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Queensland Human Rights Act 2019

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Dear Professor Harris Rimmer

Independent Human Rights Review

Thank you for the opportunity to provide a submission in relation to your independent review of the *Human Rights Act 2019* (QLD) (“the Act”). We have addressed briefly our key concerns in relation to the Act and its current application but would welcome to provide more detailed information to the review in conjunction with oral evidence during any public consultations.

Introduction

Christian Schools Australia (CSA), Australian Association of Christian Schools (AACS) and Adventist Schools Australia (ASA), are national bodies that support and represent schools for whom religious formation is an integral part of the education process. CSA, AACS and ASA schools educate more than 130,000 students across around 300 locations nationally. Associated Christian Schools (ACS) represent a group of similar schools within Queensland. Combined with ACS our associations represent **85 Christian schools with over 50,000 students enrolled in these schools across Queensland.**

Member schools of AACS, ACS and CSA schools 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.

Our school parents have made a deliberate choice for a school that teaches, supports, nurtures and seeks to live out the values, tenets and beliefs of the Christian faith. Our school families journey together as part of a “community of faith”. A community which is often rich and diverse in socio-economic and cultural backgrounds but drawn together by the common set of values and beliefs. Each school may have a slightly different set of governing documents outlining their religious beliefs and reflecting their unique denominational or historical emphases. However, all share a strong commitment to the orthodox beliefs of the Protestant tradition and share the following key distinctives:

- Follow the Australian curriculum and meet all requirements for school registration;
- Seek to promote a biblical worldview through all teaching and learning areas across the curriculum;
- Expect staff to be adherents of the Christian faith and to reflect that faith in the myriad of relationships and interactions across the school community;
- Characterised as low-fee with a commitment to supporting the marginalised and disadvantaged through a range of programs, including fee subsidies, and other tailored support mechanisms.

Some member schools have a focus on educating the children of the local Christian community or a particular church community. In other situations, enrolment is open to all families from both faith and non-faith backgrounds who share or respect the Christian ethos of the school and are willing to support the teaching of those values and beliefs.

All of these factors are integral to the authentic Christian educational experience on offer for families who choose our schools for their children.

Is the Act meeting its objectives?

The Terms of Reference for the Review require an assessment of whether the Act is meeting its objectives to:

- protect and promote human rights;
- help build a culture in the Queensland public sector that respects and promotes human rights; and
- help promote a dialogue about the nature, meaning and scope of human rights.

In undertaking this assessment, we believe that it is critical that extensive consideration be given to the extent to which religious freedom is protected, promoted and understood.

The fundamental nature of religious freedom.

Freedom of religion truly is, as indicated by Acting Chief Justice Mason and Justice Brennan, ‘the essence of a free society’¹. Freedom of religion is at the very heart of the essential human rights. Acknowledgement of the need to protect freedom of belief has a history longer than any other human right in both international instruments² and domestic law of older European nations³.

Modern international human rights instruments are founded upon the *Universal Declaration of Human Rights 1948*.⁴ In the preamble to this document the centrality of freedom of religion (and also freedom of speech) is clearly established:

‘...the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people’

Preamble to Universal Declaration on Human Rights

Freedom of speech and belief is undoubtedly at the core of a pluralist liberal democracy. There can be no diversity without a multiplicity of belief and no freedom without the liberty to express those beliefs. True diversity and equality come not from the imposition of a narrow conformity but by the embracing and celebration of difference. While we may disapprove of what others believe and say, we must defend to the death their right to say it.⁵ This is at the very heart of Australian culture, reflecting our shared commitment to ‘*a fair go*’.

¹ *Church of the New Faith v Commissioner of Pay-roll Tax (Vic.)* (1983) 154 CLR 30.

² See, e.g., Peace of Westphalia 1648

³ See, e.g., 1598 Edict of Nantes

⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

⁵ To appropriate the quotation of Evelyn Beatrice Hall writing as S. G. Tallentyre in her 1906 book *The Friends of Voltaire* and often misattributed to Voltaire.

