

**Submission to the Attorney-General's Department in Response to
Consolidation of Commonwealth Anti-Discrimination Laws
Discussion Paper**

Submitted by ANGLICARE Diocese of Sydney

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To:

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1 Executive summary

- (a) ANGLICARE Sydney's submission:
 - (i) Sets out in detail Australia's obligations to support, promote and defend the fundamental rights of religious freedom for Australian citizens and organisations; and
 - (ii) Responds to particular questions raised in the Attorney-General's discussion paper *Consolidation of Commonwealth Anti-Discrimination Laws* as are relevant to ANGLICARE Sydney's mission and activities.
- (b) The Government has committed to introducing sexual orientation and gender identity as new protected attributes in the consolidation bill. ANGLICARE Sydney's submission highlights that, in extending anti-discrimination legislation to cover these attributes, there is a need to ensure that the right to the freedom of religion is not diminished in the process. In common with the approach taken in the existing Commonwealth anti-discrimination laws, broad and robust exemptions will be needed to preserve the right to the exercise of the freedom of religion, both for individuals and corporately.
- (c) ANGLICARE Sydney welcomes the Government's commitment not to remove current religious exemptions in a future consolidation bill. ANGLICARE Sydney's submission contends that current exceptions and exemptions on the grounds of religion should be maintained and further exemptions introduced in order to ensure that individuals and religious organisations can continue to exercise their rights to freedom of religion, consistent with both Australian and international law. The need for such exemptions also reflects Australia's obligation to uphold the right to religious freedom under various United Nations conventions to which Australia is a signatory.
- (d) Furthermore, the submission outlines the view that religious rights should not be cast as 'exemptions' or 'exceptions' but rather should be seen as fully fledged rights in themselves. The casting of the protection of the right to freedom of religion in the form of exemptions or exceptions does not do justice to the importance of this right. The prohibition of unlawful discrimination in the consolidation bill ought to be drafted so that there will be no unlawful discrimination where a right to freedom of religion, association or cultural expression is being legitimately exercised.

- (e) The submission outlines recent developments both here and overseas where the right to the freedom of religion has been adversely affected through legal action under anti-discrimination legislation. These developments highlight that such costly actions should be avoided and emphasise the need for Government to ensure that the right to the freedom of religion is fully and properly protected. The submission argues that religious exemptions should apply to the provision of goods and services as well as to employment issues.
- (f) The submission responds directly to Questions 1, 22, 23 and 26 in the Attorney-General's discussion paper. Following on from the discussion about freedom of religion as a fundamental right, this submission responds to Question 22 that religious exemptions in relation to sexual orientation, marital status and gender identity must be maintained and extended as part of this consolidation bill.
- (g) In relation to the important issue of religious freedom, ANGLICARE Sydney's submission makes the following recommendations:
 - (i) **Recommendation 1**: That Australian law on unlawful discrimination provide a clear and unequivocal statement and acknowledgement:
 - (A) That there is a right to religious freedom in Australia; and
 - (B) That this right to religious freedom is a fundamental right duly recognised in Australian law.
 - (ii) **Recommendation 2**: That the selection of employees sharing the same religious beliefs as those held by the employing religious organisations remain lawful under Australian law.
 - (iii) **Recommendation 3**: That adequate exceptions be provided to protect their right to practise religion 'in community' by the establishment of faith-based organisations.
 - (iv) **Recommendation 4**: That the meaning of 'religious institution' (or 'religious organisation' or 'religious body'):
 - (A) Not be so narrow as to negate the fundamental human right to practise religion in community, including through faith-based organisations; and
 - (B) Be defined broadly, to include non-denominational or independent charities with a faith-based mission or values.

- (v) **Recommendation 5**: That genuine occupational qualifications for a position not be determined externally in ignorance of the religious mission or values of the religious organisation.
- (vi) **Recommendation 6**: That, in the application of exceptions to unlawful discrimination laws for religious organisations, Australian courts not be called on to arbitrate on the validity or otherwise of religious doctrines, tenets, beliefs or teachings.
- (vii) **Recommendation 7**: Should the term 'religious susceptibilities' be retained, that it be more clearly defined so as to patently show that it embraces the concepts of religious 'beliefs' and 'values' held by both:
 - (A) Individuals; and
 - (B) Faith-based organisations.
- (viii) **Recommendation 8**: That the formulation for the protection of religious freedom acknowledge the following:
 - (A) In respect of a particular job or position with an organisation, the legislation protect the inherent requirements of the job as determined in good faith by the organisation based on the organisation's values, beliefs and principles;
 - (B) In connection with employment as a member of the staff of an organisation conducted in accordance with religious values, beliefs and principles, the organisation be protected from a complaint of unlawful discrimination in circumstances where the organisation considers, in good faith, that such a distinction, exclusion or preference is based on the organisation's religious value, beliefs and principles.
 - (C) An organisation's values, beliefs and principles are those values, beliefs and principles as determined in good faith by the organisation.
- (ix) **Recommendation 9**: That faith-based organisations have the right to practise their religion 'corporately' and that this includes a right to decide that all or some roles within the organisation are entitled to include a requirement of acceptance and practice of a specified religious faith;

- (x) **Recommendation 10:** That faith-based organisations maintain the right to shape organisational advertisements and job descriptions at all levels in such a way as to include certain religious dimensions.
- (xi) **Recommendation 11:** That the terms of any government funding to faith-based organisations not be permitted to include requirements preventing such organisations from making decisions or following practices the result of which would be to damage or undermine the religious character, mission and values of the organisation.
- (h) In relation to questions raised in the Attorney-General's discussion paper, we make the following recommendations:
 - (i) **Recommendation 12:** That in the consolidated legislation, as far as is practicable, the term 'discrimination' be replaced by the term 'unlawful discrimination.'
 - (ii) **Recommendation 13:** That:
 - (A) Steps be taken to incorporate the concept of religious freedom within the definition of discrimination so as to properly respect the importance of the fundamental right to religious freedom.
 - (B) In addition to (A), as part of the reform of unlawful discrimination legislation, religious exceptions/exemptions be both maintained and extended and be broadly drafted to ensure that there is no reduction in the current right to religious freedom and that religious freedom remain a fundamental right without any lessening of the protection accorded to the freedom of religion.
 - (C) Religious exceptions/exemptions apply to the provision of goods and services.
 - (iii) **Recommendation 14:** That temporary exemptions be used only for situations that are temporary in nature and that they not be implemented in such a fashion so as to avoid the robust protection of religious freedom rights of individuals and organisations.
 - (iv) **Recommendation 15:** That the full burden of proof rest with the complainant in matters claiming unlawful discrimination and that costs continue to be paid by the unsuccessful party.

2 Introduction

- (a) ANGLICARE Sydney commends the Commonwealth Government's intention to ensure greater clarity as to the rights and obligations of Australian citizens through the consolidation of the five Commonwealth statutes dealing with unlawful discrimination,¹ as outlined in the discussion paper entitled *Consolidation of Commonwealth Anti-Discrimination Laws* released by the Attorney-General's Department in September 2011.
- (b) The Government has also committed to introducing sexual orientation and gender identity as new protected attributes in the consolidation bill.² Our submission contends that, in extending anti-discrimination legislation to cover these attributes, there is a need to ensure that the right to the freedom of religion is not diminished in the process. In common with existing Commonwealth anti-discrimination laws, broad and robust exemptions will be needed in the consolidation bill to preserve the right to the exercise of the freedom of religion, both for individuals and corporately.
- (c) In formulating this submission it is our desire to:
 - (i) Emphasise the need for a full and accurate protection of religious freedom in the consolidation bill; and
 - (ii) Respond to particular questions raised in the Attorney-General's discussion paper.
- (d) Our discussion of freedom of religion is purposefully detailed, as it informs our response to questions in the Attorney-General's discussion paper. Our view is that the need for religious exemptions under a consolidated unlawful discrimination act is completely appropriate and cannot be fully appreciated without a thorough understanding of Australia's obligations to uphold the right to religious freedom under various United Nations conventions of which Australia is a signatory. Our view is that it is very important for Government to fully appreciate the level of religious freedom currently enjoyed in Australia, which needs to be valued,

¹ *Australian Human Rights Commission Act 1986 (Cth)*, *Racial Discrimination Act 1975 (Cth)*, *Sex Discrimination Act 1984 (Cth)*, *Disability Discrimination Act 1992 (Cth)* and *Age Discrimination Act 2004 (Cth)*. There are also provisions relating to discrimination in employment in the *Fair Work Act 2009 (Cth)*.

² Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper 2011*, para 73.

protected and upheld throughout the current process of legislative review. For these reasons we make no apology in fully exploring this issue in this submission.

3 Overview of ANGLICARE Sydney

- (a) ANGLICARE Sydney is a Christian organisation operating a wide range of community services and programs across the Sydney Metropolitan and the Illawarra regions of New South Wales. Our range of services includes aged care both through nursing homes and community services; disability case management and respite; emergency relief for those in crisis; foster care and adoption including those with special needs; counselling and family support services (including Family Relationship Centres); youth services; shops which provide low-cost clothing; chaplains in hospitals, prisons, mental health facilities and juvenile justice institutions; and emergency services in times of disaster.
- (b) Inter alia, our mission is to care by doing good works that grow communities and address emotional, social and physical needs, and which are the fruit of the gospel of the Lord Jesus Christ.
- (c) This submission will address several issues raised by the Attorney-General's discussion paper which are relevant to ANGLICARE Sydney as a Christian charity.

4 Freedom of religion

4.1 Overview

- (a) ANGLICARE Sydney welcomes the Government's commitment not to remove current religious exemptions in a future consolidation bill. However we note the comment that consideration will be given to the way in which these exemptions may apply to unlawful discrimination on the grounds of sexual orientation or gender identity.³
- (b) The right to religious freedom is not only a key right but has been instrumental in the development of other rights. As stated by Neil Foster in his recent article,⁴ over and above the fact that religious freedom is a freedom clearly mentioned in all major international rights instruments:

³ Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* 2011, para 161.

⁴ Neil Foster: 'Law and Religion: Legal Regulation of Religious Groups, Organisations and Communities', Melbourne Law School, University of Melbourne, 15-16 July 2011 p.1.

'The notion of "rights" that are enjoyed by all persons qua members of the human race can arguably be traced back in its origins to insights from the major religious movements of the world. In the Judeo-Christian tradition human beings are intrinsically valuable because they are created "in the image of God".⁵ ... Early movements for recognition of "freedom of speech" were strongly connected with the issue of freedom of religion, and the opportunity to differ from the majority religion.'⁶

(c) Foster continues:

'But more than the fact that the historical origin of human rights lies in religious perspectives, the modern reality in Australia, as all over the world, is that religion plays a key role in the lives of many people. Whatever definition is adopted of the term (and this is an area that always presents important issues), all recognise that religion is a matter of "ultimate concern", something which shapes a person's values, their understanding of the meaning of life, and how they ought to behave. So if values such as liberty and rights to be free from interference in other areas of life are to be recognised, the law must extend its protection to some extent to an aspect of life that is fundamentally important to many people..... The response should be to provide protection for these rights, while ensuring that they are appropriately balanced with other rights.'⁷

(d) The principles which ANGLICARE Sydney wishes to emphasise in relation to the right to religious freedom are as follows:

- (i) As a faith-based entity ANGLICARE Sydney maintains that the rights under Articles 1.1 and 6 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* 1981 (**Religion Declaration**) to express religious belief in community with each other by establishing organisations which embody religious beliefs and values must be preserved.
- (ii) We maintain that the definition of a 'religious institution' must not be understood so narrowly as to negate the fundamental human right to practice religion in community, including through religious charities.
- (iii) We maintain that exceptions and exemptions for religious organisations should not be interpreted so narrowly as to exclude non-denominational

⁵ Genesis 1:26-27.

