Human Rights and Anti-Discrimination Bill 2012

Submission by The Australian Association of Christian Schools Limited on the consolidation of Commonwealth Anti-Discrimination Laws – Exposure Draft

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1. Introduction

This submission to the Senate Legal and Constitutional Affairs Committee (**Senate Committee**) has been prepared by the Australian Association of Christian Schools Limited (**AACS**) in response to the Inquiry into the Exposure Draft of the *Human Rights and Anti-Discrimination Bill* 2012 (Cth) (**Bill**).

1.1 ACCS commends the Government for referring the Bill to the Senate Committee for review and public consultation prior to its formal introduction to Parliament.

1.2 In this submission AACS intends to respond to a number of issues referred to in the Bill.

2. Recommendations

2.2 AACS and its member schools wish to make a number of recommendations for consideration by the Senate Committee.

2.3 These recommendations are explained in greater detail in the body of this submission.

(a) Recommendation 1 - That Australian law provide a clear and unequivocal acknowledgement of the right to religious freedom as a <u>fundamental</u> right.

(b) Recommendation 2 - That Australian law provide a clear and unequivocal acknowledgement of the right to practise religion <u>in community</u> by the establishment of faith-based organisations.

(c) Recommendation 3 - That Australian law provide a clear and unequivocal acknowledgement that religious organisations are lawfully permitted to select employees sharing the same religious beliefs as those held by the employing religious organisation.

(d) Recommendation 4 - That Australian law provide definitions of '*religious institution*', '*religious organisation*' or '*religious body*' which are:

(i) not so narrow as to negate the fundamental human right to practise religion in community, including through faith-based organisations, and

(ii) broad enough to include non-denominational and independent organisations possessing faith-based missions or values.

(e) Recommendation 5 - That Australian law provide a clear and unequivocal acknowledgement that genuine occupational qualifications for a position are not permitted to be determined '*externally'* in ignorance of the religious mission, values and strategy of an employing religious organisation.

(f) Recommendation 6 – That, in the event that Recommendation 21 is not accepted, the current religious exceptions regime be maintained but extended ensuring that there is no lessening of the current protection accorded to freedom of religion.

(g) Recommendation 7 – That, in the application of religious exceptions, Australian courts should not be called upon to arbitrate on the validity or otherwise of religious doctrines, tenets, beliefs or teachings.

(h) Recommendation 8 – That, if the term '*religious susceptibilities'* is retained in the context of religious exceptions, this term be clearly defined to embrace religious beliefs and values held by individuals and faith-based organisations.

(i) Recommendation 9 – That, in respect of a particular job or position with a faith-based organisation, Australian law protect faith-based organisations in such a way as allow then to determine, in good faith, the inherent requirements of a job based on the organisation's own values, beliefs and principles.

(j) Recommendation 10 – That, in respect of employment by a faith-based organisation, Australian law protect faith-based organisations as regards a complaint of unlawful discrimination in circumstances where the organisation considers, in good faith, that its act of distinction, exclusion or preference is based on the organisation's own religious values, beliefs and principles.

(k) Recommendation 11 – That Australian law acknowledge that a faith-based organisation's values, beliefs and principles are those values, beliefs and principles as are determined in good faith by the organisation itself.

(l) Recommendation 12 – That Australian law acknowledge that faith-based organisations have the right to practise their religion '*corporately'* and that this includes a right to decide that all or some roles within the organisation are entitled to include a requirement of acceptance and practice of a specified religious faith.

(m) Recommendation 13 – That Australian law acknowledge that faith-based organisations have the right to shape organisational advertisements and job descriptions at all levels in such a way as to include certain religious dimensions.

(n) Recommendation 14 – That Australian law acknowledge that the terms of any government subsidies to faith-based organisations not be permitted to include requirements preventing such organisations from making decisions or following practices the result of which would be to damage or undermine the religious character, mission and values of the faith-based organisation.

(o) Recommendation 15

That the term '*discrimination'*, wherever it appears in the Bill, be replaced by the term '*unlawful discrimination'*.

(p) Recommendation 16

That references to '*substantive equality'* and '*special measures'* in Clauses 3(1)(d), 3(1)(2), 21 and 79 to 82 of the Bill be deleted.

(q) Recommendation 17

That, in order to avoid imposing unnecessary further compliance burdens on the voluntary sector, volunteers remain exempt from laws on unlawful discrimination.

(r) Recommendation 18

That it be ensured that every aspect of the Bill falls squarely within the ambit of a power granted to the Commonwealth under the Australian Constitution.

(s) Recommendation 19

That Clause 17 be amended by the deletion of the reference to '*political opinion'* and '*social origin'*.

(t) Recommendation 20

That Clause 19(2)(b) of the Bill be deleted.

(u) Recommendation 21

That reference to the fundamental right to religious freedom be included within the definition of '*unlawful discrimination'* so as to properly respect the importance and eminence of this fundamental right and that Clause 19 of the Bill be amended accordingly.

(v) Recommendation 22

That Subclauses 33(1)(a) and 33(1)(f) of the Bill be deleted.

(w) Recommendation 23

That Subclause 33(3) of the Bill be deleted.

(x) Recommendation 24

That Clause 36(2)(b) of the Bill be deleted.

(y) Recommendation 25

That Clause 36 of the Bill be amended by the inclusion of an exception for single sex educational institutions and single sex student accommodation from unlawful discrimination on the grounds of gender identity.

(z) Recommendation 26

That Australian law provide a clear and unequivocal statement that, in situations where there is a conflict of rights, a specific right to practise religious beliefs by the establishment of organisations with a religious ethos prevails over a general right not to be discriminated against unlawfully on the ground of one or more protected attributes.

(aa) Recommendation 27

That Clause 53 of the Bill be amended to ensure that the coverage of the law as it currently stands is not extended.

(bb) Recommendation 28

That Subclause 17(1)(o) of the Bill be deleted.

(cc) Recommendation 29

That temporary exemptions where they are referred to in Clauses 83 to 86 of the Bill be used only for situations that are temporary in nature and not to avoid the robust protection of religious freedom rights of individuals and organisations.

(dd) Recommendation 30

That Clause 124 of the Bill be deleted.

3. Overview of AACS

3.1 AACS is an Australian public company limited by guarantee. Its registered office is located at 836 Mulgoa Road, Mulgoa NSW 2745.

3.2 AACS has as members approximately 120 schools, over 50,000 students and approximately 95 parent/church associations across all States and Territories of Australia. AACS member schools range in size from very small (< 20 students) primary schools in remote areas to very large (>1700 students) combined primary-secondary schools in larger urban centres.

3.3 Most AACS member schools are owned and governed by parent or church associations, though a small number are governed as ministries of particular Christian church congregations.

