



Department of the
Attorney-General and Justice

Exposure Draft:
Anti-Discrimination Amendment Bill 2022 (NT)

Submission by
Christian Schools Australia (CSA)

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Introduction

The *Discussion Paper: Modernisation of the Anti-Discrimination Act* released in September 2017 claimed as the basis for the amendment of the Act that the Act *'is in urgent need of modernisation to support achieving the objects of the Act'*, yet it is now nearly five year later that an exposure draft of a bill is released. **Clearly there is no urgency about this process.** Rather than proceed based on the obviously rushed Discussion Paper with its shallow and ill-considered 'rationale' for many of the reforms suggested, it is incumbent on the NT Government, if this process is to have credibility, to **withdraw the exposure draft bill and undertake a new, open and transparent, public consultation process.**

Since the release of the September 2017 Discussion Paper there have been significant developments in the area of religious freedom, one of the most fundamental of human rights.

In May 2018 the *Religious Freedom Review: Report of the Expert Panel* ('Expert Panel Review') was released.¹ This was the most comprehensive independent review of religious freedom in Australia. An expert panel considered more than 15,000 submissions and consulted with 180 organisations in face-to-face meetings in every State and Territory. The Expert Panel Review had a broad scope, including to 'consider the intersections between the enjoyment of the freedom of religion and other human rights' and was charged with consulting 'as widely as it considers necessary'.

The Commonwealth Government, partly in response to this Review, embarked upon a process that led to the *Religious Discrimination Bill 2022* (Cth) passing the House of Representatives in February this year. This legislative package was informed by extensive consultation through two public exposure draft processes, receiving approximately 13,000 written submissions, and roundtables with more than 90 stakeholders from all key sectors, including from religious, legal, LGBTIQ+ and community groups. It was also the subject of two Commonwealth Parliamentary Inquiries, both of which recommended its passage.

The extensive developments in this area once again point to the need for a further, **open and transparent, public consultation process** rather than attempting to respond in a piecemeal fashion to an exposure draft of a bill.

We also note, again, the paucity of any evidence in the 2017 Discussion Paper for proposed changes, the lack of cogent arguments for changes, and the significant number of issues and questions that remained unaddressed in the document. As we said in our earlier submission:

'Overall the Discussion Paper can be characterised as a 'solution' looking for a problem. It would certainly be essential, before any amendments were to be considered by Government, for a more comprehensive discussion paper, including much more detail on proposed amendments, was circulated for public consultation'.

The comments below on the Exposure Draft: *Anti-Discrimination Amendment Bill 2022* (NT) should be considered only preliminary in nature as we consider **a further, properly informed, public consultation process is essential.**

Clause 4 – Section 3 amended (Objects)

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

¹ *Religious Freedom Review: Report of the Expert Panel* (May 2018) ('Expert Panel Review').

- ‘Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion’ – **Recommendation 2**.
- ‘Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion’ – **Recommendation 3**.

The proposed amended objects in section 3 of the *Anti-Discrimination Act 1992* (‘the Discrimination Act’) may have the effect of undermining that equal status, instead placing non-discrimination above other human rights. In particular, the use of the phrase ‘to eliminate discrimination ... to the greatest extent possible’ in sub-section 3(b) suggests a pre-eminence is being placed on non-discrimination rights.

The Commonwealth, in the *Religious Discrimination Bill 2021* and *Human Rights Legislation Amendment Bill 2021*, sought to address similar concerns in relation to Commonwealth discrimination legislation. The proposed drafting below adopts this approach and applies it to the Discrimination Act, inserting a new **sub-section 3 (2)** after renumbering the existing objects as sub-section (1).

- (2) In giving effect to the objects of this Act, regard is to be had to:
- (a) the indivisibility and universality of human rights, and their equal status in international law; and
 - (b) the principle that every person is free and equal in dignity and rights.

The principles listed in this additional sub-section reflect the well-established and foundational rule of international human rights law that all rights must be treated with equal importance, and no right should be prioritised at the expense of any other. These principles clarify the relationship between human rights and recognise that all rights are interconnected and interdependent, and that there is no hierarchy of rights at international law.

New Section 3A Needed

We also support Recommendation 2 from the Expert Panel noted above, as part of a best practice approach.

An interpretative provision along these lines was the subject of recent consideration by a Joint Standing Committee of the NSW Parliament. In their Report the Committee proposed that the list of instruments listed in the clause be extended to include additional international human rights conventions, based on the NSW Government’s human rights priorities and legislative agenda.² A similar approach could be taken by the NT Government.

