

Submission to the
**Senate Standing Committee on Legal and
Constitutional Affairs:**

**Human Rights and
Anti-Discrimination Bill
2012 (Cth)**

January 24 2013



HammondCare

An independent Christian charity

HammondCare Submission

Senate Legal and Constitutional Affairs Legislation Committee

Human Rights and Anti-Discrimination Bill 2012 (Cth)

Contents

1	Executive summary	2
2	Background to HammondCare	5
2.1	Status	5
2.2	Activities	5
2.3	History	6
2.4	Mission	6
3	Religious freedom	8
4	Definition of discrimination – various places	15
5	Substantive equality and special measures to achieve equality – Subclause 3(1)(d)(i) and Subclause 3(1)(e), Clause 21 and Clauses 79 to 82	15
6	Volunteers - Clause 7	17
7	Constitutional issues - Clauses 11 to 13	17
8	Protected attributes – Clause 17	19
9	Conduct that offends – Subclause 19(2)	19
10	Religious exceptions – Clauses 32 and 33	21
11	Commonwealth-subsidised aged care - Subclause 33(3)	23
12	Conflict of rights	25
13	Publishing material re intention to engage in unlawful conduct - Clause 53	27
14	Religion as protected attribute – Subclause 17(1)(o)	28
15	Temporary exemptions – Clauses 83 to 86	29
16	Burden of proof – Clause 124	29
17	Conclusion	30

Executive summary

- (a) HammondCare makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee (Senate Committee) in its Inquiry regarding the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* (Bill).
- (b) HammondCare commends the Commonwealth Government for referring this draft legislation to the Senate Committee for review and public consultation prior to its formal introduction to Parliament.
- (c) HammondCare is also recognisant of the Commonwealth Government's guarantee that there will be no reduction in existing protections in Commonwealth legislation on unlawful discrimination and is grateful for the Attorney-General's commitment to achieving the right balance of rights and freedoms in the Bill.
- (d) This submission does not intend to deal with every issue raised by the Bill but intends only to address some issues of significant concern to HammondCare as an independent Christian charity.
- (e) Our organisation's particular emphasis in this submission is to ensure that the consolidated legislation fully and appropriately acknowledges and protects its rights to religious freedom and those of other faith-based organisations in Australia.
- (f) HammondCare makes the following recommendations to the Senate Committee. These are further explained in the body of this Submission:

Recommendation 1 - That Australian law provide a clear and unequivocal acknowledgement of the right to religious freedom as a fundamental right.

Recommendation 2 - That Australian law provide a clear and unequivocal acknowledgement of the right to practise religion 'in community' by the establishment of faith-based organisations.

Recommendation 3 - That Australian law provide a clear and unequivocal acknowledgement that religious organisations are lawfully permitted to select employees sharing the same religious beliefs as those held by the employing religious organisation.

Recommendation 4 - That Australian law provide definitions of 'religious institution', 'religious organisation' or 'religious body' which are:

- (A) not so narrow as to negate the fundamental human right to practise religion in community, including through faith-based organisations, and

(B) broad enough to include non-denominational and independent organisations possessing faith-based missions or values.

Recommendation 5 - That Australian law provide a clear and unequivocal acknowledgement that genuine occupational qualifications for a position are not permitted to be determined 'externally' in ignorance of the religious mission, values and strategy of an employing religious organisation.

Recommendation 6 – That, in the event that Recommendation 23 (A) and (B) are not accepted, the current religious exceptions regime be maintained but extended ensuring that there is no lessening of the current protection accorded to freedom of religion.

Recommendation 7 – That, in the application of religious exceptions, Australian courts should not be called upon to arbitrate on the validity or otherwise of religious doctrines, tenets, beliefs or teachings.

Recommendation 8 – That, if the term 'religious susceptibilities' is retained in the context of religious exceptions, this term be clearly defined to embrace religious beliefs and values held by individuals and faith-based organisations.

Recommendation 9 – That, in respect of a particular job or position with a faith-based organisation, Australian law protect faith-based organisations in such a way as allow them to determine, in good faith, the inherent requirements of a job based on the organisation's own values, beliefs and principles.

Recommendation 10 – That, in respect of employment by a faith-based organisation, Australian law protect faith-based organisations as regards a complaint of unlawful discrimination in circumstances where the organisation considers, in good faith, that its act of distinction, exclusion or preference is based on the organisation's own religious values, beliefs and principles.

Recommendation 11 – That Australian law acknowledge that a faith-based organisation's values, beliefs and principles are those values, beliefs and principles as are determined in good faith by the organisation itself.

Recommendation 12 – That Australian law acknowledge that faith-based organisations have the right to practise their religion 'corporately' and that this includes a right to decide that all or some roles within the organisation are entitled to include a requirement of acceptance and practice of a specified religious faith.

Recommendation 13 – That Australian law acknowledge that faith-based organisations have the right to shape organisational advertisements and job descriptions at all levels in such a way as to include certain religious dimensions.

Recommendation 14 – That Australian law acknowledge that the terms of any government subsidies to faith-based organisations not be permitted to include requirements preventing such organisations from making decisions or following practices the result of which would be to damage or undermine the religious character, mission and values of the faith-based organisation.

Recommendation 15 - That the term ‘discrimination’, wherever it appears in the Bill, be replaced by the term ‘unlawful discrimination’.

Recommendation 16 - That the reference to ‘substantive equality’ in Subclauses 3(1)(d)(i) and 3(1)(e) of the Bill be deleted.

Recommendation 17 - That Clauses 21 and 79 to 92 of the Bill be deleted.

Recommendation 18 - That, in order to avoid imposing unnecessary further compliance burdens on the voluntary sector, volunteers remain exempt from laws on unlawful discrimination as proposed by Clause 6 of the Bill.

Recommendation: 19 - That Clause 11 of the Bill be amended by removing the reference to ‘matters of international concern’.

Recommendation 20 - That a review of every aspect of the Bill be conducted to ensure that they are properly within the ambit of a power granted to the Commonwealth.

Recommendation 21 - That Clause 17 of the Bill be amended by the deletion of the reference to ‘political opinion’ and ‘social origin’.

Recommendation 22 - That Clause 19(2)(b) of the Bill be deleted.

Recommendation 23 – That:

- (A) Clause 19 of the Bill be amended to include reference to the fundamental right to religious freedom within the definition of unlawful discrimination.
- (B) The Senate Committee consider the definition of ‘unlawful discrimination’ proposed by Professors Patrick Parkinson and Nicholas Aroney in their submission to the AHRC Religion Enquiry.
- (C) If the Senate Committee does not accept our Recommendations in subparagraphs (A) and (B) above that there be no reduction in the protection accorded by religious exceptions in legislation currently in force.

