Queensland Human Rights Commission

Review of Queensland's Anti-Discrimination Act

Submission by Christian Schools Australia (CSA)

For further discussion regarding this submission please contact:

Mr Mark Spencer,
Director of Public Policy
Ph: 02 6257 7989
mspencer@csa.edu.au

Introduction

Christian Schools Australia (CSA) is a national body that supports and represents schools for whom religious formation is an integral part of the education process.

CSA serves schools in 180 locations, supporting some 10,000 staff and more than 72,000 students across Australia. Within Queensland, CSA has 20 member schools which educate over 12,000 students. Globally, CSA is part of the Association of Christian Schools International (ACSI). There are 24,000 schools educating in excess of 5.5 million students in over 108 countries around the world within this network.

Member schools of CSA operate as independent, locally governed, religious organisations. Some are closely aligned with one or more Christian churches in their communities, while others have their heritage in a group of parents coming together to start a school. In all of these schools religious formation is part of the aim of a holistic education in service of 'the common good'[1]

Preliminary Comments

"In all of these schools religious formation is part of the aim of a holistic education in service of 'the common good'."

The Discussion Paper,[2] in Appendix A, lists a number of groups involved in initial consultation with the Queensland Human Rights Commission ('the Commission') as part of the Review process. It is disappointing that despite being the largest national association of Christian schools and having extensive experience in relation to equal opportunity and human rights law, as indicated in our request for involvement in those consultations, that the Commission chose to exclude our organisation from that process.

Involvement in those earlier consultations may have provided an opportunity to address some of the clearly ideological positions that have been taken in the development of the Discussion Paper. These are addressed in more detail below.

The *Anti-Discrimination Act 1991* ('the AD Act') is, as has been often stated in the review documents, some 30 years old. However, across that time it has been updated on 46 occasions and cannot simply be characterised as reflecting a bygone era or being out of touch with 'the aspirations and needs of contemporary society'. In the Commissioner's Foreword to the Discussion Paper, he indicates that '[o]ne of the critical questions this Review must address is whether our anti-discrimination law protects and promotes equality to the greatest extent possible'.

Respectfully, these statements reflect a gross mischaracterisation of the Terms of Reference and leave open suggestions that a pre-determined outcome may he inherent in the Review process. The overarching aim of the Review as outlined in the Terms of Reference is as follows (emphasis added):

> *'review the AD Act and consider* ***whether there is a need for any reform*** *to enhance and update the AD Act, taking into account Australian and international best practices, to best protect and promote equality, and non-discrimination* ***and the realisation of human rights****.'*

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

[2] Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act* (Discussion Paper No 62, November 2021), ('Discussion Paper').

It is firstly incumbent on the Commission in the review process to demonstrate that there is a need for any reform. Whether this has been done across many areas being considered is highly questionable.

Secondly, focussing primarily on 'equality' and seeking to elevate non-discrimination as the pre-eminent human right is fundamentally inconsistent with international human rights law. As the then UN Secretary-General very eloquently indicated:

> *'When it comes to human rights, there should be no selectivity.*
>
> *Human rights are not a menu, from which we just can pick and choose.'*[3]

If, as indicated in the Discussion Paper,[4] the initial consultation focussed merely on whether 'the Anti-Discrimination Act is effective in eliminating discrimination in Queensland, or whether the legislation needs to change' it would seem that the results may be significantly skewed. In the light of this skewed framing of the issues, it is not difficult to understand why there was 'strong support from stakeholders for the Commission to have a more positive role in eliminating discrimination and sexual harassment to the greatest extent possible'.[5] Indeed, it would have been remarkable if this had not been the case.

"When it comes to human rights, there should be no selectivity.

Human rights are not a menu, from which we just can pick and choose."

The full Terms of Reference, which include consideration of the realisation of human rights, require far more than the narrow focus on discrimination.

Ideological Underpinnings

In seeking to justify the need for changes to the AD Act, the Discussion Paper focusses heavily on the highly contested and ideologically charged concepts of 'systematic' and 'intersectional' discrimination.

The Paper acknowledges that 'blatant forms of discrimination have declined', presumably referring to discrimination as commonly understood and for which evidence can be adduced.[6] This would correspond with general community expectations and the low number of complaints received by the Commission. It then goes on to suggest that 'more subtle and less visible forms of discrimination' are being experienced and that these are often 'linked to attitudes, biases, and stigma'.[7] Latter it suggests that 'intersectional' discrimination 'affects a person's sense of belonging'. Inferring that the law should seek to address imputed attitudes or biases, or provide remedies in response to 'a person's sense of belonging' is truly Orwellian, invoking notions of 'thoughtcrime' should divergent views be expressed.

The law is well suited to 'evaluating whether or not two people were treated in the same way'.[8] Courts have experience and established practices to do so over many years. Consideration of a legal framework that 'requires correcting or equalising a person's position to move towards equal outcomes'

[3] Secretary-General Ban Ki-moon, *Address to the Council of Europe* (Ceremony to mark the 60th anniversary of the European Convention on Human Rights, 19 October 2010) <https://www.un.org/sg/en/content/sg/speeches/2010-10-19/address-council-europe>.
[4] Discussion Paper, 15.
[5] Ibid, 25.
[6] Ibid, 16.
[7] Ibid, 16.
[8] Ibid, 17.

"... a legal framework that 'requires correcting or equalising a person's position to move towards equal outcomes' potentially involves an unprecedented coercive interference with other individuals who are blameless."

potentially involves an unprecedented coercive interference with other individuals who are blameless.[9] The fundamental Australian commitment is to 'a fair go' not a legislative contrived outcome.

