

Submission to Commonwealth Attorney-General and Minister for Finance and Deregulation
in response to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper

The Churches Commission on Education Inc. (YouthCARE)

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1 Summary

- (a) YouthCARE commends the Commonwealth Government's intention to consolidate the five Commonwealth statutes dealing with unlawful discrimination¹ into a Consolidation Bill so as to ensure greater clarity as to the rights and obligations of Australian citizens and organisations.
- (b) In formulating this submission in response to the Discussion Paper 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 a certain number of questions raised in the Discussion Paper.
- (c) Our submission is divided into four parts, namely:
 - (i) Overview of YouthCARE;
 - (ii) Freedom of religion and recommendations;
 - (iii) Responses to certain questions raised in the Discussion Paper and our recommendations; and
 - (iv) Conclusion.
- (d) The recommendations made in this submission are as follows:
 - (i) That Australian law provide a clear and unequivocal acknowledgement of the right to religious freedom as a fundamental right.
 - (ii) That reference to the fundamental right to religious freedom be included within the definition of 'discrimination' or 'unlawful discrimination' so as to properly respect the importance and eminence of this fundamental right.
 - (iii) That Australian law provide a clear and unequivocal acknowledgement of the right to practise religion 'in community' by the establishment of faith-based organisations.
 - (iv) That Australian law provide a clear and unequivocal acknowledgement that religious organisations are lawfully permitted to select employees sharing the same religious beliefs as those held by the employing religious organisation.

¹ *Australian Human Rights Commission Act 1986*, *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).

- (v) 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 as to include nondenominational or independent organisations possessing faith-based missions or values
- (vi) That Australian law provide a clear and unequivocal acknowledgement that genuine occupational qualifications for a position are not permitted to be determined 'externally' in ignorance of the religious mission, values and strategy of an employing religious organisation.
- (vii) That the current religious exceptions/exemptions regime be maintained but extended ensuring that:
 - (A) There is no lessening of the current protection accorded to freedom of religion;
 - (B) In the application of religious exemptions/exceptions, Australian courts are not called upon to arbitrate on the validity or otherwise of religious doctrines, tenets, beliefs or teachings;
 - (C) If the term 'religious susceptibilities' is retained, it is clearly defined so as to patently show that it embraces the concepts of religious 'beliefs' and 'values' held by individuals and faith-based organisations;
 - (D) In respect of a particular job or position with an organisation, the protection relates to the inherent requirements of the job as determined in good faith by the organisation based on the organisation's values, beliefs and principles;
 - (E) In respect of employment by an organisation conducted in accordance with religious values, beliefs and principles, the protection for the organisation extends to 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 values, beliefs and principles;
 - (F) An organisation's values, beliefs and principles are those values, beliefs and principles as are determined in good faith by the organisation itself;
 - (G) 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;

- (H) 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; and
 - (I) The terms of any government subsidies 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.
- (viii) That Australian law provide a clear and unequivocal acknowledgement that, in situations where there is a conflict of rights, a specific right of persons to practice their religious beliefs by the establishment of organisations with a religious ethos prevails over the general right of persons not to be discriminated against on the ground of religion.
 - (ix) That the term 'discrimination' be replaced by the term 'unlawful discrimination'.
 - (x) That the right to religious freedom being incorporated within the definition of 'discrimination' or 'unlawful discrimination' so as to properly respect the importance of this fundamental right.
 - (xi) That religious exemptions be drafted in such a way as to ensure that:
 - (A) There is no reduction in the current right to religious freedom; and
 - (B) Religious freedom is recognised as a fundamental right.
 - (xii) That temporary exemptions be used only for situations that are temporary in nature and are not to be implemented in such a fashion so as to avoid the robust protection of religious freedom rights of individuals and organisations.

2 YouthCARE

2.1 Overview

- (a) YouthCARE is the trading name of The Churches Commission on Education Inc. established in 1972 by a broad group of Christian churches in Western Australia.
- (b) YouthCARE provides a broad range of services including school chaplaincy and Christian religious education throughout public schools in Western Australia.