Recommendation 24 - That Subclause 33(3) of the Bill be deleted.

Recommendation 25 - That Australian law provide a clear and unequivocal statement that, in situations where there is a conflict of rights, a specific right to practise religious beliefs by the establishment of organisations with a religious ethos prevails over a general right not to be unlawfully discriminated against on the grounds of one or more protected attributes.

Recommendation 26 - That Clause 53 of the Bill be amended to ensure that the coverage of the law as it currently stands is not extended.

Recommendation 27 - That Subclause 17(1)(o) of the Bill be deleted.

Recommendation 28 - That temporary exemptions where they are referred to in Clauses 83 to 86 of the Bill be used only for situations that are temporary in nature and not to avoid the robust protection of religious freedom rights of individuals and organisations.

Recommendation 29 - That Clause 124 of the Bill be deleted.

2 Background to HammondCare

2.1 Status

- (a) HammondCare is an Australian public company limited by guarantee incorporated pursuant to the provisions of the Corporations Act 2001 (Cth) and which bears the Australian Business Number 48 000 026 219.
- (b) The registered office of HammondCare is located at Level 2, 447 Kent Street, Sydney NSW 2000.

2.2 Activities

- (a) HammondCare is an independent Christian charity specialising in dementia and aged care, palliative care, rehabilitation and older persons' mental health.
- (b) Regarded nationally and internationally as one of Australia's most innovative health and aged care providers, HammondCare offers hospital care, residential care and community services throughout NSW.
- (c) HammondCare offers residential care and community services across NSW, from the Shoalhaven to Newcastle and out to the Central West.
- (d) HammondCare is passionate about improving quality of life for people in need and has a particular commitment to dementia care and research as well as to older people who are financially disadvantaged.

- (e) HammondCare is committed to ensuring a focus on each resident's independence, growth in self-esteem and right to privacy. There are few locked doors in HammondCare facilities and where they are present they are not obvious. Technology used to monitor the movement and wellbeing of residents is discreet. Day and night buzzers and alarms alert staff only as these noises can distress people dealing with dementia.

2.3 History

- (a) The Hammondville settlement near Liverpool in south-western Sydney was envisioned and established in 1932 by the minister of St Barnabas' Anglican Church, Broadway, the Revd Canon Robert Hammond.
- (b) As this was during the Great Depression, Canon Hammond sold his personal life insurance policy in order to purchase 13 acres of bushland located 2½ miles from Liverpool. This land was cleared and nine very basic cottages were built there in a period of just two months.
- (c) Hammondville expanded over time to 110 cottages and the Hammondville village acquired a community hall, a church, several shops and a primary school.
- (d) Following Canon Hammond's death this important Christian work was continued under the leadership of other committed Christians. In the early 1950s the organisation's efforts and resources were directed towards what was considered to be the 'new emergency', that of the 'needy aged'. It soon also became apparent that nursing care would be an essential component of this new direction.
- (e) In June 2008, HammondCare acquired Hope Healthcare, an organisation that provides palliative care, psycho-geriatrics and rehabilitation services in three hospitals in the Sydney area.

2.4 Mission

- (a) The Statement of Faith of HammondCare states as follows:

'The purpose of HammondCare is to operate as a Christian organisation that provides care and support to people in need. The form, the values, and the ethical framework within which we work aims to reflect the love and compassion we see in the life and work of the Lord Jesus Christ and no other.'

- (b) HammondCare's Principles of Faith are expressed as follows:

'Our foundations of Christian faith are based on the three following principles:

- (1) *The divine inspiration, trustworthiness and authority of the Bible as the Word of God which is our standard and ultimate authority in all matters of conduct and faith.*
- (2) *A belief in the nature, person and work of God as set down in the historic Christian creeds, being the Apostles' Creed, the Nicene Creed and the Athanasian Creed.*
- (3) *A recognition that as an outcome of (1) and (2) we have a God-given responsibility to care for those in need. We accept, unequivocally, the biblical imperative that the provision of such care is an essential expression of true faith as seen in Christ's words in Matthew 25:31-46, in the example of the early church in Acts 1-6, and in the advice of James 2:14 –17.'*

(c) The Apostles' Creed¹ referred to in the preceding paragraph is worded as follows:

*'I believe in God, the Father Almighty,
maker of heaven and earth,
and in Jesus Christ, his only Son our Lord,
who was conceived by the Holy Spirit,
born of the virgin Mary,
suffered under Pontius Pilate,
was crucified, dead, and buried.
He descended into hell.
The third day he rose again from the dead.
He ascended into heaven,
and is seated at the right hand of God the Father almighty,
from there he shall come to judge the living and the dead.
I believe in the Holy Spirit,
the holy catholic church,
the communion of saints,
the forgiveness of sins,
the resurrection of the body,
and the life everlasting.*

¹ The Apostles' Creed (Latin: *Symbolum Apostolorum* or *Symbolum Apostolicum*) is an early statement of Christian belief, a creed or 'symbol'. It is widely used by a number of Christian denominations.

*Amen.*⁷

- (d) The objects of HammondCare as stated in clause 4 of its constitution are as follows:
- (i) To care for and support older people, including the provision of residential and non-residential care,
 - (ii) To promote aged care through education, research and training,
 - (iii) To care for and support any other persons in need,
 - (iv) In so doing, to promote the Christian gospel particularly through benevolent or charitable outreach,
 - (v) Such acts as are incidental and conducive to the attainment of these objects, and
 - (vi) In pursuit of those objects, to do all or any of the things authorised by the Corporations Act.

3 Religious freedom

- (a) HammondCare applauds the Commonwealth Government's commitment to maintain the current level of legal protections for religious freedom.
- (b) HammondCare wishes to ensure that the consolidated legislation fully and appropriately acknowledges and protects the rights of HammondCare (as well of other faith-based organisations) to religious freedom.
- (c) The principles which HammondCare wishes to emphasise in relation to the right to religious freedom are as follows:
 - (i) Christianity is not a purely private faith - it must be expressed in 'action'.
 - (ii) The charitable activities of HammondCare are based on the following fundamental Biblical principle – *'Even so faith, if it has not works, is dead'*.²
 - (iii) The Christian faith cannot be expressed in purely self-regarding terms. Christians believe that to worship God without having compassion on the poor and infirm is a travesty of true Christian religion.

² James 2:17.

