AUSTRALIAN ASSOCIATION OF CHRISTIAN SCHOOLS

SUBMISSION TO THE ACT GOVERNMENT

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The Australian Association of Christian Schools (AACS) thanks the ACT Government ('the Government') for the opportunity to submit a response to the Discussion Paper *Inclusive, Progressive, Equal: Discrimination Law Reform* ('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 the Australian Capital Territory (ACT), we represent Covenant Christian School and Emmaus Christian School.

The Nature of Christian Schools

Our Christian schools were 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 school communities strive to be holistic learning environments where everyone (leaders, teachers, parents, support staff and students) works together and the practised values are as important as the formal teaching of the beliefs of the faith. Faith shapes all areas of the educational experience 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.

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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 the ACT by s 14 of the *Human Rights Act 2004* (ACT) ('*HRA*'):

> **14 Freedom of thought, conscience, religion and belief**
>
> (1) Everyone has the right to freedom of thought, conscience and religion. This right includes—
>
> (a) the freedom to have or to adopt a religion or belief of his or her choice; and
> (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.
>
> (2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Christian schools, as one expression of schooling choice, play a valuable role within Australian society in providing a faith-based education for families. The existence of the many faith-based schools across Australia is a powerful testimony to the need for, and effectiveness, of the current mechanisms for the protection of human rights in this country.

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

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[1] Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (18 May 2018) 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] ACT Government Justice and Community Safety Directorate, *Inclusive, Progressive, Equal: Discrimination Law Reform* (Discussion Paper 1: Extending the Protections of Discrimination Law, October 2021) ('*Discussion Paper*') 19.

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.

Whilst the right to freedom of religion is protected at law in the ACT, discrimination law does not adequately reflect the existence of this right. This submission will attempt to demonstrate where the *Discrimination Act 1991* (ACT) can be amended to better protect this right in accordance with the *Human Rights Act 2004* (ACT).

Commonwealth Religious Discrimination Bill 2021

The Discussion Paper refers to Commonwealth religious discrimination reforms prompted by the Ruddock Review.[6] AACS would encourage the ACT Government to postpone consideration of any amendment to discrimination law affecting religious individuals and bodies until after the *Religious Discrimination Bill 2021* (Cth) ('RDB') and related amendments have passed the Federal Parliament. We believe this will give the Government a better idea of how any new federal laws will operate and interact within the ACT context. We trust that the Government will consider all of this, and its obligation to religious Canberrans, when determining any amendment to the *Discrimination Act 1991* (ACT) ('the Act').

Recommendation 1: that the Government postpones consideration of any changes to the Act until 12 months after the RDB passes the Federal Parliament.

2021 Discussion Paper

The Discussion Paper states that 'the Government will be guided by the following principles in reforming discrimination law'. These principles include:

- **Broader and stronger protections:** Any changes to discrimination law should create broader and stronger protections to send a clear message that our society believes in equality and respect.
- **Align with our human rights framework:** Discrimination laws should align with our human rights framework, meaning that any exceptions should be reasonably justifiable and proportionate to legitimate objectives under the *Human Rights Act 2004*, and other human rights should also be protected.
- **The same standard for everyone**: Discrimination laws should be comprehensive and consistent. Everyone should enjoy the same standard of protection, unless there are principled reasons based on reasonable and objective criteria to distinguish between the different protected groups.

We note that there is a non-alignment between the permissible scope of limitations under the *Human Rights Act 2004* and the standards for limitation under the International Covenant on Civil and Political Rights 1966. The former permits limitations to be imposed where exceptions are 'reasonably justifiable and proportionate to legitimate objectives under the

[6] Ibid.

Human Rights Act 2004'. The latter imposes a higher standard for limitations on religious manifestation:

> 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.

This means that analyses undertaken under the HRA do not align with Australia's obligations under international law.[7]

Furthermore, the distinct protection of the right to establish private religious schools is found in the '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.' As the United Nations Human Rights Committee has recognised, Article 18(4) is not subject to limitation principles: 'The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.'[8] This principle has also been recognised by the Australian Human Rights Commission.[9]

This right is recognised at clause 27A of the HRA, whereby the child's right to 'free, school education' is

> limited to the following immediately realisable aspects: …
> (b) to ensure the religious and moral education of a child in conformity with the convictions of the child's parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.

