SUBMISSION TO THE REVIEW OF QUEENSLAND'S *ANTI-DISCRIMINATION ACT 1991*

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The Australian Association of Christian Schools (AACS) thanks the Queensland Human Rights Commission ('QHRC') for the opportunity to submit a response to the Discussion Paper *Review of Queensland's Anti-Discrimination Act* ('Discussion Paper'). Any review of legislation which may impact the way in which Christian schools operate is of great importance to us.

Introduction

AACS is an advocacy organisation which represents over one hundred schools and thousands of Australian families from a wide variety of backgrounds, cultures and denominations. Our schools are in every state and territory across Australia, ranging from very small to large; urban to regional, rural and remote. In Queensland ('Qld'), we represent ten schools.

The Nature of Christian Schools

Our Christian schools were originally established by parents out of a desire to see their children raised in a teaching and learning environment where they could be nurtured in the faith. Characterised as low fee, our schools operate autonomously and are accountable to their parent and school communities. Our parents have an expectation of a Christian environment for their children as they make a deliberate choice, and a financial commitment, to place their children in a school that teaches and models beliefs and values that are consistent with their home environment.

Christian schools strive to be holistic learning communities where all staff, volunteers and parents work together to provide a faith-based learning environment. The Christian values and beliefs modelled by staff are equally as important as the formal teaching programme.

Faith shapes all aspects of the Christian school educational model and is the foundation upon which the character and ethos of our schools is based. Religion is not simply taught as a stand-alone subject but permeates every aspect of the school's life and is embedded within all parts of the teaching and learning program.

Parents who enrol their children in our schools understand that Christian faith is the foundation of our schools' mission. Many parents from different or no faith backgrounds choose to send their children to our schools because they recognise the benefits of a Christian education. They accept and desire for these beliefs and values to be taught and lived out by members of the school community. To us, our values and beliefs are intertwined.

Religious Freedom

Respect for religious freedom is fundamental to the Australian way of life. This freedom allows individuals and communities to exercise their faith within the framework of Australian law and civic life. Our democratic systems and institutions, and the underlying Australian belief in the 'fair go', have served our nation well since its foundation. Religious freedom is a widely accepted but poorly understood human right within the Australian democratic context.[1] It is supported by the Australian Constitution[2], Commonwealth, State and Territory statute law[3] and affirmed in multiple international covenants to which Australia is a signatory.[4]

As mentioned in the Discussion Paper[5], religious freedom is protected in Qld by s 20 of the *Human Rights Act 2019* (Qld) ('*HRA*'):

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[1] Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) ('*Ruddock Report*') 13 [1.32].
[2] *Australian Constitution* s 116.
[3] *Criminal Code Act 1995* (Cth); *Fair Work Act 2009* (Cth); *Education Act 1990* (NSW); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1998* (Tas); *Constitution Act 1984* (Tas); *Education Act 2016* (Tas); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Equal Opportunity Act 2010* (Vic); *Racial and Religious Tolerance Act 2001* (Vic); *Equal Opportunity Act 1984* (WA); *School Education Act 1999* (WA); *Criminal Code Act 2002* (ACT); *Discrimination Act 1991* (ACT); *Human Rights Act 2004* (ACT); *Anti-Discrimination Act 1996* (NT); *Education Act 2015* (NT).
[4] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 18, 26 ('*ICCPR*'); *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990 generally, and for Australia, 16 January 1991) art 14; *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969 generally, and for Australia, 30 October 1975) art 5(d-vii).
[5] Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act* (Discussion Paper, November 2021) ('*Discussion Paper*') 114.

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.

Christian schools are a small sub-set of the independent schools sector and provide one expression of schooling choice among a broad range of educational options available for parents. Our schools play a valuable role within Australian society by providing a distinctly faith-based education for families who desire such an education for their children. The continued popularity and growth of Christian schools across Australia demonstrates,[6] more than ever, the need for the protection of the human right to the freedom of religious expression in this country.

The Expert Panel on Religious Freedom chaired by the Hon Philip Ruddock AO ('Expert Panel'), made the following recommendation to Commonwealth, State and Territory Governments regarding amendments to anti-discrimination legislation:

1. (a) consider the use of objects, purposes or other interpretive clauses in such legislation to reflect the equal status in international law of all human rights, including freedom of religion;
2. (b) 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.

While the right to freedom of religion is listed within the *HRA*,[7] it is not adequately protected, particularly for private entities. The Discussion Paper proposes further limitation of this freedom through the removal of certain exemptions for religious bodies and religious educational institutions. This submission will attempt to demonstrate where the *Anti-Discrimination Act 1991* (Qld) ('*Act*') should be amended, or not amended, to better protect this right, in the context of Christian schooling, and in accordance with the *HRA*.

[6] Rebecca Urban, 'Faith Shown in Christian Schools as Enrolments Rise', *The Australian* (online, 27 December 2019), <https://www.theaustralian.com.au/nation/faith-shown-in-christian-schools-as-enrolments-rise/news-story/db4dba3f9a70bd61a630aa5a0e1b005c>.
[7] *Human Rights Act 2019* (Qld) s 20.

