



Submission

Comment on the scope of the Inquiry into the Framework of Religious Exemptions in Anti-discrimination Legislation and any issues relevant to the Terms of Reference.

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Introduction and Summary

1. Associated Christian Schools (ACS) is a faith-based organisation established to advance education from a Christian worldview for the Common Good. In doing so, ACS provides collegial support to its 38 Member Schools, with combined total enrolment of over 22,000 students. Further, ACS facilitates personal and professional development for Member School leaders to encourage and equip them in their mission to promote Christian values through education.

This submission is made by Associated Christian Schools in relation to the Australian Law Reform Commission (ALRC) Review into the Framework of Religious Exemptions in Anti-discrimination Legislation Inquiry (the Inquiry). In particular it is made in response to the ALRC's invitation for submissions 'on the scope of the inquiry and any issues relevant to the terms of reference'. The terms of reference for the Inquiry (the Reference) are set out at Appendix A. This submission first considers the obligation to consider the content of protections to religious belief and activity that is required by the Reference and then turns to specific matters concerning faith-based schools within Australia. It then considers a range of wider matters, including the implications for faith-based charities, the protection of religious and moral views and the limitations imposed by vilification law.

Interaction with Other Discrimination Law and Proposed Law

2. The Scope of the Reference requires the ALRC to
 - have regard to religious exemptions in anti-discrimination laws and their interaction with 'religious belief or activity', including the expression of religious and moral views, insofar as they are a ground of discrimination (as proposed by the Religious Freedom Review, particularly in recommendations 15 and 16, and in accordance with Recommendation 2).
3. For clarity, recommendations 2, 15 and 16 of the Expert Panel on Religious Freedom (the Panel or Expert Panel) were in the following terms:

Recommendation 2

Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.

Recommendation 15

The Commonwealth should amend the Racial Discrimination Act 1975, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

Recommendation 16

New South Wales and South Australia should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's 'religious belief or activity' including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

4. The Scope of the Reference thus requires the ALRC to have regard to both protections to 'religious belief or activity' in existing anti-discrimination law and a recommended (currently non-existent) state of affairs, namely, the protections that are to be in place under a hypothetical Commonwealth *Religious Discrimination Act* (RDA) (the subject of Recommendation 15) and equivalent New South Wales and South Australian anti-discrimination protections to religious belief or activity (the subject of Recommendation 16). As the Expert Panel on Religious Freedom (the Panel) noted in respect of its recommendation for a *Religious Discrimination Act*:

The development of such legislative protection would require careful consideration of appropriate exceptions, for example, such exceptions for religious bodies as may be required in order safeguard other aspects of the human right to freedom of religion or belief.¹

Existing anti-discrimination laws that offer protections to religious belief grant exemptions to religious institutions. This is a recognition of the practical imperative that associational freedom requires that persons who share religious belief should be able to congregate in associational form to the exclusion of persons who do not hold that belief. Such ability ensures that the unique voice and identity of those institutions are maintained.

5. In order to give adequate consideration to the interaction of the religious exemptions the subject of the Inquiry with these hypothetical protections, the ALRC must give some consideration to the alternative models available to ensure the protection of religious belief and activity through anti-discrimination law. The scope of the exemptions granted to religious bodies will be defined by the scope of the protections to religious conduct. Conclusions cannot be reached on the exemptions unless certain assumptions as to the content of the religious protections are made. Thus the ALRC will have to have regard to what is enfolded within the content of the religious protections to be contained within a Commonwealth *Religious Discrimination Act* (and equivalent NSW and SA protections).
6. At the Commonwealth level, such is not an hypothetical exercise. The proposed Commonwealth *Religious Discrimination Act* is a commitment of the Morrison government. In relation to the 'structure' of the proposed RDA, the Government response to the Expert Panel Report clarifies:

In general terms, it is anticipated that this Bill would follow the structure of existing federal anti-discrimination legislation. In this regard, it is proposed that a new Religious Discrimination Bill will protect against discrimination on the basis of the attribute of religious belief or activity. The Bill will list the specific protections from discrimination, including the defined areas of public life in which it would be unlawful to discriminate. For example, this list may include education, employment, access to premises, the provision of goods, services and facilities and accommodation. The proposed Bill will also include appropriate exemptions to allow discrimination in

¹ Paragraph 1.392.

certain circumstances, including for religious bodies, educational institutions and charities.

