

Supplementary Submission to the
Department of Attorney-General and
Justice of the Northern Territory

Discussion Paper: Modernisation of the
Anti-Discrimination Act

(September 2017)

Australian Association of Christian
Schools Limited

Contents

Introduction	3
Part I - General Occupational Qualifications Test	3
Outlining the Nature of the Test	3
Originating in Disability Law, the Test is Unsuitable for Religious Institutions	4
The Test Permits a Court to Disregard the Doctrines of the Institution	5
Administrative and Financial Burden Imposed on Charities	6
Walsh v St Vincent de Paul Society Queensland (No.2)	7
The Importance of Mission Fit	9
Illustrating the Difficult Determinations Required under the Test	13
Temporary Positions	14
Considerations Unique to the Northern Territory	14
Wider Australian Context	15
Part II - General Limitations Clause	16
Religious Institutions	18
Faith Based Schools	21
Faith-Based Charities	22
Determining When a Belief May Be Held	24
Ethnic Minorities	26

Introduction

1.1 Australian Association of Christian Schools Limited¹ offers these supplementary submissions to the Department of Attorney-General and Justice of the Northern Territory with respect to its Discussion Paper entitled 'Modernisation of *Anti-Discrimination Act*' (September 2017) (the Discussion Paper). In this supplementary submission we address the following matters:

- (a) Part I - Our concern with the proposal that faith-based schools be subject to a 'genuine occupational qualifications' test; and
- (b) Part II - Drafting that is proposed in the alternative.

Part I - General Occupational Qualifications Test

Outlining the Nature of the Test

1.2 The Discussion Paper proposes the removal of section 37A of the *Anti-Discrimination Act 1993* (the Act), with the resulting effect that schools will be required to rely upon subparagraph 35(1)(b)(i) of the Act in relation to staffing and volunteer appointments. That subparagraph provides:

A person may discriminate against another person in the area of work ... if the discrimination is based ... on a genuine occupational qualification which the other person is required to fill.

1.3 In order to assess the effect of this proposal it is first necessary to consider the existing judicial consideration of general occupational qualifications tests. The precise terminology adopted for that test finds varying expression across differing jurisdictions. In disability law it is referred to as the 'inherent requirements' test. In Queensland, subsection 25(1) of the *Anti-Discrimination Act 1991* (Qld) (the Queensland Act) refers to the 'genuine occupational requirements' test.

¹ NT Christian Schools is a member of Australian Association of Christian Schools Limited.

1.4 Courts have held that the terms 'inherent requirement' and 'genuine occupational requirements' can be considered to be interchangeable. In *Chivers v Queensland (Queensland Health)*² the Queensland Court of Appeal held that the test for 'inherent requirements' under Commonwealth legislation pertaining to employment was an acceptable standard for the purposes of subsection 25(1) of the Queensland Act. This approach was also followed by Member Mullins in *Toganivalu v Brown and Department of Corrective Services*.³

there is no relevant distinction between the two tests [of 'genuine occupational requirements' and 'inherent requirements']. In both cases, the focus is upon the essential activities in carrying out the particular employment. In *Qantas Airways Ltd v Christie* it was held that the inherent requirements of a position are primarily those which are essential and indispensable to carrying out the particular employment. Gaudron J suggested that a practical method of determining whether or not a requirement is an 'inherent requirement' in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed with.⁴

There is no reason to assume that the same approach will not be taken to exemption contained at subparagraph 35(1)(b)(i) of the Act, which adopts the term 'genuine occupational qualification'.

Originating in Disability Law, the Test is Unsuitable for Religious Institutions

1.5 The test was originally promulgated in disability law, which reveals its unsuitability for application in the area of faith-based institutions. The application of the genuine occupational requirements test in discrimination law requires determinations over essentially material matters, including determinations of physical and mental ability and establishing comparators between persons who have the disability and those who do not. A parallel may also be seen in the requirement that 'reasonable adjustments' be made for persons with a disability. That requirement necessitates consideration of matters such as the financial costs of making reasonable

² [2014] QCA 141.

³ [2006] QADT 13 (18 April 2006).

⁴ *Qantas Airways Ltd v Christie* [1998] HCA 18, 284.

adjustments to accommodate the person's disability, when factored against the available resources of the institution. Incorporating material concerns, these are generally matters that are readily assessable, on the evidence of relevant experts. None of these criteria are relevant to the application of the test to religious institutions. By contrast, application of the genuine occupational requirements test to faith-based institutions requires a Court to assess whether an employee who does not share the faith of the institution may perform the role placed upon them. If the Court is so minded, it may consider whether the doctrines of the institution require the employee holding each individual position to share the same faith, but it may not. If the Court does adopt that approach, by necessity the Court must render a determination as to what the religious texts teach about how religious belief is ordinarily to influence behaviour, and whether that belief casts obligations on the particular job description. This task must be performed for each individual role. This is an invidious task to place upon a judicial decision-maker. Chief Justice Malcolm notes the difficulties entailed in attempts by courts to make determinations as to the content or nature of religious truth:

the courts have recognised that our language has a strictly limited capacity to capture the nature of "religious belief". Indeed, one judge has ventured the opinion that: "... in no field of human endeavour has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgement and retribution."⁵ The courts have also been influenced by the essentially unknowable nature of "religious truth"⁶, and by an awareness of the lessons of history in relation to religious persecution and intolerance.⁷

The Test Permits a Court to Disregard the Doctrines of the Institution

1.6 However, 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

⁵ *United States v Seeger* (1965) 380 US 163, 858 (Clark J).