We ask that in the course of the current review, the principles of international law are applied regarding the protection of religious freedom and the ability of parents to 'ensure the religious and moral education of their children in conformity with their own convictions.'

The Discussion Paper asks whether 'the exceptions in the Discrimination Act:
[should] be removed and replaced with a general limitation / single justification defence that applies where discriminatory conduct is reasonably justifiable, or be refined to make them simpler, stronger, and better aligned with our human rights framework?'[10]

In our view, the protection of religious freedom at law in the ACT is best served by reviewing them to ensure they align with the strict standards afforded under international law. In the experience of our Christian schools, these exceptions are relied upon to make employment and enrolment decisions in good faith to protect the religious community that these schools serve.

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[7] Mark Fowler, 'State and territory legislation risks breach of international treaty' *The Australian* (online 30 June 2017) https://cdn.treasury.gov.au/uploads/sites/1/2018/07/Mark-Fowler-310865.pdf.
[8] *Human Rights Committee, General Comment No 22: Article 18, 48th sess, (20 July 1993)*, [8].
[9] Australian Human Rights Commission, *Submission to the Expert Panel*, February 2018, available at https://www.humanrights.gov.au/submissions/religious-freedom-review-2018, 10.
[10] *Discussion Paper* (n 5) 16.

Much of our response to the Discussion Paper will attempt to answer this question above by addressing the various proposals for reform to these exceptions.

Recommendation 2: that the Government maintains the exception for religious education institutions in s 46 of the Act.

Limited Exceptions for Religious Schools to Discriminate on Religious Grounds

Currently, s 46 of the Act allows Christian Schools to employ staff and enrol students on the basis of the faith shared by the school and the individual staff member or student, provided the school has a public policy stating the same. Discrimination on grounds other than religion is not permitted.

The Discussion Paper notes that this section of the Act was recently reformed and is therefore not the subject of any further consultation. AACS welcomes this and emphasises that any further reform of this section, for example, by the adoption of certain recommendations made by the Final Report of the ACT Law Reform Advisory Council ('LRAC') Inquiry into the Act ('LRAC Report'), would be problematic for our schools.

The recent changes appear to be guided by Recommendation 19.2 of the LRAC Report, which recommended that:

> [T]he Discrimination Act should be amended so that the exceptions for religious bodies, educational institutions and workers are available only for conduct that can be justified as a reasonable limit on the right to equal and effective protection against discrimination, having regard to the factors set out in section 28 [of the] *Human Rights Act 2004* (ACT).[11]

This recommendation seems to be predicated on the assumption that the right to religious belief is subordinate to the rights of those possessing another protected attribute. This would be inconsistent with ACT law. As stated above, s 14 of the *HRA* protects freedom of religion. Section 28 of the *HRA* states,

> **28 Human rights may be limited**
> (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.
> (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
> (a) the nature of the right affected;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relationship between the limitation and its purpose;
> (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

If the Government were to adopt recommendation 18 and remove the religious educational institutions exception entirely from the Act it would be disregarding s 28 of the *HRA* in

[11] ACT Law Reform Advisory Council, *Review of the* Discrimination Act 1991 *(ACT)* (Final Report, 18 March 2015) ('*LRAC Report*'), 16-17.

relation to the s 14 protection of religious freedom. The proposal then does not align even with the HRA standard, which itself falls below the standard found in international law. Furthermore, it would be undermining the recent changes to this exception[12], which limited the exception to what was considered 'necessary and proportionate' to the protection of the attribute of freedom of religion.[13] The current exception only excepts religious schools from discrimination law on the basis of religious belief where that school has a differing religious belief to that of an applicant i.e. a prospective student, prospective staff-member or current staff-member. This exception allows the school to maintain its 'religious' character and by extension its raison d'être. Removing this exception would prevent religious schools from maintaining a workforce that adheres to the religious character and ethos of the school, undermining that very character and ethos. If a religious school loses its religious character, it is no longer a religious school. Canberran parents seeking a religious education for their children will have that choice taken from them, in other words their 'right to freedom of thought, conscience and religion'[14] and their ability 'to demonstrate'[15] that right will be taken away if religious schools cease to exist in their current form.