The Government response also states that the RDA ‘will include a framework of appropriate exemptions as exists in other anti-discrimination legislation.’

7. Further, when it last held Government, the Labor Party proposed protecting religious belief within a consolidated *Human Rights and Anti-Discrimination Bill*. Although that Bill was not subsequently legislated, the 2018 Labor Party Policy Platform contains the following commitment: ‘Labor will act against all forms of discrimination, vilification or harassment and harmonise antidiscrimination laws and procedures.’ This leads to the conclusion that, regardless of the result of the 2019 Federal election, there is a reasonable likelihood that a Commonwealth government will be giving consideration to the means to protect religious belief and activity in the coming term of government.
8. In any event, the utility of the consideration of the content of religious protections aside, the terms of the reference require the ALRC to give consideration to this matter. The wording of the Scope of the Reference necessarily requires the ALRC to make some conclusion about the content of the proposed law in order to determine its interaction with the exemptions the subject of the Inquiry. In conducting this exercise, it is thus open to the ALRC to make recommendations on the content of the protection. As required by the Reference, that Inquiry should have regard to the findings of the Expert Panel. We then first turn to consider the Expert Panel’s findings, and thereafter proceed to set out the matters which we consider the ALRC will be required to consider in order to fulfil the task of having regard to the interaction of anti-discrimination protections to religious belief or activity with religious exemptions.

The Expert Panel’s Consideration of The Conduct to be Protected

9. The Panel acknowledged that existing Commonwealth law does ‘not provide protection at the federal level against religious discrimination.’² It also acknowledged that:

Many stakeholders expressed concerns about the anomalies between Commonwealth, State and Territory laws, which have resulted in greater protection for people in some parts of Australia than others.³

It also recognised that:

Issues relating to freedom of religion are the responsibility of all jurisdictions. However, the Commonwealth Government has a special responsibility due, in part, to the importance of Australia’s international commitments.⁴

In response it concluded:

While not supportive of a Religious Freedom Act, the Panel does support some of the measures that advocates would have included in such an Act, such as protection against discrimination on the grounds of religious belief or activity, and ensuring that legislation that limits the right to freedom of religion is no more restrictive than required, in order to address many of the daily issues encountered by religious adherents.⁵

² Paragraph 1.381.

³ Paragraph 1.389.

⁴ Paragraph 1.441.

⁵ Paragraph 1.123.

10. Aware of the context of the debate over the passage of same-sex marriage legislation in which it was constituted, the Panel indicated it had ‘given particular consideration to any new or emerging challenges to religious freedom resulting from its passage’.⁶ It noted that:

A common characteristic of many of the representations made to the Panel was apprehension, even ‘fear’. People of faith were apprehensive that religious freedom may come under threat in Australia. The Panel heard many examples of changes to legislation or judicial decisions from overseas that underpinned this apprehension. While the Panel considered these matters carefully, it was cautious in drawing conclusions from the experience in jurisdictions with quite different legal arrangements from Australia.⁷

However despite the concerns presented to it, the Panel stated:

While the Panel did not accept the argument, put by some, that religious freedom is in imminent peril, it did accept that the protection of difference with respect to belief or faith in a democratic, pluralist country such as Australia requires constant vigilance.⁸

11. For these reasons, the Panel considered the identification of actual examples of detrimental conduct against religious believers as critical to its deliberations. On this point, the Report appears to bear conflicting messages. The text of the Report leads to contrary conclusions on the question of the impacts on religious freedom of the marriage amendments. At one point it concludes:

The Panel received limited information to suggest that the right to freedom of religion is currently being infringed in any of these areas. The Panel notes that the Marriage Amendment Act included a number of measures to protect religious freedom, and that these and other protections appear to be operating effectively.⁹

12. However, contrary to this, the Report expressly acknowledges the occurrence of infringements on religious freedom where it states that it:

undertook a thorough review of instances that had been brought to its attention of where the right to religious freedom has been infringed, or had unreasonably impacted upon the rights of others.¹⁰

Further, the Panel cited examples of detriment that were so numerous as to enable it to identify ‘common themes’.¹¹ In its discussion of matters that could potentially form the basis of complaints of religious discrimination, the following examples were cited by the Panel as instances of ‘perceived infringement of religious freedom’, grouped according to the following ‘common themes’:

- complaints of intolerance, bullying and coercion as a result of expressing religious beliefs in the workplace, at school or in public

⁶ Paragraph 1.418.

