

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

## Introduction

### Who we are

The Australian Association of Christian Schools (AACCS) represents over 43,000 students and 120 schools in each State and Territory, as well as their families, school staff and Boards.

Our schools teach the Australian curriculum within a Christian worldview and they place great emphasis on building up Christian character in students – mind, body and spirit. We serve thousands of Australians from a wide variety of backgrounds, cultures and Christian denominations. We cherish our present freedoms to teach our children in accordance with our beliefs and to form genuine and loving Christian communities. We embed a Christian worldview into our educational philosophy, such that it informs the way we discuss any number of subjects, including mathematics, literature, history and art.

Our parents believe that educating their child is their prime responsibility, and they partner with our schools to help them steward the education of young people in line with Christ's example.

We do our best to develop respectful, compassionate and informed young women and men. They are taught to be keen learners, citizens, classmates, neighbours, colleagues and families, who serve their wider communities for a strong and flourishing Australia. We want to ensure that their potential is not hampered by undue obstacles or the worst of misconceptions about people of faith. Nor do we want them to feel like they have to compromise their beliefs to get ahead or secure a job.

We want our students to see education not just as a means to an end, but an endeavour they should honour and enjoy. One of our goals is to enable students to maintain a mature relationship with effort and achievement, growing to be lifelong learners and contributing members of society.

As Christians, our faith permeates every aspect of our life. Because of this, we want the ability to teach our faith and uphold standards of behaviour. It is part of why we value the

discretion to make wise employment choices that scaffold our operations. It is also why we accept the ability of other faiths and belief-systems or interest groups to do the same.

We do not seek a freedom in order to be 'mean-spirited' towards others, which is certainly not the theological basis of our beliefs on what constitutes good behaviour. Rather, we seek the freedom to be who we ought to be, stand up for what we ought to stand up for and to live rich and full lives.

As a collection of low-fee, independent schools that operate from a faith-based foundation, the substance of the Religious Discrimination Bill is of great importance to us. Any legislation concerning religious organisations will determine to what extent our laws will protect us from adverse action on the basis of our beliefs.

Our concern in presenting this submission is that our schools, churches, universities, agencies, aged care centres and hospitals, will not be able to operate as authentically Christian entities. Community is the fruit of the gospel and an inability to manifest the beliefs of Christianity will result in an eventual loss of character. To have failed to be good stewards of the gifts we have been given would be anathema to the thousands of students, parents and staff who seek to live honourable and generous lives.

That is why we have made a number of recommendations to improve the exposure draft in its current form. We are also greatly concerned as to the workplaces and environments our students will be working in and want to ensure that they can be who they are in any profession, without fear of disadvantage due to their faith and respectfully held views.

## Overarching Recommendation

This submission consists of two parts – Part 1) the public policy rationale for religious freedom and Part 2) specific legislative recommendations on the suite of Bills themselves.

To those who hold a faith or who are involved with faith-based organisations, the Religious Discrimination Bill is more than just about 'completing the suite' of discrimination laws. It raises the important issue of religious freedom, something that Australia needs to address in a thorough and nuanced manner.

There are a multitude of views about how people of faith live and work within a secular liberal society. It is important, however, that when discussing this topic, we endeavour to do so through the lens of civil liberties, rather than purely parochial and at times emotive interests. A robust framework for religious freedom, championed by the government, will benefit all Australians, regardless of their views and beliefs. Religious freedom is intrinsically linked to several other fundamental liberties, including speech, association and conscience, making the freedom of religious expression a barometer for the health of the wider civil society.

There are, however, obstacles to achieving the type of religious freedom that will benefit Australia and will meet the country's obligations under international human rights law. The government needs to espouse a public policy narrative that explains why religious freedom is important to the health of society, and why this issue is not about discrimination *per se* but the protection of civil liberties. Without such arguments being made at the highest levels, we see little hope of religious freedoms being legislatively enshrined and safeguarded in the long term. To shepherd this legislation through both Houses of Parliament and to institute lasting religious freedom reform, Australia needs to learn how to handle differences of opinion and belief. This will not be an easy process, but it is a necessary one if we are all to enjoy the benefits of living in a vibrant and diverse multicultural society.