- (iv) The Christian faith cannot be expressed in purely self-regarding terms. Christians believe that to worship God without having compassion on the poor and infirm is a travesty of true Christian religion.³
- (v) It is for this reason that, since 1813, Christians in Australia have organised themselves into faith-based charities.
- (vi) Freedom of religion is more than just a private affair but it actually is a deeply rooted principle of international and domestic law.
- (vii) As a faith-based entity, HammondCare maintains the right under Articles 1.1 and 6 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* 1981 (Religion Declaration)⁴ to express religious belief in community with others by establishing organisations which embody religious beliefs and values and expects that this right be preserved.
- (viii) HammondCare maintains that the definition of a religious institution must not be understood so narrowly as to negate the fundamental human right to practise religion in community, including through religious charities and associations.
- (ix) HammondCare is Christian in mission but is not operated by or allied to any one particular Christian denomination. HammondCare thus maintains that exceptions and exemptions for religious organisations should not be interpreted so narrowly as to exclude religious organisations which are not ‘denominationally-specific’, such as HammondCare.
- (x) HammondCare would not exist if it were not for the Christian mission and values upon which it is formed and in which it finds its very *raison d’être*.
- (xi) The relationship between HammondCare and the Christian faith is more than a historical quirk - it is central to the very identity of HammondCare and to what we do. It also shapes the way in which we operate on a day-to-day basis. The

³ See James 1:27 and Matthew 25:35.

⁴ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 - URL www2.ohchr.org/english/law/religion.htm. The Religion Declaration was adopted unanimously by the 37th Session of the United Nations General Assembly in November 1981 and Australia supported its adoption of the Declaration. On 8 February 1993, following consultations with State and Territory governments, the Declaration was declared as a relevant international instrument for the purposes of the Australian *Human Rights Commission Act* 1986 (Cth) (formerly called the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth)).

Christian faith is not simply the foundation and motivation for the work of HammondCare - it dictates and impacts the decisions we make at every level.

- (xii) For this reason, it is essential that genuine occupational qualifications not be determined externally to HammondCare in ignorance of our religious mission, values and strategy.
- (xiii) This has a number of non-negotiable implications:
 - (A) The right under Article 6(b) of the Religion Declaration to practise religion corporately. This includes a right to decide that all or some roles within HammondCare are expected and required to both accept and practise the Christian faith.
 - (B) The right under Article 6(b) of the Religion Declaration to shape advertisements and job descriptions at all levels in such a way as to include certain religious dimensions. At HammondCare we cannot employ, at any level, someone who is hostile to or unsupportive of our mission, vision or values. Provided this is done in good faith, religious organisations such as HammondCare maintain the right to decide whether some or all of the positions offered by it carry such a faith dimension. To allow for limitation of this right would be to seriously diminish the specific right to religious freedom.
 - (C) The qualifications and roles within a religious organisation such as HammondCare cannot be dictated by values formulated externally to the organisation.
- (xiv) HammondCare claims the right to decide which roles require a personal commitment to the Christian faith and what form of Christian faith is to be expected of our employees.
- (xv) In applying exceptions to laws dealing with unlawful discrimination courts must not be called on to arbitrate on contentious religious doctrines, tenets, beliefs or teachings.
- (d) It is essential that the Commonwealth Government recognise that the right to religious freedom extends far beyond the running of worship services within church buildings or the nomination and appointment of clergy. It extends to the vast array of activities and services which HammondCare, and other faith-based organisations, carry out within the community at large.
- (e) Various international rights instruments make it clear that:

- (i) All voices, religious or non-religious, have a right to be heard, and
 - (ii) Central to the freedom of religion is the protection of the right not to be discriminated against on the basis of religion.
- (f) It also logically follows that there is also a right to express religious belief ‘in community’ with each other by establishing organisations which embody religious beliefs and values. To allow for limitation of this right would be to seriously diminish the specific right to religious freedom.
- (g) Ensuring that religious freedom can be freely exercised is an important social policy objective for pluralistic and democratic societies such as our own.
- (h) The various statements, documents and declarations of the United Nations have affirmed the significance of religious freedom. The rights of the human person include the right:
- (i) To freedom of thought, conscience and religion,
 - (ii) To manifest religion and belief, in private and in public, subject only to such limitations as prescribed by law and as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others,
 - (iii) Of parents to ensure that the religious and moral education of their children is in conformity with their own religious beliefs and convictions,
 - (iv) Of religious bodies to be protected from undue intrusion by the State into their ethos, principles or conduct, and
 - (v) For people to be protected from discrimination based on religion and belief in the area of employment (and the obligation of the State to take effective measures to prevent and eliminate religious discrimination in all fields of civil, economic, political, social and cultural life).
- (i) It is also important that it be acknowledged that freedom of religion is about more than just a private affair is a deeply rooted principle of international and domestic law. Article 18 of the International Covenant on Civil and Political Rights 1966 (ICCPR)⁵ and Article 1.1 of the Religion Declaration both state that everyone shall have 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.’*

⁵ International Covenant on Civil and Political Rights 1966 – URL www2.ohchr.org/english/law/ccpr.htm - The ICCPR was adopted by the United Nations General Assembly in 1966 and was ratified by Australia on 13 August 1980.

- (j) More specifically, Article 6 of the Religion Declaration states that the right to freedom of thought, conscience, religion or belief shall include the freedom:
- (i) To establish and maintain appropriate charitable or humanitarian institutions,
 - (ii) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief.
- (k) Under international law these freedoms are to be subject only to such limitations:
- ‘... as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.’⁶*
- (l) Concerns have been raised about the extent to which Australian human rights frameworks place emphasis on the rights of individuals. HammondCare submits that communities, given that they are more than a mere collection of individuals, have an existence in and of themselves and, as such, also have rights worthy of protection including the right to religious freedom.
- (m) In its submission to the to the Australian Human Rights Commission (AHRC) Freedom of Religion and Belief in the 21st Century Project (AHRC Religion Enquiry) the *Anglican Church Diocese of Sydney* drew attention to the presentation of religion primarily as a matter for individual choice rather than a communal affair. The Sydney Anglican Diocese also stated that:
- ‘... religious people often meet together in organised groups, and traditionally the ‘freedom of religion’ has also been a defence of the life and identity of these groups.’⁷*
- (n) The Sydney Anglican Diocese stated further in this submission that this concern is reflected in the ICCPR and the Religion Declaration when they mention the place of religion communities, their organisations and the education of children.⁸
- (o) In its submission to the AHRC Religion Enquiry the *Ad Hoc Interfaith Committee* stated:
- ‘For most people, religion is a communal and public commitment, underscoring the fact that the person is not simply an isolated, autonomous individual but a person in solidarity with others. This solidarity is underscored also in other communities – locality, school, business, and cultural and sporting activities, and most particularly in the family (Article 16). In such communities people keep faith with the allegiances that give meaning to their*

⁶ Religion Declaration, Article 1.3.

⁷ Submission No 1533 to the Freedom of Religion and Belief Project by the Anglican Church Diocese of Sydney - www.humanrights.gov.au/frb/frb_submissions.html...