⁶ See, e.g. *United States v Ballard et al* (1944) 322 US 78, 889-890 (Jackson J).

⁷ The Hon Mr Justice David Malcolm AC, 'Religion, Tolerance and the Law' (1996) 70 *Australian Law Journal* 976.

require that the entire institution be staffed by persons who share the faith. In *Flannery v O'Sullivan*⁸ Member Atkinson held that subsection 25(1) of the Queensland Act is objective in its terms. This means that it is not sufficient for a potential employer to set a requirement if it is not objectively required in respect of the instant position under consideration. An employer cannot just state that its understanding of a particular role is that a spiritual requirement is a genuine occupational requirement, it must be objectively so in the eyes of a Court. As so clearly demonstrated by *Walsh v St Vincent de Paul Society Queensland (No.2)*⁹ (*Walsh*) further discussed below, whether a Court chooses to consider the doctrine of the institution is left to the discretion of the Court. 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 the difficulties outlined at paragraph 1.5 above.

Administrative and Financial Burden Imposed on Charities

1.7 In *Qantas Airways Ltd v Christie*¹⁰ the High Court held that the test requires that regard be had to the actual functions performed by each position under consideration. The Court held that in determining the 'inherent requirements' reference is to be made to both the terms of the employment contract and the function that the employee performs:

The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.¹¹

⁸ [1993] QADT 2.

⁹ [2008] QADT 32.

¹⁰ *Qantas Airways Ltd v Christie* [1998] HCA 18, 284.

¹¹ [1998] HCA 18; (1998) 193 CLR 280.

This requirement imposes considerable administrative burden on charities. The assessment of the applicability of the exemption must be made in relation to each individual position. There is a paucity of judicial consideration of the application of the genuine occupational requirements test to religious institutions. The primary determination, *Walsh v St Vincent de Paul Society Queensland (No.2)*,¹² clearly demonstrates the difficulties that arise where this test is imposed in the area of religious institutions. Because of the breadth of employment positions that are often associated with a faith-based school, there are thus many uncertainties as to how this test will be applied. In practice, this has led to the impost of significant legal fees for many schools seeking advice on the scope of the exemption.

1.8 In summarising the application of the foregoing authorities to subparagraph 35(1)(b)(i) of the Act, the genuine occupational qualification test to be applied for each staff position, is: would, on an objective appraisal, and having regard to both the employment contract or volunteer appointment and the function performed, the role be 'essentially the same' if the requirement of faith was dispensed with.

Walsh v St Vincent de Paul Society Queensland (No.2)

1.9 The decision of the Anti-Discrimination Tribunal Queensland in *Walsh v St Vincent de Paul Society Queensland (No.2)*¹³ (*Walsh*) provides an insight into the difficulties entailed in the application of a genuine occupational requirements test to religious institutions. Therein Member Wensley QC, considering the genuine occupational requirements test under subsection 25(1) of the Queensland Act, held that the subsection did not permit the local Queensland chapter of the St Vincent de Paul Society to require that a President of a local conference be a Catholic. The facts of the matter were that St Vincent de Paul Society (SVDP) had permitted a non-Catholic to be the President. Subsequently, on the direction of the relevant bishop, SVDP altered its stance to require that all such positions must be held by Catholics.

¹² [2008] QADT 32.

¹³ [2008] QADT 32.

The Tribunal held that the plaintiff's identification as a Christian, but not as a Catholic, was a sufficient basis to uphold a complaint of religious discrimination.

1.10 In determining whether the requirement that the President be a Catholic was inherent to the position the Tribunal looked to the following criteria:

- (a) Whether there was an actual stated requirement. It was held that the relevant governing documents at the relevant time did not state a requirement that the President be a Catholic.
- (b) Whether, viewed objectively, being a Catholic is necessary for discharge of the actual functions imposed upon the role in question.
- (c) 'whether the position of president would be essentially the same if the president were not required to be Catholic.'¹⁴
- (d) 'whether the requirement is "genuine" in the relevant sense'.¹⁵
- (e) Relevant to this was 'whether a president who is a non-Catholic, as opposed to a Catholic, would have difficulty in carrying out the position successfully; and
- (f) Whether it is essential and indispensable that a president be Catholic'.¹⁶

1.11 The Tribunal looked to the treatment of the position of President within the applicable governing documents and found that:

being a Catholic is not essential and indispensable to carrying out the duties of president, although it may well be desirable, and I think that the position, overall, would be essentially the same if there were no requirement that a president be Catholic, especially given the status and the role of the Spiritual Advisor, who may well be a priest, in a conference.¹⁷

¹⁴ Ibid at 89.

¹⁵ Ibid at 89.