⁷ Paragraph 1.17.

⁸ Paragraph 1.6.

⁹ Paragraph 1.425.

¹⁰ Page 119.

¹¹ Paragraph 1.400.

...

- instances where people of faith experienced adverse consequences as a result of expressing views in favour of same-sex marriage or as a result of their sexual orientation or gender identity
- concerns from people of faith that they need to suppress their religious identities or views for fear of ostracism or reprisal
- instances of church facilities being booked for purposes that are contrary to their religious values (such as a church hall being used for a seminar promoting the legalisation of euthanasia in Victoria)
- instances of venues cancelling, or refusing to provide bookings for, religious institutions that wish to promote a traditional view of marriage.¹²

13. This listing clarifies that the Panel was able to locate examples of infringement upon religious freedom. While the Panel's Report at times gives conflicting messages on the extent to which religious freedom within Australia is currently at risk, the Report expressly acknowledges the occurrence of infringements on religious freedom and cites examples of detriment that are so numerous as to enable it to identify 'common themes'. The list of examples cited by the Panel provide illustrations of the kind of detrimental conduct that the ALRC should have regard to in its consideration of the protections to be contained within a *Religious Discrimination Act*.

Scope and Content of Protections to Religious Belief and Activity

14. As anticipated by the Government response cited above at paragraph 6, at a minimum the ALRC will need to assume the replication of the existing framework of protections within Commonwealth anti-discrimination law. It would be highly unusual for the ALRC to recommend less protection for religious belief than is offered for other protected attributes in the existing Commonwealth anti-discrimination framework. That would entail the following:
- a. **Commonwealth bound** - The Act will bind the Commonwealth.
 - b. **States bound** - The Act will bind the States in certain respects. Importantly, Commonwealth anti-discrimination law binds the States where the States are engaged under a Commonwealth law or program.¹³ For example, section 26 of the *Sex Discrimination Act (SDA)* provides that the States are bound where they 'perform any function under a Commonwealth law or for the purposes of a Commonwealth program'. This has been held to apply to a local government and also in the context of education.
 - c. **Government Contracting** - Government authorities (Commonwealth, State and Territory) should contract private services with neutrality. The Act is to impose obligations on such bodies to not discriminate against religious bodies in tendering processes. The ALRC should recommend that the RDA clarifies that it protects religious bodies from conditions upon, or withdrawal of, funding on the basis of their religious belief.

¹² Paragraph 1.400.

¹³ Section 26 SDA; section 29 DDA; section 31 ADA. Amongst these the SDA alone excludes provisions relating to employment. Various State Acts, for example the Queensland *Anti-discrimination Act 1991*, also bind the State Government.

- d. **Scope of Protections** – Given the range of detrimental conduct cited by the Expert Panel (see paragraph 12), the scope of the protections are to extend to the fields of academic, trade or professional qualifications, accreditation or licensing.
- e. **Protection of Associates etc.** - associates of a person who holds a religious belief should be protected. There is Commonwealth precedent for the protection of associates of protected persons. An example of a similar protection is found in section 4(1) of the *Disability Discrimination Act*.

It would be novel to resile from these existing characteristics of Commonwealth anti-discrimination law. Indeed it would be to offer to religious belief a lesser standard of protection than that applied to other protected attributes in Commonwealth law.