Many of the broad academic and social critiques of concepts of 'systematic' and 'intersectional' discrimination are succinct captured in a quotation in the Discussion Paper, 'people do feel discriminated against, but they don't really know why.'[10] Untested, unverifiable, subjective feelings, with no identifiable cause, are deemed sufficient to constitute some form of discrimination demanding a legislative, and consequently often punitive, response. Causation, or even any sense of possible correlation, seems redundant, all that is apparently required is 'the vibe' in this Dennis Denuto inspired approach to the law.

Christian schools, motivated and guided as they are by the Christian Gospel, are profoundly emancipatory. As outlined below in more detail, they are founded on the fundamental principle of the inherent dignity and worth of all individuals. Discrimination is repugnant to these schools.

However, the controversial concepts of 'systematic' and 'intersectional' discrimination simply provide no basis for a sensible legislative approach. Inasmuch as these concepts have shaped the Discussion Paper and the proposals therein, the Paper is weaker as a result. Certainly, the essentially coercive nature of responses to such discrimination do not reflect the 'the aspirations and needs of contemporary society'.[11]

"[Christian schools] are founded on the fundamental principle of the inherent dignity and worth of all individuals. Discrimination is repugnant to these schools."

Understanding Christian Schools

CSA schools are concerned with the religious (or spiritual) formation of students as an integral aspect of education. This is very much in line with the goals of the Alice Springs (Mparntwe) Education Declaration.[12] All jurisdictions across Australia, including Queensland, are signatories to the Declaration which asserts, in its Preamble:

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

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

[9] Ibid, 17.
[10] Ibid, 19.
[11] Ibid, 4.
[12] Council of Australian Governments. Education Council (2019). *Alice Springs (Mparntwe) education declaration*.

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

> *"Parents, carers and families are the first and most important educational influence in a child's life. They have a critical role in early development, including social, emotional, intellectual, spiritual and physical wellbeing. They instil attitudes and values that support young people to access and participate in education and training, and contribute to local and global communities. It is critical for the education community to work in partnership with parents, carers and families to support a child's progress through early learning and school.".*

In the schools represented by this submission, and indeed in Australian faith-based schools of many kinds, the ideals of the Mparntwe Declaration are realised, embodied and celebrated.

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

This includes an emphasis on the importance of spiritual values in the formation of individuals, families and society at large. It includes a foundational emphasis on the dignity of all people, the right to religious freedom, the obligation to serve and care for others and be active global citizens.

"... includes a foundational emphasis on the dignity of all people, the right to religious freedom, the obligation to serve and care for others and be active global citizens."

The nature of 'religious belief or activity'

The central role of God – 'religious belief'

Religious belief, or 'faith', within the individuals that make up the communities of Christian schools is understood to be at the very core of their identity. While there are a multitude of forms of expression of the Christian faith, for those believers associated with the establishment and ongoing leadership of Christian schools it is the central characteristic of their lives. They define themselves in terms of their beliefs and, in common with the other monotheistic faith traditions, are accountable for all their actions to a supernatural God. A God who, in the Christian understanding, created all that there is and remains sovereign over all that he created, including humankind.

This understanding is captured, in part, within the CSA Statement of Faith,[13] which indicates in its opening paragraphs that:

> *"There is one God and He is sovereign and eternal. He is revealed in the Bible as three equal divine Persons - Father, Son and Holy Spirit. God depends on nothing and no one; everything and everyone depends on Him. God is holy, just, wise, loving and good.*
>
> *God created all things of His own sovereign will, and by His Word they are sustained and controlled."*

[13] The CSA Statement of Faith is accepted by all member schools and reflects a broad, inclusive statement of foundational Christian beliefs. It can be viewed online <https://www.csa.edu.au/CSA/Resources-and-Media/Resource-Library/Resource-Library-Viewer.aspx?ResourceID=176>.

The impact of belief on all of life – 'religious activity'

If these statements are accepted as truth, which is the case amongst schools reflected in this submission, and it is acknowledged that God exists with these properties, the **absolute and fundamental nature of faith** becomes self-evident. After reflecting on the atoning work of God's Son, Jesus Christ, the CSA Statement of Faith summaries the impact of these understandings in the lives of mature believers. The outworking of this faith in the day to day lives of believers is expressed in the final paragraph of the Statement of Faith which says:

> *"Out of gratitude for God's grace and in dependence on the Holy Spirit, God's people are called to live lives worthy of their calling in love and unity and in obedience to God in all spheres of life. They are responsible to ensure that the gospel is faithfully proclaimed. Christian parents are required to bring their children up in the discipline and instruction of the Lord and to diligently teach them the truth of God's Word."*[14]

"The preparation of this submission is as much a reflection of faith, as much a 'religious observance' as involvement in a weekend church service."

This seeks to express a 'whole of life' understanding of the impact of faith to which believers are called. The preparation of this submission is as much a reflection of faith, as much a 'religious observance' as involvement in a weekend church service.

The responsibilities of Christian parents – 'religious activity'

This understanding of faith acknowledges the ***imperative*** for Christian parents to raise their children with a knowledge of God. While it is arguable that a Christian school is not the only means by which this task can be undertaken, for those who have the option and choose a Christian school, the school is an integral part of supporting those parents in this essential aspect of their parental responsibilities.

