Review of the Equal Opportunity Act 1984 (WA)

Response to Project 111 Discussion Paper

1. This document represents the response of Freedom for Faith to the discussion paper issued by the Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA): Project 111 Discussion Paper* (August 2021).

2. *Freedom for Faith* is a Christian legal think tank that exists to see religious freedom protected and promoted in Australia and beyond. It is led by people drawn from a range of denominational churches including the Anglican Church Diocese of Sydney, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia and the Seventh-day Adventist Church in Australia. It has strong links with, and works co-operatively with, a range of other Churches and Christian organisations in Australia.

3. The Commission's Discussion Paper ("DP") is very wide-ranging over many areas of discrimination law. This response is limited to the major matters relating to religious freedom.

Discrimination Law and Religious Freedom in Australia

4. The Commission's project raises significant issues around the protection of religious freedom in Australia. While this is a key human right spelled out in art 18 of the ICCPR, and other international instruments, it is protected in a "patchwork" way in our country. One of the key mechanisms for protection of the right is the inclusion of "balancing clauses" (often called "exceptions" or "exemptions") in discrimination laws in the various States and Territories.[1] The clauses play the vital role, as the Commission put it in the DP at 162, of "balancing the rights of individuals to remain free from

[1] For comment on this mechanism see Neil J Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" *Oxford Journal of Law and Religion* Vol. 5 (2016) pp. 385 – 430.

discrimination on the basis of a number of attributes, and the rights of religious organisations to observe practices in conformity with the beliefs of those organisations." If this balance is to be maintained, it is important for these balancing clauses not to be weakened. The following provides a necessarily brief response to specific questions posed by the DP.

5. *Would the Act benefit from an interpretation provision? If so, what type of interpretative provision should be included?* The Ruddock Committee recommended some very helpful interpretative provisions. These, and a possible provision suggested by Christian Schools Australia, are noted at pp 104-105 of the DP. We support inclusion of these provisions to stress the important of the right to religious freedom and to assist courts in interpreting the legislation.

6. *Should the protections for religious or political conviction expressly include religious and political beliefs and activities?* Yes, we would strongly support this. Protection of "conviction" alone falls well short of the scope of ICCPR art 18(1), which protects the "freedom, either individually or in community with others and in public or private, to **manifest** his religion or belief in worship, observance, practice and teaching". Protection of internal convictions alone is not sufficient.

7. *Should lawful sexual activity be included as a Ground? If so, what exceptions might apply?* We believe this is not an appropriate "prohibited ground" under discrimination law. One of the significant areas where many religious groups differ from the majority in Australia today is that of sexual morality. A *prima facie* rule preventing selection decisions being made on the basis of "lawful sexual activity" is likely to have a serious impact on religious groups. As the DP notes, only three Australian jurisdictions list this as a "prohibited ground" of discrimination, and the extent to which it is a genuine problem should be carefully considered before introducing such a ground into WA. Lawful sexual activity involves choices, and this includes moral choices. It is not similar to race or disability which are unchosen characteristics.

8. *Should the area of education be extended to include the evaluation and selection of student applications?* Prohibitions which already apply in relation to offers of admission already cover this area, in our view.

9. *Should the area of education be extended to provide for prohibitions of the educational institution to refuse students to carry out their religious practices during school hours?* The DP at 130 suggests that this concern has been raised by the Islamic community. Presumably the suggestion is that it should be discriminatory to refuse to allow students to carry out religious practices (perhaps regular prayer times) during school hours. While we support the religious freedom rights of students, we suggest that denying a student "free time" to engage in a religious practice during formal class time would not of itself usually be considered discriminatory, if all other students are required to be engaged in secular curricular activities at that time. However, we would strongly support a rule that made it clear that student activities outside class hours (during recess

or lunchtime, or before or after school hours on school premises) should not be hindered on the basis that they are religious in nature.