This approach will also assist in overcoming, in an operational sense, some of the problems inherent in the Discrimination Act, which provides insufficient protection for non-derogable rights, such as freedom

² Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, NSW Parliament, *Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (2021) [2.37].

of religion, contained in the *International Covenant on Civil and Political Rights*.³ The inclusion of this interpretive principles within the Discrimination Act, which provides the ‘active’ protection of human rights in the NT, would mitigate against practical effect of that fundamental weakness.

The following draft section **3A – Interpretive Principles**, is based on the proposal of the NSW Parliamentary Committee referred to above.

- (1) In carrying out functions and making determinations under this Act, the Minister, Commissioner, Tribunal and Courts shall have fundamental regard to the following —
 - (a) the *International Covenant on Civil and Political Rights* (to the extent that it has been ratified by Australia),
 - (b) the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, proclaimed by the UN General Assembly on 25 November 1981; and
 - (c) the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.
- (2) In particular, in interpreting the requirement of the International Covenant on Civil and Political Rights, Article 18(3), that limitations upon a person’s right to manifest their religion or belief must only be made where such are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights provide that limitations must, amongst other matters—
 - (a) be prescribed by law,
 - (b) respond to a pressing public or social need,
 - (c) pursue a legitimate aim and be proportionate to that aim, and
 - (d) be applied using no more restrictive means than are required for the achievement of the purpose of the limitation.
- (3) To ensure equal treatment of the attributes protected under all Parts of the Act, the Siracusa Principles shall be used whenever limitations on the rights protected by those Principles are imposed under the Act.
- (4) So far as it is possible to do so consistently with their purpose, all provisions of this Act must be interpreted in a way that is compatible with the international instruments referred to in sub-section (1).

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976) (*‘the ICCPR’*).

Clause 5 -Section 4 amended (definitions)

The definition of ‘sexual orientation’ proposed to be incorporated into the Discrimination Act is bizarre, inconsistent with Commonwealth legislation and potentially incapable of protection.

How is a person’s ‘capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals’ justiciable? How could this concept even be defined with any legal precision?

A far better approach would be to simply adopt the definition of sexual orientation from the *Sex Discrimination Act 1984* (Cth) –

sexual orientation means a person’s sexual orientation towards:

- (a) persons of the same sex; or
- (b) persons of a different sex; or
- (c) persons of the same sex and persons of a different sex.

Clause 9 – Part 2A inserted

The proposed Part 2A may have the effect of undermining the equal status of all human rights discussed above in relation to the Objects.

The use of the phrase ‘... to the greatest extent possible’ in relation to the positive duty created under this new part suggests a pre-eminence is being placed on non-discrimination rights in a manner which is inconsistent with Australia’s obligations under the ICCPR and potentially beyond the powers of the Territory government.

This proposed Part 2A must be withdrawn or recast to remove all references to the phrase ‘... to the greatest extent possible’.

Amendment of Section 20 – a better definition of Discrimination

If the aim of the Government is truly to ‘modernise’ the Discrimination Act it is time for an alternative definition of ‘discrimination’ to be adopted.

The proposed drafting included below provides a balancing of different human rights within a comprehensive definition.⁴

The proposed drafting would **replace the existing section 20**.

⁴ The drafting is taken from Patrick Parkinson and Nicholas Aroney, Submission to Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, January 2012.

- (1) Discrimination means any distinction, exclusion, preference, restriction or condition made or proposed to be made which has the purpose of disadvantaging a person with a protected attribute or which has, or is likely to have, the effect of disadvantaging a person with a protected attribute by comparison with a person who does not have the protected attribute, subject to the following subsections.
- (2) A distinction, exclusion, preference, restriction or condition does not constitute discrimination if:
 - (a) it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
 - (b) it is made because of the inherent requirements of the particular position concerned; or
 - (c) it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
 - (d) it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.
- (3) The protection, advancement or exercise of another human right protected by the *International Covenant on Civil and Political Rights* is a legitimate objective within the meaning of subsection (2)(a).
- (4) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of freedom of religion if it is made by a religious body, or by an organisation that either provides, or controls or administers an entity that provides, educational, health, counselling, aged care or other such services, and either:
 - (a) it is reasonably necessary in order to comply with religious doctrines, tenets, beliefs or teachings adhered to by the religious body or organisation; or
 - (b) it is reasonably necessary to avoid injury to the religious sensitivities of adherents of that religion or creed; or
 - (c) in the case of decisions concerning employment, it is reasonable in order to maintain the religious character of the body or organisation, or to fulfil its religious purpose.
- (5) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of ethnic minorities to enjoy their own culture, or to use their own language in community with the other members of their group, if it is made by an ethnic minority organisation or association intended to fulfil that purpose and has the effect of preferring a person who belongs to that ethnic minority over a person who does not belong to that ethnic minority.