⁶ Foster, *op cit.*, p.1.

⁷ *Ibid.*, p.2.

religious organisations, or charitable or humanitarian groups established for religious reasons.

- (iv) ANGLICARE Sydney would not exist if it were not for the Christian mission and values upon which it is formed and in which it finds its very 'raison d'être'. The relationship between our organisation and the Christian faith is more than a historical - it is central to what we are and what we do.
- (v) It is essential that genuine occupational qualifications not be determined externally to ANGLICARE Sydney, in ignorance of its religious mission and values.
- (vi) The Christian faith and values are not just the foundation and motivation for ANGLICARE Sydney's work - they also shape the way in which it operates on a day to day basis. Our identity as a Christian organisation dictates and impacts the decisions it makes at every level. This has two non-negotiable implications:
 - (A) The right under Article 6(b) of the Religion Declaration to practice religion 'corporately'. This includes a right to decide that all or some roles within it are expected and required to both accept and practice the Christian faith.
 - (B) The right under Article 6(b) of the Religion Declaration to shape advertisements and job descriptions at all levels in such a way as to include certain religious dimensions. We cannot employ, at any level, someone who is hostile to or unsupportive of our mission, vision or values. Provided this is done in good faith, religious organisations such as ANGLICARE Sydney maintain the right to decide whether some or all of the positions offered by it carry such a 'faith dimension'. To allow for limitation of this right would be to seriously diminish the specific right to religious freedom. Without this requirement, we cannot maintain our character as a Christian organisation, or carry out our mission. In this respect it is in the same position as any organisation – be it a company, political party or environmental advocacy group. It is a well-accepted principle that all organisations require their employees to be capable of working towards the mission of their employing organisation while respecting the organisation's values. Article 6(g) of the Religion Declaration recognises that the choice of religious leadership according to the requirements of the relevant religion is a critical

element of the freedom of religion. The qualifications and roles within a religious organisation cannot be dictated by values formulated externally to the organisation.

- (vii) It is essential that the Commonwealth Government recognise that the right to religious freedom extends far beyond the running of worship services within church buildings or the nomination and appointment of clergy. It extends to the vast array of activities and services which we and many other organisations carry out within the community at large.
- (viii) In order to pursue a uniquely religious mission, we sometimes need to create roles which add a faith dimension to the standard job description. The decision about whether this is a necessary or effective way to pursue the objectives of our institution should never, provided our objectives are lawful and any decision is made in good faith, be supplanted by an externally imposed decision of courts or legislators. To do so would be to seriously impact in a negative fashion upon the freedom guaranteed in Article 6 of the Religion Declaration. ANGLICARE Sydney therefore claims the right to decide which roles within its operations require a personal commitment to the Christian faith and what form of Christian faith is to be expected of employees and volunteers.
- (ix) In applying exceptions to laws dealing with unlawful discrimination courts must not be called on to arbitrate on contentious religious doctrines, tenets, beliefs or teachings.

4.2 Religious social service institutions in Australia

- (a) In Australia, the Christian churches have been delivering social services from the very beginning of European settlement. Christians in Australia have organised themselves into faith-based charities since 1813 with the establishment of the Benevolent Society in Sydney. District nursing services followed in 1820, followed soon by a wide range of services from maternity hospitals to palliative care.
- (b) Today many of the top charities in Australia are Christian or have a Christian heritage. An investigation by BRW magazine⁸ found that the list of the top 20 charities in Australia is dominated by religious organisations. Catholic Education offices in NSW, Victoria and Queensland made up three of the top four charities and several Catholic hospitals were in the top 20. Churches through their activities

⁸ *BRW Magazine*, 29 June-5 July 2006.

in health, education, aged care and welfare are large providers of essential community services.⁹

- (c) Australian governments have generally taken the view that it is more effective and efficient to outsource social services to the charities which are already running well-established and highly effective services. This relationship has many benefits for society:
- (i) Efficient: rather than duplicating existing services by commencing new government programs, well established programs with a proven track record can be expanded;
 - (ii) Non-profit: under Australian law charitable entities are not permitted to operate so as to profit their 'members'. Accordingly, a greater proportion of government monies can thus reach the intended recipients than if the programs were carried out by a 'for profit' commercial entity;
 - (iii) Risk-taking: charities tend to be more willing to pilot new programs which carry an element of 'risk'. Once the program is proven to be successful governments are then able to expand on the proven program model;
 - (iv) Community based: many services, such as family support and community aged or disability care, cannot work without strong community support and participation. It is a well-known fact that charities (and religious charities in particular) bring with them a remarkably strong nexus of community ties;
 - (v) Volunteer capacity: charities are typically more effective at mobilising large numbers of volunteers than government bureaucracies or 'for profit' commercial enterprises. The contribution of volunteer assistance is a significant contributor to the provision of labour intensive care services in particular. We, for instance, have about 100 volunteers who complement the efforts of paid staff; and
 - (vi) Competition: under current Government funding models charities 'compete' with each other for philanthropic as well as government funding. They must demonstrate that their programs provide the best outcomes for monies provided by philanthropy and governments.
- (d) Our view is that the above advantages accorded to Australian society by the presence of not-for-profit organisations are enhanced rather than hindered by the faith-based approach of those Christian organisations. Being a Christian

⁹ 'Catholics lead rise in charity revenue,' Australian Associated Press/The Age, 23 March 2005.

organisation is not so much about maintaining a heritage but rather the permeation of organisational activities with Christian values and beliefs.

- (e) Where governments provide funding to religious organisations such as ANGLICARE Sydney these governments achieve effective and efficient outcomes for their budgetary spending by outsourcing their social services to charities, many of which in Australia are Christian faith-based institutions.

4.3 International law

- (a) Many of the provisions in the five statutes which set out Australia's national laws on unlawful discrimination¹⁰ implement Australia's obligations under seven core human rights treaties to which Australia is a party:

- (i) *International Convention on Civil and Political Rights;*
- (ii) *International Convention on Economic, Social and Cultural Rights;*
- (iii) *International Convention on the Elimination of All Forms of Racial Discrimination;*
- (iv) *Convention on the Elimination of All Forms of Discrimination against Women;*
- (v) *Convention on the Rights of the Child;*
- (vi) *Convention on the Rights of Persons with Disabilities;* and
- (vii) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

- (b) In addition, every significant international instrument of the United Nations concerning human rights since the proclamation of the 1948 *Declaration of Human Rights* contains specific and unqualified reference to the inherent and inviolable dignity of every human person.

- (c) All of the following international instruments refer to either the right to freedom of thought, conscience and religion, or the right of parents to educate their children, or to have them educated, according to their religious and moral beliefs and traditions:

- (i) *Universal Declaration of Human Rights 1948;*

¹⁰ *Australian Human Rights Commission Act 1986 (Cth); Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth) and Age Discrimination Act 2004 (Cth).*

- (ii) *Convention against Discrimination in Education* 1960;
 - (iii) *International Covenant on Economic, Social and Cultural Rights* 1966;
 - (iv) *International Covenant on Civil and Political Rights* 1966;
 - (v) *International Convention on the Elimination of All Forms of Racial Discrimination* 1966; and
 - (vi) *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* 1981.
- (d) These international instruments make it clear that:
- (i) All voices, religious or non-religious, have a right to be heard; and
 - (ii) Central to the freedom of religion is the protection of the right not to be discriminated against on the basis of religion;
- (e) It also logically follows that there is also a right to express religious belief in community with each other by establishing organisations which embody religious beliefs and values. To allow for limitation of this right would be to seriously diminish the specific right to religious freedom.
- (f) Religious freedom is a human right, the cornerstone of a just society, and the foundation for international peace and security.
- (g) Ensuring that religious freedom can be freely exercised is an important social policy objective for pluralistic and democratic societies such as our own.
- (h) The various statements, documents and declarations of the United Nations have affirmed the significance of religious freedom. The rights of the human person include the rights:
- (i) To freedom of thought, conscience and religion;
 - (ii) To manifest religion and belief, in private and in public, subject only to such limitations as prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others;
 - (iii) Of parents to ensure that the religious and moral education of their children is in conformity with their own religious beliefs and convictions;
 - (iv) Of religious bodies to be protected from undue intrusion by the state into their ethos, principles or conduct; and

- (v) For people to be protected from discrimination based on religion and belief in the area of employment, (and the obligation of the state to take effective measures to prevent and eliminate religious discrimination in all fields of civil, economic, political, social and cultural life).
- (i) Faith ‘in community’
- (i) There are different views in contemporary Australian society on the appropriate relationship between individual and collective rights in relation to freedom of religion and belief.
 - (ii) However the acknowledgment that freedom of religion is more than just a private affair is a deeply rooted principle of international and domestic law.
 - (iii) Article 18 of the *International Covenant on Civil and Political Rights* 1966 (**ICCPR**) and Article 1.1 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* 1981 (**Religion Declaration**),¹¹ both state that everyone shall have the freedom:
 - ‘... either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.’
 - (iv) More specifically, Article 6 of the Religion Declaration states that the right to freedom of thought, conscience, religion or belief shall include the freedom:
 - (b) *To establish and maintain appropriate charitable or humanitarian institutions;*
 - (g) *To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief.’*
 - (v) Under Article 1.3 of the Religion Declaration these freedoms are to be subject only to those limitations:
 - ‘... as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.’¹²

¹¹ See www2.ohchr.org/english/law/ccpr.htm and www2.ohchr.org/english/law/religion.htm.

¹² Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief Article 1.3 www2.ohchr.org/english/law/religion.htm.

(vi) Concerns have been raised about the extent to which Australian human rights frameworks place emphasis on the rights of individuals. We therefore submit that communities, given that they are more than a mere 'collection of individuals,' have an existence in and of themselves.

(vii) In its submission to the Australian Human Rights Commission (**AHRC**) enquiry into *Freedom of Religion and Belief in the 21st Century (AHRC Religion Enquiry)*, the Church of Jesus Christ of Latter-day Saints argued:

*'While there is presently an emphasis within much of the intellectual discourse in Australia on the right of individuals to be free from religious intrusion, governments must be careful not to inadvertently restrict the rights of believers while protecting the rights of non-believers.'*¹³

(viii) In its submission to the AHRC Religion Enquiry the Anglican Diocese of Sydney drew attention to the presentation of religion '*primarily as a matter for individual choice rather than communal affair.*' The Sydney Anglican Diocese also stated that:

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

(ix) The Sydney Anglican Diocese stated further in its submission that this concern is reflected in the ICCPR and the Religion Declaration when they mention the place of religion communities, their organisations and the education of children.¹⁴

(x) In its submission to the AHRC Religion Enquiry the Ad Hoc Interfaith Committee stated:

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

¹³ AHRC Religion Enquiry Submission No 1012 - The Church of Jesus Christ of Latter-day Saints – see www.humanrights.gov.au/frb/frb_submissions.html.

