



Submission to the Expert Panel on Religious Freedom February, 2018

The Expert Panel on Religious Freedom
C/O Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

Introducing the Australian Association of Christian Schools (AACS)

The Australian Association of Christian Schools (AACS) represents 108 schools/ 41,000 students across Australia. In the main AACS schools are low fee, low SES schools with an average SES of 97.4. Our schools are located in every State and territory and range from very small to large; from urban to regional, rural and remote. Whilst some schools operate in small systems, most AACS schools operate autonomously and are accountable to their parent and school communities.

1. Introduction

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.

It is well recognised and understood that Christian schools, as one expression of schooling choice, play a valuable role within Australian society. Christian schools provide their members with the ability to express themselves and their concerns.

Religious freedom is a well-established human right within the Australian democratic context. It is supported in common and statute law and affirmed in multiple international covenants to which Australia is a signatory. Our democratic systems and institutions and the underlying Australian belief in 'a fair go' have served our nation well over many years. Indeed the existence of such a large number of faith-based schools across Australia is a powerful testimony to the need for and effectiveness of the current mechanisms for the protection of human rights in this country.

Until recent times Christian schools have enjoyed the assumed protections and understandings of religious freedom. Christian schools have noted the increased commentary and critique regarding religious freedom protections. There have been numerous attempts at the State and Territory government level to ‘reign in’ religious freedom protections and expand the rights of not being discriminated against.

In this light, AACS requests that the common understandings of religious freedom protection within human rights law be re-affirmed, that areas of ambiguity be clarified, and that more substantive religious and associational freedoms protection be afforded to all religious schools.

Even though much of the present debate is around expressions of identity and sexuality, our contention is not limited to concerns about sexual norms and we note that there have been significant changes in society about these things. Our concerns are primarily and most basically around faith and the protection of beliefs which guide and inspire people’s lives. Indeed, according to the last census some 70% of Australians identified with some form of religious faith or spirituality.

2. The Nature of Christian Schools

2.1 ‘Distinctives’ of Christian Schools

Christian schools were established out of a desire by parents to see their children grow up in a Christian teaching/learning environment where they could be nurtured in their faith. Parents in a Christian school have an expectation of a religiously framed environment.

Parents make a deliberate choice to place their children in a school that teaches, nurtures and seeks to live out a value and belief system that is in keeping with what is expressed in their home environment. Christian parents seek to pass on their deeply held values and moral commitments to their children.

Christian schools are communities where faith is not only taught, but ‘caught’; where the informal curriculum of lived-values is as important as the formal teaching of the various beliefs and tenets of the faith. All participants (parents, teachers, non-teaching staff, leaders and students), structures and practices, work together to provide a faith-based community within which learning takes place. Christian schools strive to be holistic learning communities in which everyone plays a part. As an old proverb puts it, ‘it takes a village to raise a child’.

The Christian faith is the foundation upon which all aspects of a Christian school are based. The Christian faith shapes the character and ethos of our schools.

Many people think that religion can be a small ‘spiritual’ component that can be added (or left off). We do not agree with this view. Ours is a holistic view where our faith-based worldview shapes and directs all parts of the educational expression. In our schools, religion is not simply taught as a stand-alone subject. It can’t be, because faith permeates all that takes place and is lived out in the daily lives of the community of the school.

One of our publications, ‘Head, Heart, Hand’ captures this holistic outlook when it says,

“We want our students to be robust in mind, heart, and character, seeing A VISION FOR LIVING BEYOND THEMSELVES, a vision that is grounded in a clear understanding of who they are in God’s world... “We partner with parents to forge a community that believes IT TAKES A VILLAGE TO RAISE A

CHILD. We attract and retain ... teachers who see the BIGGER PICTURE of God's world and our place and purpose within it."

"Our approach: a holistic view of the child. At the end of the day, it's not academics and the external pursuit of excellence alone that will determine the quality of life for a child. We believe that nurturing the whole child means developing a strong sense of faith and calling—equipped to embrace life's challenges, celebrations, and opportunities so they can flourish in God's Kingdom. We call it WHOLE PERSON DEVELOPMENT.

"Our approach: a holistic view of education. We have three big goals:

- we build learning that has ACADEMIC RIGOUR - motivating students to achieve the best they can be
- we promote an attitude of CULTURAL ENGAGEMENT - serving and contributing in all areas of society
- we nurture a heart that fosters FAITH FORMATION - faith that is biblically grounded, cross-centred, and Kingdom seeking. We call it WHOLE SCHOOL PURPOSE."

2.2 What do Christian schools bring to the wider society?

Christian schools provide an opportunity for their members to express who they are as participants in a diverse and flourishing democracy. Fowler says,

In a community of communities, they offer these as gifts to wider society. Their role in pursuing the vision of the common good forged by their members, and in permitting the articulation of their shared concerns, is fundamental to the great contest of ideas that is a flourishing democracy. The formation of citizenry requires competing visions, and at times, challenges to the State. A society in which the State labours under the misassumption that it has the exclusive ability to define individual and community conceptions of the good is a very sick, pallid society indeed.¹

In the AAC's submission to the *Department of Attorney General and Justice of the Northern Territory* into the *Modernisation of the Anti-Discrimination Act (Sept 2017)* we explore the role that Christian schools (or all associations) play in a plural modern democratic State.