15. However, due to the presence of certain additional factors that are unique to religious activity and belief, mere replication of the structure of existing anti-discrimination law will either fail to protect a wide range of detrimental conduct, or will leave the existence of protections uncertain. These addition unique factors include the following:

- a. **States bound** - To provide adequate coverage in those States where the existing protections to religious belief and activity are inadequate and also in those States where no protections exist (currently in NSW and SA), the new Act may also legitimately bind the States and Territories (and local government) and those exercising functions of a public nature on their behalf, not just in the activities under which they are engaged under a Commonwealth law or program, but in the full scope of their activities.
- b. **Enforced Promotion** – Protecting people or entities from being discriminated against requires preventing compulsion to act against or promote a view that is contrary to religious or conscientious belief. The new law should provide protections against enforced promotion of matters that are contrary to religious conviction.
- c. **Evidencing the Content of Religious Belief** - Courts have taken differing approaches to the evidentiary standards to be applied when determining the content of religious belief. In *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*¹⁴ (*Cobaw*) the Court refused to acknowledge evidence of the traditional religious belief of the respondent on sexuality. The ALRC should give consideration to how the Act can set standards for evidencing that permit certainty to religious persons or bodies who wish to evidence their beliefs as religious beliefs.
- d. **Protect Both Individuals and Groups** - There is some ongoing uncertainty as to the extent to which antidiscrimination protections extend not only to individuals but also to groups (whether incorporated or unincorporated).¹⁵ Given religious belief most often is expressed in associational form (distinguishing it from most of the other protected attributes), the Act must clarify that the protection extends to the full range of unique religious associational expressions (such as trusts, unincorporated associations, associations, letters patent, corporations etc.).

The above establishes that if the standard framework of Commonwealth anti-discrimination law is merely replicated without particular reference to the unique aspects of religious

¹⁴ [2014] AVSCA 75.

¹⁵ See for example *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 at 334 and *IW v City of Perth* (1997) 191 CLR 1.

belief, the law would leave significant remaining exposure. The protective potential of such an Act would not be assured without express clarification of these matters.

Siracusa Principles

16. Consistent with the recommendations of the Panel, the Reference requires the ALRC to give consideration to the Siracusa Principles in its consideration of the interaction of religious exemptions with protections to religious belief and activity in anti-discrimination law. The Siracusa Principles provide a statement of the requirements of Article 18(3) of the ICCPR, providing that limitations upon religious manifestation can only be permitted where such are *necessary*, proportionate and are the least restrictive means to achieve the end. The Panel stated:

The Panel is of the view that the Siracusa Principles form a sound basis for parliaments to assess whether a law limiting the operation of freedom of religion or other rights is unduly burdensome.¹⁶

The Panel noted the importance of ensuring that the right to religious freedom is given appropriate weight in situations where it is in tension with other public policy considerations, including other human rights. Although not binding at international law, the Siracusa Principles form a sound basis for considering any law that limits the operation of freedom of religion. The Panel recommends that legislators have regard to the Siracusa Principles when drafting laws that would limit the right to freedom of religion and other rights. In addition, the Panel recommends that governments consider the use of interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.¹⁷

17. The Siracusa Principles offer a statement of principles for interpreting limitations provisions in the United Nations *International Covenant on Civil and Political Rights 1966* (ICCPR). Broadly described the Siracusa Principles provide that where the ICCPR states that a right can be subjected only to ‘necessary’ limitations, a limitation is only lawful where it:

- is based on one of the grounds justifying limitations recognised by the relevant article of the ICCPR,
- responds to a pressing public or social need,
- pursues a legitimate aim, and
- is proportionate to that aim.

18. The Principles state that ‘In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.’¹⁸ Consistent with the Expert Panel’s recommendations, the bounds of permissible limitations set out in the Siracusa Principles are to be reflected in the proposed *Religious Discrimination Act* (RDA), or other Commonwealth protection to religious belief and activity. These Principles are to be applied to both individual expressions of religious belief and their interaction with other human rights (such as equality), and also in respect of the exemptions permitted to religious bodies. As a component of the Inquiry, the ALRC should give consideration to how the Siracusa Principles

¹⁶ Paragraph 1.149.

¹⁷ Paragraph 1.423.

¹⁸ Paragraph 11.

are to be reflected in protections to religious belief and activity and within the religious exemptions contained in anti-discrimination law.

Objects clauses

19. Although the reference does not make express reference to Recommendation 3, consistent with the wider terms of the Reference, it should be presumed that the ALRC is to fashion its proposals in light of that recommendation. Recommendation 3 states:

Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.