¹⁴ AHRC Religion Enquiry Submission No 1533 - Anglican Diocese of Sydney – see www.humanrights.gov.au/frb/frb_submissions.html.

*the communities and associations by which a culture of human dignity flourishes.*¹⁵

- (xi) The implications for faith-based organisations that follow from this are that they have the right under Article 6(b) of the Religion Declaration to practise their religion ‘corporately’. This includes rights for the organisation:
 - (A) To decide that all or some roles within it are expected and required to both accept and practise its faith; and
 - (B) To include certain religious dimensions within roles in the organisation.
- (xii) Further, it is our view that, in their application of the so-called ‘exceptions’ to laws on unlawful discrimination, courts and tribunals:
 - (A) Must not be called on to arbitrate on what is, or is not, a church doctrine, tenet, belief or teaching; and
 - (B) Must not apply a narrow conception of what a ‘religion’ or ‘religious organisation’ is or should be.

Indeed we argue that courts and tribunals lack the competence to do so.

4.4 Australian law

- (a) Australian law largely, but not comprehensively or consistently, reflects the international instruments in its protections of religious freedom. On the one hand, it sometimes proscribes (but only in very limited circumstances goes so far as to make illegal) unlawful discrimination based on religion. On the other hand, it affirms:
 - (i) The right to practice religion in community with others by establishing faith based organisations; and
 - (ii) That exclusions made based on the inherent requirements of a job do not amount to unlawful discrimination.
- (b) As regards the application of the international instruments referred to above to the domestic law of Australia, it is important to consider the Mabo decision of the High Court of Australia:

¹⁵ AHRC Religion Enquiry Submission No 1687 Ad Hoc Interfaith Committee – see www.humanrights.gov.au/frb/frb_submissions.html.

*'...the common law does not necessarily conform with international law ... [But international law is] a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.'*¹⁶

(c) Commonwealth of Australia Constitution Act 1900 (UK)

(i) s116 of the *Commonwealth of Australia Constitution Act 1900* (**Australian Constitution**) prevents the Commonwealth government from making any law:

'.... for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.'

(ii) It is important to note that the Australian Constitution expresses the separation of church and state in pointedly different terms than the earlier American First Amendment. This difference is deliberate and extremely significant.

(iii) In Australia, the principle of separation of church and state is about the establishment of a church as a national institution.

(iv) In the 1988 Referendum Australians were offered the opportunity to change the wording of s116 of the Australian Constitution. They declined to do so and the proposal was defeated in every state as the Australian people overwhelmingly decided to keep the Australian principle of separation of church and state the way it was.

(v) International instruments, such as the Religion Declaration, are not of themselves or as a matter of right, part of Australian domestic law. As part of the body of international law, however, such documents must be regarded as points of significant general reference.

(vi) Australia has also given effect to various international treaties and conventions, by enacting legislation using the 'external affairs power' in the Australian Constitution.¹⁷

¹⁶ *Mabo -v- State of Queensland (No. 2)* [1992] 175 CLR I at 42 per Brennan J. – see www.austlii.edu.au/au/cases/cth/HCA/1992/23.html.

¹⁷ For instance, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (now the *Australian Human Rights Commission Act 1986* (Cth)) was enacted by relying upon this power in the Australian Constitution.

- (vii) By restricting the legislative powers of the Commonwealth Parliament, s116 provides some protection. However, because the Australian Constitution does not affect the legislative powers of the states and territories, which have more responsibility than does the Commonwealth for social regulation that may affect religious practice, the protection afforded by the Australian Constitution is limited.
- (d) Australian Human Rights Commission Act 1986 (Cth)
 - (i) The *Australian Human Rights Commission Act 1986 (Cth)* (**AHRCA**) (formerly called the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*). established the Human Rights and Equal Opportunity Commission (now the AHRC) and gives it functions in relation to the following international instruments:
 - (A) *International Covenant on Civil and Political Rights*;
 - (B) *Convention Concerning Discrimination in Respect of Employment and Occupation (ILO 111)*;
 - (C) *Convention on the Rights of Persons with Disabilities*;
 - (D) *Convention on the Rights of the Child*;
 - (E) *Declaration of the Rights of the Child*;
 - (F) *Declaration on the Rights of Disabled Persons*;
 - (G) *Declaration on the Rights of Mentally Retarded Persons*; and
 - (H) *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.
 - (ii) Complaints about discrimination can be made under any of the five Acts for which the AHRC has statutory responsibilities.¹⁸
 - (iii) The AHRCA empowers the AHRC to investigate complaints of discrimination, harassment and bullying based on specifically-cited grounds.
 - (iv) Provisions (c) and (d) of the definition of the term 'discrimination' in s3(1) of the AHRCA reflect international law in that they qualify the general

¹⁸ *Australian Human Rights Commission Act 1986 (Cth)*; *Racial Discrimination Act 1975 (Cth)*; *Sex Discrimination Act 1984 (Cth)*; *Disability Discrimination Act 1992 (Cth)* and *Age Discrimination Act 2004 (Cth)*.

position with two exceptions, that is, unlawful discrimination does not include any '*distinction, exclusion or preference*':

(A) In respect of a particular job based on the inherent requirements of the job; or

(B) In connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to '*avoid injury to the religious susceptibilities of adherents*' of that religion or that creed.

(v) Part IIB of the the AHRCA is titled '*Redress for Unlawful Discrimination*' It is important to note here that '*religion*' is not one of the categories which can attract redress under the AHRCA. Thus the AHRCA does not provide enforceable remedies against discrimination on the grounds of religion or belief.

(vi) In addition to receiving complaints of unlawful discrimination, the AHRC can inquire into complaints of breaches of human rights and workplace discrimination under the AHRCA. When the AHRC receives a complaint of a breach of human rights or workplace discrimination, it will attempt to resolve the complaint through conciliation. If conciliation is unsuccessful or inappropriate, and the AHRC finds that there has been a breach of human rights or workplace discrimination has occurred, then it can prepare a report of the complaint, including recommendations for action, addressed to the Commonwealth Attorney General. Such a report must be tabled before the Commonwealth Parliament.

(e) *Sex Discrimination Act 1984* (Cth)

(i) The *Sex Discrimination Act 1984* (Cth) (**SDA**) gives effect to Australia's obligations under the Convention on the Elimination of All Forms of Discrimination against Women and certain aspects of the International Labour Organisation Convention 156.

(ii) The SDA provides exceptions for, among other things:

(A) The ordination, training and appointment of priests, ministers of religion or members of a religious order – s 37(a) to (c). This protects the right under Article 6 of the Religion Declaration to

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

(B) *'Any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion'* – s 37(d); and

(C) Unlawful discrimination on the grounds of sex, marital status or pregnancy by educational institutions *'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed ... in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'* - s 38(1) and s38(2).

(f) Other Commonwealth legislation

(i) Other Commonwealth legislation is relevant to the issue of religious freedom.

(ii) The *Racial Discrimination Act 1975* (Cth) (**RDA**) provides some indirect protection against religious groups which are also identifiable racial groups.

(iii) s351 of the *Fair Work Act 2009* (Cth) (**FWA**) states as follows:

351 Discrimination

(1) *An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) *However, subsection (1) does not apply to action that is:*

(a) *not unlawful under any anti-discrimination law in force in the place where the action is taken; or*

- (b) *taken because of the inherent requirements of the particular position concerned; or*
 - (c) *if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:*
 - (i) *in good faith; and*
 - (ii) *to avoid injury to the religious susceptibilities of adherents of that religion or creed.*
- (3) *Each of the following is an anti-discrimination law:*
- (aa) *the Age Discrimination Act 2004;*
 - (ab) *the Disability Discrimination Act 1992;*
 - (ac) *the Racial Discrimination Act 1975;*
 - (ad) *the Sex Discrimination Act 1984;*
 - (a) *the Anti-Discrimination Act 1977 of New South Wales;*
 - (b) *the Equal Opportunity Act 1995 of Victoria;*
 - (c) *the Anti-Discrimination Act 1991 of Queensland;*
 - (d) *the Equal Opportunity Act 1984 of Western Australia;*
 - (e) *the Equal Opportunity Act 1984 of South Australia;*
 - (f) *the Anti-Discrimination Act 1998 of Tasmania;*
 - (g) *the Discrimination Act 1991 of the Australian Capital Territory;*
 - (h) *the Anti-Discrimination Act of the Northern Territory.*

4.5 Adoption

- (a) A very practical example of the way in which ANGLICARE Sydney relies upon the right to religious freedom in its day to day activities is in the area of adoption.
- (b) ANGLICARE Sydney is one of the two NSW Christian charities which handle over half of all domestic adoptions in NSW.

- (c) The principles we follow in relation to our adoption services are as follows:
- (i) All people are deserving of ANGLICARE Sydney's respect, love and care and we do not generally exclude clients from any of our services based on their sexual orientation;
 - (ii) In the case of adoption, however, ANGLICARE Sydney considers that its primary responsibility lies with the child. Adoptive parents are not ANGLICARE Sydney's client - the child is our client;
 - (iii) ANGLICARE Sydney's well-known Christian beliefs place a significant emphasis on the family unit as a committed partnership between a man and a woman. This is a reflection of the traditional family values upheld and followed by our organisation;
 - (iv) The best interests of children (rather than the interests of any adult) are the paramount consideration in ANGLICARE Sydney's deliberations and we are convinced that the interest of children in our care are best served by finding a mother and a father to adopt them into a traditional family unit. This is an authentic and fundamental issue of religious belief and is not a view based on a 'conservative' view of social mores;
- (d) ANGLICARE Sydney believes that the experience of being mothered and fathered remain among the important environmental factors that constitute optimal conditions for children. ANGLICARE Sydney remains committed to ensuring that children are given every chance of obtaining the benefit of both motherhood and fatherhood,
- (e) To require ANGLICARE Sydney to do otherwise would require us to act contrary to our religious beliefs and to what we firmly believe to be in the best interests of the child.
- (f) For this reason when the *Adoption Act 2000 (NSW)* was amended to permit adoption by same sex couples, ANGLICARE Sydney requested that an exemption be permitted for its service not to be required to have same sex couples as clients, In this instance not permitting such an exemption may have led to closure of the service in view of ANGLICARE's stance based upon its religious beliefs. It should be noted that alternative services were available for same sex couples through other agencies.

4.6 Recent developments

(a) Introduction

- (i) It is with a note of serious concern that we draw attention to a number of recent developments, both in Australia and in other parts of the western world, which evidence the placing of 'strain' upon individuals and faith-based organisations heretofore peaceably enjoying their religious freedoms.
- (ii) In relation to Australia, it is our sincere hope that these regrettable developments can be rectified as a matter of priority and that Australia not decide to follow certain unhelpful international developments leading to:
 - (A) Placing severe restrictions upon the exercise of religious freedoms;
 - (B) An increase in costly and unnecessary litigation; and
 - (C) A rise in the unease experienced by some within the faith communities that the right to religious freedom is being curtailed as a result of pressure from minority interest groups.