The language deliberately reflects that of the UN Human Rights Committee in paragraph 13 of the Human Rights Committee's General Comment 18 (Non-Discrimination),⁵ which states that '*not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant*'.

The way in which differentiation of treatment is legitimate is spelled out in this approach and provides much greater clarity, utility and alignment with international law and best practice. Consequential amendments would be required to other provisions in the Act.

Clause 11 – Section 20A inserted

As indicated in our earlier submission, in seeking to justify these provisions the Discussion Paper talks of providing 'legal redress against extreme or pervasive vilification' yet the standard it proposes to introduce of 'offend' or 'insult' is clearly much lower than that extreme situation. In addition, the limited range of exemptions proposed, in acknowledgement of the principle of balancing rights, does not provide sufficient protections for the 'right to voice opinions in a respectful manner' which is indeed an essential right in a 'free and democratic society'.

It is not inconsistent with voicing opinions in a respectful manner that people may still be offended or indeed insulted, this should not provide the basis for legal redress.

While 'legal redress against extreme or pervasive vilification' would generally be supported the proposals are far from this in their scope. As outlined, they present **a completely unacceptable limitation on freedom of speech.**

The Commonwealth's *Religious Discrimination Bill 2022*, drafted after the far more extensive consultation noted above, settled on protections against conduct 'that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group'. The term 'vilify' being defined, 'in relation to a person or group of persons, means incite hatred or violence towards the person or group'.

The proposed section 20A should be redrafted to adopt this standard arising from extensive national consultation.

Clause 16 – Section 30 amended (Exemptions)

There is no justification provided for the removal of the ability of schools operating in accordance with a particular religious doctrine to no longer do so, in the same way that some schools may operate for a single sex or those with disabilities. To remove this ability would disproportionately impact families seeking that form of education in accordance with their beliefs and as protected under the ICCPR in Article 18(4).

Clause 16 should be amended to not remove existing subsection 30(2).

Clause 18 – Section 40 amended (Exemptions)

Concurrently with operating a school in accordance with a particular religious doctrine it may be necessary in some circumstances to provide accommodation associated with the operation of that school.

Clause 18 should be amended to not remove existing subsection 40(2A).

⁵ *General Comment No. 18: Non-discrimination*, 37th sess (10 November 1989).

Clause 19 – Section 41 amended (Discrimination in goods, services and facilities area)

The Discussion Paper briefly considered the situation of workers in pubs and clubs who may be the subject of discrimination, although it also recognised that there are protections that exist in criminal law or work safety laws.

The proposed amendments to section 41, however, go far beyond that narrow situation.

This clause inserts a new, unprecedented requirement on the way consumers or users of facilities make use of the relevant goods or facilities. It makes it unlawful for a consumer or user, which would encompass Christian schools, to ‘discriminate’ against the provider:

- By refusing to accept the goods or services, or
- In the terms on which they are accepted, or
- In the way they are accepted or used.

How this will be applied is a little head scratching – the way you use a loaf of bread could potentially be actionable!

The lack of a rationale or clarity on a provision with potential impact on every individual and business in the Northern Territory as a consumer of goods or services or user of facilities is alarming.

Far more information and consultation needs to take place before such a dramatic amendments can be considered properly.

The Government, prior to allowing for a further round on consultation, needs to:

- **provide a clear rationale for this enormous potential widening of the scope of the Act to affect consumers and users of facilities, and**
- **outline how this provision may work with clear examples of its operation across all of the protected attributes**

Clause 24 – Section 51 Amended (religious bodies)

The Discussion Paper understandably could not include consideration of the approach taken in the subsequently released *Religious Discrimination Bill 2021* (Cth) regarding the action of religious bodies.

Rather than seeking to continue with the outdated exceptions approach to protecting religious freedom the Commonwealth bill clearly defines the permissible scope of activities of religious bodies which, consistent with international law, do not constitute discrimination in the first place. Reflecting that not every differentiation of treatment is discrimination as outlined in General Comment 18.⁶

Utilising the drafting in the Commonwealth’s *Religious Discrimination Bill 2021* as a base, rather than making the proposed amendments a **new section 51 – Actions by Religious Bodies** could be inserted into the Discrimination Act to clarify this.