Our leadership must address a question that is fundamental to Australia as it moves forward through the next decades: how will Australia 'do' pluralism?

What will it look like for diverse groups with divergent and sometimes conflicting ideas to share the benefits of an Australian way of life and also receive appropriate protection to live out their lives free from perceived discrimination, harassment or harm? Our schools are at the epicentre of this challenge and we will do all we can to contribute to discourse in favour of pluralism, whilst maintaining our distinctive biblical orthodoxy and unique educational philosophy.

To be a truly multicultural, diverse and inclusive country, everyone should have the freedom to decide for themselves what they believe and how they will go about living a fruitful life in line with their convictions. They should be allowed to do this in peace and raise their children as they desire without Government interference. The right of parents to choose an education for their child in line with their own beliefs and moral convictions is of utmost importance to the Christian schools movement. The freedom of parents to associate in the formation and governing of schools with a particular educational philosophy according to their faith is both a natural and democratic right.

We encourage politicians, leaders, commentators and those with opposing views, to see the expression and operations of faith-based communities through the prism of civil liberties – freedom of speech, conscience, belief and association. Principles that political parties, trade unions, media and interest groups could not authentically exist without. It benefits society to have a diverse range of expressions and alternatives in the public square and if all views cannot be discussed in a rational way, then we cannot pride ourselves in allowing freedom of thought in our country.

We are all Australians, and the question is what will we do when we disagree? Will we seek to suppress opposing beliefs and look upon those who disagree with us with scorn, ridicule and, at worst, hatred? Or will we let them exist in 'community', able to flourish in their own way and meeting for debate in the public square with respect and persuasive argument instead?

## Part One: Religious Freedom for Schools

We recognise that many of the levers of protection or vulnerability to religious freedom lie foremost in the hands of the States and Territories. They set anti-discrimination laws, register schools and manage and set a variety of government policies that permeate workplaces and education bodies.

In 2017, a discussion paper was circulated in the Northern Territory concerning religious discrimination legislation. If the recommendations contained within the paper had been enacted as initially proposed last month in a Bill, the resulting legislation would have fundamentally undermined the ability of faith-based schools to operate in accordance with their doctrines, tenets and beliefs, as it is essential for staff employed by schools to share those core beliefs. As such, the Northern Territory Government has delayed, but not rejected, the implementation of such anti-discrimination laws for consideration after the Territory elections.

The ideas expressed in that discussion paper are of great concern to the schools represented by AACS, as they would potentially leave schools vulnerable to losing their identity and compromising their operations. These ideas and attitudes towards religious bodies are not uncommon in other State and Territory governments.

To require that each faith-based school seek approval from an unelected Commissioner to 'justify' why they require the right to choose staff in accordance with their ethos is unprecedented.

The inability to employ staff who manifest the beliefs and values of an organisation risks undermining the type of authentic, faith-based education that our parents want for their children and usurps their rights to choose an education that is consistent with their beliefs.

AACS does not want to see this undemocratic approach writ large across the Commonwealth. It would be inconsistent with the established principles for the protection of human rights under international law. Around the country, anti-discrimination laws can also be swept in with little public consultation and poor consideration of the effect of the changes being introduced. These Bills are passed with little or any evidence of the need for change or the purported benefits of the proposals and often constrict faith-based schools' ability to exercise their discretion over their mission and operations. We now face the real prospect of classical Christianity being classed as 'unsafe' and 'harmful'.

Independent schools cater for cultural minorities or special interests, whether it be a particular educational philosophy or clientele served. Christian education schools are just one part of the educational landscape, and we are fully committed to Australia's multicultural and pluralist society. However, for there to be vibrant and diverse choices for

parents in selecting schools for their children, schools and school associations need staff that reflect and uphold the values of the organisations.

It is important to note that parents from various faith backgrounds (or those without any confessional belief) decide to send their children to our schools and see the benefits of a Christian education. To us, our values and beliefs are intertwined. We aim for our schools to be warm and affirming communities, where pastoral care is exceptional and accountability in behaviour is a built-in. This is one of the many reasons our schools attract parents from a variety of backgrounds.