- (c) YouthCARE believes that its presence in public schools makes a difference to educational outcomes for students and the wellbeing of school communities.
- (d) YouthCARE is grounded in three core values:
 - (i) Respect - we recognise the context in which we exist and we accept and honour the diversity of views among our membership and in the communities we serve;
 - (ii) Compassion - we reach out to others in need by providing holistic services aimed at inspiring hope; and
 - (iii) Service - we serve our members and educational communities and create partnerships relying upon collaboration and we recognise the contribution of others.

2.2 Member churches

- (a) YouthCARE's member churches are as follows:
 - (i) Anglican Church of Australia;
 - (ii) Assemblies of Christian Brethren;
 - (iii) Australian Christian Churches – WA;
 - (iv) Baptist Churches in WA Inc.;
 - (v) Catholic Archdiocese of Perth;
 - (vi) Christian Outreach Centre WA;
 - (vii) Churches of Christ in WA Inc.;
 - (viii) Church of the Foursquare Gospel;
 - (ix) Greek Orthodox Archdiocese in WA;
 - (x) Lutheran Church of Australia - WA District;
 - (xi) Presbyterian Church in Western Australia;
 - (xii) Salvation Army; and
 - (xiii) Uniting Church in Australia – WA.
- (b) These member churches elect representatives to the YouthCARE Board, who in turn appoint YouthCARE's Chief Executive Officer who is then responsible for the day-to-day management and operation of YouthCARE.

3 Religious freedom

3.1 Overview

- (a) YouthCARE applauds the Commonwealth Government's commitment to maintain the current level of legal protections for religious freedom.
- (b) In this submission YouthCARE wishes to take the opportunity to emphasise certain principles in relation to the right to religious freedom, namely:
- (i) As a faith-based entity, YouthCARE maintains the right 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 by establishing itself as an organisation embodying religious beliefs and values. We assert that this right must be preserved;
 - (ii) YouthCARE maintains 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 organisations;
 - (iii) YouthCARE maintains that exceptions/exemptions² for religious organisations should not be interpreted so narrowly as to exclude non-denominational religious organisations or charitable or humanitarian groups established for religious reasons;
 - (iv) YouthCARE 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 YouthCARE and the Christian faith is more than a historical quirk. It is in fact central to who we are and what we do;
 - (v) It is essential that genuine occupational qualifications not be determined externally to YouthCARE, in ignorance of our religious mission, values and strategy;
 - (vi) The Christian faith and values are not just the foundation and motivation for YouthCARE's work but they also shape the way in which we operate on a day to day basis. Our identity as a Christian organisation dictates and impacts the decisions we make 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

² Some confusion exists in the community as to the correct terminology 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. In order to avoid confusion in this submission, we will use the term 'religious exceptions/exemptions' when referring to such provisions.

are expected and required to both accept and practice the Christian faith;
and

- (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. YouthCARE cannot employ, at any level, someone who is hostile to or unsupportive of its mission, vision or values.
- (vii) Provided this is done in good faith, religious organisations such as YouthCARE maintain the right to decide whether some or all of the positions within 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;
- (viii) In this respect we are 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 organisation while respecting the organisation's values;
- (ix) 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 religious organisation;
- (x) YouthCARE claims the right to decide which roles require a personal commitment to the Christian faith and what form of Christian faith is to be expected of our employees;
- (xi) In order to pursue a uniquely religious mission, YouthCARE 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 organisation, provided our objectives are lawful and any decision is made in good faith, should never be supplanted by an externally imposed decision of courts or legislators. To allow for this would seriously and negatively impact our religious freedom guaranteed by Article 6 of the Religion Declaration;
- (xii) In applying exceptions /exemptions and to laws dealing with unlawful discrimination courts must not be called on to arbitrate on contentious religious doctrines, tenets, beliefs or teachings;

- (xiii) 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 are carried out by such entities within, for, and to the significant benefit of, the community at large.