Commonwealth Religious Discrimination Bill 2021

Recently, the Commonwealth has proposed reform in the area of religious discrimination law as recommended by the Expert Panel. Disappointingly, the *Religious Discrimination Bill 2021* (Cth) ('*RDB*') appears to have stalled in the Senate after the House of Representatives made a number of amendments to the legislative package that were unacceptable to the Government. AACS would encourage the QHRC to postpone consideration of any amendment to discrimination law affecting religious individuals and bodies until twelve months after the upcoming Federal election. We believe this will give the new Commonwealth parliament the chance to reconsider the *Religious Discrimination Bill 2021* (Cth) in the event that it does not pass before the election. Waiting for the Commonwealth matters to be dealt with will give the Government a better idea of how reform should be proposed in Qld. We trust that the QHRC will consider all of this, and its obligation to religious Queenslanders, when determining any amendment to the Act.

Recommendation 1: that the QHRC recommends that the Queensland Government postpones consideration of any amendment to the Act until 12 months after the next Federal election.

The Discussion Paper is divided into several parts, this submission will address the parts separately while attempting to answer the discussion questions posed. Where a direct answer has not been given, general comments will be offered on the subject.

General Comments on Part B

Part B discusses the impact of intersectionality on discrimination and how the current legal framework may not adequately address intersectional discrimination.[8] A general comment on this subject is that any lowering of the legal thresholds for discrimination would make lawful operation in public life for certain persons, particularly Christian schools, extremely difficult. The characterisation of discrimination as a 'feeling',[9] implies a subjective standard and we strongly recommend against shifting away from an objective definition of discrimination. While we can appreciate the harm that discrimination can cause and the limitations of a 'reactive' system, the maintenance of objective legal tests and the ability to

[8] *Discussion Paper* (n 6) 19.
[9] Ibid.

respond to complaints is essential for Christian schools to navigate and comply with discrimination law.

Recently, in our submission to the ACT Government's Review of the *Discrimination Act 1991* (ACT),[10] we discussed the potentially burdensome nature of a regulatory approach to prevention, especially when in the form of a positive duty. We are concerned that where such a duty is coupled with 'level two' or 'level three' regulatory measures,[11] the QHRC becomes a moral policeman. Our schools have no desire to be monitored by a government authority trying to find discrimination where it does not exist. The reactive, complaints-based system is much less invasive and burdensome by comparison.

The Discussion Paper referred to 'community expectations'[12] but exactly which community and what these expectations are remains unclear. AACS represents ten school communities in Qld, that share not only the ethos and beliefs of the school but also support its mission and role in society. The point is that there is a diversity of views within 'the community'. Our member schools and their parent communities expect that their schools will continue to operate as they have always operated, well into the future, and that their State Government would not seek to limit their ability to so do. Any such limitation is a breach of the internationally recognised human right to freedom of religion and the right of parents to choose a Christian education for their children.

Part C: Options for Reform

Should the Act clarify that direct and indirect discrimination are not mutually exclusive? (Question 1)

As the Discussion Paper states, the High Court has held that direct and indirect discrimination are mutually exclusive concepts.[13] Therefore, 'clarifying' by fusing the two concepts undermines the High Court authority.[14] While AACS recognises that tribunals may

[10] Australian Association of Christian Schools, Submission to the Justice and Community Safety Directorate (ACT), *Inclusive, Progressive, Equal: Discrimination Law Reform* (28 January 2022) <https://aacs.net.au/pdf/ACT%20Discrimination%20Act%202021%20Final.pdf>.
[11] *Discussion Paper* (n 6) 82-3.
[12] Ibid 29.
[13] Ibid.
[14] *Waters v Public Transport Corporation* (1992) 173 CLR 349; [1991] HCA 49 (disability discrimination under *Equal Opportunity Act 1984* (Vic)); *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165; [1989] HCA 56 (treatment that is facially neutral would not fall within direct discrimination under *Anti- Discrimination Act 1977* (NSW)); *Australian Medical Council v Wilson* [1996] FCA 1618 (under *Racial Discrimination Act 1975* (Cth)); *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78; [1997] FCA 1311 (under *Sex Discrimination Act 1984* (Cth))

have found that certain conduct amounts to both direct and indirect discrimination,[15] the two concepts remain distinct and attract different legal tests.[16] We believe it is still possible, and preferable, for the two concepts to remain separate, and for the law to recognise that certain conduct can amount to both direct and indirect discrimination. This is what has occurred in the ACT.[17]Therefore, 'clarification' here could involve adopting the ACT drafting.[18] The ACT drafting appears to resolve the issue without outrightly rejecting the High Court authority on the matter. Conduct can be both direct and indirect discrimination simultaneously for different reasons, this does not conflate the two concepts. AACS remains concerned about lowering the threshold for a finding of discrimination, so if the 'clarification' is drafted in such a way that maintains the legal thresholds where they are currently, then AACS may be able to support this.

Recommendation 2: that care is taken not to conflate the two distinct concepts of direct and indirect discrimination, nor to lower the legal threshold for discrimination.

Should the test for direct discrimination remain unchanged, or should the 'unfavourable approach' be adopted? Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach? (Question 2)

AACS believes the current 'comparator' test remains the better legal test, as it is objective. A shift to the 'unfavourable approach' appears to shift the test to a subjective standard, lowering the threshold for discrimination, potentially resulting in many corporations being subject to discrimination claims for conduct that would otherwise not be discriminatory.