3.4 In all cases, AACS member schools are incorporated under either State or Territory associations incorporation legislation or as Australian public companies limited by guarantee pursuant to the *Corporations Act* 2001 (Cth).

3.5 All AACS member schools are eligible to receive government funding and are therefore either 'registered' or 'exempt from registration' under relevant State or Territory regulations.

3.6 Each AACS member school association is governed by its own rules or constitution which generally identifies in its statement of purpose and/or objects that it exists to educate the enrolled children within a context of Christian beliefs, a Christian worldview and/or Christian values as identified in the Christian scriptures, the Bible.

3.7 In most, if not in all cases, the AACS member school association will have incorporated into its constitutions a Statement of Faith or Creed specifying the school community's particular beliefs or simply make reference regarding their beliefs to the Bible.

3.8 The mission of AACS itself is to provide assistance to Christian schools in Australia and to advocate and protect their interests at the national level. In so doing AACS's aims to:

(a) Provide a combined 'Christian schools voice' on issues relevant to Christian education,

(b) Enable combined representation at the national level on behalf of Christian schools,

(c) Undertake cooperative activities that are in the overall interests of Christian schools, and

(d) Disseminate appropriate information on issues of national significance to Christian schools.

3.9 It is important to note that most AACS member schools are not identified with a particular Christian denomination. Whilst they all identify with a Biblical Christian faith this is, in most cases, in an 'inter-denominational' or 'non-denominational' sense.

3.10 For this reason, the activities, beliefs and objects of many AACS member schools are not automatically linked to the beliefs or public statements of a particular Christian denomination or church leader but will either be clearly stated in the individual school's objects (as set out in their rules of constitution) or be based upon the authority upon which they rely (the Bible).

3.11 For the most part, AACS member schools have 'open' enrolment policies. However, almost all AACS member schools are specifically designed to support Christian parents in the education of their children from a Biblical and Christian perspective.

3.12 As such, together with the parents, AACS member schools are an integral part of the formation of religious beliefs (in the Biblical Christian tradition). They are not restricted by denominational traditions, though they may choose to draw on certain broad theological traditions from within the breadth of Christian history (e.g. Protestant, Reformed, Evangelical, Pentecostal etc.) as a framework for interpretation and/or explanation of their beliefs.

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4. General comments

4.1 Concerns

(a) AACS and its member schools are concerned about recent developments in Australia where governmental authorities and tribunals in some jurisdictions have made decisions and judgements based on the authority or the tribunal's own perception of what constitutes Christian belief without making appropriate enquiries of the institution itself as to the content of its actual belief.

(b) This is, at best, alarming and, at worst, mischievous. Anyone possessing even a superficial knowledge of world religions would know that Christianity, just as with Islam, Hinduism, Buddhism, Judaism or any other '*worldview'* belief system, does not speak with a single unified voice.

4.2 Religious beliefs of AACS and its member schools

(a) As regards the issues of personal faith, moral values and lifestyle choices, AACS member schools have very specific and strongly-held beliefs and standards which they seek to apply within the teaching content, employment relationships and enrolment criteria.

(b) AACS and its member schools hold that these beliefs, standards and choices derive from the teaching and example of Jesus Christ, his revealed purposes for godly living as expressed in the Christian scriptures, and from the counsel and encouragement of the Holy Spirit.

(c) AACS and its member schools make no apology for these beliefs and, like those who adopt alternative worldviews, AACS and its member schools ask for the respect and protection of Australian law to allow them to express their beliefs, to teach them and to require staff to model them by their example, teaching, behaviour and lifestyle choices.

(d) AACS and its member schools claim the right under Australian law to operate schools and to teach students without undue restriction or limitation by State or Commonwealth authorities upon the content of their teaching or upon the interpretation or treatment of that content.

(e) AACS and its member schools also claim the right to employ persons who have a thorough understanding of, and commitment to, the individual school's Christian worldview and Statement of Faith and who, in their personal lives, are able and willing to consistently model a personal standard of conduct and lifestyle that aligns to the Christian worldview and Statement of Faith of the school in which they have applied to teach.

(f) In a similar fashion, AACS member schools expect students to comply with and respect the behaviour and faith standards of the school they attend.

(g) Therefore, in seeking to simplify, harmonise and consolidate the law in the area of unlawful discrimination, AACS and its member schools wish to ensure that they shall continue to remain free to practice, promote and apply their religious beliefs in the context of their school communities and to openly declare the religious foundations thereof.

(h) AACS and its member schools also accept that they are expected to demonstrate substantive consistency in the application of these religious principles and standards.

(i) AACS and its member schools confirm their commitment to standards of best practice and ethical conduct and, to that end, are fully supportive of appropriate Government scrutiny.

(j) We are committed to living at peace with other Australians and accept that there are others who hold beliefs that are in direct conflict with our own. AACS and its member schools remain willing to engage in constructive and open dialogue with those who hold different beliefs without demeaning them as persons and we are committed to avoiding any intentional action that might incite anger, violence or hatred against such persons or their religions.

(k) AACS and its member schools expect the protection of Australian law to allow them to freely practice, promote and apply their religious beliefs and to teach from their worldview within their own communities.

(l) AACS and its member schools seek the Australian Government's support to ensure the robust protection of their right to exercise their rights to religious freedom in such a fashion.

(m) AACS and its member schools do not wish to see the enactment of legislation the purpose of which is to silence civil debate or preclude school-based teaching that critically explores differences and concerns about the beliefs of different religions - provided that these discussions and debates promote community understanding and mutual respect and do not incite hatred or ridicule.

4.3 Purpose of Bill

(a) AACS and its member schools understand that one of the purposes of the Bill is to give effect to Australia's international obligations to prevent unjustified forms of discrimination. In so doing, AACS wishes to urge the Senate Committee to ensure that Australia complies with its international obligations to protect rights to freedom of religion, association and cultural expression.

(b) AACS and its member schools believe that, in an ideal world, any action claiming unlawful discrimination should generally be quite difficult to mount. To this end, we believe that the international covenants should be the primary standard against which our domestic laws on unlawful discrimination should be based.

(c) AACS and its member schools are strongly of the view that, fundamentally, any new legislation must fully endorse the rights upheld by the conventions to which Australia is a signatory. To do anything else would be putting the 'cart before the horse.'

(d) Unlawful discrimination of the type needing the protection of Australian law demands a set of clear and enduring standards against which certain actions can be demonstrated to be unjust and/or inequitable. This definition must never be weakened to the point that the law becomes a vehicle for punitive action by those who want to exact recrimination against those with whom they have a fundamental disagreement.

(e) AACS and its member schools also note that the Commonwealth Government has already resolved not to move down the path of introducing a Human Rights Act or Charter of Rights. With this in mind, AACS wishes to ensure that the consolidation exercise does not become a 'second bite' at enacting a Human Rights Act or Charter of Rights.