3.2 Religious institutions in Australia

- (a) A proper reading of history will reveal that, in Australia, the Christian churches have been involved in the delivery of social services from the very beginning of European settlement.
- (b) 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.
- (c) One of the more recent detailed studies of the sector, undertaken in 2006, found that 23 of the top 25 Australian charities (based on income) were Christian.
- (d) The role played by Christian charities in this country represents a particular point of historical difference between Australian and other similar countries.
- (e) Government interest in providing social services to the poor and disadvantaged has waxed and waned during this time, prompting Christian organisations such as YouthCARE to meet the substantial needs of society.
- (f) For example, during the Depression of the 1890s, unemployment affected a third of the working class in Australia, yet the government's economic and social policy of non-intervention (in line with British Empire policies) left an immense need. Without access to the dole, pensions or publicly-funded health programmes the survival of many people in Australia became the responsibility of the Christian churches.
- (g) It is really only in the second half of the 20th century that western governments such as Australia's have taken an interest in the provision of some social services.
- (h) In Europe this meant that social services became 'public services' run by governments. However 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: charities 'compete' with each other for philanthropic as well as government subsidies. They must demonstrate that their programs provide the best outcomes for monies provided by philanthropy and governments.
- (i) Where governments provide subsidies to religious organisations such as YouthCARE these governments achieve effective and efficient outcomes for their budgetary spending by outsourcing their social services to charities, the majority of which in Australia are Christian faith-based institutions.

3.3 International law

- (a) Many of the provisions in the five statutes which set out Australia's national laws on unlawful discrimination 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 *Universal 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;
 - (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 right:
 - (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) International Covenant on Civil and Political Rights 1966

(i) The *International Covenant on Civil and Political Rights* 1966 (ICCPR)³, to which Australia is a signatory, guarantees in Article 18 the right to freedom of ‘thought, conscience and religion’ and the freedom to manifest one’s religion or beliefs.

(ii) Article 18 of the ICCPR states:

- 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
- 3. Freedom to manifest one's religion or beliefs may be subject only to such 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.*
- 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.’*

(iii) Article 19 of the ICCPR says that:

- 1. Everyone shall have the right to hold opinions without interference.*
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds,*

³ See www2.ohchr.org/english/law/ccpr.htm.

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

a. For respect of the rights or reputations of others;

b. For the protection of national security or of public order (ordre public), or of public health or morals.'

(j) Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief 1981

(i) *The Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief 1981 (Religion Declaration)*⁴ attempts to define more precisely, but not exhaustively, certain protections for religious freedom.

(ii) It is evident that an important object of the Religion Declaration is to protect individuals and religious groups from undue intrusion, either by the state or any other body, into their ethos, principles and conduct of religious practice.

(iii) Para 1 of Article 1 of the Religion Declaration states:

'1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.'

(iv) Article 4 of the Religion Declaration requires that:

'1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.'

(v) Article 6 of the Religion Declaration states:

⁴ See www2.ohchr.org/english/law/religion.htm.

[T]he right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;*
- (b) To establish and maintain appropriate charitable or humanitarian institutions;*
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;*
- (d) To write, issue and disseminate relevant publications in these areas;*
- (e) To teach a religion or belief in places suitable for these purposes;*
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;*
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;*
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;*
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.'*

(k) 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 ICCPR and Article 1.1 of the Religion Declaration⁵ 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

⁵ See www2.ohchr.org/english/law/ccpr.htm and www2.ohchr.org/english/law/religion.htm.

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 international law 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.'*⁶

(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 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.'*⁷

(viii) In its submission to the AHRC Religion Enquiry the Anglican Church 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.'

The Sydney Anglican Diocese stated further 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.⁸

(ix) 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

⁶ Religion Declaration Article 1.3.

⁷ AHRC enquiry into Freedom of Religion and Belief in the 21st Century Submission No 1012 The Church of Jesus Christ of Latter-day Saints.

⁸ AHRC Enquiry into Freedom of Religion and Belief in the 21st Century Submission No 1533 Anglican Diocese of Sydney.

*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 the communities and associations by which a culture of human dignity flourishes.*⁹

(x) 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 practice their religion ‘corporately.’ This includes the right:

(A) to decide that all or some roles within it are expected and required to both accept and practice its faith

(B) to include certain religious dimensions within roles in the organisation.

(xi) Further, it is our view that, in their application of 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

(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.

3.4 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 where it was stated:

‘... 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

⁹ AHRC Enquiry into Freedom of Religion and Belief in the 21st Century Submission No 1687 Ad Hoc Interfaith Committee.

rights.¹⁰

- (c) Commonwealth of Australia Constitution Act 1900 (UK)
 - (i) s116 of the *Commonwealth of Australia Constitution Act 1900* (UK) (**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.¹¹
 - (vii) By restricting the legislative powers of the Commonwealth Parliament, s116 of the Australian Constitution 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)).