(b) Australia

- (i) OW & OV -v- Members of the Board of the Wesley Mission Council
 - (A) The matter of OW and OV –v- Members of the Board of the Wesley Mission Council has a long judicial history, being considered first by the NSW Administrative Decisions Tribunal (**NSWADT**), then the Appeal Panel of the NSWADT, then the NSW Court of Appeal which, after clarifying certain points of law, returned the matter for the current determination by the NSWADT.
 - (B) The NSWADT handed down its final decision on 10 December 2010.¹⁹
 - (C) The case concerned a complaint by a same-sex couple that Wesley Mission²⁰ had, in 2003, breached the *Anti-Discrimination Act 1977 (NSW)* (**NSW ADA**) by not accepting an application to place a child in the foster care of the same-sex couple.

¹⁹ OW & OV –v- Members of the Board of the Wesley Mission Council [2010] NSWADT 293 (10 December 2010) at para 13 – see www.austlii.edu.au/au/cases/nsw/NSWADT/2010/293.html.

²⁰ A congregation of the Uniting Church in Australia which, inter alia, conducts a number of community services.

- (D) The case considered the terms of the exemption granted to religious bodies by s56 of the NSW ADA which provides:
- '.... nothing in this Act affects...any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.'*²¹
- (E) The religious freedom concerns in this case relate principally to the determination of the NSWADT at first instance after a hearing commencing in May 2007.²²
- (F) At first instance, the NSWADT determined (based on little more than the diversity of beliefs within the Christian religion) that Wesley Mission had failed to prove their interpretation of the Bible reflected the true doctrine of the Christian religion.
- (G) The NSWADT's narrow interpretation at first instance presents a problem, not just for Christian organisations such as our own, but also for Jewish, Moslem or Buddhist organisations etc. in that they may not be able to rely upon the exemption in the NSW ADA due to the fact that there is a divergence in beliefs on key issues of faith and/or practice within their respective denominations.
- (H) Thankfully, the matters did not rest there, and in a July 2010 appeal, the NSW Court of Appeal held that the NSWADT had erred in law at first instance, as:
- '.....there is no basis in s56 of the Anti-Discrimination Act to infer that Parliament intended to exempt from the operation of the Anti-Discrimination Act only those acts or practices which formed part ... of the religion common to all Christian churches, or all branches of a particular Christian church (in the sense of a denomination), to the exclusion of variants adopted by some elements within a particular Church.'*²³

²¹ See http://corrigan.austlii.edu.au/au/legis/nsw/consol_act/aa1977204/s56.html.

²² The then title of which was *OV and Anor v QZ and Anor (No.2) [2008] NSWADT 115* - see www.lawlink.nsw.gov.au/adtjudgments/2008nswadt.nsf/2008nswadt.nsf/WebViewEOD2/649A0E73BAF29B1DCA25742D000AA85B?OpenDocument.

²³ *OV & OW –v- Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (06 July 2010) at para 41 - see www.austlii.edu.au/au/cases/nsw/NSWCA/2010/155.html.

- (I) The NSWADT's incorrect interpretation at first instance had led it to look for:

*'.... a doctrine of "the Christian religion", conformity with which required the rejection of applications to foster from same-sex couples. It found no such doctrine, because the evidence before it was directed specifically to the beliefs and teachings of Methodism or Wesleyism.....'*²⁴

- (J) The NSW Court of Appeal concluded that it was such reasoning that had led the NSWADT to incorrectly find that, as the actions of Wesley Mission were not in accordance with its doctrines, it could not therefore enjoy the sanction of the exempting provision in the NSW ADA. Having clarified the law, the Court of Appeal then returned the matter to the NSWADT to reconsider the facts on the basis of its clarification of the law.

- (K) In reconsidering the matter in December 2010, the NSWADT, taking its lead from the NSW Court of Appeal, instead reasoned that question of whether the exemption could apply must be determined with reference to the:

*'...relevant doctrines of the religion which the Wesley Mission was, at 2003, established to propagate.'*²⁵

- (L) The evidence of Wesley Mission was relied upon to establish that in 2003 the Wesley Mission held a doctrine that *'monogamous heterosexual partnership within marriage is both the norm and ideal'*.²⁶

- (M) The NSWADT then determined that the refusal to consider the application conformed with the relevant doctrines of the religion which Wesley Mission was, as at 2003, established to propagate, and as such, the decision fell within one of the arms of the religious exemption within s56(d) of the NSW ADA, and therefore, did not breach the NSW ADA.

²⁴ *OV & OW –v- Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (06 July 2010) at para 40 - see www.austlii.edu.au/au/cases/nsw/NSWCA/2010/155.html.

²⁵ *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) at para 13 – see www.austlii.edu.au/au/cases/nsw/NSWADT/2010/293.html.

²⁶ *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) at para 18 subpara 54 – see www.austlii.edu.au/au/cases/nsw/NSWADT/2010/293.html.

- (N) The NSWADT rejected the claimants' argument that the exemption should only apply to 'pastoral' activities, to the exclusion of 'non-pastoral' activities of religious bodies.
- (O) It must be said that, while the final determination of the NSWADT was much more respectful of Wesley Mission's right to religious freedom, the process was an extremely convoluted and expensive exercise for the organisation concerned. The temptation for many religious organisations, faced with a similar dilemma, may well be to accept a poor determination at first instance rather than going to the effort and expense of an appeal.
- (P) Such a situation is unhelpful at best and, we submit, should be avoided at all costs.
- (ii) Islamic Council of Victoria -v- Catch the Fire Ministries Inc.
- (A) In the case of *Islamic Council of Victoria -v- Catch the Fire Ministries Inc.*²⁷ the Islamic Council of Victoria lodged a complaint under the *Racial and Religious Tolerance Act 2001 (Vic) (Vic RRTA)* arising out of certain statements critical of Islam made by a Christian pastor at a seminar and published on the internet.
- (B) The respondents to the action were 'Catch the Fire Ministries' and Pastors Daniel Nalliah and Daniel Scot.
- (C) At first instance, on 17 December 2004, the Victorian Civil and Administrative Tribunal (VCAT) upheld the complaint²⁸ and later ordered that corrective advertisements be published on the respondents' website for a period of 12 months.²⁹
- (D) The respondents' *appeal* from the VCAT determination to the Victorian Court of Appeal was upheld on the basis that VCAT had applied an incorrect test in determining whether the Vic RRTA had been breached. However, the court confirmed that:

²⁷ *Catch the Fire Ministries Inc. & Ors -v- Islamic Council of Victoria Inc.* [2006] VSCA 284 (14 December 2006) - see www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2006/284.html .

²⁸ *Islamic Council of Victoria -v- Catch the Fire Ministries Inc. (Final)* [2004] VCAT 2510 (22 December 2004) - see www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2004/2510.html?stem=0&synonyms=0&query=catch.

²⁹ *Islamic Council of Victoria -v- Catch the Fire Ministries Inc. (Anti-Discrimination - Remedy)* [2005] VCAT 1159 (22 June 2005) – see www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2005/1159.html?stem=0&synonyms=0&query=catch.

- (1) The corrective advertising order was not beyond the VCAT's power under s136 of the *Equal Opportunity Act* 1995 (Vic) (**Vic EOA**); and
- (2) s8 of the Vic EOA was *valid* and did not burden the implied freedom of communication about government and political matters.
- (E) s8(1) of the Vic RRTA provides that:
- 'A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.'*
- (F) The problem posed by the presumably well-intentioned Vic RRTA is that, instead of protecting religion and public harmony, when applied in practice it has served to create social division and the censorship of sincerely held religious beliefs by force of law.
- (G) In addition, Australia is obliged by international conventions to protect rights of conscience, freedom of expression and equal protection under the law as Australia has ratified the Universal Declaration of Human Rights and its enforcement mechanism, the ICCPR.
- (H) The free speech, belief and religious exercise provisions of Articles 18, 19, and 26 of the ICCPR protect the right to freely preach about and analyse the religious claims of differing religions.
- (I) Due to the intervention of a number of supporting entities, the matter was appealed to the Supreme Court of Victoria which upheld the appeal and found in favour of Pastors Nalliah and Scot, vacating the original determination and ordering the matter to be reheard in front of a different judge.³⁰
- (J) Similarly to the case of *OW & OV -v- Members of the Board of the Wesley Mission Council* previously cited, while the final determination in this matter was much more respectful of the two pastors' rights to religious freedom, the process to prosecute these

³⁰ *Catch the Fire Ministries Inc. & Ors v Islamic Council of Victoria Inc.* [2006] VSCA 284 (14 December 2006) - see www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2006/284.html.

rights was both expensive and lengthy. Once again we are of the view that it is in the best interests of Australian society at large for such a situation to be strenuously avoided in the future.

(c) International

(i) Introduction

- (A) In parts of the world where extensive laws regarding unlawful discrimination have been enacted a significant problem has emerged whereby certain religious organisations have found themselves unfairly restricted in acting in accordance with their legitimately held religious and moral beliefs.³¹
- (B) Particularly in the United Kingdom, religious organisations and individuals have in recent times been forced to rely upon narrowing exemptions reluctantly permitted to them by Parliament when defending or prosecuting their rights to religious freedom. A number of examples where religious freedoms have been clearly curtailed are cited below.

(ii) Reaney -v- Hereford Diocesan Board of Finance

In the United Kingdom case of *Reaney v Hereford Diocesan Board of Finance*,³² the Church of England Diocese of Hereford was ordered to pay a sum of £47,000 for refusing to employ a practicing homosexual in the position of youth officer.

(iii) Hull University Christian Union

- (A) In January 2004, the Christian Union at Hull University in the United Kingdom³³ was de-ratified from the Hull University Student Union after being told that its 'Christians-only' leadership policy was unlawfully discriminatory.
- (B) The Hull University Student Union Council, led by a same-sex rights campaigner, voted to de-ratify the Hull University Christian Union because its leadership was obliged to agree to and sign a 'Doctrinal Basis.'

³¹ R Adhar and I Leigh, *Religious Freedom in the Liberal State*, Oxford University Press, 2005 p.323.

³² [Reaney –v- Hereford Diocesan Board of Finance, April 2007, Cardiff Employment Tribunal](#) (case no 1602844/2006 on 4, 5, 16 and 17 April 2007, judgment on 17 July 2007). – see www.emplaw.co.uk/lawguide/content/data/hereford.htm.

³³ Hull University Christian Union www.hucu.org.uk.

- (C) Only after legal intervention and the threat of legal action did the Hull University Student Union back down.
- (iv) Exeter University Evangelical Christian Union
- (A) A similar situation to that witnessed at Hull University occurred at Exeter University, where the 50-year-old Christian Union³⁴ was banned from campus because of its 'discriminatory' membership policies.³⁵
- (B) Only after legal proceedings were launched in the High Court did the matter settle.
- (v) Edinburgh University Christian Union
- (A) At the University of Edinburgh in 2006, the Edinburgh University Christian Union³⁶ was prohibited from running a course on sexual ethics.
- (B) The course was entitled 'Pure' and it promoted traditional marriage as the best setting for a sexual relationship. It was banned following protests from other students, particularly members of the Gay and Lesbian Society at the university. The university's student representative council deemed the course to be 'homophobic'.³⁷
- (C) Additionally, the Edinburgh University Christian Union was banned from holding the course at an alternative site on the university campus.³⁸
- (vi) Hall & Preddy -v- Bull & Bull
- (A) In the United Kingdom, exemptions for religious organisations do not extend to organisations that are 'solely or mainly' commercial.