Currently, there is no reasonableness element to the test for direct discrimination but there is for indirect discrimination. The example given of a local Council in Victoria banning a complainant from their precinct resulting from behaviour caused by mental illness being archetypal.[19] While there may not be any doubt that the individual could not be held liable for their actions, the conduct of the Council should not be seen as discriminatory where the intention was to prevent public nuisance and maintain the safety of those within the precinct. Under the current law in Qld, the Council could argue that there was no 'less favourable' treatment vis-à-vis a person without the disability, as the same behaviour by the 'comparator' would have been met with the same response by the Council. This case

[15] For example, *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249 (under appeal).
[16] *Waters v Public Transport Corporation* (1992) 173 CLR 349; [1991] HCA 49.
[17] *Discussion Paper* (n 6) 29.
[18] *Discrimination Act 1991* (ACT) s 8.
[19] *Discussion Paper* (n 6) 33; *Slattery v Manningham City Council (Human Rights)* [2013] VCAT 1869.

demonstrates how by changing the test to 'unfavourable treatment', the threshold is lowered for the finding of discrimination.

Recommendation 3: that the objective 'comparator' test remains unchanged.

Should the test for indirect discrimination remain unchanged, or should the 'disadvantage' approach be adopted? (Question 3)

To a certain extent, neither the current nor proposed tests for indirect discrimination appropriately protect the attribute of religious belief or activity. Religious belief or activity is not a physical or fixed attribute. Using the example of an employment policy stating that a certain set of Christian beliefs is a requirement of the position, candidates or staff who hold, or develop, beliefs at odds with the religious beliefs of the school could argue that their sincerely-held beliefs prevent them from complying. It is presumed here that within the context of a faith-based school, the majority of employees hold the beliefs of the school and that this cohort is the relevant comparative cohort of a higher proportion. If the school's policy is seen as reasonable then there is no discrimination, if however, it is not, then it is considered discrimination. Conformity is valued within a religious organisation. Disagreement, however respectful, about a fundamental doctrine of the Christian faith may not be tolerated by a religious body, indeed, it may defeat the entire purpose of the religious body. The same can be said of a religious educational institution. The fact that an employment policy seeking adherence to the religious beliefs upheld by a religious school has the potential to be discriminatory defies common sense and is the raison d'être for the employment exemption for religious educational institutions. Indeed, it is argued elsewhere in this submission that the exercise of the right to freedom of religion cannot and should not be seen as discrimination.

Returning to the question, AACS is concerned that if the exemption is removed or narrowed, then removing the 'proportionality' test may lower the bar for a finding of discrimination in the situation outlined above. The Discussion Paper mentions that the 'proportionality test' is a difficult evidentiary burden to meet but is the purpose of the law to set an objective standard, or to make it easier for claims to be brought? It cannot be assumed that every claim is meritorious, and the law should account for this reality.

Recommendation 4: that the test for indirect discrimination remain unchanged.

Do you support a unified test for both direct and indirect discrimination? Why or why not? (Question 4)

As the Discussion Paper mentions, a unified test would be a significant departure from the current law and Australian jurisprudence.[20] As the High Court stated in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, 'there is a common law of Australia, rather than of each Australian jurisdiction'.[21] Therefore, it seems impractical and unwise for Qld to depart from the rest of the Australian Commonwealth in the matter of discrimination law.

However, a unified test could assist with the issue of a lack of a 'reasonableness' element in the test for direct discrimination. As previously mentioned, corporations lack a defence to direct discrimination even when the conduct is entirely reasonable in the circumstances.[22] We would not wish to see our schools brought before tribunals to answer for conduct that was entirely reasonable in the circumstances.

Recommendation 5: that a unified test is investigated.

Should the onus of proof shift at any point during the process? (Question 8)

As outlined in the Discussion Paper the complainant has the burden of substantiating the complaint of discrimination and then the respondent must then prove whether an exemption applies. Our schools are comfortable with the current model and would not wish to see the burden of proof shifting entirely to the respondent, whereby a presumption of discrimination applies and the respondent must rebut the presumption in order to discharge the burden. It is our strong belief that a reversal of the onus of proof would result in an increase in vexatious claims and litigation against Christian schools in relation to employment decisions.

Recommendation 6: that no changes be made to the onus of proof.

Should the Act include a direct right of access to the tribunals? Should a complainant or respondent be entitled to refer a complaint directly to a tribunal? Should a person be entitled to apply directly to the Supreme Court where the circumstances of a complaint raise matters of significant public interest? What are the risks and benefits of any direct right of access? How

[20] *Discussion Paper* (n 6) 37.
[21] (2007) 230 CLR 89, 152 [135].
[22] *Slattery v Manningham City Council (Human Rights)* [2013] VCAT 1869.

could the process be structured to ensure that tribunals and the Supreme Court are not overwhelmed with vexatious or misconceived claims? (Question 10)

While AACS can see a benefit in having a right to refer a complaint directly to a tribunal, our concern is that such a right will be abused by vexatious or litigious complainants as a punitive measure against the school. Perhaps a better process would be to allow direct access where both parties agree. This would benefit the resolution of complaints that have no possible chance of conciliation and/or that contain complex issues of law or fact that must be determined by an independent arbiter.

The same could be said about direct application to the Supreme Court. If the same process applies, where both parties must agree to an application to the Supreme Court, this may alleviate the concern about vexatious claims. A further limitation on direct application could be limiting who can apply to the Supreme Court on the principle of locus standi. By limiting applications only to the parties directly involved, the chance of vexatious litigation reduces as third-party advocacy groups are prevented from appearing.

Recommendation 7: that direct access to tribunals or the Supreme Court is only allowed where both parties agree to it.

