

## Introduction

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

CSA schools educate around 60,000 students across more than 135 locations nationally. The schools are geographically, culturally and educationally diverse, although they serve predominantly middle to lower socio-economic communities. At present a group associated with a CSA member school is undertaking a feasibility study in relation the commencement of a school in the Northern Territory.

While mainly in the metropolitan or outer suburban fringe suburbs of major cities a number are located across regional and rural Australia. Some have entirely indigenous or predominantly indigenous student communities.

The average socio-economic status (SES) score of these schools nationally is **below the non-government school average**, reflecting the affordable-and-accessible philosophy which underpins these schools.

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.

### Religious formation and culture

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 Melbourne Declaration.<sup>1</sup> With all other jurisdictions, the Northern Territory is a signatory to the Declaration which asserts, in its Preamble:

*“Schools play a vital role in promoting the intellectual, physical, social, emotional, moral, spiritual and aesthetic development and wellbeing of young Australians, and in ensuring the nations 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.

The Melbourne Declaration is also important for its recognition of shared responsibility.

*“Society is well served when the responsibility of parents, individual schools and the broader community is recognised. Schools share this responsibility with students, parents, carers, families, the community, business and other education and training providers. In recognition of this collective responsibility, this*

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<sup>1</sup> Ministerial Council on Education, Employment, Training and Youth Affairs, *Melbourne Declaration on Educational Goals for Young Australians* (December 2008) Ministerial Council on Education, Employment, Training and Youth Affairs  
<[http://www.curriculum.edu.au/verve/\\_resources/National\\_Declaration\\_on\\_the\\_Educational\\_Goals\\_for\\_Young\\_Australians.pdf](http://www.curriculum.edu.au/verve/_resources/National_Declaration_on_the_Educational_Goals_for_Young_Australians.pdf)>.

*declaration, in contrast to earlier declarations on schooling, has a broader frame and sets out educational goals for young Australians”.*

In the schools represented by our organisation, and indeed in Australian faith-based schools of many kinds, the ideals of the Melbourne 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.

#### Community support

Christian schools represented by our organisations have attracted very strong community support evidenced, among other things, by sustained enrolment growth.

In addition to serving Christian families, most CSA schools attract significant enrolments from families who may not be regular Church attenders but who nevertheless deliberately seek a Christian faith-based education for their children. This is not only a direct outworking of the Melbourne Declaration goals referred to above but reflects Australia’s commitments under international human rights instruments to which we are a signatory.<sup>2</sup>

#### Context of Submission

Below, then, is our initial submission to the *Northern Territory Department of the Attorney-General and Justice, Discussion Paper Modernisation of the Anti-Discrimination Act September 2017*.<sup>3</sup>

We are more than willing 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 might be recommended following the review.

It should also be noted that our submission seeks to focus on issues directly affecting Christian schools. This should not be construed as an endorsement of, or support for, other proposals in the discussion paper. Indeed, many of these other proposals are of significant concern.

#### The nature of Christian Schools

As noted above, all Australian Governments have recognised, in the Melbourne Declaration, that ‘[s]chools play a vital role in promoting the intellectual, physical, social, emotional, moral, spiritual and aesthetic development and wellbeing of young Australians’.<sup>4</sup>

In choosing a CSA school 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.

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<sup>2</sup> See Appendix One for relevant extracts.

<sup>3</sup> Northern Territory Department of the Attorney-General and Justice, ‘Modernisation of the *Anti-Discrimination Act*’, Discussion Paper (September 2017) (*Discussion Paper*).

<sup>4</sup> Ministerial Council on Education, Employment, Training and Youth Affairs, above n 1.

A holistic, 21<sup>st</sup> 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.

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.

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.

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, processes 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.<sup>5</sup>

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.

## General comments and concerns

The introduction to the Discussion Paper claims that the Anti-Discrimination Act 1993(NT) ('the Act') is '*in urgent need of modernisation*' on the basis that it needs to '*keep pace with contemporary standards and expectations*'. However, the only rationale provided for this urgently needed modernisation are amendments in three other jurisdictions in 2012, 2013 and 2016. These amendments, in only a third of the legal jurisdictions in Australia, are a fairly spurious justification for change and a poor reflection of '*contemporary standards and expectations*'. It is also of note that

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<sup>5</sup> 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.

none of these amendments sought to eliminate the exemptions for religious bodies nor introduce many of the other amendments proposed in the discussion paper.