Associations are also important in providing grass-roots means for the promotion of virtuous character and the honing of the various skills and attributes necessary to contribute within wider society. These abilities include the value of reciprocity, empathy and awareness of the imperatives of other, the ability to understand other worldviews, articulation, reasoned debate, collegiality, accountability, leadership and service. They provide opportunity to participate in the dynamic process of applying complementary but differing talents to a common purpose. They provide a colourful palate from which mutual sympathy, trust and compassion towards those differing in talent or attribute may be fashioned. The foregoing description applies to associations in general. These capacities, unique to associations, take on a particular salience when applied to the context of educational institutions. They are engine rooms for the engendering of such talents and abilities in future generations.²

3. Democratic Values

Most Australians have enjoyed, and continue to enjoy, a quality of life and a degree of freedom that have largely been derived from a society that is steeped in core democratic values. These are fundamental beliefs about the rights of individuals, associations and governments and an expression of the behaviour that is expected of those entities. In this context Christian schools, as one expression of a faith-based education, have been established and are able to flourish.

¹ Fowler, Mark, 'Church and State, revisited', *The Spectator* (online). 28 May 2017 <<https://www.spectator.com.au/2017/05/church-and-state-revisited/>>

² Australian Association of Christian Schools Limited (AAC). Submission to the Department of Attorney General and Justice of the Northern Territory. *Discussion Paper: Modernisation of the Anti-Discrimination Act, September 2017*, page 23.

Some of the most applicable values that are cherished in Australia relating to the issues being considered by the Expert Panel are: pluralism, diversity, choice and religious freedom.

3.1 Core Values in Democracy: Pluralism and Diversity

Pluralism and diversity contribute to the common good. Pluralism and diversity allow for competing visions of the common good and divergent viewpoints. Societies where there is a State imposed uniformity become totalitarian. They do not guarantee religious freedom or the right of the individual or individuals grouped into associations to express the freedoms of belief, conscience, speech and religion.

The Guiding Principles for the Religious Freedom Roundtable (AHRC), recognises that “pluralism necessitates respect for each person’s common humanity and tolerance for a diversity of beliefs, both within and between religious faiths, those with no faith, as well as other attributes associated with an individual’s identity.”³

Australia is renowned for championing the values of pluralism, diversity, tolerance, fairness and ‘inclusivity’. It is frequently claimed that Australia is the most successful ‘multicultural’ nation in the world.

A feature of a democratic, pluralistic and respectful society is that it has a robust structural means that allows for the meaningful incorporation of a range of moral values and differing conceptions of the good. It allows its members to be free to hold a variety of viewpoints and even to teach a dissenting view. It means that individuals are free to gather around areas of common concern and values. It means that viewpoints can be held, and disagreements can be had, without there being claims of ‘discrimination’ or ‘hate speech’.

Harrison and Parkinson talk about the ways in which governments can empower greater diversity within a multicultural society.

...support for a range of different schools, on a non-discriminatory basis, is a way in which the government can help support religious and cultural diversity in a multicultural society — recognising and accepting that across the community there is a range of moral values and different conceptions of the good. Accepting the freedom to teach the tenets of the faith through educational institutions run by faith-based communities is one way of giving effect to the government’s international commitments.⁴

Educational institutions are fundamental not only to the inculcation of knowledge but also to the understanding and appreciation of what pluralism and diversity contribute to the common good. The provision of education is a significant agency for the realisation of freedom of thought within a society.

Christian schools, having the freedom to express their faith, will be allowed to thrive in a society that values pluralism and diversity.

³ <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/religious-freedom-roundtable>. See ‘Statement of purpose and Guiding Principles’.

⁴ Joel Harrison and Patrick Parkinson, ‘Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society’ 40(2) *Monash University Law Review*, 448.

3.2 Core Values in Democracy: Choice

Choice contributes to the common good. Choice allows individuals to choose from a range of options and for associations to express their own identity.

The ready availability of choice provides freedom from discrimination. In the main, the demands of equality are met via the ability to access alternative providers.

A society that values choice will facilitate the expression of choice. As a society that values choice and diversity, it follows that different communities will be able to reflect their own specific values. This is true for all religious schools and even for schools that do not express any particular religious faith.

Christian schools seek to reflect the values of the Christian faith in all that they do. Christian schools clearly state their beliefs and their values. It is impossible to miss that they are steeped in the teachings of the Bible and the gospel of Jesus Christ. Those who do not agree with this faith have the opportunity to choose an option that is in line with their own beliefs and values.

Christian schools seek to be learning communities that reflect their stated faith and charter. Therefore, by their very nature, they will be different to those of other faiths or their secular State counterparts. Parental choice is made on the basis of such difference. When the freedom to shape such differences is taken away, parental choice and diversity are diminished and frustrated.

Where religious institutions are one of a number of service suppliers, autonomy and choice are available for parents. They are free to choose to receive services from an entity that is not religiously motivated or one that is.⁵ To enforce the withdrawal of religious institutions from the service provider offering is to limit the choice available to individuals within wider society. Conversely, the existing framework does not limit the choice of those who do not wish to receive services from religiously inspired institutions. Such parents are able to ensure a secular education for their children in either State or independent secular schools.

The right of parents to send their children to a Christian school is a freedom we expect in a democratic, tolerant and pluralistic society.

3.3 Core Values in Democracy: Religious Freedom

Religious freedom contributes to the common good. The core rights to freedom of religion, belief, thought, conscience and speech are wonderful liberties and pillars of our liberal democracy.

Religious freedom means that individuals are not coerced to act against their conscience. Religious freedom allows parents to choose a religious and moral education for their children in conformity with their own convictions. Religious freedom means that Christian schools can operate in accordance with their doctrines, tenets and beliefs.

The core values of democracy and the rights to freedom of thought, expression and religion will mean that the Christian school is protected when it teaches or upholds its faith tradition.