Faith schools do this by employing staff who believe in and live out the religion and by having standards of conduct for staff and students that require them to respect the beliefs and values of the religion. We believe that it is important for our staff to be able to model genuine Christian character and behaviour. The removal or watering-down of protections will compromise the ability of faith schools to employ in line with the values that form the bedrock of our faith and underpin the educational excellence our students and families expect.

The ability of a school to select its employees in line with its values and educational philosophy is not unreasonable; every school, regardless of type, values its ability to employ staff in this manner. Principals know that their human resources are key to creating their community. Faith-based schools were established to offer choice to parents who want religious values to serve as the basis for their children's education. For this valued option, those parents are willing to pay fees over and above their contribution to public education through taxation (thus forfeiting the benefit of some of their education tax dollars). Parents make this choice willingly and knowingly, in the expectation that all staff, including teachers, will adhere to the values of the school.

We do not want—and our parents do not want—the government determining which roles need to be filled by a Christian in a Christian school (also known as an 'inherent requirement test'). Once that choice is taken away from schools and parents, we also fear that government determinations on what we can teach will be next.

What our schools teach is intrinsically connected to our values. The freedom to teach, and choose teachers, based upon our faith-based values is what makes our schools the unique places we love and that parents of both Christian and non-Christian parents have chosen to send their students to for decades. We urge the Government to adopt a common sense approach and allow organisations to be authentic to their beliefs. As such, we urge the Commonwealth Government to reaffirm a commitment to diversity of culture. Currently, Australia risks falling short of international human rights standards that protect freedom of association, in addition to jeopardising its commitment to upholding cultural diversity, as illustrated by government sponsorships and other initiatives.

Faith-based schools do not seek to unfairly discriminate against anyone. The issue is not, as it has been suggested, enshrining discrimination against staff based upon sexual preference.

Rather, schools should be able to expect that the behaviour of teachers and staff match the values and expectations of the faith that the school is based upon. Should this discretion be limited by State and Territory governments and the State determine which positions do and do not require conformity to religion as an 'inherent requirement', schools would likely be forced to permit the promotion of contrary views by staff and students or face a discrimination claim.

It would be counter-intuitive to you to ask your Government members to employ people who do not believe in and adhere to your party's principles and policies, or who do not behave in a way that is befitting of the cause. In turn, we urge you to uphold faith-based education in the same light. We too want the freedom to discern who will advance our faith's educational philosophy and how to nurture our children in the best way possible.

It is important to note that, not only do independent schools provide alternatives to parents, but they reduce the financial burden on the taxpayer for providing the full cost of educating students who would otherwise be in the public system. Should Christian schools be exposed to litigation on the basis of discrimination, they face lengthy and costly legal proceedings which might affect the schools' ability to conduct its core business and, *in extremis*, see schools unable to continue operating.

Across Australia, we have seen freedoms watered down in Tasmania, Queensland and very recently in the ACT and this has put pressure on faith schools, who would rather be focusing all energy and attention on delivering high-quality Christian education. It is only a matter of time that watering down of anti-discrimination laws takes place in other jurisdictions.

A positively-worded provision that gives bodies the right to employ staff who uphold the belief with which their school identifies is one way of avoiding the problem when exemptions are also typically not given the same weight as an actual right when judicially interpreted. We don't want a grudgingly allowed exemption – we'd prefer to have our religious freedom rights expressed positively, for example, to be allowed to select staff that best suit the ethos of our school (not as exemptions to other rights where it appears that we are given special treatment and allowed to 'discriminate').

When calls are made about whose rights deserve Government affirmation and protection, please consider the positive contribution that Christian education schools and their communities make to society and our strong desire to thrive and continue raising decent, compassionate and hard-working citizens, serving those around them. A balance of rights allows freedom of association and diversity in educational philosophies.

The International Covenant on Civil and Political Rights (ICCPR) affirms the right of parents and guardians 'to ensure the religious and moral education of their children in conformity with their own religious and moral convictions' (Article 18(4)). We also note that government burdens placed on religion under Article 18(3) of the ICCPR are only to be subject to limitations that are 'necessary to protect public safety, order, health, or morals or

the fundamental rights and freedoms of others.’ Removing the ability of schools to choose their staff without duress or threat of legal action is ‘unnecessary’ and is undue interference and control over association.