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.[16] The liberty of parents to choose for their children schools, other than those established by the public authorities, to ensure the religious and moral education of their children in conformity with their own convictions.[17]

Whilst our schools currently have an 'open' enrolment policy, allowing applications from Christian families as well as others, our schools rely on the enrolment exception to require families to 'support the School Ethos as expressed in the School's Statement of Faith, Vision, Mission and Values' as a condition of enrolment.'[18] This demonstrates that all parents, religious or otherwise, have made a deliberate choice and a financial commitment to enrol their children at a religious school in full knowledge that the school is established in accordance with a particular religion, containing doctrines, tenets and beliefs. If the religious character of that school is eroded, this parental choice is removed. This exception is therefore relied upon by both religious and non-religious Canberran parents when it comes to having a broad range of educational choices for their children.

Recommendation 18 recommended replacing all of the exceptions in Part 4 of the Act with a general limitation allowing a 'justification defence' for any unlawful conduct committed. As the Discussion Paper mentions, the 'justification defence' is a feature of discrimination law in the United Kingdom (UK) and Canada but 'neither jurisdiction has a single justification

[12] *Discrimination Amendment Act 2018* (ACT) s 7.
[13] *LRAC Report* (n 8) 105-6.
[14] *Human Rights Act 2004* (ACT) s 14(1).
[15] Ibid s 14(1)(b).
[16] *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).
[17] *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).
[18] *Enrolment Contract*, Covenant Christian School (ACT) (at 1 December 2021) cl 2.1.4.

defence for types of discrimination.'[19] This means that such a proposal is untested and unprecedented. It also risks failing to comply with the unique standards and considerations that apply to the protection of religious freedom under international law.

Based on current arguments, AACS opposes Recommendation 18 and considers it unnecessary, particularly in relation to the limited exception for religious schools for two reasons. Firstly, the current exception was limited in 2018 to what was considered 'necessary and proportionate' for religious schools to operate and for freedom of religion to operate in the ACT. Secondly, a 'justification defence' regime could result in Christian schools' being required to litigate on a case-by-case basis to demonstrate a necessity that is already recognised by the current Act. This creates great uncertainty for schools, and their associated communities. AACS, therefore, sees no need for further limitations.

As stated in the Discussion Paper, the current exceptions for religious educational institutions are very limited. The employment exception only allows "discrimination" on the basis of religious belief to 'enable, or better enable, the institution to be conducted in accordance with those doctrines, tenets, beliefs or teachings'.[20] Whereas, the enrolment exception only allows discrimination where the prospective student holds 'a religious conviction other than that' of the school.[21] In other words, these exceptions only allow "discrimination" in good faith to preserve the religious community that the school operates within and serves. They do not allow "discrimination" to occur on the basis of any other personal attribute. The current framework thus limits the ability of religious schools to maintain their ethos, and should be reformed to comply with the requirements of international law.

The ACT already has one of the most limited exceptions for religious educational institutions in the Australian Commonwealth. Other jurisdictions such as New South Wales, Queensland, Western Australia, South Australia (SA) and the Northern Territory (NT) extend their employment exception to the attribute of sexuality.[22] The ACT Legislative Assembly recognised through the enactment of the *Discrimination Amendment Act 2018* that any attribute beyond religious belief is unnecessary and disproportionate to what is required to allow religious schools to continue operating. Whilst this has made the operation of our Christian school model precarious in the ACT, our schools have attempted to work within the new legislative regime in good faith. Further limitation will make continued operation of our Christian school model difficult.

As discussed above, our school community evidences its faith through conduct. Our schools currently 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 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).

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[19] *Discussion Paper* (n 5) 14.
[20] *Discrimination Act 1991* (ACT) s 46(2)(b) ('*ACT Act*').
[21] Ibid s 46(1).
[22] *Equal Opportunity Act 1984* (SA) s 34(3); *Anti-Discrimination Act 1992* (NT) s 37A.

Removing these exceptions will make it unlawful for our schools to preference candidates for employment on the basis of faith and could have significant implications for the viability of our unique educational 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 their original purpose, which is to serve the ACT community by providing an authentic religious educational service.

One of the impractical implications of implementing Recommendation 18, which was not canvassed by either the LRAC Report nor the Discussion Paper, is the vast increase in litigation it could result in. If such a regime was implemented, our schools may be forced to defend themselves before tribunals and courts for practices that would currently be considered routine for a Christian School. This is a very unreasonable proposition. Our schools can afford neither the time, nor the cost, of such litigation and we would consider it to be vexatious where the behaviour in question was employment or enrolment decisions favouring adherence to the faith which the school holds.