⁵ Further consideration of these principles is given by Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' 40(2) *Monash University Law Review* 413.

Christian schools and schools based in other religious beliefs, having the freedom to express their faith, will thrive in a society that values religious freedom.

4. The Rights of Religious Educational Institutions in International Law

The rights of parental choice and religious freedom are a vital part of Australian democracy. Human rights' covenants that Australia is a signatory to protect the right of parents to choose their child's school. Further, the right to establish and maintain private religious schools is also protected under various United Nations instruments.⁶

Article 13(3) of the *International Covenant on Economic, Social and Cultural Rights* states:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

Article 26 (3) *UN Universal Declaration of Human Rights* states:

Parents have a prior right to choose the kind of education that shall be given to their children.

Article 18 of the *International Covenant on Civil and Political Rights (ICCPR)* states:

- (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and 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.
- (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The right to freedom of religion and the right of parents to choose their children's schools are not just general rights. They are fundamental rights that are broad in their scope. They allow faith based groups to define their religious character.

In relation to the scope of the right to religious freedom under Article 18, in its General Comment on the ICCPR, the United Nations Human Rights Committee made the following observation:

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.⁷

5. Intersection between Human Rights

5.1 Religious freedom intersecting with other human rights

Christian schools understand that religious freedom does not stand in isolation from other freedoms. 'Religious freedom' does not provide absolute freedom.

⁶ Manfred Nowak, *CCPR Commentary* (Kehl: N P Engel, 1993), 331.

⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: <http://www.refworld.org/docid/453883fb22.html>.

Religious freedom intersects with other human rights and Christian schools need to give due respect to all human rights. At the same time as arguing for the right of Christian schools to determine an educational practice based on their beliefs, Christian schools understand their responsibilities to work within a democratic framework of broadly accepted values and standards.

We note that Article 18 (3) within the ICCPR states that the freedom to manifest one's religion is subject to limitations that protect "public safety, order, health, or morals or the fundamental rights and freedoms of others".

A long tradition of balancing the human right to religious freedom with the right not to be discriminated against has co-existed, with reasonable success, for quite some time. 'Balancing clauses' within anti-discrimination legislation have sought to 'balance' the relevant competing human rights.

Of concern to Christian schools has been the recent change in this balance with the resultant diminishment of religious freedom rights. When the government's task of assisting society to protect the vulnerable (via anti-discrimination laws) means that particular associations, like Christian schools, can no longer have authority over their own employment and enrolment policies, the balance has swung too far.

Freedom for Faith in their submission to the Australian Law Reform Commission on '*Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*', (27 February 2015) said,

Great care needs to be taken to ensure that a focus on the freedom from discrimination does not diminish freedom of religion, freedom of association, and the right of minority groups to express and practice their faith in accordance with values that may differ from the secular mainstream.

Religious freedom and associated rights are at risk of being undermined in Australian society due to a disproportionate focus on other, sometimes competing, rights. Protecting and promoting religious freedom is an essential and indivisible part of a broader program to safeguard fundamental freedoms in Australian life. As a society, we need to 'live and let live', and to accept our differences on all kinds of moral, social and political questions. That is what freedom is all about.⁸

The State has the difficult task of getting the balance right between competing, and at times conflicting, rights. The right to freedom of religion and freedom from discrimination can be in a state of tension. The State needs to determine the appropriate boundary line between competing rights and how to manage the interface. However, this difficult task of balancing competing rights needs to be undertaken within a framework of adherence to the fundamentals of human rights obligations that the State has signed up to.

The Interim Report of the *Joint Standing Committee on Foreign Affairs, Defence and Trade* noted the difficulty of striking an appropriate balance between the right to freedom of religion or belief with other rights, in particular the right to non-discrimination⁹.

Neil Foster, Associate Professor of Law at Newcastle University, affirms the need to uphold all human rights even when the interaction between competing interests makes this difficult.

⁸ Australian Law Reform Commission, 'Traditional Rights and Freedoms— Encroachments by Commonwealth Laws', ALRC Report No 129 (2016).

⁹

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion/Interim_Report, pages 75 & 76.

If we are concerned about “human rights”, we cannot pick and choose only the ones that make us feel comfortable. Indeed, it is the human rights that have become unpopular and applicable to minorities, which will require all the more careful protection.

If our society makes it impossible for believers to undertake these activities, by demanding that they conform to the majority views on gender equality and the new sexual identity politics which requires “affirming” sexual choices that their religion says is wrong, then we run the risk of driving believers out of the public square altogether. In doing so we will be denying the fundamental human right of religious freedom, and also losing the value added to our community by believers who serve the needy.¹⁰

5.2 The Siracusa Principles

Christian, and other faith-based, schools should be able to operate freely in accordance with our underlying values and beliefs within the reasonable expectations of the broader society.

In this regard, Christian schools are good citizens. There are obvious requirements of the State that have to do with registration, standards of education, curriculum and the like, with which all schools need to comply.

Whilst it is quite appropriate that the State has certain authority with regards the operation of schooling, the courts have also stated that there should be a great level of latitude given to private associations to educate their children.

Problems arise when State imposed restrictions or limitations ‘overreach’ and they circumvent the freedom of religion that lies at the heart of the operation of Christian schools.

To assist in understanding how fundamental rights and limitations inform each other, the Siracusa Principles were developed. The Siracusa Principles outline the range of permissible limitations and derogations from ICCPR clauses. They apply to Article 18(3) of the ICCPR. Relevantly, they state that “all limitation clauses shall be interpreted strictly and in favor of the rights at issue”¹¹.

