABLE OR NECESSARY TEST?

Using a test of 'reasonableness' when deciding whether there has been indirect discrimination on the basis of religious belief or activity falls short of the international law standard.

It should be replaced by a test of whether the impingement upon religious freedom is 'necessary' instead (section 8(1)(c)). This test should also be used to balance cases in which claims can be made both under the *Religious Discrimination Act* and another anti-discrimination law.

As discussed in our first submission:

'Both direct and 'unreasonable' indirect discrimination against people of faith is prohibited. However, courts are known for narrowly defining what is necessary for religious freedom, let alone in their future deliberations on what is reasonable and what is not. As one advocate noted, courts tend to equate freedom of religion 'more with a "freedom to worship" rather than a broader freedom to express faith in word and action throughout the week'.

Recommendation:

- *That any limitation on the expression of religious belief or activity must be ‘necessary’ to ensure public safety, order, health or morals, or the fundamental rights of others, as prescribed in international law.*
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10. ACCREDITATION

Qualifying bodies or accreditation authorities should not be able to discriminate against schools on the basis of faith (section 16)

Faith-based schools are an expression of freedom of thought and are a highly valuable educational option for families. The second draft protects individuals, but not corporations or associations. Schools could face requirements that obstruct their freedom of religion as a condition of registration or accreditation.

Recommendation:

- *That clause 16 be extended to protect the qualifications of corporate entities, as well as individuals.*
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11. STATEMENTS OF BELIEF

Tests of ‘good faith’ and ‘reasonably in accordance with’ religious doctrine may be too subjective and will hand judges the ability to determine matters of religious belief when they are not equipped to do so, particularly when their judgments may extend the purview of the State into religious matters (section 5 and 42).

There are ways to limit improper religious manifestation, such as tests in the United Kingdom and Canada that assess ‘genuineness’ and ‘sham religions’, other than what is proposed in the Bill.

There are certain provisions within the Bill that protect statements of belief provided they are not malicious, vilifying, harassing or inciting violence or hatred. In addition, there is also a test as to whether such statements of belief were made in 'good faith' and are seemingly already covered by other provisions.

The problem with a 'good faith' test is that it could be as low-bar a test as a defendant school or individual knowing that the statement could cause offence. This is not a good outcome, given disagreement is a natural part of healthy discussion and universal agreement on every topic is impossible.

Faith-schools must be free to teach and manifest their beliefs about human flourishing in their entirety. For Christian schools, human flourishing revolves around accepting and believing the 'good news' of Jesus Christ's death and resurrection, which, as the apostle Paul noted, can be considered a stumbling block or folly to many. The notion of a Christian organisation proclaiming these basic tenets of faith as true and necessary or accepting important doctrine such as original sin or total depravity could be considered subjectively offensive to someone who disagreed.

The Bill also does not clearly define terms such as 'malicious', 'harass', 'threaten' or 'seriously intimidate'. Without clarity on what these terms mean or do not mean, people of faith, and religious bodies could have legitimate protections denied. Potentially also creating a subjective test that is far too vague. The Bill needs to make clear its intention, ideally with an objective test of whether a reasonable person would be harassed, threatened or seriously intimidated by such statements.

There are also curious amendments to the second draft of the Bill that only seem to protect statements made 'by written or spoken words'. This ignores faith-based statements made through imagery, which has been a standard method of communication for adherents to the Christian faith for two thousand years and which often transcends culture and language. Some of the greatest works of art during the High Renaissance, for instance, are statements of belief.

We would not want to see a situation where employees were discriminated against for displaying a Christian cross, which is just as meaningful a statement of faith as anything communicated through words. We would wish to see people protected from being compelled to act in a manner that disregards their personal religious convictions.

Given that vilification laws attempt to regulate speech to a greater extent than anti-discrimination laws - section 42 must also protect statements of belief from both State and Territory vilification complaints or risk not protecting statements of belief at all.

Recommendations:

- *That faith-based schools must be able to teach, operate and advance their purpose in accordance with their faith without constraint unless necessary as per international law.*
 - *In turn, expand s42 to protect statements of belief from vilification laws.*
 - *The definition in section 5 of statement of belief should be:*
 - ‘(a) (i) is of a religious belief held by a person; and (ii) the person has a genuine conviction that the belief in question is in accordance with, or in furtherance of, the doctrines, tenets or teachings of the person’s religion.’*
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12. RELIGION AS A CHARACTERISTIC

Elements of existing discrimination law should not be applied in a blanket fashion to the Religious Discrimination Bill. There are conceptual differences between the various discrimination Bills that need addressing (section 7).