¹⁶ Ibid 89.

¹⁷ Ibid 123.

1.12 Central to the Tribunal's decision was the fact that the Society had not at any time made it a condition of Mrs Walsh's employment (as a volunteer) that she be a Catholic and that she had notified the Society prior to each appointment that she was not a Catholic. These facts were held to be illustrative of the inherent requirements of the position.

124. To this may be added the facts – undisputed by the Respondent – that the Respondent knew that the Claimant was not a Catholic; with this knowledge welcomed her as a member and saw her elected as president of three of its conferences, one of these elections being in the presence of a regional president and a priest of the Catholic Church; saw her inducted as a president of a conference by a priest of the church in a service of the church; and allowed her to work without challenge for years as a conference president. These facts point strongly to a conclusion, which I make, that it was not a genuine occupational requirement that a president of a conference of the Respondent be a Catholic.

125. Therefore I conclude that the Respondent has failed to establish that being a Catholic is a genuine occupational requirement for the position of president of a conference of the Society, or of the Respondent, in Queensland.

1.13 The effect of the decision is that St Vincent de Paul Society was effectively precluded by an arm of the State from altering its position on the required attributes of its leadership. This is an extraordinary incursion into the internal affairs of an association. It is however in our view the inevitable consequence of the application of the genuine occupational requirements test to faith-based bodies.

The Importance of Mission Fit

1.14 In our initial submission on the Discussion Paper we noted:

The 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.¹⁸ The gardener working within a Christian school should be enabled to consider their work as a vocation, a calling in which their inner convictions are expressed in the quality of their work efforts and their interactions with their fellow human beings. The gardener in particular should be free to pursue her work cultivating the earth as an image bearer of God, the Creator of all nature. Equally, the receptionist should be free to express his convictions concerning the obligations of love in human relationships through his employment.

In the Christian tradition, such persons do not see themselves, nor are they appreciated solely, as individuals. They are members of a community, and should be free to consider the role they may play and the contribution they may offer to the unique expression of the community ethos. The same applies to the gardener, to the office receptionist, or to the typist. Each participant within the organisation has a contribution to make to the organisational character of the whole. As noted by the European Court of Human Rights, religious observance extends to all facets of a student's school experience and is not restricted to specific religious ceremonies:

Article 2 (P1-2), which applies to each of the State's functions in relation to education and to teaching, does not permit a distinction to be drawn between religious instruction and other

¹⁸ The words of the Apostle Paul in the Epistle of James summarise this position: '14 What does it profit, my brethren, if someone says he has faith but does not have works? Can faith save him? 15 If a brother or sister is naked and destitute of daily food, 16 and one of you says to them, "Depart in peace, be warmed and filled," but you do not give them the things which are needed for the body, what does it profit? 17 Thus also faith by itself, if it does not have works, is dead. 18 But someone will say, "You have faith, and I have works." Show me your faith without your works, and I will show you my faith by my works. 19 You believe that there is one God. You do well. Even the demons believe—and tremble! 20 But do you want to know, O foolish man, that faith without works is dead? 21 Was not Abraham our father justified by works when he offered Isaac his son on the altar? 22 Do you see that faith was working together with his works, and by works faith was made perfect? 23 And the Scripture was fulfilled which says, "Abraham believed God, and it was accounted to him for righteousness." And he was called the friend of God. 24 You see then that a man is justified by works, and not by faith only. 25 Likewise, was not Rahab the harlot also justified by works when she received the messengers and sent them out another way? 26 For as the body without the spirit is dead, so faith without works is dead also.' (New King James Version).

subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme.¹⁹

The religious convictions of the parent and child are relevant to the entirety of the education experience of the child. The same principle necessitates broad exemptions for religious schools in respect of the persons whom those schools seek to employ. Christian schools do not regard religion as a matter to be simply taught as a standalone subject. Instead it is to be reflected in all levels of engagement with the student. 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.

With respect, in its failure to contemplate these matters, the Discussion Paper's proposals evince what Professor Carolyn Evans recently lamented before the Australian Commonwealth Parliament Human Rights Subcommittee Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Status of the Human Right of Freedom of Religion or Belief in the following terms: 'as a society we are becoming less religiously literate' and that consequently, at times there is 'no real understanding of the way religious groups operate, their ethos and so forth', which in her view can lead to problems in areas such as genuine occupational tests.²⁰

1.15 Affirming these sentiments the Australian Human Rights Commission (formerly the Australian Human Rights and Equal Opportunity Commission) has stated 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

¹⁹ *Case of Kjeldsen, Busk Madsen and Pedersen v Denmark* (European Court of Human Rights, Application No. 5095/71; 5920/72; 5926/72, 7 December 1976) at para 51.

