DISSENTING REPORT OF THE COALITION SENATORS

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Introduction

1. On 13 November 2018, the Senate referred the following matter to the Legal and Constitutional Affairs References Committee for inquiry and report:

> Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity and other attributes covered by the Sex Discrimination Act 1984, with particular reference to proposals for amendments to current legislation, and any related matters.

2. The context of the current referral is the introduction of the *Discrimination Free Schools Bill 2018* (the Bill) by the Australian Greens as well as the leak in the Sydney Morning Herald of recommendations purporting to be of the Ruddock Review. It is appropriate then to conduct an analysis of the relevant issues through examination of the Bill, and indeed this is the approach adopted by many submissions to the Inquiry. The Bill proposes to remove the existing exemptions at section 38 of the *Sex Discrimination Act 1984* (SDA) provided to educational institutions that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed. Those exemptions cover the employment of staff, the engagement of contract workers and the provision of education and training. The Bill also clarifies that such an institution cannot be a 'body established for religious purposes' under section 37 of the SDA.

3. This committee has not been established to undertake an examination of the substantial issues raised by this question in good faith. It has been hurried in a way that exposes its true purpose: to provide a platform for some Labor and Greens Senators to project their pre-determined views onto a larger stage, for their own political advantage. Those involved should be condemned for doing so.

4. It is therefore unsurprising that the Senators who are a party to this dissenting report cannot support the majority report. Our reasons for that view are set out in the remainder of this report. In summary, it is our view that the committee's work demonstrates the need for further consideration to be given to a positive and stand-alone protection of religious freedom in Australia.

Inconsistency with the relevant international law

5. The Bill must be considered with reference to the applicable international human rights. The Statement of Compatibility with Human Rights that accompanies the Bill is two paragraphs in length and only refers to one of the applicable rights, the right to equality and non-discrimination. It fails to reference the right to religious freedom and, for the reasons set out below, thus discloses its extraordinarily one-sided and inadequate consideration of the applicable human rights. Indeed, as the following analysis shows, the Bill could be described as undermining human rights in the name of arbitrarily selected human rights. It does not provide an adequate statement of the relevant human rights, and limits human rights in a way that is not permissible in international law.

International Covenant on Civil and Political Rights

Religious Institutional Autonomy

6. The primary protection to religious freedom to which submitters drew attention is contained in Article 18 of the *International Covenant on Civil and Political Rights 1966*, which protects freedom of thought, conscience and religion. That protection extends to both individuals and institutions.[1] The UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (the *Religious Declaration*), which has been used by the United Nations Human Rights Committee for interpretive purposes,[2] enfolds within that protection the right to 'to establish and maintain appropriate charitable or humanitarian institutions'.[3] The provision of education is recognised as a charitable purpose in Australian Commonwealth law[4] and has also been recognised as such within various statements of the United Nations Special Rapporteur on freedom of religion or belief.[5]

7. The former United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt has emphasized the importance of religious institutional autonomy in the following terms:

> Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. This is not just an

[1] Human Rights Committee, *General Comment No 22: Article 18*, 48th sess, (20 July 1993), [8].
[2] See for example, *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, Communication No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005).
[3] UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, Article 6.
[4] Section 12(1) *Charities Act 2013* (Cth).
[5] For example UN Doc, A/65/207 (2010) p. 12-13, paras. 35-36; see also UN Doc, E/CN.4/1987/35 (1986) 16, para. 51. See also Paul M Taylor, Freedom of Religion UN and European Human Rights Law and Practice (Cambridge University Press, 2005) 248-250.

> external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members (see A/HRC/22/51, para. 25). Moreover, for many (not all) religious or belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.[6]

8. This nation advocated for the importance of freedom of expression when Australia was seeking a position on the United Nations Human Rights Council, and subsequently having been elected to that body, we should be very cognizant of the importance of recognizing freedom of religion.

9. While not forming a part of its submission to the current inquiry, expressing similar sentiments, the Australian Human Rights Commission (AHRC) has in the past recognised that:

> special provision for religious institutions is appropriate. It is reasonable for employees of these institutions to be expected to have a degree of commitment to and identification with the beliefs, values and teachings of the particular religion … Accommodating the distinct identity of

[6] UN General Assembly, *Elimination of all Forms of Religious Intolerance*, 7 August 2013, A/68/290, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/421/91/PDF/N1342191.pdf?OpenElement, cited in Mark Fowler, *submission 46*, 8.

> religious organisations is an important element in any society which respects and values diversity in all its forms.[7]

10. International human rights law stipulates that strict conditions must be satisfied in order for the manifestation of the freedom of religion or belief to be limited. The majority report states various generic principles for when limitations may be imposed upon the right to religious freedom. However, as further set out below, it fails to accurately apply those requirements to the matters considered by this Inquiry. Furthermore, in its consideration of the equality right, the majority report fails to recognise the general principle of international law that:

> not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[8]

The implications of this are further set out below.

11. In this context, the right to manifest religious belief at Article 18(3) may only be limited to the extent that it is 'necessary' in order to 'protect … the fundamental rights and freedoms of others'. As now set out, the Bill fails to comply with this requirement. Moreover, the Statement of Compatibility with Human Rights does not engage with this requirement as it does not even identify Article 18 as a relevant right. As Professor Patrick Parkinson Dean of the TC Beirne School of Law at the University of Queensland noted in his submission:

[7] Human Rights and Equal Opportunity Commission, Article 18: Freedom of Religion and Belief, (1999) 109.

[8] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination,* 10 November 1989, available at: http://www.refworld.org/docid/453883fa8.html.

> As is well understood, different human rights are not infrequently in conflict with one another and balances must be found between them. So legislation that cherry picks Article 26 concerning non-discrimination, ignoring other rights guaranteed by the ICCPR, cannot be a proper implementation of that Convention. Article 26 must be read in the light of other Articles in the Convention, including Article 18 (freedom of religion), Article 22 (freedom of association) and Article 27 (rights of ethnic minorities).

12. In its submission the AHRC also recognised that the exemptions for religious schools exist to 'balance' religious freedom with non-discrimination:

> Certain exemptions from federal anti-discrimination legislation for religious bodies and educational institutions established for religious purposes also seek to protect freedom of religion by balancing that right with the right to non-discrimination.[9]

13. Although the full report of the Expert Panel on Religious Freedom (the Ruddock Review) has not been tabled, the twenty recommendations of that review have been reported in the Sydney Morning Herald. Assuming that that reporting is accurate (which we cannot confirm), in respect of the permissible scope of limitations to the right to manifestations of religious belief the Ruddock Review recommended that:

> 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.

[9] Australian Human Rights Commission, *Submission* 5, 20.

Similarly, last year the Chair's foreword to the Australian Commonwealth Parliament Human Rights Sub-Committee Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Status of the Human Right of Freedom of Religion or Belief concluded that 'the Siracusa Principles provide guidance for interpreting the "limitations clauses" in the ICCPR, such as those found in Article 18(3)'.[10]

14. *The United Nations Economic and Social Council's Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* were promulgated by the American Association for the International Commission of Jurists in 1985. The Siracusa Principles state that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue'. The Principles require that:

> Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:
>
> a. is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
>
> b. responds to a pressing public or social need,
>
> c. pursues a legitimate aim, and
>
> d. is proportionate to that aim.