Religious beliefs become the characteristics of a person for the purpose of direct discrimination law. Complainants should not be compared to a hypothetical non-religious person doing the same thing and suffering the same action as an excuse to say that person was not discriminated against for their religious beliefs.

The same applies to people who are forced to do something against their religious conscience. To apply the comparator test will seriously undermine discrimination law conceptually – it is meant to protect religious observance as a unique characteristic (see item 14 – *Conscientious Objections and Reasonable Adjustments*).

Recommendation:

- *That it be made clear that a person in proven circumstances can be discriminated against on the basis of their genuine religious convictions.*
 - *That being forced to act against one’s religious conscience is something an individual can suffer as a religious believer without requiring reference to another person in a determining test (see further discussion on section 7 under item 14 – *Conscientious Objections and Reasonable Adjustments*).*
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13. EMPLOYER CONDUCT RULE

Protecting what people of faith say.

As noted in our first submission:

'The future workplace our students will contribute to matters greatly to us. Clause 8(3) of the Bill introduces a presumption that it is reasonable for small employers and government to regulate the speech of their employees, regardless of whether the speech occurs inside or outside the workplace. It also presumes that large employers are entitled to regulate the speech of their employees within the workplace.

In essence, there is no protection for the expression of belief inside the workplace and a degree of restriction outside the workplace depending on the employer. The presumptions of reasonableness in the Bill should be removed, but there are reasonable directions regarding the regulation of speech of employees that can be made.

Employers should only be able to prevent statements of belief in the workplace if it is "necessary" and we question why it depends on the amount of money that company turns over as to the religious freedom it can 'afford'.

The 'unjustifiable financial hardship' test is also a problematic way to restrict employee's religious speech. The test could potentially be enlivened via threat of boycott (or confected threat i.e. via social media) and manipulation of circumstances to procure a legal result would leave individuals and entities adrift.'

Recommendation:

- *Remove the 'unjustifiable financial hardship test'*
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14. CONSCIENTIOUS OBJECTIONS AND REASONABLE ADJUSTMENTS

Sections 7 and 8 including sub-ss (5) and (6):

We are concerned for the ability of our alumni to be excellent contributors in whatever careers and fields they pursue. In this context we suggest greater protections for religious conscientious objectors in health care and other fields.

There should be a general provision requiring those who may discriminate in the relevant fields where unlawful discrimination is prohibited (e.g. employment, accommodation, provision of good and services) to make reasonable accommodation for people who refuse to engage in conduct or to express or associate themselves with particular views because of their genuine religious beliefs.

For example, the Jewish or Adventist believer who will not work on Saturday, the Muslim who needs to be briefly absent from her work duties to pray at midday on Friday, the health practitioner who won't participate in abortions or euthanasia, the Muslim or Christian who does not want to display a desk poster at the work Pride Day celebrations.

There is a similar concept of reasonable adjustment in the Disability Discrimination Act 1992 (Cth).

We propose amending both clause 7 on direct discrimination and clause 8 on indirect discrimination to require persons who may discriminate on the basis of a religious belief or activity to make reasonable adjustments for persons with that religious belief or activity.

This will avoid the comparator test problem where courts may say that a policy applies equally to all persons who engage in particular conduct regardless of whether the conduct is motivated by religious belief.

In terms of indirect discrimination we propose that the *result* sought by the person imposing the condition, requirement or practice (e.g. all staff must be working at midday on Fridays if rostered on, or all interns must assist as required at all medical procedures) makes a reasonable adjustment for religious belief and activity. Secondly, that the *condition, requirement or practice itself* makes a reasonable adjustment (e.g. no roster swaps or flexi-time can be taken for absences at midday on Friday, or interns who do not attend a medical procedure when required will lose pay and promotion credits).