²⁰ Professor Carolyn Evans, private capacity, *Committee Hansard*, Melbourne, 7 June 2017, pp. 8-9.

identity of religious organisations is an important element in any society which respects and values diversity in all its forms.²¹

Similarly, United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt has argued:

religious institutions constitute a special case. As their raison d'être and corporate identity are religiously defined, employment policies of religious institutions may fall within the scope of freedom of religion or belief, which also includes a corporate dimension.²²

1.16 The ability to retain discretion over the staff complement within Christian school is fundamental to the educational experience offered. It is necessary to ensure the child has access to authentic models of virtue that are reflective of the applicable religious tenets espoused. 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".²³ In a similar vein Patrick Lenta wrote: "moral virtue is not simply taught, but is acquired by pupils through their association with teachers who are themselves virtuous, with the corollary that it is wrong to place pupils with teachers who are not virtuous... teachers teach moral values not didactically, as in the case of arithmetic, but through example".²⁴

1.17 The concern held with an objective genuine occupational test is whether a judge would give proper weight to the self-conceived obligations of religious institutions, defined pursuant to their religious doctrine. In our view, the authority in *Walsh* provides a definitive example of the effect of an absence of 'religious literacy'

²¹ Human Rights and Equal Opportunity Commission, Article 18: Freedom of Religion and Belief, (1999) p.109.

²² Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2015 at [68].

²³ Parkinson, "Christian Concerns about an Australian Charter of Rights" (2010) 15(2) Australian Journal of Human Rights 83, 97.

²⁴ Lenta, "Taking Diversity Seriously: Religious Associations and the Work-Related Discrimination" (2009) 126 South African Law Journal 827, 853.

491

on the part of arms of the State. The following passage from the judgement is illustrative of our concern:

77. Likewise, and despite the particulars which have been provided [by SVDP] of the functions of the president relied upon, and the religious observances and practices said to be relevant, it does not seem to me that the fact that a conference president performs some functions (such as leading prayers) and has some duties (among a long list of duties), some with spiritual aspects and some with practical aspects, means that what happens at conference meetings, or what the president does in the discharge of his or her duties, involves "religious observance or practice".

Why should a judicial body be required to enquire into such matters? Would, for example, a Tribunal applying this form of reasoning consider that the genuine occupational requirements test would hold that back-office roles without contact with the wider public or beneficiaries of a school's services do not need to be persons of the Christian faith in order to perform their respective roles? If *Walsh* sets the applicable standard, there is a concern that this flawed reasoning may then also be extended to 'secular', non-religious roles, such as administration, clerical records, gardeners and the like, removing the ability of faith-based schools to ensure 'mission fit'. These factors also lead one to ask where in the management levels within a religious school should the line be drawn by a court? The uncertainty further demonstrating the inherent difficulties proposed by the administration of a genuine occupational requirements test.

Illustrating the Difficult Determinations Required under the Test

1.18 The test requires a Court to make highly unusual and difficult determinations. For example, where an employee has no direct contact with the students of a college could it be said that their contribution to the overall culture of the school is of sufficient weight as to require that they be a Christian? Would it instead suffice for an employee who does not directly engage with students to have contact with the parents of children as a component of her role? If so, what would be the level of engagement required? Would it be satisfactory that the engagement is limited to, for example, sending fee statements, processing payments and chasing debtors? The

faith-based school might assert that the effectiveness of that employee in assisting a school in extending its purposes in its engagement with families or other staff would be undermined by any perceived inconsistency in the employee's statements or actions. However, would this be relevant to the question of whether the holding of the Christian faith is a genuine occupational requirement for that role, objectively determined? No court has considered the application of these issues to faith-based schools. These are however the inane questions that must be answered where a genuine occupational qualifications test is applied to faith-based institutions.

Temporary Positions

1.19 It is also important to note that, where a genuine occupational requirements test is applied, on the authority of *Walsh*, where a faith-based school temporarily engages persons who are not of the relevant faith in order to fill a vacancy, it will not be able to at a later stage require that the position must be filled only by a believer. This is because, by filling the position temporarily, the school has effectively declared that the holding of faith is not a genuine occupational requirement for the instant position. As we have noted, this is not the practice adopted by Northern Territory Christian Schools. However, 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.

Considerations Unique to the Northern Territory

1.20 It has been argued that the difficulties in attracting staff to schools in the Territory provides support for the removal of the section 37A exemption. This, it is said, is on the basis that schools are not relying on the exemption. This argument is flawed for several reasons:

- (a) Christian schools within the Northern Territory Christian Schools network employ only persons who share their faith.

- (b) It ignores the importance of the preference to select staff across the whole institution outlined in the preceding paragraph.
- (c) It establishes that there is no breach of the equality requirement in the Northern Territory, as there is no impediment on suitably qualified staff finding employment in other schools. As we stated in our prior submission:

former United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt directly contradicts this unqualified assumption that religious institutions should 'justify' their human rights, when he notes that in any proposal to limit internationally protected religious freedom rights, 'the onus of proof ... falls on those who argue in favour of the limitations, not on those who defend the full exercise of a right to freedom.' To acquit its international obligations pursuant to the Siracusa Principles, it is incumbent upon any government seeking to restrict rights to demonstrate that the restriction proposed is 'necessary' and uses 'no more restrictive means than are required'.

Wider Australian Context

1.21 It is also important to note that the current proposal is not void of context. Various proposals have been made to impose a genuine occupational requirements test on religious institutions in other Australian jurisdictions, each meeting with high levels of concern on the part of religious institutions.