Christian schools operate in partnership with parents. By and large this is with Christian parents, although increasingly parents are being attracted to Christian schools who may not be involved in a faith community outside the school themselves. By seeking enrolment for their children in a Christian school they are, however, **making an explicit choice to accept and support the values and beliefs of that school**. An alignment of purpose and willingness to actively partner together on the basis of a set of agreed values and beliefs is a pre-requisite for an effective Christian school education.

The nature of Christian Schools – 'in community with others'

A holistic, 21st century, education seeks to address all these areas providing far more than a purely academic transfer of knowledge. The Christian faith is the foundation upon which all aspects of a Christian school are based. Formal and informal structures and practices work together to provide a faith-based community within which learning and religious formation can take place.

"... parents have made a deliberate choice for a school that teaches, supports, nurtures and seeks to live out the values, tenets and beliefs of the Christian faith."

In choosing a CSA school, parents have made a deliberate choice for a school that teaches, supports, nurtures and seeks

[14] While much more could be said and has been written on the obligations and duties of Christians to lead a faithful life of service these comments are limited to references within the CSA Statement of Faith.

to live out the values, tenets and beliefs of the Christian faith. It is a choice to journey together as part of a community, a community which is often rich and diverse in its backgrounds, race, ethnicity and occupation but drawn together by the common bond of faith.

Schools represented in this submission understand that spirituality, or religious formation, permeates all that is lived out in the daily life of the school and its community. The pedagogical underpinning of these schools is that faith is not only taught, but 'caught'. That is, the *informal* curriculum of culture and lived values is as important as the formal teaching of the various beliefs and tenets of the faith.

"... all staff members, including administrative and teaching staff, are role models and exemplars for the students whose educational, social and spiritual development is the school's purpose."

In establishing such a Christian learning community, the conduct and character of individuals, and the nature of their relationships with others, are key concerns. This includes all manner of conduct – including integrity of professed faith and personal conduct. Faith is lived out ***in*** community and ***through*** relationships – these are essential elements of a Christian school education.

In the Christian learning communities represented by this submission, *all* staff members, including administrative and teaching staff, are role models and exemplars for the students whose educational, social and spiritual development is the school's purpose. Whether by modelling or instruction all staff are required to participate in a culture of faith formation in the context of education.

Teachers in Christian schools are required to integrate the beliefs and tenets of the faith into their rendering of the Australian Curriculum. Their own internalised faith is critical to this educative process. In addition, and again as an essential aspect of their role, Christian school teachers are required to be pastors and spiritual mentors to the students in their care.

Similarly, administrative and general ancillary staff are required to both embrace, and act in accordance with the values, beliefs, doctrines and tenets of the faith in their many interactions with school students and their families. These staff participate in the prayer life of the community, are commonly involved in communal worship and can also play a vital pastoral role with individual students.[15]

If freedom of religion is to remain a legitimate hallmark of Australian education, then the rights of school communities to operate in accordance with religious beliefs must be upheld.

"If freedom of religion is to remain a legitimate hallmark of Australian education, then the rights of school communities to operate in accordance with religious beliefs must be upheld."

This must include the right to choose *all* staff based on their belief in, and adherence to, the beliefs, tenets and doctrines of the religion concerned. It must also include the right to speak and teach in accordance with those doctrines, tenets and beliefs, to apply a faith driven perspective to the curriculum.

In many situations this must also include the right to select students, or possibly more correctly, families, based on religious criteria. Faith communities, including Christian schools, must be able to take action that separates individuals from that community when

[15] See, e.g Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392, 415.

their actions undermine the school, or reflect a repudiation of what the school believes in and stands for. While not a preferred outcome this option remains a necessary final response to situations determined by a community to be a threat to that group, or the achievement of the mission of that community.

Part C: Options for Reform - Responses

Meaning of discrimination

The Discussion Paper asks, **Discussion Question 1**, whether the AD Act should 'clarify that direct and indirect discrimination are not mutually exclusive'. This is proposed with reference to a single tribunal decision subject to appeal and in the face of extensive High Court jurisprudence supporting an alternative view.[16] Maybe a clearer framing of this question would have been to ask whether there is support to change the definition and follow the approach taken in the ACT.

However, it remains unclear from the Discussion Paper what impact this change would have. With the High Court so definitive regarding the distinction it would seem essential to outline precisely what legal impact such a change in approach would have in order to have informed discussion on this point. Without such clarification, when the overwhelming majority of other jurisdictions have not made such a change, it seems premature to do so.

Direct discrimination

The Paper goes on in **Discussion Question 2** to ask whether the test for direct discrimination remain unchanged or whether the 'unfavourable treatment' approach be adopted. This latter test only being utilised in the Australian Capital Territory and Victoria.

Such a change would seem to create considerable potential for confusion and lack of clarity. This would particularly be the case where the forms of discrimination are also protected under the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth) or *Sex Discrimination Act 1984* (Cth) with the resultant potential for conflict between State and Commonwealth legislation. With the latest available data indicating that over 90% of complaints accepted by the Commission last year related to attributes within the areas covered by Commonwealth legislation there seems to be a significant possible problem.[17] Elsewhere in the Discussion Paper such consistency with Commonwealth law is supported.[18] On balance, it may be prudent to retain the existing, established test.

"... over 90% of complaints accepted by the Commission last year related to attributes within the areas covered by Commonwealth legislation."

Indirect discrimination

Similar considerations seem to provide a compelling basis when considering **Discussion Question 4** which proposes a 'unified' approach to discrimination. As the Discussion Paper notes, this 'would be a significant departure from the scheme operating in Australian jurisdictions' and would 'require new jurisprudence to provide guidance on interpretation of the law' – a dramatic step. There would certainly need to be compelling justification for such a change and a clear legislative proposal to consider, neither of which the Discussion Paper provides.