We sincerely hope that Australian pluralism - the ability to respect each other without being forced to agree is preserved - and that freedom of thought that can only come with wide-educational choice is not ignored by your Government, let alone in our lifetimes.

This is a matter of justice for all Australian families, who should be allowed a real choice in the education of their children. We encourage Parliament to improve the exposure draft and not play politics with people of faith in Australia.

## Pluralism within Christianity on schooling

AACS notes out that there are many schools outside of our Association that state and affirm a Christian ethos, manifesting in a different educational philosophy to ours in the passing on of faith and culture in a school setting. They may even have different employment requirements or not quite understand why our schools prefer to employ Christians for every staff position. An Anglican Grammar School is often very different from a school set up by a Dutch-Reformed community, both in the educational embedding of Christianity at a teaching level and expectations on staff commitment to the faith. The Christian education schools movement, which AACS represents, has a unique educational philosophy and rigour in combining curriculum content, with an emphasis on the Christian response to themes, priorities and attitudes raised in academic studies and current affairs.

In acknowledgement of the diversity in Christian education, we call for unity beyond the Christian education schools movement and respect for schools who wish to deliver a certain biblical orthodoxy, even if their own vision for Christian education is not the same. As Anglican Bishop Mark Short of the Canberra-Goulburn Diocese said in his Bishop’s address in September 2019, *“I do recognise that other religious bodies and organisations may choose to do things differently [e.g. in schools and welfare agencies] and I am wary of supporting a particular legislative agenda purely on the basis it suits ‘us’ but not ‘them’.”*

We acknowledge that even within faith groups there are legitimate differences of expression and approaches. The Government should not take the view that the approach of one group is necessarily sufficient for all. The divergence of views within Christendom (and indeed other faiths too) is an argument for greater accommodation of diversity – not narrow conformity.

## Unfinished business

The Bill is silent on the issue of whether current exemptions for religious education institutions in the Sex Discrimination Act will be repealed, as these matters are before the Australian Law Reform Commission (ALRC). Unfortunately, the inquiry's terms of reference have also been narrowed and the discussion paper delayed from this September to early 2020 and the reporting date delayed from April 2020 to December 2020 – closer to the next election and leaving schools in limbo for longer.

This is highly disappointing, both for the delay and that the Bill and the ALRC inquiry will not be considered together. However, one solution could be to expand the ALRC terms of reference to allow for recommendations that could alter any formalised Religious Discrimination Act when looking at how best to deal with exemptions.

We understand that politically it would be difficult to resolve all outstanding issues at the same time. However, our schools have been waiting patiently, and anxiously, while states and territories have moved to restrict religious freedom in the meantime and with no guarantee that Commonwealth exemptions already in existence will be able to protect our schools from state legislation that erodes religious freedom.

If the exemptions in question are removed without rights being put in place beforehand, the ability of faith-based schools to expect employees to behave in line with their faith inside and outside of work hours would be in doubt. One could suggest that the desire to uphold and protect the Christian 'brand' is not that much different from that of corporate sporting entities.

Other potential issues arising from the removal of exemptions (without other protections in place) are enrolment, uniforms, toilet facilities and camping accommodation; policies based on biological sex and the ability to resist curriculum at odds with Christian beliefs (i.e. gender theories in schools).

We believe that to pass an effective Religious Discrimination Bill, other areas of Government will need to outline the broader philosophical concepts to make the case – at least in considering what narrative the Government utilises when discussing independent schools. Currently, the Commonwealth Department of Education is working on Guidelines pertaining to recommendation nine of the Ruddock Review - the right of parents to take their children out of classes (particularly in the state system).

However, faith-based schools are disappointed that the jurisdiction funding approximately 85% of its schooling resource standard, plus billions in capital funding, has not yet asserted the importance of the narrative of federal education policy that upholds parental choice and wide-educational thought.