20. The Panel stated:

The Panel is also of the view that, in drafting laws that do have an impact on rights such as freedom of religion, parliaments should consider the inclusion of express provisions that require the interpretation of laws consistently with those rights so far as it is possible to do so in a way that gives effect to the purpose of the law.

This could be achieved in a variety of ways. One approach is through the use of objects clauses.¹⁹

Alternatively, or in addition, appropriate interpretation clauses could be inserted in the relevant legislation or in legislation of general application to ensure that such laws are interpreted in a manner consistent with the equal status of all human rights.

21. The Government accepted this recommendation as it pertains to the Commonwealth. The response provides:

The Australian Government will introduce a Bill containing amendments to existing Commonwealth anti-discrimination legislation (being the Sex Discrimination Act, Disability Discrimination Act, Age Discrimination Act and Racial Discrimination Act 1975) to ensure each respective piece of anti-discrimination legislation has an objects clause to reflect the equal status in international law of all human rights, including freedom of religion. An objects clause will also be included in the proposed Religious Discrimination Bill (referred to with respect to recommendation 15 below).

22. The ALRC should, in considering the content of a Commonwealth protection to religious belief, whether in the form of a *Religious Discrimination Act* or otherwise, give consideration to the means to give effect to Recommendation 3 of the Expert Panel.

Interaction with State and Territory Law

23. The Reference makes specific mention of the 'interaction between Commonwealth, State and Territory anti-discrimination laws and the desirability of national consistency in religious exceptions in those laws'. Currently State and Territory law gives varying and incomplete protection to the internationally recognised rights of freedom of expression, association, thought, conscience or religion. Under Article 50 of the *International Covenant on Civil and Political Rights* (ICCPR), the Commonwealth is accountable for a failure on the part of the States or Territories to acquit the obligations under the Covenant.

¹⁹ Paragraph 1.151.

24. A complainant against a person or body seeking to assert their internationally protected religious freedom rights simply has to elect to exercise their rights under a more limited State or Territory law to avoid the stronger Commonwealth protections. The ALRC should give consideration to mechanisms available to give effect to the Commonwealth's obligations under international law that will ensure that the applicable rights are recognised equally and without discrimination in all the States and Territories of the Commonwealth.

Religious Schools

25. Turning to the specific parts of the Reference that pertain to religious schools, we first consider the specific question of the ability of faith-based schools to teach and ensure conduct consistent with their ethos and then turn to consider the question of employment within such schools. Prior to these specific considerations, some general comments may first be made. To the extent that the terms of reference pertain to the conduct of religious schools, in conducting its Inquiry the ALRC should have regard to:
- a. The unique and important historic and ongoing role of faith-based educational institutions in the Australian educational system.
 - b. The fact that Australia is a vibrant multicultural community and that the autonomy of religious communities is 'indispensable for pluralism'.²⁰
 - c. The important contribution made to the maintenance and preservation of Australian diversity and democratic freedoms by religious educational institutions, and, in particular, through the ability of such educational institutions to maintain their religious ethos at a whole of institution level, including in respect of their dealings with students, staff and contract workers.
 - d. The recognition of the European Court of Human Rights in *Kjeldsen, Busk Madsen and Pedersen v. Denmark*²¹ that independent private schooling networks are a means to give effect to the international human right of parents to ensure the religious and moral education of their children.
 - e. To the extent that the distinction between direct and indirect discrimination is to be applied to religious educational institutions, the ALRC should give consideration to the means to provide certainty and precision for school communities, including staff, parents and students, not only in the formulation of policies, but also in the application and administration of those policies.

Right of religious institutions to teach and ensure conduct consistent with ethos

26. In relation to the specific question of the ability of faith-based schools to teach and ensure conduct consistent with their ethos, the Reference recognises the distinction between matters that may be taught and the setting of rules or standards of conduct, both of which are relevant to the maintenance of the ethos of a school, wherein it states: 'the importance of allowing religious institutions to *both to teach and otherwise conduct themselves* in a manner consistent with their religious ethos'. For many schools, conduct that is permitted within the school community, although not engaged in directly by the school or its representatives, can impact detrimentally upon the ethos of the school. The principles entailed here may be summarised in the frequently cited phrase 'The standard you walk by is

²⁰ *Hasan and Chuash v Bulgaria*, App No 30985/6, (2002) 34 EHRR 55, [62].