[16] Discussion Paper, 29.
[17] Queensland Human Rights Commission, *Annual Report 2020–21* (Report, 2021) 38 ('Annual Report')
[18] Discussion Paper, 47.

An alternative approach – **properly** defining discrimination

If the aim is truly to 'enhance and update' the AD Act, taking into account Australian and international best practices, 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.[19]

(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 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.

(cont …)

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

> (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),[20] 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'*.

" ... 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.

Unjustifiable hardship and reasonable accommodations

Schools across Australia are familiar with, and support, the requirements in the *Disability Standards for Education 2005* developed under the *Disability Discrimination Act 1992* (Cth). These standards have been the subject of extensive reviews on three occasions, the last in 2020 and are supported by extensive Guidance Notes and other resources.

In effect, these standards determine what does not constitute 'unjustifiable hardship' in an educational context. It would be a significant and retrograde step if any amendment to the AD Act varied factors relevant to determining unjustifiable hardship as considered in Discussion Question 5 in a school context and created inconsistencies with those standards. Any consideration of reframing requirements to a positive obligation as raised in Discussion Question 6 must be evaluated in the same way.

Discrimination on combined grounds

Should the AD Act be amended as consider in Discussion Question 7 to accommodate the effect of a combination of attributes it would be essential to ensure that the combined effect, to be actionable, is 'a substantial reason for the treatment' as currently provided for in section 10(4) of the AD Act. It should certainly not be the case that a number trivial or inconsequential reasons for an action, merely because they arise across a range of attributes, should give rise to prohibited discrimination unless the combined effect is substantial.

[20] United Nations Human Rights Committee *General Comment No. 18: Non-discrimination*, 37th sess (10 November 1989).

Meaning of sexual harassment

While internal research has shown a far lower prevalence of sexual harassment within Christian schools,[21] any such harassment is unacceptable. Once again, however, it is important to ensure that proposals in response to **Discussion Question 9** seek to ensure alignment and consistency with Commonwealth legislation to avoid complexity and confusion.

Dispute resolution

The structure of the AD Act relies upon exemptions as the means of protecting religious freedom, a fraught approach as discussed in more detail below. If this structure remains then Christian and other faith-based schools bear the onus of proving that an exemption applies, generally resulting in considerable legal costs being incurred even in relation to the most unmeritorious claims.

" ... Christian and other faith-based schools bear the onus of proving that an exemption applies, generally resulting in considerable legal costs being incurred even in relation to the most unmeritorious claims."

In response to the matters raised in **Discussion Question 10** we support the recommendations by the Commonwealth Parliamentary Joint Committee on Human Rights *Inquiry into Freedom of Speech in Australia*.[22] The changes considered by that Inquiry, in the context of the Commonwealth's *Racial Discrimination Act 1975,* included:

(a) a requirement for a complaint lodgement fee;

(b) a requirement for the AHRC to bundle multiple complaints into one proceeding where the complainant lodges multiple complaints against the same respondent, and to require the AHRC to decline complaints that are of the same substance and subject matter as earlier complaints from the same complainant;

(c) a limit on the assistance that the AHRC can give to a serial complainant and a requirement for the AHRC to give equal assistance to respondents in all cases; and

(d) a requirement on the AHRC to terminate a complaint if it is determined that it is vexatious, misconceived or lacking in substance, if there are no reasonable prospects or success, or if the AHRC is satisfied in the circumstance of the case that further inquiry is not warranted.

These provisions should be applied within the AD Act and required of the Commission.

Written complaints

It is demonstrably fair for assistance to be provided to complainants to put their complaint in writing as mooted in **Discussion Question 12**. However, as recommended by the Commonwealth Parliamentary Joint Committee on Human Rights in their Inquiry referred to above, the Commission should also give equal assistance to respondents.

---

[21] Heidi Campbell, *Report into Sexual Harassment in Christian Schools* (unpublished report to member schools, 2019) indicating that 95% of respondents to the anonymous data collection stated they had not experienced sexual harassment within the Christian school context within the last 5 year period.

[22] Parliamentary Joint Committee on Human Rights, Parliament of Australia *Inquiry into Freedom of Speech in Australia* (Final Report, 28 February 2017)

Time Limits

The Discussion Paper compares the 1-year timeframe under the AD Act with the limitations for personal injury, tort or contract claims which, respectfully, involve very different matters and different legal responses.

Extension of this period would not only provide a significant further hurdle for possible defences but arguably prolongs the uncertainty for complainants.

In relation to discrimination, not involving sexual harassment, in the context of employment it might indeed be arguable that a shorter timeframe, possibly even the 21 days stipulated under section 394(2) of the *Fair Work Act 2009* (Cth) for the lodgement of unfair dismissal claims, could be adopted.

In the context of Christian and other faith-based schools likely to be bearing the onus of proving that an exemption applies, even a 1-year delay in notification of a complaint can create considerable difficulties in responding. Rather than increasing the timeframe as contemplated in Discussion Question 14, our view is that at least a preliminary notification of a possible claim should be provided within a relatively short period, such as 21 days, of the alleged discrimination.

While we accept that it is unlikely that full details of the complaint would be available in that timeframe, the receipt of such a notification would allow respondents the opportunity to collate the evidence that may be applicable to the complaint while it remains fresh and accessible. This would have clear benefits to all parties in the process and to the administration of justice more broadly.