The ongoing importance of religious freedom in international law is reflected in the numerous instruments containing protections for both holding and manifesting religious faith. The most prominent of these protections is undoubtedly Article 18 of the International Covenant on Civil and Political Rights (ICCPR).⁶

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.*

The United Nations Human Rights Committee has provided additional interpretative guidance on Article 18 in its General Comment 22.⁷ As noted in the Andrews Committee interim report,⁸ this Comment gives the freedom a 'broad scope' and reinforces the 'fundamental' nature of the right.

Importantly, both Article 18 itself and the General Comment recognise the right to 'manifest' religion in 'worship, observance, practice and teaching' including 'in community with others'.⁹ This recognition of the need to 'live out' an individual's faith is an essential element of faith as noted above. In a complex contemporary society this is often done 'in community with others' through a variety of means, including corporate structures. **Christian schools, for example, are required to be incorporated by funding legislation,¹⁰ but are no less a communal expression of faith.** The importance of the community element of the protections have been recognised by the European Court of Human Rights commenting that they lay 'at the very heart of the protection' of religious freedom.¹¹

A number of other international instruments explicitly include recognition of the right to establish religious schools.¹² This builds on the rights of parents recognised in the ICCPR to 'ensure the religious and moral education of their children in conformity with their own convictions'.¹³ Similar rights are also recognised in the *Convention on the Rights of the Child* (CROC) to which Australia is also a signatory.¹⁴

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976) ('the ICCPR').

⁷ UN Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) ('General Comment 22').

⁸ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report, Legal Foundations of Religious Freedom in Australia* (2017) ('Andrews Committee interim report')

⁹ ICCPR Article 18(1)

¹⁰ See, e.g., *Australian Education Act 2013* (Cth) s75(2).

¹¹ *Hasan and Chaush v Bulgaria*, App No 30985/96, (2002) 34 EHRR 55, [62] quoted in Andrews Committee interim report [3.31].

¹² See, e.g., *Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief* Article 5, *Convention against Discrimination in Education* Article 5(b).

¹³ ICCPR Article 18(4).

¹⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Is religious freedom adequately protected, promoted and understood?

In our view the Act has failed abysmally to provide adequate protection for religious freedoms. As Aroney and Taylor comment in relation to the Act and equivalent instruments in other Australian jurisdictions, ‘they superficially rather than authentically give effect to the ICCPR rights which they list’.¹⁵

The Act does not adequately protect, promote and ensure understanding of religious freedom as evidenced by:

- The deficient nature of the right of freedom of religion and belief in section 20 of the Act,
- The inadequate protections against restrictions on freedom of religion and belief in section 13 of the Act, and
- The lack of effective protections for freedom of religion and belief in other legislation

These are addressed in turn below.

The deficient nature of the right of freedom of religion and belief in section 20 of the Act.

The Act had the explicit aim ‘to consolidate and establish statutory protections for certain human rights recognised under international law including those drawn from the ICCPR’.¹⁶ However a comparison of the provisions of section 20 with the language of Article 18 make the deficiencies clear. The description of the right to religious freedom in the Act in section 20 only captures the first two elements of the right as expressed in Article 18 -

20 Freedom of thought, conscience, religion and belief

- 1) *Every person has the right to freedom of thought, conscience, religion and belief, including—*
 - (a) *the freedom to have or to adopt a religion or belief of the person’s choice; and*
 - (b) *the freedom to demonstrate the person’s religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.*
- 2) *A person must not be coerced or restrained in a way that limits the person’s freedom to have or adopt a religion or belief.*

The Act fails to incorporate an equivalent to Article 18(4) of the ICCPR –

‘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.’

The importance of this right is reinforced by the clear statement in General Comment 22 ‘the liberty of parents and guardians to ensure religious and moral education **cannot be restricted**’.¹⁷ This is one of the very few rights described in this way as an absolute right.

¹⁵ Nicholas Aroney and Paul Taylor, ‘The Politics of Freedom of Religion in Australia: Can International Human Rights Standards point the way forward?’ (2020) 47(1) *University of Western Australia Law Review* 42, 48.

