



ACT Justice and Community Safety Directorate

***Inclusive, Progressive, Equal: Discrimination Law Reform***

Submission by Christian Schools Australia (CSA)

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## Introduction

Christian Schools Australia (CSA) is a national body that supports and represent 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 70,000 students across Australia. Within the Australian Capital Territory, member schools educate over 2,000 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’<sup>1</sup>

## Preliminary Comments

The Discussion Paper indicates that the aim of the Government is to ‘modernise our discrimination laws and put the ACT at the forefront of best practice in promoting equal opportunity, respect for diversity and social inclusion in our community’. Despite this aim, focussing on modernisation, the vast majority of the proposals within the Discussion Paper, and the overall direction of the review process, are anchored in a 2015 review by the ACT Law Reform Advisory Council – hardly a contemporary review. It should also be noted that the 2015 review only considered 25 submissions.

In contrast, and more recently, the most comprehensive independent review of religious freedom in Australia was completed in 2018.<sup>2</sup> 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’. This submission draws on many of the evidence based recommendations of this review.

The Discussion Paper also outlines five principles which have been adopted to guide the process. One of these seeks alignment with the ACT’s human rights framework as outlined in the *Human Rights Act 2004* (‘Human Rights Act’). Respectfully, alignment along these lines is extremely problematic as the Human Rights Act itself is fundamentally flawed in failing to adequately protect religious freedom.

## Ensuring ‘best practice in promoting equal opportunity’

After the extensive consultation by the panel of independent experts noted above, 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.**

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<sup>1</sup> 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.

<sup>2</sup> *Religious Freedom Review: Report of the Expert Panel* (May 2018) (‘Expert Panel Review’)

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

The existing objects in section 4 of the *Discrimination Act 1991* (‘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 4(a) suggests a pre-eminence is being placed on non-discrimination 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 and applies it to the Discrimination Act, inserting a new **sub-section 4 (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.

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.<sup>3</sup> A similar approach could be taken by the ACT Government.

This approach will also assist in overcoming, in an operational sense, some of the problems inherent in the Human Rights Act. Section 28 of the Human Rights Act would continue to provide insufficient protection for non-derogable rights, such as freedom of religion, contained in the *International Covenant on Civil and Political Rights*.<sup>4</sup> The inclusion of this interpretive principles within the Discrimination Act, which provides the more ‘active’ protection of human rights in the ACT, would mitigate against practical effect of that fundamental weakness.

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<sup>3</sup> 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].

<sup>4</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976) (‘the ICCPR’).

The following draft section **4AB – 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).

## Modernising the definition of Discrimination

If the aim of the Government is truly to ‘modernise’ the Discrimination Act and ‘put the ACT at the forefront of best practice’, 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.<sup>5</sup>

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<sup>5</sup> The drafting is taken from Patrick Parkinson and Nicholas Aroney, Submission to Attorney-General’s Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, January 2012.

The proposed drafting would **replace the existing section 8**.

- (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),<sup>6</sup> 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.

## Coverage of the Discrimination Act

The Discussion Paper indicates that the ACT Government 'intends to amend the Discrimination Act to prohibit discrimination in all areas of public life, with an exception for private conduct'. It is respectfully submitted that this pre-emptive decision is unjustified and will potentially create significant problems. While rationalised on the basis of the limited and targeted consultations undertaken prior to the release of the Discussion Paper this is not an acceptable alternative to meaningful and extensive public consultation.

We strongly suggest that rather than introducing a potentially nebulous concept of 'public life' that the Discrimination Act be amended to include the areas of desired operation if these are to be expanded. This approach would be **more user friendly**, and certainly be **clear** and **simple**.

Looking at the areas of coverage, we want to once again, draw attention to the human rights protected under international law. While the Human Rights 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."*

While considered further in relation to exceptions, the current mechanism for protecting this right, this could be better addressed by an updated definition of discrimination, see below, and/or by clarifying the general protections around religion and education.

Using the current formulation regarding the prohibition of discrimination in education found in section 18 of the Discrimination Act, appropriate protection of the Article 18(4) rights could be achieved by redrafting the applicable clauses, **sub-sections 18(1) and 18(2)** respectively, as follows -

It is unlawful for an educational authority, apart from an educational authority acting in accordance with its the doctrines, tenets, beliefs or teachings, to discriminate against a [person/student] ....

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<sup>6</sup> *General Comment No. 18: Non-discrimination*, 37th sess (10 November 1989).

This will, in turn, require a mechanism for determining the ‘doctrines, tenets, beliefs or teachings’ of such an educational authority. This could be achieved by inserting a new **section 18A – Determining doctrines and beliefs** as follows –

An educational authority may adopt doctrines, tenets, beliefs or teachings for the purposes of section 18 by:

- (a) including the doctrines, tenets, beliefs or teachings in its governing documents, organising principles, statement of beliefs or statement of values; or
- (b) adopting a doctrines, tenets, beliefs or teachings of another body or institution which include the doctrines, tenets, beliefs or teachings; or
- (c) adopting doctrines, tenets, beliefs or teachings from a document or source which include the doctrines, tenets, beliefs or teachings; or
- (d) acting consistently with that doctrine, tenet, belief or teaching.

## Exceptions for 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.<sup>7</sup>

Utilising the drafting in the Commonwealth’s *Religious Discrimination Bill 2021* as a base, a **new section 9 – Actions by Religious Bodies** could be inserted into the Discrimination Act to clarify this.

- (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.

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<sup>7</sup> Ibid.

- (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.

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 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 9 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 9 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.

## Concluding Comments

The Discussion Paper indicates that the Government's aim is to '**modernise our discrimination laws and put the ACT at the forefront of best practice**'. 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.

**Broader and stronger protections** will arise from the adoption of the proposals in this submission, sending a clear message that true **equality and respect** is important in the ACT, including for people of faith.

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

The recommendations in this submission will **better align our human rights framework** with international human rights law.

By adopting these recommendations, the ACT Government will clearly be ensuring **the same standard for everyone** in the ACT, 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.