Health Practitioners

As noted in our first submission, *'Provisions in the Bill that govern conscientious objections by health practitioners do not apply to faith-based hospitals. Unfortunately, this leaves faith-based health providers exposed to religious discrimination claims. Health practitioners are*

also subject to less than ideal State laws and if a state law does not afford them the right to conscientiously object, then they have no protection under Commonwealth law in the Bill's present form.'

Unfortunately, the new 'unjustifiable adverse impact' test will cover nearly every inconvenience to a patient, regardless of the impact on the health practitioner with a faith.

We are concerned about our alumni who become health practitioners and recommend that regardless of whether a State or Territory allows a health practitioner to conscientiously object, that a hospital conduct rule requiring action against conscience is not reasonable.

Recommendations:

- *Insert a definition of reasonable adjustment as follows:*

reasonable adjustment: an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.

- *Clause 7 should be amended to include the following provisions:*

A person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of the religious belief or activity of the aggrieved person if:

(a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and

(b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of their religious belief or activity, treated less favourably than a person without the religious belief or activity would be treated in circumstances that are not materially different.

(3) For the purposes of this section, circumstances are not materially different because of the fact that, because of their religious belief or activity, the aggrieved person requires adjustments.

- *In section 8 (indirect discrimination) include new sub-clauses as follows:*

8(2A) For the purposes of paragraph (1)(c) a condition, requirement or practice is not reasonable unless:

- (a) the result sought by the person who imposes or proposes to impose the condition, requirement or practice makes reasonable adjustments for persons who hold or engage in the religious belief or activity; and*
 - (b) the condition, requirement or practice makes reasonable adjustments for persons who hold or engage in the religious belief or activity; and*
 - (c) the condition, requirement or practice creates the least possible restriction on the ability of persons to hold, express or engage in the religions belief or activity which is necessary to achieve the result mentioned in paragraph (a).*
- *Section 8 on health practitioners should be amended so that regardless of whether a State or Territory allows a health practitioner to conscientiously object, a hospital conduct rule requiring action against conscience is unreasonable.*
-

15. INHERENT REQUIREMENT TEST

As discussed in our first submission regarding section 32:

‘We think that inherent requirement tests are highly problematic and we have sought to avoid their introduction in the education sector. Not only would it shift control of what is required by an employer in the work context to the courts, profoundly non-core requirements of a role could easily find their way into ‘inherent requirement’ status and conflict with employee beliefs. We would prefer that such exceptions be limited to instances where the role requires the employee to be a religious adherent.

Secondly, s31(4) [now 32(4)] appears to not prevent accreditation bodies from penalizing professionals, like doctors, lawyers and social workers or counsellors by cancelling registration on the assumption that the religious belief or objections makes them unable to carry out the ‘inherent requirement’ of their role?

Will students be able to achieve teacher registration if they have been taught in a faith-based accredited university or college?

Our students make wonderfully caring professionals and to threaten their livelihood by risk of de-registration for socially contentious issues is something we wish to prevent. Students should never be precluded from registration on relative morality grounds, rather only on competency grounds or the inadequacy of their training.’

Recommendation:

- *Restrict the inherent requirement test exceptions to where holding a faith is an actual requirement.*
-

16. FREEDOM OF RELIGION COMMISSIONER

Without more detailed and relevant requirements for the role of Freedom of Religion Commissioner and the potential for such requirements to breach the constitution, our argument remains that it is far better, that there is no Freedom of Religion Commissioner (section 46).

As discussed in our first submission:

‘We remain unconvinced that creating this position is wise. If the role is to serve the impression that discrimination cases will be heard by someone with religious sympathy, this would undermine the reasonable and vital expectation that all commissioners are to judge impartially and with freedom of belief, conscience, speech or association for religious (and other groups) in mind – regardless of their personal sympathies.

We are concerned that the perceived bias and subjectivity of a specific Freedom of Religion Commissioner will undermine religious freedom by narrowing the basis by which it is accepted i.e. only by those who also hold religious beliefs. We would prefer that the manifestation of religion by individuals and communities be held on par with civil liberties – freedom of association, freedom of belief, freedom of conscience and freedom of speech by the Commissioner.

Funding for this office would be better directed toward educating existing commissioners in issues of religious literacy and the practical application of faith and doctrine in the daily lives of individuals or the operations of an organization that is faith-based.