15. The Bill fails to satisfy the requirement of proportionality, as it extinguishes the right to religious freedom for a right that can be maintained through other means. The Institute for Civil Society (ICS) submitted:

[10] *UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, E/CN.4/1985/4 (28 September 1984).

> It is not necessary in order to protect teachers and students from discrimination on the grounds of sexual orientation to give them State protection under anti-discrimination laws to disrupt and oppose the religious values and ethos of a religious school of which they are a part.[11]

16. The ICS submitted:

> a balance of harms analysis favours the religious school over the teacher or the student because the teacher and student have many other options for employment or education. However, the school cannot recover its religious ethos once compromised … An individual applicant or employee whose beliefs or conduct contradict the doctrines, beliefs or practices of the religion of the religious employer will in almost all cases be able to find alternative employers where there is no such conflict.[12]

17. Professor Patrick Parkinson noted:

> Because … the Discrimination Free Schools Bill [does] not include a provision affirming the positive right of faith-based schools and other faith-based organisations to employ staff, taking into account the school's religiously defined raison d'être and corporate identity, those provisions cannot be reconciled with Australia's international human rights obligations concerning freedom of religion.

18. Relevantly, the Siracusa Principles also state that 'In applying a limitation, a state shall use no more restrictive means than are required for the

[11] Institute of Civil Society, *Submission 35*, 11.
[12] Ibid, 12. Mark Spencer from Christian Schools Australia submitted similarly at Committee Hansard, 35.

achievement of the purpose of the limitation.'[13] The complete removal of the religious freedom of a school is clearly more restrictive than is required in order to progress the right to equality. As Dr Alex Deagon of the Queensland University of Technology argued:

> In most circumstances there are other equivalent options reasonably available for those discriminated against, such as employment or enrolment in the public system or in private/independent schools which do not have incompatible religious convictions. The harm against religious educators is therefore likely to be much greater than that suffered by discriminated persons.[14]

19. Furthermore, lawyer and Adjunct Associate Professor at the University of Notre Dame Mark Fowler submitted:

> International law recognises that differential treatment will not be unlawful where a distinction is legitimate, reasonable and to pursue a recognised human right. The European Court of Human Rights has recognised that the autonomous ability of religious bodies to retain staff who can convey their identity "is indispensable for pluralism in a democratic society." Such freedoms are reasonable and legitimate components of a free and open society.

In light of its restrictions on these most fundamental considerations, the Bill cannot be said to be a proportionate means of limiting religious freedom, nor can it be considered to 'use no more restrictive means than are required' to progress equality.

[13] Op cit., 11, paragraph 11.
[14] Dr Alex Deagon, *Submission 9*, 16.

International human right to establish private religious schools

20. With particular regard to the position of faith-based schools, Article 18(4) of the *ICCPR* provides:

> 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.

This Convention right protects the right to establish private religious schools.[15] This is the same right by which parents who do not wish their children to participate in religious instruction provided in public schools may excuse their children from that teaching.

21. As noted by the Australian Human Rights Commission:

> The [United Nations] Human Rights Committee has stated that the freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.

22. The *United Nations Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child* each also provide relevant protections to children and their parents.[16] The *Convention on the Rights of the Child*, which Australia has ratified, requires State Parties to 'undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into

[15] Manfred Nowak, *CCPR Commentary, 2nd revised edition* (Kehl: N P Engel, 2006), 443.
[16] United Nations Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, Article 10-3.

account the rights and duties of his or her parents …'.[17] Article 14 protects the right of the child to 'freedom of thought, conscience and religion'.[18] States must respect the 'rights and duties of parents … to provide direction to the child in the exercise of his or her right.'[19] These rights similarly protect the right to establish private schools.

23. With reference to the *Religious Declaration*, Adjunct Associate Professor Fowler submitted:

> The establishment and maintenance of such faith-based schools in accordance with their religious freedom rights necessitates their ability to exercise discretion over their leadership, their staff and their volunteers.[20]

24. He argued:

> Groups are only able to convey their identity through the collective character and efforts of the individuals who comprise them. A failure to grant "exemptions" would compel a body to forego the ability to define its character, goals and imperatives. Ultimately, it would remove the identity of the institution and deprive society of its unique voice. In effect, it would breach the right "to establish and maintain" the institution as a religious institution.[21]

25. Many of the submitters who represented faith-based schools emphasised that their particular model of education requires ongoing discretion over staff as a

[17] International Covenant on Economic, Social and Cultural Rights Article 13; Convention on the Rights of the Child (1989), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(2).
[18] Ibid art 14(1).
[19] Ibid art 14(2). See also art 5, which contains a general requirement for State Parties to 'respect the responsibilities, rights and duties of parents … to provide … appropriate direction and guidance in the exercise by the child of the rights contained in the Covenant.'
[20] Mark Fowler, *Submission 46*, 7.
[21] Ibid.

means to define the religious character of the institution and the education it provides. Mr Adel Salman appearing on behalf Islamic Schools Association of Australia submitted that staff 'are expected to uphold the ethos and values of the school.'[22] In a Christian context, a leading example of this reasoning was provided by Associated Christian Schools (ACS):

> For Christian schools to fulfil their objects of providing education from a Christian worldview, maintaining an environment where Christian values prevail is essential. The key way that ACS Member Schools achieve this is the ability to select staff with a personal commitment to the Christian faith and a lifestyle that reflects this…lifestyle alone is not sufficient… ACS considers that maintaining strong allowances for faith-based organisations such as Christian Schools to hire staff who are able to uphold the school's values and maintain a consistent witness in all aspects of their lives, is essential to enable Member Schools to fulfil their mandate to parents to provide education from a Christian worldview.

The ACS further submitted:

> ACS Member Schools view adherence to the Christian faith as an essential requirement for employment, with no distinction being drawn between teaching and support staff … In our Member Schools, all staff interact with parents and students and are integral parts of the Christian community of the school. This concept of community is essential if a Christian school is to fulfil its obligation to parents who enrol their children in these schools. Once an individual agrees to be bound by these rules and expectations, they agree to behave accordingly. In the Christian school, this understanding is an essential

[22] Committee Hansard, 68.

element of the contractual and personal relationship between the school and parents.

26. Similarly, Christian Schools Australia (CSA) submitted:

> this goes to the very heart of our identity as a religious school and the ability to uphold our faith and teachings in the classroom and our broader school community. As the Melbourne Declaration on Educational Goals for Young Australians recognises, education encompasses 'intellectual, physical, social, emotional, moral, spiritual and aesthetic development'. At our schools, staff members are asked to share the school's beliefs and to demonstrate an active Christian faith so that they can adequately fulfil their role in teaching, mentoring, and supporting students in a way that is consistent with the character of the school. Christian faith requires not simply holding Christian beliefs, but attempting to live according to those beliefs.

27. Dr Alex Deagon also acknowledged that:

> Whether framed as exemptions to discrimination or as a legal right to select, allowing faith-based schools to select staff designed to consistently uphold this ethos is an essential aspect of maintaining this ability.[23]

28. The ICS submitted that the Bill would breach international law principles by preventing religious schools from maintaining their distinct religious ethos:

> The effect of the Bill is that religious schools will be forced to employ persons whose beliefs or actions and lifestyles in relevant respects do not conform to the doctrines, beliefs or practices of the religion. This

[23] Dr Alex Deagon, *Submission 9,* 4.