Recommendation 8: that standing to apply to the Supreme Court is only granted to the parties to the complaint.

Should the Commission be allowed to provide reasonable help to those who require assistance to put their complaint in writing? How would this impact on respondents? (Question 12)

AACS can see the need for assistance to be provided to certain vulnerable complainants who may not be physically, or mentally, capable of putting a complaint in writing. However, allocating that role to the same body which conducts conciliation may compromise the independence of the conciliator, and the integrity of the conciliation process. To alleviate this potential for bias, AACS recommends that respondents are also offered the same assistance.

Recommendation 9: that provision of assistance for the writing of complaints is also offered to respondents in the compiling of their response.

Is one year the appropriate timeframe within which to lodge a complaint? Should it be increased, and if so, by how long? (Question 14)

AACS believes one year is the appropriate timeframe, consistent with other Australian jurisdictions for similar complaints.[23] As our members are likely to be respondents in any such complaint, we would prefer the status quo to be maintained for the sake of respondents. One year should be more than enough time for an aggrieved party to make a complaint. Any longer than this and it becomes unfair on the respondent to have the threat of litigation hanging over the organisation.

Recommendation 10: that the timeframe within which complaints must be lodged is not increased.

Should an objects clause be included? If so, what are the key aspects that it should contain? (Question 19)

AACS believes that an objects clause should be included in line with Recommendation 3 of the Expert Panel with an object 'to reflect the equal status in international law of all human rights, including religious freedom'.[24] Some acceptable models to consider include the objects clause of the *Religious Discrimination Bill 2021* (Cth) or the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW).

Recommendation 11: that a new objects clause be included in line with Recommendation 3 of the Expert Panel.

Do you support the introduction of a positive duty in the Anti-Discrimination Act? (Question 21)

AACS submits that such a duty could be onerous on Christian schools for several reasons. To comply with this duty, hours of training will be required for staff to ensure they are aware of their obligations under such a duty. While our member schools want to avoid harmful discrimination in all forms, they would not wish for the legal duty to become burdensome. As faith-based organisations or 'religious bodies' our schools are unique in their worldview and approach to education. As organisations partial to a certain set of beliefs, our schools rely on exceptions to discrimination law, implying that certain acts and practices fundamental to our schools' existence are otherwise considered discriminatory. This would

[23] *Discussion Paper* (n 6) 58.
[24] *Ruddock Report* (n 1) 47.

mean that such a duty may be unworkable in our schools. It is foreseeable that our schools may be the subject of burdensome litigation if the QHRC were empowered to enforce such a duty through the bringing of complaints. AACS would not wish to see our schools' resources crippled by such burdensome litigation.

Expanding on above, the notion of a 'positive duty' to eliminate discrimination in a religious school proceeds from a fundamental misunderstanding of international law. The exercise of religious freedom *is not* discrimination. As Adjunct Associate Professor Mark Fowler recently clarified:

> Equality is a fundamental right. However, while most of the attention given to religious freedom is directed to the permissible grounds for limitation of that freedom, the central focus for the right to equality is a threshold one, requiring attention to the conditions in which the right will be enlivened. This is because international law recognises that the protection to equality will not apply to all acts of 'differentiation'. Equality is thus not a right that can be assumed to immediately apply to all conditions. Indeed, there may be legitimate forms of distinction that will not give rise to a breach of the right to equality. It is, for example, not contentious that the equality right will not be relevant where a comparison is being made between matters that are not alike in substance. It is the nature of the criteria that are being compared that will determine whether questions of equality can arise. This principle applies to the right to equality on the basis of religious belief and activity, as it does to other protected attributes.
>
> These notions are reflected in the applicable human rights law. The right to equality, or freedom from discrimination is contained at Article 26 of the ICCPR. The United Nations Human Rights Committee's General Comment 18 on Article 26 provides:
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> > The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[25]
>
> This statement is not qualified by necessity (as is the right to religious freedom under Article 18(3)), nor does it require that the purported differentiation is the most appropriate means of achieving the purpose, rather the test is to achieve a legitimate purpose and be determined by reasonable and objective criteria.
>
> To adopt the phraseology of the United Nations Human Rights Committee, where a religious body acts in accordance with its religious precepts it is exercising a 'differentiation' that is 'reasonable and objective', where 'the aim is to achieve a purpose which is legitimate under the

[25] *Human Rights Committee, General Comment No 22: Article 18, 48th sess, (20 July 1993).*

Covenant', being the manifestation of religious practices as protected by the Covenant, consistent with a democratic and plural society.[26]

When religious schools act in accordance with the protections afforded under Article 18(4) they are operating according to criteria that have already been determined to be 'reasonable and objective' according to the internal coherence of the *ICCPR*. They are acting to give effect to a purpose which is 'legitimate under the Covenant'.

Recommendation 12: that any introduction of a positive duty in the Act does not infringe upon religious body, such as a Christian school, acting in accordance with its religious beliefs .

Should the statutory framework be changed to incorporate a role in regulating compliance with the Act and eliminating discrimination? (Question 22)

Our members would be very concerned with such a dramatic increase in the powers of the Commission, particularly if 'level two' or 'level three' regulatory powers are considered.[27] Such an increase in regulatory power would most certainly compromise the independence and impartiality of the Commission. Respondents could have no confidence in the ability of the Commission to conciliate complaints if they are also acting as 'police' and 'prosecutor' when it comes to discrimination. Introducing 'level three' regulatory powers to the Commission would be particularly insidious and inappropriate. The framework would have to be very stringent to prevent vexatious investigations being conducted into our schools' religious teaching programs from an ideologically-driven and potentially anti-religious regulator.