We also wonder what would happen if a religious discrimination complaint involved a simultaneous claim under the Sex Discrimination Act arising from the same circumstances? For example, a magistrate who wishes to be excused from approving a same-sex adoption?

How would the Commission manage competing rights by parties who would prefer it to be heard by a Commissioner other than the Freedom of Religion Commissioner?

These outstanding questions have still not been answered in the Bill.

Recommendation:

- *That no Freedom of Religion Commissioner be appointed.*
-

17. Religious Freedom Act

As discussed in our first submission:

'Given the manner in which the High Court has traditionally interpreted the concept of religious freedom under section 116 of the Constitution, we believe there needs to be a Religious Freedom Act in order for Australia to meet its international obligation to implement Article 18 of the International Covenant on Civil and Political Rights (ICCPR).

Under such an Act, governments and councils would need to justify their administration of policy. The Act would also protect against practices that unduly burden religious freedom, unless, as Article 18 of the ICCPR states, they are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.'

Recommendation:

- *Protect religious freedoms through a Religious Freedom Act*
-

18. Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (section 4)

As our first submission argued:

'While the Bill has amended the section of the Charities Act to ensure that a charity will not lose its charitable status if it advocates for a traditional view of marriage, the Bill has not amended section 6 of the Act, which requires charities to be for the 'public benefit'. In other common law countries, courts have removed the tax-exemption status of charities that advocated for a traditional view of marriage and sexuality, arguing that they did not meet the 'public benefit' requirement. We are concerned that the international examples create a dangerous precedent, and to fulfil the spirit of the current Bill, Section 6 must be amended.'

Recommendation:

- *That section 6 be amended to accommodate religious beliefs more broadly, including a traditional view on marriage and gender.*
-

Where to from here?

We believe that a Bill introduced into Parliament can pave the way to protect all faith communities into the future. Part of being a genuinely multicultural and pluralist society is ensuring that all communities have the freedom to express themselves and live according to their beliefs. Faith, in whatever form it might be found, is here to stay in Australia. This should be something to be celebrated and protected, as religious communities contribute to the country's vibrant social and cultural fabric.

We are not after a *Human Rights Act* or *Bill of Rights* – we know that allowing courts to decide matters of complex public policy is dangerous – but we hope to protect our rights within this religious discrimination law.

Our overarching recommendation from our first submission stands. Both the Government and Opposition need to articulate a clear narrative acknowledging divergent views on social matters and stating a commitment to social pluralism manifested in the right of parents to educate their children in accordance with their moral convictions.

We urge the Government, Opposition and Crossbench to display the political will to protect freedom of association by expressing a narrative that all Australians can agree with – that civil liberties should benefit all communities and parental principalship, freedom of association and the ability to determine human resources and the direction an entity takes are basic rights in a democracy.

We will not stop our advocacy until our schools are assured the space to educate in accordance with our beliefs and principles. This was what we were founded to be – a blessing to young Australians as they grow, learn and mature into adults with positive foundations for an enriched life.

Conclusion

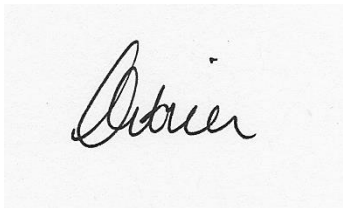
The Christian schools' movement will continue. It will flourish in the resolve and commitment of parents, staff and communities in the pursuit of an authentic Christian

education to benefit children and the wider society. No intimidation or ridicule of our schools can detract from the living and breathing hope in Christ that permeates these communities through the custodianship of parents and staff.

This is what attracts families to our schools. The community and hope for life flowing from our beliefs are what ground our schools' perspectives and character. These are places where people from all backgrounds and nationalities find their home on 'common ground' to learn and develop with others in a Christ-focused environment.

We encourage members of parliament, bureaucrats and journalists to contact us to arrange a visit to a school and to sit down with principals and staff and learn about the schools for which their policies, legislation and commentary directly relate. It would be our pleasure to host you and welcome you into our schools.

On behalf of the students, parents, staff, alumni, founders, academics, benefactors and supporters of Christian education, we present our concerns and hopes for the Bill above and ask that you carefully consider them for the preservation of social pluralism in Australian. The fruits of Christian education are of great benefit to Australian youth and their families and should be allowed to continue to grow and flourish.



Alithea Westerman

Executive Officer