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5. Religious Freedom

5.1 **AACS applauds the Commonwealth Government's commitment to maintain the current level of legal protections for religious freedom.**

5.2 We wish to ensure that the consolidated legislation fully and appropriately acknowledges and protects the rights of AACS and its member schools (as well of those of other faith-based organisations) to religious freedom.

5.3 AACS and its member schools submit that:

(a) Religious freedom is a fundamental human right,

(b) Religious freedom is the cornerstone of a just society,

(c) Religious freedom is the foundation for international peace and security,

(d) Ensuring that religious freedom can be freely exercised is an important social policy objective for pluralistic and democratic societies such as our own,

(e) The significance of religious freedom has been affirmed by various statements, documents and declarations of the United Nations which declare that the rights of the human person include:

(i) The right to freedom of thought, conscience and religion.

(ii) The right to manifest religion and belief, in private and in public, subject only to such limitations as prescribed by law and as are necessary to protect public safety, order, health or morals or the fundamental rights and

freedoms of others.

(iii) The right of parents to ensure that the religious and moral education of their children is in conformity with their own religious beliefs and convictions.

(iv) The right of religious bodies to be protected from undue intrusion by the State into their ethos, principles or conduct.

(v) The right of people to be protected from discrimination based on religion and belief in the area of employment (and the obligation of the State to take effective measures to prevent and eliminate religious discrimination in all fields of civil, economic, political, social and cultural life).

(f) It is also important to AACS and its member schools for the Senate Committee to acknowledge that the right to freedom of religion is about more than just a private affair - it is a deeply rooted principle of international and domestic law. Article 18 of the *International Covenant on Civil and Political Rights* 1966 (**ICCPR**)[1] and Article 1.1 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* 1981 (**Religion Declaration**)[2] both state that everyone shall have the freedom:

'…. *either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching*.'

(g) More specifically, Article 6 of the Religion Declaration states that the right to freedom of thought, conscience, religion or belief shall include the freedom:

(i) To establish and maintain appropriate charitable or humanitarian institutions, and

(ii) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief.

(h) Under international law these religious freedoms are to be subject only to such limitations:

'…. *as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others*.'[3]

5.4 AACS and its member schools are concerned about the extent to which Australian

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1 International Covenant on Civil and Political Rights 1966 www2.ohchr.org/english/law/ccpr.htm.

2 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* 1981 URL www2.ohchr.org/english/law/religion.htm

3 Religion Declaration Article 1.3.

human rights frameworks place emphasis on the rights of '*individuals'*. AACS therefore submits that '*communities'*, given that they are more than a mere collection of individuals, have an existence in and of themselves and also have religious freedom rights.

5.5 In its submission to the Australian Human Rights Commission's (**AHRC**) *Freedom of Religion and Belief in the 21st Century Project* (**AHRC Religion Enquiry**) the Anglican Church Diocese of Sydney drew attention to the common presentation of religion primarily as a matter for '*individual choice'* rather than a '*communal' affair*'. In its submission the Sydney Anglican Diocese stated:

'…. *religious people often meet together in organised groups, and traditionally the 'freedom of religion' has also been a defence of the life and identity of these groups*.'[4]

5.6 The Sydney Anglican Diocese further stated in its submission that their own concerns are reflected in the ICCPR and the Religion Declaration[5] where these statements mention the place of religious communities, organisations and the education of children.

5.7 In its submission to the AHRC Religion Enquiry, the Ad Hoc Interfaith Committee stated:

'*For most people, religion is a communal and public commitment, underscoring the fact that the person is not simply an isolated, autonomous individual but a person in solidarity with others. This solidarity is underscored also in other communities – locality, school, business, and cultural and sporting activities, and most particularly in the family (Article 16). In such communities people keep faith with the allegiances that give meaning to their lives. Respect for human rights requires the protection of the communities and associations by which a culture of human dignity flourishes*.'[6]

5.8 With the exceptions and exemptions currently included within legislation relating to unlawful discrimination in Australia, there is a misconception held by many that religious freedom is a lesser right, an '*exceptional'* right, rather than a concept which should be included within the very definition of unlawful discrimination itself. It is therefore both misleading and unhelpful to deal with the issue of '*religious freedom'* by way of '*exceptions'*.

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4 Submission No 1533 to the Freedom of Religion and Belief Project, Anglican Church Diocese of Sydney - www.humanrights.gov.au/frb/frb_submissions.html.

5 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 www2.ohchr.org/english/law/religion.htm.

6 Submission No 1687 to the Freedom of Religion and Belief Project, Ad Hoc Interfaith Committee - www.humanrights.gov.au/frb/frb_submissions.html.

5.9 AACS and its member schools therefore seek the inclusion of a definition of religious freedom which encompasses the concept of religious freedom within the definition of unlawful discrimination itself.

5.10 As faith-based organisations, AACS and its member schools maintain the right under Articles 1.1 and 6 of the Religion Declaration[7] to express their religious belief in community with others by establishing organisations which embody religious beliefs and values. This right must be preserved and protected by law.

5.11 AACS and its member schools also maintain that the definition of a religious institution must not be understood so narrowly as to negate the fundamental human right to practise religion '*in community'*, including through the establishment of religious charities and associations.

5.12 AACS and its member schools maintain that, if their submission in paragraph 8 above regarding religious '*exceptions'* is not accepted by the Senate Committee '*and 'exemptions'* for religious organisations are retained in their current form, they should not be interpreted so narrowly as to exclude religious organisations which are not '*denominationally-specific'*. AACS and its member schools are such organisations. Whilst our member schools are deeply Christian in foundation, belief and practice they are not operated by or allied to any one particular Christian denomination.

5.13 AACS and its member schools would not exist if it were not for the Christian mission and values upon which they are formed and in which they find their *raison d'être*. Accordingly, the relationship between AACS and their member schools and the Christian faith is more than a simple historical quirk - it is central to their very identity and to what they do.

5.14 For this reason, AACS and its member schools consider it essential that genuine occupational qualifications not be determined externally, in ignorance of their religious mission and values. The Christian faith is not simply the foundation and motivation for the work of AACS and its member schools - it also shapes the way in which they operate on a day to day basis – in their structure, employment practices, enrolment, curriculum etc. In this way, the identity of AACS member schools as Christian organisations dictates and impacts the decisions made at every level. This has a number of non-negotiable implications:

(a) The right under Article 6(b) of the Religion Declaration to practise religion '*corporately'* including the right to decide that all or some roles within member schools legitimately expect and require that the holders thereof both accept and

[7] Religion Declaration, op cit.

practise the Christian faith.

