# SUBMISSION RE THE *ANTI-DISCRIMINATION AMENDMENT BILL 2022* (NT) CONSULTATION DRAFT

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The Australian Association of Christian Schools (AACS) thanks the Department of the Attorney-General and Justice ('AGD') for the opportunity to submit feedback to the Consultation Draft of the *Anti-Discrimination Amendment Bill 2022* ('Bill').

AACS would also like to acknowledge and thank the AGD team for their invitation to meet and provide clarification on several issues the Bill raised. We will incorporate this information into our feedback for context, where necessary.

## Introduction

AACS is an advocacy organisation which represents over one hundred schools and thousands of Australian families from a wide variety of backgrounds, cultures and denominations. Our schools are in every state and territory across Australia, ranging from very small to large; urban to regional, rural and remote. In the Northern Territory ('NT'), we represent Northern Territory Christian Schools (NTCS) across seven campuses.

## The Nature of Christian Schools

Our Christian schools were originally established by parents out of a desire to see their children raised in a teaching and learning environment where they could be nurtured in the faith. Characterised as low fee, our schools operate autonomously and are accountable to their parent and school communities. Our parents have an expectation of a Christian environment for their children as they make a deliberate choice, and a financial

commitment, to place their children in a school that teaches and models beliefs and values that are consistent with their home environment.

Christian schools strive to be holistic learning communities where all staff, volunteers and parents work together to provide a faith-based learning environment. The Christian values and beliefs modelled by staff are equally as important as the formal teaching programme. Faith shapes all aspects of the Christian school educational model and is the foundation upon which the character and ethos of our schools is based. Religion is not simply taught as a stand-alone subject but permeates every aspect of the school's life and is embedded within all parts of the teaching and learning program.

Parents who enrol their children in our schools understand that Christian faith is the foundation of our schools' mission. Many parents from different or no faith backgrounds choose to send their children to our schools because they recognise the benefits of a Christian education. They accept and desire for these beliefs and values to be taught and lived out by members of the school community. To us, our values and beliefs are intertwined.

## Religious Freedom

Respect for religious freedom is fundamental to the Australian way of life. This freedom allows individuals and communities to exercise their faith within the framework of Australian law and civic life. Our democratic systems and institutions, and the underlying Australian belief in the 'fair go', have served our nation well since its foundation. Religious freedom is a widely accepted but poorly understood human right within the Australian democratic context.[1] It is supported by the Australian Constitution[2], Commonwealth, State and Territory statute law[3] and affirmed in multiple international covenants to which Australia is a signatory.[4]

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[1] Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) ('*Ruddock Report*') 13 [1.32].
[2] *Australian Constitution* s 116.
[3] *Criminal Code Act 1995* (Cth); *Fair Work Act 2009* (Cth); *Education Act 1990* (NSW); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas); *Constitution Act 1984* (Tas); *Education Act 2016* (Tas); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Equal Opportunity Act 2010* (Vic); *Racial and Religious Tolerance Act 2001* (Vic); *Equal Opportunity Act 1984* (WA); *School Education Act 1999* (WA); *Criminal Code Act 2002* (ACT); *Discrimination Act 1991* (ACT); *Human Rights Act 2004* (ACT); *Anti-Discrimination Act 1996* (NT); *Education Act 2015* (NT).
[4] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 18, 26 ('*ICCPR*'); *Convention on the Rights of the Child,* opened for

Christian schools are a small sub-set of the independent schools sector and provide one expression of schooling choice among a broad range of educational options available for parents. Our schools play a valuable role within Australian society by providing a distinctly faith-based education for families who desire such an education for their children. The continued popularity and growth of Christian schools across Australia demonstrates,[5] more than ever, the need for the protection of the human right to the freedom of religious expression in this country.

The Expert Panel on Religious Freedom chaired by the Hon Philip Ruddock AO ('Expert Panel'), made the following recommendation to Commonwealth, State and Territory Governments regarding amendments to anti-discrimination legislation:

1. (a) consider the use of objects, purposes or other interpretive clauses in such legislation to reflect the equal status in international law of all human rights, including freedom of religion;
2. (b) have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.