⁸ Anglican Diocese of Sydney Submission No 1533 - *ibid*.

lives. Respect for human rights requires the protection of the communities and associations by which a culture of human dignity flourishes.’⁹

- (p) The implications for faith-based organisations that follow from this are that they have the right under Article 6(b) of the Religion Declaration to practise their religion corporately. This includes the right:
 - (i) To decide that all or some roles within it are expected and required to both accept and practise its faith, and
 - (ii) To include certain religious dimensions within roles in the organisation.
- (q) Further, it is the view of HammondCare that, in their application of exceptions to laws on unlawful discrimination, courts and tribunals:
 - (i) Must not be called on to arbitrate on what is, or is not, a church doctrine, tenet, belief or teaching, and
 - (ii) Must not apply a narrow conception of what a ‘religion’ or ‘religious organisation’ is or should be.
- (r) Indeed HammondCare argues that courts and tribunals lack the competence to do so.
- (s) HammondCare recommends as follows:
 - (i) Recommendation 1 - That Australian law provide a clear and unequivocal acknowledgement of the right to religious freedom as a fundamental right.
 - (ii) Recommendation 2 - That Australian law provide a clear and unequivocal acknowledgement of the right to practise religion ‘in community’ by the establishment of faith-based organisations.
 - (iii) Recommendation 3 - That Australian law provide a clear and unequivocal acknowledgement that religious organisations are lawfully permitted to select employees sharing the same religious beliefs as those held by the employing religious organisation.
 - (iv) Recommendation 4 - That Australian law provide definitions of ‘religious institution’, ‘religious organisation’ or ‘religious body’ which are:
 - (A) not so narrow as to negate the fundamental human right to practise religion in community, including through faith-based organisations,

⁹ Submission No 1687 to the Freedom of Religion and Belief Project by the Ad Hoc Interfaith Committee - www.humanrights.gov.au/frb/frb_submissions.html.

- (B) broad enough to include non-denominational and independent organisations possessing faith-based missions or values.
- (v) Recommendation 5 - That Australian law provide a clear and unequivocal acknowledgement that genuine occupational qualifications for a position are not permitted to be determined 'externally' in ignorance of the religious mission, values and strategy of an employing religious organisation.
 - (vi) Recommendation 6 – That, in the event that Recommendation xx is not accepted, the current religious exceptions regime be maintained but extended ensuring that there is no lessening of the current protection accorded to freedom of religion.
 - (vii) Recommendation 7 – That, in the application of religious exceptions, Australian courts should not be called upon to arbitrate on the validity or otherwise of religious doctrines, tenets, beliefs or teachings.
 - (viii) Recommendation 8 – That, if the term 'religious susceptibilities' is retained in the context of religious exceptions, this term be clearly defined to embrace religious beliefs and values held by individuals and faith-based organisations.
 - (ix) Recommendation 9 – That, in respect of a particular job or position with a faith-based organisation, Australian law protect faith-based organisations in such a way as allow them to determine, in good faith, the inherent requirements of a job based on the organisation's own values, beliefs and principles.
 - (x) Recommendation 10 – That, in respect of employment by a faith-based organisation, Australian law protect faith-based organisations as regards a complaint of unlawful discrimination in circumstances where the organisation considers, in good faith, that its act of distinction, exclusion or preference is based on the organisation's own religious values, beliefs and principles.
 - (xi) Recommendation 11 – That Australian law acknowledge that a faith-based organisation's values, beliefs and principles are those values, beliefs and principles as are determined in good faith by the organisation itself.
 - (xii) Recommendation 12 – That Australian law acknowledge that faith-based organisations have the right to practise their religion 'corporately' and that this includes a right to decide that all or some roles within the organisation are entitled to include a requirement of acceptance and practice of a specified religious faith.
 - (xiii) Recommendation 13 – That Australian law acknowledge that faith-based organisations have the right to shape organisational advertisements and job descriptions at all levels in such a way as to include certain religious dimensions.

- (xiv) Recommendation 14 – That Australian law acknowledge that the terms of any government subsidies to faith-based organisations not be permitted to include requirements preventing such organisations from making decisions or following practices the result of which would be to damage or undermine the religious character, mission and values of the faith-based organisation.

4 Definition of discrimination – various places

- (a) HammondCare wishes to present a number of observations concerning a number of terms of particular interest to HammondCare.
- (b) HammondCare considers the term ‘discrimination’ to be problematic. Ordinary, dictionary definitions of the term ‘discrimination’ include:
- (i) ‘Perceiving differences or distinctions with nicety’,
 - (ii) ‘Using one’s judgement well’, or
 - (iii) ‘Observing a difference’.
- (c) As such, the term ‘discrimination’ is not necessarily negative. Indeed, it is often perceived in a very positive sense.
- (d) For this reason HammondCare recommends that the definition in the consolidated legislation be qualified by the addition of the adjective ‘unlawful’ and thus refer to ‘unlawful discrimination’ throughout the Bill.
- (e) HammondCare recommends as follows:
- Recommendation 15 - That the term ‘discrimination’, wherever it appears in the Bill, be replaced by the term ‘unlawful discrimination’.

5 Substantive equality and special measures to achieve equality – Subclauses 3(1)(d)(i) and 3(1)(e) and Clauses 21 and 79 to 82

- (a) In relation to the proposed objects of the Bill, Subclause 3(1)(d)(i) refers to the object of promoting ‘*recognition and respect within the community for the principle of equality (including both formal and substantive equality)*’.
- (b) However, neither the term ‘formal equality’ nor the term ‘substantive equality’ has been defined in the Bill.

- (c) The Explanatory Notes do provide some clarity when they indicate that:
- (i) ‘Formal equality’ requires people to be treated the same, regardless of their irrelevant personal attributes, and
 - (ii) ‘Substantive equality’ takes into account the effects of historical disadvantage and recognises that relevant personal attributes may need to be taken into account and accommodated in order to achieve equal opportunity.
- (d) Subclause 3(1)(e) proposes an additional object of the Bill, namely:
- ‘To recognise that achieving substantive equality may require the taking of special measures or the making of reasonable adjustments.’*
- (e) Clause 21 states that that ‘special measures taken to achieve equality’ will not be considered to be unlawful discrimination. Such measures are defined as:
- ‘...a law, policy or program made, developed or adopted, or other conduct engaged in, by a person or body is a special measure to achieve equality if:*
- (a) the person or body makes, develops or adopts the law, policy or program, or engages in the conduct, in good faith for the sole or dominant purpose of advancing or achieving substantive equality for people, or a class of people, who have a particular protected attribute or a particular combination of 2 or more protected attributes, and*
 - (b) a reasonable person in the circumstances of the person or body would have considered that making, developing or adopting the law, policy or program, or engaging in the conduct, was necessary in order to advance or achieve substantive equality.’*
- (f) Furthermore Clauses 79 to 82 propose that the Australian Human Rights Commission (AHRC) be granted the power to determine that a proposed measure is a ‘special measure’ designed to ‘achieve equality’
- (g) HammondCare is concerned that the concept of ‘substantive equality’ may be intended to support affirmative action programmes of and thereby foreshadow the introduction of such programmes designed to provide more favourable treatment to persons with certain protected attributes.
- (h) HammondCare is further concerned that the AHRC is proposed to be given the power to determine whether certain ‘special measures’ are acceptable in circumstances where they may amount to ‘formal’ unlawful discrimination. This is of concern to us.