(b) The right under Article 6(b) of the Religion Declaration to shape advertisements and job descriptions at all levels in such a way as to include certain religious dimensions. AACS and its member schools cannot employ, at any level, someone who is 'hostile to' or 'unsupportive of' their mission, vision or values. Provided this is done in good faith, religious organisations such as AACS and its member schools maintain the right to decide whether some or all of the positions offered by it carry such a faith dimension and what expression of Christian faith is to be expected of their employees. To limit this right would be to seriously diminish their specific right to religious freedom. The qualifications and roles within a religious organisation such as AACS and its member schools cannot be dictated by beliefs or values formulated externally to their organisation.

(c) AACS and its member schools contend that, in the application of courts and tribunals of 'exceptions' to unlawful discrimination laws these courts and tribunals:

(i) Must not be called on to arbitrate on what is, or is not, a Christian community's doctrine, tenet, beliefs or teaching, and

(ii) Must not apply a narrow definition of a '*religion'* or '*religious organisation'*.

Indeed it is our firm belief that courts and tribunals will almost always lack the competence to do so.

(d) It is essential for AACS and its member schools that the Commonwealth Government recognise and respect that the right to religious freedom extends far beyond the running of worship services within church buildings or the nomination and appointment of clergy. It extends to the vast array of activities and services which AACS, its member schools and other faith-based organisations carry out within the community at large.

5.15 AACS and its member schools consider that it logically follows that there is a right to express religious belief '*in community with each other'* by the establishment of organisations which embody religious beliefs and values. We contend that to allow for any limitation of this right would be to seriously diminish our specific right to religious freedom.

Recommendation 1 - That Australian law provide a clear and unequivocal acknowledgement of the right to religious freedom as a <u>fundamental</u> right.

Recommendation 2 - That Australian law provide a clear and unequivocal acknowledgement of the right to practise religion in community by the establishment of faith-based organisations.

Recommendation 3 - That Australian law provide a clear and unequivocal acknowledgement that religious organisations are lawfully permitted to select employees sharing the same religious beliefs as those held by the employing religious organisation.

Recommendation 4 - That Australian law provide definitions of '*religious institution'*, '*religious organisation'* or '*religious body'* which are:

- not so narrow as to negate the fundamental human right to practise religion in community, including through faith-based organisations, and
- broad enough to include non-denominational and independent organisations possessing faith-based missions or values.

Recommendation 5 - That Australian law provide a clear and unequivocal acknowledgement that genuine occupational qualifications for a position are not permitted to be determined '*externally'* in ignorance of the religious mission, values and strategy of an employing religious organisation.

Recommendation 6 – That, in the event that Recommendation 21 is not accepted, the current religious exceptions regime be maintained but extended ensuring that there is no lessening of the current protection accorded to freedom of religion.

Recommendation 7 – That, in the application of religious exceptions, Australian courts should not be called upon to arbitrate on the validity or otherwise of religious doctrines, tenets, beliefs or teachings.

Recommendation 8 – That, if the term '*religious susceptibilities'* is retained in the context of religious exceptions, this term be clearly defined to embrace religious beliefs and values held by individuals and faith-based organisations.

Recommendation 9 – That, in respect of a particular job or position with a faith-based organisation, Australian law protect faith-based organisations in such a way as allow then to determine, in good faith, the inherent requirements of a job based on the organisation's own values, beliefs and principles.

Recommendation 10 – That, in respect of employment by a faith-based organisation, Australian law protect faith-based organisations as regards a complaint of unlawful discrimination in circumstances where the organisation considers, in good faith, that its

act of distinction, exclusion or preference is based on the organisation's own religious values, beliefs and principles.

Recommendation 11 – That Australian law acknowledge that a faith-based organisation's values, beliefs and principles are those values, beliefs and principles as are determined in good faith by the organisation itself.

Recommendation 12 – That Australian law acknowledge that faith-based organisations have the right to practise their religion '*corporately'* and that this includes a right to decide that all or some roles within the organisation are entitled to include a requirement of acceptance and practice of a specified religious faith.

Recommendation 13 – That Australian law acknowledge that faith-based organisations have the right to shape organisational advertisements and job descriptions at all levels in such a way as to include certain religious dimensions.

Recommendation 14 – That Australian law acknowledge that the terms of any government subsidies to faith-based organisations not be permitted to include requirements preventing such organisations from making decisions or following practices the result of which would be to damage or undermine the religious character, mission and values of the faith-based organisation.

6. Definition of discrimination – various places

6.1 AACS wishes to present various observations concerning a number of terms of particular interest to it and its member schools.

6.2 We consider the term '*discrimination'* to be problematic. Ordinary, dictionary definitions of the term 'discrimination' include:

(a) '*Perceiving differences or distinctions with nicety*,'

(b) '*Using one's judgement well*,' or

(c) '*Observing a difference*.'

6.3 As such, the term '*discrimination'* is not necessarily negative. Indeed, it is often perceived in a very positive sense.

6.4 For this reason AACS recommends that the definition in the consolidated legislation be qualified by the addition of the adjective '*unlawful'* and thus refer to '*unlawful discrimination'* throughout the Bill.

Recommendation 15
That the term '*discrimination'*, wherever it appears in the Bill, be replaced by the term '*unlawful discrimination*.'

7. Substantive equality and special measures to achieve equality – Subclause 3(1)(d)(i) and Subclause 3(1)(e), Clause 21 and Clauses 79 to 82

7.1 In relation to the proposed objects of the Bill, SubClause 3(1)(d)(i) refers to the object of promoting 'recognition and respect within the community for the principle of equality (including both formal and substantive equality)'.

7.2 However neither the term '*formal equality'* nor the term '*substantive equality'* is defined in the Bill. The Explanatory Notes do provide some clarity when they indicate that:

(a) '*Formal equality'* requires people to be treated the same, regardless of their irrelevant personal attributes, and

(b) '*Substantive equality'* takes into account the effects of historical disadvantage and recognises that 'relevant personal attributes may need to be taken into account and accommodated in order to achieve equal opportunity.'

7.3 We are unclear as to the meaning of the phrase in the Explanatory Notes '*relevant personal attributes may need to be taken into account and accommodated in order to achieve equal opportunity*'.

7.4 Subclause 3(1)(e) proposes an additional object of the Bill, namely:

'*To recognise that achieving substantive equality may require the taking of special measures or the making of reasonable adjustments*.'

7.5 Clause 21 states that that '*special measures taken to achieve equality'* will not be considered to be unlawful discrimination. Such measures are defined as:

'*….a law, policy or program made, developed or adopted, or other conduct engaged in, by a person or body is a special measure to achieve equality if:*

(a) the person or body makes, develops or adopts the law, policy or program, or engages in the conduct, in good faith for the sole or dominant purpose of advancing

or achieving substantive equality for people, or a class of people, who have a particular protected attribute or a particular combination of 2 or more protected attributes; and

(b) a reasonable person in the circumstances of the person or body would have considered that making, developing or adopting the law, policy or program, or engaging in the conduct, was necessary in order to advance or achieve substantive equality.'