It is indeed noteworthy that **there is no evidence base at all** provided to support the proposals in the Discussion Paper. Broad claims are made in relation to the proposals under the heading of '*What difference should it make?*' without any basis for these claims. In fact, the nature of the heading itself, '*What difference **should** it make?*', seems to accurately describe the speculative and sometimes baseless benefits that are purported to arise from the change. There is also, in many cases, no substantive discussion of the any negative impacts of the proposals nor consideration of alternative approaches to achieve the presumed outcomes of the proposals.

While not detailed in the Discussion Paper it would obviously be feasible for the need to make changes to arise from a pattern of complaints or enquiries. A review of the most recent Annual Report<sup>6</sup> from the Northern Territory Anti-Discrimination Commission (the Commission) suggests, however, that this is not the case either. The Annual Report indicates that the Commission received 304 enquiries in 2016-2017, a decrease in 8% from the previous year. Of these 21%, or 64 enquiries, were described as 'Not under the Act', the remainder obviously being already within the scope of the Act. The Annual Report goes on to note that 'Common enquiries of this nature are bullying and harassment issues where the behaviour is not because of a particular attribute.'

These figures do not reflect complaints, which average a little over half of this number, but simply enquiries. As a percentage of the total population of the Northern Territory,<sup>7</sup> the number of enquiries only amounts to 0.12% of people if each came from a different person. The number of enquiries received outside the scope of the current Act, again if each came from a different person, reflects a mere 0.026%. We fully supporting the notion that the dignity of every person is to be respected in safe and supportive environments and certainly do not diminish the impact on those individuals affected by events leading to a *complaint*. However, without even reaching this threshold of a *complaint*, the small size and scale of *enquiries* must be acknowledged.

Furthermore, the lack of data on situations where the current Act may be deficient must also be acknowledged and the scale of perceived negative impacts questioned. In weighing up policy options these factors must be balanced against the potential impact of changes, particularly where they will impact a much larger number of people.

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

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<sup>6</sup> Northern Territory Anti-Discrimination Commission, 'Annual Report 2016 - 2017', (September 2017) ('*Annual Report*').

<sup>7</sup> Australian Bureau of Statistics, 3101 -Australian Demographic Statistics, Mar 2017, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>.

## Religious freedom as a fundamental human right

Freedom of religion is, as indicated by Acting Chief Justice Mason and Justice Brennan, ‘the essence of a free society’<sup>8</sup>. Freedom of religion is at the very heart of the essential human rights. Acknowledgement of the need to protect freedom of belief has a history longer than any other human right in both international instruments<sup>9</sup> and domestic law of older European nations<sup>10</sup>.

Modern international human rights instruments are founded upon the *Universal Declaration of Human Rights 1948*.<sup>11</sup> In the preamble to this document the centrality of freedom of religion (and also freedom of speech) is clearly established:

*‘...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*

The ongoing importance of religious freedom in international law is reflected in the numerous instruments containing protections for both holding and manifesting religious faith, see Appendix One. These explicitly include recognition of the right to establish faith based schools.<sup>12</sup>

## Protecting religious freedom while ‘balancing’ human rights

It is accepted that anti-discrimination or equal opportunity law inherently involves a balancing of human rights. Within international law the limitations upon the balancing process provide very significant protection for certain rights such as religious freedom. The primary international treaty protecting individual rights, the *International Covenant on Civil and Political Rights*,<sup>13</sup> provides that (emphasis added):

*‘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)*

Clearly the text of the Covenant itself provides a narrow scope for limitation of religious freedom, only when ‘necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’. This is further reinforced by the Siracusa Principles,<sup>14</sup> relating to the conditions

<sup>8</sup> *Church of the New Faith v Commissioner of Pay-roll Tax (Vic.)* (1983) 154 CLR 30.