Recommendation 13: that any regulatory responsibility for compliance and eliminating discrimination be given to a body separate to that which is responsible for conciliation and arbitration of complaints.

Recommendation 14: that any regulatory framework remains at 'level one' of the regulatory pyramid.

[26] Mark Fowler, Submission to Australian Parliament Legal and Constitutional Affairs Legislation Committee in respect of the legislative package containing the Religious Discrimination Bill 2021, (https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Religiousdiscrimination/Submissions

[27] *Discussion Paper* (n 6) 82-3.

Part D: Coverage of the Act

Should there be a new definition of gender identity, and if so, what definition should be included in the Act? (Question 26)

The Discussion Paper refers to the *Yogyakarta Principles*, which use the following definition of gender identity: 'the person's internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth.'[28] While AACS accepts that in a pluralistic society there can be differing definitions of gender identity, our schools hold to a religious belief which views gender identity in accordance with biological sex.[29] As a result, we ask that a definition of gender identity that is objective, in accordance with biological sex, is accommodated by the statutory definition.

Recommendation 15: that the statutory definition of 'gender identity' in the Act accommodates an objective definition of gender that accords with biological sex.

Should there be a new definition of sexuality, and if so, what definition should be included in the Act? (Question 27)

Any new definition of sexuality must recognise that in a pluralistic society, some individuals and organisations, particularly religious organisations, may have differing views. We seek assurances that the sincerely held religious beliefs of our schools in relation to Biblical sexual ethics and morality will not be deemed discriminatory when taught in our schools, especially where a commitment has been sought to uphold, or not to undermine, these beliefs as a condition of enrolment or employment. As mentioned above, the exercise of religious freedom *is not* discrimination.

Recommendation 16: that the definition of sexuality is not limited, or broadened, to the extent that it would render discriminatory the teaching of religious beliefs.

[28] Ibid 97.
[29] Genesis 1:27; 2:20-24; Ephesians 5:21-33; 1 Timothy 2:8-15; Titus 2:1-8.

Does the terminology used to describe any existing attributes need to be changed? For attributes that have a legislative definition in the Act, do those definitions need to change? (Question 29)

The definition of the attribute of 'religious belief' could include reference to a belief that is 'sincerely held' as per the definition at law.[30] AACS finds it curious that the attribute of religious belief and religious activity was left out of the Discussion Paper, given that it was recently explored by the Ruddock Review[31] and was a priority of the Commonwealth Government. AACS recommends that this definition is included as it may prevent tribunals and courts form having to hear argument, and rule, on religious doctrine.

Recommendation 17: that the definition of the attribute of 'religious belief' be specified to that which is 'sincerely held'.

Should the attribute of 'gender' be introduced? Should it be defined, and if so, how? (Question 35)

AACS does not believe this is necessary given the attribute of 'gender identity' is already protected and defined by the *Act*. AACS would have to see further evidence of why a separate attribute of 'gender' must exist alongside 'gender identity'.

Recommendation 18: that a separate definition of 'gender' not be introduced.

Should an additional attribute of sex characteristics be introduced? Should it be defined, and if so, how? (Question 36)

AACS believes that the attribute of 'sex characteristics' could easily be accommodated by the 'sex' attribute currently listed in the *Act.* Given that the 'sex' attribute remains undefined in the *Act*, it may be necessary to add a definition to incorporate 'intersex status' and 'sex characteristics', where the law does not already recognise this.

Recommendation 19: that the 'sex' attribute is defined to incorporate 'intersex status' and 'sex characteristics'.

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[30] *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 152 CLR 120; for further discussion see Mark Fowler, Submission No 146 to the Legal and Constitutional Affairs Committee, Australian Senate, *Religious Discrimination Bill 2021 [Provisions]; Religious Discrimination (Consequential Amendments) Bill 2021 [Provisions] and Human Rights Legislation Amendment Bill 2021 [Provisions]* (February 2022) 15 [26]. .

[31] Ruddock Report (n 1).

Should competitive sporting activity be more clearly defined? (Question 40)

Our members must maintain the ability to set their own rules for participation in intra-school sport and would consider the determination of such rules as an internal matter. However, AACS would like to see clarification for inter-school sport. If this could be deemed competitive, this would allow policies to be set regarding standards for gender categorisation. For reasons already discussed, our members would be concerned if inter-school sport was not deemed competitive and therefore not subject to an exemption.

Recommendation 20: that intra-school sport policy is left for each school to determine individually, especially in the case of independent schools.

Recommendation 21: that inter-school sport policy is included in the definition of 'competitive sporting activity' to allow gender categorisation rules to be applied via an exemption to the Act.

In what areas should exemptions for religious bodies apply, and in relation to which attributes? (Question 41)

It appears that this exemption may apply to religious schools in areas other than the work area (employment) and the education area (enrolment and teaching/instruction). This may cover conduct such as the formulation of school policies. AACS seeks clarification that this indeed the case. To allow Christian schools to continue to operate in accordance with their beliefs, the exemption under s 109(1)(d) may need to apply to certain attributes.

Recommendation 22: that the religious bodies exemption in s 109(1)(d) is clarified in relation to its application to Christian schools citing specific examples where required.