Recommendation 3: do not implement a general 'justification defence' as it is impractical and unworkable for religious schools and would ultimately impact the ability of parents to choose a religious education for their children.

Recommendation 4: the current framework should be reformed to the extent that it limits the ability of religious schools to maintain their ethos, it to comply with the requirements of international law.

Exceptions for Religious Bodies Dealing with the Public Generally

Section 32(1)(d) of the Act excepts religious bodies from unlawful discrimination for an 'act or practice conform[ing] to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion.' We note that the LRAC considered this test for the exception as inappropriate and that the *ACT LGBTIQ+ Legal Audit* recommended removing the exception altogether.[23] AACS does not support removal of this exception which merely provides protection to religious institutions to act in accordance with its religious 'doctrines, tenets or beliefs' without being subject to discrimination claims for so doing.

In our schools, the source of these 'doctrines, tenets or beliefs' is the Bible, which our communities consider to be absolute truth and fixed. As a result, these 'doctrines, tenets or beliefs' are not subject to reform or amendment in the same way the law is. Therefore, it would be a severe incursion on the religious freedom of the individuals within the school community if any act done in accordance with the 'doctrines, tenets or belief' of their faith is deemed to be discriminatory at law.

[23] *LRAC Report*, 108; Equality Australia, *ACT LGBTIQ+ Legal Audit*: Reforms for an Inclusive ACT (30 June 2019), 38 ('*LGBTIQ+ Legal Audit*').

The *ACT LGBTIQ+ Legal Audit* argues that this exception is 'broad' in application. It further argues that Federal courts have interpreted a similar exception in the *Sex Discrimination Act 1984* (Cth) ('*SDA*')[24] broadly to include commercial services, 'provided that the nexus between the act or practice and the religious beliefs can be established'.[25] AACS submits that the fact that such a nexus must be established, suggests a self-evident narrowing of all possible excepted acts. What the *ACT LGBTIQ+ Legal Audit* fails to mention is that the provision in question, s 37(1)(d) of the *SDA*, further limits excepted acts to those of a 'body established for religious purposes' where 'the act or practice conforms to the doctrines, tenets or beliefs of that religion' or where it 'is necessary to avoid injury to the religious susceptibilities of adherents of that religion.' In other words, there are three tests that the act (or practice) must meet in order to be excepted from the *SDA*. As a result, this exception cannot be considered 'broad' when it applies to such a limited number of acts in a limited number of circumstances.

The similar exception in the Act is narrower again, as the act must '[conform] to the doctrines, tenets or beliefs of that religion' *and* be 'necessary to avoid injury to the religious susceptibilities of adherents of that religion.' If it cannot be established that the act (or practice) is necessary to avoid injury to the 'religious susceptibilities of adherents' then it will not be excepted from the Act. Such a provision could not be considered 'broad' by any reasonable standard.

Section 32(2)(b), despite being an exception applying to 'religious bodies' more generally, still applies to 'religious educational institutions'.[26] Christian schools require the protection of this section for 'undefined acts'[27], in areas such as teaching and school policy. Where the teaching and policies are in accordance with certain Christian 'doctrines, tenets or beliefs' and are necessary to 'avoid injury to the religious susceptibilities of adherents of that religion', they are not subject to discrimination claims, which is reasonable. Removing this exception would have real ramifications to the current Christian educational model and preclude adherence to biblical 'doctrines, tenets or beliefs' in the classroom and within the school's administration.

By removing this exception, the Government would be undermining particular 'doctrines, tenets or beliefs' of certain faiths that are not popular nor politically correct. Indeed, the Government could be rendering unlawful the teaching of certain Christian doctrine.

Recommendation 5: that the exception outlined in s 32(1)(d) of the Act is maintained or, where this is not feasible, that an exception is applied to all 'unspecified' acts (or practices) of religious educational institutions that meet the same three tests detailed in s 32(1)(d).

[24] *Sex Discrimination Act 1984* (Cth) s 37(1)(d).
[25] *LGBTIQ+ Legal Audit* (n 20) 38.
[26] *ACT Act* (n 16) s 32(2).
[27] Ibid.