<sup>9</sup> See, e.g., Peace of Westphalia 1648

<sup>10</sup> See, e.g., 1598 Edict of Nantes

<sup>11</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

<sup>12</sup> See, e.g., *Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief* Article 5, *Convention against Discrimination in Education* Article 5(b) in Appendix Two.

<sup>13</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976).

<sup>14</sup> 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).

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 the freedom to hold and manifest religion or beliefs.

Domestically the Constitutional test for determining the legitimacy of a law under section 116 proposed by Latham CJ in *Adelaide Company of Jehovah's Witnesses V Commonwealth* was whether the law 'can be fairly regarded as a law to protect the existence of the community'.<sup>15</sup> This would seem to once again provide a very strict test regarding at least the Commonwealth's right to legislate in relation to religious 'actions'.<sup>16</sup>

Certainly, the importance placed on religious freedom within both international and domestic law cannot be ignored.

## Overarching approach to freedoms

Properly stating the objects of the Act

Against this background, if the Act is to be modernised this should be done in a way consistent with international law and reflecting of the inherent need for balancing rights.

While the long title of the Act, 'to promote equality of opportunity in the Territory by protecting persons from unfair discrimination' contains an element of this balancing, the Objects as set out in section 3 of the Act provide for no such nuance, speaking in terms of seeking to 'eliminate discrimination'. It elevates equality of opportunity and prevention of discrimination, both laudable aims, above the protection of other human rights, such as religious freedom, freedom of speech or freedom of conscience, through any process of balancing, or exemption.

Protection against (inappropriate) discrimination is of course vital,<sup>17</sup> however, the need to balance rights seems to have been ignored in the construction of the Act at this fundamental level. Re-formulation of the objects to recognise the need to balance competing rights would provide a more robust means of describing the full purposes of the legislation. It would be a critical first step in anchoring the legislation within the broader international human rights framework and provide clear signals to those undertaking subsequent reviews of the importance placed on the broader framework.

Appropriately defining discrimination

Consistent with the broader human rights framework and reflecting the need for balancing rights, if there are to be reforms, we argue that protection for religious freedom could be tackled as a definitional issue (rather than as an exemption). For example, it could be established *as a definitional matter* 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.

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<sup>15</sup> (1943) 67 CLR 116 [132].

<sup>16</sup> While State governments (with the exception of Tasmania) are not bound by a similar Constitutional test, as demonstrated in *Grace Bible Church v Reedman* (1984) 36 SASR, the High Court's views on this matter should at least be considered persuasive in relation to public policy.

<sup>17</sup> Discrimination per se, understood to be in the nature of differentiation or distinction can, of course, be beneficial when, for example in a school context, an individual student's needs are identified and addressed in a way different to the approach taken for other students.

This could be achieved by amendment of the interpretative provision in section 20 to recognise the balancing of rights and exclude an act from being regarded as a discriminatory act where it is undertaken in 'good faith' by an organisation 'administered in accordance with the precepts of a particular religion' and the act is 'founded on the precepts of that religion'. Such an approach puts the balancing of fundamental human rights at the centre of the legislation in a manner consistent with the broader human rights framework.

We believe this should be considered as a preferred approach to this issue. Determination of whether discrimination has occurred would involve discussions of a different kind, allowing a more even-handed sense of balancing sometimes competing rights.

Ensuring a sense of proportion

A further consideration in balancing rights must be some form of proportionality test in which the impact of the exercise of the respective rights should be considered. Thus, for example, removing the ability of Christian schools to employ staff who share the school's values and beliefs would undermine the essential nature of the school as a place where families can access their right to a religious education. The right to receive a religious education, an internationally recognised human right,<sup>18</sup> is what is at stake here.

Arguably the teacher looking for employment within that Christian school has his or her 'right' to employment subjected to a similarly absolute impact if, as a non-adherent, they are not able to access employment in that setting. However, this claim needs to be assessed against the context. While the teacher is likely to have other opportunities for employment, the families seeking a faith-based education have no access to their right, if employment or other policy constraints frustrate the establishment and operation of religious schools.

At the broad Territory level, the latest, 2016, data from the Australian Bureau of Statistics on the number of staff within schools<sup>19</sup> indicates that within Northern Territory:

- Government school staff, 3,987, constituted 66% of the FTE positions in schools;
- Catholic school staff, 887, constituted 15% of the FTE positions in schools;
- 'Independent' school staff, 1,116, constituted 19% of the FTE positions in schools.