- (i) HammondCare recommends as follows:

Recommendation 16 - That the reference to 'substantive equality' in Subclauses 3(1)(d)(i) and 3(1)(e) of the Bill be deleted.

Recommendation 17 - That Clauses 21 and 79 to 92 of the Bill be deleted.

6 Volunteers – Clause 6

- (a) The definition of 'employment' in Clause 6 of the Bill includes voluntary or unpaid work.
- (b) Many faith-based organisations such as HammondCare rely on the support and assistance of a large band of volunteers.
- (c) Our concern with Clause 6 is that, if the consolidated legislation were to have the effect of diverting managerial and financial resources away from service delivery towards the tasks of managing risk, litigation and developing protocols to serve new laws on unlawful discrimination, it is likely to impact adversely upon the invaluable contribution made by our volunteers as well as increasing the cost to the organisation, and by extension, to those served by HammondCare.
- (d) HammondCare is concerned about the increased compliance costs which would be imposed the effect of which would be to lessen our ability to sustain the very valuable contribution of volunteers.
- (e) Furthermore, HammondCare is unaware that unlawful discrimination in relation to volunteers has been a major societal problem. Consequently, the lack of evidence supporting the need for change is a further reason supporting our opposition to the inclusion of Clause 6 in the Bill.
- (f) HammondCare recommends as follows:

Recommendation 18 - That, in order to avoid imposing unnecessary further compliance burdens on the voluntary sector, volunteers remain exempt from laws on unlawful discrimination as proposed by Clause 6 of the Bill.

7 Constitutional issues - Clauses 11 to 13

- (a) Clauses 11 to 13 of the Bill set out its constitutional foundations.
- (b) The title of Clause 11 indicates that the Bill's 'main constitutional basis' is the 'external affairs power' in the Australian Constitution. The text of Clause 11 then proceeds to

reference various human rights and International Labour Organisation instruments as well as ‘matters of international concern’.

- (c) HammondCare is concerned about the Bill’s claimed basis of authority to deal with ‘matters of international concern’. We consider this concept to possess very dubious constitutional validity as it has a very tenuous link indeed to the external affairs power established under Section 51 of the Australian Constitution. In this regard we draw the Senate Committee’s particular attention to the case of XYZ v The Commonwealth (2006) 227 CLR 532 in which Callinan and Heydon JJ stated:

‘There is no case in this Court deciding that the international concern doctrine exists. There are dicta which support the view, or which some contend support the view that it does. But there is less to these dicta than meets the eye. Some of them do not in fact support the international concern doctrine as a means of widening s 51(xxix), rather, for example, they discuss whether it narrows s 51(xxix) in its treaty implementation aspect. It is curious that a doctrine potentially narrowing s 51(xxix) so far as it depends on treaties is said to widen s 51(xxix) where no treaty can be relied on. All the dicta, so far as they were approving, were unnecessary for the actual outcome of the particular reasoning in which they appeared. They tended to be passing remarks made in the course of enunciating some more final conclusion, but not all of them were directed to the international concern doctrine itself. Assuming that a matter of "international concern" can be interpreted and defined, the outer limits of and the difficulties in applying such a doctrine do not, with respect, appear to have been tested in the authorities.’¹⁰

- (d) HammondCare is also concerned that the Bill does not clearly reference the relevant Constitutional power for the proposed prohibition of unlawful discrimination on the grounds on ‘sexuality’, ‘gender identity’ and ‘marital or relationship status’.
- (e) For these reasons we are concerned that the Bill has been cast too broadly and that it purports to legislate in areas for which the Commonwealth has no clear constitutional head of power.
- (f) HammondCare recommends as follows:

Recommendation: 19 - That Clause 11 of the Bill be amended by removing the reference to ‘matters of international concern’.

Recommendation 20 - That a review of every aspect of the Bill be conducted to ensure that

¹⁰ XYZ v Commonwealth [2006] HCA 25, (2006) 227 ALR 495, (2006) 80 ALJR 1036 (13 June 2006) at par 217.

they are properly within the ambit of a power granted to the Commonwealth.

8 Protected attributes – Clause 17

- (a) Clause 17 includes ‘political opinion’ and ‘social origin’ as new ‘protected attributes’.
- (b) However, neither term is defined in the Bill nor is HammondCare clear as to their intended meaning.
- (c) Furthermore, it is HammondCare’s view that these new characteristics proposed by Clause 17 take the Bill beyond the protection of certain rights as envisaged of Article 2 of the ICCPR.
- (d) HammondCare recommends as follows:

Recommendation 21 - That Clause 17 of the Bill be amended by the deletion of the reference to ‘political opinion’ and ‘social origin’.

9 Conduct that offends – Subclause 19(2)

- (a) Clause 19(2)(b) of the Bill defines unlawful discrimination to include ‘conduct that offends, insults or intimidates’ another person. This new provisions will apply to all grounds and not just to racial vilification.
- (b) This is of concern to HammondCare as none of the current Commonwealth legislation dealing with unlawful discrimination states that conduct which ‘offends’ is unlawfully discriminatory.
- (c) Furthermore, we are concerned about the absence in Subclause 19(2)(b) of an ‘objectivity’ test and the fact that this provision, as currently worded, is not limited by words such as ‘reasonably likely to offend’.
- (d) During the 2012 Human Rights Day Oration, the Honourable James Spigelman AC QC, the former Chief Justice of NSW, made reference to a book by Jeremy Waldron’s titled ‘The Harm in Hate Speech’. In this regard Mr Spigelman stated:

‘From the perspective of society, Waldron emphasizes inclusiveness as a public good, providing an assurance and sense of security to all members of the society that they can live their lives without facing hostility, violence, discrimination or exclusion. This assurance affirms each person’s status as ‘a member of society in good standing....From the other perspective, of those who are meant to benefit from this assurance, the fundamental human right that is affirmed is the right to dignity. Hate speech undermines

the sense of assurance and denies the dignity of individuals.’¹¹

- (e) In his address Mr Spigelman supported Waldron’s contention that the protection of the dignity of members of society does not require that such members be protected from being ‘offended’. Mr Spigelman went on to state:

‘.. I do not believe that it should be the aim of these laws to prevent people from being offended. Protecting people’s feelings against offence is not an appropriate objective for the law.’¹²

- (f) HammondCare supports Mr Spigelman’s contentions in his address and considers the novel proposal in Clause 19 of the Bill to ‘extend’ the law of unlawful discrimination in Australia to cover ‘being offended’ to be a very dangerous innovation. We are further concerned that the effect of such a change would be to seriously restrict free speech in Australia.
- (g) As Mr Spigelman stated in the oration already cited, this innovation goes beyond the need to deal with a situation where someone is denied a position because of a ‘protected attribute’. He is concerned that it actually attempts to restrict the ordinary citizen’s day to day interactions at work and in other situations. As such, the Bill recommends a major move of the line drawn between ‘permissible’ and ‘unlawful’ speech.
- (h) Australia’s international treaty obligations do not require the Government to protect any person or group from being ‘offended’. There is However an obligation on the Government of Australia to protect freedom of speech.
- (i) In relation to political comment, we are concerned that, if the proposed provision were to be enacted, further problems in the arena of political communication needs to be anticipated. Oral and written freedom of expression is a fundamental defining characteristic of a modern and sophisticated democracy, it would be ‘courageous’ government that would choose to legislate to erode such a fundamental freedom. HammondCare is concerned about the possibility of having losing long-standing and well-respected freedoms and protections in Australia.
- (j) HammondCare also notes Mr Spigelman’s major reservations regarding the serious risks posed by the Bill in relation to freedom of speech in Australia. In his address Mr Spigelman pointed out that no other existing Commonwealth laws defined any act of ‘offending’ as unlawfully discriminatory. He states, and we concur, that there is no such

¹¹ *Freedom of speech warning on bill*, Sydney Morning Herald 10 December 2012, URL www.smh.com.au/opinion/political-news/freedom-of-speech-warning-on-bill-20121210-2b5pj.html.

¹² Spigelman, op cit.

right as a 'right not to be offended' In Australian law.

- (k) Mr Spigelman goes on to indicate that that he is unaware of any international human rights instrument or anti-discrimination statute in another liberal democracy which extends to conduct which merely causes offence. Mr Spigelman recommends extreme caution in relation to subjective test of being 'offended' as proposed in the Bill.
- (l) HammondCare recommends as follows:
Recommendation 22 - That Clause 19(2)(b) of the Bill be deleted.

10 Religious exceptions – Clauses 32 and 33

- (a) HammondCare is of the view that the spirit of current 'exceptions' protecting certain actions of religious organisations must to be preserved and strengthened in the consolidated legislation.
- (b) In fact, we encourage the Senate Committee to make every effort to ensure that the fundamental right to religious freedom is expressed in an affirmative sense rather than by way of 'exceptions'.
- (c) Since religious freedom is a fundamental right it is completely inappropriate for it to be defined in negative sense as an 'exception'. Rather, this fundamental right needs to be upheld in a positive sense. It is our view that the most appropriate way to achieve this aim is to ensure that, in the definition of 'unlawful discrimination', the language also addresses what is not unlawful discrimination. We see this as significantly preferable to the current, unhelpful and misleading use of 'exceptions'.
- (d) If freedom of religion were to be both affirmed and protected in a positive sense the need for exceptions would be negated. To assist the Senate Committee in its consideration of our proposal we strongly encourage it to consider the definition of 'unlawful discrimination' as proposed by Professors Patrick Parkinson and Nicholas Aroney in their January 2012 submission to the Commonwealth Attorney-General in the context of the Consolidation of Commonwealth Anti-Discrimination Laws Project.¹³
- (e) HammondCare's sensitivity about the 'language' of religious exceptions is that they tend to be misleading in that they fail to recognise and clearly express that religious freedom is not a 'special permission to discriminate' as granted by government but rather a 'fundamental human right' that government is obliged to protect. To some, the notion of

¹³ Consolidation of Commonwealth Anti-Discrimination Laws - Submission by Prof. Patrick Parkinson AM, University of Sydney Prof. Nicholas Aroney, University of Queensland January 2012, pp5-6.

religious exceptions leads them to a false conclusion that religious people and organisations are ‘above the law’ or are allowed to discriminate through legal loopholes¹⁴ and that this is somehow unfair or, at the very least, makes the law more complicated.

- (f) It is our view therefore that it is preferable for religious rights not to be cast in terms of ‘exceptions’ but rather as fully fledged rights in themselves.
- (g) However, if the Senate Committee is not minded to accept the recommendations as stated above, we urge it to recall that it is essential that the consolidation process not lead to any reduction of accepted freedoms celebrated in Australia - including the right to religious freedom. One of the Commonwealth Government’s principles in the consolidation of laws on unlawful discrimination is that there was to be no reduction in the existing protections provided by the religious exceptions.
- (h) Therefore, if religious exceptions are to be retained they must be both broadly drafted and robustly protected. Otherwise Australia runs the risk of discriminating against one of the protected groups that they are supposed to protect in denying religious people and faith-based organisations the right to act in accordance with their religious beliefs.
- (i) Any prohibition of unlawful discrimination must be drafted in such a way as to make it clear that there is no unlawful discrimination in circumstances where a right to freedom of religion is being legitimately exercised.
- (j) It is also essential that the definition of unlawful discrimination be drafted in a way which makes it clear that selection on the basis of an attribute does not constitute ‘unlawful discrimination’ against someone who does not possess that attribute if such a selection is based on either:
 - (i) A genuine occupational requirement, or
 - (ii) For the purpose of supporting another human right such as freedom of religion, freedom of association and freedom for persons of a particular ethnic, religious or cultural background to live in community in accordance with their particular convictions, beliefs and customs.
- (k) Likewise, it is essential that faith-based organisations remain free to select staff who adhere to the beliefs and values of the organisation without being accused of unlawful discrimination.
- (l) HammondCare recommends as follows:

¹⁴ For example, see ‘*A Humanist Manifesto for the 2010 General Election*’ at www.humanism.org.uk.