10. *Should anti-vilification provisions be included in the Act? If anti-vilification provisions are included in the Act, should they cover only racial vilification or extend to other types of vilification? Should or how may vilification provisions address concerns about the impact on other rights and exemptions under the Act? Should or how may vilification provisions address concerns around the loss of freedom of speech?* While an argument can be made for making speech which incites violence and extreme hatred unlawful, the potential for "chilling" free speech is very strong. We comment on the question of "religious vilification" laws. Even a law which required a seriously harmful form of speech on the basis of religion, was subject to mis-use in the Victorian litigation involving the organisation "Catch the Fire".[2] While an initial finding of "religious vilification" was overturned on appeal, the whole process made it difficult for anyone in Victoria to know whether they were allowed to criticise and discuss religious doctrines. The version of such law which is in force in Tasmania at the moment allowed a claim to brought against Roman Catholic Archbishop Porteous, alleging that distribution of a booklet giving the Roman Catholic view of marriage had caused "offence". It has also been used to allow a claim to be brought against a federal Senator, Claire Chandler, for writing to a person in the electorate that women's sports and changing facilities were designed for women and should remain so. It seems fairly clear that a law forbidding the causing of "offence" is far too onerous a restriction of free speech, and probably contrary to the Constitutional implied freedom of political speech.[3]

11. *Should the scope of the exception contained in section 72(a)-(c) of the Act (exception for religious personnel) be amended, and if so, how? Should the exception contained in section 72(d) of the Act (exception for religious bodies) be removed or retained? Should the scope of the exception contained in section 72(d) of the Act (exception for religious bodies) be amended, and if so, how?*

    a. The model represented by the "balancing clause" of s 72 is similar to other such provisions around Australia, and should generally be retained.

    b. What the DP calls the "Religious Personnel" exception, allowing churches to set their own criteria for appointment of clergy and key ministry workers,

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[2] See *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510, overturned on appeal in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284. The wider issues are canvassed in detail in Neil J Foster, "Religious Free Speech After Ruddock: Implications for Blasphemy and Religious Vilification Laws" (2019) at: http://works.bepress.com/neil_foster/131/ . For comment on the litigation see R T Ahdar, "Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law" (2007) 26 U Q Law Jnl 293-316; G Blake, "Promoting religious tolerance in a multifaith society: Religious vilification legislation in Australia and the UK" (2007) 81 ALJ 386-405; P Parkinson, "Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different" (2007) 81 ALJ 954-966.

[3] See the comments of Hayne J in *Monis v The Queen* [2013] HCA 4 at [222]: "The conclusion that eliminating the giving of offence, even serious offence, is not a legitimate object or end is supported by reference to the way in which the general law operates and has developed over time."

should be retained unchanged. Decisions of this sort lie at the very heart of the religious freedom of churches and believers, and such decisions should not be required to be justified by the churches explaining why they are required by religious doctrine. As the DP notes on p 163, to add such a requirement would mean a decision to appoint a minister "would be susceptible to review", obviously by a secular tribunal or court. It is generally widely acknowledged that such bodies should not be making theological judgments, both on the pragmatic ground that they are not trained and equipped to do so, but also on the more important basis that religious freedom means that where believers choose to join together to live out their shared faith in worship, the wider state has no business in interfering.[4] Article 6(g) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief indicates the protection given in international human rights law to the appointment of religious personnel.

c. The "Religious Bodies Doctrine" exception in s 72(4) is also common to most discrimination laws in Australia. It allows the ethos of religious bodies to be implemented over a wider set of decisions, and it should also be retained. If Western Australia, like Australia as a whole, is a place that recognises true diversity and multiculturalism, it needs to provide space for religious groups, joined freely by religious citizens and supported by their giving, to implement policies that reflect those religious beliefs. To require religious groups to abandon their moral commitments will see those groups forced to withdraw from many of the vital social services that they provide. Such groups rarely, if ever, discriminate in providing help to others; but if they are to be a reflection of the religious faith of those who have set them up, they need to be allowed to operate in accordance with that faith.