***Recommendation 1: that the Bill be amended to include a reference to the 'equal status in international law of all human rights, including freedom of religion' in the objects and purposes sections of the* Anti-Discrimination Act 1991 *(NT) ('*Act*').***

***Recommendation 2: that the Bill be amended to include a reference to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights to ensure that the free exercise of religion is adequately protected.***

While there is currently protection of the attribute of 'religious belief or activity' within the *Act*,[6] this only protects individuals from discrimination on the basis of that attribute. There is no general protection for the free exercise of religion in the NT. The *Act* recognises that the free exercise of religion in certain circumstances may breach discrimination law through the

signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990 generally, and for Australia, 16 January 1991) art 14; *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969 generally, and for Australia, 30 October 1975) art 5(d-vii).

[5] Rebecca Urban, 'Faith Shown in Christian Schools as Enrolments Rise', *The Australian* (online, 27 December 2019), <https://www.theaustralian.com.au/nation/faith-shown-in-christian-schools-as-enrolments-rise/news-story/db4dba3f9a70bd61a630aa5a0e1b005c>.

[6] *Anti-Discrimination Act 1992* (NT) s 19(1)(m).

imposition of exemptions. These exemptions acknowledge that there is a fundamental and irreconcilable conflict between the exercise of religious belief and activity and discrimination on the basis of certain attributes. The removal or narrowing of some of these exemptions in the Bill fails to recognise this irreconcilable conflict and privileges certain attributes over religious belief and activity.

Christian schools remain a demonstrable manifestation of the free exercise of religious belief of parents, employees and organisations. This submission will attempt to demonstrate where the Bill should be amended to better protect this right, in the context of Christian schooling.

If Christian schools lose their Christian character, they lose their *raison d'être* and fail to provide a vital educational alternative in the NT.

## The Bill

### **Clause 5, subcls (5) and (11) (amending s 4(1))** – *new definition of 'educational institution'*

AACS welcomes this new definition as it includes 'childcare centres', which is presumed to include Early Learning Centres ('ELCs'). NTCS has three ELCs attached to the school campuses at Marrara, Palmerston and Sattler (Bees Creek). It is important that our ELCs are considered to be Christian educational institutions in the same way that our schools are and that the *Act* recognises this as such.

### **Clauses 5(6) and 11** – *prohibition of 'offensive behaviour' or 'offensive conduct'*

These clauses insert a new prohibition on 'offensive conduct' in proposed s 20A. Firstly, AACS would like to know why there appears to be a discrepancy in language between the definition proposed in cl 5(6) and the prohibition in cl 11. AGD may want to consider whether it is better to use 'conduct' or 'behaviour' in both clauses for the sake of consistency.

***Recommendation 3: that cls 5(6) and 11 are amended to use either 'offensive conduct' or 'offensive behaviour' to describe the prohibition rather than using two different descriptions.***

Substantively, AACS is opposed to cl 11 and the creation of a new category of prohibited conduct. While we acknowledge that anti-vilification provisions are useful, we do not believe that this drafting strikes the right balance and in fact 'lowers the bar' for bringing discrimination claims.

Defining vilification as merely 'offensive' or 'insulting' acts removes the element of intent from the vilifying act. Many unintentional acts such as 'off the cuff' remarks, could be considered offensive or insulting to many people. There are parts of the Bible, and other religious texts, which some may find offensive. It is foreseeable that the public reading of sacred texts in a church or school assembly may be considered prohibited conduct.

AGD representatives acknowledged that this drafting was transposed from the much-maligned s 18C of the *Racial Discrimination Act 1975* (Cth) ('*RDA*'). The difference between its use in this Bill and the *RDA* is that the Bill intends to protect all attributes, not just race. At the consultation meeting on Tuesday 9 August with faith groups, it did not appear that much consideration has been given to how such broad language could affect the ability of religious groups to practice their faith in 'public places'. Further, there appeared to be a misunderstanding by AGD representatives that places of worship would not be considered 'public places' under the *Act*. Clause 11 redefines 'public place' as 'any place to which the public have access as of right or by invitation', which would include churches and Christian schools.[7] Churches and schools are open to the public by design. It would be untenable for 'public' acts of worship and religious instruction at churches and schools to be found discriminatory and vilifying under the Act. AACS proposes that cl 11 be amended to 'raise the bar' of the anti-vilification provisions to cover acts of genuine vilification properly and accurately.

***Recommendation 4: that proposed s 20A(1)(a) of cl 11 be amended to remove the words 'offend, insult,' and in redrafting this clause that consideration be had to the language proposed by Commonwealth Attorney-General, the Hon Mark Dreyfus QC during debate on the* Religious Discrimination Bill 2021 (Cth) *('*RDB*'), i.e. 'threaten, intimidate, harass or vilify'.***[8]

[7] Consultation Draft cl 11.
[8] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 February 2022, 264 (Mark Dreyfus, Shadow Attorney-General).