7.6 Furthermore Clauses 79 to 82 propose that the AHRC be granted the power to determine that a proposed measure is a '*special measure'* designed to '*achieve equality*'.

7.7 AACS is concerned that the concept of '*substantive equality'* may be intended to support programmes of affirmative action and thereby foreshadow the introduction of programmes designed to provide more favourable treatment to persons with certain protected attributes.

7.8 AACS is further concerned that it is proposed the AHRC be given the power to determine whether certain '*special measures'* are acceptable despite the fact that they actually amount to 'formal' unlawful discrimination.

7.9 If we are correct in our concerns, AACS and its member schools strongly recommend that such innovations be rejected by the Senate Committee.

Recommendation 16
That references to '*substantive equality'* and '*special measures'* in Clauses 3(1)(d), 3(1)(2), 21 and 79 to 82 of the Bill be deleted.

8. Volunteers - Clause 6

8.1 The definition of 'employment' in Clause 6 of the Bill includes voluntary or unpaid work.

8.2 Many faith-based organisations such as AACS member schools rely on the support and assistance of a large band of volunteers.

8.3 Our concern with Clause 6 is that, if the consolidated legislation were to have the effect of diverting managerial and financial resources away from service delivery towards the tasks of managing risk, litigation and developing protocols to serve new laws on unlawful discrimination and their application to our volunteers, it is likely to impact adversely upon the invaluable contribution made by our volunteers as well as

increasing the cost to the organisation, and by extension, to the students served by member schools.

8.4 AACS is concerned about the increased compliance costs which would be imposed upon its member schools the effect of which would be to lessen their ability to sustain the contribution of volunteers.

8.5 AACS is unaware that unlawful discrimination in relation to volunteers has been an issue of special societal concern and, accordingly, urge the Senate Committee to keep volunteers exempt from laws on unlawful discrimination

Recommendation 17
That, in order to avoid imposing unnecessary further compliance burdens on the voluntary sector, volunteers remain exempt from laws on unlawful discrimination.

9. Constitutional issues - Clauses 11 to 13

9.1 Clauses 11 to 13 of the Bill set out its constitutional bases. The title of Clause 11 indicates that the Bill's 'main constitutional basis' is the 'external affairs power' in the Australian Constitution. The text of Clause 11 references various human rights and International Labour Organisation instruments and then refers to the term 'matters of international concern'.

9.2 AACS and its member schools are concerned about the ability of the Bill authority to deal with '*matters of international concern'*. In this regard we wish to point out the statements of Callinan and Heydon JJ in the case XYZ v The Commonwealth (2006) 227 CLR 532 where their Honours stated:

'*There is no case in this Court deciding that the international concern doctrine exists. There are dicta which support the view, or which some contend support the view that it does. But there is less to these dicta than meets the eye. Some of them do not in fact support the international concern doctrine as a means of widening s 51(xxix); rather, for example, they discuss whether it narrows s 51(xxix) in its treaty implementation aspect. It is curious that a doctrine potentially narrowing s 51(xxix) so far as it depends on treaties is said to widen s 51(xxix) where no treaty can be relied on. All the dicta, so far as they were approving, were unnecessary for the actual outcome of the particular reasoning in which they appeared. They tended to be passing remarks made in the course of enunciating some more final conclusion, but not all of them were directed to the international concern doctrine itself. Assuming that a matter of "international concern" can be interpreted and defined, the outer limits of and the difficulties in applying such a*

doctrine do not, with respect, appear to have been tested in the authorities.' [8]

9.3 AACS and its member schools are also concerned that the Bill does not refer to the relevant Constitutional power for the proposed prohibition of unlawful discrimination on the grounds on '*sexuality*', '*gender identity'* and '*marital or relationship status'*.

9.4 Accordingly, we are concerned that the Bill is cast too broadly and purports to legislate in areas for which the Commonwealth has no clear constitutional head of power. This is unsatisfactory and we urge the Senate Committee to consider the matter in depth.

Recommendation 18
That it be ensured that <u>every</u> aspect of the Bill falls squarely within the ambit of a power granted to the Commonwealth under the Australian Constitution.

10. Protected attributes – Clause 17

10.1 Clause 17 includes 'political opinion' and 'social origin' as new 'protected attributes'.

10.2 Neither term is defined in the Bill nor is AACS certain of their intended meaning.

10.3 Furthermore, it is the view of AACS and its member schools that the new '*protected attributes*' proposed by Clause 17 take the Bill beyond the protection of certain rights as envisaged of Article 2 of the ICCPR.

10.4 Once again, we urge the Senate Committee to consider this matter in depth.

Recommendation 19
That Clause 17 be amended by the deletion of the reference to '*political opinion'* and '*social origin'*.

11. Conduct that offends – Subclause 19(2)

11.1 Clause 19(2)(b) of the Bill defines unlawful discrimination to include 'conduct that offends, insults or intimidates' another person. This applies to all grounds and not just racial vilification.

11.2 This is of great concern to AACS and its member schools as none of the current Commonwealth laws dealing with unlawful discrimination state that to conduct which '*offends'* is unlawfully discriminatory.

[8] XYZ v Commonwealth [2006] HCA 25; (2006) 227 ALR 495; (2006) 80 ALJR 1036 (13 June 2006) at par 217.

11.3 Furthermore, ACCS is concerned by the absence in Subclause 19(2)(b) of an '*objectivity'* test. We are concerned that the proposed provision as currently worded is not limited by words such as '*reasonably likely to offend*'.

11.4 In this regard we draw the Senate Committee's attention to the 2012 Human Rights Day Oration by the Honourable James Spigelman AC QC, former Chief Justice of NSW, where he makes reference to a book by Jeremy Waldron titled '*The Harm in Hate Speech*.' In his address, Mr Spigelman supported Waldron's contention in his book that the protection of the dignity of members of society does not require that such members be protected from being '*offended*.' Mr Spigelman stated:

> '.. *I do not believe that it should be the aim of these laws to prevent people from being offended. Protecting people's feelings against offence is not an appropriate objective for the law*.'[9]

11.5 ACCS concurs with Mr Spigelman when he states that the '*freedom to offend'* is an integral component of freedom of speech in Australia and that in Australia no '*right not to be offended'* is in existence.

11.6 Mr Spigelman added that he is unaware of any other international human rights instrument or anti-discrimination law in other liberal democracies which prohibit conduct which merely causes '*offence*'. It is for this reason that he recommends extreme caution in relation to this innovation proposed by the Bill with its proposed '*subjective test'* of being '*offended*'.

