1 October 2019

Human Rights Unit, Integrity Law Branch, Integrity and Security Division
Attorney-General’s Department
3-5 NATIONAL CIRCUIT
BARTON ACT 2600

By email: ForConsultation@ag.gov.au

Dear Consultation Team,

Religious Discrimination Bill 2019 Exposure Draft - Associated Christian Schools Submission

Associated Christian Schools (“ACS”) is a faith-based charity established to advance education from a Christian worldview for the public benefit. In doing so, ACS provides collegial support to Member Schools and facilitates personal and professional development for Member School leaders to encourage and equip them in their mission to promote education with Christian values.

ACS welcomes the Government’s consultation period on the current version of the Religious Discrimination Bill 2019 Exposure Draft (the “Bill”). While there are key concepts within the Bill, in our view, requiring clarification and in some cases alteration, the Bill goes some way toward providing a framework for the protection of people of faith from discrimination at Commonwealth law level.

ACS is however disappointed that the consultation in relation to the Bill has not accrued in conjunction ALRCs report on its consideration of the current exemptions for religious educational institutions in the Sex Discrimination Act 1984 (Cth) (the “SDA”). ACS notes that the Bill in no way addresses the range of issues deal with in the current exemptions for religious educational institutions in the SDA. More below.

Overview comments on the Bill

ACS considers that in order for educational institutions to flourish, freedom for education to be provided from the underlying worldview of the institution providing the education is essential.
At a fundamental level, it is noted that the Government has demonstrated its preference to avoid any positive affirmation of freedom of religion or conscience in this Bill that could be seen as conferring rights.

The foundation of the legislative package proposed by the Government follows a ‘restriction of freedoms’ approach as opposed to a ‘positive law’ approach, which has been a disappointment to many faith-based organisations and religious bodies. The Bill follows traditional anti-discrimination architecture by setting out what it is unlawful to do. At the same time it seeks to protect the rights of faith-based organisations to maintain their identity and goes a little way to providing a framework towards protecting freedom of speech on religious matters and individual conscience.

ACS recognises the delicate balance to be found between freedom of expression and freedom from discrimination\(^1\).

The Bill ultimately seeks to strike a balance for the inevitable structural conflict between freedom of expression and the freedom from defamatory or vilifying speech. This balance is critically important for ACS.

**Object of the Bill**

Clause 3 of the proposed legislation includes in its object at paragraph (c) to:

> “ensure that people can, consistently with Australia’s obligations with respect to freedom of religion and freedom of expression and subject to specified limits, make statements of belief”.

The reference in this clause to Australia’s ‘obligations’ refers to the *International Covenant on Civil and Political Rights* to which Australia is a signatory. Of key importance to ACS, is the protection given to parents within this instrument, specifically by Article 18(4) to ensure religious and moral education of their children in conforming with their convictions. ACS is concerned that if this is not more directly reflected in the new legislation, there is a risk that this will be slowly eroded over time\(^2\).

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\(^1\) In his speech opening the consultation period for the Religious Discrimination Bill 2019 Exposure Draft, the Attorney-General and Minister for Industrial Relations, The Hon Christian Porter (29 August 2019) stated that:

> “The Bill accepts as its starting point that the right to free religious expression (like other rights) exists in perpetuity and indivisibly with our human existence. Without a need to point to any single statutory description of that right. And that as a consequence, our society should be as collectively restrained as is reasonably possible; from interfering with another’s freedom to express themselves”.

\(^2\) This particular right articulated in Article 18(4) was notably not included in the recent *Human Rights Act 2019* (Qld).
The *International Covenant on Civil and Political Rights* provides (emphasis added):

**Article 18.**

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.”

**General Concerns – areas of the legislative package requiring further clarity**

**Religious Belief or Activity (Conduct)**

Clause 4 provides that “it is unlawful to discriminate on the ground of religious belief or activity in a range of areas of public life. It is unlawful to discriminate on the ground of religious belief or activity in relation to work, in certain other areas such as education and in providing goods and services”.

ACS welcomes this apparent protection for religious schools, however, we also note that a “religious belief or activity” has been given a broad definition in the proposed laws to include ‘not holding a religious belief’.

Clause 5 defines ‘religious belief or activity’ as (a) holding a religious belief; or (b) engaging in lawful religious activity; or (c) not holding a religious belief or (d) not engaging in, or refusing to engage in, lawful religious activity.

ACS has concerns about how this definition may be construed by a Court. Specifically, whether the concept of ‘religious activity’ would be limited to prayer, communal worship and sacraments or whether it incorporates a broader range of activities which include among other motivations, a religious motivation (eg. Public expression through art, rendering service to others).

This is of particular concern to ACS when read alongside Clause 9 which provides that ‘if (a) conduct is engaged in for 2 or more reasons; and (b) one of those reasons is a person’s religious belief or activity (whether or not it is the dominant or a substantial reason for the conduct which would seem to be a more reasonable approach); then for the purposes of the Act, the conduct is taken to be engaged in for that reason’.