Both the ICCPR and the Siracusa Principles provide a high level of protection for religious freedom rights. The Siracusa Principles state that:

Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

- a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
- b) responds to a pressing public or social need,
- c) pursues a legitimate aim, and
- d) is proportionate to that aim.¹²

The Principles also require that any State limitation on religious freedom ‘shall use no more restrictive means than are required’. Further, there should be no limiting of religious freedom where a competing protection, like the right to equality, can readily be found elsewhere, e.g. Are there teaching positions found in another school that shares the religious convictions of the applicant? Lastly, the onus of proof “falls on those who argue in favour of the limitations”.

However, former United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt directly contradicts this unqualified assumption that religious institutions should ‘justify’ their human rights, when he

¹⁰ <https://lawandreligionaustralia.blog/author/neilfoster/> May 21, 2016.

¹¹ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, E/CN.4/1985/4 (28 September 1984).

¹² Ibid.

notes that in any proposal to limit internationally protected religious freedom rights, ‘the onus of proof ... falls on those who argue in favour of the limitations, not on those who defend the full exercise of a right to freedom.’⁴² To acquit its international obligations pursuant to the Siracusa Principles, it is incumbent upon any government seeking to restrict rights to demonstrate that the restriction proposed is ‘necessary’.¹³

5.3 Over-Reach

There are numerous examples where provisions within Anti-Discrimination law or guidelines for Anti-Discrimination Commissions have created confusion and alarm about the ability of religious institutions to freely express their faith. The most classic example where anti-discrimination provisions have been used to restrict religious freedom expression is that of the claim against the Tasmanian Catholic Archbishop Julian Porteous.

In this situation, the Catholic Church was disseminating materials that explained traditional teachings on marriage within Catholic educational communities. Upon the lodging of a complaint, the Tasmanian Anti-Discrimination Commissioner deemed that there were grounds for the complaint to be heard and that the Archbishop had a case to answer.

One concern of AACs is that in the light of the recent change to the Marriage Act, will Christian schools have the freedom to teach and uphold the long-held traditional viewpoint about marriage, a viewpoint that is in keeping with the school’s faith position?

Christian schools are alarmed at this extraordinary situation and therefore have significant concerns about the implications for religious freedom in a context of changing understandings on a range of social and moral views.

When holding a viewpoint that is ‘out of step’ with mainstream viewpoints, are Christian teachers and Christian schools likely to be vulnerable to hate speech claims? In light of this significant concern, we request stronger protection for freedom of speech and religion, whilst at the same time standing against the use of speech to incite hatred or contempt for persons based on any attribute, including sexual orientation.

6. Protections within Anti-Discrimination Law

6.1 Exemptions as Balancing Provisions

Exemptions within anti-discrimination law have been used in an attempt to get the balance right. As Paul Kelly has commented in *The Australian* (May 18, 2016)

The exemption from anti-discrimination law for religious institutions and schools allows them to retain their religious character. It is a cornerstone for religious freedom in this country.

The use of exemptions for the purpose of ‘balancing provisions’ has been used within the *Sexual Discrimination Act 1984 (SDA)*. Section 38 of the *Sex Discrimination Act 1984 (Cth)* (SDA) gives effect to the internationally recognised human rights of religious freedom and associational freedom.

¹³ Australian Association of Christian Schools Limited (AACs). Submission to the Department of Attorney General and Justice of the Northern Territory. *Discussion Paper: Modernisation of the Anti-Discrimination Act, September 2017*.

The ALRC (*Australian Law Reform Commission Report on ‘Traditional Rights and Freedoms’*) summarises these in saying:

Commonwealth anti-discrimination laws contain exemptions for religious organisations and religious educational institutions. These exemptions apply where the discriminatory act or conduct conforms to the doctrines, tenets or beliefs of a religion, or is necessary to avoid injury to the religious sensitivities of adherents of that religion.¹⁴

Within the SDA, the relevant specific exemption relating to Christian schools is S 38:

which allows discrimination by educational institutions established for religious purposes in relation to the employment of staff and the provision of education and training, provided that the discrimination is in ‘good faith in order to avoid injury to the religious susceptibilities of adherents of that religion’.¹⁵

All Australian jurisdictions afford exemptions to religious educational institutions in both the areas of employment¹⁶ and in respect of the supply of services to students.¹⁷

The intersection between Commonwealth and State-based jurisdictions and the differences in exemptions between jurisdictions presents some difficulty. This has made it more and more difficult for religious institutions to defend their freedoms. Even while constitutionally, Commonwealth law has precedence over State law when a conflict arises in the same specific area of law (with the exception of some explicitly stated Commonwealth statutes), generally we have seen all the changes and challenges coming from State Anti-Discrimination law revision.

What Christian schools are seeking is an over-arching Commonwealth law that recognises that people have a right to the freedoms that are expressed in Article 18 of the ICCPR.

6.2 Are Exemptions the Best Protection?

Within current debates on discrimination, some argue that the provision of exemptions that protect religiously held views is unfair and discriminatory. Therefore, they argue, exemptions need either greater limitation or removal altogether.

To a certain measure, the ‘exemptions’ provisions are not the best form of protection as they are negatively expressed mechanisms for protecting religious freedom. They appear to merely tolerate religious freedom or provide grudging concession, rather than recognising this form of religious freedom is a fundamental right. And so it has been frequently and unfairly alleged that ‘Christian schools have a free licence to discriminate’.

The present divisive debate about exemptions and the challenges that have been mounted against their retention highlight the limitation of this protection and the vulnerability of those holding onto views that are ‘out of step’ with majority views.

¹⁴ Australian Law Reform Commission, ‘Traditional Rights and Freedoms— Encroachments by Commonwealth Laws’, ALRC Report No 129 (2016). Chapter 5.