Should religious bodies be permitted to discriminate when providing services on behalf of the state such as aged care, child and adoption services, social services, accommodation and health services? (Question 42)

The assumption that underpins this question is that these religious bodies are providing services *on behalf of the state* but these bodies are providing services to the *people* of the state. The state, in considering this to be of benefit to it, opts to provide some funding to assist with the costs of such a service. In many instances, the state does not have to run its own service because the religious bodies provide it adequately. Many of these services are

run parallel and in competition to state-owned and provided services, but in some instances the state does not run its own service because religious bodies provide a service at a fraction of the cost to taxpayers that a state-run service would.

Limiting the religious bodies exception only to those that do not receive a certain proportion of public funding appears punitive. In Qld, governments are majoritarian, however, there is a duty to protect minorities and ensure equality under the law. This is especially true of service delivery. Most citizens pay taxes but not all citizens have the same religious convictions, nor do they have the same convictions when it comes to many areas governed by public policy. If we use provision of education as an example, why should Queenslanders who hold minority religious convictions be prevented from seeking to use their tax dollars on the education of their children at a school, which shares their religious conviction? It does not seem at all fair that their tax dollars be used on the education of other children but not their own.

Indeed, where this exemption applies to schools, such as for childcare or early learning services, we would not wish to see exemptions removed, which allow Christian schools to operate as *Christian* schools. The fact that the school receives some state funding, should be an irrelevant consideration when it comes to exemptions to the *Act*. For every child that is sent to a Christian school, that is one less child in the state education system, thereby lessening the financial burden on the state Education Department, the State Government more broadly and most importantly the Qld taxpayer. Research done by Independent Schools Australia shows that the cost is lower for taxpayers to educate a child in a private school than it is in a state school.[32] It is therefore in the Qld Government's interest to support Christian schooling and ensure that it can operate lawfully in Qld.

Recommendation 23: that Parliament clarifies whether this exemption applies to religious schools.

Should the religious educational institutions and other bodies exemption be retained, changed or repealed? (Question 44)

AACS believes that the exemption must be retained to protect Christian schooling in Qld. Christian schools simply will not be able to operate if the delivery of Christian schooling is considered discriminatory at law. Our schools exclusively employ Christian staff to maintain the religious character and ethos of the school and to ensure that students receive an

[32] 'Recurrent Funding', *Independent Schools Australia* (Web Page) <https://isa.edu.au/about-independent-schools/school-funding/recurrent-funding/>.

authentic Christian education. Authenticity is the key concept here, it is not enough for our staff to uphold or submit to the beliefs of the school, they must also have a personal faith which is consistent with the beliefs of the school. This protection of the religious character of faith-based schools is consistent with Australia's human rights obligations at international law, namely to have respect for the liberty of parents and to ensure the religious and moral education of their children in conformity with their own convictions.[33]

Our schools have employment policies requiring staff to have a personal Christian faith consistent with that of the school's Statement of Faith. As evidence of personal faith, the school also requires a reference from a Pastor or Minister indicating regular church attendance. Faith is an inherent requirement of any position at our schools because they are established as Christian communities where parents entrust their children to mentors with an expectation of adherence to, and instruction in, the biblical moral code. This is consistent with the protections afforded under Article 18(4) of the *ICCPR*.

Removing these exemptions would make it unlawful for our schools to preference candidates for employment on the basis of faith and could significantly undermine the viability and authenticity of our Christian school model. Put simply, our schools will no longer be able to preference staff whose beliefs align with those of the school. Our schools could lose their distinctly Christian character and become indistinguishable from other secular or nominally religious independent schools, making them unfit for purpose.

An important point about this exemption is that it currently applies to 'educational institutions under the direction and control of a body established for religious purposes'.[34] AACS is concerned this wording could preclude non-denominational, independent Christian schools that are not under the 'direction or control' of a particular church, in the same way that other church schools are, such as Catholic or Anglican schools. This is a significant issue for our members who may find they are unable to rely upon this exemption when defending an employment discrimination claim. We recommend removing or amending this language to avoid any unintended consequences for non-denominational Christian schools.

Recommendation 24: that the religious educational institutions and other bodies exemption be maintained.

[33] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1974) art 18(4); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 13(3).
[34] *Anti-Discrimination Act 1991* (Qld) s 25(2)(a).

Recommendation 25: that 'educational institutions under the direction and control of a body established for religious purposes' in Section 25 2(a) either be removed or amended to refer to 'educational institutions established for religious purposes'.

If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race or impairment)? (Question 44)

Currently, the exemption is attributes-based and appears to apply to all attributes except age, race and impairment.[35] Looking at the list of attributes in s 7 of the Act, to maintain the Christian ethos of the school, it may be necessary for the exemption to apply to the following attributes: sex, relationship status, pregnancy, parental status, religious belief and religious activity, lawful sexual activity, gender identity and sexuality. If the attributes-based approach is maintained then exemptions to discrimination on the grounds of these attributes appear to be the only way for our schools to maintain their Christian character and to authentically operate in accordance with the doctrines, tenets and beliefs of the Christian faith as manifested by the schools' Statement of Faith.