1.22 The ensuing debates have also served to demonstrate the lack of religious literacy on the part of senior decision-makers, affirming the concerns outlined above. For example, in evidence before a Victorian Parliamentary Committee in 2009, the then Chair of Victoria's Equal Opportunity and Human Rights Commission argued:

"We do not see a need for a religious school to be able to discriminate in relation to the choice of a cleaner or for a religious school to discriminate in

relation to the choice of a mathematics teacher who has no contact with the practice of the religion or the profession of faith in that school.”²⁵

Moira Rayner, another former Commissioner for Equal Opportunity for Victoria, said it was difficult to see the relevance of the beliefs or lifestyles of a cleaner, gardener or clerk in a religious school.²⁶

1.23 In 1999, the New South Wales Law Reform Commission recommended that exceptions in employment under the *Anti-Discrimination Act 1977* (NSW) be narrowed so that discrimination on the grounds of religion, inter alia, would only be permitted if this was a genuine occupational requirement. The government of the day did not accept this recommendation. In 2016 the Victorian Government proposed the inclusion of an inherent requirements test in the *Equal Opportunity Act 2010* (Vic). The proposal was highly contentious and ultimately defeated in the Legislative Council after the voicing of significant concerns on the part of many religious institutions, including faith-based schools.

Part II - General Limitations Clause

1.24 For the reasons put above the Northern Territory Government should abandon the proposal to apply the genuine occupational qualifications test to religious institutions and faith-based schools. In the following Part we set out our submission that the Northern Territory Government should instead give consideration to the introduction of general limitations clauses into the Act.

1.25 In explaining the concept of a ‘general limitations’ clause it is first necessary to note that the elements of the religious freedom protection under Article 18 of the *International Covenant on Civil and Political Rights* are completely distinct from the

²⁵ Scrutiny of Acts and Regulations Committee, Victorian Parliament, *Inquiry into exceptions and exemptions in the Equal Opportunity Act*, 4 August 2009, transcript p. 5 available at: <http://www.parliament.vic.gov.au>.

²⁶ Eureka Street, 13 August 2009.

elements of the protection against inequality under Article 26. Article 18(3) provides that religious freedom (which includes the right to 'to establish and maintain appropriate charitable or humanitarian institutions'²⁷) may only be limited to the extent that it is 'necessary' in order to 'protect ... the fundamental rights and freedoms of others'. By contrast under international law, the protection to equality will not apply to all acts of 'differentiation'. This notion is reflected in the United Nations Human Rights Committee's General Comment 18 on Article 26:

The Committee observes 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.

1.26 The test is whether the distinction achieves a legitimate purpose and can be determined by reasonable and objective criteria. This test accords with common experience – individuals and organisations discriminate between differing substances through a multitude of means each day – the preference to purchase Thai over Vietnamese for dinner, the awarding of dux to the person who has earned it by merit, the awarding of first place to the person who completes the race before other competitors. These distinctions are reasonable and objective, and are not regarded as unlawful discrimination. A general limitations clause proceeds from this understanding by distinguishing between acts legitimately draw distinctions between differing substances, and those that are unlawful discrimination. By contrast, the Act is drafted on the incorrect premise that any form of discrimination is unlawful, subject to certain exceptions in defined areas.

1.27 The notion of a general limitations clause has received wide ranging and distinguished support. In 2008 the Australian Senate Legal and Constitutional Affairs Committee recommended that the exemptions in s 37 and 38 of the SDA be replaced by a general limitations clause. The Committee wrote that such a clause would permit

²⁷ Pursuant to the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, proclaimed by the General Assembly of the United Nations on 25 November 1981 (resolution 36/55).

discriminatory conduct within reasonable limits and allow a case-by-case consideration of discriminatory conduct. It argued that this would allow for a more 'flexible' and 'nuanced' approach to balancing competing rights.²⁸

1.28 Noting this recommendation in its 2016 Freedoms Inquiry Report, the Australian Law Reform Commission (ALRC) concluded 'further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions'.²⁹ The Report acknowledged that:

A broader concern of stakeholders is that freedom of religion may be vulnerable to erosion by anti-discrimination law if religious practice or observance is respected only through exemptions to general prohibitions on discrimination. An alternative approach would involve the enactment of general limitations clauses, under which legislative definitions of discrimination would recognise religious practice or observance as lawful discrimination, where the conduct is a proportionate means of achieving legitimate religious objectives.³⁰

The ALRC made reference to a particular model put forward by Professors Patrick Parkinson and Nicholas Aroney in their joint submission to the Commonwealth Attorney-General's Department Consolidation of Commonwealth Anti-Discrimination Laws in 2011.

Religious Institutions

1.29 Drawing upon the wording of that clause, a suitably worded clause that would replace existing section 20 of the Act is proposed as follows:

Section 20

(1) Discrimination means any distinction, exclusion, preference, restriction or condition made or proposed to be made which has the purpose of disadvantaging a person with a protected attribute or which has, or is likely to have, the effect of disadvantaging a person with a protected attribute by comparison with a person who does not have the protected attribute, subject to the following subsections.