> will limit the ability of those schools to ensure that staff are ambassadors for, and models of, the values of the religion. If religious schools are forced to employ staff who contradict the values of the religion by word or example, that will limit the ability of religious schools to provide a religious and moral education in accordance with the convictions of parents who voluntarily choose the value system of that school, contrary to the ICCPR and UN Declaration provisions.[24]

29. The Australian Association of Christian Schools (AACS) submitted:

> This matter cuts to the essence of how we understand religious freedom rights. To remove the ability of religious schools to ensure their staff share their religious worldview is a direct limitation of their religious freedom rights. The Government would effectively push faith schools into an impossible position in which they would be compelled to either change their deeply held religious convictions by order of the State, to act against their convictions in significant ways, or to close.[25]

30. Against the presumptions seemingly underpinning the Bill, Dr Alex Deagon notes that:

> The idea of religious freedom is to protect religious belief and practice from any prevailing orthodoxy (e.g. equality) which might oppose it. The idea is 'worthless' if it is allowed only when it fits in with that particular orthodoxy … As Trigg powerfully observes, 'the essence of religious freedom is that people are allowed to follow their religion, even if it is a different one from that of the majority. The

[24] Institute of Civil Society, *Submission 35*, 7.
[25] Australian Association of Christian Schools, *Submission 49*, 2.

accommodation of minority beliefs is what distinguishes democracy from a totalitarian state'.[26]

31. Adjunct Associate Professor Fowler also argued:

> To fail to recognise the rights of faith-based institutions would strip the wider community of the unique voice of such bodies. It is no understatement to say that in the Western tradition associational freedom has been the single greatest preserve of the equality rights of the individual. It is precisely the freedom of individuals to aggregate around common concerns and elect leaders who are able to articulate their unique view to the majority that has given birth to the fundamental freedoms we enjoy today. Individual equality is best preserved by a plurality of institutions, whose capacity to advocate for the fundamental rights of their members enjoys strong protection at law. In modern Australia it is the practical, granular terms and scope of the exemptions in anti-discrimination law that determine whether these foundational freedoms are maintained.

The Bill Amounts to Religious Discrimination

32. Furthermore, various submitters argued that the Bill actually discriminates against religious believers as it imposes a burden that they alone encounter on the basis of their religious conviction. The particular burden was summarised by the AACS as follows:

> For the Government to determine that religious educational institutions have no claim to act according to their beliefs in relation to sexuality, gender and relationships, is to carve out an area of religious

[26] Dr Alex Deagon, *Submission 9*, 7.

> conviction and to say that religious schools can no longer lawfully manifest those convictions.[27]

33. Accordingly, Adjunct Associate Professor Fowler submitted:

> The proposal for removal of the exemption raises the concern that religious institutions and believers are being subject to detrimental action solely on the basis of their religious belief, in contravention of the right to equality.[28]

Referring to a decision of the European Commission on Human Rights, *Verein Gemeinsam Lernen v Austria*,[29] he noted that the principles of equality have been extended to faith-based schools in various respects:

> in that decision the Commission also confirmed that private schools have a right based on article 14 [right to equality] in the context of article 2 First Protocol to non-discriminatory conditions of existence, including equal access to State funding for schools of their type. Similarly, in *Waldman v Canada*, the United Nations Human Rights Committee held that the differential treatment granted by Ontario to Roman Catholic religious schools, which were publicly funded, as opposed to schools of other religions, which were not, amounted to discrimination. The distinction drawn by the State could not be considered to be reasonable and objective, and thus violated Article 26.

34. Similarly, the ICS submitted 'The Bill is discriminatory because it imposes a legal standard of discrimination law which applies only to religious organisations.' The ICS stated:

[27] Australian Association of Christian Schools, *Submission 49*, 2.
[28] Mark Fowler, *Submission 46*, 4.
[29] (1995) 20 EHRR CD 78.

> Our society would not expect the ALP, the Liberal Party, or the Greens (also voluntary associations), to have to employ and retain persons who consistently spoke or acted against core party policy. So why should a law force a conservative religious school to justify to a human rights commission or a tribunal why it should not have to hire a gay rights activist maths teacher or vice versa?[30]

35. Adjunct Associate Professor Fowler asked:

> Why should believers — be they Islamic, Jewish, Protestant, Hindu or any other faith — be prevented from coming together with their fellow believers to act upon the dictates of their faith that encourage humanitarian concern? No similar limitation is proposed for persons who are motivated to humanitarian acts absent religious compulsion. It's a bizarre conclusion, and it represents a form of discrimination on the basis of religious belief.[31]

36. Dr Alex Deagon argued that the removal of exemptions:

> allows actions which violate their religious convictions, preventing them from holistically participating in a democratic society and undermining freedom and equality for these citizens and communities.[32] … As Trigg explains, uniform treatment can make 'religious people feel like they are marginalised in their own society' because they alone are subject to an unequal burden through generally applicable legislation. So religious people may resent their 'commitments being ignored and that they are being treated unfairly and unequally… Obviously there is no doubt equality legislation is an

[30] Institute of Civil Society, *Submission 35*, 9.
[31] Mark Fowler, *Submission 46*, *Supplementary Submission* 1, 2.
[32] Dr Alex Deagon, *Submission 9*, 5.

> essential aspect of liberal democracy. But if administered in a coercive fashion without due attempts at accommodation and proportionality, it will burden some in society unnecessarily and inequitably.[33]

37. Dr Deagon further articulated:

> legally compelling [religious schools] to accept employees with views or conduct inconsistent with that perspective undermines their religious identity and, consequently, their democratic position as equal and valued citizens… And as Trigg emphasises, 'the idea of reasonable accommodation highlights the need to adjust rules when they bear down unfairly on some categories, including religious believers'. As such the need to accommodate religious practices can be traced to equality itself.[34]

38. By precluding the ability of religious believers to associate and form educational institutions founded on the basis of their religious beliefs, the Bill subjects them to a burden that they alone incur on the basis of that belief. It thus breaches the equality principle.

Summary

39. Returning to the scope of permissible limitations under the Article 18(3), and the *Siracusa Principles*, in light of the foregoing analysis, the withdrawal of such foundational societal freedoms is not a proportionate means to progress the equality right. Rather, the Bill actually breaches the equality rights of religious believers. In light of these considerations, the Bill's proposal is more restrictive of religious freedom than is required and is not a proportionate

[33] Ibid, 7-8, 9.
[34] Ibid, 13-4.

means to achieve the asserted countervailing rights under the international human rights law that Australia has ratified.

European Convention on Human Rights

40. Although not binding on Australia, the decisions of the European Court of Human Rights are highly influential in the jurisprudence of the United Nations Human Rights Committee and the provisions of the European Convention on Human Rights bear strong analogy to the ICCPR, particularly Article 9 concerning freedom of thought, conscience and religion. The European Court of Human Rights has a long-running and established jurisprudence that affords high levels of protection to religious institutional autonomy. This is based upon the link between such autonomy and democratic freedom and pluralism. For example, in *Hasan v Bulgaria* the European Court of Human Rights stated:

> the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[35]

[35] *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)), cited in Mark Fowler, *submission 46*, 9.

