CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LEGISLATION

Submission of

CHRISTIAN LAWYERS SOCIETY INC

QUEENSLAND

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To:

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Human Rights Policy Branch

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Introduction

We write with reference to the section of the Submission Paper titled Exceptions and Exemptions and with specific reference to the section titled Exemptions for Religious Organisations (being paragraphs 161 to 166 of the Paper). Our comments are made in respect of the following questions, stated in the Submission Paper:

> '20. Should the consolidation bill adopt a general limitations clause? Are there specific exceptions that would need to be retained?'
>
> '22. How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?'

By way of brief summary, we argue herein that:

1. These matters concern the historical separation of Church and State in Australia, and in particular the 'Free Exercise Clause' and the 'Establishment Clause' as contained in section 116 of the Australian Constitution.

2. The proposed 'General Limitations Test' for determining access to an exemption is problematic in that:
    a. It requires a Court to define a belief, a task over which Courts have consistently expressed their hesitation.
    b. The Australian Courts have consistently refused to determine the 'legitimacy' of a religious belief.
    c. To determine the legitimacy of a religious belief against the views of the majority is to potentially breach the Free Exercise Clause. Such an exercise has the potential to amount to discrimination against the adherents of the belief.
    d. Requiring religious adherents to act against their conscience, as informed by their faith may amount to a requirement to deny their religious convictions.

3. The Courts have consistently held that it is 'calculated to lead to error for a secular tribunal to attempt to assess the theological propriety' of conduct in matters that are quintessentially religious.

4. The United States Supreme Court recently delivered a unanimous decision relevant to this consultation process in which the application of an anti-discrimination employment statute

was held to breach both the Free Exercise and the Establishment Clauses (upon which section 116 of the Australian Constitution is substantially based). In that decision the Court held, as is further outlined below:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. … The church must be free to choose those who will guide it on its way.

Any consolidation of Anti-Discrimination Legislation in Australia must ensure that any proposed law does not violate section 116 of the Australian Constitution.

Whilst our comments are relevant to those Questions 20 and 22 in the Submission Paper they are sufficiently generic as to be applicable to the entirety of the Submission Paper. As a general proposition, merit is seen in the proposal to consolidate the disparate areas of law that apply to organisations seeking to comply with their obligations under the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992*, and the *Age Discrimination Act 2004* (together 'Anti-Discrimination Legislation'). It is hoped that consolidation will bring a consistency of approach and assist the sector by enabling compliance. Government facilitated public information sessions targeting the not for profit, religious and community sectors would be of assistance in ensuring this compliance.

Context: Separation of Church and State

Consideration of the exemptions that ought to be accorded to religious organisations must take place in the centuries old and ongoing dialogue concerning the Separation of Church and State. That dialogue concerns whether the State should impose a religious belief on its citizens and the extent of the State's power to regulate the Church's ability to act in accordance with its beliefs. In the British common law that dialogue traces back to the Magna Carta of 1215 AD, further than that, the dialogue streams back to Emperor Constantine and the Edict of Milan in 313 AD.

Our Constitutional forebears adopted *almost* verbatim into section 116 of our Constitution the separation provisions found in the United States Constitution (we say 'almost' because certain variances have turned out to be critical). Recently, in Australia two Constitutional provisions concerning the separation of Church and State, both drawn from the United States Constitution, have come into renewed public focus. They are the 'Establishment Clause', namely 'The

Commonwealth shall not make any law for establishing any religion' and the 'Free Exercise Clause': 'The Commonwealth shall not make any law … for prohibiting the free exercise of any religion'.

Distinctions are to be drawn between the American and Australian jurisprudence concerning the Establishment Clause. For example, in the early 1980s the High Court dismissed the body of law that had developed around the Establishment Clause in the United States by ruling that financial support to religious schools did not violate the separation of Church and State. By contrast United States Courts have held that direct funding to religious schools contravened the Establishment Clause[1].