On the overstated assumption that all 'Independent' schools were faith based and Catholic schools share similar restrictions, which is generally not the case, restrictions on the availability of employment would only apply to a little around a third of the total positions available. The widespread nature of Government schools virtually ensures that there will be a Government school within the vicinity of every Christian school.

Even in the rare case where a faith based school is the 'sole-provider' of education in a location, the competing rights needs to be judiciously balanced. Is it more reasonable, for example, to expect a teacher to relocate or maybe commute to seek work than to impose a fundamental change in the essential character of a school, denying families access to a religious education? Certainly, comparison

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<sup>18</sup> Above, n 13, Article 18(4).

<sup>19</sup> Australian Bureau of Statistics, 4221.0 - Schools, Australia, 2016, Feb 2017, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4221.02016?>

with other industries would suggest that there is no explicit or implied right to work in a location of an individual's choosing.

On this very simple, basic analysis it is clear that in many cases a simple proportionality test will demonstrate that the impact of equality prevailing over religious freedom produces an obviously disproportionate effect on the school and its community. The balancing of rights must recognise and reflect this type of test in accordance with the principles established in both international and domestic law. In these circumstances, it **cannot be considered 'necessary' to infringe religious freedom** as required under international law.

## Religious Exemptions

Of the 32 exemptions in the Act apart from those granted under section 59 it is disappointing that the Discussion Paper chooses to only focus on those relating to religious bodies. Certainly, the approach taken in the Discussion Paper highlights the need for **stronger protections for religious freedom** and a reframing of the Objects of the Act as outlined above.

The Discussion Paper seeks to justify the consideration of the removal of some of these exemptions as being in order 'to promote equality of opportunity for all Territorians'. In doing so, of course, it would dramatically reduce the religious freedom of all Territorians – an inconvenient truth blithely ignored.

There is tacit acknowledge of the impact of the proposals when the Discussion Paper suggests that the changes would make religious bodies '*more accountable for their actions and more inclusive*'. The undeniable conclusion from this statement is that the clear intention of the proposals is to force religious bodies and their adherents to adopt the views of the Commission regardless of their own deeply held beliefs and religious identity. It constitutes a **direct attack on religious freedom** and indeed the concomitant freedoms of conscience and speech.

The Discussion Paper goes on to introduce an artificial separation between the exemptions it proposes to remove and those it describes as 'permitted or necessitated by legislation' which would remain. No rational basis is given for this distinction, or even the term used to describe the exemptions to be retained. All that is provided are some limited examples of the acts considered to be part of the group of protected exemptions. From the examples given though it seems clear that the conception of religious activity which underpins the Discussion Paper is limited to involvement in worship services, a narrow and artificial conception.

Despite its sometimes-problematic nature, the current exemptions approach nevertheless is inherently intended to achieve a balancing of rights. It does so not merely within the narrow confines of a worship service but across a much more realistic span of the expression of religious identity. This narrow view certainly does not reflect the long history of legal protection for religious freedom in this country.<sup>20</sup>

As indicated earlier a Christian school of the type outlined in this submission is a faith community in which every staff member is required to celebrate, teach and model the beliefs, doctrines and

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<sup>20</sup> See, Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society' (2014) 40(2) *Monash University Law Review* 413 for a more complete discussion of the issues and principles.

practices of the faith. It is a community where faith is as much caught as it is taught, and Christian schools integrate a Christian worldview across the whole life of the school.

Teachers of all subjects are required to have thought deeply about the nature of their discipline in light of their personal understanding of the Christian faith. Every teacher is involved in teaching the tenets of the faith whether in their subject specialty, in a home room or pastoral care group. All staff members participate fully in the religious celebration, worship and prayer life of the school community. All staff have a degree of pastoral involvement and responsibility to students and in some cases also to the wider school community.

Each staff member is required to demonstrate the personal and professional moral attributes characteristic of a genuine adherent of the faith. The total immersion of the school and its staff in the formative aspects of education ensures the congruence of the espoused doctrines, tenets and beliefs with the lived values and beliefs.