²¹ (1976) 1 Eur Court HR 711.

the standard you accept'. The ALRC's consideration should acknowledge that student conduct can have an impact upon the maintenance of a school's ethos, even though the conduct is not performed by representatives of the school directly.

27. The ALRC should be informed by the recent Parliamentary debate surrounding the *Discrimination Free Schools Bill 2018* and the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*. Various amendments were proposed to the latter Bill by the Government that would have clarified that schools may continue to teach their religious beliefs in matters such as marriage or sexuality. A further amendment clarified that schools may set standards of conduct consistent with their religious ethos. The ALRC should give consideration to those amendments in recommending reforms that will provide sufficient certainty that schools will continue to be able to teach in accordance with their doctrines and ensure the maintenance of their religious ethos within their respective communities.

Reforms Concerning Teachers

28. In recommending reforms in respect of employment within religious schools, the ALRC should give consideration to the position of the Labor party, as declared prior to the 2019 Federal Election. In the February 2019 dissenting report on the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, Labor Senators stated 'Labor affirms its commitment to legislating to remove exemptions from the SDA not only for students but also for teachers and other staff. Labor upholds the right of schools to ensure the fidelity of teachers to their school in their conduct within the school.' For many faith-based schools the ability to employ persons who not only can act consistently with the school's ethos, but who actually hold the beliefs of the school is considered to be foundationally critical to their ability to offer an authentic model of belief to students and the community, across the school's entire staffing complement, not just its teachers. The fact that such bodies wish to employ persons who share their belief at a whole of institution level is an expression of their understanding of their own religious doctrines, tenets, beliefs or teachings.
29. In considering possible models for reform, the ALRC should give consideration to the impact of the following:
- a. the application of inherent requirements, genuine occupational requirements or genuine occupational qualifications tests to religious educational institutions;
 - b. proposals that a religious educational institution may assert religious freedom rights where a staff member fails to act in conformity with the belief system of the institution, but that a school must not require that staff members must ascribe to its belief system;
 - c. the proposal that section 38(3) of the Sex Discrimination Act 1984 be deleted without the introduction of additional provisions that clarify the ability of religious educational institutions to maintain their ethos, with the result that permissible conduct would be determined by the existing test for indirect discrimination pursuant to section 7B of that Act
- upon the following matters:
- d. the ability of religious educational institutions to maintain their religious values and ethos at a whole of institution level in accordance with their understanding of their religious doctrines, tenets, beliefs or teachings;
 - e. the ability of religious educational institutions to conduct themselves in accordance with their understanding of their religious doctrines, tenets, beliefs or teachings;
 - f. the desirability of certainty in application of the law for religious educational institutions, staff and parents; and
 - g. the resultant administrative burdens placed upon such educational institutions.

Faith-based charities

30. The Reference states that ‘To avoid doubt, religious institutions for the purposes of this reference includes bodies established for religious purposes (including faith-based institutions) ...’ There is long running uncertainty as to whether faith-based institutions (such as welfare providers) are religious bodies under anti-discrimination law. For example, in *Walsh v St Vincent de Paul Society Queensland (No.2)*²² the Queensland Anti-Discrimination Tribunal held that the St Vincent de Paul’s Society was not a religious body for the purposes of anti-discrimination law, due to its primary benevolent purpose. In 2010 the New South Wales Court of Appeal took a differing approach and held that the Wesley Mission, also a benevolent institution, was a religious body for the purposes of anti-discrimination law.²³ The terms of reference make clear that the ALRC is to take the latter approach.
31. The approach adopted by the Reference is consistent with the Ruddock Review’s consideration of the religious exemptions, which clearly proceeded on the basis that such faith-based bodies were religious bodies. The Panel’s discussion on whether funding should be removed from faith-based charities where they rely upon anti-discrimination law exemptions (in Chapter 4 under the sub-heading ‘Charities and faith-based organisations’) proceeds on the clear basis that faith-based charities are eligible for exemption in anti-discrimination law. Their discussion includes reference to ‘aged care, education and health’²⁴ and the following forms of ‘faith-based’ charitable expression:
- Faith-based organisations have played, and continue to play, a vital role in civic life in Australia. They assist the needy, provide hospitals and aged-care facilities, provide homecare and company to the elderly, run schools and institutions for higher learning, and provide humanitarian assistance in times of natural disaster. Many of these institutions operate outside Australia as well.²⁵
32. The Ruddock Review’s recommendation for the *Religious Discrimination Act* also said that exemptions should extend to ‘charities’:
- The Commonwealth should amend the Racial Discrimination Act 1975, or enact a *Religious Discrimination Act*, to render it unlawful to discriminate on the basis of a person’s ‘religious belief or activity’, including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.
- In the Panel’s view ‘charities’ are to be included as bodies that are to be eligible for the ‘appropriate exceptions and exemptions’ within the mooted Act. Seen within the wider context of the Panel’s report, the recommendation that exemptions within the RDA extend to ‘charities’ clearly includes faith-based charities that have a charitable purpose that is other than the ‘advancement of religion’.
33. The ALRC should make recommendations on means to clarify that faith-based charities fall within the notion of ‘bodies established for religious purposes’ under anti-discrimination law (including section 37 of the SDA).

