



Consolidation of Commonwealth Anti-Discrimination Laws

**Submission by
Christian Schools Australia Ltd**

For further discussion regarding this submission please contact:

Stephen O'Doherty
Chief Executive Officer

e: ceo@csa.edu.au

t: 02 9887 4099

m: 0418 255 330

f: 02 9887 4928

This submission has been prepared by:

Stephen O'Doherty

Chief Executive Officer

E: ceo@csa.edu.au

T: 02 9887 4099

F: 02 9887 4099

PO Box 403
North Ryde NSW 1670

Mark Spencer

Executive Officer, National Policy

E: m Spencer@csa.edu.au

T: 02 6257 7989

F: 02 6257 6637

PO Box 6061
O'Connor ACT 2602

Original document © 2012 Christian Schools Australia Limited A.C.N. 092 580 124

This publication is protected by Australian and international copyright law. Any member school may use this document in accordance with the CSA *Shared Resources Licence*, a full copy of which can be obtained from the National Office.

This publication is provided as a submission to the Attorney-General's review and consolidation of the Commonwealth's anti-discrimination law and may be used in accordance for the purposes of that Review and in accordance with the terms of that process.

All other rights are reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of Christian Schools Australia Limited. Without limiting the generality of the above the use of this information for commercial purposes is expressly prohibited.

The moral rights of the author/s listed above are acknowledged.

1. Introduction

Christian Schools Australia (CSA) is a peak group representing more than 130 member schools nationally with approx 46,000 students and more than 2,000 teaching staff. CSA provides leadership in policy, services and resources for its members, and generally works to advance the cause of Christian schooling.

CSA member schools are geographically, culturally and educationally diverse, while serving predominantly middle to lower socio-economic communities. They operate as locally governed, community-based, not for profit religious organisations.

CSA member schools are closely aligned with one or more Christian churches in their communities. As faith-based schools, our members are overt and particular about the beliefs and values that underpin the schools' culture and practice.

As a direct expression of Christian faith, our member schools have a strong culture of mission and service both at home and overseas. They educate students to be locally and globally active citizens, concerned about the welfare of others and about using their gifts to serve.

CSA member schools have attracted very strong community support as evidenced by their enrolment growth, which has averaged almost 10 percent over the past decade.

Many CSA members were commenced by and remain affiliated with a local church, and draw their enrolments from church families. Others are associated with and supported by members from a number of churches in their local area. In addition, most CSA schools also attract significant enrolments from families who, while not currently attending a Christian church, nonetheless deliberately choose the school because they desire for their children an education that is based upon Christian beliefs and values. This can be expected when the position is accepted that every parent has an inalienable right to choose the type of education they desire for their children.

We have set out below our initial submission to the Attorney-General's Discussion Paper in relation to the consolidation of Commonwealth anti-discrimination laws. In doing so we reserve the right to provide further analysis and comment either in response to other submissions or more generally. In particular we may wish to make a response to any proposed legislative change which may be recommended.

2. The nature of Christian Schools

Christian schools were established out of a desire by parents and churches to provide teaching/learning environments in which the education of young people would include being established and nurtured in the Christian faith.

The Christian faith is the foundation upon which all aspects of a Christian school are based. Structures and practices, both formal and informal, work together to provide a faith-based community within which learning takes place. In our schools religion is not simply taught as a stand-alone subject, it permeates all that takes place and is lived out in the daily lives of the community of the school.

Parents make a deliberate choice to place their children in a school which teaches, supports, nurtures and seeks to live out a value and belief system consistent with Christian faith of their home environment. Such an environment is a *community* in which faith is not only taught, but 'caught'; where the informal curriculum of lived values is as important as the formal teaching of the various beliefs and tenets of the faith.

The conduct and character of individuals, and the nature of their relationships with others in the school community, are key concerns in establishing such a Christian learning community. This includes all manner of conduct - the use of appropriate language, the conduct of relationships, attitudes, values and expression of matters of sexuality, and many other aspects of conduct within the community in general.

Staff members, including both administrative and teaching staff, are role models and exemplars for the students whose educational, social and spiritual development is the school's purpose. Their work is to do with teaching - by *modelling* and instruction – the doctrines and values of the faith. In this respect they are similar to a pastor or minister in a church setting.

Like other religious workers teachers in our schools are also called upon to be pastor/mentor to the students in their care. Likewise administrative staff are often called upon to pastorally care for school families in their many dealings with them. Parents have chosen Christian schools precisely for this reason – that the staff are known to have a pastoral concern from a distinctly Christian point of view.

Essential to the operation of such schools is therefore that they can make a deliberate determination that *all* staff members both adhere to and live by the beliefs and values of the Christian faith: in other words are practicing Christians. (The definition of *Christian* is that commonly used in legislation, including in the current legislation, as being that which would normally be recognised by the mainstream Christian denominations.)