¹⁰ *Mabo -v- State of Queensland (No. 2)* [1992] 175 CLR 1 at 42 per Brennan J.

¹¹ 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.

established the Human Rights and Equal Opportunity Commission (now known as the Australian Human Rights Commission (**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.¹²
- (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 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

¹² *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).*

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.*

3.5 Conflict of 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 where even a perceived conflict has materialised is extremely low.
- (b) To put it bluntly, 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.
- (c) 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.
- (d) Openness about vision, mission and ethos within all employer entities is certainly always to be encouraged.
- (e) YouthCARE acknowledges 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.
- (f) 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.
- (g) In its 2011 report following the completion of the AHRC Religion Enquiry¹³ the following statement from Anglicare Sydney is cited:

'... the general right of persons not to be discriminated against on the basis of religion ... the

¹³ *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.

*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.*¹⁴

- (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 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) It also follows that the rights under Article 1.1 and Article 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.
- (k) Religious organisations such as YouthCARE 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 and to compel the religious organisation to act in a way that injures the religious susceptibilities of its adherents or members. 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.

3.6 Inherent 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 11)*.
- (b) Article 1(1) of ILO 11 affirms that discrimination includes:
'... Any distinction, exclusion or preference made on the basis of ... religion.'
- (c) However, Article 1(2) of ILO 11 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 11 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

¹⁴ AHRC Enquiry into Freedom of Religion and Belief in the 21st Century Submission No 1535 Anglicare Sydney.

functions that an atheist could not perform.

- (e) 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.
- (f) 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.

3.7 Religious exceptions/exemptions

- (a) To some, the notion of religious exceptions/exemptions means that religious people are permitted to be 'above the law' or are allowed to discriminate through 'legal loopholes'¹⁵ and that somehow this is unfair or, at the very least, makes the law more complicated.
- (b) However, there are many exceptions or exemptions to be found on the statute books. These exist in order to prevent an intolerably blunt application of the law which fails to recognise the principle of '*different treatment under the law*.'¹⁶
- (c) A liberal democracy can be distinguished from cruder majoritarian forms of democracy by the fact that in a liberal democracy, government has concern for the views of minorities and does not just create a 'tyranny of the majority.'¹⁷ Moreover, different treatment takes place all the time, yet the (perhaps emotive) language of exceptions or exemptions is not always used.¹⁸
- (d) We submit therefore that the right to religious freedom must not be cast only as an 'exception' or an 'exemption' but rather should be seen as a fully-fledged right in itself.
- (e) Therefore, as regards the Consolidation Bill, we submit that:
 - (i) The right to religious freedom needs to be included within the definition of 'discrimination' or 'unlawful discrimination' itself; and
 - (ii) The current religious exceptions/exemptions should be retained by more broadly drafted and more robustly protected. If they are not broadly drafted, there is a danger that unlawful discrimination laws will in fact discriminate against one of the protected groups these laws are designed to protect with the

¹⁵ For example, see '*A Humanist Manifesto for the 2010 General Election*' at www.humanism.org.uk.

¹⁶ 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.

¹⁷ Alexis de Tocqueville, '*Tyranny of the Majority*,' Chapter XV, *Democracy in America*, Book 1, Echo Library, 2006

¹⁸ For example, as one United Kingdom commentator pointed out during the passing of the *Equality Act 2010* (UK), where religious exemptions were the source of much debate, it is illegal to segregate toilets on the ground of race; it is not illegal to segregate toilets on the ground of sex. However, no-one complains that the law is sexist in segregating toilets. Hence, different treatment helps the law to work smoothly, it does not merely create categories that are above the law or create complications.

result that religious people and organisations will be deprived of their right to act according to their religious beliefs.

- (f) Therefore, any prohibition of unlawful discrimination must be drafted in such a way as to make it clear that no unlawful discrimination occurs in circumstances where a right to freedom of religion, association or cultural expression is being legitimately exercised.
- (g) It is essential that the definition of unlawful discrimination be drafted in such a way as to make 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:
 - (i) A genuine occupational requirement; or
 - (ii) 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.
- (h) 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.

