



*Australia*



Joint Preliminary Submission

**NSW Law Reform Commission**

Review and Report on the *Anti-Discrimination Act 1977* (NSW)

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## Introduction

Christian Schools Australia (CSA) is a national body that supports and represents schools for whom religious formation is an integral part of the education process. CSA schools educate more than 75,000 students across around 180 locations nationally, with 43 of those schools educating over 18,000 students in New South Wales.

The Australian Association of Christian Schools (AACS) represents over a hundred Christian Schools located in every state and territory across the country, educating over 44,000 students. The majority of AACS schools are open enrolment, serving families from a variety of socio-economic, cultural and religious backgrounds. Within New South Wales, there are 40 AACS member schools with over 18,000 students enrolled.

Adventist Schools Australia (ASA) are part of the largest protestant schooling system in the world with 9,489 schools, colleges and universities in over 100 countries, educating 2,044,709 students. Within Australia, ASA has 48 schools and 13 early learning services providing authentic Christian education to nearly 17,000 students, 18 of these schools are in New South Wales educating over 5,000 students.

Member schools of both CSA and AACS operate as independent, locally governed, religious organisations. Some are closely aligned with one or more Christian churches in their communities, while others have their heritage in a group of parents coming together to start a school. ASA schools operate systemically through a range of small systems aligned with church governance requirements.

Religious formation is key part of the aim of a holistic education in service of ‘the common good’ within our schools which seek to partner with parents to provide a Christ-centred, biblically grounded, culturally engaging and academically rigorous education. Christian School graduates have a strong sense of meaning, purpose and direction for their lives, and are more likely than others to contribute to society through engagement with civic institutions like trade unions and political parties.<sup>1</sup>

The inclusion of the religious (or spiritual) formation of students as an integral aspect of education is very much in line with the goals of the Alice Springs (Mparntwe) Education Declaration.<sup>2</sup> All jurisdictions across Australia, are signatories to the Declaration which asserts, in its Preamble:

*“Education plays a vital role in promoting the intellectual, physical, social, emotional, moral, spiritual and aesthetic development and wellbeing of young Australians, and in ensuring the nation’s ongoing economic prosperity and social cohesion.”*

We agree strongly that the education of the whole child is not complete unless it includes spiritual, moral, emotional and aesthetic development alongside the more commonly stated domains of intellectual, physical and social. Social cohesion is served well by such a view of education.

The Mparntwe Declaration is also important for its recognition of the role of parents.

*“Parents, carers and families are the first and most important educational influence in a child’s life. They have a critical role in early development, including social, emotional, intellectual, spiritual and physical wellbeing. They instil attitudes*

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<sup>1</sup> The recent Cardus Education Survey Australia (<https://carduseducationsurvey.com.au/>) provides extensive data on the holistic education provided by Christian schools in Australia, their impact on graduates through their lives, and the contribution to the ‘common good’ of society by these graduates.

<sup>2</sup> Council of Australian Governments. Education Council (2019). *Alice Springs (Mparntwe) Education Declaration*.

*and values that support young people to access and participate in education and training, and contribute to local and global communities. It is critical for the education community to work in partnership with parents, carers and families to support a child's progress through early learning and school.”.*

In the schools represented by this submission, the ideals of the Mparntwe Declaration are realised, embodied and celebrated. More details on the nature of these schools and the form of education offered are provided in Appendix One.

On behalf of the parents who choose such a faith-based education, and the church and faith communities that deliver it, schools represented in this preliminary submission are overt and particular about the beliefs and values that underpin curriculum, culture and practice, including employment practices.

This preliminary submission is responding to the invitation ‘to suggest what we [ the NSW Law Reform Commission] should consider in this review’ following the release of the Terms of Reference. It is preliminary in nature and does not seek to respond in detail to all the elements of the Terms of Reference. We would welcome the opportunity to meet with the Commission to discuss the Review and look forward to providing a more substantive submission in due course.