Organisation complaints

If the AD Act was to allow a representative body or a trade union be able to make a complaint on behalf of an affected person as Discussion Question 16 suggests, this would support the shorter timeframes for at least an initial notification as proposed in response to Discussion Question 14 above. Such bodies could easily provide such a notification on initial contact with the affected person while a fuller consideration of their complaint was undertaken.

Objectives of the Act

As the Discussion Paper acknowledges, the current Preamble recognises and supports Australia's ratification for a range of international human rights instruments. It also acknowledges that critical interpretive role played by the objects outlined in legislation as they may 'provide an explicit starting point for the interpretation' of the whole of the AD Act.[23]

" An object in these terms has been widely criticised as having the effect of undermining that equal status of all human rights as recognised in international law ..."

However, the Discussion Paper then proceeds, in the lead up to Discussion Question 19, to consider including an object in the terms of 'eliminating discrimination, sexual harassment, and other objectionable conduct to the greatest extent possible'.[24] Objects in these terms have been widely criticised as having the effect of undermining that equal status of all human rights as recognised in international law, instead placing non-discrimination above other human rights.

The Report of the Expert Panel on Religious Freedom ('Expert Panel Review'),[25] noted the importance of

[23] Discussion Paper, 66.
[24] Ibid, 68.
[25] *Religious Freedom Review: Report of the Expert Panel* (Final Report, 18 May 2018) ('Expert Panel Review').

ensuring that the right to freedom of religion is given appropriate weight in situations where it is in tension with other public policy considerations, including other human rights.

The Expert Panel Review had a broad scope, including to 'consider the intersections between the enjoyment of the freedom of religion and other human rights' and was charged with consulting 'as widely as it considers necessary'. After the extensive consultation involving more than 15,000 submissions and discussions with 180 organisations in face-to-face meetings in every State and Territory, the final report of the Expert Panel Review recommended, inter alia:

- *'Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion'* – Recommendation 2.

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

These recommendations correctly summarise the expectation for a unity of human rights. As noted above the objects under consideration may have the effect of undermining that equal status, instead placing non-discrimination above other human rights.

The Commonwealth has, 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 in a form which could be utilised in the AD Act, inserting a sub-section (2) after including the proposed 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.

We also support Recommendation 2 from the Expert Panel Review 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.[26] A similar approach could be taken by the Queensland Government.

This approach will also assist in overcoming, in an operational sense, some of the problems inherent in the *Human Rights Act 2019* ('the HR Act'). Section 13 of the HR Act provides insufficient protection for non-derogable rights, such as freedom of religion, contained in the *International Covenant on Civil and Political Rights*.[27] The HR Act allow these rights to be subject to any 'reasonable limits that can be demonstrably justified in a free and democratic society'. This imposes a much lower bar than the test demanded in Article 18(3) of 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

The inclusion of this interpretive principles within the AD Act, which provides the more 'active' protection of human rights in Queensland, would mitigate against practical effect of that fundamental weakness. The following draft Interpretive Principles are 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.

(Cont…)

[26] 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].

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

(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).

A Regulatory Approach?

The Discussion Paper proposes within the bundle of questions labelled Discussion Question 22 a proposed regulatory role for the Commissions which is, frankly, chilling and of incredible concern.

While described innocuously in terms of a three-tiered structure, as if each was clearly separated and autonomous, it is clear that the reality would be vastly different. The 'education, assistance, and persuasion' described as part of 'Level one' could not realistically be separated by the quasi-judicial powers outlined in 'Level Three'. It would be stupefyingly naïve to consider that 'persuasion' would never reference the potential for investigations by the Commission, or that 'guidelines' would not become de-facto standards enforced by the Commission, but subject to no effective Parliamentary scrutiny in their development.

These concerns are merely amplified by the adoption of the radical claims of the need to address 'systematic' and 'intersectional' discrimination that are discussed above. These ideological perspectives would no doubt pervade the education provided by the Commission, influence the assistance offered, permeate the guidelines created, underpin the action plans endorsed and, ultimately, determine the types of conduct targeted for investigation.

"These ideological perspectives would no doubt pervade the education provided by the Commission, influence the assistance offered, permeate the guidelines created, underpin the action plans endorsed and, ultimately, determine the types of conduct targeted for investigation."

Role of the Commission

It is perhaps timely in light of the questions raised in the Discussion Paper, particularly those in Discussion Question 22, whether, more fundamentally, there is an ongoing role for the Commission.

Clause 5 of the current Preamble to the AD Act indicates:

> *'The Parliament is satisfied that there is a need—*
>
> *(a) to extend the Commonwealth legislation; and*
>
> *(b) to apply anti-discrimination law consistently throughout the State; and*
>
> *(c) to ensure that determinations of unlawful conduct are enforceable in the courts of law.'*

This clearly suggests that the intention of the AD Act is to *supplement* and not *supplant* the protections in Commonwealth legislation. On this basis it is instructive to consider the accepted discrimination

complaints, by attribute, detailed in the Commissions latest Annual Report. **Over 90% of the complaints accepted by the Commission related to attributes within the scope of Commonwealth protections**.[28]

Of all the complaints received by the Commission 'just over 1%' are received in person or by letter, the remainder electronically.[29] The Annual Report also indicates that telephone conferences have 'continued this year as an effective means of resolving complaints' noting that video-conferencing is offered for those with a special requirement for a face-to-face conference.[30] Clearly there is no significant impact on complaints relating to the physical proximity of a complaints handling body. There seems to be no impediment at all for the vast majority of the complaints received to be addressed by Commonwealth agencies.