In addition to this change, a simple solution to the problem of genuine religious practice (such as reading the Bible in a public place) potentially breaching the Act would be to include 'religious' in the exempted list of 'genuine purposes in the public interest' in proposed s 20B(b) of cl 11. This was also included in the anti-vilification provision proposed by the Hon Mark Dreyfus QC during debate on the *RDB*.[9] It should be self-evident that if 'genuine academic, artistic, or scientific' purposes are in the 'public interest' then so to must be genuine religious purposes.

***Recommendation 5: that the word 'religious' be inserted into the list of 'genuine purposes in the public interest' in proposed s 20B(b) of cl 11.***

## **Clauses 5(1), 5(11) and 10 (new ss 4(1) and 19(1))** – *replacement of attribute of 'sexuality' with attributes of 'sex characteristics' and 'sexual orientation'*

AACS supports separating intersex status from the attribute of 'sexuality'. The two attributes and concepts are distinct, and it is illogical for them to remain under one attribute termed 'sexuality'.

## **Clause 9 (new Part 2A)** – *Positive Duty to Eliminate Discrimination etc.*

This clause adds a duty to take 'positive action to eliminate discrimination, sexual harassment and victimisation'. AACS submits that such a duty would be unnecessary and onerous on small organisations such as Christian schools for several reasons. Firstly, our schools do not employ lawyers or experts in discrimination law. To comply with this duty, hours of training will be required for staff to ensure they are aware of their obligations under such a duty. Secondly, the purpose of our schools is to provide education, not to eliminate discrimination, quite obviously as part of a nurturing environment the staff in our schools will be looking to prevent discrimination in everything that they do. However, their first duty is always to educate children and nothing should supplant this priority. It would put pressure on school resources to impose a duty to eliminate discrimination on our schools. Thirdly, as faith-based organisations or 'religious bodies' Christian schools somewhat 'exclusive' in their worldview and their approach to education. As organisations partial to a certain set of beliefs, the imposition of a duty to eliminate discrimination is not only inappropriate but counterproductive. Our schools are organisations which rely on exceptions to discrimination law, implying that certain acts and practices fundamental to

[9] Ibid.

our schools' existence are considered discriminatory. This would mean that such a duty would be unworkable in our schools. Lastly, it is foreseeable that our schools may be the subject of burdensome litigation if the Human Rights Commission were empowered to enforce such a duty through the bringing of complaints. AACS would not wish to see NTCS resources crippled by such burdensome litigation.

In discussions with AACS about a similar duty being introduced in the ACT, departmental representatives had the understanding that the positive duty is supposed to work in tandem with the exceptions in the *Discrimination Act 1991* (ACT) ('*ACT Act*'), meaning a duty will not be imposed in an area where an organisation is excepted from the *ACT Act*. In other words, a school will not be obliged to make adjustments that are contrary to religious doctrine or belief.

AACS remains concerned about where this duty encroaches on the religious doctrines and beliefs of our school communities. The drafting of this clause does not reflect the fact that certain organisations have exemptions to the Act based on the nature of the organisations. A positive duty to eliminate discrimination in areas for which these organisations currently have exemptions is internally inconsistent and makes the legislative scheme unworkable. Therefore, a limitation in the applicability of the positive duty should be explicitly drafted in the Bill.

In the case of this Bill, we ask AGD to clarify whether the positive duty is intended to operate in areas where there are exemptions in place. Given that the exemptions for religious educational institutions are being amended in the Bill, AACS implores AGD to clarify how the positive duty will interact with the exemptions to the *Act*. Regardless, we ask AGD to amend the Bill to expressly state that the exemptions operate to the positive duty to ensure clarity for NTCS in their duty under the *Act*.

***Recommendation 6: that the Bill be amended to include exemptions to the positive duty that are consistent with the exemptions outlined elsewhere in the Act.***

## **Clauses 8, 9 and 43 (new ss 13(1)(ha), 18C and div 4B)** – *Commissioner empowered to investigate breaches of the Act*

AACS is opposed to the empowering of the Commissioner to investigate both breaches of the positive duty and representative complaints. AACS is of the strong view that a complaint must be brought before the Commissioner can act. Such provisions can only have the effect

of finding fault where none exists. Ultimately the *Act* exists to eliminate discrimination, and a claim of discrimination can often be subjective. AACS would like to see the Commissioner remain a neutral regulator, or umpire, in the system by investigating complaints and breaches of duty rather than risk becoming an advocate for complainants.