¹⁵ *Sex Discrimination Act 1984* (Cth).

¹⁶ *Discrimination Act 1991* (ACT) ss 33(1), 44(a); *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 38C(3)(c), 40(3)(c), 49ZH(3)(c); *Equal Opportunity Act 2010* (Vic) s 83; *Anti-Discrimination Act 1998* (Tas) s 51; *Equal Opportunity Act 1984* (SA) s 34(3); *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(1); *Anti-Discrimination Act 1991* (Qld) s 25.

¹⁷ *Discrimination Act 1991* (ACT) ss 33(2), 46; *Anti-Discrimination Act 1977* (NSW) ss 38K, 46A, 49ZO; *Equal Opportunity Act 2010* (Vic) ss 39(a), 61(a), 83; *Anti-Discrimination Act 1998* (Tas) s 51A; *Equal Opportunity Act 1984* (SA) s 35(2b); *Equal Opportunity Act 1984* (WA) ss 66(1)(a), 73(3); *Anti-Discrimination Act 1991* (Qld) s 41(a).

6.3 General Limitation Clause

It would be a vastly better option if laws could be enacted without the need for exemptions or exceptions whilst still protecting fundamental rights. Christian schools support the idea of a ‘general limitations clause’ – a more positive definition of how a religious institution should be able to express its faith within the context of broader social human rights.

A ‘general limitations clause’ seeks a legislative definition of discrimination that recognises religious practice as not being unlawful discrimination, where the conduct is a proportionate means of achieving legitimate religious objectives. A clear definition, which could be used across relevant legislation and jurisdictions, would allow all people to practise their faith freely within the bounds expressed in the ICCPR.

Freedom for Faith agrees that,

it is inappropriate for anti-discrimination laws to address issues of religious freedom by means of exceptions or exemptions from otherwise applicable laws. As the Human Rights Committee of the United Nations has explained, conduct is not ‘discriminatory’ if it is for a purpose which is legitimate under the ICCPR. That is, the right to be free from discrimination sits alongside other human rights such as freedom of religion, freedom of association and the rights of cultural and religious minorities, and the definition of ‘discrimination’ operates within that context.

For this reason, we propose redefining discrimination in accordance with the model drafted by Professor Patrick Parkinson and Professor Nicholas Aroney. Their definition, which defines both what is, and what is not, discrimination, [*can be found at*] ¹⁸

The notion of a general limitations clause has received wide ranging and distinguished support. In 2008 the Australian Senate Legal and Constitutional Affairs Committee recommended that the exemptions in s 37 and s 38 of the Sexual Discrimination Act be replaced by a General Limitations Clause. The Committee wrote that such a clause would permit discriminatory conduct within reasonable limits and allow a case-by-case consideration of discriminatory conduct. It argued that this would allow for a more ‘flexible’ and ‘nuanced’ approach to balancing competing rights.¹⁹

Noting this recommendation in its 2016 Freedoms Inquiry Report, the *Australian Law Reform Commission* (ALRC) concluded ‘further consideration should be given to whether freedom of religion should be protected through a General Limitations Clause rather than exemptions’.²⁰ The Report acknowledged that:

A broader concern of stakeholders is that freedom of religion may be vulnerable to erosion by anti-discrimination law if religious practice or observance is respected only through exemptions to general prohibitions on discrimination. An alternative approach would involve the enactment of general limitations clauses, under which legislative definitions of discrimination would recognise religious practice or observance as lawful discrimination, where the conduct is a proportionate means of achieving legitimate religious objectives.²¹

The ALRC also made reference to the model that Professors Patrick Parkinson and Nicholas Aroney proposed in their joint submission to the Commonwealth Attorney-General’s Department Consolidation of Commonwealth Anti-Discrimination Laws in 2011.

¹⁸ Prof Patrick Parkinson AM, and Prof Nicholas Aroney, Submission on the Consolidation of Commonwealth antidiscrimination laws (2011), Found in, https://freedomforfaith.org.au/images/uploads/F4F_Submission_to_ALRC_Feb_2015 - Final PDF.pdf p. 12/13

¹⁹ *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality: Senate Standing Committees on Legal and Constitutional Affairs* (2008).

²⁰ Australian Law Reform Commission, ‘Traditional Rights and Freedoms— Encroachments by Commonwealth Laws’, ALRC Report No 129 (2016) [5.124], [5.154].

²¹ Ibid [5.7].

Mark Fowler, in a AACS Supplementary Submission to the *Department of Attorney-General and Justice in the Northern Territory* (Feb, 2018), has drawn on the wording of the Parkinson and Aroney clause to propose a General Limitations Clause that has responded to particular changed legal circumstances since the original Clause was proposed:

- (1) Discrimination means any distinction, exclusion, preference, restriction or condition made or proposed to be made which has the purpose of disadvantaging a person with a protected attribute or which has, or is likely to have, the effect of disadvantaging a person with a protected attribute by comparison with a person who does not have the protected attribute, subject to the following subsections.
- (2) A distinction, exclusion, preference, restriction or condition does not constitute discrimination if:
 - (a) it is reasonably appropriate and adapted to achieve a legitimate objective; or
 - (b) it is made because of the inherent requirements of the particular position concerned; or
 - (c) it is not unlawful under any anti-discrimination law of any State or Territory in the place where it occurs; or
 - (d) it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.
- (3) The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23) is a legitimate objective within the meaning of paragraph (2)(a).²²

Until such a positive ‘redefined discrimination’ mechanism is in place, however, Christian schools will continue to advocate strongly for the retention of ‘exemptions’ so that freedom of religion retains its present measure of protection.