ACS submits that there are risks for Christian schools associated with this provision. The Explanatory Notes at [156] state that “this provision is intended to avoid situations in which a
person is able to avoid liability for otherwise discriminatory conduct where they can prove that there were additional motivations for their conduct and the person’s religious belief or activity was only a secondary motivation”.

Clause 10 - Key concerns for ACS

Clause 10(1) provides that a ‘religious body does not discriminate against a person under the Act by engaging, in good faith, in conduct that may be reasonably regarded as being in accordance with the doctrines, tenets, beliefs, or teachings of the religion in relation to which the body is conducted.

ACS proposes the following redrafted provision (or drafting to this effect):

Clause 10(1) A religious body does not discriminate against a person under this Act by:

a) Engaging in conduct that the person genuinely believes is in accordance with the doctrines, tenets, beliefs or teachings of the religion of the body; or
b) Imposing an employer conduct rule which the person genuinely believes conforms to the doctrines, tenets, beliefs or teachings of the religion of the body; or

c) Appointing, or preferring to appoint, and maintaining the appointment of staff or volunteers who practise the religion of the body (or the faith with which the body is associated).

In addition, ACS proposes the inclusion of a definition of ‘practise the religion’ which should include words to the effect, “can include a moral code of conduct prescribed by the religious body in accordance with the doctrines, tenets, beliefs, or teachings of the religion of the body”.

We provide the reasons for this alternate drafting (or drafting to that effect) in the paragraphs that follow.

- ‘Religious body’

ACS notes that an educational institution is included in Clause 10 (2)(a) as a “religious body” includes an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.

It is unclear as to what is meant by the phrase “that is conducted in accordance with”. This requires further clarification.

It is of course important that all religious schools are included in this meaning.

ACS also queries the language, “other than a registered charity that engages solely or primarily in commercial activities” as seeming to be inconsistent with the decision of the High Court in Commissioner of Taxation of the Commonwealth v Word Investments Ltd [2008] HCA 55.
‘[I]n accordance with the Doctrines, Tenets, Beliefs or Teachings of the Religion’

The conflicting outcomes of the CYC Case\(^3\) and the Wesley Mission Case\(^4\) have left the concept of what constitutes ‘doctrines, tenets, beliefs or teachings of the religion’ unresolved.

ACS submits that the current drafting does not adequately deal with matters relating to hiring practices within Christian schools.

The new laws are unclear as to whether faith-based organisations can exercise a mere preference for hiring a person who is a faith adherent in their hiring practices as opposed to this being a requirement for all (as opposed to some) staff and required by the doctrines tenets and beliefs, or teachings of the religion (which is what the Explanatory Notes suggest at \([180]\) and \([181]\)) as set out below (emphasis added):

*This provision will also ensure that religious bodies are able to maintain their religious ethos through staffing decisions. For example, it would not be unlawful for a Jewish school to require that all staff be Jewish and accordingly refuse to hire someone because they were not Jewish, if that conformed to the doctrines, tenets, beliefs or teachings of Judaism.*

*Similarly, a Catholic charity could require that all employees, including volunteer workers, were Catholic, and refuse to engage a volunteer worker who was not Catholic, provided this was in good faith and in accordance with the doctrines, tenets, beliefs and teachings of Catholicism.*

‘Reasonably Regarded’ – the ‘reasonableness test’

ACS has suggested an approach of genuineness to avoid the problem of regulators or the Courts becoming involved in disputes about what religion teaches (which the courts have consistently refused to do).

The test of ‘reasonableness’ for indirect discrimination

For the first time within the anti-discrimination architecture, we see the attempt of the legislature to articulate a test for what constitutes ‘reasonable indirect discrimination’. This is welcomed by ACS.

The High Court of the United Kingdom in *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 noted that in discrimination matters, the test of reasonableness is less demanding than one of necessity. This test was recently applied in the *Australian Capital Territory v Wang* [2019] ACAT [65] at [79] directly references the Styles case:

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\(^3\) *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75.

\(^4\) *OV & OW v Members of the Board of the Wesley Mission* [2010] NSWCA 155.
The test of “reasonableness” is less demanding than one of convenience… the criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect on one hand against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.

Clause 8 (2) sets out that the proposed legislation comprises a test of reasonableness as to what is acceptable indirect discrimination including matters such as:

- Nature and extent of the disadvantage
- Feasibility of overcoming or mitigating the disadvantage
- Proportionality
- Extent to which the requirement or practice limits the ability of the employee to engage in their religious belief or activity

A determination of ‘reasonableness’ in relation to indirect discrimination is left open to the Courts under the new laws, however there is extensive statutory direction as to what is reasonable as established in Clause 8. This is welcome.

Employer conduct rules and employment

Conditions that are not reasonable relating to statements of belief - unjustifiable hardship to the employer

ACS welcomes the general protection of making statements of belief in Clause 8(3) and Clause 41(1).