41. The First Protocol to the European Convention on Human Rights contains the right corresponding to Article 18(4) of the ICCPR. It states that:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

42. In its consideration of Article 2 of the First Protocol the Court has applied the principles to the context of private education:

> The second sentence of Article 2 (P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention … The right set out in the second sentence of Article 2 (P1-2) is an adjunct of this fundamental right to education ... It is in the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.[36]

43. In *Jordebo v Sweden* the European Commission on Human Rights applied these principles to conclude that the Article 2 of the First Protocol guarantees the right to start and run religious educational institutions:

> the principle of the freedom of individuals, forming one of the corner-stones of the Swedish society, requires the existence of a possibility to

[36] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711, at 21-22.

> run and to attend private schools … In particular, it was pointed out that it should be possible at a private school to give certain topics a more, and others a less, prominent position than that given in public schools and that the activity in a private school should be allowed "within very wide ranges to bear the stamp of different views and values".[37]

44. In that decision, the Commission criticised the Swedish Government, which:

> seem[ed] to regard the right to keep a school as something entirely within "le fait du Prince" [permissible acts of government]. But this is clearly different from the mainstream in the countries of the High Contracting Parties, necessitating an autonomous way of judgment… The Government seem to look at schooling the same way as at military service, where of course no competing “private regiments” could be tolerated.[38]

45. The Bill demonstrates no consideration of these issues. In its proposal to completely remove the religious identity of private religious schools the *Discrimination Free Schools Bill 2018* appears to proceed from the same totalitarian presumptions as that remonstrated by the European Commission on Human Rights.

Students

46. Certain distinct considerations arose in respect of students within faith-based schools. The AACS clarified a common concern:

[37] *Ingrid Jordebo Foundation of Christian Schools v Sweden* (European Commission of Human Rights, Application No. 11533/85, 7 May 1985).
[38] *Ingrid Jordebo Foundation of Christian Schools v Sweden* (European Commission of Human Rights, Application No. 11533/85, 7 May 1985).

> Christian schools have no desire to expel students on the grounds of sexuality orientation or gender identity. However, in the absence of exemptions, schools have no adequate legal protection to:
>
> • Teach in accordance with widely held Christian beliefs regarding sexuality, gender and relationships;
>
> • Manage the school community and student behaviour in ways that are appropriate to the faith of the school; and
>
> • Employ only people who share their beliefs and manifest those beliefs in their own lives.[39]

47. As noted at paragraph 2.32 of the majority report witnesses were asked to provide examples of cases in which the legislative exemptions 'have been involved or invoked'. Due to the sensitive nature of the matters, several submitters provided confidential examples. At paragraph 2.130 the majority report concludes that 'if it is the case that the exemptions are not being used against students, there is no reason to maintain them.' However the report itself acknowledges that examples were provided in camera by schools where reliance was placed upon the exemptions. Several submitters opposed the passage of the Bill on the basis of various practical circumstances that they asserted would arise were the Bill to pass into law. Without disclosing the personal circumstances of any individual, their submissions highlighted the kinds of matters that have arisen, and may foreseeably arise in the future. The ICS submitted:

> A student may assert the right to use the change rooms and toilets of the gender they identify as rather than their biological gender. A student may assert the right to take a same sex partner to a school

[39] Australian Association of Christian Schools, *Submission 49*, 2.

> dance or to run and publicise a student club celebrating the gay lifestyle … If the school is unable to set and enforce behaviour standards and limit the promotion of views which are antithetical to the religion because of the threat of discrimination lawsuits by the student, the school is unable to maintain its religious ethos and modelling of the beliefs and values of the religion… If the Bill is enacted, a student who wanted to start a Gay Pride Club or a Gay Pride page on the student intranet to promote LGBTI lifestyles in a traditional Muslim, Jewish or Christian school could claim that a refusal by the school was prohibited discrimination under the *Sex Discrimination Act* and take the school to the Human Rights Commission and the Federal Court.[40]

48. Similarly, Professor Patrick Parkinson asked:

> Should a person born male, and who has reached adulthood with no hormonal or surgical treatment that alters physical characteristics associated with being male (including genitalia, body mass and physical strength), be regarded, for the purposes of sex-segregated sporting competitions as female, because the person feels and presents as female? … Is it unlawful to continue referring to the boy by the first name under which he was enrolled or which is recorded on his birth certificate? If the child is in a mixed gender school, must it, as a matter of law, allow the child to wear the girls' uniform to the extent that it is different from the boys' uniform? In high school, does non-discrimination require allowing a child who feels and identifies as being of the opposite sex, to participate in sex-segregated sports competitions organised for that opposite sex?

[40] Institute of Civil Society, *Submission 35*, 8.

> Does the law require a natal female who now wishes to transition to identify as male, to be accepted by a boys' school? Conversely, does it require that a natal male who now wishes to transition to identify as female be allowed to enrol in a girls' school? What is in the best interests of both the student experiencing gender dysphoria and the other students at the school, especially considering that single-sex schools are established for a host of well-considered reasons? These are complex and difficult questions.[41]

49. Christian Schools Australia submitted:

> Schools must be able to make reasonable requests of the students to respect the school's values and beliefs regarding sexuality, gender and relationships even if that student does not agree with the school's beliefs. Changing the existing exemptions in the *Sex Discrimination Act* in the way that has been reported in the media, would not give schools the ability to confidently maintain behaviour standards that are in line with the beliefs of the school.[42]

In concluding that as 'the exemptions are not being used against students, there is no reason to maintain them', the majority report appears to misunderstand that, in certain circumstances, even the mere making of a request that a student or staff member respect the school's values could be an action that requires reliance on the exemptions to be lawful (at least on the law as it currently stands). In light of the foregoing examples, it cannot be said that the 'committee did not hear any satisfactory examples of cases in

[41] Professor Patrick Parkinson, *Submission 4*, 6-7.
[42] Christian Schools Australia, *Submission 110*, 2.

which a school might need these exemptions in order to uphold its religious ethos.'[43]

50. Professor Patrick Parkinson argued that the constitutional basis for the provisions of the *Sex Discrimination Act 1984* (SDA) extending to gender identity were in some doubt:

> It seems very difficult to find a constitutional basis for the 2013 amendments concerned with gender identity. Discrimination on the basis of gender identity is not the subject of a specific treaty like CEDAW and nor could it plausibly be said that by enacting antidiscrimination provisions concerning gender identity, the Parliament is in some way giving effect to a Convention or treaty…It is very hard to argue that discrimination against a person on the basis of how a person feels and presents is a matter covered by international conventions prohibiting discrimination… there are the most serious doubts about whether the 2013 amendments, so far as they concern gender identity, can find constitutional justification in the external affairs power.

51. Given this uncertainty he cautioned against an extension of the existing provisions to faith-based schools:

> It follows from this that unless the Parliament, properly advised on the Constitutional position, is satisfied on the balance of probabilities that its proposed legislation is constitutional, it should not make any laws which further extend the prohibition on discrimination on the basis of gender identity to organisations which are not currently subject to those laws. In short, the Parliament should not now apply the

[43] Committee majority report, paragraph 2.130.

prohibition to faith-based schools which are currently exempted by operation of s.38 of the SDA.[44]

52. The Bill and its accompanying Explanatory Memorandum provide no consideration of these very important issues. Any reform will need to give detailed consideration to these complicated matters and, in light of the practical circumstances raised above, will need to ensure that faith-based schools are able to maintain standards that are in accordance with their religious convictions.