6.4 The Importance of ‘Mission Fit’

As previously mentioned, religious organisations (and all associations) should be free to express who they are. The ‘general limitations clause’ facilitates this expression and readily incorporates the idea of ‘mission fit’ for all roles that are played out within any organisation/ association.

Mission fit is a common sense principle that incorporates a right of positive selection, a notion which is quite different to discrimination. Parkinson outlines the relevant principle:

‘A right of positive selection is rather different from discrimination ... Selection based in part on a characteristic which is relevant to the employment is not discriminatory.’²³

The example of staffing a Thai Restaurant readily shows how a General Limitations Clause works in a much more constructive way than the use of exemptions or the use of ‘Inherent Requirements’.

Should a Thai Restaurant be able to discriminate by employing Thai waiters? Prohibitions on discriminating on the basis of race or the fact that there are no inherent requirements that are intrinsic to being Thai, implies that the restaurant shouldn’t engage in this form of discrimination. However, it is generally accepted that it is perfectly reasonable for the Thai Restaurant to preference Thai workers or that the restaurant should be allowed to include this as a genuine requirement. There is an obvious alignment and ‘mission fit’. Exemptions and inherent requirements do not work in this situation. However, a General Limitations Clause, with its understanding of ‘mission fit’, would be most appropriate.

²² Australian Association of Christian Schools Limited (AACS). Supplementary Submission to the Department of Attorney General and Justice of the Northern Territory. *Discussion Paper: Modernisation of the Anti-Discrimination Act, September 2017*. Pages 18,19

²³ Patrick Parkinson, ‘Christian Concerns about an Australian Charter of Rights’ (2010) 15(2) *Australian Journal of Human Rights* 83, 94.

6.5 Employing staff who align with your values and beliefs

Christian schools were established by Christian parents or churches seeking an authentic Christian educational expression for their faith. The freedom to employ Christian staff, people who are in step with the religious values and beliefs of the school community, goes to the very heart of why Christian schools exist. It is essential to the operation of the Christian school that it can make a deliberate determination that all staff members adhere to, and live by, the beliefs and values of the Christian faith.

Staff members, including both teaching and non-teaching staff, are role models for the students whose educational, social and spiritual development is the school's purpose. All their work is to do with teaching, by modelling and instruction, the doctrines and values of the faith.

As explained in the opening section on the 'Nature of the Christian school' teachers are not just involved in teaching the prescribed curriculum. Their job brief is wide-ranging. Teachers are called to lead in devotions and to pastor and mentor students in their care. This work is also undertaken by non-teaching staff who are involved across the breadth of school life. Parents have chosen Christian schools precisely for this reason, that the staff approach their teaching and pastoral work from a distinctly Christian point of view.

When adjustments to anti-discrimination laws mean that associations like Christian schools, can no longer have authority over their own employment policies, an inappropriate intrusion into the freedom that faith-based schools have been built on, will have occurred.

Christian schools should be allowed to advertise for Christian staff, just as it is appropriate that other associations should be able to employ staff who align with that association's values and ethos. In regards to the ability to determine its leadership, Fowler says,

The ability of a religious or religious educational body to determine the appointment of its leaders (the people who determine its doctrine), and the people who are its voice to the wider society is a fundamental condition of both religious freedom and associational freedom.

Any removal of the ability to act consistently with an educational institution's religious teachings would be a restriction on these historically hard won liberties, which arguably are characteristic of the Western legal tradition.

The establishment and maintenance of such institutions in accordance with their religious freedom rights necessitates their ability to exercise discretion over their leadership, their staff and their volunteers.

As noted above, the removal of the discretion of a private Christian school to ensure that those persons appointed to its leadership, staff and volunteer roles also share its Christian faith is a removal of the ability to maintain the Christian identity of that school. Such a proposal is thus a breach of the right to establish private religious schools.²⁴

As summarised so concisely by former U.S. Chief Justice Brennan:

there can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members that it does not desire. Such a regulation may impair the

²⁴ Australian Association of Christian Schools Limited (AACS). Submission to the Department of Attorney General and Justice of the Northern Territory. *Discussion Paper: Modernisation of the Anti-Discrimination Act, September 2017*.

ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.²⁵

No suggestion is made that an organisation which purports to promote indigenous culture should be required to employ persons from a differing culture. Nor is it suggested that an environmental organisation should be required to employ a climate change denier. No one would argue that a sitting member of a mainstream political party should be required to offer employment to a member of an opposing party in the interests of promoting equality.

While the suggestion of any of these proposals would be treated rightly as absurd, calls for the removal or limiting of the operation of exemptions for religious organisations extends the same flawed reasoning. There is no logical reason to limit the operation of religious institutions through curtailing their appropriate use of exemptions, just as there would not be for indigenous cultural organisations, environmental organisations, trade unions, political parties or any other association. All of these associational bodies are defined by their unifying attributes, being adherence to a legitimate common philosophy, worldview, culture or cause.

It is deeply concerning that proposed changes to Anti-discrimination law in this way, would effectively mean that an association like a Christian school would not have the ability to determine its leadership or its workforce.

6.6 Limitations and/or Restricting Exemptions

A number of proposals have been made to deal the ‘problem’ of exemptions. These include:

- The imposition of an inherent requirement test
- The need to make application to obtain an exemption
- The removal of exemptions.

6.6.1 The Inherent Requirements Test

The Inherent Requirements, or Genuine Occupational, Test would require Christian schools to prove why faith is an essential or genuine or bona fide occupational requirement for each and every staff member’s role.