²⁸ *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality: Senate Standing Committees on Legal and Constitutional Affairs* (2008).

²⁹ Australian Law Reform Commission, 'Traditional Rights and Freedoms— Encroachments by Commonwealth Laws', ALRC Report No 129 (2016) [5.124], [5.154].

³⁰ *Ibid* [5.7].

(2) A distinction, exclusion, preference, restriction or condition does not constitute discrimination if:

- (a) it is reasonably appropriate and adapted to achieve a legitimate objective; or
- (b) it is made because of the inherent requirements of the particular position concerned; or
- (c) it is not unlawful under any anti-discrimination law of any State or Territory in the place where it occurs; or
- (d) it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.

(3) The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23) is a legitimate objective within the meaning of paragraph (2)(a).

1.30 Subsection 20(2)(a) gives effect to the notion of 'general limitations', that not all conduct is automatically discrimination where distinctions are reasonably and objectively drawn between differing substances. It is based on the wording of United Nations Human Rights Committee General Comment 22,³¹ set out above.

1.31 The general protection to religious freedom could then be set out in a new section 51. While current subsection 51(a) to (c) are appropriately worded and reflect exemptions available in other Australian jurisdictions, the current subsection 51(d) only exempts acts that are 'done as part of any religious observance or practice'. In this respect the Northern Territory fails to align with all other Australian jurisdictions, which do not impose the requirement that the acts be conducted in 'religious observance or practice', but instead extend to any act by a religious body. The following wording is then proposed in substitution for existing subsection 51(d), which would be deleted. The following alternative wording again draws upon the wording of the Parkinson / Aroney proposal, with amendments to adapt it to the context of the Northern Territory (including the verbatim insertion of current subsections 51(a) to

³¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21 Rev. 1/ Add.4, available at: <http://www.equalrightstrust.org/ertdocumentbank/general%20comment%2022.pdf>.

(c) and to take account of subsequent developments in the law (which are further elaborated below):

51(1) Without limiting the generality of subsection 20(2), a distinction, exclusion, preference, restriction or condition is reasonably appropriate and adapted to protect the right of freedom of religion if it is:

(a) in relation to the ordination or appointment of priests, ministers of religion or members of a religious order; or

(b) in relation to the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or

(c) in relation to the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or

(d) made by a body established for religious purposes and either:

(i) is consistent with the religious doctrines, tenets, beliefs or teachings of the body; or

(ii) is because of the religious sensitivities of adherents of that religion or creed.

(2) Without limiting the generality of subsection (1), in the case of decisions concerning employment or volunteers, a distinction, exclusion, preference, restriction or condition is reasonably appropriate and adapted to protect the right of freedom of religion if the body established for religious purposes believes it is made in order to maintain the religious character of the body or organisation, or to fulfil its religious purpose.

Example: employing persons of a particular religion in all positions in a body established for religious purposes, or maintaining a preference for the employment of persons of a particular religion in all positions.

1.32 The chapeau to the proposed subsection 51(1) thus addresses the interaction of religious freedom and discrimination. It defines the circumstances in which differentiation will not be discrimination where the conflicting right asserted is a religious freedom right. Existing subsections 51(a) to (c) are recast as acts that do not comprise discrimination at 51(1)(a) to (c). Subsection 51(1)(d) draws upon but modifies the existing exemption contained at subsection 37(1)(d) of the *Sex Discrimination Act 1984* (Cth). It does so in light of recent judicial decisions in which very restrictive interpretations have been applied to equivalent exemptions.

1.33 Subparagraph 51(1)(d)(i) adopts a test that requires that the *conduct be consistent with* religious doctrine, tenets, beliefs or teachings. This is distinct from tests that require *conduct to conform with* religious doctrine. In *Christian Youth Camps*

*Ltd v Cobaw Community Health Services Ltd*³² (*Cobaw*), the interpretation applied to the phrase ‘conforms with the doctrines of the religion’ by the Victorian Court of Appeal was that ‘the doctrine requires, obliges or dictates that the person act in a particular way when confronted by the circumstances which resulted in their acting in the way they did’³³ and ‘as requiring it to be shown that conformity with the relevant doctrine(s) of the religion gave the person no alternative but to act (or refrain from acting) in the particular way.’³⁴ The drafting thus makes clear that this strict reading is not to be applied. Instead, the term ‘consistent’ is adopted, noting the Macquarie Dictionary definition of that term is ‘agreeing or accordant; compatible’.

1.34 In addition, subparagraph 51(1)(d)(ii) adopts a test that requires that the conduct be entered into ‘because of religious susceptibilities’. This is distinct from tests that require that the conduct be ‘necessary to avoid injury to religious susceptibilities’. Applying such a test in *Cobaw*, the Victorian Court of Appeal held that that test required demonstration of various matters, including that the harm be ‘unavoidable’. Again, the strict reading applied in *Cobaw* is not intended to be applied.

1.35 Subsection 51(2) clarifies that, without limiting subsection (1), a decision taken by a religious body or organisation in order to maintain its religious character falls within the scope of subsection (2)(2). An example is offered to clarify the scope of the exemption at subsection (2).