It may be prudent at this time to consider whether the $7.3million operating cost of the Commission is an appropriate investment considering the mere 43 complaints it accepted in 2020-21 which were not potentially within the jurisdiction of Commonwealth redress mechanisms.

Non-legislative measures

While noting that resourcing is outside the scope of the Review, the preamble to **Discussion Question 24** notes the concerns raised in initial consultations regarding 'the limited resourcing of the legal service sector and the advocacy and support sector'.

"... it can be extremely daunting to be confronted by complainants supported by taxpayer funded legal or advocacy services. Resources used in any defence must be diverted from funds otherwise earmarked for the provision of education and the support of students and their learning."

For Christian and other faith-based schools responding to any complaint and bearing the onus to prove an exception applies, it can be extremely daunting to be confronted by complainants supported by taxpayer funded legal or advocacy services. Resources used in any defence must be diverted from funds otherwise earmarked for the provision of education and the support of students and their learning. The resources involved can be extremely challenging to muster for smaller schools in particular.

Certainly, any comments made in relation to resourcing should also be cognisant of the impact on respondents.

Part D: Coverage of the Act - Responses

Current Attributes - Impairment

We support the proposition reflected in **Discussion Question 25** that 'impairment' should be replaced with disability. Moreover, we strongly encourage close alignment with the *Disability Discrimination Act 1992* (Cth).

We also potentially support the expansion of the current grounds from the reference to a 'guide, hearing or assistance dog' to a broader category of 'assistance animal'. We are not, however, aware of broader categories of animals being accredited under either the existing Commonwealth or ACT provisions referred to in the Discussion Paper.

---

[28] Annual Report, 38.
[29] Queensland Human Rights Commission, *2020-21 Annual Snapshot*, <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0005/35735/QHRC_AnnualSnapshot_2020-21.pdf>.
[30] Annual Report, 33.

We note that in South Australia, for example, section 5(1) of the *Equal Opportunity Act 1984* (SA) defined 'assistance animal' in terms of 'a dog that is an accredited assistance dog under the *Dog and Cat Management Act 1995*' or 'an animal of a class prescribed by regulation', no such other animal having been so prescribed. In effect, this is no broader that the existing provisions in the AD Act.

There are additional provisions in the South Australian legislation relating to therapeutic animals, section 88A, which do apply to the broader range of 'an animal certified by a medical practitioner as being required to assist a person as a consequence of the person's disability'. This section, however, only protects against discrimination in the provision of accommodation, not a as a general protection.

In a school context, care would need to be taken to ensure that a medical practitioner could not simply certified that an animal 'needed' to accompany a student to school on the basis that this 'may' assist in the child's integration into the school environment or similar. While a number of Christian schools have accommodated properly accredited assistance animals, who are trained and well socialised, there would be considerable risks to both the safety of other students and to the efficacy of the learning environment if a broader range of animals were required to be accepted.

Current Attributes – Gender Identity

We agree, as discussed in the context of Discussion Question 26, that the inclusion of those with differences/disorders of sexual development, alternatively described as having 'variations of sex characteristics' or 'intersex', within the vague language of 'gender identity is problematic. This is discussed further below.

However, it is a considerable overreach to claim that the self-proclaimed 'Yogyakarta Principles' have in any way 'settled' a definition of gender identity. This meeting of activists had no formal governmental representation or involvement and sits completely outside the established processes of international law let alone the democratic mechanisms leading to domestic Australian law.

The ideology underpinning the identification of 'gender identity' as a separate, or interchangeable, attribute to sex is highly questionable and under increasing scrutiny, and that the unintended consequences of these proposals are increasing becoming apparent. We have also received legal advice that definitions in current legislation lack legal precision. Despite subsequent claims in the Discussion Paper that 'scientific understanding of sex and gender has substantially advanced since the Act was introduced in 1991' this is simply not the case, and no evidence is provided to support this sweeping claim.[31]

"... dealing with emerging adolescents developing a sense of their personhood and identity, the inclusion of 'gender identity' is particularly fraught, requiring significant sensitivity on a case-by-case basis."

In the context of schools dealing with emerging adolescents developing a sense of their personhood and identity, the inclusion of 'gender identity' is particularly fraught, requiring significant sensitivity on a case-by-case basis. We reiterate the definitional questions that would create enormous practical challenges should protections along the lines of the protected attribute under the *Sex Discrimination Act 1984* (Cth) be introduced and apply to schools, including:

- What are 'gender-related characteristics', how are they determined and by whom?

[31] Discussion Paper, 105.

- At what point of time are these characteristics determined? What happens if they change over time?
- How are 'identity, appearance or mannerisms' determined to be gender-related? When might they be gender related and when might they be otherwise determined?

Similarly, if the definition in s213G of the *Public Health Act 2005* (Qld) was adopted how would Christian schools or others in the community be able to determine 'the person's internal and individual experience of gender'? Disconnected from the binary nature of biological sex it would seem that there are 8 billion different possibly genders connected with each individual's personal experience. How can each of these be given legal protection? How are changing tastes required to be accommodated?

It becomes almost impossible in the shadow of the uncertainty created by such vague definitions for otherwise lawful distinctions based on sex to be made. These distinctions are often vital to ensure the personal and bodily autonomy of young people, especially young girls but also boys, and accommodate the strong cultural sensitivities often involved around these issues, including considerations of indigenous spirituality.

Current Attributes – Sexuality

It may be, as reflected in the preamble to Discussion Question 27, that people now describe their sexuality in a range of ways. There may be thousands or indeed millions of terms used, however this does not detract from the comprehensiveness of the current legal definition.