The rationale is that there needs to be a closer nexus between the need to discriminate and the requirements of the particular job. At some levels, this sounds reasonable and a requirement with which Christian schools would be able to comply.

However, a number of significant problems emerge. (1) What are the definitions of ‘religion’ and ‘inherent’? (2) Where does the boundary line lie for those who are a part of the association? (3) Who decides these things?

Firstly, the problem of how religion is defined and what is ‘inherent’. The ‘Inherent Requirements’ test stipulates that religion needs to be used as a basis to decide employment positions where faith is ‘relevant’.

²⁵ Roberts v. United States Jaycees, 468 U.S. 609 (1984), 468.

Implicit in this requirement is a ‘dualistic’ understanding of the Christian faith that separates the secular (Maths, Administration, Library, Maintenance staff) from the ‘religious’ or sacred (the Principal, Chaplain or Biblical studies teacher). This means that Christian schools would not be able to ask the Administration staff, the Maths teacher, the Camping Program coordinator about their faith position.

This commonly held dualistic understanding of religion says that faith has nothing to do with Maths. This is a complete misunderstanding of some of the foundational beliefs that Christian schools hold. It suffers from a fundamental misunderstanding of the nature of religious conviction, as is understood within the Christian tradition. Christian belief is transformative and is to be demonstrated, even if fallibly, in every area of life.

In contrast to a dualistic view of faith, Christian schools hold a holistic view, one that claims God’s interest in every part of life, in all areas of study and in every part of school life.

Secondly, if one accepts the dualistic view of religion (which Christian schools do not) the problem of who is directly identified as being ‘religious’ remains. What does an ‘inherent requirement’ mean for the ‘supposed’ non-religious teacher? Or, what of the Property Manager or the Payroll Clerk? Is faith a necessary requirement for these roles?

We would contend that the Property Manager working within a Christian school should be enabled to consider their work as a vocation, a calling in which their inner convictions are expressed in the quality of their work efforts and their interactions with their colleagues and also with students. Equally, the Payroll Clerk should be free to express her convictions concerning the obligations of love in human relationships through her employment.

In the Christian tradition, all participants do not see themselves, nor are they appreciated solely, as individuals. They are members of a community and thus should be free to consider the role they play and the contribution they offer to the unique expression of the community ethos. Each participant within the organisation has a contribution to make.

Inherent Requirements cause great concern for organisations seeking to operate within their ‘mission fit’. In Queensland, where ‘Inherent Requirements’ have entered the statute books, there has been difficulties for Christian schools who, with their holistic understanding of education and community, need to work through what is required to comply with these requirements and which staff members it might involve. The process of trying to work through these unnecessary compliance measures, or landing before a Tribunal to clarify the confusion, becomes ‘the punishment’.

Thirdly, ‘who decides’? When legislation has an ‘inherent requirement’ test it requires an authoritative body to interpret and enforce the test. Is it fair or appropriate that a secular tribunal like an Anti-Discrimination Commission should decide what religion means, what is ‘inherent’ and who should be included?

As was famously asserted in 2009 by the Victorian Chair of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in response to a question during a consultation meeting, ‘religion has nothing to do with the employment of a Maths teacher’. In further evidence before a Victorian Parliamentary Committee the VEOHRC Chair argued:

"We do not see a need for a religious school to be able to discriminate in relation to the choice of a cleaner or for a religious school to discriminate in relation to the choice of a mathematics teacher who has no contact with the practice of the religion or the profession of faith in that school."²⁶

We differ most strongly from that opinion for the reasons we have already noted and more especially because the tribunals of a secular state rarely acknowledge their own foundations in their 'religiously' held view of atheism. We understand that no religious ground motive is neutral, which means that entitlements to judgement afforded to the secular state in a democratic society are broadly motivated from a religious antithesis.

Such a shift in power away from the parliament determining legislative guidelines and towards the judiciary, tribunals and Anti-Discrimination Commissions is of great concern. This shift in power has been widely acknowledged in an analysis of overseas jurisdictions that have taken up an 'inherent requirement' approach.

The consequences here not only create great uncertainty for associations like Christian schools but require judicial authorities to interpret doctrine, matters which the judiciary themselves say they are inexpert in and inadequately 'versed in' in order to make determinations. How can those who might well be religiously illiterate be asked to adjudicate on matters that require a high measure of religious literacy? Should judges be asked to determine whether a particular doctrine is genuine in the eyes of the law? What if the judicial officer has a dualistic definition / understanding of religion, which is 'out of step' with the holistic understanding of Christian schools? Courts weighing into matters of doctrine, matters that they have traditionally steered well clear of, is fraught with complexity and difficulty. Courts and Tribunals are not well equipped to do this work.

Professor Carolyn Evans recently lamented before the Australian Commonwealth Parliament *Human Rights Sub-Committee Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry* into the *Status of the Human Right of Freedom of Religion or Belief* that,

'as a society we are becoming less religiously literate' and that consequently, at times there is 'no real understanding of the way religious groups operate, their ethos and so forth', which in her view can lead to problems in areas such as genuine occupational tests.²⁷

In summary, 'Inherent Requirement' tests diminish the authority that Christian schools have over whom they may employ. Control of employment practice would be largely handed over to the relevant secular Tribunal or Anti-Discrimination Commission to shape the employment practice of a religious institution. Such an outcome would severely restrict the freedom of the Christian school to operate in conformity with its convictions and expectations of its community.

6.6.2 Applying for Exemptions

Another proposal that has been recommended in certain jurisdictions is that Christian schools would need to "apply for an exemption with the Anti-Discrimination Commission and justify why a particular exemption"²⁸ is needed. Many of the problems that arise with the use of Inherent Requirements are also applicable here. Further our question is, why should religious bodies be required to do so?