Recommendation 23 – That:

- (A) Clause 19 of the Bill be amended to include reference to the fundamental right to religious freedom within the definition of unlawful discrimination.
- (B) The Senate Committee consider the definition of ‘unlawful discrimination’ proposed by Professors Patrick Parkinson and Nicholas Aroney in their submission to the AHRC Religion Enquiry.¹⁵
- (C) If the Senate Committee does not accept our Recommendations in subparagraphs (A) and (B) above, that there be no reduction in the protection accorded by religious exceptions in legislation currently in force

11 Commonwealth-subsidised aged care - Subclause 33(3)

- (a) HammondCare wishes to express its view as to policy concerns relation to Subclause 33(3) which proposes to limit the general exception contained in Subclause 33(2).
- (b) Clauses 32 and 33 of the Bill provide broad exceptions related to religion. However, these exceptions are proposed not to apply to a body established for religious purposes in receipt of Commonwealth subsidies for aged care delivery.
- (c) The Explanatory Notes accompanying the Bill provide the reasoning behind Subclause 33(3), that is, its purpose is to counter concerns communicated the Government by older same-sex couples about their ability to access aged care services run by religious organisations, particularly when seeking to be recognised as a couple. The Explanatory Notes state:

‘When such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate. This applies regardless of whether the Commonwealth is the sole or even dominant funder of these services (that is, this applies even if the services are provided with a combination of Commonwealth and other resources). This position is also consistent with the Government’s broader aged care reforms.’
- (d) HammondCare understands that the proposed changes relate to the recipients of aged care services and that, in relation to employment decisions, aged-care providers would still be entitled to make decisions in conformity with the religious beliefs.
- (e) HammondCare’s concerns about the change proposed by Subclause 33(3) are as follows:

¹⁵ Parkinson and Aroney, op cit.

- (i) It is a completely contrary to the common sense approach to date which has been to recognise the contribution of religious bodies to aged care, while fully respecting their faith positions.
- (ii) It completely fails to acknowledge and respect the valuable contribution and religious liberty of faith-based aged care services.
- (iii) In some cases it will negate the right of some faith-based aged care service providers in receipt of Commonwealth subsidies to provide services in accordance with their religious principles, the very principles whose purpose they were originally established to serve.
- (iv) It deals with the issue of conflict of rights by legislative mandate without the benefit of a proper and fulsome consideration of all the principles involved. It simply proposes that one right should prevail over another and heavy-handedly extinguishes an important aspect of the fundamental right to freedom of religion.
- (v) If this proposal were to accepted HammondCare is seriously concerned that it will lead to further inroads being made into religious freedom of other faith-based entities in Australia.
- (vi) It totally misinterprets the relationship between Government and religious organisations in relation to the provisions of subsidies. The terms of any government subsidies to faith-based organisations must not be permitted to include requirements preventing such organisations from making decisions or following practices the result of which would be to damage or undermine the religious character, mission and values of the organisation. We contend that this aspect of the provision is ill-founded for the following reasons:
 - (A) Christian charities deliver the overwhelming majority of Australia's non-government welfare services.
 - (B) Providing subsidies to religious organisations will never accord to governments the right to change the mission or values of a religious organisation.
 - (C) Governments cannot have the same total control over inputs and processes of a funded program of a religious institution as if they ran the program(s) themselves.
 - (D) Regulation by Government of a religious charity's standards, outcomes and some processes is appropriate. But religious charities must remain 'religious' charities even when some of their programs receive government subsidies.

- (f) HammondCare recommends as follows:

Recommendation 24 - That Subclause 33(3) of the Bill be deleted.

12 Conflict of rights

- (a) Legal rights theorists remind us that rights will often conflict and that it is not always possible to find a tidy way to resolve such conflicts. But it is also important to seek to balance potentially conflicting rights.

- (b) In our experience, the actual number of incidents where even a perceived conflict has materialised is extremely low.

- (c) In his 2012 Human Rights Day Oration, James Spigelman stated as follows:

‘Human rights discourse, which has always been comfortable with privileging a right over an interest, has never successfully dealt with situations in which rights conflict. This is a context bedevilled by a conflict of metaphors: from ‘rights as trumps’ to ‘balancing’. As Benjamin Cardozo warned us: ‘Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.’¹⁶

- (d) To put it bluntly, the right to establish religious organisations is entirely extinguished if these organisations cannot maintain their religious values and mission.

- (e) As stated by Mr Spigelman in his oration:

‘When rights conflict, drawing the line too far in favour of one, degrades the other right.’¹⁷

- (f) HammondCare make particular reference to the following statements of Prof Patrick Parkinson and Nicholas Aroney in their submission to the Commonwealth Attorney General previously cited:

‘Great care needs to be taken to ensure that a focus on the first-mentioned right (freedom from discrimination) does not diminish the others (e.g. freedom of religion, association and cultural expression and practice). This can readily happen, for example, if freedom of religion is respected only grudgingly and at the margins of anti-discrimination law as a concessionary ‘exception’ to general prohibitions on discrimination. It can also happen if inadequate attention is paid to freedom of association and the rights of groups to celebrate

¹⁶ Spigelman op cit.

¹⁷ Spigelman. *ibid.*

and practise their faith and culture together. These dangers are real.’¹⁸

(g) Mr Spigelman made specific reference to the need to ensure that in the drafting of new law human rights that are ‘in creative tension with one another’ are ‘appropriately balanced’ and said that , if this is not done, Indeed, it is arguable that ‘Australia is not complying with its international obligations’.

(h) Mr Spigelman continued:

‘Some advocates for reform of anti-discrimination laws have a tendency to place a very high value on ‘non-discrimination’ and to concede ‘exceptions’ based upon freedom of religion, association or cultural expression only with great reluctance, if at all. Although they sometimes recognise that there is a need to give due weight to all human rights and to find an appropriate balance between them, it is generally not acknowledged that posing the question as one of identifying exceptions to the principle of non-discrimination prejudices the inquiry in favour of the right to be free of discrimination and against the rights to freedom of religion, association and culture, understood as both individual and group rights. Moreover, anti-discrimination laws tend to be highly individualistic in focus, and allow relatively little room for group rights, including the associational rights guaranteed and implied by Articles 18, 22, 23 and 27, ICCPR.’¹⁹

(i) HammondCare contends that it is essential that a balance be sought between two potentially conflicting rights which both flow from the right of religious freedom. These are:

(i) The general right of persons not to be discriminated against on the basis of certain protected attributes, and

(ii) The specific right of persons to practise their religious beliefs by the establishment of charities possessing a religious ethos.

(j) In its 2011 report following the completion of the AHRC Religion Enquiry²⁰ the AHRC cites the following statement from Anglicare Sydney:

‘... the general right of persons not to be discriminated against on the basis of religion ... the specific right of persons to practise their religious beliefs by the establishment of charities with a religious ethos ... In light of this, the most appropriate method to determine an appropriate outcome is to accept in principle that a specific right must, to

¹⁸ Parkinson and Aroney, op cit.

¹⁹ Spigelman, op cit.