Constitutional Implications

53. Furthermore, Dr Alex Deagon argued that the Bill 'would likely' breach the Constitutional protection to the free exercise of religion contained at section 116 of the Australian Constitution:

> Religious conduct protected by s 116 extends to 'faith and worship, to the teaching and propagation of religion, and to the practices and observances of religion'. Since staff of religious educational institutions engage in, at the very least, the teaching and propagation of religion, the ability of these institutions to select staff consistent with their religious convictions comes within the ambit of free exercise... the right to free exercise in the Constitution 'does not suggest a "balance" to be struck between anti-discrimination standards and rights of religious liberty, but a constitutionally required preference for religious liberty'… Section 116 was designed precisely to prevent the direct targeting of religious practice by religious entities by Commonwealth laws, and since the provision of education by a religious institution is a religious practice in accordance with religious convictions, and any removal of

[44] Professor Patrick Parkinson, *Submission 4*, 7.

> exemptions would directly prohibit that practice in accordance with those convictions, it follows that the removal of exemptions would be likely to breach the free exercise clause.[45]

Again, the Bill and its accompanying Explanatory Memorandum provide no consideration to these very important issues. Any reform will need to give detailed consideration to these matters, which go to the validity of the proposed Bill.

Public Funding and Liberal Autonomy

54. In their submission to the Inquiry the Church of the Flying Spaghetti Monster Australia argue:

> Faith-based institutions do not pay tax, however they are also recipients of taxpayer funds to run educational facilities, hospitals, social services and other businesses. This situation needs to stop for faith-based organisations that wish to continue to use the exemptions to discrimination.

55. In contrast, Adjunct Associate Professor Fowler submitted:

> The Australian Bureau of Statistics notes that 'Nearly a third of Australians (30 per cent) reported in the Census that they had no religion in 2016.' However, such calls for a 'secular' society often overlook the logical extension of the subsidy argument - that the 70% who profess a form of religious belief are also subsidising non-religious persons through the proportion of their taxation that is applied to public schools. Rather a truly neutral, democratic and pluralistic society will seek to most accurately reflect both the religious and non-religious

[45] Dr Alex Deagon, *Submission 9*, 17.

> sentiments that are exhibited within its underlying polity. In the context of this current Inquiry, this is most properly acquitted through the ongoing presence of both public schools and private religious schools.[46]

56. Dr Alex Deagon argued that the withdrawal of funding from religious schools would limit pluralism, a hallmark of liberal democracies:

> secularist separation is neither desirable nor practical. A truly democratic society needs a system of governance which promotes equal representation of religious and non-religious perspectives in accordance with constitutional prescriptions. … Reasonable accommodations of difference are part of a flourishing, pluralist community, and we must learn to live together harmoniously with our differences if the idea of liberal democracy is to retain currency today.[47]

57. Similarly, the AACS submitted:

> What is at stake in this inquiry is not simply the operation of faith-based schools, but the viability of pluralism. If faith-based schools are no longer permitted to operate according to their beliefs in the key areas of teaching; managing behaviour; and employing staff, choice in education will be eroded along with diversity and Australia's commitment to core human freedoms.[48]

[46] Mark Fowler, *Submission 46*, 21.
[47] Dr Alex Deagon, *Submission 9*, 6.
[48] Australian Association of Christian Schools, *Submission 49*, 3.

58. As Canadian Supreme Court Justices Cote and Brown said in minority in *Trinity Western*: 'In a liberal and pluralist society, the public interest is served, and not undermined, by the accommodation of difference'.[49]

59. Adjunct Associate Professor Fowler submitted:

> Calls to defund faith-based charities fail to consider democratic government's obligation to preserve pluralism and autonomous choice for those individuals seeking charitable support. They fail to appreciate that to defund faith-based charities is to endorse a form of state-enforced monochromaticity.

60. He argued:

> Where religious institutions are one of a number of service suppliers, the autonomy and choice of the recipient is enhanced. Members of the public are free to choose to receive services from an entity that is not religiously motivated or one that is. To enforce the withdrawal of religious institutions from the service provider offering is to limit the choice available to individuals within wider society. Conversely, the existing framework does not limit the choice of those who do not wish to receive services from religiously inspired institutions. Applying this principle to schooling, parents who wish to ensure a secular education for their children may do so in either State or independent secular schools. The removal of exemptions for faith-based schools would remove the choice of parents who wish to ensure the particular form of religious education that accords with their worldview is provided to their children.

[49] *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33. Cited in A Deagon, 14.

Proposed Alternative Models

61. Various submitters proposed, or provided critique of other alternative models for reform of section 38 of the *Sex Discrimination Act 1984*. The primary alternatives considered are canvassed in the remainder of this analysis.

Tasmanian Legislation

62. Various submitters recommended that the Tasmanian *Anti-Discrimination Act 1998* provided a suitable model for religious schools. The AACS stated that 'the Tasmanian model of legislation does not provide adequate freedom to religious schools.'[50] At paragraph 2.136, the majority report concludes that the Tasmanian laws 'appear to strike the right balance between ensuring that students and staff are protected from unreasonable and harmful discrimination, while also ensuring that religious schools can maintain their religious ethos.'

63. The exemptions granted to religious bodies and educational institutions that are or are to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion at section 51 of the *Anti-Discrimination Act 1998* (Tas) extend only to religious belief. They do not extend to the protected attributes of sex, gender identity, sexual orientation, marital or relationship status. The application of each of the protected attributes to a given set of facts must be determined independently. For example, if a set of circumstances enlivens both the protected attributes of religious belief and relationship or marital status, say for example an atheist teacher in an unmarried heterosexual relationship, the exemption will apply to the attribute of religious belief, but will not apply to the relationship

[50] Australian Association of Christian Schools, *Submission 49,* 3.

status.[51] The result is that the religious institution could not take action to ensure it offers leadership that reflects its teachings with integrity. The practical effect of this limitation is that a Tasmanian religious body or religious school cannot require that their representatives act consistently with their beliefs across a wide range of fields, including matters where most major religious beliefs provide substantive requirements. They are not then able to ensure valid and authentic models of faith can be offered in integrity to either their own believers or the wider community.

64. Practically, under the Tasmanian legislation, a pastor, imam, priest or rabbi, or teacher or chaplain could not be refused on the grounds of sex, on the basis that they were in a married relationship (applicable to those religions which require celibacy in their leaders), or on the basis that they were in a relationship outside of marriage or on the basis that they were in multiple relationships, or were homosexual, or were transgender. To compel religious institutions to accept persons who do not model or share their religious beliefs as their representatives is a direct limitation on their religious freedom. When these outcomes are weighed against the analysis of the applicable international human rights law outlined above, the conclusion of the majority report that the Tasmanian laws 'appear to strike the right balance between ensuring that students and staff are protected from unreasonable and harmful discrimination, while also ensuring that religious schools can maintain their religious ethos' simply cannot be sustained. The Tasmanian legislation does not provide a suitable model for reform.

[51] See for example the reasoning of Lee v Ashers Baking Company Ltd [2018] UKSC 49 (10 Oct 2018), per Lady Hale, with whom Lord Mance, Lord Kerr, Lord Hodge and Lady Black agree, at paragraphs 45 following.