⁶ Ibid.

- (1) This section sets out circumstances in which a religious body's conduct is not discrimination under this Act. Because the conduct is not discrimination, it is therefore not unlawful under this Act in any area of public life. As such, it is not necessary to consider whether the conduct comes within an exception in Part 4.

Conduct that is not discrimination by a religious body

- (2) Subject to subsection (6), a religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.

Note 1: Subsection (6) contains an additional requirement for religious educational institutions.

- (3) Without limiting subsection (2), conduct mentioned in that subsection includes giving preference to persons of the same religion as the religious body.
- (4) Subject to subsection (6), a religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.

Note 1: Subsection (6) contains an additional requirement for religious educational institutions.

- (5) Without limiting subsection (4), conduct mentioned in that subsection includes giving preference to persons of the same religion as the religious body.

Religious educational institutions must have a publicly available policy in relation to conduct

- (6) If a religious body that is an educational institution engages in conduct mentioned in subsection (2) or (4), the conduct is in accordance with a written policy that:
- (i) outlines the religious body's position in relation to particular religious beliefs or activities; and
 - (ii) explains how the position in subparagraph (i) is or will be enforced by the religious body; and
 - (iii) is publicly available, including at the time employment opportunities with the religious body become available or the time of enrolment.

- (7) Without limiting subsections (2) or (4) the Act does not apply in relation to:
- (i) the ordination or appointment of priests, ministers of religion or members of a religious order; or
 - (ii) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
 - (iii) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

This proposal avoids some of the complexities of the Commonwealth legislation and applies across all religious bodies. For the avoidance of doubt, it would be helpful to include **an additional definition in section 4** of the Discrimination Act as follows:

religious body means any of the following that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion:

- (a) an educational authority;
- (b) a registered charity;
- (c) any other kind of body (other than a body that engages solely or primarily in commercial activities).

The proposed new section 51 ensures the prohibition of discrimination in the Discrimination Act does not unduly limit the right to freedom of religion. Without it, the other provisions in the Discrimination Act could restrict or interfere with the observance or practice of particular religions or the ability for religious bodies to conduct their affairs in accordance with their religious beliefs. It therefore promotes the right to freedom of religion and association. It is not an impermissible limitation on an individual's right to freedom of religion or belief, as it does not limit an individual's freedom to continue to hold a particular religious belief.

Obviously though, by allowing this conduct, the new section 51 could limit an individual's rights to equality and non-discrimination by preventing them accessing the provision of services and education or employment opportunities from that religious body on the basis of their religious belief or activity. However as indicated in relation to the Commonwealth's *Religious Discrimination Bill 2021*, the provisions have been carefully balanced to ensure they only exempt conduct engaged in in good faith by inherently religious bodies, which relates to the fundamental tenets underpinning the religious body and is necessary for that body to continue to act in accordance with their religious beliefs and to maintain their religious ethos.

This ensures that there is a rational connection between the limitation and the objective, and that the measure will be effective at targeting and achieving the objective. The provision does not provide a general basis for discrimination outside of the doctrines of the relevant religion and values and susceptibilities of adherents of the religion. This limitation is, therefore, rationally connected, and proportionate, to its legitimate objective of enabling religious bodies to conduct themselves in accordance with their religion, which also promotes an individual's right to freedom of association and right to manifest their religion in community with others.

Clause 27 – Section 60 replaced

Clause 28 – Section 62A inserted

These amendments would, in turn:

- allow complaints to be made by 'an organisation or body (whether or not incorporated), on behalf of a group of individuals, whether named or not'
- allow 'representative complaints' to be made, again without any need for identification of alleged victims of discrimination.

These provisions fundamentally alter the nature and structure of the Discrimination Act. The Act would no longer be predicated on addressing and responding to legitimate concerns of discrimination, but rather would be open to abuse by activists perusing unmeritorious claims for ideological purposes. There would seem to be little to stop confected or concocted claims being made under these proposals.

These clauses should be amended to remove the ability for complaints to be made on behalf of unidentified persons alleged to have suffered discrimination.

Concluding Comments

We have sought to engage constructively and positively with the ED Bill in the responses above, as we have done throughout this process. We urge the Government, however, to take the time to provide greater clarity and allow further input into these proposals – **there is time to get these amendments right.**

We are happy to meet with the Government to discuss any of these issues raised and explain our concerns more fully.