Looking in turn at the matters within the Term of Reference –

#### 1. whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards

To date, the Act has managed to protect the freedom of religious school communities through the use of exceptions and exemptions which our members rely upon to establish and maintain a distinctive Christian ethos and character within their schools. Without the protections provided by these exceptions, situations may arise where employment and enrolment decisions may fall foul of the Act, undermining the community of faith our schools seek to preserve.

We agree that the Act can and should be modernised as the existing structure and drafting approach is archaic and difficult to work with. However, any attempt to modernise or ‘reflect contemporary community standards’ within the Act **must not come at the cost of foundational and timeless human rights**. Whether human rights are presently ‘fashionable’ and enjoy community support is not an appropriate measure of either their importance or need for protection. Indeed, those human rights that may not have community support are those seemingly more needing clear legislative protection.

The equal enjoyment of rights was considered by the Expert Panel on Religious Freedom reporting in 2018, the most comprehensive independent review of religious freedom in Australia and other rights conducted in Australia.<sup>3</sup> The expert panel considered more than 15,000 submissions and consulted with 180 organisations in face-to-face meetings in every State and Territory. The Expert Panel Review had a broad scope, including to ‘consider the intersections between the enjoyment of the freedom of religion and other human rights’ and was charged with consulting ‘as widely as it considers necessary’.

After the extensive consultation by the panel of independent experts, the final report of the Expert Panel Review recommended, inter alia:

- *‘Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political*

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<sup>3</sup> *Religious Freedom Review: Report of the Expert Panel* (May 2018) (‘Expert Panel Review’)

*Rights when drafting laws that would limit the right to freedom of religion’ – Recommendation 2.*

- *‘Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion’ – Recommendation 3.*

These recommendations should guide the Commission’s consideration of ensuring the equal enjoyment of rights.

## 2. whether the range of attributes protected against discrimination requires reform

Once again, it is clear that the Act is long overdue for reform, the omission of protections against religious discrimination must be addressed. The Commission should adopt as its starting point the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW) and the consideration of Bill by a Joint Select Committee of the New South Wales Parliament.<sup>4</sup>

As Christian schools we fully endorse the positive statement of rights enumerated under Article 18 of the International Covenant on Civil and Political Rights. It highlights freedom of thought, conscience and religion as a positive, a right that may be enjoyed by all. Further, it affirms the right of parents to educate their children according to their religious and moral convictions. The adoption of provisions in line with Article 18 will offer a positive protection to faith based organisations and obviate the perception that exercising a religious right will negatively impact on other rights and the community.

In relation to other potential protected attributes, Christian schools did not oppose the introduction of ‘intersex’ as an additional protected ground in the *Sex Discrimination Act 1984* (Cth), nor was any exemption sought in relation to this ground.<sup>5</sup> A similar approach would be taken within New South Wales.

The possible inclusion of ‘gender identity’ as a ground of discrimination, however, needs to be balanced against the impact on other fundamental freedoms. The ideology underpinning the identification of ‘gender identity’ as a separate, or interchangeable, attribute to sex is highly questionable and under increasing scrutiny. The impact of the elevation of ‘gender identity’ to a protected attribute under the *Sex Discrimination Act 1984* (Cth) and other legislation is being increasingly felt and the unintended consequences only now being identified.

Concerns would also need to be recognised in relation to other potential grounds, such as ‘lawful sexual activity’, which could result in the fundamental moral codes of Christian and other Abrahamic religious traditions being undermined.

## 3. whether the areas of public life in which discrimination is unlawful should be reformed

We recommend great caution be taken in considering any proposals to broaden the areas of social interaction to which discrimination laws are applied. The need to balance human rights, ‘to better promote the equal enjoyment of rights’, requires the careful consideration of the impact of

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<sup>4</sup> Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, NSW Parliament, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (2021)

<sup>5</sup> Amendments made by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). The Explanatory Memorandum noting, as understood by Christian schools that ‘the separate ground of intersex status recognises that whether a person is intersex is a biological characteristic and not an identity’

discrimination law on associational rights, rights of free speech and conscience, and fundamental rights of religious freedom.