Genuine Occupational Requirements Tests

65. Various submitters counselled against the imposition of a genuine occupational requirements / inherent requirements / genuine occupational qualifications (variously described) test to religious schools. The ACS submitted:

> The problem with these provisions is that they enable tribunals to make determinations about the inherent or genuine requirements of a position, as if the tribunal has a better understanding of the religious beliefs of the school that the school itself … ACS Member Schools view adherence to the Christian faith as an essential requirement for employment, with no distinction being drawn between teaching and support staff … In our Member Schools, all staff interact with parents and students and are integral parts of the Christian community of the school. This concept of community is essential if a Christian school is to fulfil its obligation to parents who enrol their children in these schools. Once an individual agrees to be bound by these rules and expectations, they agree to behave accordingly. In the Christian school, this understanding is an essential element of the contractual and personal relationship between the school and parents.[52]

66. Dr Renae Barker argued:

> While those of no particular faith and those who embrace atheism or agnosticism may not see the need for those fulfilling an ostensibly secular role to comply with the beliefs of the religious organisation employing them this only highlights an important difference between those of faith and those who are not. Taking the example of a gardener

[52] Australian Christian Schools, *Submission 45*, 2.

> a person who has no religion is likely to see the role as being the care and maintenance of the religious organisations grounds and gardens. However the care of the natural environment can also be seen as a profound act of worship or spiritual fulfilment in honouring God's creation. Similarly the role of receptionist is likely to be seen by those with no religion as an administrative role involving answering the telephone, greeting people and attending to general administrative tasks. For a religious organisation and individuals the role could be seen as the first contact between those seeking spiritual guidance and the religion involved… As with others teachers the maths teacher is likely to be approached by students for guidance on a range of issues, not just trigonometry or algebra. They may also be required to participate in religious activities of the school. A teacher whose belief and values conflict with the religious ethos of the school is unlikely to be able to do either of these things both in line with the school's religious ethos nor authentically. [53]

67. The ACS argued that a genuine occupational requirements test 'is unsuitable for application in the area of faith-based institutions'.[54] This it considered is because 'under a genuine occupational requirements test a Court is not obligated to consider the tenets of the institution and its view on whether its doctrines require that the entire institution be staffed by persons who share the faith' … 'As the test is to be objectively determined, a Court may reach a view that fails to take account of the doctrinal position of the particular religious institution. If however, the Court does choose to take into account the doctrines of the institution, the Court must then interpret doctrine at the level of each instant position, giving rise to high levels of uncertainty and

[53] Dr Renae Barker*, Submission 1*, 2-3.
[54] Associated Christian Schools, *Submission 45*, 4.

administrative cost'[55] for the school. They argued that in practice the test has amounted to 'an extraordinary incursion into the internal affairs of an association.'[56]

68. The ACS submitted that:

> Any proposal to remove the exemption for religious schools ignores the importance of 'mission fit' to associations generally ... the assertion that only those roles that are inherently 'spiritual' should be afforded the exemption also suffers from a fundamental misunderstanding of the nature of religious conviction, including as understood within the Christian tradition. Belief is transformative and, if sincere, is demonstrated in action.[57]

69. The ACS submitted:

> for many schools, the desire that staff hold the faith of the institution is a preference to be sought wherever possible across the whole of the institution. A genuine occupational qualifications test has the direct effect of removing that ability to maintain discretion over the character of the institution as a whole.[58]

70. For the foregoing reasons a genuine occupational requirements / inherent requirements / genuine occupational qualifications (variously described) tests is not a suitable model for reform.

[55] Ibid, 6.
[56] Ibid, 9.
[57] Australian Christian Schools, *Submission 45*, 9.
[58] Ibid, 13.

The Distinction between Attribute and Conduct

71. Various submitters considered the alternative proposal that a school could not discriminate against a teacher on the basis of the existence of a protected attribute (whether religious belief, sexual orientation, relationship status, gender identity or otherwise), but could instead take action where the teacher failed to act in conformity with the belief system of the relevant school. Various submitters and schools argued against such a requirement, emphasising that a purported distinction between identity and conduct was not workable in law. At paragraph 2.134 the majority report concludes 'it has not been fully established schools need to be able to discriminate on the basis of a teacher's *attribute*, as distinct from the *conduct*.'

72. For many schools the opposition to such a test stems from their understanding of the particular nature of religious belief and its distinct implications within the context of education. The AACS submitted:

> There are a range of faith-based school models in Australia. The schools within AACS were established as places in which faith would infuse all areas of education. All AACS schools are committed to offering a distinctively Christian education and to the employing of teachers who share the Christian faith.
>
> All schools—religious or otherwise—operate out of values and beliefs. For schools in our membership, those values and beliefs reflect the faith of the school. This impacts all aspects of school life including the way behaviour is managed, pastoral care is undertaken and curriculum is taught. Faith is embedded in the essence of the school and staff

members are therefore expected to be committed to the school's beliefs and to model their lives in accordance with those beliefs.[59]

73. Similarly, the ACS submitted:

> For Christian schools to fulfil their objects of providing education from a Christian worldview, maintaining an environment where Christian values prevail is essential. The key way that ACS Member Schools achieve this is the ability to select staff with a personal commitment to the Christian faith and a lifestyle that reflects this…lifestyle alone is not sufficient… There is also no distinction between identity or the holding of belief, on the one hand, and conduct on the other. In a Christian context we believe that conduct flows from belief…
>
> A fundamental component of education, as understood within Christian schools, is the modelling of the practical consequences of religious belief in the actions of all staff and volunteers.[60]

The ACS argued that within this particular form of education 'It is necessary to ensure the child has access to authentic models of lived conviction that are reflective of the applicable religious tenets espoused.'[61]

74. The AACS submitted:

> There has been some suggestion that faith-based schools should simply require staff members to verbally endorse the schools beliefs without any expectation that they will live in accordance with those beliefs. This has been described as "upholding" the school's ethos. This suggestion

[59] Australian Association of Christian Schools, *Submission 49*, 1.
[60] Associated Christian Schools, *Submission 45*, 10.
[61] Ibid, 11.

> thoroughly misunderstands the nature of Christian faith and what it means to "uphold" religious belief.
>
> The Christian faith does not permit a person to separate their convictions and the conduct of their lives. Recognising that each person lives in the tension between their desire for what is good, and their own proclivities, there is much room for grace. However, to uphold the Christian faith is to be in movement towards what the faith teaches to be true. If someone does not share the faith convictions of the school, they cannot meaningfully uphold that faith in their employment.[62]

75. Professor Nicholas Aroney of the TC Beirne School of Law, University of Queensland has said:

> some people who regard themselves as religious nonetheless tend to regard their religion as one aspect of their lives among many; others see their religion as definitive of their whole lives, so that even the most mundane activities are seen in religious terms. Such people frequently gather together, not only for narrowly 'religious' activities such as prayer or scriptural study, but also for what might be described as social and cultural activities, such participation in games and sports, or the provision of educational, medical or charitable services. For many such people, such activities are deeply religious.[63]

76. Many submitters argued that this understanding takes a particular form within the context of education. The ICS submitted:

> a religious school is entitled to choose staff who believe in and will model the values of the religion. Religion and its moral life are

[62] Australian Association of Christian Schools, *Submission 49*, 2.
[63] Cited in Dr Alex Deagon, *Submission 9*, 12-3.