²⁰ *2011 Freedom of Religion and Belief in 21st Century Australia - A research report prepared for the Australian Human Rights Commission*, Professor Gary Bouma, Professor Desmond Cahill, Dr Hass Dellal and Athalia Zwartz.

the extent of any conflict, prevail over a general right.’²¹

- (k) It is our view that, in circumstances where there is conflict between a general right and a specific right to religious freedom, there is a possibility that one or other right may be extinguished. We consider it to be a principle of contemporary human rights thought that governments and courts should make every effort to ensure that the effect of the exercise of a general right does not have the effect of extinguishing a specific right.
- (l) In light of this, we consider the most appropriate method for determining an appropriate outcome is to accept in principle that, to the extent of any conflict, a specific right must prevail over a general right.
- (m) The resolution of conflict, whether real or perceived, requires wisdom, sensitivity and tolerance. So great are the claims of religious freedom in a democratic society, however, that, unless individual safety or public order are threatened, religious freedom must be respected and permitted to be exercised freely.
- (n) HammondCare recommends as follows:

Recommendation 25 - That Australian law provide a clear and unequivocal statement that, in situations where there is a conflict of rights, a specific right to practise religious beliefs by the establishment of organisations with a religious ethos prevails over a general right not to be unlawfully discriminated against on the grounds of one or more protected attributes.

13 Publishing material re intention to engage in unlawful conduct - Clause 53

- (a) Current Commonwealth laws on unlawful discrimination prohibit the publication of an advertisement or notice which indicates an ‘intention to engage in discriminatory conduct’.
- (b) However Clause 53 proposes that this be extended from just advertisements to any publication whatsoever.
- (c) HammondCare is concerned that this provision proposes to make further inroads into the issue of freedom of speech and recommends that such a move be resisted.
- (d) HammondCare recommends as follows:

Recommendation 26 - That Clause 53 of the Bill be amended to ensure that the coverage of the law as it currently stands is not extended.

²¹ Anglican Diocese of Sydney Submission No 1533 – op cit.

14 Religion as protected attribute – Subclause 17(1)(o)

- (a) Concerns have been raised about the extent to which Australian human rights frameworks place emphasis on the rights of individuals. We have already made reference to the Anglican Church Diocese of Sydney’s submission to the AHRC Religion Enquiry where the diocese drew attention to the presentation of religion primarily as a matter for individual choice rather than a communal affair.²²
- (b) HammondCare submits that communities, given that they are more than a mere collection of individuals, have an existence in and of themselves and, as such, also have rights worthy of protection including the right to religious freedom.
- (c) HammondCare’s serious concerns about the proposal in the Bill for the inclusion of ‘religion’ as a ‘protected attribute’ in relation to work and work-related areas is that it only one aspect of a much more sophisticated topic – a topic which is not broached in the Bill or the Explanatory Notes. .
- (d) If the Government wishes to make any changes to the protection of religion in Australian law it must consider the entirety of its legal – in particular to ALL of its obligations under to Article 18 of the ICCPR and the Religion Declaration.
- (e) ICCPR Article 18 states:
1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
 2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
 3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
 4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.’*

²² Anglican Diocese of Sydney Submission No 1533, *ibid*.

- (f) In the absence of a proper consideration of all of Australia’s obligations under these instruments, as well as a proper consideration of individual and communal rights HammondCare does not support the inclusion of ‘religion’ as a ‘protected attribute’.
- (g) We also note the concerns expressed by James Spigelman about Subclause 17(1)(o) in his recent address already cited. Mr Spigelman is concerned that the effect of this provision will be to make blasphemy unlawful in the employment context but nowhere else. He makes specific reference to the highly-publicised and controversial Danish cartoons of the Prophet Mohammed which Mr Spigelman states could be published under the Bill but not taken to work.
- (h) HammondCare recommends as follows:

Recommendation 27 - That Subclause 17(1)(o) of the Bill be deleted.

15 Temporary exemptions – Clauses 83 to 86

- (a) It has been suggested that an appropriate mechanism for balancing rights to protection against certain forms of unlawful discrimination with other potentially competing rights including freedom of religion would be through provision for application to the AHRC for temporary exemptions.
- (b) HammondCare does not consider this to be an approach which is either appropriate or respectful of the fundamental right to freedom of religion...
- (c) HammondCare is of the view that the temporary exemption mechanism is appropriate in circumstances where the need for an exemption is temporary in nature and is totally inappropriate where the expressed justification is more enduring or even permanent in nature.
- (d) HammondCare recommends as follows:

Recommendation 28 - That temporary exemptions where they are referred to in Clauses 83 to 86 of the Bill be used only for situations that are temporary in nature and not to avoid the robust protection of religious freedom rights of individuals and organisations.

16 Burden of proof – Clause 124

- (a) Clause 124 proposes that, once some plausible evidence pointing to possible unlawful discrimination is adduced by a complainant, shift the burden of proof to the respondent who must then prove that the alleged unlawful discrimination was not a reason for the

conduct that is the subject of the complaint.

- (b) In the context of civil legal actions in Australia, it is a general rule that the onus of proof rests with the complainant who is required to establish that, on the balance of probabilities, the action complained of was carried out for a particular reason or with a particular intent.
- (c) We strongly content that this general rule not be lightly overturned.
- (d) HammondCare believes that a party's motives or intentions should never be lightly assumed or impugned and that in a dispute it is the responsibility of the complainant to establish the bona fides of their case. In addition, it is well-known that proving a negative is almost impossible and so an even greater burden will now be placed upon a respondent.
- (e) Clause 124 proposes a significant change to the law. Current Commonwealth laws on unlawful discrimination do not contain such a provision nor do unlawful discrimination laws in the States or Territories of Australia.
- (f) Furthermore, many businesses in Australia already feel compelled to settle speculative unlawful discrimination complaints regardless of the strength of the complainant's case in order to avoid the costs of litigation or damage to the business's reputation. To increase the likelihood of such actions would lead to the exacerbation of this problem.
- (g) In the absence of any clear basis indicating a need for the proposed change, or evidence of a systemic or obvious failure of the current legislative regime, HammondCare contends:
 - (i) That, these proposed changes should be opposed, and
 - (ii) That the general rule for civil actions should remain, that is, that the burden of proof remain with the complainant and not be imposed on the respondent.
- (h) HammondCare recommends as follows:

Recommendation 29 - That Clause 124 of the Bill be deleted.

17 Conclusion

- (a) HammondCare trusts that this submission has been of assistance to the Senate Committee in its deliberations.
- (b) We would be very happy to assist with any further consultation into the issues, and would appreciate being considered as a witness at any hearing.

Yours sincerely

Tara Michaels
Legal Counsel
HammondCare

Date: 24 January 2013