The second limb of section 116, the Free Exercise Clause, has also come into recent public focus, principally in the area the subject of this submission, Anti-Discrimination Legislation. Garnering particular attention are the exemptions granted to religious institutions in the areas of employment, membership, housing, services and the like. There is a relative paucity of judicial treatment of the Free Exercise Clause by Australian Courts. One of the leading cases as applies to this clause is *Krygger v Williams*, in which a military conscript's argument that compulsory service was against his conscience and the word of God was unsuccessful in 1912.[2] Importantly the Court held that this was because the legislation under consideration provided an alternative for those who objected to combatant roles – a person was entitled to apply to engage only in medical, clerical or other such duties. The Court observed that without that allowance the legislation *may* have been in breach of s 116, in that it limited the free exercise of religion.

Due to the relatively scant judicial treatment of the Free Exercise Clause regard may be had by Australian Courts to decisions arising out of other jurisdictions when considering the constitutionality of any consolidated Anti-Discrimination regime. Due to the similarity between the Australian and United States Constitutions in their adoption of the Free Exercise Clause, Courts may pay particular regard to decisions arising out of the United States. Whilst, as is noted above, the Australian High Court has differed from the position of the United States in its jurisprudence (at least in respect of the application of the Establishment Clause to the funding of religious schools) it has not had opportunity to consider the question of whether the State may interfere in the freedom of religious groups to appoint their employees, and in particular, the question of whether such interference would infringe either or both of the Establishment Clause and the Free Exercise Clause.

[1] *Lemon v. Kurtzman* [1971] USSC 141.
[2] *Krygger v Williams* (1912) 15 CLR 366.

In January this year the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission et al* (Hosanna-Tabor) had occasion to consider both Religious Clauses as they apply to the employment of ministers of religion and to teachers in religious schools also considered to be ministers.[3] The Court emphasised that 'until today, we have not had occasion to consider whether this freedom of a religious organisation to select its ministers is implicated by a suit alleging discrimination in employment.' For the above reasons we consider the decision to be applicable to the current review of Anti-Discrimination Legislation. We set out a sizeable proportion of the reasoning of the Court, firstly, because it is a unanimous decision on point and is reasoning that Australian Courts may look to in interpreting any consolidated legislation. Secondly, their Honours have set out a very helpful analysis of the historical, policy and constitutional imperatives underlying the religious exemptions to anti-discrimination law. Many of those imperatives we consider to be identical to those underpinning the historical context of the adoption of a Separation of Church and State in Australia, and further, readily applicable in contemporary Australia.

By way of introduction to the decision, Chief Justice John Roberts, delivering the decision of the Court on 11 January 2012, held that:

> The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions…[4]

In conclusion he held:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will

[3] US Supreme Court *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission et al.* 565 US (2012).
[4] Ibid, at page 14

> preach their beliefs, teach their faith, and carry out their mission. … The church must be free to choose those who will guide it on its way.[5]

In outlining the motivation behind the adoption of the two clauses into the United States Constitution, by way of the First Amendment, the Supreme Court explained:

> By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses ensured that the new Federal Government – unlike the English Crown – would have no role in filling ecclesiastical offices. The Establishment Clause prevents the government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.[6]

The case involved a teacher in a school and the Court expressly left open the question how far the Free Exercise Clause extended. It is clear it extends to all ministers of religion. The open question is to what extent it the principles apply to other teachers in religious schools. An argument seems open that all persons who are appointed to communicate the faith are capable of falling within the Free Exercise Clause.

General Limitations Test

The Discussion Paper seeks comments on the adoption of a 'general limitations' test for determining whether an exemption could be relied upon. That test, it would appear, would require that a person seeking to rely on an exemption must satisfy a Court, first, that the conduct is necessary to achieve an objective that is legitimate in the eyes of the Court, and, second, that the conduct is a proportionate means of achieving that objective. Any enquiry by a Court into the question of whether a religious belief is a legitimate objective is problematic. Such concern is consistent with a wealth of judicial concern in respect of such a proposition, as is set out below.