Schools commonly require that staff are able to attest to a statement of faith, can demonstrate they are active and participating members of the Christian community (usually demonstrated through membership of a church) and can bring evidence of their commitment to live according to the doctrines and teachings of their faith (often through a reference from a pastor or other senior member of a recognised church).

3. *Human Rights and Christian Schools*

The *Human Rights Framework* that underpins the current consolidation project reaffirm the Commonwealth Government's commitment to the promotion of human rights and the basis of this commitment in the belief in the fundamental equality of all persons.

Consistent with the teaching of Christ, that both men and women are created '*Imago Dei*' (in the image of God), Christian schools actively seek to model a community where the value of all people is upheld, and their rights respected and supported. This is reflected both in the practices of the schools and through the formal curriculum.

Christian schools endorse and express the principle articulated in the preamble to the *Universal Declaration of Human Rights 1948* namely:

'...the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people'

Preamble to Universal Declaration on Human Rights

Freedom of speech and belief, and freedom from fear and want, are at the very heart of the Christian faith. They are 'core principles' for Christian schools and the communities that form and sustain them. As in the wider community, the best means of achieving these aspirations is a matter on which there is much debate.

The responses below to particular questions raised in the Discussion Paper need to be read in the light of this foundational commitment to freedom and equality that lies at the foundation of the Christian message and the operation of Christian schools

4. The objects of Commonwealth anti-discrimination law

It is a widely accepted notion that anti-discrimination law inherently involves a balancing of human rights. This balancing effect is acknowledged in international and domestic law, both Commonwealth and in the States and Territories.

Within international law the limitations upon the balancing process provide very significant protection for certain rights such as religious freedom.

'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'

International Covenant on Civil and Political Rights Article 18(3)

The text of the Covenant itself provides a very narrow scope for limitation of religious freedom. This is further reinforced by the Siracusa Principles¹ relating to the conditions and grounds for permissible limitations and derogations enunciated in the International Covenant. Together the Covenant and the Siracusa Principles provide a high level of protection for these rights and allows their limitation in only certain circumstances.

Existing domestic laws seek to achieve a similar outcome through the provision of exemptions or exceptions such as section 38 in the *Sex Discrimination Act 1984*.

The objects of current Commonwealth anti-discrimination legislation however seem to be inconsistent with the internationally recognised approach. The current objects are generally described in the form: *'to eliminate, so far as is possible, discrimination against persons on the ground of...'* This formulation of the objects of the legislation seems out of step with the imperative to recognise the legitimate and fundamental need to balance different human rights within and broader overall framework of rights. In other words it falls short of the imperative to guard against limitations on the *freedom to manifest one's religious beliefs*. Note that the freedom

¹ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

expressed in the international instruments is not just to *hold* a religious belief, but to *manifest* that belief. This is a key issue for faith-based institutions in Australia, such as Christian schools.

Any consolidated Commonwealth anti-discrimination legislation should recognise within the objects the need to balance different aspects of human rights and achieving anti-discrimination outcomes in a manner that reflects and protects other rights, such as freedom to have and manifest religious beliefs.

5. The meaning of discrimination

Question 1:
What is the best way to define discrimination?

The Discussion Paper proposes a number of potential ‘technical’ changes to the meaning of discrimination. On behalf of schools who seek to comply with legislation in this area we make the following observations:

- The differentiation between ‘direct’ and ‘indirect’ discrimination found currently in legislation is helpful in understanding the concepts involved. This distinction may also be of value in applying different approaches to other aspects of the operation of the legislation as noted below.
- While there has been some support for replacing the current ‘comparator test’ with a ‘detriment test’ this is not overwhelming and the former remains the approach taken in the majority of states, as well as currently at the Commonwealth level. The adoption of a different approach at the Commonwealth level risks introducing uncertainty and confusion and potential conflict between State and Commonwealth law, for organisations that may operate across different jurisdictions (or even for those operating in one jurisdiction).
- In the test for indirect discrimination, the inclusion of an indicative list of factors relevant to determining ‘reasonableness’ is far preferable to a new and completely alien notion of a ‘legitimate and proportionate’ element. Reasonableness is a well understood legal concept and conveys accurately to the ‘person in the street’ the intention of the legislation. The replacement of this test with the notion of a ‘legitimate and proportionate’ response will create conflict with the tests in State and Territory legislation and make existing jurisprudence. It also fails to effectively define the requirement of the legislation in a way that would be understood by duty holders seeking to comply with the legislation.
- Christian schools have long supported the positive responsibility to make ‘reasonable adjustments’ in relation to people with a disability. The extension of this requirement to other protected attributes is, however, extremely problematic and not supported. We are particularly concerned that the boundaries of what might be considered ‘reasonable adjustments’ are vague and potentially very broad.
- The extension of existing harassment provisions to all attributes is supported, providing that this does not curtail freedom of speech and expression - especially the expression of legitimate religious views.