#### 4. whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination

We commend the Commission's intention to 'modernise' the Act' and recommend an updated and alternative definition of 'discrimination' be adopted to reflect the guidance of the UN Human Rights Committee in paragraph 13 of the Human Rights Committee's General Comment 18 (Non-Discrimination),<sup>6</sup> which states 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'*.

The way in which differentiation of treatment is legitimate must be spelled out in this approach which provides much greater clarity, utility and alignment with international law and best practice. A properly crafted definition would clearly articulate that actions taken in relation to the protection, advancement or exercise of another human right would not necessarily constitute discrimination and outline a framework for applying a test consistent with international law.

5. the adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law
6. the adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes
7. whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life

Experience in other jurisdictions has demonstrated the negative impact of well-meaning vilification provisions crafted with an unreasonably low definitional bar as to what constitutes vilification. Arguably, vilification complaints have been weaponised and resulted in the reduction of other human rights.

Similarly, it would potentially undermine the strong progress being made against sexual harassment for similar provisions to be introduced in relation to other protected attributes. This would especially be the case if they were extended to attributes where there are legitimate differences of views, and a mis-used harassment regime was again used to stifle reasonable and proportionate debate.

The potential introduction of 'positive obligations' in these areas would further amplify these concerns.

#### 8. exceptions, special measures and exemption processes

Of particular importance to our members is the freedom to employ staff who adhere to the faith and preference families whose values are aligned with the mission and ethos of the school.

Our schools want to be able to employ staff who are able to uphold, model and teach a distinctive Christian worldview without fear of defending costly discrimination claims in the courts. Ideally, we do not want to have this right grudgingly permitted through an exemption or exception where it appears to general society that our schools are given special treatment or allowed to unfairly 'discriminate' against people. We would much prefer to have positively worded provision that make clear it is not

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<sup>6</sup> *General Comment No. 18: Non-discrimination*, 37th sess (10 November 1989).

discrimination for religious schools prefer to preference staff and families of the same faith in employment and enrolment matters.

The current exemptions approach to the ‘balancing’ of human rights is highly problematic. It establishes, by default, a hierarchy of human rights, inconsistent with international law. Rights ‘protected’ by exemptions are very clearly relegated under this approach to ‘second-tier’ rights of lesser importance.

For these reasons, and others, it is vital that discrimination is properly defined to clarify and balance rights. This would allow exceptions and exemptions to operate correctly as dealing with unique or unusual situations.

#### 9. the adequacy and accessibility of complaints procedures and remedies

#### 10. the powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination

#### 11. the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws

It is held by many that the process of complaints under the Act is a form of punishment. If the Anti-Discrimination Board was to be granted powers to undertake investigations at its own initiative to address ‘systemic discrimination’ this has the potential to exacerbate these concerns.

The experience of Katrina Tait of Queensland, but while resident there the subject of a complaint in New South Wales, and the examples provided by Mark Latham MLC in the New South Wales parliament are chilling.<sup>7</sup> There must be a robust threshold test for complaints to proceed.

#### 12. the interaction between the Act and Commonwealth anti-discrimination laws

If a state-based jurisdiction is to remain in areas covered by Commonwealth legislation definitions should be consistent, or, if this is not possible, differences should be clearly identified, and a rationale provided in explanatory material. There is already considerable confusion with both State and Commonwealth discrimination and industrial and employment laws. With the Commonwealth currently reviewing exemptions for religious educational institutions, and proposing a religious discrimination bill, it is vital that the Commission take any proposed changes into account when considering amendments to the Act.

We urge the Commission to await the final recommendations of the Australian Law Reform Commission’s Inquiry into *Religious Educational Institutions and Anti-Discrimination Laws* to ensure greater clarity and consistency between State and Commonwealth anti-discrimination laws.

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<sup>7</sup> For a summary of the experience of Katrina Tait see <https://australiawatch.com.au/katrina-tait/>. The examples provided by Mark Latham MLC were given during his Second Reading Speech in relation to the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (NSW), see *Hansard*, NSW Legislative Council, 27 February 2020, p 7 (Mark Latham).