It is through independent schools of all educational philosophies that parental choice and freedom of thought is manifested, from Jewish to Montessori schools. It has also been long-

term Commonwealth education policy to give a contribution to the education of all Australian students, regardless of the sector. This is a matter of justice for all families and without a narrative that underpins why we allow educational choice in Australia, the Government leaves our sector vulnerable to cheap shots and calls for funding to be tied to a top-down moral education.

We urge the Commonwealth to formalize its commitment in open acknowledgement of the acceptance of and benefit of the independent sector of education for freedom of thought.

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

## Part Two: Recommendations

### 1. Objects: Purpose should be extended to protecting faith ‘in-community’

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

Recommendation:

That subclause 3(1)(c) be extended as follows:

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

Why? If freedom of religion is conceptualised and limited to statements of beliefs and not ways of organising schools, churches and welfare organisations, faith-based aged care facilities and hospitals, to promulgate and practice those beliefs in word and deed, then that is not protection enough.

## 2. 'Freedom of Religion' is equal to other rights

When the right to religious freedom conflicts with any other right in Australia, religious freedom may be read down as less important given the use of the phrase 'indivisibility of rights' in the Bill as opposed to 'equal status'. This could mean that a faith-based school's rights are subservient to other interests, even though they may be actively opposed to the purpose or rationale of a faith-based school.

There needs to be clear instructions as to how the courts are to handle a conflict of equal rights and the established 'Siracusa Principles' are a respected formula. One of the reasons behind the Bill's genesis was to balance competing rights, and the Bill would fall short if it does not include this legal achievement.

Recommendation:

*Change 'indivisibility of rights' in clause 3(2)(a) to 'equal status' to afford a level playing field for freedom of religion as per international law and adopt the 'Siracusa Principles' to provide guidance when there is a clash of rights.*

## 3. Parental rights

The Bill does not enshrine parental rights to reflect Article 18(4) ICCPR, that states that parents are to have the natural right of freedom to educate their children in accordance with their beliefs and moral convictions. This right is manifested in the ability to associate in community to operate faith-based school communities. However, the Bill is silent on how faith-based schools will be able to operate in accordance with their faith under the Sex Discrimination Act and other discrimination laws. (See item ...)

Recommendation:

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

## 4. Clause 5: Lawful religious activity

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

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

The definition of religious belief and activity limits protections only to 'lawful' activities in clauses 5, 26 and 29(3).

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

Recommendation:

*That 'lawful religious activity' be replaced with 'religious activity that is not involving a criminal offence'.*

## 5. Clause 5: Educational institution

The Bill does not explicitly define educational institution as including early learning centres, which are increasingly a part of the structure of many schools. Not-for-profit rules emanating from State education Acts are also somewhat ambiguous as to how they will be applied and what may be required of such centres in the future.

If faith-based early learning centres are required to be separate entities for the purpose of State legislation in the future, they may be deemed as solely or primarily commercial entities and thus not enjoy the protection of the Bill despite their clear faith-based nature. (See item 10 for further comments).

Recommendation:

*In order to avoid confusion surrounding the meaning of educational institution and its applicability to faith-based early learning centres, that such centres be explicitly included in the clause 5 definition of 'educational institution'.*

## 6. Clause 8(1)(c): Reasonableness

The draft Bill outlines a 'reasonableness' test to measure whether indirect discrimination is unlawful. Who determines what is 'reasonable'? By definition, the test falls short of a much higher standard of 'necessity' prescribed by international law (Art 18 (3) ICCPR).

Both direct and 'unreasonable' indirect discrimination against people of faith is prohibited. However, courts are known for narrowly defining what is necessary for religious freedom, let alone in their future deliberations on what is reasonable and what is not. As one

advocate noted, courts tend to equate freedom of religion ‘more with a “freedom to worship” rather than a broader freedom to express faith in word and action throughout the week’.

Recommendation:

*That a limitation on the expression of religious belief or activity must be “necessary” to ensure public safety, order, health or morals, or the fundamental rights of others, as prescribed in international law.*

## 7. Clauses 8(3): Employer conduct rule

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

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

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

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

‘Harassment’ and ‘vilification’ are also not included in this protection. It is left open for groups to argue that not only have they been ‘offended’ or ‘insulted’, but that they have also been ‘vilified’ which is undefined anywhere in Australian legislation.