***Recommendation 7: that the Bill be amended to remove cls 8 and 43 in their entirety and to remove proposed s 18C from cl 9.***

## **Clause 16(1) (s 30(2))** – *removing the religious educational institutions enrolment exemption*

AACS is opposed to removing this exemption. AGD representatives commented that none of the schools present at the 2017 consultation meetings indicated any reliance on this exemption and that this was the justification for its removal. This is not a completely accurate picture. Although our schools are 'open enrolment' in the sense that non-Christian families are not excluded, NTCS would still rely upon this exemption if a school is reaching its enrolment capacity. NTCS currently has a policy of *preference* for Christian families seeking to enrol their children at an NTCS campus. AACS is concerned that the removal of this exemption would inhibit, or prohibit, the preferencing of children from Christian families. Enrolments are finite, particularly at independent schools, so this policy of preferencing Christian families to ensure the Christian character of NTCS is maintained is very relevant to enrolment decision-making.

It is important that all legislation is 'futureproofed' and considers all possible scenarios that are reasonably foreseeable. It is reasonably foreseeable that a religious community may seek to establish a religious educational institution for their community's exclusive use in the future. Indeed, an example was provided in the meeting of a remote school providing education to Aboriginal people that required the students to be of the Anglican faith.

AACS asks the Department to maintain this exemption to ensure that NTCS campuses remain identifiably Christian communities that contribute to the rich diversity of the Northern Territory.

***Recommendation 8: that the Bill is amended to remove cl 16(1) to maintain the enrolment exemption for religious educational institutions.***

**Clause 17 (new s 37A)** – *amending the religious educational institutions employment exemption*

AACS is opposed to this amendment as it will narrow the application of the exemption and make it difficult for NTCS to rely upon it in their employment decisions to employ Christian staff.

AACS seeks clarification as to the reason for the amendment, is there a deficiency with the current exemption in s 37A? The point was made in the consultation meeting by one of the faith group leaders that this is a solution in search of a problem. The current exemption maintains a number of threshold tests that will filter out nefarious discriminatory behaviour by a religious educational institution, if indeed it ever occurs. The current exemption requires a religious educational institution to discriminate on the basis of religious belief or activity or sexuality *and* this discrimination must be in good faith *for the purpose of* avoiding offence to adherents of the particular religious community that the educational institution serves. The three arms of this test are more than enough to filter mala fides behaviour.

Unfortunately, this amendment does not recognise that, firstly, in many instances religious views on sexuality are not a 'core tenet' of a faith, and secondly, tribunals and courts will be forced to rule on correct *application* of doctrine in addition to whether the doctrine forms part of the religion at issue. In other words, this amendment reaches much further into matters of religious practice than does the current exemption. This cannot be best practice legislation.

***Recommendation 9: that the Bill is amended to remove clause 17.***

There are difficulties with this legislative device, which is used in all Australian jurisdictions, that attempts to exempt religious activity from discrimination law. Inevitably, once the irreconcilability of certain religious beliefs with certain protected attributes (e.g. sexuality, gender identity and sex work) is realised, legislative draftsmen and legislators have sought to narrow the exemptions for religious activity to accommodate this increasingly broad spectrum of protected attributes. The obvious effect is that religious belief and activity is no longer protected in its entirety and to the same extent as other attributes.

A solution is to have a general exemption stating that all *genuine* and *good faith* religious activity done in accordance with a particular religious belief is not discriminatory. Such a general limitation would not require future amendment and any 'discriminatory' behaviour

made within the confines of a genuine religious activity becomes an internal disciplinary matter handled by the religious body or organisation but any discrimination that is not genuine religious activity will be subject to the Act. In practice, this would not sully courts and tribunals with the undesirable task of wading through religious doctrine to determine whether a certain action was in accordance with it. Instead, courts and tribunals merely determine whether the religious activity was genuine insofar as the actor was concerned. Whether the defendant brings evidence citing religious doctrine in their defence remains a matter for them. The action and doctrine itself will not require judicial consideration as to its religious legitimacy. Under this type of exemption, tribunals and courts will not become triers of religious doctrine.

***Recommendation 10: that a general exemption is inserted into the Bill stating that 'genuine religious activity in accordance with the doctrines, tenets and beliefs of a religion' is not discrimination.***[10]

## **Clause 18 (s 40(2A))** – *removing the religious educational institutions accommodation exemption*

It was clear from the views expressed in the consultation meeting that AGD must do further consultation before removing this exemption, as some religious education institutions do rely upon this exemption or may do in the future. The Department must ensure that all possible organisations that rely on this exemption have been consulted on this change before it is legislated.