³⁴ Exeter University Evangelical Christian Union <http://societies.ex.ac.uk/ecu>.

³⁵ 'Exeter Christian Union threatens legal action over 'ban'', Education Guardian (UK), 17 November 2006 – see www.guardian.co.uk/education/2006/nov/17/highereducation.students.

³⁶ Edinburgh University Christian Union www.eucu.org.uk.

³⁷ 'Christian Union Sexual Relationships Course Under Fire at Edinburgh University', Christianity Today, 22 October 2006 www.christiantoday.com/article/christian.union.sexual.relationships.course.under.fire.at.edinburgh.university/8081.htm; 'Christian Union under Threat, Students Prepare for Legal Action', Christianity Today, 18 November 2006 www.christiantoday.com/article/christian.union.under.threat.students.prepare.for.legal.action/8379.htm and 'Christians Criticise Christian Union Ban,' Christianity Today, 21 November 2006 www.christiantoday.com/article/christians.criticise.christian.union.ban/8419.htm.

³⁸ For more information see www.christian.org.uk/issues/2007/cu/briefing_april07.htm.

- (B) Legal action has been commenced against several people of religious faith as a result of the change in the law.
- (C) In the case of *Hall & Preddy –v- Bull and Bull*,³⁹ action was commenced against Mr and Mrs Bull for refusing to provide double-bed accommodation to unmarried couples at their bed and breakfast establishment run in their own home. The Bulls had their policy in place since 1986.
- (D) The Bulls gave evidence that over the years numerous unmarried heterosexual couples had been prevented from sharing a double bed and as a result, the couples either took two single rooms or found another bed and breakfast.
- (E) However, in 2009, following the passage of the *Equality Act (Sexual Orientation) Regulations 2007* (UK), a same-sex couple was refused a double room by the Bulls. As a result, the police were called, the incident was registered as a ‘hate incident’ and the same-sex couple subsequently issued a civil claim against the Bulls under the *Equality Act (Sexual Orientation) Regulations 2007* (UK) for unlawful discrimination on the ground of sexual orientation.
- (F) The same-sex couple’s action was supported by the UK Equality and Human Rights Commission.
- (G) The Bulls were later ordered to pay £3,600 in damages.
- (H) The United Kingdom’s treatment of commercial organisations can be contrasted with that of Canada where it has been held that organisations that are also commercial can be protected under anti-discrimination provisions. In the case of *Brockie -v- Ontario (Human Rights Commission)*,⁴⁰ Mr Brockie, the Christian executive officer of a printing company, refused to print material for a same-sex rights organisation as he held a sincere religious belief that same-sex sexual conduct was immoral.

³⁹ *Hall & Preddy –v- Bull and Bull* [2011] EW Misc 2 (CC) 18 January 2011 Case No 9BS02095 9BS02096 4 January 2011 www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/Misc/2011/2.html&query=preddy&method=boolean.

⁴⁰ *Brockie -v- Ontario (Human Rights Commission)* [2002] OJ No. 2375 (Sup. Ct. J. (Div. Ct.)). Reviewing the decision of the Ontario Board of Inquiry in *Brillinger –v- Brockie* [2000] OHRBID No. 3.

- (I) Mr Brockie believed that he should not assist in the dissemination of information intended to spread the acceptance of a same-sex sexual lifestyle. Mr Brockie drew a distinction between acting for customers who are of a same-sex orientation (something to which he had no objection) and those who acted in furtherance of a same-sex sexual lifestyle.⁴¹
 - (J) The Ontario Superior Court of Justice held that Mr Brockie was not obliged to print material:

*‘... of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed.’*⁴²
 - (K) We submit that, given the presence of many service-providers who wish to uphold a sincerely held religious conviction, such convictions should be adequately accommodated by the Consolidation bill.
- (vii) Catholic Care (Diocese of Leeds) -v- The Charity Commission for England and Wales
- (A) One of the most disappointing aspects of recent laws on unlawful discrimination in the United Kingdom is the discriminatory affect that they have had on faith-based organisations intending to access public funds.
 - (B) For example, faith-based adoption agencies have now been closed in England following the introduction of the *Equality Act (Sexual Orientation) Regulations 2007* (UK) made pursuant to s81 of the *Equality Act 2006* (UK).⁴³
 - (C) Pursuant to these regulations, any agency refusing to place children with same-sex persons would be in breach, would lose funding and would be forced to close down or withdraw its religious

⁴¹ *Brockie -v- Ontario (Human Rights Commission)* [2002] OJ No. 2375 (Sup. Ct. J. (Div. Ct.)) at para 3.

⁴² *Brockie -v- Ontario (Human Rights Commission)* [2002] OJ No. 2375 (Sup. Ct. J. (Div. Ct.)) at para 58.

⁴³ *‘Adoption Agencies Shut under ‘Equality’ Laws’, The Christian Institute*, April 2009 www.christian.org.uk/wp-content/downloads/adoption-agencies-shut.pdf.

ethos. This was despite Catholic adoption agencies being widely recognised as some of the best in the country.⁴⁴

- (D) At the time of the passage of the regulations there were 14 faith-based adoption agencies working throughout the United Kingdom. These agencies accounted for a third of all adoptions within the voluntary sector.⁴⁵
- (E) Most of these agencies have since been forced to withdraw their faith-based ethos and become secularised or cease their adoption services altogether. A similar risk of the withdrawal of faith-based agencies from areas of service provision exists in Australia without adequate legislative protection.

(viii) Pilgrim Homes Brighton

- (A) The United Kingdom's anti-discrimination laws permit local authorities to withdraw funding from religious organisations that do not, in the view of the local authority, sufficiently promote certain issues which may conflict with the religious organisation's ethos.
- (B) Pilgrim Homes is a 200-year-old Christian charity set up by William Wilberforce and others providing residential care for elderly Christians, meeting their spiritual as well as physical needs. It runs 10 homes in the UK one of which was located in the city of Brighton. Under the Christian ethos of the homes, all residents must be personally committed to the Christian faith.
- (C) The Brighton home's residents comprised 39 single Christian people aged over 80, including retired missionaries and a retired church minister.
- (D) The home in Brighton was in receipt of a £13,000 annual grant from Brighton & Hove Council which the home used to support a warden. In 2008 Brighton & Hove Council removed the home's funding⁴⁶ because it did not:

⁴⁴ Many of the children helped were considered 'hard-to-place' (see *BBC News*, 25 January 2007) and furthermore, the breakdown rate was just 3.6% - one of the lowest of all the agencies.

⁴⁵ See House of Commons, *Hansard*, 21 February 2007, col. 110WH.

⁴⁶ 'Care home suffers under 'equality' laws: How traditional Christian beliefs cost an elderly care home a £13,000 grant', The Christian Institute, May 2009 – see www.christian.org.uk/wp-content/downloads/care-home-suffers.pdf.

- (1) Provide statistics on the sexual orientation of each of its 17 residents;
 - (2) Promote homosexuality by including photographs of same-sex couples in its publications and by giving an express statement affirming the acceptance of same-sex relationships;
 - (3) Publicise same-sex events taking place in the area; and
 - (4) Make it compulsory for staff to attend training on same-sex issues.
- (E) The home considered these requirements to be in direct conflict with its Christian ethos and a source of serious distress for the residents of the home.
- (F) Brighton & Hove Council then withdrew its £13,000 per annum grant⁴⁷ and a spokesperson for the council stated:
- 'The Government specifically states the home must be open to the gay and lesbian community and that it must demonstrate this to qualify for funding. In the absence of any willingness to do this, funding has been withdrawn.'*⁴⁸
- (G) After more than a year of internal appeals, costing the home £21,000 in legal fees, and after the case was made public, Brighton & Hove Council eventually backed down but the Council did not offer to pay any of the home's legal fees.

4.7 Balancing rights

- (a) Legal rights theorists remind us that rights will often conflict and that it is not always possible to find a 'tidy' way to resolve such conflicts. But it is also important to seek a balance potentially conflicting rights. In our experience, the actual number of incidents in Australia where even a perceived conflict has materialised is extremely low.

⁴⁷ See 'Home for retired missionaries loses grant - because it won't ask residents if they are lesbians,' Daily Mail (UK), 28 December 2008 www.dailymail.co.uk/news/article-1102206/Home-retired-missionaries-loses-grant--wont-ask-residents-lesbians.html#ixzz1jnEtcus3 and 'Christian care home loses funding over 'gay rights'', Christianity Today, 29 December 2008 www.christian.org.uk/news/christian-care-home-loses-funding-over-gay-rights.

⁴⁸ Daily Telegraph (UK), 28 December 2008.

- (b) In relation to balancing rights where the right to freedom of religion is involved Foster states:
- '..... the danger is that, in a secular Western society where religion is perceived sometimes as archaic and anachronistic, that the freedom of religion right will be ignored or reduced to a merely formal principle, and subordinated to other rights.'*⁴⁹
- (c) ANGLICARE Sydney contends that the right to establish religious organisations is entirely extinguished if these organisations cannot maintain their religious values and mission by deciding which roles require religious conviction. The right not to be excluded from employment, however, is only partially qualified by the exception granted to religious organisations to employ religious people for religious jobs.
- (d) The unfortunate effect of poor adverse decisions in certain lower courts and tribunals has tended to encourage some religious organisations to be less open about the religious nature of their vision and mission. This is regrettable because, in the few instances where problems have arisen, they have arisen where there are disappointed expectations at either the employer or employee level.
- (e) Openness about vision, mission and ethos within all employer entities is certainly always to be encouraged.
- (f) We also acknowledge that the ICCPR and the Religion Declaration are not binding on the Commonwealth Parliament (or for that matter on state or territory parliaments). However we maintain that it is essential for moral force to be placed behind the implementation of the principles of religious freedom contained in both of these declarations in the Consolidation bill.
- (g) A balance must be met, therefore, between two potentially conflicting rights which both flow from the right of religious freedom:
- (i) The general right of persons not to be discriminated against on the basis of religion (Article 2.1), and
 - (ii) The specific right of persons to practice their religious beliefs by the establishment of charities with a religious ethos.
- (h) In circumstances where there is conflict between a general right and a specific right to religious freedom there is a possibility that one or other right may be extinguished. It is a principle of contemporary human rights thought that

⁴⁹ Foster, *op.cit.*, p.6.

governments and courts should make every effort to ensure that the effect of the exercise of a general right does not have the effect of extinguishing a specific right.

(i) In light of this, the most appropriate method to determine an appropriate outcome is to accept in principle that a specific right must, to the extent of any conflict, prevail over a general right.