The reality of Christian schools is obviously in stark contrast with the characterisation inherent in the Discussion Paper. The approach taken in the Discussion Paper is profoundly discriminatory in its application of *one view* about education to schools which take a *different* view and approach. Given the narrow and unrealistic view of religious activity reflected in the Discussion Paper it is evident that should the current exemptions be removed and replaced by an application process there would be a dramatic reduction in religious freedoms for Christian schools and their communities.

## Approaches in other jurisdictions

Appendix Two summarises the current approach taken to safeguard the ability of Christian schools to employ staff consistent with their values, tenets and beliefs. All jurisdictions provide such protections.

Except for the current exemption in the New South Wales legislation for private educational institutions there are clearly common elements in the majority of other exemption provisions. The most common formulation of the requirements for valid action indicate that it must be undertaken 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion' and/or in conformity with the doctrines and beliefs of the relevant religion.

These provisions have been the subject of reviews in numerous jurisdictions over the time since the Act was introduced. The results of these reviews have, almost universally, resulted in a continuation of the present form of exemption protecting religious freedom. The most comprehensive review in recent years was conducted in Victoria. The Department of Justice commenced a review in respect to the exceptions and exemptions in the Victorian legislation and released a Consultation Paper in February 2008. The consultation paper sought comments on the desirability of reform and modernisation of the exceptions and exemptions in the Act in that jurisdiction. In response to this paper over 500 submissions were received by the Department.

Prior to the Department releasing a report on its community consultation, the Scrutiny of Acts and Regulations Committee (SARC) of the Victorian Parliament was given a reference on the same subject matter by the Attorney General in December 2008. SARC released a further 'Options Paper' as part of its processes. After receiving some 1,800 submissions the SARC provided a final report which recommended in relation to the employment of staff in Christian schools that:

*'The Committee recommends that the exception in section 76 should be retained but should not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age.'*<sup>21</sup>

After conducting one of the most extensive reviews in relation to this issue in recent times the independent Parliamentary committee recommended no change. This reinforces the outcomes of the number of other inquiries and reviews which have all resulted in the retention of this key protection.

It is also clear from a simple reading of the provisions in Appendix Two that the current exemption in the Queensland legislation is inconsistent with most other jurisdictions and takes an approach that has not been followed by other states. It is also potentially in conflict with the approach taken in the Federal arena, particularly in relation to the *Fair Work Act 2009* (Cth) that would apply to cover employment rights and responsibilities for most employees in the Northern Territory.

In summary, the proposals to remove the religious exemptions are unjustified, inconsistent with other jurisdictions, not supported by other reform processes, and impose an unacceptable and disproportionate burden on those with a genuine religious identify. These exemptions should at least be retained in their current form if not strengthened by the more robust approach discussed above.

## Responses to other proposed options for reform

### Gender and Sexuality Protections

The replacement of the term 'sexuality' with 'sexual orientation', defined in line with section 4 of the *Sex Discrimination Act 1984* (Cth), would provide a sensible reduction in potential for conflict between the understanding of the respective legislation and inconsistency of application.

The replacement of 'sex' with 'gender identity' as a protected attribute is far more problematic and introduces a level of unhelpful vagueness and uncertainty into the law. The term 'sex' in the Act takes on its usual and common meaning relating to an individual's biological status and would be expected to encompass both males and females. Accordingly, it is unlawful, subject to the Act, to discriminate against another person on the ground of a person being male or female. This should, for the avoidance of doubt, be extended by the inclusion of 'Intersex status' as a protected attribute. **This results in the coverage of protections extending to the entire population.**

Contrary to the assertion in the Discussion Paper the inclusion of 'Gender Identity' as a protected attribute does not provide clarity but introduces uncertainty. Defined in the *Sex Discrimination Act 1984* (Cth), as *'the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth'*, gender identity is a vague and ill-defined concept. It leads to a multitude of definitional questions:

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

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<sup>21</sup> Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (2009) 64 Recommendation 49.

At practical level it poses further questions, including around otherwise lawful distinctions based on sex. If the vilification proposal discussed below were to be included it would also conceivably actions or comments simply because they are in some way connected to a person's appearance.