Should religious bodies be permitted to discriminate when providing goods or services to members of the public?

Returning to the issue of the provision of goods or services to members of the public by religious bodies, the Discussion Paper addresses this question in detail by arguing that it is justifiable for a religious body that provides charitable and not-for-profit services to be able to act in accordance with its 'doctrines, tenets and beliefs' as 'performing charitable works for some people may be an important part of living and demonstrating their religion.' However, where the acts or practices '[impact] disproportionately on the rights of others' it is not justifiable. This appears to be an arbitrary approach and not one that is consistent with the right to freedom of religion. Is it 'disproportionate' for certain acts and practices of religious bodies to impact negatively on the rights of non-believers or those who hold differing religious convictions to those of the religious body or adherents? It may well be 'disproportionate' to limit the ability of religious believers to exercise their faith through the provision of assistance to others. This could be a form of unequal treatment, itself amounting to discrimination. To a certain extent, this competition of rights appears to be irreconcilable. An example affecting our schools, both now or potentially in the future, is whether the provision of childcare or early learning services, are considered 'educational' services. Currently childcare and early learning are not expressly included in the definition of 'educational institution' and so, on one account, 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 excepted from discrimination law, it follows that childcare and early learning services should also be excepted in the same limited fashion. Given it is arguable that there is a need for clarification as to whether our schools are able to rely on the religious educational institutions exception to cover these services, the Government should clarify that the religious bodies exception covers such bodies. Our schools are unlikely to be able to rely on s 27(1)(b) as their services are offered both to those within a 'relevant class', i.e. those of a particular 'religious conviction', and to those outside it.

Recommendation 6: that the religious bodies exception be amended to clarify that it covers the provision of other 'services' such as childcare and early learning that are not explicitly covered by the religious educational institutions exception.

Should religious bodies be permitted to discriminate in employment?

This question is raised by the Discussion Paper specifically regarding Christian schools. The Discussion Paper asks whether it is appropriate for religious bodies, including Christian schools, to be able to discriminate in favour of religious conviction when it comes to the hiring of staff not explicitly connected to the religious nature of the school. The example given is whether it is appropriate to hire only non-teaching staff, such as cleaners, that hold the same religious conviction of the school.

It is our view that religious bodies, particularly Christian schools, should retain the ability to discriminate in favour of religious conviction for all staff and should even be expanded to cover other relevant attributes that may impact on the ethos of a Christian school. 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 environments. It is the desire of our parents to provide authentic Christian role models by placing them in a nurturing environment coherently driven by consistent biblical values and Christian virtues.

Unlike some church schools, 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 are 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.

AACS would not wish to see any employment exception linked to the 'role' that the employee has at the religious body or educational institution. Not only would such a provision be far too rigid and subjective, but it would also undermine the existence of our Christian school model. If implemented, our schools would cease to be authentic Christian educational communities. It would also be inconsistent with international human rights law.[28]

Recommendation 7: the Government should not consider limiting any religious employment exception merely to roles whose nature is directly linked to a particular religious conviction.

Should some sectors or types of organisations be prevented from relying on the general religious bodies exception? For example, organisations that receive a certain proportion of public funding.

Limiting the religious bodies exception only to those that do not receive a certain proportion of public funding appears punitive. In the ACT, 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 a number of areas governed by public policy. If we use provision of education as an example, why should

[28] See for example, *Siebenhaar v Germany* [2011] no. 18136/02 Eur Court HR.

Canberran taxpayers who hold a particular minority religious conviction 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.

Recommendation 8: that the Government does not prevent certain sectors or types of organisations, particularly the education sector, from relying on the general religious bodies exception, where currently allowed.

Should an attribute-based approach be adopted?

Currently, the religious educational institutions exception is somewhat of an attribute-based approach in that the exception only allows discrimination on the basis of religious conviction, particularly where the applicant's conviction is inconsistent with that of the institution. Given that Christian schools already operate under this limited exception regarding provision of education and employment, it may be workable where the schools rely on the religious bodies exception for acts other than the 'defined acts' referred to above. The concern our schools have is whether a more limited exception would still protect the teaching of a biblical worldview regarding sexuality and gender in the classroom and whether such a worldview could extend to school policy without being subject to discrimination claims.

Recommendation 9: that the religious bodies exception is not limited to the extent that it would prevent both the teaching of, and implementation of policy consistent with, a Christian worldview of sexuality and gender.