²² [2008] QADT 32.

²³ *OW & OV v Members of the Board of the Wesley Mission Council*.

²⁴ Paragraph 1.183.

²⁵ Paragraph 1.169.

Moral Views

34. The reference invites consideration as to how a moral view may be protected under a *Religious Discrimination Act* wherein it states:

The ALRC should also have regard to religious exemptions in anti-discrimination laws and their interaction with 'religious belief or activity', *including the expression of religious and moral views*, insofar as they are a ground of discrimination (as proposed by the Religious Freedom Review, particularly in recommendations 15 and 16, and in accordance with Recommendation 2) (emphasis added).

35. The Reference thus makes clear that religious beliefs may include beliefs about moral matters, and are not to be considered as merely philosophical or abstract notions pertaining to the spiritual matters only. Thus it is contemplated that a protection to religious belief under the *Religious Discrimination Act* would encompass a protection to the expression by a religious believer, for example, that marriage is the exclusive union of a man and a woman for life and the proper place for the expression of sexual relations, or that such a union is the best case scenario for the rearing of children. These are properly to be considered to be religious views on matters pertaining to morality.

Reforms Concerning Vilification Law

36. The ALRC has recently considered the issue of Commonwealth vilification law that prohibits offensive and insulting language in its 2016 *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws Report*. That Report concluded that section 18C 'may be vulnerable to constitutional challenge on two fronts'. The first of those fronts was the concern that section 18C fails to acquit Australia's international obligations, the second was on the basis of the Constitutionally protected implied freedom of political communication. These conclusions may form a basis for the assessment of State and Territory vilification provisions.

37. The Government response to the Expert Panel Report also sheds some light on the intention of this component of the Reference:

it is not the intention of the Government to include in [a *Religious Discrimination Bill*] a provision regarding offensive, humiliating or insulting behaviour, such as that contained in section 18C of the Racial Discrimination Act because, as the Expert Panel has noted, the entrenchment of laws regarding blasphemy would be a retrograde step which the Government considers would place too great a burden on freedom of expression in Australia.

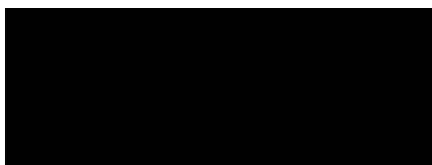
Relatedly, the Government will consult with the States and Territories on the terms of a potential reference to the ALRC to give further consideration to how best to amend current Commonwealth anti-discrimination legislation to prohibit the commencement of any legal or administrative action, pursuant to State-based anti-discrimination legislation analogous to section 18C of the Racial Discrimination Act, that seeks to claim offence, insult or humiliation because a person or body expresses a view of marriage as it was defined in the Marriage Act before being amended in 2017.