(j) In its 2011 report following the completion of the AHRC Religion Enquiry⁵⁰ the following statement from ANGLICARE Sydney is cited:

*'... the general right of persons not to be discriminated against on the basis of religion ... the specific right of persons to practice their religious beliefs by the establishment of charities with a religious ethos ... In light of this, the most appropriate method to determine an appropriate outcome is to accept in principle that a specific right must, to the extent of any conflict, prevail over a general right.'*⁵¹

(k) It also follows that the rights under Articles 1.1 and 6 of the Religion Declaration to express religious belief in community with each other by establishing charitable organisations which embody religious beliefs and values must be preserved.

(l) It should be noted in this regard that our organisation cannot employ, at any level, someone who is hostile to or unsupportive of its mission, vision or values.

(m) Religious organisations such as ours also maintain the right, provided it is done in good faith, to decide whether some or all of the positions offered by it carry a 'faith dimension'. To allow for limitation of this right would be to seriously diminish the specific right to religious freedom. The Christian faith and values are not just the foundation and motivation for our work - they also shape the way in which it operates on a day to day basis.

4.8 Inherent job requirements

(a) A second qualification on the general right not to be discriminated against is provided by *International Labour Organisation Discrimination (Employment and Occupation) Convention No 111 (ILO 111)*.

⁵⁰ '2011 Freedom of Religion and Belief in 21st Century Australia - A research report prepared for the Australian Human Rights Commission' by Professor Gary Bouma, Professor Desmond Cahill, Dr Hass Dellal and Athalia Zwartz.

⁵¹ AHRC Religion Enquiry Submission No 1535 - Anglicare Sydney – see www.humanrights.gov.au/frb/frb_submissions.html.

- (b) Article 1(1) of ILO 111 affirms that discrimination includes:
‘Any distinction, exclusion or preference made on the basis of ... religion.’
- (c) However, Article 1(2) of ILO 111 qualifies this general rule, stating that:
‘Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.’
- (d) So, for example, it is not unlawful discrimination under ILO 111 for a church to refuse to employ an atheist as a minister of religion, on the grounds that the job inherently requires the person to hold certain beliefs and perform certain teaching and liturgical functions that an atheist could not perform.
- (e) In fact there are many such examples of discrimination in society. An environmental group would be expected to employ people who are committed to environmental values and beliefs, such as the reality of climate change. Practitioners of alternative medicine would be expected to employ people who accept the claims of alternative medicine and have a positive attitude to its use. Such forms of discrimination are uncontroversial.
- (f) It should be noted that this qualification is not a mere concession to religious organisations which gives them a ‘right to discriminate’. It is a qualification which goes to the heart of what unlawful discrimination means.
- (g) Unlawful discrimination in employment means more than simply differentiating between job applicants based on their personal characteristics. It means that it is unlawful to differentiate between them if the differentiation is based on a certain class of ‘irrelevant characteristics’ for no better reason than ‘blind prejudice’ or worse.

4.9 Recommendations

In relation to the important issue of religious freedom we make the following recommendations

- (a) **Recommendation 1:** That Australian law on unlawful discrimination provide a clear and unequivocal statement and acknowledgement:
- (i) That there is a right to religious freedom in Australia; and
- (ii) That this right to religious freedom is a fundamental right duly recognised in Australian law.

- (b) **Recommendation 2**: That the selection of employees sharing the same religious beliefs as those held by the employing religious organisations remain lawful under Australian law.
- (c) **Recommendation 3**: That adequate exceptions be provided to protect their right to practise religion 'in community' by the establishment of faith-based organisations.
- (d) **Recommendation 4**: That the meaning of 'religious institution' (or 'religious organisation' or 'religious body'):
 - (i) Not be so narrow as to negate the fundamental human right to practise religion in community, including through faith-based organisations; and
 - (ii) Be defined broadly, to include non-denominational or independent charities with a faith-based mission or values.
- (e) **Recommendation 5**: That genuine occupational qualifications for a position not be determined externally in ignorance of the religious mission and values of the religious organisation.
- (f) **Recommendation 6**: That, in the application of exceptions to unlawful discrimination laws for religious organisations, Australian courts not be called on to arbitrate on the validity or otherwise of religious doctrines, tenets, beliefs or teachings.
- (g) **Recommendation 7**: Should the term 'religious susceptibilities' be retained, that it be more clearly defined so as to patently show that it embraces the concepts of religious 'beliefs' and 'values' held by both:
 - (i) Individuals; and
 - (ii) Faith-based organisations.
- (h) **Recommendation 8**: That the formulation for the protection of religious freedom acknowledge the following:
 - (i) In respect of a particular job or position with an organisation, the legislation protect the inherent requirements of the job as determined in good faith by the organisation based on the organisation's values, beliefs and principles;
 - (ii) In connection with employment as a member of the staff of an organisation conducted in accordance with religious values, beliefs and principles, the

organisation be protected from a complaint of unlawful discrimination in circumstances where the organisation considers, in good faith, that such a distinction, exclusion or preference is based on the organisation's religious value, beliefs and principles.

- (iii) An organisation's values, beliefs and principles are those values, beliefs and principles as determined in good faith by the organisation.
- (i) **Recommendation 9**: That faith-based organisations have the right to practise their religion 'corporately' and that this includes a right to decide that all or some roles within the organisation are entitled to include a requirement of acceptance and practice of a specified religious faith;
- (j) **Recommendation 10**: That faith-based organisations maintain the right to shape organisational advertisements and job descriptions at all levels in such a way as to include certain religious dimensions.
- (k) **Recommendation 11**: That the terms of any government funding to faith-based organisations not be permitted to include requirements preventing such organisations from making decisions or following practices the result of which would be to damage or undermine the religious character, mission and values of the organisation.

5 Responses to specific questions in Attorney-General's Discussion Paper

We wish to respond to the following specific questions in the Attorney-General's Discussion Paper:

5.1 Question 1

What is the best way to define discrimination?

- (a) In common parlance, the term 'discrimination' often has a neutral or even a positive sense. Some definitions of the term include such actions as '*perceiving differences or distinctions with nicety*', '*using one's judgement well*', or '*observing a difference*'. Most of the definitions of this term treat it in a very positive sense.
- (b) However, Commonwealth legislation on unlawful discrimination casts the term 'discrimination' in a completely negative way. Yet in fact the law allows proper discriminatory activity to occur unhindered, prohibiting only that which is 'unlawful' discrimination. In our view this has the unfortunate effect of turning the noun 'discrimination' from a positive or at least neutral sense to a negative sense and

leads to the apprehension by some that any decision which adversely impacts upon an individual would be unlawful. The term thus becomes somehow tainted and treated with suspicion in the minds of some people.

- (c) If the noun is to be retained in the consolidated legislation we recommend that, as far as practicable, it be qualified by the adjective 'unlawful' i.e. by referring to 'unlawful discrimination', as occurs in the discussion paper.
- (d) We also would like to see inclusion of a definition of 'discrimination' which encompasses the concept of religious freedom (this issue will be covered later in this submission). With the exceptions and exemptions currently included in certain legislation, there is a misconception held by many that religious freedom is a 'lesser' or 'exceptional' right rather than a concept which should be included within the very definition of unlawful discrimination itself.

Recommendation 12: That in the consolidated legislation, as far as is practicable, the term 'discrimination' be replaced by the term 'unlawful discrimination.'

5.2 Question 22

How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?

- (a) 'Exceptions' or 'exemptions'?
 - (i) Some confusion exists in the community regarding the correct terms to be used when referring to religious freedom protections afforded by Commonwealth laws on unlawful discrimination. The same confusion arises in relation to State and Territory unlawful discrimination legislation.
 - (ii) For this reason, in order to avoid confusion in this submission, we will use the term '*exceptions/exemptions*' when referring to such provisions.
- (b) State and Territory laws
 - (i) The Attorney-General's discussion paper notes that most State and Territory religious exceptions/exemptions also extend to discrimination on the grounds of sexual orientation and gender identity.⁵²

⁵² Attorney-General's Department, op cit., p.40.

- (ii) Each State and Territory of Australia has its own statute governing the issue of unlawful discrimination and the process for dealing with such complaints.
- (iii) These statutes are as follows:
- (A) *Discrimination Act 1991* (ACT)⁵³;
 - (B) *Anti-Discrimination Act 1977* (NSW)⁵⁴;
 - (C) *Anti-Discrimination Act 1996* (NT)⁵⁵;
 - (D) *Anti-Discrimination Act 1991* (QLD)⁵⁶;
 - (E) *Equal Opportunity Act 1984* (SA)⁵⁷;
 - (F) *Anti-Discrimination Act 1998* (TAS)⁵⁸;
 - (G) *Equal Opportunity Act 2010* (VIC)⁵⁹; and
 - (H) *Equal Opportunity Act 1984* (WA)⁶⁰.
- (iv) A table showing the religious exceptions/exemptions in place under State and Territory anti-discrimination laws is shown in the Appendix. Whilst these exceptions/exemptions vary from one State or Territory to another, they are often designed to protect individuals and organisations which carry out acts in accordance with the beliefs and doctrines of their particular religion. Such protections can include decisions around the training, ordination and appointment of ministers of religion, employment in religious organisations and the operation of educational institutions. It can also include restriction of access to places of religious significance.
- (v) Flowing from the earlier discourse in this submission regarding freedom of religion as a fundamental right, it follows that our view is that religious exceptions/exemptions in relation to sexual orientation, marital status and gender identity should be maintained and extended as part of any reform of unlawful discrimination legislation.

⁵³ See www.austlii.edu.au/au/legis/act/consol_act/da1991164.

⁵⁴ See www.austlii.edu.au/au/legis/nsw/consol_act/aa1977204.

⁵⁵ See www.austlii.edu.au/au/legis/nt/consol_act/aa204.

⁵⁶ See www.austlii.edu.au/au/legis/qld/consol_act/aa1991204.

⁵⁷ See www.austlii.edu.au/au/legis/sa/consol_act/ea1984250.

⁵⁸ See www.austlii.edu.au/au/legis/tas/consol_act/aa1998204.

⁵⁹ See www.austlii.edu.au/au/legis/vic/consol_act/ea2010250.

⁶⁰ See www.austlii.edu.au/au/legis/wa/consol_act/ea1984250.

(vi) To some, the notion of exceptions/exemptions means that religious people will be 'above the law' or will be allowed to discriminate through legal loopholes⁶¹ and that somehow this is unfair or at the very least, it makes the law more complicated. However, there are many exceptions/exemptions to be found on the statute books and they exist in order to prevent an intolerably blunt application of the law that does not recognise the principle of 'different treatment under the law.'⁶²

(c) Concern

(i) Our concern is that certain individuals and groups within Australian see the present exceptions/exemptions for religious entities to be a kind of 'social indulgence' rather than a legitimate and fundamental human right. An example of this approach is evidenced in the following public comment by the NSW Anti- Discrimination Commissioner

*'.... It's a breach of the Anti-discrimination Act, there's no question about it. But a religious school is probably exempt from that breach.'*⁶³

(ii) This kind of statement leads some to the conclusion that the rights of an exempt organisation in respect of unlawful discrimination are akin to an 'indulgence' granted by society and often results in the lowering of reputation of the excepted or exempt organisation in the eyes of some of the public. This is regrettable.