This approach requires quite a broad exemption across many attributes, as a result, Parliament has attempted to limit the scope of this exemption by attaching a 'genuine occupational requirements' qualification to the exemption.[36] This qualification or 'test' was originally designed to protect the religious character of the school by ensuring that schools could employ adherents of that 'religion' as members of staff, regardless of position or occupation. This is how Premier Beattie described in Parliament how the test was supposed to operate,

> 'Basically, the amendment means that if somebody is employed as a teacher—let us say a maths teacher—then their conduct, *not just as a maths teacher but within that school*, is important in terms of the religion and important for that religious school. This is where the churches are able to discriminate.'[37]

There was no further clarification of this specific provision (s 15 of the *Discrimination Law Amendment Act 2002* (Qld), which became s 25 of the *Act*) by the Attorney-General during the Committee Stage of the debate. As a result, Premier Beattie's description above, must be taken to be Parliament's intention regarding this provision.

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[35] Ibid ss 25(3), 25(6).
[36] Ibid s 25(1).
[37] Queensland, *Parliamentary Debates*, Legislative Assembly, 28 November 2002, 5005 (Peter Beattie, Premier) (emphasis added).

This explanation from the Premier implies that the 'genuine occupational requirements' test was understood by Parliament to be broader than the 'inherent requirements' in place at the Commonwealth level and recently introduced in Victoria. However, Qld Courts have held that the terms 'inherent requirement' and 'genuine occupational requirements' can be considered to be interchangeable.[38]

The Queensland Anti-Discrimination Tribunal has held that the definition of a 'genuine occupational requirement' is objective,[39] therefore a Court is not obliged to consider the tenets of the institution and the institution's view on whether it requires that the entire institution be staffed by persons who share the faith. An employer cannot simply state in the job description that religious belief is a genuine occupational requirement, it must be objectively so in the eyes of a Court.

It was clearly demonstrated by *Walsh v St Vincent de Paul Society Queensland (No.2)*[40] ('*Walsh*'), that whether a Court chooses to consider the doctrine of the institution is left to the discretion of the Court. The decision in *Walsh* provides an insight into the difficulties entailed in the application of a 'genuine occupational requirements' test to religious institutions. Therein Member Wensley QC, considering the 'genuine occupational requirements' test under section 25(1) of the *Act*, held that the section did not permit the local Queensland chapter of the St Vincent de Paul Society (SVdP) to require that a President of a local conference be a Catholic.

As a result of the decision in *Walsh,* where a faith-based school applies a 'genuine occupational requirements' test but temporarily engages persons who are not of the relevant faith in order to fill a vacancy, the school will not be able to require at a later stage that the position be filled only by a believer. This is because, according to the Court, by filling the position temporarily, the school has effectively declared that the holding of faith is not a genuine occupational requirement for the position.[41]

It can be seen from this discussion above that the 'genuine occupational requirements' test, as currently interpreted by the courts, does not work as originally intended, does not protect religious organisations or schools. In effect, it could limit the freedom of religious schools to preference staff who share the religious beliefs of the school for all roles other

[38] *Chivers v Queensland (Queensland Health)* [2014] QCA 141; *Toganivalu v Brown and Department of Corrective Services* [2006] QADT 13 (18 April 2006).
[39] *Flannery v O'Sullivan* [1993] QADT 2.
[40] [2008] QADT 32.
[41] Ibid.

than chaplains and religious studies teachers. This is certainly the intention of the Victorian legislation, which introduced an 'inherent requirements' test.[42] This could erode the Christian character of our schools in Victoria and we certainly do not wish to see a similar narrow inherent requirements test introduced in Qld.

Our schools do not view religion as a separate, standalone subject that can only be taught by the chaplain or 'religious' teachers. Faith is an inherent requirement of the job for all staff, regardless of the role. Our educational model is based on the understanding that there is no divide between the spiritual and secular world. Everyone on staff is expected to be an active participant in the intellectual, social, physical and spiritual development of our students. Delivering this holistic, spiritually integrated model of education requires all our staff to be active members of the Christian faith community. Everyone on staff is required to perform functions and participate in religious observance such as prayer, devotions and Bible study.

Our schools have clearly articulated mission statements and values that describe their Christian ethos and educational culture. Just as a football club or a political party seek to make membership and employment decisions based on whether a person's beliefs and conduct align with their mission and values, so too do our schools. Our schools require the ability to choose to employ people who genuinely believe in the mission and will model the Christian values of the school in both their professional and personal life.

For an exemption to work for our schools, it must recognise that our schools cease to be authentic Christian communities when all staff do not share the faith of the school community, or act in ways that are inconsistent with the authentic modelling of those beliefs. Our parents have made the decision to entrust their children's care and education to our schools on the basis that they are a wholly Christian environment. This is the raison d'être of our schools.

Taking all of this into account, a possible solution could be replacing the entirety of s 25, i.e. the 'genuine occupational requirements' test, with a 'general limitations' clause.

In explaining the concept of a 'general limitations' clause it is first necessary to note that the elements of the religious freedom protection under Article 18 of the *International Covenant on Civil and Political Rights* are completely distinct from the elements of the protection against inequality under Article 26. Article 18(3) provides that religious freedom may only be limited to the extent that it is 'necessary' in order to 'protect … the fundamental rights and

[42] Victoria, *Parliamentary Debates*, Legislative Assembly, 28 October 2021, 4374-6 (Natalie Hutchins).

freedoms of others'. By contrast under international law, the protection to equality will not apply to all acts of 'differentiation'.[43] This notion is reflected in the United Nations Human Rights Committee's General Comment 18 on Article 26:

> The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

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

In 2008 the Australian Senate Legal and Constitutional Affairs Committee recommended that the exemptions in s 37 and 38 of the SDA be replaced by a general limitations clause. The Committee wrote that such a clause would permit discriminatory conduct within reasonable limits and allow a case-by-case consideration of discriminatory conduct. It argued that this would allow for a more 'flexible' and 'nuanced' approach to balancing competing rights.'[44]

Noting this recommendation in its 2016 Freedoms Inquiry Report, the Australian Law Reform Commission (ALRC) concluded 'further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions'.[45]

Recommendation 26: that the exemption be maintained in some form with consideration given to replacing the 'genuine occupational requirements' test with a 'general limitations' clause.