¹⁶ Human Rights Bill 2018 (QLD), Explanatory Notes, introduced 31 October 2018, 2. See also the ‘ICCPR source of human rights’, Schedule 1, *Human Rights Act 2024* (ACT).

¹⁷ General Comment 22, [8].

Despite this unequivocal endorsement of the fundamental and absolute nature of this right, it has simply been entirely omitted in the Act, a glaring and unacceptable omission.

RECOMMENDATION: that the Act be amended to include in section 20 a right in the same terms as Article 18(4) of the ICCPR.

The inadequate protections against restrictions on freedom of religion and belief in section 13 of the Act.

The Act provides in section 13(1) that:

'A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.'

This contrasts starkly with the ICCPR Article 18(3) which provides that:

'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.'

The test for 'reasonable limits' is a far lower standard than that of 'are necessary' that applies to constraints on religious freedom in international law.¹⁸ A standard of 'reasonableness' is far less likely to protect the rights of minorities than the more objective and certainly higher standard of 'necessity'.

Clearly the text of the ICCPR itself provides a narrow scope for limitation of religious freedom, only when '**necessary** ...'. General Comment 22 provides further guidance on the permissible restrictions on the 'manifestations' of religion or belief.¹⁹ The Comment outlining that:

'Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted.'

This is further reinforced by the Siracusa Principles,²⁰ relating to the conditions and grounds for permissible limitations and derogations enunciated in the ICCPR. Together the ICCPR, General Comment 22 and the Siracusa Principles, provide a high level of protection for the freedom to hold and manifest religion or beliefs.

The most comprehensive independent review of religious freedom in Australia was completed in 2018.²¹ An expert panel considered more than 15,000 submissions and consulted with 180 organisations in face-to-face meetings in every State and Territory. The 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 this extensive consultation by a panel of independent experts, the final report 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 Rights when drafting laws that would limit the right to freedom of religion' – Recommendation 2.*

¹⁸ See, e.g., discussion in Andrews Committee interim report [5.16].

¹⁹ General Comment 22 [8].

²⁰ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984).

²¹ Religious Freedom Review: Report of the Expert Panel (May 2018) ('Expert Panel Review')

- ‘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.**

The Expert Panel Review effectively provides further endorsement within the Australian domestic context for the Siracusa Principles. The Expert Panel Review in its regular references to both Commonwealth and State and Territory governments and legislation **clearly saw merit in the application of the international standards** for the protection of religious freedom.

RECOMMENDATION: that the Act be amended to ensure that the 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, consistent with Article 18(3) of the ICCPR.

RECOMMENDATION: that the Act be amended to include reference to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* when determining if a limitation on the right to manifest one's religion is necessary.

The lack of effective protections for freedom of religion and belief in other legislation

The Act can only be said to be successful in protecting, promoting and ensure understanding of religious freedom if this is evidenced by effective operational protections for the exercising of religious freedoms in Queensland.

The operative protections for religious freedom within Queensland, as much as they exist, are achieved largely through exemptions or exceptions in anti-discrimination law. In Queensland, as they apply to religious schools, this is currently provided by section 25 of the *Anti-Discrimination Act 1991* (QLD) in relation to employment and section 41 in relation to the enrolment of students.

These exemptions provide the only [poor] mechanism that currently protects religious freedom for Christian and other religious schools. While the Government has indicated its intention not to proceed at this stage with the further restrictions on this exemption as proposed by the draft *Anti-Discrimination Amendment Bill 2024*, further amendments have been flagged for the next term of Parliament. The amendments being considered, would add further conditions on the existing genuine occupational requirements test in relation to the employment of staff.

It is accepted that anti-discrimination or equal opportunity law inherently involves a balancing of human rights. No human right is absolute, and this includes non-discrimination and equality. General Comment 18 concluding that not every differentiation of treatment is discrimination.²² The Comment notes that **differentiation aimed at achieving a legitimate purpose under the ICCPR using reasonable and objective criteria will not constitute discrimination.** Effectively the desire for equality must at times be balanced.