Firstly there is the concern expressed by the Courts regarding the initial difficulty of defining a religious belief. Justice Murphy summed up this concern as follows:

> Religious freedom is a fundamental theme of our society. That freedom has been asserted by men and women throughout history by resisting the attempts of government, through its legislative, executive or judicial branches, to define or impose beliefs or practices of religion. Whenever the legislature prescribes what religion is, or permits or requires the executive or

[5] Ibid at page 21 to 22.
[6] Ibid at page to 9.

> the judiciary to determine what religion is, this poises a threat to religious freedom. Religious discrimination by officials or by courts is unacceptable in a free society. The truth or falsity of religion is not the business of officials or the courts. If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the number of adherents small, the leaders hypocrites, or because they seek to obtain the financial and other privileges which come with religious status. In the eyes of the law, religions are equal. There is no religious club within the monopoly of State privileges for its members. The policy of the law is 'one in, all in'. … The Truth or falsity of religion is not the business of officials or the courts"[7]

Secondly, Justice Murphy is not alone in his concern, as expressed in the excerpt above, over any proposal that a Court be tasked to assess the legitimacy of a religion's beliefs. Justices Wilson and Deane of the High Court have held that the question of whether a belief is 'religious' should be 'approached and determined as one of arid characterisation not involving the assessment of the utility, the intellectual quality, or the essential 'Truth' or 'worth' of tenets of the claimed religion.'[8]

Further, to determine the legitimacy of a belief against the opinion of a prevailing majority has the potential to curtail the Free Exercise Clause. Former Western Australian Chief Justice Malcolm has recognised that the Courts have held 'a strong appreciation of the dangers involved in tailoring legal protection according to the views of the prevailing majority'. He further argues that 'Religious beliefs are not dismissed out of hand because their tenets are difficult to understand, or are considered to lack vitality or utility, and the "religious beliefs" of the prevailing majority are no longer promoted at the expense of the minority.'[9]

Chief Justice Malcolm has further argued that to impose a restriction on the free exercise of religion may amount to discrimination against adherents of a religion:

> "One of the problems with claims to necessity is that what is considered necessary usually depends on the experience and values of those who impose the relevant restriction. In these circumstances, as Brennan J observed in *Goldman v Weinberger,* one of the tasks of the courts must be: "…to protect the rights of members of minority religions against quiet

[7] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 150 (per Murphy J) (Church of the New Faith)
[8] Church of the New Faith at 174, per Wilson and Deane JJ.
[9] David Malcolm CJ 'Religion, Tolerance and the Law' *The Australian Law Journal* (1996) vol 70 976 at 984.

> erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar." In making this reference to the "quiet erosion" of the right freely to exercise a religion, Brennan J highlights the ever-present potential of the majority, indirectly, and unthinkingly, to discriminate against the religious practices of a minority. Regulations and restrictions which are not intended to discriminate against religious practice, and are applied uniformly, may nevertheless in their effect discriminate to the extent of imposing an intolerable burden on the adherents of a particular religion."[10]

To conclude the foregoing argument, we cite Justice Gibbs

> "It hardly needs to be said that in this country the law recognises a complete freedom of conscience in matters of religion. No one is compelled to adhere to, or to abjure, any particular religious opinions".[11]

The application of a General Limitations Test that is based on legitimacy of the belief as determined against the prevailing view of the majority may therefore require religious adherents to act against their conscience, as informed by their faith. It may in certain circumstances, take on such a character as to amount to a requirement to abjure their religious opinions.

Determining Matters of a Religious Nature

The debate on the proper authority of the State in enquiring into matters of a religious nature must also be placed in the context of judicial hesitation to determine matters that are purely in religious nature. The following is a sample of Australian judicial opinions expressing similar concern:

> "In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar": *Catch the Fire v Islamic Council* (1998) 206 FLR 56 at 69 (per Nettle JA).

> "[C]ourts should not decide questions of doctrine, practice or procedure in ecclesiastical government. This would exceed the judicial sphere and interfere with religious freedom. Judicial determination of religious doctrine and practice is as much state interference in religious affairs as legislative and administrative measures are.": *Attorney General (NSW) v Grant* (1979) 135 CLR 587 at 512 (Murphy J).