***Recommendation 11: that cl 18 is removed from the Bill until the Department is satisfied that this provision is of no use or value to any group in the NT.***

## **Clause 19 (s 41) –** *inserting a prohibition on discrimination in the receipt of goods and services*

These amendments appear to impose an obligation on consumers not to discriminate against the provider of goods, services and facilities. AACS is concerned that this may encroach on the freedom of consumers to make legitimate, free choices within the marketplace. There are many factors that enter the minds of consumers in the marketplace

[10] See s 7 *Religious Discrimination Bill 2021* (Cth) for drafting examples.

when deciding with whom to contract. Christian schools often have non-economic priorities when it comes to contracting in the marketplace, such as whether goods and services providers share the values of the school. For example, a Christian school may prefer to engage the services of a Christian law firm to provide legal advice. This is not a unique consideration, consumers make these choices all the time, whether those consumers are schools, other organisations or individuals.

This restriction on freedom of contract appears onerous and AACS would like to see this restriction removed.

***Recommendation 12: that cl 19 be removed from the Bill.***

## **Clause 24 (new s 51(d))** – *amending the religious bodies exemption*

AACS cautiously supports this amendment, provided that it broadens the exemption to cover acts that are done in accordance with religious belief but are not strictly a religious 'observance or practice'. Our only concern is with the way in which this exemption is drafted. It may burden tribunals and courts with determining whether an act is in accordance with a religious doctrine, tenet or belief. As referred to above, a better legislative device would be to utilise the drafting from s 7 of the *Religious Discrimination Bill 2021* (Cth), which provides a general limitation for genuine religious activity.[11]

***Recommendation 13: that a 'general limitation' clause is included utilising similar drafting from s 7 of the Religious Discrimination Bill 2021 (Cth).***

## **Clauses 28, 29(3), 30(2), 31, 32(2), 35, 37(1), 38, 43 (new ss 62A, 64(1A), 65(1A), 66(1)(a), 66A, 66D(2), 69, 81(3), 82A, div 4B)** – *Representative Complaints*

AACS is opposed to the introduction of representative complaints. Conventionally, the system of anti-discrimination law in this country, in the same manner that our justice system is conducted generally, is adversarial. The process requires a complaint or allegation by an individual, which is then tried by a tribunal. The individual is entitled to be represented by counsel. 'Representative' complaints, however, are not in this vein. It is an

[11] See discussion above on Clause 17, Recommendation 8.

avenue for activist groups to allege 'systemic discrimination' in an organisation, which the Commissioner is obliged to investigate. During the consultation meeting, one of the faith group representatives stated that even under the current system of anti-discrimination law, for a religious organisation, 'the process is the punishment' when it comes to an allegation, often resulting in a pre-trial settlement. Introducing 'representative complaints' will only make this process more punishing for religious bodies and organisations. Activist groups can dedicate much of their resources to such actions but religious bodies resources must be diverted from other worthy and meaningful programs to defend complaints, however vexatious they may be.

Much of our concern to the introduction of representative complaints will be allayed if the Department clarifies that the exemptions for religious belief and activity currently in place for conventional complaints will also be in place for systemic complaints. If the exemptions apply to systemic discrimination then genuine religious activity will not be unlawful, particularly if a general limitation is legislated in the form referred to earlier.[12]

***Recommendation 14: that the system of representative complaints, as outlined in cls 28, 29(3), 30(2), 31, 32(2), 35, 37(1), 38, 43, is removed from the Bill.***

***Recommendation 15: where the system of representative complaints is not removed from the Bill, express exemptions are made for policy actions done in accordance with religious belief or activity.***

## Conclusion

AACS trusts that AGD, and by extension the NT Government, values cultural and religious diversity in the NT and will therefore ensure that minority interests such as those of our Christian school communities are protected.

We look forward to working constructively with AGD to ensure that any proposed reform does not adversely impact on the continued existence and flourishing of NTCS.

[12] See discussion above on Clause 17, Recommendation 8 and s 7 *Religious Discrimination Bill 2021* (Cth) for drafting examples.

AUSTRALIAN ASSOCIATION OF CHRISTIAN SCHOOLS

Once again, thank you for the opportunity to submit feedback to this Bill. We hope that AGD will take our concerns into account and are willing to meet with us further to discuss these matters and any drafting specificities.

Yours faithfully

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