(iii) Indeed, a liberal democracy can be distinguished from cruder majoritarian forms of democracy by the fact that in a liberal democracy, the government has regard for the views of minorities and does not just create a 'tyranny of the majority.'⁶⁴

(iv) In this respect, the Attorney-General's discussion paper notes a 'lack of community consensus' on the issue of religious exceptions/exemptions in relation to sexual orientation and gender identity in legislation dealing with unlawful discrimination, based on a 2011 AHRC Sexual Orientation and

⁶¹ For example, see 'A Humanist Manifesto for the 2010 General Election' at www.humanism.org.uk.

⁶² See D Boucher, 'A Little Bit Against Discrimination? Reflection on the opportunities and challenges presented by the Equality Bill 2009-2010', *Care Research Paper*, 2010, p.11.

⁶³ 'School Rejects Daughter of Same-sex Couple'. *The Australian*. 14 December 2011, p.7 – see www.theaustralian.com.au/news/nation/school-rejects-daughter-of-same-sex-couple/story-e6frg6nf-1226221339567.

⁶⁴ Alexis de Tocqueville, 'Tyranny of the Majority,' Chapter XV, *Democracy in America*, Book 1, Echo Library, 2006

Gender Identity Report.⁶⁵ This report was based on written comments from 153 organisations and individuals, and the outcomes of roundtable discussions involving 97 individuals. It outlined that while some participants argued that there should be exceptions/exemptions to laws prohibiting unlawful discrimination, particularly for religious organisations, more participants questioned whether there should be any such exceptions/exemptions or a more narrowly defined set of exceptions/exemptions.

(v) With respect, we would contend that this AHRC report is an insufficient basis upon which to conclude the degree of community consensus or otherwise around this issue. By their very nature such consultations attract interest groups for whom the issue at stake is of importance. The composition of participants will not be representative of the broader community, meaning that the degree of 'community consensus' is unable to be established from such proceedings.

(vi) Instead we would agree with the AHRC when it states in the same report that there is a need for further consultation and careful consideration of this issue of religious exceptions/exemptions. As the AHRC concludes:

*'... determining the extent of any exemptions must involve careful balancing of the right to be free from discrimination with the right to freedom of religion and belief.'*⁶⁶

(d) Requested improvement

(i) In this respect we would argue that priority must be given to upholding the long-established right to the freedom of religion and belief, particularly as consideration is given to the extension of legislation on unlawful discrimination into new areas. Current exceptions/exemptions on the ground of religion should be maintained and further exceptions/exemptions introduced in order to ensure that faith communities and religious bodies can continue to exercise their rights to freedom of religion, consistent with both Australian and international law.

⁶⁵ Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination* Consultation Report, 2011, pp36-38 – see www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/report/index.html.

⁶⁶ *Ibid*, p48

- (ii) It is almost of equal importance that these exceptions/exemptions are not burdensome or overbearing and provide a clear and simple mechanism for religious bodies to operate in accordance with their faith, values and beliefs. The existing and long standing form of exception/exemption used in section 38 of the *Sex Discrimination Act 1984* (Cth) provides such a form of exceptions/exemptions and would expect that a similar exemption would be included in any future legislation.
- (iii) Furthermore, we submit that religious rights should not be cast as 'exceptions' or 'exemptions' but rather should be seen as fully fledged rights in themselves. Unlawful discrimination laws give effect to Australia's international obligations to prevent unjustified and unlawful discrimination. However such legislation needs to acknowledge the need to comply with Australia's rights to protect the freedom of religion, association and cultural expression.
- (iv) In this regard, we concur with the positions of Patrick Parkinson, Professor of Law at Sydney University, and Nicholas Aroney, Professor of Constitutional Law at University of Queensland, when they state that, the casting of the protection of the right to freedom of religion in the form of 'exceptions' or 'exemptions' does not do justice to the importance of this right.⁶⁷
- (v) This goes to the heart of how unlawful discrimination is to be defined. As Professors Parkinson and Aroney conclude, the prohibition of unlawful discrimination ought to be drafted so that there will be no unlawful discrimination where a right to freedom of religion, association or cultural expression is being legitimately exercised. Unlawful discrimination ought therefore to be defined in legislation in such a way as to make clear that selection on the basis of an attribute does not constitute 'unlawful discrimination' against someone who does not have that attribute if the selection is based upon a genuine occupational requirement or is for the purpose of supporting another human right, including the freedom of religion.
- (vi) We submit that the following approach is needed in relation to the issue of religious exceptions/exemptions, namely:

⁶⁷ Parkinson, P and Aroney, N 'Review of Commonwealth Anti-Discrimination Laws Prohibitions and Exceptions' Unpublished note.

- (A) That the Commonwealth Government accept the approach recommended by Professors Parkinson and Aroney i.e. that the legislative definition of discrimination be drafted in such a way as to make clear that selection on the basis of an attribute does not constitute 'unlawful discrimination' against someone who does not have that attribute if the selection is based upon a genuine occupational requirement or is for the purpose of supporting another human right, including the freedom of religion.
 - (B) That, in addition to the recommendation in para (A) above, current religious exceptions/exemptions be maintained but that they be broadly drafted and robustly protected. The approach of allowing exceptions for religious bodies and religious schools ought to be fully preserved and extended in any reform or consolidation of unlawful discrimination laws, without any lessening of the protection accorded to the freedom of religion.
- (vii) Furthermore, religious exceptions/exemptions should apply to the provision of goods and services as well as to the field of employment. If religious exemptions are not broadly drafted, there is a real danger that unlawful discrimination laws will in fact discriminate against one of the protected groups that they are supposed to protect, by denying religious people their right to act on their religious beliefs.
- (viii) Any prohibition of unlawful discrimination must be drafted in such a way as to make it clear that there is no unlawful discrimination in circumstances where a right to freedom of religion, association or cultural expression is being legitimately exercised. It is essential that the definition of unlawful discrimination be drafted which makes it clear that selection on the basis of an attribute does not constitute 'unlawful discrimination' against someone who does not possess that attribute if such a selection is based on either:
- (A) A genuine occupational requirement, or
 - (B) For the purpose of supporting another human right such as freedom of religion, freedom of association and freedom for persons of a particular ethnic, religious or cultural background to live in community in accordance with their particular convictions, beliefs and customs.

- (ix) It is essential that faith-based organisations remain free to select staff who adhere to the beliefs and values of the organisation without being accused on unlawful discrimination.
- (x) We further recommend that the extension of existing religious exceptions/exemptions contained in Anti-Discrimination legislation to apply in respect of the proposed additional protected attributes of sexual orientation and gender identity.

Recommendation 13: That:

- (a) Steps be taken to incorporate the concept of religious freedom within the definition of discrimination so as to properly respect the importance of the fundamental right to religious freedom.**
- (b) In addition to (a) as part of the reform of unlawful discrimination legislation, religious exceptions/exemptions be both maintained and extended and broadly drafted to ensure that there is no reduction in the current right to religious freedom ensuring that religious freedom remains a fundamental right without any lessening of the protection accorded to the freedom of religion.**
- (c) Religious exceptions/exemptions apply to the provision of goods and services.**

5.3 Question 23

Should temporary exemptions continue to be available? If so, what matters should the Commission take into account when considering whether to grant a temporary exemption?

- (a) It has been suggested that an appropriate mechanism for balancing rights to protection against certain forms of unlawful discrimination with other potentially competing rights including freedom of religion would be through provision for application to the Australian Human Rights Commission for temporary exemptions.
- (b) We do not consider this to be an appropriate approach.
- (c) We are of the view that the temporary exemption mechanism is appropriate in circumstances where the need for an exemption is temporary in nature. It is not appropriate where the expressed justification is more enduring or even permanent in nature.

Recommendation 14: That temporary exemptions be used only for situations that are temporary in nature and that they not be implemented in such a fashion so as to avoid the robust protection of religious freedom rights of individuals and organisations.

5.4 Question 26

Are there any improvements needed to the court process for anti-discrimination complaints?

- (a) Regarding the burden of proof in unlawful discrimination matters, we believe that the full burden of proof should rest with the complainant. This approach is consistent with existing approaches in Australian laws on unlawful discrimination.
- (b) Regarding the allocation of the costs of litigation, the Attorney-General's discussion paper raises the possibility of changes to the allocation of costs so that they are not necessarily borne by the unsuccessful party.⁶⁸ Our concern here is that any change to the burden of proof, combined with changes to the way that costs are allocated may simply lead to an increase in legal actions that have little merit, increasing the burden on religious organisations as respondents to such actions.
- (c) As discussed earlier in this submission there are now many examples both in Australia and overseas of actions being commenced against religious organisations or individuals that were ultimately shown to have little merit and were unsuccessful, yet were extremely burdensome to those organisations or individuals both in terms of time and costs. For religious organisations that provide services for the community, such litigation diminishes the financial resources that would otherwise be used to meet service and client needs. Unlike for-profit organisations, not-for-profit organisations often do not have many resources to respond to such actions. For the good of society at large we believe that such unhelpful and expensive actions are best avoided wherever possible.

Recommendation 15: That the full burden of proof rest with the complainant in matters claiming unlawful discrimination and that costs continue to be paid by the unsuccessful party.

⁶⁸ Attorney-General's Department, op cit., para 203 and 204

6 Conclusion

- (a) ANGLICARE Sydney trusts that this submission has been of assistance to your department in its deliberations.
- (b) ANGLICARE Sydney and Prolegis Lawyers remain available to your department should you wish to seek our further input and comments on the wording to be included in any future consolidated legislation.