38. The ALRC's consideration of the reference concerning vilification law should also be read in the light of the inclusion of moral views in the scope of the reference. It is important in this context to avoid distinctions being drawn between a view of marriage and a view of sexuality or the family. To only protect a belief about 'marriage' but exclude sexuality or the family would arbitrarily undermine the policy intent of protecting religious and moral worldviews. As outlined above, both a view on marriage and a view on sexuality may be considered to be

moral or religious worldviews, and the effect of State and Territory vilification provisions on both forms of view should be considered by the ALRC.

The Requirement to Make Recommendations

39. In conclusion, it is important to note the Reference seeks recommendations on what reforms to the law 'should be made' in order to give effect to two differing purposes. In respect of religious schools, the Reference seeks the accomplishment of the following dual purpose: 'limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos'. The only circumstance in which reform may not be recommended is where the ALRC is satisfied that the current state of the law allows for the satisfaction of that dual purpose.
40. The same is also true of the referral concerning state vilification law. The ALRC may only refrain from recommending reform where it is satisfied that existing State and Territory law does not impose 'legal impediments to the expression of a view of marriage as it was defined in the *Marriage Act 1961* (Cth) before it was amended by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), whether such impediments are imposed by a provision analogous to section 18C of the *Racial Discrimination Act 1975* (Cth) or otherwise.' In each case, where the stated purposes are not met by existing law, the ALRC is to provide recommendations upon the means by which reforms are to be given effect to meet those purposes. If the dual purposes are not currently met, the reference makes clear that what is required from the ALRC is not a conclusion on whether reforms should be made, but rather, how they should be made to achieve the stated purposes.
41. We take this opportunity to thank you for the opportunity to make submissions on the Reference. We would be pleased to offer any clarification that you may require.



Dr. Lynne Doneley
Executive Director/Principal Research Officer
Associated Christian Schools
9 May 2019

Appendix A

Review of religious exemptions in anti-discrimination law

I, the Hon Christian Porter MP, Attorney-General of Australia, having regard to:

- the rights and freedoms recognised in the international agreements to which Australia is a party, in particular:
 - the rights to freedom of speech, association and thought, conscience and religion, including the right to manifest one's religion or belief in worship, observance, practice and teaching (including in community with others) and the liberty of parents and guardians (where applicable) to ensure the religious and moral education of their children in conformity with their own convictions; and
 - the rights of equality and non-discrimination
- the importance of protecting the rights of all people, and children in particular, to be free from discrimination in education
- the importance of allowing religious institutions both to teach and otherwise conduct themselves in a manner consistent with their religious ethos
- the interaction between Commonwealth, State and Territory anti-discrimination laws and the desirability of national consistency in religious exceptions in those laws

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the Australian Law Reform Commission Act 1996 (Cth), a consideration of what reforms to relevant anti-discrimination laws, the Fair Work Act 2009 (Cth) and any other Australian law should be made in order to:

- limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos; and
- remove any legal impediments to the expression of a view of marriage as it was defined in the Marriage Act 1961 (Cth) before it was amended by the Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth), whether such impediments are imposed by a provision analogous to section 18C of the Racial Discrimination Act 1975 (Cth) or otherwise.

Scope of the reference

In undertaking this reference, the ALRC should include consideration of Commonwealth, State and Territory anti-discrimination and vilification laws and the Fair Work Act.

To avoid doubt, religious institutions for the purposes of this reference includes bodies established for religious purposes (including faith-based institutions) and educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

The ALRC should identify and have regard to existing reports and inquiries including:

- the Report of the Expert Panel on Religious Freedom (Religious Freedom Review), particularly recommendations 1, 5, 6, 7 and 8;
- Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129); and

- any other inquiries or reviews, including state and territory inquiries or reviews, that it considers relevant.

The ALRC should also have regard to religious exemptions in anti-discrimination laws and their interaction with 'religious belief or activity', including the expression of religious and moral views, insofar as they are a ground of discrimination (as proposed by the Religious Freedom Review, particularly in recommendations 15 and 16, and in accordance with Recommendation 2).

Consultation

The ALRC should consult widely with State and Territory governments, religious institutions, the education sector, and other civil society representatives.

The ALRC should produce consultation documents to ensure experts, stakeholders and the community have the opportunity to contribute to the review.

Timeframe for reporting

The ALRC should provide its report to the Attorney-General by 10 April 2020.