11.7 AACS and its member schools agree with and repeat Mr Spigelman's concerns. We consider this novel extension of the law to cover '*being offended'* to be a very dangerous innovation. We are further concerned that the effect of such an innovation will be to seriously restrict free speech in Australia.

11.8 As Mr Spigelman stated, this innovation goes beyond the need to deal with a situation where someone is denied a position because of a '*protected attribute'* and it actually is aimed at restricting the ordinary citizen's day to day interactions at work and in other situations. The Bill therefore proposes a major shift of the dividing line between '*permissible'* and '*unlawful'* speech..

11.9 Furthermore, we contend that Australia's international treaty obligations do not require the Government to protect any person or group from being '*offended*'. However, the Government does have a positive obligation to protect freedom of speech.

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[9] 'Freedom of speech warning on bill' Sydney Morning Herald, 10 December 2012, URL www.smh.com.au/opinion/political-news/freedom-of-speech-warning-on-bill-20121210-2b5pj.html.

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11.10 In relation to political comment, if the proposed provision were to be enacted, we foresee further problems as regards the implied right to freedom of political communication in the Australian Constitution. We therefore contend that freedom of expression encompassing both speech and writing is a fundamental defining characteristic of a democracy and that it would be a very '*courageous'* Government indeed that would seek to legislate for the erosion of such a freedom.

Recommendation 20 That Clause 19(2)(b) of the Bill be deleted.

12. Religious exceptions – Clauses 32 and 33

12.1 AACS and its member schools believe that the spirit of the current exceptions within Commonwealth laws on unlawful discrimination which protect certain actions carried out by religious organisations needs to be both preserved and strengthened in any consolidated legislation on unlawful discrimination.

12.2 We believe that the fundamental right to religious freedom should be expressed in an '*affirmative'* sense rather than by way of '*exceptions'*. Given that religious freedom is a fundamental right it is not appropriate for it to be defined and explained within and under the title of an '*exception'*. Rather, this fundamental right needs to be expressed in such a way as to uphold and promote this right in a positive sense.

12.3 We consider the most appropriate way to achieve this to be within the very definition of '*unlawful discrimination'* itself. In explaining what unlawful discrimination **is** it should explain what it is **not**. Affirming and protecting freedom of religion in this fashion would respect its importance as a fundamental right and also negate the need for '*exceptions*'.

12.4 In this regard we refer the Senate Committee to the definition of unlawful discrimination as proposed by Professors Patrick Parkinson and Nicholas Aroney in their submission to the Commonwealth Attorney-General pursuant to the Consolidation of Commonwealth Anti-Discrimination Laws Submission.[10]

12.5 AACS's is concerned that the language of '*exceptions'* for religious organisations is misleading in that it fails to recognise and clearly express the fact that religious freedom is not a '*special permission to discriminate'* granted by Government but rather

[10] Consolidation of Commonwealth Anti-Discrimination Laws Submission by Prof. Patrick Parkinson AM, University of Sydney Prof. Nicholas Aroney, University of Queensland January 2012 – URL www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx, pp5-6.

a fundamental human right and one which Government is obliged to protect. For some of our fellow citizens, the notion of '*exceptions'* leads them to the false conclusion that religious people and organisations are '*above the law'*, 'behind the times' or are permitted to discriminate by accessing '*legal loopholes'*[11] and that this is somehow unfair or, at the very least, makes the law more complicated.

12.6 This is another reason for our preference that religious rights not to be cast in terms of '*exceptions'* but rather as fully fledged rights in themselves.

12.7 In this light it is AACS's preference that a new definition of '*unlawful discrimination'* be developed which includes a reference to and support for the fundamental right to religious freedom thus negating the misleading view that the religious exception and exemption regime is a form of 'indulgence' provided to religious individuals and organisations.

12.8 AACS and its member schools further submit that, if it is not accepted that these '*exceptions'* be dealt with as we have recommended, such '*exceptions'* need to be both broadly drafted and robustly protected. It needs to be made patent that there is no unlawful discrimination in circumstances where a right to freedom of religion is being legitimately exercised.

12.9 It is also essential that the definition of unlawful discrimination be drafted in a way which makes it clear that selection on the basis of an attribute does not constitute '*unlawful discrimination*' against someone who does not possess that attribute if such a selection is based on either:

(a) A genuine occupational requirement, or

(b) For the purpose of supporting another human right such as freedom of religion, freedom of association and freedom for persons of a particular ethnic, religious or cultural background to live in community in accordance with their particular convictions, beliefs and customs.

12.10 It is also essential that faith-based organisations remain free to select staff who adhere to the beliefs and values of the organisation without being accused of unlawful discrimination.

Recommendation 21

[11] For example, see '*A Humanist Manifesto for the 2010 General Election'* at www.humanism.org.uk.

That reference to the fundamental right to religious freedom be included within the definition of '*unlawful discrimination'* so as to properly respect the importance and eminence of this fundamental right and that Clause 19 of the Bill be amended accordingly.

13. Sexual orientation and gender identity – Subclauses 33(1)(a) and 33(1)(f)

13.1 In its submission to the Commonwealth Attorney General's Consolidation of Commonwealth Anti-Discrimination Laws project,**12** AACS stated its opposition to the introduction of 'sexual orientation' as a 'protected attribute' under any future consolidated legislation.

13.2 In its previous submission AACS also indicated that the introduction of '*gender identity'* as a '*protected attribute'* was a more complex issue especially in relation to cases of a person confronted by physical genital ambiguity.

13.3 Should these new grounds be added to the consolidated legislation AACS is concerned that there would then exist a potential for them to become a source of considerable conflict with wide implications for society at large.

13.4 AACS refers to its previous comments concerning the nature of its members schools, our particular understandings of '*religion*', '*sexual orientation'* together with our views on religious '*exemptions'* and the need for a positive protection for the fundamental right of religion freedom.

13.5 AACS and its member schools (and others of like mind) hold the view that the Bible unambiguously regards certain sexual behaviours expressed outside the bond of one male-one female marriage to be morally wrong before God and not conducive to the proper ordering of society. In taking this position, AACS and its member schools believe that they should not be placed in the position of being pursued at law for unlawful discrimination when their actions arise from the legitimate exercise of their religious freedom.

13.6 In relation to the issue of '*gender identity'*, AACS and its member schools have great empathy for those who face a daily conflict related to physical genital ambiguity or hormonal dysfunction. However, these issues are best handled with sensitivity and pastoral care rather than by the '*heavy hand'* of the law.

Recommendation 22

[12] Consolidation of Commonwealth Anti-Discrimination Laws Project, URL www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx.

That Subclauses 33(1)(a) and 33(1)(f) of the Bill be deleted.