12. *Should the exception contained in section 73(1)-(2) of the Act (exception for educational institutions established for religious purposes re employment) be retained or removed? If the exception contained in section 73(1)-(2) of the Act is retained, should it be narrowed and if so, how? If the exception contained in section 73(1)-(2) of the Act is narrowed, should it be narrowed such that it only operates in relation to the employment of specific categories of employees or relates to only some of the Grounds?*

a. For the same reasons as noted above in relation to s 72, s 73 should also be retained, allowing faith-based schools to provide education in accordance with faith-based commitments to both teaching and living. To require a religious school to employ a member of staff whose private life contradicts fundamental religious moral teaching (say, a single male teacher who is in a sexual

[4] See Neil J Foster, "Respecting the Dignity of religious organisations: Courts deciding theology?" *University of Western Australia Law Review* Vol. 47 (2020) pp 175 – 219 for a more detailed analysis of when theological decisions need to be made by secular courts.

relationship with a girlfriend), is effectively to ban religious schools from operating at all.

b. The suggestion noted at DP p 166 is that such issues can be dealt with by terms of employment contracts: for example, "a necessary requirement for employees to refrain from acting (other than in private) in a manner that is contrary to the school's religion or ethos". The bracketed words alone reveal one problem with this proposal: in our hyper-connected social media world, a person's major moral decisions, such as to live with a partner, will rarely remain "private" for long. Modern educational theory has recognised for some time that "teaching" involves more than merely imparting words from a blackboard, and that students see and model themselves on the character of teachers they admire. But there is a second problem with the proposal: that no term of a private contract can be upheld if it would take away an important right given by the general law. If a teacher has a right to have an unmarried domestic partner, then it seems unlikely that a private contract requiring them not to reveal this fact to others would be upheld as enforceable. A provision such as s 73 is important to spell out clearly how Parliament has chosen to strike the balance between competing human rights in this area.

c. The suggestion that decisions relating to religious doctrine should only be made where holding a certain view is a "genuine occupational requirement" or the like should not be adopted.

d. Religious persons seek to live their whole lives, not just their time in religious meetings, in service to their God. Those who disagree with those religious views are not required to be a part of the religious community. But for those who are, expression of their commitment to their beliefs will involve decisions about moral issues and the way that they wish to model their religious beliefs to each other and, for schools, to their children.

e. Christian schools, and other religious schools, are aiming to model the life of a whole community with shared religious beliefs (and hence moral values). That is why the commitment of the Maths teacher, or the gardener, or the receptionist, may be just as important as that of the religious studies teacher. And, as noted above, making that call should lie with the religious school, which is best qualified to do so, not with a secular decision-maker.

f. Sometimes, of course, it will not be possible for a religious school to find someone who shares all their values for a particular job. The law should be clear that a school may "prefer" those who share its values in employment decisions, but not be penalised should it occasionally have to engage a specialist teacher or administrative officer who does not do so.

13. *Should religious educational organisations be required to maintain a publicly available policy outlining their positions in relation to the employment of staff? Should the exception contained in section 73(3) of the Act (exception for educational institutions established for religious purposes re provision of education) be retained or removed? If the exception contained in section 73(3) of the Act is retained, should it be narrowed and if so, how?*

    a. There would be no objections to a requirement that a school's policy on employment should be made clear to anyone who applies for a position. The view that it should be "publicly available" is more problematic. Does any member of the public who is interested have a right to see the detailed employment policies of a private company? Not usually. A danger of a requirement of "public" availability of a policy is that in the age of "Twitter mobs" such may be used to attack a school simply operating in accordance with the law. Genuine applicants for employment should be advised of the school policy; it is doubtful whether wider publicity is required.

14. *Should prohibitions on conversion practices be included in the Act?*

    a. No. Such prohibitions raise a number of complex issues and ought to be the subject of separate, targeted, consideration, rather than incorporated into general discrimination legislation. Insofar as such proposals go beyond banning discredited pseudo-scientific techniques which are not used any more, and move into banning "prayer" (as the Victorian legislation does), they are not a good idea in any case.[5]

15. We thank the Commission for its work on this important area and encourage the Commission to continue to weigh up religious freedom issues very carefully in its considerations.

Freedom for Faith

11 Nov 2021

[5] See for a general discussion of the issues, https://lawandreligionaustralia.blog/2020/08/23/conversion-therapy-laws-and-religious-freedom/ .