> modelled and not merely taught by staff. Religious schools can legitimately require that the beliefs and behaviour of staff conform to those of the religion, otherwise it cannot fulfil its mission of showing students how to be a Muslim or a Jew or a Christian.[64]

77. As Professor Patrick Parkinson has stated: "modelling [the religion] within a faith community is as important as teaching [the religion] within a classroom or from a pulpit. Indeed it may well be more important and have more impact on people's lives".[65] Similarly, Dr Alex Deagon submitted:

> A religious educational institution may want to preserve their distinctive identity as religious in order to be a community which approaches questions of education from that particular religious perspective. Indeed, they may see the practice of education itself as a religious injunction which is to be performed in accordance with their religious convictions. Maintaining this religious identity allows them to present a unique perspective in a democracy[66]

78. In the context of sexual orientation, the Victorian Court of Appeal has affirmed the view that a distinction between identity and conduct cannot be drawn:

> Sexual orientation, like gender, race and ethnicity, [is] part of a person's being, or identity. The essence of the prohibitions on discrimination on the basis of attributes such as sexual orientation, gender, race or ethnicity is to recognise the right of people to be who or what they are. ... To distinguish between an aspect of a person's identity, and conduct which accepts that aspect of identity, or

[64] 4 Institute of Civil Society, *Submission 35*, 4.
[65] Parkinson, "Christian Concerns about an Australian Charter of Rights" (2010) 15(2) Australian Journal of Human Rights 83, 97, cited in submission by ACS.
[66] Dr Alex Deagon, *Submission 9*, 13.

> encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity.[67]

Contrary to the majority report's conclusions, such a proposal is highly problematic, and would require further work if it were to offer genuine protection of schools' religious freedoms.

79. For instance, it could require a structural rewrite of Commonwealth anti-discrimination law. That is because most anti-discrimination law extends to not only discrimination on the basis of a protected attribute but also:

    a. a characteristic that appertains generally to persons who have the attribute; or

    b. a characteristic that is generally imputed to persons who have the attribute.[68]

    Such provisions might need to be displaced solely in respect of faith-based schools, or removed from Commonwealth anti-discrimination law entirely. Neither are considered to be realistic proposals.

80. Accordingly, a proposal that the law should be reformed to provide that a school could not discriminate against a teacher on the basis of a protected attribute, provided that the teacher is willing to act in conformity with the belief system of the relevant school, would require further detailed consideration if it is to afford religious schools with an appropriate degree of freedom to maintain their religious ethos.

[67] *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014), per Maxwell J at 57, citing Hampel J at first instance.
[68] See for example section 5A *SDA.*

Amendments to Remove Exemptions in Respect of Direct Discrimination and Amend the Reasonableness Test for Indirect Discrimination

81. As noted at paragraph 1.19 of the majority report, amendments to the SDA were recently proposed by the Attorney-General to the Opposition. In its submission the AACS stated that those amendments would 'remove section 38(3) of the *Sex Discrimination Act 1984* (SDA) and replace it with a new provision that pertains only to indirect discrimination.'[69] CSA described the proposal as follows:

    • Remove the existing section 38(3) of the SDA;

    • Insert an additional factor into section 7B of the SDA for the Courts to consider when determining 'reasonableness' in relation to a claim of indirect discrimination (only in relation to primary and secondary schools).

82. This would remove any exemption in relation to direct discrimination and only permit indirect discrimination where such was 'reasonable' having regard to a range of factors. As CSA outlined 'Indirect discrimination occurs when, broadly, you have a policy or practice that applies to all students but is argued to disproportionately impact students with a protected attribute.' A policy that imposes a 'condition, requirement or practice' formulated uniquely with respect to a particular protected attribute would not be neutral, or of general application, but would be aimed at persons with that protected attribute. Thus any action taken pursuant to that policy would not amount to indirect discrimination, but would be direct discrimination (assuming the other requirements of that test are met).

[69] Associated Christian Schools, *Submission 45*, 2.

83. The AACS was particularly concerned with the range of conduct that would no longer be lawful on the basis that it would not fall within the definition of indirect discrimination. It argued that:

> This amended legislation would be inadequate in providing the necessary protection for schools to operate according to their ethos … If the proposed amendments were enacted, there would be many situations in which schools are currently seeking to balance the needs of all students, and are supporting students in ways that are consistent with the faith of the school, which would likely be deemed direct discrimination.
>
> For example, if a ten-year-old student requested to transition gender at a Christian school that upheld a view of gender as biologically determined, the school would have little defence if they were to manage this in a way that was appropriate to their beliefs. The school might give the child flexibility in uniform and bathroom use for example, but may draw the line at compelling other ten-year-old children and teachers at the school to support the transition and use the student's chosen pronoun. If exemptions regarding direct discrimination are removed it is very likely that a court would find this decision to be unlawful.
>
> In another instance, if a high-school student was to disagree with the school's position on sexuality and relationships, it is unclear whether the school would be permitted to ask that student not to advocate for their view among primary school students whose parents are seeking to educate their children in accordance with the Christian faith.[70]

[70] Australian Association of Christian Schools, *Submission 49*, 2.

84. CSA was concerned that the proposal would limit the ability of faith-based schools to teach in accordance with their beliefs: 'One of our concerns in this area relates to the teaching of a Biblical view of sexuality and sexual conduct which could be argued to constitute indirect discrimination. This is based on the broad ambit of 'any other detriment' in section 21.' They concluded 'These proposed amendments would be inadequate in providing the necessary protection for schools to operate according to their faith, values and beliefs and would create greater uncertainty for all within the school community – including students.'[71]

The Scope of the notion of an 'educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'

85. The ICS noted that under the Bill:

> The training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order remains exempt. But the religious or other training of missionaries, religious chaplains, youth workers or ordinary members of the religion loses its exemption. Several religions consider that persons in same sex relationships are not conforming to the beliefs and practices of the religion and therefore would not make suitable missionaries or chaplains or youth workers or instructors in theological education for that religion.[72]

86. Adjunct Associate Professor Fowler noted:

> Any reform proposal should also be aware that the existing section 38 extends not only to primary and secondary schools, but also to tertiary

[71] Christian Schools Australia, *Submission 110*, 4.
[72] Institute of Civil Society, *Submission 35*, 5.

> institutions. There are many Australian tertiary faith-based institutions who would not be able to employ staff, engage board members who believe and act consistently with the applicable religious belief, or teach or act in accordance with that belief if the section 38 exemption was removed.[73]

87. The Bill again fails to contemplate these distinctions. Any reform proposal should give consideration to these concerns.

Conflict with State Laws

88. The ACS submitted:

> Christian schools nationwide call on the Federal Parliament to enact overriding legislation to ensure that state laws do not interfere with our right to religious freedom by selecting and maintaining staff who fully adhere to the religious and moral convictions of the parents who entrust their children to our care. Without such protections Australia is not meeting its obligations under Article 18 of the ICCPR to respect the liberty of parents to ensure the religious and moral education of their children is in uniformity with their own convictions. Australia, as signatory nation to the ICCPR and its First Optional Protocol, may be subject to a complaint to the UNHRC that domestic legislation (including legislation of individual States within a federation, pursuant to Article 50 of the ICCPR) do not comply with the protections afforded by the ICCPR.[74]

89. Again, the interaction of State law with Commonwealth law is a complicated matter. Any reform proposal should give proper consideration to these issues and the obligations of the Commonwealth in international law.

[73] Associate Professor Mark Fowler, *Submission 46*, 4.
[74] Australian Christian Schools, *Submission 45*, 2.