ACS notes that the Bill creates a type of commercial consideration relevant to what is taken to be a ‘reasonable’ level of discrimination relating to statements of belief, including in an employee’s private capacity.

Clause 8(3) sets out that an employer’s ability to make a private statement of belief is limited by whether it would cause “unjustifiable financial hardship to the employer”. ACS submits that instead, words to the effect of “reasonably likely to damage the business of the employer” would be a better formulation.

A note is included here in the Bill which states that ‘a requirement to comply with an employer conduct rule that is not reasonable under this section is also not an inherent requirement of employment (subsection 31(6)). This is not welcome without additional clarification that religious bodies may impose employer conduct rules as proposed by our draft amendments to Clause 10(1).

Both direct and ‘unreasonable’ indirect discrimination against people of faith is prohibited in the proposed legislation. However, Courts have historically taken a narrow interpretation of what is necessary for religious freedom. Given the new legislation creates the environment where deliberations on what is reasonable and what is not will play out in the Courts, ACS anticipates the risk that rather than protect this freedom, the actual impact of the legislation as currently
drafted will be to restrict this freedom. Take for example the breadth of the language “that would, or is likely to harass” in Clause 41(2)(b).

**Staffing Policies in faith-based institutions**

For the reasons outlined above, the Bill in its current form makes it very difficult for faith-based organisations to retain their culture and ethos in their staffing policies. This is a significant oversight in ACS’ view, given that such matters were at the heart of why the draft legislation was introduced.

*‘Inherent requirement clause’*

Without our proposed safeguards in the amendments to Clause 10(1) there is very limited protection under the proposed legislation for hiring practices where there is an ‘inherent requirement’ issue. The drafting of Clause 31 and the reference to employer conduct rules which are unreasonable in Clause 31(6) indicates that the intent of Clause 31 is actually to protect non-religious bodies from discrimination claims based on their inherent requirements as opposed to the inherent requirements of religious bodies to retain their culture and ethos in their staffing policies.

If Clause 31 is also intended to apply to staffing policies in religious schools, ACS submits that a specific exemption should also be included in relation to genuine occupational requirements for staff of religious Schools as an additional sub-provision in the same clause.

ACS notes the qualification in Clause 31(4) that Section 15 does not make it unlawful for an authority or body to discriminate against a person, on the ground of the person’s religious belief or activity, if the person is unable to carry out the inherent requirements of the profession. However, this provision would not assist Christian schools in their hiring practices given its limitation to proposed s15 which would not apply to Christian schools.

However, given its connection to the teaching profession, ACS welcomes the protection that Clause 31(4) potentially provides for teachers in gaining registration while proposing to teach in accordance with their religious beliefs.

**Vilification**

Clause 8(4) and 41(2) of the Bill refer to the concept of vilification. This concept needs to be defined in the legislation and in our view, the definition should be narrow.

The Explanatory Notes at [132] indicate the intention that “employers may legitimately restrict their employees’ religious expression where it may cause harm to a person, group of persons or the community at large”.

This definition is problematically wide because it essentially covers any statement which “may cause harm”. Arguably, this creates a limitation on freedom of expression which would arguably include any expression of a view against same sex marriage, for example, or raising concerns about a range of important social issues.
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ACS submits that the drafting of Clause 44 should be amended so that unlawful discrimination is a necessary pre-requisite to its operation.

Complaint Resolution

A key functional purpose of the legislative package is to address the issue of complaint resolution in relation to freedom of religious expression and to set out how disputes will be managed in the future.

The Attorney-General refers to the significant statutory guidance in the Bill as ‘guardrails’ to protect against the ‘unpredictability’ of judicial decision making. While consistency in religious freedom legislation is paramount, the nature of the extensive reference to ‘reasonable limitations on a person’s freedom’ seems to require a judicial officer to wrestle with these complex ‘case by case’ situations.

Direct relevance of this Bill to the Findings of the Inquiry into the Framework of Religious Exemptions in Anti-Discrimination Legislation due to report in 2020

On 10 April 2019, the Attorney-General issued Terms of Reference requesting The Australian Law Reform Commission (ALRC) to conduct an Inquiry into the Framework of Religious Exemptions in Anti-Discrimination Legislation. The Terms of Reference were altered by the Attorney-General on 29 August 2019 (the date the Religious Discrimination Bill 2019 Exposure Draft was published). The ALRC is due to report its findings in December 2020. ACS notes the direct relevance of many of the pending findings and recommendations of this inquiry to the Bill, particularly in relation to any proposed amendments to the Sex Discrimination Act 1984 (Cth). ACS would urge the Government to wait for the findings of the Inquiry before finalising the legislative package currently under consideration. In the alternative, we would submit that any amendments to the Sex Discrimination Act 1984 (Cth) should also include clear protections of statements, positions and activity around sexuality and gender.

We thank you for the opportunity to provide this submission and would welcome further consultation before these important matters find their way into law. If you wish to discuss the content of this submission, please contact me at ldoneley@christianschools.org.au or (07) 3228 1534.

Yours sincerely

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