Grant Millard
Chief Executive Officer
ANGLICARE Sydney

Appendix

Existing Religious Exemptions and Exceptions under State and Territory Anti-Discrimination Acts

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Statute	<u><i>Discrimination Act 1991</i></u> (ACT)	<u><i>Anti-Discrimination Act 1977</i></u> (NSW)	<u><i>Anti-Discrimination Act 1996</i></u> (NT)	<u><i>Anti-Discrimination Act 1991</i></u> (QLD)	<u><i>Equal Opportunity Act 1984</i></u> (SA)	<u><i>Anti-Discrimination Act 1998</i></u> (TAS)	<u><i>Equal Opportunity Act 2010</i></u> (VIC)	<u><i>Equal Opportunity Act 1984</i></u> (WA)
Grounds of unlawful discrimination	Sex, sexual harassment, sexuality, transsexuality, age, profession, trade, occupation or calling, relationship status, status as a parent or carer, pregnancy, race, racial vilification, religious or political conviction, impairment, membership or non-membership of association of employers or employees, breastfeeding, spent convictions, disability, religious practice in employment, having had one of the enumerated attributes in the past, or association with person with an above attribute	Race (including colour, nationality and national or ethnic origin), sex (including pregnancy), marital status, disability, homosexuality, age (compulsory retirement only), transgender and carer's responsibilities.	Race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association activity, religious belief or activity, irrelevant criminal record, political opinion, affiliation or activity, irrelevant medical record, or association with person with an above attribute	Sex, relationship status, pregnancy, parental status, breast feeding (goods and services only), race, age, physical impairment, religion, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities, or association with a person who has any of these attributes	Sex, sexuality, marital status, pregnancy, race, age, physical and intellectual impairment (but does not include mental illness)	Age, breastfeeding, disability, family responsibilities, gender, industrial activity, irrelevant criminal record, irrelevant medical record, lawful sexual activity, marital status, relationship status, parental status, political activity, political belief or affiliation, pregnancy, race, religious activity, religious beliefs or affiliation, sexual orientation, association with a person who has, or is believed to have any of these attributes	Sex, sexual orientation, gender identity, pregnancy, breastfeeding, marital status, status as a carer, age, race (including colour, nationality, ethnic or national origin), parental status, physical features, childless or a de facto spouse, lawful religious or political belief or activity, impairment (including physical impairment, mental illness, mental retardation), industrial activity, lawful sexual activity, or personal association with persons having any of the above attributes	Sex, sexual orientation, marital status, pregnancy, race, religious or political conviction, age, racial harassment, impairment, family responsibility or family status, gender history

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Specific protections for religion	<p>Protects:</p> <ul style="list-style-type: none"> • employee's religious practice at work • provision of accommodation by religious body for member of relevant class • ordination, appointment or training of priest, minister, member of religious order • selection/ appointment of people in connection with religious observance • any other act or practice of a body established for religious purposes, if it conforms to doctrines, tenets or beliefs of religion and is necessary to avoid injury to religious susceptibilities of adherents • employment as a member of the staff of educational institution or position contract worker that involves doing work in educational institution if 	<p>Protects:</p> <ul style="list-style-type: none"> • ordination/appointment/training of priest, minister, member of religious order • appointment of any other person in any capacity by body established to propagate religion • any other act or practice of a body established to propagate religion that conforms to the doctrines of religion or is necessary to avoid injury to religious susceptibilities of adherents of religion • private educational authorities from education and employment provisions of Act on all grounds except race 	<p>Protects:</p> <ul style="list-style-type: none"> • religious educational institution operating in accordance with doctrine of particular religion if discrimination: <ul style="list-style-type: none"> ○ on grounds of: <ul style="list-style-type: none"> ➢ religious belief or activity or ➢ sexuality ○ and in good faith to avoid offending religious sensitivities of people of religion • restriction of access to land building or place of cultural or religious significance by people not of a particular sex, age, race or religion if restriction: <ul style="list-style-type: none"> ○ in accordance with culture or doctrine of the religion 	<p>Protects:</p> <ul style="list-style-type: none"> • educational authority for students of particular sex or religion or impairment who may exclude:- <ul style="list-style-type: none"> ○ applicants not of particular sex or religion or ○ applicants without impairment • restriction of access to land building or place of cultural or religious significance by people not of particular sex, age, race or religion if restriction: <ul style="list-style-type: none"> ○ in accordance with culture or doctrine of the religion ○ is necessary to avoid offending cultural or religious sensitivities of people of culture or religion • accommodation under direction or control of body established for religious purposes and 	<p>Protects:</p> <ul style="list-style-type: none"> • ordination, appointment or training of priest, minister, member of religious order • administration of body established for religious purposes in accordance with precepts of religion • any other practice of body established for religious purposes that conforms with precepts of that religion or is necessary to avoid injury to religious susceptibilities of adherents of that religion • religious bodies from unlawful discrimination on ground of marital or domestic partnership status re ordination, appointment or training of priest, minister and member 	<p>Protects:</p> <ul style="list-style-type: none"> • person who discriminates against another person on ground of race in relation to places of cultural or religious significance if discrimination: <ul style="list-style-type: none"> ○ in accordance with: <ul style="list-style-type: none"> ➢ customs of culture or ➢ doctrines of religion and ○ is necessary to avoid offending cultural or religious sensitivities of person of culture or religion • person who discriminates against another person on the ground of religious belief or affiliation or religious activity in relation to employment if participation of person in the observance or practice of particular religion is genuine occupational qualification or 	<p>Protects:</p> <ul style="list-style-type: none"> • ordination, appointment and training of priest, minister of religion, member of religious order or • selection or appointment of people in connection with religious observance • anything done on the basis of person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by religious body that: <ul style="list-style-type: none"> ○ conforms with the doctrines, beliefs or principles of religion or ○ is reasonably necessary to avoid injury to religious sensitivities of adherents of religion • anything done on basis of 	<p>Protects:</p> <ul style="list-style-type: none"> • ordination, appointment and training of priest, ministers, member of religious order or • selection/ appointment of people in connection with religious observance • any other act or practice of body established for religious purposes being act or practice that conforms to doctrines, tenets or beliefs of that religion or is necessary to avoid injury to religious susceptibilities of adherents of religion • person who discriminates against another person on any one or more grounds of discrimination in connection with employment as a member of staff of an educational institution conducted in accordance with the doctrines,

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
	<p>institution conducted in accordance with doctrines, tenets, beliefs or teachings of particular religion, and first person discriminates in good faith to avoid injury to the religious susceptibilities of adherents of religion</p> <ul style="list-style-type: none"> failure to accept person's application for admission as student at educational institution conducted solely for students with religious conviction other than that of applicant 		<ul style="list-style-type: none"> necessary to avoid offending cultural or religious sensitivities of people of culture or religion ordination, appointment or training of priest, minister, member of religious order selection or appointment of people to perform religious observance act by body established for religious purposes if act done as part of religious observance or practice 	<p>discrimination:</p> <ul style="list-style-type: none"> in accordance with doctrine of religion concerned and necessary to avoid offending religious sensitivities of people of the religion ordination, appointment or training of priest, minister, member of religious order selection or appointment of people to perform religious observance act by body established for religious purposes if act: <ul style="list-style-type: none"> in accordance with doctrine of religion and necessary to avoid offending religious sensitivities of people of religion but this does not apply to work or education 	<p>of religious order</p> <ul style="list-style-type: none"> requesting party in circumstances in which second person requested to reveal face for purpose of verifying identity and request reasonable in circumstances. 	<p>requirement in relation to employment.</p> <ul style="list-style-type: none"> person who discriminates against another person on ground of religious belief or affiliation or religious activity in relation to employment in educational institution conducted in accordance with tenets, beliefs, teachings, principles or practices of particular religion if discrimination is to enable educational institution to be conducted in accordance with tenets, beliefs, teachings, principles or practices person who discriminates against another person on ground of religious belief or affiliation or religious activity in relation to: <ul style="list-style-type: none"> ordination, appointment or training of priest 	<p>person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status or gender identity by person or body in course of establishing, directing, controlling or administering religious educational institution that:</p> <ul style="list-style-type: none"> conforms with doctrines, beliefs or principles of religion or is reasonably necessary to avoid injury to religious sensitivities of adherents of religion discrimination by person against another person on basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental 	<p>tenets, beliefs or teachings of a particular religion or creed, if person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed</p> <ul style="list-style-type: none"> a person who discriminates against another person on any one or more grounds of discrimination in connection with a position as a contract worker in educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed. a person who discriminates against another person on any

	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
						<ul style="list-style-type: none"> o selection of person to participate in religious observance o any other act that: <ul style="list-style-type: none"> ➢ is carried out in accordance with doctrine of a religion and ➢ is necessary to avoid offending religious sensitivities of person of that religion 	status or gender identity if discrimination reasonably necessary for first person to comply with doctrines, beliefs or principles of their religion	ground of discrimination other than the grounds of race, impairment or age, in connection with the provision of education or training by educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed.

Discrimination on the basis of religious belief or activity is prohibited in some circumstances in the Australian Capital Territory, Northern Territory, Queensland, Tasmania, Victoria and Western Australia.⁶⁹

⁶⁹ *Discrimination Act 1991* (ACT) s11; *Anti-Discrimination Act* (NT) s19(m); *Anti-Discrimination Act 1991* (QLD) s7(i); *Anti-Discrimination Act 1998* (TAS) s16(o) and (p); *Equal Opportunity Act 1995* (VIC) s6(j); *Equal Opportunity Act 1984* (WA) s53(1).

Discrimination on the basis of religion is generally prohibited in such jurisdictions with respect to employment,⁷⁰ provision of goods and services,⁷¹ accommodation,⁷² education,⁷³ membership of clubs and participation in sporting activity⁷⁴ and provision of government services.⁷⁵

The precise definitions of religious discrimination differ between jurisdictions but religious discrimination can usually be either 'direct' or 'indirect'.

Some states and territories have legislation that expressly prohibits religious discrimination and vilification. Other states and territories have not made religious discrimination and vilification unlawful as such but racial discrimination and vilification laws in such other states and territories may provide some protection.

Across Australia legislation protecting people from discrimination on the basis of religion and belief are 'patchy'. For example, in Victoria, Queensland, Western Australia, Northern Territory and ACT discrimination on the ground of religion is unlawful. In New South Wales there are many grounds of unlawful discrimination but not the ground of religion. However, the definition of 'race' in the New South Wales does include 'ethno-religious background'.

There are a number of 'exemptions' in the various state and territory acts permitting discrimination on the grounds of religious beliefs and activities in certain circumstances and most of these 'exemptions' benefit religious organisations in areas such as employment.

⁷⁰ *Discrimination Act 1991* (ACT) ss10–17; *Anti-Discrimination Act* (NT) ss31–37A; *Anti-Discrimination Act 1991* (QLD) ss15–36; *Anti-Discrimination Act 1998* (TAS) s22(1)(a); *Equal Opportunity Act 1995* (VIC) ss13–15, ss30–1; *Equal Opportunity Act 1984* (WA) ss11–17.

⁷¹ *Discrimination Act 1991* (ACT) s20; *Anti-Discrimination Act* (NT) s41; *Anti-Discrimination Act 1991* (QLD) ss45–51; *Anti-Discrimination Act 1998* (TAS) s22(1)(c); *Equal Opportunity Act 1995* (VIC) s42; *Equal Opportunity Act 1984* (WA) s20.

⁷² *Discrimination Act 1991* (ACT) s21; *Anti-Discrimination Act* (NT) ss38–9; *Anti-Discrimination Act 1991* (QLD) ss82–4; *Anti-Discrimination Act 1998* (TAS) s22(1)(d); *Equal Opportunity Act 1995* (VIC) ss49–52; *Equal Opportunity Act 1984* (WA) ss21–21A.

⁷³ *Discrimination Act 1991* (ACT) s18; *Anti-Discrimination Act* (NT) s29; *Anti-Discrimination Act 1991* (QLD) ss38–39 and 41; *Anti-Discrimination Act 1998* (TAS) s22(1)(b); *Equal Opportunity Act 1995* (VIC) ss37–38; *Equal Opportunity Act 1984* (WA) s18.

⁷⁴ *Discrimination Act 1991* (ACT) s22; *Anti-Discrimination Act* (NT) s46; *Anti-Discrimination Act 1991* (QLD) ss94–95; *Anti-Discrimination Act 1998* (TAS) s22(1)(e); *Equal Opportunity Act 1995* (VIC) ss59–60; *Equal Opportunity Act 1984* (WA) s22.

⁷⁵ *Anti-Discrimination Act 1991* (QLD) ss101–102; *Anti-Discrimination Act 1998* (TAS) s22(1)(f); *Equal Opportunity Act 1995* (VIC) s67.