Question 4:
Should the duty to make reasonable adjustments be extended?

Question 5:
Should the prohibition against harassment be extended?

6 Protected Attributes

Christian schools are not seeking to add ‘religion’ as a protected attribute alongside those currently covered under the consolidated anti-discrimination laws. We note the significant range of views on this issue across religious organisations. In jurisdictions where religion is a protected attribute, both within Australia and

overseas, the experience of faith organisations has often been that it is used in a way that reduces religious freedom rather than supports it. Contrary to the intention of those who introduced the provisions freedom of religion has effectively become freedom from religion in many cases.

The lack of a strong desire for the inclusion of religion as a protected attribute, based in part on experiences where religion *is* a protected attribute, suggest that caution is needed in this regard. If the law was extended to include such an attribute it would be important to ensure that it incorporates not only protections for religious freedom but also restrictions on the limitation of that freedom consistent with international law. This is in line with the cautious views expressed above.

A fundamental principle that should be applied in relation to the extension of protected attributes is, however, that existing exemptions or exceptions should generally be similarly extended consistent with their original policy intention.

7 Protected Areas of Public Life

While acknowledging concerns about the scope of coverage of some existing Commonwealth anti-discrimination legislation, the approach outlined in the Discussion Paper of defining coverage of activities ‘in connection with’ aspects of public life is not supported. The history of industrial law and practice in relation to matters ‘in connection with employment’ and the contested nature of this phrase in that context suggest that such an approach may not provide the certainty that is sought in this area.

An alternative solution raised during the Consultations on the Discussion Paper involved a multi-layered approach which had both broad statements and specificity where this was already established as an area of application. This way forward has significant benefits in ensuring the desired scope of coverage while retaining the clarity needed by duty holders.

8 Exceptions and Exemptions

The Government has reiterated in the Discussion Paper that it does not propose to remove the current religious exemptions. This is welcomed and consistent with assurances we have received from the highest levels of government.

As noted above, the “*freedom to manifest one’s religion or beliefs*” is internationally recognised as a most significant human right, not lightly to be limited by legislation or otherwise. The exemptions and exceptions approach is an effective, practical and justifiable way of achieving the correct balance.

During the Consultations in relation to the Discussion Paper it was suggested that the replacement of many, if not all, existing exceptions and exemptions would assist in reducing the complexity of the consolidated legislation. We remain strongly of the view that this reductionist approach, rather than achieving ‘simplicity’, will actually increase complexity.

The current forms of exemption are straightforward, consistent with religious freedom principles, well understood and workable. In the event that a general limitations clause was favoured, replacing current exceptions and exemptions, we believe that the purposes of the legislation would be well served by the *continued* inclusion of additional specific exemptions where these are long-standing and settled: such as those in section 38 of the *Sex Discrimination Act 1984*.

Question 9:
Should the range of protected attributes be extended?

Question 12:
What is the most appropriate way to articulate the areas of public life to which the law applies?

Question 20:
Should a general limitations clause replace specific exceptions?

Question 22:
How might religious exemptions apply in relation to potential new attributes?

To be clear Christian schools are not seeking an extension of the current exemptions to the area of race or disability. Consistent with practice in most States and Territories we would, however, expect existing exemptions to be extended to the proposed new grounds of sexual orientation and gender identity. This approach is consistent with the protections of religious freedom in international law and with the policy that underpins the existing exemptions.

An alternative approach to the issue of religious exemptions not in the Discussion Paper was canvassed during the Consultations. The issue could be tackled as a definitional issue, such that *activities done in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, undertaken in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed*, would *not* constitute discrimination. We believe this approach has considerable merit and should be considered as a preferred approach to this issue. This approach would be consistent with the discussion regarding the proposed objects of the legislation outlined in section 4 above. It would reinforce the ‘balancing’ that is implicit in any determination of discrimination.

9. Complaints and Compliance Framework

Question 27:
Is it necessary to change the role and function of the Commission to provide a more effective compliance regime?

We are concerned about the proposal to provide the Commission with the power to investigate and enforce matters on its own initiative.

These powers are not commonly held by similar commissions in other jurisdictions across Australia. While the Victorian Commission has certainty powers to make inquiries these were significantly reduced from those originally proposed in response to community concerns. We also agree with the Productivity Commission that such powers give rise to at least a perception of conflict with the Commission’s role as a neutral conciliator. Accordingly, Christian schools are not in favour of the extension of the Commission’s powers in this way.