## 8. Clause 8(5) and (6): Conscientious objection by a health practitioner

Provisions in the Bill that govern conscientious objections by health practitioners do not apply to faith-based hospitals. Unfortunately, this leaves faith-based health providers exposed to religious discrimination claims. Health practitioners are also subject to less than

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

Recommendation:

*That regardless of whether a State or Territory allows a health practitioner to conscientiously object, that a hospital conduct rule requiring action against conscience is unreasonable.*

## 9. Clause 10: Statement of belief

We are concerned that tests of 'good faith' and 'reasonably in accordance with' religious doctrine may be too subjective and will hand judges the ability to determine matters of religious belief when they are not equipped to do so, particularly when their judgments may extend the purview of the State into religious matters. There are other ways to limit improper religious manifestation, such as tests in the United Kingdom and Canada that assess 'genuineness'.

Recommendation:

*Faith-based schools must be able to teach, operate and advance their purpose in accordance with their faith without constraint unless necessary as per international law. In turn, the definition of statement of belief should be:*

*'(a) (i) is of a religious belief held by a person; and (ii) the person has a genuine conviction that the belief in question is in accordance with, or in furtherance of, the doctrines, tenets or teachings of the person's religion ....'*

## 10. Clauses 10(2)(b) and 10(2)(c): Exclusion of for-profit religious entities

We note that the exclusion of for-profit religious entities proposed in the Bill is highly abnormal and without precedent. This provision could affect a variety of faith-based service providers and aged care facilities, as well as hospitals. It would be a severe curtailment of religious activity to the confines of church buildings and away from the marketplace.

Certain for-profit bodies should legitimately be able to exercise discretion over their employment. A Christian medical practice and a Jewish aged care home should be able to employ only people that share their faith.

Bodies that deliver services with a particular ethos and to meet the needs of a certain clientele, should still be legitimately able to determine their employment policies. If a

Christian service provider wants to run a Christian leadership retreat for church groups, then that should be protected.

What will s10(2) mean for a faith-based op shop that charges for the clothing it sells to put back into operations and charity work?

In addition to for-profit bodies, we strongly recommend that not-for-profit faith-based charities that undertake solely or primarily commercial activities, not be excluded from the exemption in clause 10(2)(b). The exclusion will mean that a large cohort within the charitable religious sector could not ensure that its character remained engrained in the religion it follows.

Regrettably, as the Bill stands, health practitioners with pro-life beliefs will still have to refer patients for abortions if required by state law or conduct rules/policies. There will also be no protection for commercial faith-based providers to refuse to offer services that are against their beliefs (i.e. abortions in non-life-threatening circumstances to the mother, sex-change operations etc).

Our students often choose health professions to work in and the lack of protection for decisions of conscience would be highly difficult to content with.

Recommendation:

*That for-profit religious entities and not-for-profit religious entities that engage solely or primarily in commercial activities be allowed to rely on the exemptions that the Bill excludes them from, so as to retain the religious character of their purpose and operation.*

## 11. Clause 31: Inherent requirement test permitting discrimination (cl 13, 14, 15, 17)

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

Secondly, s31(4) appears to not prevent accreditation bodies from penalizing professionals, like doctors, lawyers and social workers or counsellors by cancelling registration on the basis that the religious belief or objections make them unable to carry out the 'inherent requirement' of their role?

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

Our students make wonderfully caring professionals and to threaten their livelihood by risk of de-registration for socially contentious issues is something we would actively want to prevent. Students should never be precluded from registration – not on competency grounds or the rigour of their academic training – but on relative morality grounds.

At this stage, we cannot see that the Bill will protect a school or tertiary education provider against Commonwealth or State regulators threatening to strip them of registration on the basis of their religious beliefs.

Recommendation:

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

## 12. Section 41: Vilification definition

Under section 41, speech that is considered to be ‘vilification’ will not be protected, but there is no definition of ‘vilification’ contained in the Bill. Given that the very nature of statements of belief on moral matters can and do offend, it would be wise to have a higher bar. This is not to say that people do not have a responsibility to convey their views respectfully, but it should not be the case that mere statements of belief, regardless of the generous and loving context in theology they may have, are at risk of having the worst of intentions and hatred imported upon them. This impasse needs common sense and maturity buttressed by an objective and high bar test.