The definition in section 213E of the *Public Health Act 2005* (Qld) referred to in the Discussion Paper,[32] was only recently included in that Act as part of the amendments within the controversial *Health Legislation Amendment Bill 2020* rammed through Parliament despite considerable and widespread community concern. As many commented at the time, it is simply incomprehensible on a plain reading.

It would certainly be a retrograde step to adopt such a vague 'definition'.

Other Current Attributes – Religious Belief and Religious Activity

While 'religious belief and religious activity' are currently a protected attribute under the AD Act, there is only a very general definition of religious belief in the Act, 'religious belief means holding or not holding a religious belief'. Extensive consideration of issues around protections against religious discrimination have been undertaken, including by the NSW Parliamentary Committee referred to earlier.[33]

We propose in response to Discussion Question 29 that d that religious beliefs and religious activities both be defined as follows –

> ***religious activities*** *includes engaging in religious activity, including an activity motivated by a religious belief, but does not include any activity that would constitute an offence punishable by imprisonment under the law of Queensland or the Commonwealth.*
>
> ***religious beliefs*** *includes the following—*
>
> *(a) having a religious conviction, belief, opinion or affiliation,*
>
> *(b) not having any religious conviction, belief, opinion or affiliation.*

[32] Discussion Paper, 97
[33] Above n26.

It will also be necessary to determine when a belief is held –

> For the purposes of this Act, a person holds a religious belief (inclusive of the person's beliefs as to the actions, refusals, omissions or expressions that are motivated or required by, conflict with, accord or are consistent with, that belief) if the person genuinely believes the belief.

The scope of religious activity will also need definition –

> A reference to a person's religious activity is a reference to a religious activity:
>
> (a) that a person engages in, does not engage in or refuses to engage in, or
> (b) that a person is thought to engage in, thought not to engage in, or refuses to engage in (whether or not the person in fact engages in the religious activity), or
> (c) that a person engaged in in the past, or is thought to have engaged in the past or did not engage in or refused to engage in in the past, or it is thought to have not engaged in or to have refused to engage in in the past (whether or not the person in fact engaged in the religious activity), or
> (d) that a person will engage in in the future, or that it is thought a person will engage in in the future, or will not engage in or refuse to engage in in the future, or it is thought a person will not engage in or refuse to engage in in the future (whether or not the person in fact will engage in the religious activity).

In addition, it will be necessary to ensure that religious belief or activity includes past, future and presumed religious belief or activity –

> A reference to a person's religious belief is a reference to a religious belief:
>
> (a) that a person holds, or
> (b) that a person is thought to hold (whether or not the person in fact holds the religious belief), or
> (c) that a person held in the past, or is thought to have held in the past (whether or not the person in fact held the religious belief) or
> (d) that a person will hold in the future or that it is thought a person will hold in the future (whether or not the person in fact will hold the religious belief).

We note that the Joint Select Committee of the NSW Parliament referred to above largely endorsed similar drafting for amendments to the *Anti-Discrimination Act 1977* (NSW).[34]

The Committee did recommend that religious activity be more narrowly defined as 'includes engaging in lawful religious activity, including an activity motivated by a religious belief'. It indicated that it did so '[f]or the avoidance of doubt',[35] as it 'was argued that the Bill could provide protection for other

[34] Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, above n26, [2.84]
[35] Ibid, [2.44]

offences conducted in the name of religion'.[36] These arguments are seriously misplaced and not relevant in the context of consideration of amendments to the AD Act. The AD Act does not and will not authorise the breach of other legislative provision or common law duties.

"... religious belief and activity is its communal nature ... it is essential to ensure that religious organisations can be formed and maintained in accordance with those shared beliefs.."

A unique feature of religious belief and activity is its communal nature. It stands not merely as a right held or exercised by an individual but as a right in many cases essentially exercised in the company of others who share those beliefs. For this reason, it is essential to ensure that religious organisations can be formed and maintained in accordance with those shared beliefs. This is addressed below in relation to exceptions.

Additional attributes - Gender

There is simply no evidence to support the sweeping statements in the Discussion Paper that 'gender is now generally considered a separate concept from gender identity, sex, and sex characteristics' and that 'scientific understanding of sex and gender has substantially advanced since the Act was introduced in 1991'.[37]

The *Guidelines on the Recognition of Sex and Gender* produced by the Australian Government do not purport to reflect the state of 'community and scientific understanding' but to provide guidance to Australian Government departments and agencies on the collection of gender information.[38] ABS guidance from 2020 is also referred to in support of the propositions in the Discussion Paper.[39] However a cursory reading of the ABS guidance indicates that it was 'developed to respect the intent of the Australian Government Guidelines on the Recognition of Sex and Gender, November 2015'.[40] In effect, the ABS guidance is merely following the *Guidelines on the Recognition of Sex and Gender, so* only one primary source is provided, and it does not claim any widespread or scientific basis for its approach.

In response to Discussion Question 35, if we are to not lose the valuable ground gained by women and girls it is vital that sex be retained as a protected attribute. There is no evidence that gender is as conceptually distinct from other existing protected attributes as is claimed in the Discussion Paper. The introduction of a separate attribute as proposed seems destined only to add further confusion.

Additional attributes – Sex characteristics

Christian schools supported the introduction of protection on the basis of 'intersex status' into the *Sex Discrimination Act 1984* (Cth) by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (Cth).