²⁶ Scrutiny of Acts and Regulations Committee, Victorian Parliament, *Inquiry into exceptions and exemptions in the Equal Opportunity Act*, 4 August 2009, transcript p. 5 available at: <http://www.parliament.vic.gov.au>.

²⁷ Professor Carolyn Evans, private capacity, *Committee Hansard*, Melbourne, 7 June 2017, pp. 8-9.

²⁸ Discussion Paper: Modernisation of the Anti-Discrimination Act, (September 2017) available at https://justice.nt.gov.au/__data/assets/pdf_file/0006/445281/anti-discrimination-act-discussionpaper-september-2017.pdf.

The former UN Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, directly contradicts the assumption that religious institutions should be required to ‘justify’ their human rights, when he notes that in any proposal to limit internationally protected religious freedom rights,

‘the onus of proof ... falls on those who argue in favour of the limitations, not on those who defend the full exercise of a right to freedom.’²⁹

6.6.3 Removal of Exemptions

In certain jurisdictions, it has been proposed that exemptions, particularly in relation to enrolment of students, should be removed because the religious exemption has rarely been used by a religious institution to deny enrolment³⁰, or that Christian schools are not complying with the requirements relating to anti-discrimination.

Protected attributes are well understood by Christian schools. At the same time as complying with their legal requirements, Christian schools seek to retain their right to shape enrolment policies and practices in keeping with their vision and mission.

The Christian school’s enrolment policy will be consistent with the school’s mission to support all parents who choose Christian education for their children. The stipulations of the policy will require parents to agree to support the aims and policies of the school through their words and actions as a condition of enrolment. Parents realise that this is what ‘partnership’ with a faith-based community means, regardless of their personal convictions. This ‘partnership’ necessitates supporting and working in accordance with the fundamental tenets of the school’s expressed faith.

Proposals to remove the ability to access exemptions is effectively the removal of the ability of the institution to define its character, goals and imperatives. It is the removal of the ability to control the unique voice of the institution to the wider society. It is actually the removal of the identity of the institution.

Proposals to remove exemptions from educational institutions gives rise to some chilling possibilities. It operationalises in law the creeping presumption that the State is the only true protector of common interest and will not permit views that do not align with the views held in the cultural ascendancy. The State should guard against intervening in “the affairs of religious groups in order to remake them into the image of the liberal society.”³¹

²⁹ UN General Assembly, *Elimination of all Forms of Religious Intolerance*, 5 August 2014, A/69/261, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/495/56/pdf/N1449556.pdf?OpenElement>, 10.

³⁰ Discussion Paper: Modernisation of the Anti-Discrimination Act, (September 2017) available at https://justice.nt.gov.au/__data/assets/pdf_file/0006/445281/anti-discrimination-act-discussionpaper-september-2017.pdf.

³¹ Australian Association of Christian Schools Limited (AACS). Submission to the Department of Attorney General and Justice of the Northern Territory. *Discussion Paper: Modernisation of the Anti-Discrimination Act*, September 2017, page 25.

7. Conclusion

1. A pluralistic democracy is by its very nature one that allows for differing religious outlooks and moral views.
2. Human rights and protections found in international covenants (particularly the *International Covenant on Civil and Political Rights (ICCPR) Article 18*) that Australia is a signatory to, express the fundamental rights that are central to the preservation of a pluralistic democracy. These rights include religious freedom protections (and what that means) and the expression of the rights of children and their parents to ensure the religious and moral education of their children.
3. Christian schools seek to offer students a holistic religious education in accordance with their religious convictions. Christian schools require robust religious freedom protection in order to teach and uphold their specific expressed beliefs.
4. With the rise of particular human rights advocacy, greater ambiguity has arisen regarding the common understanding of what religious freedom means. We recommend clarification and legislative reassurance.
5. AACS recommends that the Expert Panel to be proactive in protecting all Australians' rights to freedom of thought, conscience and religion so that Australians with deep religious convictions can live out their religious beliefs in their life and work within society.
6. AACS recommends that a clear and robust expression of protection for religious institutions should be included so that those bodies can operate and teach in a manner that is true to their faith tradition. **AACS recommends an enhanced Commonwealth Act that will ensure that all people will have their Article 18 (ICCPR) rights protected.**
7. Christian schools are responsible citizens and conduct themselves in responsible and reasonable ways. Therefore, limitations that would distort their very character are restrictions that are unhelpful and un-called for.
8. Christian schools recognise that both “individuals and communities of faith should be free to work constructively with government and other public agencies to protect religious freedom within a society governed by the rule of law.”³²
9. Christian schools recognise that no right is absolute, that different human rights will interact, and that the State needs to find the best means of ‘balancing rights’ within the framework of its human rights obligations.
10. There are great dangers when the state ‘reaches in’ and either limits or removes an association’s religious freedom rights. This will adversely affect the unique identity of Christian schools.

³² <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/religious-freedom-roundtable>. See ‘Statement of purpose and Guiding Principles No:11.

11. Protections within present exemptions to Anti-Discrimination law should be sufficiently broad to cover all people of faith and allow Christian schools to practise their faith freely.
12. The adoption of a General Limitations Clause would deal with the negative nature of exemptions. A General Limitations Clause would allow the legitimate pursuit of an association's cause (within their mission fit) without requiring the use of exemptions. Until such a broader protective mechanism that redefines discrimination is in place, exemptions are a necessary protection.

Thank you for the opportunity to provide input into this most important matter.

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