Recommendation:

*That vilification be defined with an objective, high bar definition, such as an objective test of ‘malicious intent’.*

## 13. Clause 45: Freedom of Religion Commissioner

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

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

freedom of association, freedom of belief, freedom of conscience and freedom of speech by the Commissioner.

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

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

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

Recommendation:

*That no Freedom of Religion Commissioner be appointed.*

#### 14. General conscience

If Australia was to follow the trend overseas that has seen judicial interpretation limit protections for conscience – then a standard form anti-discrimination law is not robust enough. If a faith-based school is required to affirm theories or conduct that is against its belief on condition of funding or registration – this should be classified as such unjust compulsion for the purpose of discrimination law.

Recommendation:

*Discrimination should also entail any compulsion to go against one's genuine religious beliefs via an affirmation or act.*

#### 15. Religious Freedom Act

Given the manner in which the High Court has traditionally interpreted the concept of religious freedom under section 116 of the Constitution, we believe there needs to be a Religious Freedom Act in order for Australia to meet its international obligation to implement Article 18 of the International Covenant on Civil and Political Rights (ICCPR). Under such an Act, governments and councils would need to justify their administration of policy. The Act would also protect against practices that unduly burden religious freedom, unless, as Article 18 of the ICCPR states, they are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

## 16. Acts Interpretations Act 1901

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

AACS requires greater certainty of the protection for its schools that in many being associations and companies, that they will be classified as being able to hold 'beliefs' in light of existing case law that says corporate and unincorporated legal entities cannot hold beliefs for the purpose of claiming discrimination, on the basis of those beliefs, and furthermore to be able to incur damages as a direct result.

There is significant leeway for a court to not uphold an entity's own view on what action, belief or conduct is in accordance with its religious beliefs, given a lack clarity as to how a body can hold or prove its beliefs under the Bill.

Recommendation:

*That 'person' is explicitly defined to include all entities, including corporations, trusts and associations, and that they are capable of holding 'beliefs' as such entities.*

## 17. Clause 4: 'Public benefit' test in the HRLA (Freedom of Religion) Bill 2019

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

Recommendation:

*Charities who hold a biological view on gender or other socially conservative views on other topics may be vulnerable and we would urge that amending section 6 to accommodate religious beliefs more broadly, including a traditional view on marriage and gender.*

## Conclusion

In summary, AACS cannot support the suite of Bills in their current form. AACS has grave reservations regarding the loopholes and potential unintended consequences of the draft Bills and ALRC delay, including that vague notions of harm and vilification in the religious discrimination Bill could still be used against classical Christian teaching in schools.

Consideration may not be given to alternative frameworks to protect freedom of association other than through problematic 'exemptions'; and the narrowing and delay of the ALRC review could mean a watering down of specific protections for faith-based schools.

We especially do not want the Bill to be a 'trade-off' for losing protections being considered by the ALRC in relation to the employment of staff.

The delay in delivering the ALRC review extends the uncertainty for Christian education schools who simply want their ability to be authentic Christian education communities protected. All of this is taking place in the context of other jurisdictions interfering with freedom of association.

Independent schools play an important role in upholding diversity and freedom of thought in Australia, particularly for minorities. We cannot have freedom of thought in our country without wide educational choice to reflect this long-held freedom. If independent schools lose their point of difference and are unable to practice and teach their different educational philosophies or faiths – government will be the arbiter of morality and conscience. You cannot have religious freedom unless you also allow schools to work within the parameters of that religion.

We urge the Government to accompany its efforts to see the Bills' passage with a stronger narrative as to why religious freedoms matter in the context of civil liberties and to bring all Australians along in securing long-established principles of freedom of thought, belief, association, conscience and speech. These are principles that protect us from tyranny and oppression and which allow for robust public discourse in society.



**Alithea Westerman**

**Executive Officer**

**Australian Association of Christian Schools**