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[43] This was touched on briefly on page 10 above.

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

[45] Australian Law Reform Commission, 'Traditional Rights and Freedoms— Encroachments by Commonwealth Laws', ALRC Report No 129 (2016) [5.124], [5.154], [5.7]. For examples on the drafting of such a clause, see the joint submission by Professors Patrick Parkinson and Nicholas Aroney to the Commonwealth Attorney-General's Department Consolidation of Commonwealth Anti-Discrimination Laws in 2011.

Are there reasons why the work with children exemption should not be repealed? (Question 45)

It is the view of our schools that individuals who wilfully participate and seek sex work are inappropriate candidates to work with children. As a result, we would like to see this exemption maintained to the extent that such activity would present on a working with children check. However, AACS supports removing the exemption for intersex individuals, where this status is a legitimate medical or congenital condition out of the individual's control.

Recommendation 27: that intersex status be removed from the working with children exemption.

Should the definition of goods and services that excludes non-profit goods and service providers be retained or changed? Should any goods and services providers be exempt from discrimination, and if so, what should the appropriate threshold be? (Question 52)

Section 46 may cover the provision of childcare or early learning services as well as incorporated associations established for the purposes of founding and governing Christian schools in Qld.

The provision of childcare or early learning services, are not currently covered by the definition of 'educational institution'. These services could be considered a 'service' conducted 'for-profit'. In the same way that the provision of education by a religious educational institution is exempted from the *Act*, it follows that childcare and early learning services should also be exempted in the same fashion. There is a need for clarification as to whether our schools can rely on the religious educational institutions exception to cover these services. Parliament should clarify that the religious bodies exception covers such bodies.

Recommendation 28: that the definition of 'educational institution' is broadened to include childcare and early learning centres.

Part E: Human Rights Analysis

Are any provisions in the Anti-Discrimination Act incompatible with human rights? Are there any restrictions on rights than cannot be justified because they are unreasonable, unnecessary and disproportionate? Where rights are being limited to meet a legitimate purpose, are there any less restrictive and reasonably available ways to achieve that purpose? (Question 56)

As mentioned above, s 20(1) of the *HRA* states that

> 'every person has the right to freedom of … religion and belief including … the freedom to demonstrate [this] religion or belief in worship, observance, practice and teaching, either individually or as part of a community...'

This encompasses the decision by parents to send their children to a Christian school and the collective decisions of the school's governing Associations, Boards and leaders. Restriction of this right cannot be justified on the basis of the s 20(2) of the *HRA* and the *ICCPR*. Section 20(2) states further that this right cannot be 'restrained in a way that limits [their] freedom to have or adopt a religion or belief'.

As argued earlier in this submission, there is a question here about whether the extension of anti-discrimination provisions regarding certain attributes to areas of religious belief is a restraint on the human right to freedom of religion. Certainly, on the ordinary meaning of 'restraint', such an extension would be. This is the primary reason why exemptions to the *Act* are required for discrimination against certain attributes for religious bodies.

It is an inescapable reality that certain human rights will compete in the area of public life. However, it is imperative that governments in liberal democratic states, account for this competition by not preferencing any human right over another when drafting anti-discrimination law. Where an irreconcilable conflict exists between two competing human rights, the government must consider exemptions where appropriate to allow certain human rights to be manifested to their full extent. In the case of the human right to freedom of religion, the *Act* must account for religious freedom to remain consistent with the *HRA*. Furthermore, the *ICCPR* requires states '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.'[46] As we have argued earlier in this

[46] *ICCPR* (n 4) art 18(4).

submission, in our view the best way to achieve this balance is to adopt a 'general limitations' clause in place of an exemption to discrimination on the basis of attributes.

As a footnote to this point, the QHRC may wish to consider the protection of organisations from discrimination, which would certainly give Christian Schools the legal protection it needs to continue to operate in modern society.[47]

Conclusion

This final question was a fitting one on which to conclude as it allows a comprehensive summary of the essence of our submission. Primarily, manifestation of the human right to freedom of religion and belief cannot, and should not, be discrimination. Recognition of this fact is fundamental, not only to the free exercise of religious belief in Qld, but to Qld's survival as a robust liberal democracy within a pluralistic, multicultural society.

We hope that through this submission, we have ably demonstrated this to the QHRC. We look forward to your final report and to any further opportunity to contribute to this review process.

Yours faithfully,

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Government Relations Advisor

[47] This is discussed further in Mark Fowler, Submission No 146 to the Legal and Constitutional Affairs Committee, Australian Senate, *Religious Discrimination Bill 2021 [Provisions]; Religious Discrimination (Consequential Amendments) Bill 2021 [Provisions] and Human Rights Legislation Amendment Bill 2021 [Provisions]* (February 2022).