3.8 Recommendations re religious freedom

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

- (a) That Australian law provide a clear and unequivocal acknowledgement of the right to religious freedom as a fundamental right.
- (b) That reference to the fundamental right to religious freedom be included within the definition of 'discrimination' or 'unlawful discrimination' so as to properly respect the importance and eminence of this fundamental right.
- (c) That Australian law provide a clear and unequivocal acknowledgement of the right to practise religion 'in community' by the establishment of faith-based organisations.
- (d) That Australian law provide a clear and unequivocal acknowledgement that religious organisations are lawfully permitted to select employees sharing the same religious beliefs as those held by the employing religious organisation.
- (e) 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 as to include nondenominational or independent organisations possessing faith-based missions or values

- (f) That Australian law provide a clear and unequivocal acknowledgement that genuine occupational qualifications for a position are not permitted to be determined 'externally' in ignorance of the religious mission, values and strategy of an employing religious organisation.
- (g) That the current religious exceptions/exemptions regime be maintained but extended ensuring that:
- (i) There is no lessening of the current protection accorded to freedom of religion;
 - (ii) In the application of religious exemptions/exceptions, Australian courts are not called upon to arbitrate on the validity or otherwise of religious doctrines, tenets, beliefs or teachings;
 - (iii) If the term 'religious susceptibilities' is retained, it is clearly defined so as to patently show that it embraces the concepts of religious 'beliefs' and 'values' held by individuals and faith-based organisations;
 - (iv) In respect of a particular job or position with an organisation, the protection relates to the inherent requirements of the job as determined in good faith by the organisation based on the organisation's values, beliefs and principles;
 - (v) In respect of employment by an organisation conducted in accordance with religious values, beliefs and principles, the protection for the organisation extends to 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 values, beliefs and principles;
 - (vi) An organisation's values, beliefs and principles are those values, beliefs and principles as are determined in good faith by the organisation itself;
 - (vii) 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;
 - (viii) 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; and
 - (ix) The terms of any government subsidies 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) That Australian law provide a clear and unequivocal acknowledgement that, in situations where there is a conflict of rights, a specific right of persons to practice their religious beliefs by the establishment of organisations with a religious ethos prevails over the general right of persons not to be discriminated against on the ground of religion.

4 Responses to specific questions

We respond to certain questions raised in in the Discussion Paper as follows:

4.1 Question 1

What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?

- (a) We consider that the term ‘discrimination’ poses some problems.
- (b) 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 (or at least a ‘neutral’) sense.
- (c) It is for this reason that we consider that, if the term ‘discrimination’ is to be retained in the Consolidation Bill, it should be qualified by the addition of the adjective ‘unlawful’ e.g. by referring to ‘unlawful discrimination’.
- (d) We also would like to see in any such definition which encompasses the concept of religious freedom. With the exceptions and exemptions currently included in certain legislation, there is a misconception held by many that religious freedom is a lesser right, an ‘exceptional’ right, rather than a concept which should be included within the very definition of unlawful discrimination itself.
- (e) We submit that the definition of unlawful discrimination ought to be drafted in such a way as to clearly state that there will be no unlawful discrimination where a right to freedom of religion, association or cultural expression is being exercised in a legitimate fashion. 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.
- (f) This issue is linked to the issue of religious exceptions/exemptions which we have addresses in paragraph 3.7 and following of this submission.

4.2 Question 22

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

- (a) 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.
- (b) Religious rights should not be cast as ‘exemptions’ but rather should be seen as fully fledged rights in themselves.

4.3 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.

4.4 Recommendations re specific questions

- (a) That the term ‘discrimination’ be replaced by the term ‘unlawful discrimination’.
- (b) That the right to religious freedom being incorporated within the definition of ‘discrimination’ or ‘unlawful discrimination’ so as to properly respect the importance of this fundamental right.
- (c) That religious exemptions be drafted in such a way as to ensure that:
 - (i) There is no reduction in the current right to religious freedom; and
 - (ii) Religious freedom is recognised as a fundamental right.
- (d) That temporary exemptions be used only for situations that are temporary in nature and are not to be implemented in such a fashion so as to avoid the robust protection of religious freedom rights of individuals and organisations.

5 Conclusion

We trust that this submission has been of assistance to your department in its deliberations.

Stanley Jayaraj
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YouthCARE