14. Commonwealth-funded aged care - Subclause 33(3)

14.1 Clearly AACS is not engaged in the provision of aged care services. Nevertheless AACS wishes to express its view as to policy concerns relating to Subclause 33(3) which proposes to limit the general exception contained in Subclause 33(2).

14.2 Clauses 32 and 33 provide broad exceptions related to religion. However, these exceptions are proposed not to apply to a body established for religious purposes in receipt of Commonwealth funding for aged care delivery.

14.3 The Explanatory Notes accompanying the Bill provide the reasoning behind Subclause 33(3), that is, to counter the unlawful discrimination stated to have been experienced by older same-sex couples in accessing aged care services run by religious organisations, particularly when these same same-sex couples were seeking to be recognised as a couple. The Explanatory Notes state:

'*When such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate. This applies regardless of whether the Commonwealth is the sole or even dominant funder of these services (that is, this applies even if the services are provided with a combination of Commonwealth and other resources). This position is also consistent with the Government's broader aged care reforms*.'

14.4 It is noted that these aged-care providers are still entitled to make '*employment decisions'* which conform to religious '*doctrines or tenets'* or which '*are necessary to avoid injury to religious sensitivities of adherents of that religion*'.

14.5 AACS's concerns about the provisions in Subclause 33(3) are that:

(a) It requires religiously-based facilities which do not accept that an active sexual relationship outside the context of a one man-one woman marriage to be an acceptable form of Godly living either to:

(i) Provide shared accommodation in their facilities for de facto couples including same sex couples, or

(ii) Forego their Commonwealth funding.

(b) The approach is very heavy-handed and contrary to the common sense approach taken to date which has been to recognise the contribution of religious bodies to aged care, while fully respecting their faith positions.

(c) It completely fails to acknowledge and respect the valuable contribution and religious liberty of faith-based aged care services.

(d) It deals with the issue of conflict of rights in an extremely imbalanced fashion without acknowledging the fundamental right to religious freedom. We refer to the issue of conflict of rights in greater detail in paragraph 17and following of this submission.

(e) It totally misinterprets the relationship between Government and religious organisations where funding is provided to them. It is essential that the terms of any government funding to faith-based organisations not be permitted to require that such organisations be prohibited from making decisions or following practices based on their faith and religious beliefs. The result of this would be to damage or undermine the religious character, mission and values of the organisation.

(f) If accepted into law, this innovation would be a very dangerous precedent and would open the door to additional attempts to undermine the religious freedoms of other sectors of Australian society.

Recommendation 23 That Subclause 33(3) of the Bill be deleted.

15. Sporting activities exception – Clause 36

15.1 Clause 36 contains exceptions for sporting activities.

15.2 These exceptions are commended insofar as they acknowledge the nature of sport and the difference in male and female physiology and the needs of people with disabilities.

15.3 However, the provision as currently drafted would preclude competitive sporting activities for people of one sex where Clause 36(2)(b) is not satisfied i.e. in circumstances where it is not proved that the '*strength, stamina or physique of competitors is relevant*'.

Recommendation 24 That Clause 36(2)(b) of the Bill be deleted.

16. Single sex educational institutions and single sex student accommodation – Clauses 37 and 38

16.1 The exceptions contained in Clauses 37 and 38 of the Bill refer to:

(a) Single sex educational institutions, and

(b) Single sex student accommodation,

in relation to unlawful discrimination on the grounds of sex.

16.2 AACS considers these provisions to be too broad in scope.

16.3 AACS's concern related to the need for such entities to have appropriate flexibility to allow them to make their own decisions in regard to admitting a person who is not of the specified sex but who identifies as being of that sex.

16.4 If the exception is not broadened, such institutions could be found to have discriminated on the grounds of gender identity if they refuse to admit a person not of the specified sex who identifies as of being of that sex.

Recommendation 25
That Clause 36 of the Bill be amended by the inclusion of an exception for single sex educational institutions and single sex student accommodation from unlawful discrimination on the grounds of gender identity.

17. Conflict of rights

17.1 Legal rights theorists remind us that rights will often conflict and that it is not always possible to find a tidy way to resolve such conflicts. But it is also important to seek to balance potentially conflicting rights.

17.2 In our experience, the actual number of incidents where even a perceived conflict has materialised is extremely low.

17.3 In the 2012 Human Rights Day Oration already cited, James Spigelman stated as follows:

'*Human rights discourse, which has always been comfortable with privileging a right over an interest, has never successfully dealt with situations in which rights conflict. This is a context bedevilled by a conflict of metaphors: from 'rights as trumps' to 'balancing'. As Benjamin Cardozo warned us: 'Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it*.'[13]

17.4 James Spigelman further stated:

[13] Spigelman, op cit.

'*When rights conflict, drawing the line too far in favour of one, degrades the other right*.'[14]

17.5 Mr Spigelman continued:

'*Some advocates for reform of anti-discrimination laws have a tendency to place a very high value on 'non-discrimination' and to concede 'exceptions' based upon freedom of religion, association or cultural expression only with great reluctance, if at all. Although they sometimes recognise that there is a need to give due weight to all human rights and to find an appropriate balance between them, it is generally not acknowledged that posing the question as one of identifying exceptions to the principle of non-discrimination prejudices the inquiry in favour of the right to be free of discrimination and against the rights to freedom of religion, association and culture, understood as both individual and group rights. Moreover, anti-discrimination laws tend to be highly individualistic in focus, and allow relatively little room for group rights, including the associational rights guaranteed and implied by Articles 18, 22, 23 and 27, ICCPR*.'[15]

17.6 Mr Spigelman made specific reference to the need to ensure that, in the drafting of new laws, human rights that are '*in creative tension with one another'* are '*appropriately balanced*.' If this is not done, Mr Spigelman considers it arguable that '*Australia is not complying with its international obligations*'.

17.7 We wish to also draw the Senate Committee's particular attention to the statement of Professors Patrick Parkinson and Nicholas Aroney in their submission to the Consolidation of Commonwealth Anti-Discrimination Laws project.

'*Great care needs to be taken to ensure that a focus on the first-mentioned right (freedom from discrimination) does not diminish the others (e.g. freedom of religion, association and cultural expression and practice). This can readily happen, for example, if freedom of religion is respected only grudgingly and at the margins of anti-discrimination law as a concessionary 'exception' to general prohibitions on discrimination. It can also happen if inadequate attention is paid to freedom of association and the rights of groups to celebrate and practise their faith and culture together. These dangers are real*.'[16]

17.8 It is our contention that, in circumstances where there is conflict between a <u>general</u> right and a <u>specific</u> right to religious freedom, there is a possibility that one or other right may be extinguished. We consider it a principle of contemporary human rights thought that governments and courts should make every effort to ensure that the effect of the exercise of a <u>general</u> right does not have the effect of extinguishing a

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[14] Spigelman, op cit.
[15] Spigelman, op cit.
[16] Consolidation of Commonwealth Anti-Discrimination Laws Submission by Prof. Patrick Parkinson AM, University of Sydney Prof. Nicholas Aroney, University of Queensland January 2012, pp3-4.

specific right.