The Best Interests of the Child Test

90. Plainly, no student of a non-state school should be expelled on the basis of their sexuality alone. But the Ruddock Review reportedly went further, recommending the introduction of amendments to section 38(3) that would establish a legislative requirement that a school act in the 'best interests of the child'. The full Report has not been released, and the specific content of that recommendation is not yet known. However Adjunct Associate Professor Fowler submitted:

> On the face of it, this articulation appears to be decidedly imprecise. Without some degree of further clarification, such a test will introduce a high level of uncertainty for students, their families and for religious educational institutions.[75]

91. In its comments on the best interests test the ACS submitted:

> Parents trust that our Member Schools are able to make such determinations about the best pastoral care and support for their children in a safe and caring community. It is the school itself who is best positioned to make determinations as to what is in the best educational interest of students. The determination can only be undertaken in light of a holistic appraisal, including with reference to the interests of the other students in the school community[76]

92. Similarly the AACS submitted:

> If the requirement that the school act in the 'best interests of the child' is to be employed, the legislation should acknowledge that the school, having regard to the appropriate factors, is the institution that is best

[75] Associate Professor Mark Fowler, *Submission 46*, 3.
[76] Associated Christian Schools, *Submission 46*, 2.

> placed to make the determination of what is in the child's best educational interest. Those factors may include the obligations of the school to other students, the maintenance of the religious ethos of the school as a component of the educational offering provided and the relevant professional advice.[77]

93. CSA was concerned that this test could operate 'to the exclusion of the best interests of other children or the broader school community'. Both CSA and AACS made recommendations in respect of this requirement, which are further outlined below. Again, the Bill fails to give any consideration to these matters. Any reform proposal should give proper consideration to these issues and the above proposals.

A 'Positive Right'

94. Various submissions called for the introduction of a 'positive right' to protect religious freedom. Some submissions argued that such a right should supplant the existing exemptions in the SDA. Some submitters argued that at least one means by which this may be done is through a 'general limitations clause', a recommendation put forward by the Australian Human Rights Commission in its submission to the Inquiry. The Commission recommended:

> that the Government examine alternatives to the current system of religious exemptions to anti-discrimination laws, including a general limitations clause, and that proposed changes should adhere to Australia's obligations under international law…federal law should be amended to include a general prohibition against discrimination on the basis of religion or other belief. This would help to incorporate

[77] Australian Association of Christian Schools, *Submission 49*, 3.

> important elements of Articles 18 and 26 of the International Covenant on Civil and Political Rights (ICCPR) into Australia's domestic law.[78]

95. The ACS recommended 'the removal of the current exemptions and their replacement by a redefined definition of 'discrimination' in Commonwealth law, consistent with international law, to recognise that not all differentiation is discrimination and to ensure a balancing of rights and a range of positive protections for religious freedom.'[79] Similarly, the ACS provided drafting that attempted to reflect the recognition under international law that certain:

> distinctions are reasonable and objective, and are not regarded as unlawful discrimination. A general limitations clause proceeds from this understanding by distinguishing between acts that legitimately draw distinctions between differing substances, and those that are unlawful discrimination.[80]

That drafting provided that acts will not constitute unlawful discrimination where they are done pursuant to the principles of international law concerning equality and religious freedom, outlined above.

96. In addition, both CSA and the AACS set forward four broad principles for legislative reform, that they assert would reflect the notion of a positive right:

> 1. The ability of religious educational institutions to both act in accordance with and teach their beliefs in respect of students should continue to be lawful, and thus should apply to both direct and indirect discrimination.

[78] Australian Human Rights Commission, *Submission 5*, 1-2.
[79] Associated Christian Schools, *Submission 45*, 3.
[80] Associated Christian Schools, *Submission 45*, 15.

2. If the requirement that the school act in the 'best interests of the child' is to be employed, the legislation should acknowledge that the school, having regard to the appropriate factors, is the institution that is best placed to make the determination of what is in the child's best educational interest. Those factors may include the obligations of the school to other students, the maintenance of the religious ethos of the school as a component of the educational offering provided and the relevant professional advice.

3. The amendments should extend beyond primary and secondary schools to tertiary institutions. To fail to do so would mean that tertiary faith-based institutions (with the exception of bible colleges exempt under section 37 of the SDA) would not be able to teach or act in accordance with the applicable doctrines.

4. Explicit permission should be given to religious educational institutions to act in accordance with their beliefs regarding marriage, gender identity being biologically determined, and the proper expression of sexuality (including through the form of teaching provided by such schools).

CSA also emphasised the need to ensure teaching within faith-based schools can continue to conform to the relevant belief systems: 'The changes that have been proposed would also make it unclear whether a school could teach a historic, Biblical view of sexuality and relationships.'

97. Contrary to the recommendations of the majority, these four principles may indeed provide a suitable framework for reform. However these are matters that require detailed consideration. They are beyond the scope of what can properly be considered within the short time frame allotted for the undertaking of this Inquiry. The Inquiry has however enabled some degree of

consideration of the relevant human rights law, and has illuminated the clear inadequacies of the Bill in light of that law. The committee's processes have made it abundantly clear that there is a pressing need for protection of the right of individuals to have the freedom to practice their faith, including when they come together to form schools and other religiously- based organisations. It has brought into the fore the desirability of legislation that protects this right, along with the need for several Commonwealth acts to be amended consequentially.

Conclusion

98. We reject the the majority committee report, for the reasons outlined above, and instead recommend that the Government give further consideration to legislation that would enshrine and protect the right of religious freedom that would make it clear that religious schools and religious universities are permitted to operate in accordance with the doctrines, tenets and beliefs of their particular faith. To do any less would have the practical effect of depriving religious institutions of the ability to teach their beliefs and operate consistently with their ethos. It would also assist for there to be a nationally consistent approach to the issue of discrimination of this kind.

99. The existing exemptions for schools in the SDA should not be eroded unless adequate protections for religious freedom are afforded in their place. For this reason, Government members believe that further investigation and consultation is required on the issues raised by the majority's recommendations. The Committee majority is not able to provide any reliable or persuasive conclusions. Clearly this matter needs to be subject of serious and intense consultations with schools, religious leaders, parents and teachers and all other stakeholders and cannot be adequately dealt with in this rushed inquiry.

100. We recognise that the Sydney Morning Herald's coverage of the Ruddock Review leaks caused a concern in the community. This committee process has made it plain that in practice schools have been focussed on the pastoral support of all students, irrespective of their gender or sexual orientation. Our focus as a Parliament must be on ensuring that we set the conditions to ensure that religious schools remain able to do so in accordance with their religious ethos. Further consideration of positive legislative protections of the right to religious freedom would assist with achieving that objective.

Senator Ian Macdonald	Senator Concetta Fierravanti-Wells
Senator for Queensland	Senator for New South Wales
Deputy Chair of the committee	Voting member of the committee

Senator Jane Hume	Senator Eric Abetz
Senator for Victoria	Senator for Tasmania
Voting member of the committee	Participating member of the committee

Senator Amanda Stoker

Senator for Queensland

Participating member of the committee

Senator Jonathon Duniam

Senator for Tasmania

Participating member of the committee

Senator Barry O'Sullivan

Senator for Queensland

Participating member of the committee

Senator Slade Brockman

Senator for Western Australia

Participating member of the committee

26 November 2018