Exceptions for Voluntary (Not-For Profit) Organisations

Should voluntary bodies be permitted to discriminate when limiting their membership or services to groups of people protected by discrimination law where the organisation's reason for existence is to promote the interests of that group of people?

In AACS' view this exception, in some form, must remain in place. Our schools are governed by voluntary associations, whose purpose is to establish and maintain the schools and to elect the governing board or council, which governs the day-to-day activity and life of the school. These associations have a membership that is strictly limited to those holding a certain religious conviction which is often much more specific than that required by staff.[29] Our schools view these associations as the guardians of the religious character of the school, which is why such strict membership criteria are required. If the voluntary bodies exception was removed, our school associations could no longer ensure that the strict membership criteria are adhered to, nor could they guarantee that the membership would be unified in their convictions and their goal to educate local children in accordance with the doctrine, tenets and beliefs of their shared faith.

[29] See *Constitution and Rules of the Association*, Covenant College, Tuggeranong, ACT Association (at 24 June 2003) cl 2.

Our school associations may be able to work under a more limited exception that '[allows] exclusion from membership of a person who is not a member of the group of people with a protected attribute for whose benefit the voluntary body was established', assuming that 'religious conviction' remains a protected attribute. One concern with such a limitation would be whether it would cover all exclusions from membership. For example, the constitution of Covenant College, Tuggeranong ACT Association ('Association'), states that in addition to holding a specific religious conviction, candidates for membership must also: 'have made a conscientious Public Profession of Faith'; 'be a Communicant Member … in good standing of a Protestant Denomination'; and 'shall have attained the age of 21 years'.[30] If the exception is limited purely to a protected attribute, in this case, religious conviction, the Association may not be able to limit membership in the way that it currently does. This could have potential unintended consequences for the character of the school. AACS, therefore, asks that the Government consults in good faith with our schools to ensure that any amendment to this exception will not negatively impact on our school associations and will ensure that our school associations are given the opportunity to continue to operate the way they have always operated.

Recommendation 10: that the voluntary bodies exception is only limited where our Christian schools are satisfied that it will not have a negative impact on the operation of their governing associations.

Positive Duty to Eliminate Discrimination

Recommendation 5.3 of LRAC states 'the positive duty should apply to public authorities immediately and should apply to private bodies and community organisations after a period of three years.'

AACS submits that such a duty would be unnecessary and onerous on small organisations such as Christian schools for several reasons. Firstly, our schools do not employ lawyers or experts in discrimination law. 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. Secondly, the purpose of our schools is to provide education, not to eliminate discrimination, quite obviously as part of a nurturing environment the staff in our schools will be looking to prevent discrimination in everything that they do. However, their first duty is always to educate children and nothing should supplant this priority. It would put pressure on school resources to impose a duty to eliminate discrimination on our schools. Thirdly, as faith-based organisations or 'religious bodies' our schools are somewhat exclusive in their worldview and their approach to education. As organisations partial to a certain set of beliefs, the imposition of a duty to eliminate discrimination is not only inappropriate but counterproductive. Our schools are organisations which rely on exceptions to discrimination law, implying that certain acts and practices fundamental to our schools' existence are considered discriminatory. This would mean that such a duty would be unworkable in our schools. Lastly, it is foreseeable that our schools may be the subject of burdensome litigation if the Human Rights Commission were

[30] Ibid.

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.

The recommendation 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:
>
> > 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.[31]
>
> 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 Covenant', being the manifestation of religious practices as protected by the Covenant, consistent with a democratic and plural society.[32]

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'.

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

[32] 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

Recommendation 11: that Christian schools (and other like organisations) are excepted from a legal duty to eliminate discrimination.

Conclusion

As discussed above, the current exceptions that ACT Christian schools rely upon in their everyday operations must be maintained by the Government and reformed to align with international human rights law. Not doing so will lead to the decline and demise of the Christian school sector in the ACT.

AACS trusts that the Government values cultural and religious diversity in the ACT and will ensure that minority interests such as those of our Christian school communities are protected. We look forward to working constructively with the Government to ensure that any proposed reform does not adversely impact on the continued existence and success of our Christian schools in the ACT.

AACS thanks the Government for the opportunity to make a submission to this review.

Yours faithfully,

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