Faith Based Schools

1.36 Applying the above basic framework to faith-based schools would recast the existing section 37A in the following terms:

- (1) Without limiting the generality of subsection 20(2), a distinction, exclusion, preference, restriction or condition is reasonably appropriate and adapted to protect the right of freedom of religion if:

³² [2014] AVSCA 75.

³³ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] AVSCA 75, 286.

³⁴ *Ibid*, 286.

- (a) It is made by an educational authority that operates or proposes to operate an educational institution in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and
- (b) It is in the area of work in the institution; and
- (c) It is on the grounds of:
 - (i) religious belief or activity; or
 - (ii) sexual orientation; or
 - (iii) gender identity; and
- (d) It is either:
 - (i) consistent with the religious doctrines, tenets, beliefs or teachings adhered to by the institution; or
 - (ii) because of the religious sensitivities of adherents of that religion or creed.

(2) Without limiting the generality of subsection (1), in the case of decisions concerning employment or volunteers, a distinction, exclusion, preference, restriction or condition is reasonably appropriate and adapted to protect the right of freedom of religion if the institution believes it is made in order to maintain its religious character.

Example: employing persons of a particular religion in all positions in a school, or maintaining a preference for the employment of persons of a particular religion in all positions.

1.37 Proposed section 37A includes the additional attribute of gender identity, and exchanges the phrase 'sexuality' for 'sexual orientation'. This is in line with the proposals considered in the Discussion Paper to amend the Act to align Territory law with the amendments introduced into the *Sex Discrimination Act 1984* (SDA) in 2013. As noted in our initial submission, the Discussion Paper fails to recognise that at the time of the introduction of the new protected attribute of gender identity into the SDA, the exemption for religious educational authorities at section 38 was expanded to cover that additional attribute. The drafting above remedies this omission. An example is offered to clarify the scope of the exemption at subsection (2).

Faith-Based Charities

1.38 The test in proposed paragraph 51(1)(d) applies to a 'body established for religious purposes'. In light of the judgement in *Walsh* outlined above, it is also necessary to clarify that this phrase includes faith-based charities. The following additional section 51A is then proposed:

51A Meaning of body established for religious purposes

- (1) Despite any provision of this Act a body established for religious purposes includes, and shall be deemed to have always included, without limitation, a body:
- (a) that is a:
 - (i) not for profit entity; or
 - (ii) charity under the *Charities Act 2013* (Cth), including any public benevolent institution (regardless of whether any of the charitable purposes of the entity is advancing religion);
 - (b) where that body:
 - (i) is established by or under the direction, control or administration of a body established for religious purposes; or
 - (ii) is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; or
 - (iii) is a body to which subsection (2) applies.
- (2) A charity that has a charitable purpose pursuant to the *Charities Act 2013* that is not advancing religion may be a body established for religious purposes through advancing that other charitable purpose:
- (a) where that other charitable purpose is an effectuation of, conducive to or incidental or ancillary to, and in furtherance or in aid of, the advancement of its religious purpose; or
 - (b) where the advancement of religion is an effectuation of, conducive to, or incidental or ancillary to, and in furtherance or in aid of, that other charitable purpose.
- (3) Subsection (2) does not limit the circumstances in which a charity that has a charitable purpose that is not advancing religion may be a body established for religious purposes through advancing that other charitable purpose.

1.39 Drawing upon other existing legislation and common law authorities, the drafting is intended to be broad and capture bodies under the control of a religious body, and also those that are not under such control but are administered in accordance with the doctrines of a religion. Subsection (2) also affirms, for the purposes of the Act, the proposition that a charity may advance religion by advancing another charitable purpose, for example the provision of benevolent relief. It will be noted that the definition is an 'inclusive' one, it thus does not otherwise affect the definition of a religious body, and only operates as a clarification that the definition is intended to include a certain type of body, without limiting any other type of body. The phrase 'effectuation of' is included to reflect Dixon J's reasoning in *Roman Catholic Archbishop of Melbourne v Lawlor*.³⁵ Therein his Honour held that welfare benefitting

³⁵ [1934] HCA 14; (1934) 51 CLR 1.

482

activities are not ancillary or incidental, they are properly construed as extensions of religious purposes. This is based upon the inclusion in his seminal statement of the boundaries of religion for the purposes of charity law 'gifts to religious bodies, orders or societies, if they have in view the welfare of others.'³⁶ The phrase 'conducive to' is drawn from the judgement of the High Court in *Congregational Union of New South Wales v Thistlethwaite (Thistlethwaite)*.³⁷ The phrase 'incidental or ancillary to, and in furtherance or in aid of' is lifted from the definition of charity in the *Charities Act 2013* (Cth). The phrase 'conducive to' has a separate jurisprudence to the incidental and ancillary test and is therefore separately included.

1.40 The section applies to entities that are charities, as defined under the Commonwealth *Charities Act 2013*. The equivalent Northern Territory definition (including if it is solely defined according to the common law) may be inserted in substitution, to the extent that it exists. It may be necessary to ensure that the amendments introduced by proposed section 51A do not detrimentally affect the tax treatment of charities in the Territory. We do not make any recommendations in that regard in this submission, but merely raise it as a matter for future consideration.