[10] Ibid at 981.
[11] *Attorney-General (NSW) v Grant* (1979)135 CLR 587 at 600 (per Gibbs J).

In *Hosanna-Tabor* the United States Supreme Court, in considering the application of anti-discrimination law to the employment decisions of the Church, also emphasised the hesitation of Courts in that country to adjudicate matters of church governance. The Court described the context of such hesitation as follows:

> We explained that "whenever the questions of discipline, or of faith or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."[12] …
>
> As we would put it later, our opinion in *Watson* "radiates…a spirit of freedom for religious organisations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those faith and doctrine."[13]…
>
> We thus held that by inquiring into whether the Church had followed its own procedures, the State Supreme Court had "unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals" of the Church.[14] …
>
> The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful -a matter "strictly ecclesiastical," *Kedroff,* 344 U.S., at 119- is the church's alone.[15]

We submit that the decision by a religious body in relation to who it selects as its employees will in most cases be one that is 'quintessentially religious'. This would in most cases be satisfied where the employee is chosen on the understanding that the employee undertook a role in conveying of the beliefs of the religion, either to subscribers or to the unconverted. By way of example, the desire of a religious group that operates a camping ground to exercise discretion over the groups from whom it will receive bookings may also in certain circumstances be one that is 'quintessentially religious'.

[12] Hosanna-Tabor at page 10
[13] Ibid at page 11
[14] Ibid at page 12
[15] Ibid at page 20

Relevant to such a choice would be the role such discretion (and the communication thereof) plays in both the expression and the conveying of the belief of the religion, again either to subscribers or to the unconverted.

Who then is a 'Minister'?

In applying section 116 to the Anti-Discrimination Legislation as it extends to the employment decisions of religious institutions the next question that must be asked is, what criteria are necessary in determining whether the position is religious in nature? The unanimous decision of the United States Supreme Court held that such must be determined in light of the circumstances surrounding the employment:

> 'Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister…[16]
>
> The EEOC … [contends] that any ministerial exception "should be limited to those employees who perform exclusively religious functions … We cannot accept that view. Indeed, we are unsure whether any such employees exist. The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities.[17]
>
> The issue before us, however, is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.[18]

Whilst supporting the Courts' unanimous decision, Thomas J further raised the concern, with which we agree, that the determination of who is a minister must rest in the hands of the religious body, as informed by their religious tenets:

> 'A religious organization's right to choose its ministers would be hollow, however, if secular courts could second-guess the organization's sincere determination that a given employee is

[16] Ibid at pages 15 - 16
[17] Ibid at pages 18 - 19
[18] Ibid at page 19

> a "minister" under the organization's theological tenets. [19] … The question whether an employee is a minister is itself religious in nature, and the answer will vary widely.[20]
>
> "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos,* 483 U.S. 327, 336 (1987).[21]
>
> But the evidence demonstrates that Hosanna-Tabor sincerely considered Perich a minister. That would be sufficient for me to conclude that Perich's suit is properly barred by the ministerial exception.[22]

Whilst also supporting the unanimous decision of the Court, Alito and Kagan JJ further placed emphasis on the functions performed by the employee:

> Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term "minister" or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies.[23]

Relevant to this consideration was the role of the employee in the conveyance of the faith of the religious institution:

> It should apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position. [24]
>
> Different religions will have different views on exactly what qualifies as an important religious position, but it is nonetheless possible to identify a general category of "employees" whose functions are essential to the independence of practically all religious groups. These include those who serve in positions of leadership, those who perform

[19] Ibid at page 1
[20] Ibid at page 1
[21] Ibid at page 2
[22] Ibid at page 2
[23] Ibid at page 2
[24] Ibid at page 2

> important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.[25]

Noting "the difficulties inherent in separating the message from the messenger",[26] enabling a religious institution to rely upon the ministerial exemption was seen by Alito and Kagan JJ as central to its ability to consistently espouse its doctrines:

> "[forcing a group to accept certain members may impair [its ability] to express those views, and only those views, that it intends to express." *Boy Scouts of America v Dale, 530 U.S. 640, 648 (2000)*[27]*…*
>
> A religion cannot depend on someone to be an effective advocate for its religious visions if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as they very "embodiment of its message" and "its voice to the faithful." A religious body's control over such "employees" is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world. [28]

To adopt a practical example, in the context where teachers or staff are seen as the agents of the school in the propagation of the religion of the educational institution, and where the objects of the institution include the propagation of the Christian faith, the right to employ teachers or staff who display a lifestyle consistent with the propagation of that faith should rightfully be left as the reserve of the school. This should apply where the institution considers, according to its own doctrines that the employed staff are the emissaries of the school and play an important role in the propagation of the faith of the school. To certain institutions, this may also be true of support staff, who equally play a role in the social education of the child, be it, by way of example, as a tuck-shop staffer, or a janitor.

In many Australian schools each staff member, due to his or her interaction with the children, is expected to play a role as a model to the children, and indeed are often important satellites in the school universe, as perceived by the child. The importance of such staff in the development and

[25] Ibid at page 3
[26] Ibid at page 7
[27] Ibid at page 3
[28] Ibid at page 4

education of the student is both assumed in the expectations placed upon them by both the executive staff and parents, and is affirmed by the day to day engagement that they have with the children. Persons employed by an educational institution carry with them the implicit sanction of the institution (and implicit sanction by the parents who place the children in the care of the institution) as a component of the instruction and development of the child. By way of example, children seek out the gardener for a conversation in many schools, or a janitor may enjoy a degree of fame as a well-known and well-loved individual amongst a student body. To that end such individuals can be influential on a child's education. In one sense, every employee of a school has an influence on the children of that school and is chosen based on criteria formulated on the presumption of that influence.

Discretion over the employees of a religious school should therefore properly be seen as a necessary extension of the religious beliefs of the school (and their propagation). Decisions over the employment of staff should be left as a decision of the institution, to be determined in accordance with its beliefs. The question then becomes, who do the religious see as necessary proponents of their faith? In this regard Alito and JJ held:

> The "ministerial" exception gives concrete protection to the free "expression and dissemination of any religious doctrine". The constitution leaves it to the collective conscience of each religious group to determine for itself who is qualified to serve as a teacher or a messenger of its faith. [29]

To not adequately provide for such conduct by a religious school is to potentially also challenge a parent's right to determine the religious and moral instruction of their child. In that regard we draw your attention to article 18 of the *International Covenant on Civil and Political Rights* which provides

> The states parties to the present covenant undertake to have respect for the liberty of parent and, when applicable, legal guardians, to ensure the religious and moral education of their children in conformity with their own convictions.

Conclusion

In the context of the religious exemption the discussion is not simply a question of policy preferences - how to strike a balance between religious freedom and equality of opportunity. There

[29] Ibid at page 5

is an overarching obligation to ensure that any proposed law does not violate section 116 of the Australian Constitution. The reasoning of the unanimous decision of the Supreme Court of the United States on the equivalent of our s116 and the added comments of three judges inform this consultation process. In that decision handed down in January 2012, the Court unanimously held that any attempt to interfere with the capacity to hire and fire a 'minister' even if working in a church school was a breach of the constitutional protection. The Court left open the question as to whether other teaching staff might be included but the additional independent judgements go further. They seem to lay a platform for a decision, at a future time, that the Constitution might extend to govern contracts of employment/calls of anyone involved in communicating the faith, such as teachers in religious schools. This submission draws that decision to the attention of the Consultation. It does not seat out where the limits in Australia might lie but rather offers some commentary on the judgement and the issues it raises. Providing an example from employment within religious schools, it argues that the proper determination of who are the conveyors of faith should be determined by the tenets of the faith itself. It also emphasises that to require a Court to determine the legitimacy of a religious belief as against the views of the majority, as may be proposed by a General Limitations Test for determining access to an exemption on the ground of religious belief, is fundamentally problematic in operation and runs against the weight of Australian judicial opinion on such an exercise to date. It may also require adherents to a religious belief to deny that belief and in so doing raises concerns as to its ability to comply with the Free Exercise Clause.