---

[36] Ibid, [2.43]
[37] Discussion Paper, 105.
[38] Australian Government, *Guidelines on the Recognition of Sex and Gender* (Updated Guidelines, 18 November 2015)
[39] Discussion Paper, 105 referring to: Australian Bureau of Statistics, *Standard for Sex, Gender, Variations of Sex Characteristics and Sexual Orientation Variables* (Web Page, 27 February 2022) <www.abs.gov.au/statistics/standards/standard-sex-gender-variations-sex-characteristics-and-sexual-orientation-variables/latest-release>.
[40] Ibid.

We would support the include of an additional protected attribute as proposed in **Discussion Question 38** for those with differences/disorders of sexual development, alternatively described as having 'variations of sex characteristics' or 'intersex'.

General Exemptions – sport

A bill is currently before the Commonwealth Senate to 'clarify that the operation of single-sex sport is not a breach of the *Sex Discrimination Act 1984* (Cth)'.[41]

The effect of the Bill at a Commonwealth level would not be to undermine the criteria currently in place in the Commonwealth law, which are similar to the factors discussed in **Discussion Question 40**. The Bill would simply ensure that single sex sports can be conducted lawfully, which is primarily expected to benefit girls and women.

Christian schools support this Bill which provides certainty for organisers of sporting activities and allow them to get on with providing opportunities for women and girls to compete on a level playing field.

We would encourage consideration of equivalent provisions in the AD Act.

General exemptions – religious bodies / Work exemptions – religious schools

The language of exemptions is inherently fraught and widely recognised as a poor mechanism to balance human rights. Even a simple change of nomenclature to 'balancing provisions' would greatly enhance the general understanding of these provisions which are an essential part of the legislative framework adopted in the AD Act.

International human rights law has recognised that the right to equality before the law and non-discrimination must co-exist with other fundamental rights and freedoms, including freedom of religion."

International human rights law has recognised that the right to equality before the law and non-discrimination must co-exist with other fundamental rights and freedoms, including freedom of religion. It is widely acknowledged that 'great care must be taken when seeking to limit the rights of one individual or group in favour of another' including in relation to religious freedom rights.[42]

The UN Special Rapporteur for Freedom of Religion and Belief has made it very clear that:

> *'States that adopt more secular or neutral governance models may ... run afoul of article 18(3) of the Covenant [ICCPR] if they intervene extensively, overzealously and aggressively in the manifestation of religion or belief alleging the attempt to protect other rights…'*[43]

The current 'genuine occupational requirements' approach in the AD Act in relation to employment in religious schools is enormously problematic in this regard. The potential scope of the exception has been described as 'difficult to predict' and labelled by some in the category of 'novel exceptions with uncertain scope'.[44]

---

[41] *Sex Discrimination and Other Legislation Amendment (Save Women's Sport) Bill 2022*.

[42] Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 117.

[43] Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/37/49 (28 February 2018) [47]

[44] Sarah Moulds, above n42, 121.

Other advice we have received suggests that the current 'genuine occupational requirements' approach in the AD Act is inconsistent with the clear expectations of international law.

While the HR Act again fails to adequately protect religious freedom by omitting to include equivalent protections, Article 18(4) of the ICCPR is very clear –

> *"The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."*

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.[45]

In response to the issues in **Discussion Questions 41 to 44**, utilising the drafting in the Commonwealth's *Religious Discrimination Bill 2021* as a base, a **new section – Actions by Religious Bodies** could be inserted into the AD Act to clarify the interaction between religious freedom and other rights:

(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 5.

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.

(Cont …)

[45] United Nations Human Rights Committee, above n20.

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.

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 the Dictionary in the AD 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 ensures the prohibition of discrimination in the AD Act does not unduly limit the right to freedom of religion. Without it, the other provisions in the AD 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 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.

Part E: Human Rights Analysis - Responses

As noted in responses to a number of earlier questions, the *Human Rights Act 2019* is itself deficient in relation to the protection of religious freedom. The failure to provide in section 20 an equivalent protection to that found in Article 18(4) of the ICCPR is a glaring omission.[46] The adoption of a much lower bar for acceptable constraints on religious freedom, the 'reasonable limits' in section 13 rather than the test of necessity found in Article 18(3) further weakens the protections and demonstrates a clear inconsistency with the international law standards.

Any analysis of the AD Act in response to **Discussion Question 56** measured against the benchmark of the *Human Rights Act 2019* will inevitably fall short of properly considering religious freedom protections as a result.

Concluding Comments

The Commissioner's foreword in the Discussion Paper indicates a desire to ensure that the AD Act is '**protecting fragile freedoms and reflecting the aspirations and needs of contemporary society'**. The recommendations and proposals in this submission help to achieve this by reflecting the most contemporary approaches to properly defining discrimination, recognising legitimate differentiation, and incorporating best practice in relation to 'balancing' human rights.

We agree that **'[s]trong communities and social cohesion are always important'**, and accommodation of religious belief has been at the centre of Australia's pluralist society – providing a solid base for this cohesion.

The proposals in this submission will also ensure that the AD Act operates in a manner which is far more **clear, simple and user-friendly**.

The recommendations in this submission will **better align the AD Act with international human rights law**.

By adopting these recommendations, the Commission will clearly be ensuring **the same standard for everyone** in Queensland, including people of faith.

Importantly, the proposals and recommendations will also **promote systemic and preventative change**, ensuring that false understandings of what constitutes discrimination are addressed, and 'balancing provisions' more properly understood.

[46] The provisions of section 36 of the Human Rights Act relating to education do not provide the same protection for parents to 'ensure the religious and moral education of their children in conformity with their own convictions' found in Article 18(4).