17.9 We consider the most appropriate method to determine an appropriate outcome is to accept in principle that a specific right must, to the extent of any conflict, prevail over a general right.

17.10 In its 2011 report following the completion of the AHRC Religion Enquiry[17] the following statement from Anglicare Sydney is cited:

> '… *the general right of persons not to be discriminated against on the basis of religion … the specific right of persons to practise their religious beliefs by the establishment of charities with a religious ethos ... In light of this, the most appropriate method to determine an appropriate outcome is to accept in principle that a specific right must, to the extent of any conflict, prevail over a general right*.'[18]

17.11 AACC contends that Australian law needs to provide a clear and unequivocal statement regarding conflict of rights and propose that as set out above.

Recommendation 26
That Australian law provide a clear and unequivocal statement that, in situations where there is a conflict of rights, a specific right to practise religious beliefs by the establishment of organisations with a religious ethos prevails over a general right not to be discriminated against unlawfully on the ground of one or more protected attributes.

18. Publishing material re intention to engage in unlawful conduct - Clause 53

18.1 Current Commonwealth laws on unlawful discrimination prohibit the publication of an advertisement or notice which indicates an 'intention to engage in discriminatory conduct'.

18.2 However Clause 53 of the Bill proposes that this be extended from advertisements to any publication.

18.3 AACS and its member schools are concerned that this provision proposes to make further inroads into the issue of freedom of speech and requests that such a development be resisted.

[17] 2011 Freedom of Religion and Belief in 21st Century Australia - A research report prepared for the Australian Human Rights Commission,' Prof Gary Bouma, Prof Desmond Cahill, Dr Hass Dellal and Athalia Zwartz.

[18] Submission No 1533 to the Freedom of Religion and Belief Project by the Anglican Church Diocese of Sydney - www.humanrights.gov.au/frb/frb_submissions.html.

Recommendation 27
That Clause 53 of the Bill be amended to ensure that the coverage of the law as it currently stands is not extended.

19. Religion as protected attribute – Subclause 17(1)(o)

19.1 Concerns have been raised about the extent to which Australian human rights frameworks place emphasis on the rights of individuals. We have already made reference to the Anglican Church Diocese of Sydney's submission to the AHRC Religion Enquiry where the diocese drew attention to the presentation of religion primarily as a matter for individual choice rather than a communal affair. [19]

19.2 AACS and its member schools submit that communities, given that they are more than a mere collection of individuals, have an existence in and of themselves and, as such, also have rights worthy of protection including the right to religious freedom.

19.3 Our concerns about the proposal in the Bill for the inclusion of '*religion'* as a '*protected attribute'* in relation to work and work-related areas is that it is only one aspect of a much more sophisticated topic – a topic which is not broached in the Bill or the Explanatory Notes in any comprehensive fashion.

19.4 If the Government wishes to make any changes to the protection of religion in Australian law it must consider the entirety of its legal obligations and, in particular, the entirety of its obligations under to Article 18 of the ICCPR and the Religion Declaration.

19.5 In the absence of a proper consideration of all of Australia's obligations under these instruments, as well as a proper consideration of individual and communal rights, we do not support the inclusion of '*religion'* as a '*protected attribute'*.

19.6 We also note the concerns expressed by James Spigelman about Subclause 17(1)(o) in his recent address already cited. Mr Spigelman is concerned that the effect of this provision will be to make blasphemy unlawful in the employment context but nowhere else. He makes specific reference to the highly-publicised and controversial Danish cartoons of the Prophet Mohammed which Mr Spigelman states could be published under the Bill but not taken to work.

19.7 We are of the view that the inclusion of religion as a protected attribute needs further detailed consideration and should not therefore be included in the consolidated legislation.

[19] Anglican Diocese of Sydney Submission No 1533, op cit.

Recommendation 28

That Subclause 17(1)(o) of the Bill be deleted.

20. Temporary exemptions – Clauses 83 to 86

20.1 It has been suggested that an appropriate mechanism for balancing rights to protection against certain forms of unlawful discrimination with other potentially competing rights, including freedom of religion, is via application to the AHRC for temporary exemptions.

20.2 AACS and its member schools do not consider this to be an approach which is either appropriate or respectful of the fundamental right to freedom of religion.

20.3 AACS and its member schools are of the view that the temporary exemption mechanism is only appropriate in circumstances where the need for an exemption is temporary in nature and is totally inappropriate where the expressed justification is more enduring or even permanent in nature.

Recommendation 29

That temporary exemptions where they are referred to in Clauses 83 to 86 of the Bill be used only for situations that are temporary in nature and not to avoid the robust protection of religious freedom rights of individuals and organisations.

21. Burden of proof – Clause 124

21.1 It is a general rule that, in civil actions, the onus is on the complainant to establish that, on the balance of probabilities, the action complained of was carried out for a particular reason or with a particular intent.

21.2 This general rule must not be lightly overturned.

21.3 AACS and its member schools believe that a party's motives or intentions should never be lightly assumed or impugned and that in a dispute it is the responsibility of the complainant to establish the bona fides of their case.

21.4 The effect of Clause 124 would be that, in proceedings before a court where unlawful discrimination has been alleged, if there is some evidence allowing the court to decide that an alleged reason is the reason for conduct, the burden of proof will be shifted to the respondent to disprove that the alleged reason was an actual reason for the conduct.

21.5 This is a significant change from- current Commonwealth laws on unlawful discrimination do not contain such a provision nor does such a provision exist in State or Territory unlawful discrimination laws.

21.6 Furthermore, it is a concern for many businesses in Australia as they already feel compelled to settle speculative unlawful discrimination complaints regardless of the strength of the applicant's case so as to avoid the costs of litigation or the potential for damage to their reputation.

21.7 To further broaden the likelihood of actions would be, in AACS's view, likely to exacerbate this problem.

21.8 In the absence of any clear basis for the proposed change, or of evidence revealing the failure of the current legislative regime, AACS considers that these proposed changes should be opposed and that the general rule for civil actions should remain, that is, that the burden of proof remain with the complainant and not be imposed on the respondent.

Recommendation 30 That Clause 124 of the Bill be deleted.

22. Conclusion

22.1 AACS trusts that this submission has been of assistance to the Senate Committee in its deliberations.

22.2 We would be very happy to assist in any further consultation regarding the issues raised and would be available and willing to attend the public hearing if chosen by the Committee.

Yours sincerely

Robert Johnston

Executive Officer