Determining When a Belief May Be Held

1.41 Having regard to the approach adopted by the Court in *Cobaw*, it is also considered necessary to define the circumstances in which a Court may interpret religious belief. The following additional drafting is thus proposed:

³⁶ [1934] HCA 14; (1934) 51 CLR 1 at 32 (per Dixon J).

³⁷ (1952) 87 CLR 375, wherein the Court held:

We are here concerned with the question whether a particular corporate body is a charitable institution. Such a body is a charity even if some of its incidental and ancillary objects, considered independently, are non-charitable. The main object of the Union is predominantly the advancement of religion ... an institution is a charitable institution if its main purpose is charitable although it may have other purposes which are merely concomitant and incidental to that purpose. The fundamental purpose of the Union is the advancement of religion. It can create, maintain and improve educational, religious and philanthropic agencies only to the extent to which such agencies are conducive to the achievement of this purpose. The same may be said, *mutatis mutandi*, of the other object, the preservation of civil and religious liberty.

Section 51B Determining when an act or practice is consistent etc.

- (1) For the purposes of subparagraph 37A(1)(d)(i) and subparagraph 51(1)(d)(i), an act or practice is consistent with the doctrines, tenets, beliefs or teachings of that religion if the religious body holds a belief that it is consistent with the doctrines, tenets, beliefs or teachings of that religion and that belief is not fictitious, capricious or an artifice.
- (2) For the purposes of subparagraph 37A(1)(d)(ii) and subparagraph 51(1)(d)(ii), an act or practice is because of the religious susceptibilities of adherents of that religion if the religious body holds a belief that it is because of the religious susceptibilities of adherents of that religion and that belief is not fictitious, capricious or an artifice.
- (3) For the purposes of this Act, a religious body holds a religious doctrine, belief, tenet or teaching if the holding of the doctrine, belief, tenet or teaching (inclusive of the body's beliefs as to the actions, refusals, omissions or expressions that are consistent with or because of that doctrine, belief, tenet or teaching) is not fictitious, capricious or an artifice.
- (4) A religious body holds a doctrine, tenet, belief or teaching if it has adopted that doctrine, tenet, belief or teaching. Without limiting the foregoing, a religious body may adopt a doctrine, tenet, belief or teaching by:
 - (a) including the doctrine, tenet, belief or teaching in its governing documents, organising principles, statement of beliefs or statement of values; or
 - (b) adopting principles, beliefs or values of another body or institution which include the doctrine, tenet, belief or teaching; or
 - (c) adopting principles, beliefs or values from a document or source which include the doctrine, tenet, belief or teaching; or
 - (d) acting consistently with that doctrine, tenet, belief or teaching.
- (5) In this section a religious body includes:
 - (a) a body established for religious purposes; and
 - (b) an educational authority that operates or proposes to operate an educational institution in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

1.42 Proposed subsections 51B(1) to (3) require that the holding of a belief be not fictitious, capricious or an artifice. This test adopts the wording employed by Lord Nicholls in *R (on the application of Williamson) v Secretary of State for Education and Employment*.³⁸ As the Canadian Supreme Court has recognized, the right to religious freedom does not necessitate an inquiry into whether religious 'beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make'.³⁹ The ruling in *Cobaw*, to the extent that the Court

³⁸ [2005] UKHL 15, 22.

³⁹ *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 [43].

had regard to, what was considered by the Court to be, a range of views amongst congregations associated with the appellant, is an example of reasoning that is to be distinguished from this test. For this reason, section 51B requires that regard is instead to be had to the belief of the actual 'body', and whether that belief is genuinely held by that person or entity.

1.43 Subsection 51B(4) clarifies the means by which a religious body may be said to hold a belief. In *Cobaw* an entity's doctrines were held to be limited to the matters expressly addressed solely in its core governance document. This reading, it is considered, fails to appreciate the many and varied means by which religious belief may be adopted or held. The question concerns when the law will recognise the holding of belief. The effect of the reading in *Cobaw* is to impose very strict limitations on the expression of religious freedom by religious bodies. Subsection (4) clarifies that this strict reading is not to be applied. It provides a means for the law's recognition of when religious bodies have adopted a belief that gives due recognition to the broad plurality of religious expressions within Australia, and the many and varied unique means by which they may adopt or define their beliefs.

Ethnic Minorities

1.44 For completeness, it is also noted that the Parkinson / Aroney proposal also contained a provision relating to ethnic minorities, which when applied to the context of the Act, is as follows:

(1) Without limiting the generality of subsection 20(2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of ethnic minorities to enjoy their own culture, or to use their own language in community with the other members of their group, if it is made by an ethnic minority organisation or association intended to fulfil that purpose and has the effect of preferring a person who belongs to that ethnic minority over a person who does not belong to that ethnic minority.

1.45 We take the opportunity to thank the Department of Attorney-General and Justice for the opportunity to offer these supplementary submissions in respect of this

485

Inquiry. Should you have any further questions or comments you may liaise with our Executive Officer Martin Hanscamp. [REDACTED]

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490

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