These two understandings are central to the international human rights framework. The understanding that not all differentiation is discrimination and that rights must be carefully balanced if diversity and freedom are to be protected. Any claim for absolute ‘equality’, or for equality to be sought above all else, is not only misguided but is fundamentally inconsistent with international law.

In addition to the ‘balancing’ implicit in Recommendations 2 and 3 of the Expert Panel Review noted above, other recommendations establish clear principles regarding such balancing.

²² *General Comment No. 18: Non-discrimination*, 37th sess (10 November 1989).

Although the two recommendations of the Expert Panel Review focussing on schools directly referred to the *Sex Discrimination Act 1984* (Cth) they are relevant to the Act currently under consideration as they reflect important policy principles that the Review sought to establish.

Recommendation 5

The Commonwealth should amend the Sex Discrimination Act 1984 to provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status provided that:

- (a) the discrimination is founded in the precepts of the religion*
- (b) the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced, and*
- (c) the school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.*

Recommendation 7

The Commonwealth should amend the Sex Discrimination Act to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:

- (a) the discrimination is founded in the precepts of the religion*
- (b) the school has a publicly available policy outlining its position in relation to the matter*
- (c) the school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated, and*
- (d) the school has regard to the best interests of the child as the primary consideration in its conduct.*

Both in relation to the employment of staff and, more broadly the operation of the school, the Expert Panel Review, charged with considering ‘the intersections between the enjoyment of the freedom of religion and other human rights’, has effectively **endorsed actions taken by religious educational institutions** where:

- the actions are founded in the precepts of the religion
- the school has a publicly available policy outlining its position in relation to the matter
- the school provides a copy of the policy in writing to those people potentially directly affected by such actions, and
- when actions impact students, the school has regard to the best interests of the child as the primary consideration in its conduct.

These recommendations outline where, in the view of this independent expert panel, the appropriate balance lies between the religious freedom and other rights. More recently, Justice Rothman, who led the recent Australian Law Reform Commission (ALRC) inquiry into religious educational institutions indicated that, if not constrained by the terms of reference of that enquiry, that the law should be amended to include a ‘positive right’, for religious educational institutions:

“ ... religious education institutions, despite the provisions of the Sex Discrimination Act or any other discrimination legislation, or any law, written or unwritten, Commonwealth or State,

should be able to discriminate in favour of, or preference, on the basis of the person's adherence to or belief in the genuinely held religion, beliefs or tenets of the religious education institution."

Justice Stephen Rothman

Notre Dame University School of Law Annual Religious Liberty Conference, 12 April 2024

This echoes the views of the previous ALRC President, Justice Derrington, when she was considering this issues.

Given the lack of such a 'positive right' in the *Anti-Discrimination Act 1991* (QLD), and the potential moves to further narrow the existing exemptions, it is hard to see how the Act has made any positive contribution to the wider protection of religious freedom as a fundamental human right.

RECOMMENDATION: that following the amendment of the Act as recommended earlier, the *Anti-Discrimination Act 1991* be reviewed, and recommendations made to ensure that it adequately protects religious freedom.

The potential human rights protections in any act

In recent years, the widely accepted and understood characteristics protected in Article 26 of the ICCPR, 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' have ballooned to a list of 16 attributes in section 7 of the *Anti-Discrimination Act 1991* (QLD) with more proposed.

Some of these newly created categories of protected attributes, such as 'lawful sexual activity', 'sexual orientation' and 'gender identity' have been introduced without proper consideration of how they interact with existing protected characteristics, such as religious belief.

All the major Abrahamic faiths, including Christianity, include a moral code with standards of conduct regarding appropriate sexual activity for adherents, and these attributes as defined cut across those standards. The Act should be extremely cautious in relation to the recognition of human rights. Only those rights clearly defined and protected within international covenants to which Australia is a party should be recognised.

RECOMMENDATION: that only those rights clearly enunciated and protected in international covenants to which Australia is a signatory should be recognised in the Act.

As indicated above, we would welcome the opportunity to meet with you to discuss these concerns in more detail or provide evidence at any public hearings.

Yours faithfully



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