Should the Government determine to proceed to include gender identity as a protected attribute despite these concerns we would expect that, consistent with the *Sex Discrimination Act 1984* (Cth) that **existing exemptions would be extended** to cover this new attribute.

### Vilification

The proposal to introduce provisions that make it unlawful to merely offend or insult a person, or a group of people are a completely unwarranted and unjustifiable constraint on freedom of speech.

In seeking to justify these provisions the Discussion Paper talks of providing 'legal redress against extreme or pervasive vilification' yet the standard it proposes to introduce of 'offend' or 'insult' is clearly much lower than that extreme situation. The limited range of exemptions proposed, in acknowledgement of the principle of balancing rights, does not provide sufficient protections for the 'right to voice opinions in a respectful manner' which is indeed an essential right in a 'free and democratic society'. It is not inconsistent with voicing opinions in a respectful manner that people may still be offended or indeed insulted, this should not provide the basis for legal redress.

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

### Additional Attributes

It is again difficult to comment meaningfully on some of the additional aspects because of the lack of specificity of the proposals.

The proposed additional protected attribute of 'socioeconomic status' is a case in point. The Discussion Paper is breathtakingly vague in how this would be defined let alone applied. There is no clarity in the difference it is purported to make and it smacks of being an ill-conceived, ideologically driven, thought bubble. At best, it would be imprecise and unworkable, at worst socially divisive and result in further entrenching of social and economic differences. It is not a protected attribute in equivalent legislation in other jurisdictions and this should remain the case.

The inclusion of lawful sexual activity as a protected attribute is less vague, reflecting the provisions of other jurisdictions, but it is not clear whether the Discussion Paper is contemplating appropriate exemptions and restrictions in this area. Putting aside the legitimate concerns around the best policy approach to the sex industry, the regulatory schemes across the country generally recognise the legitimate needs to ensure that:

- The regulated activities do not take place close to schools or places of worship; and
- The protections would not limit the requirements of faith based schools to ensure that staff and students are not actively involved in sex work where this is inconsistent with the religious identity of the school.

Any introduction of lawful sexual activity as a protected attribute must be balanced by the inclusion of such exemption provisions.

## Appendix One

### Relevant International Declarations and Conventions

For present purposes, the relevant provisions of the applicable international declarations and conventions are as follows.

#### **Universal Declaration of Human Rights 1948 (UDHR)**

##### **Article 18**

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

#### **International Covenant on Civil and Political Rights (ICCPR)**

**Article 4** No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

##### **Article 18**

- (a) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.
- (b) No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.
- (c) 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.
- (d) 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.

##### **Article 20**

- (a) Any propaganda for war shall be prohibited by law.
- (b) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law

##### **Article 27**

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

*The ICCPR was ratified by Australia on 13 August 1980. Australia acceded to the First Optional Protocol to the ICCPR with effect from 25 December 1991.*

#### **Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief (Religion Declaration)**

##### **Articles 2 & 3**

These provisions prohibit any act or practice of intolerance or discrimination on the grounds of religion or belief by any person in any capacity whatsoever.

**Articles 4 & 7**

These place obligations on States to take positive measures to counter intolerance and discrimination on the ground of religion and belief.

**Article 5**

Freedom to impart religion or belief to one's children - children have a right of access to a religious education that is consistent with the wishes of their parents.

**Article 6**

Religion and belief in practice - provides a list of minimum freedoms, including freedom to teach religion and belief and freedom to establish and maintain appropriate charitable institutions and freedom to assemble and worship.

This Declaration has been declared to be a 'relevant international instrument' for the purposes of the *Australian Human Rights Act 1986* (Cth).

**Convention on the Rights of the Child****Article 28**

Provides for education to develop the child to his or her fullest potential, but this article is not to be construed so as to "interfere with the liberty of individuals and bodies to establish and direct educational institutions..."

**Convention against Discrimination in Education****Article 5(b)**

"it is essential to respect the liberty of parents ... firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as ... approved by the competent authorities and secondly, to ensure ... the religious and moral education of the children in conformity with their own convictions..."

## Appendix Two

### Comparison of exceptions or exemptions in other domestic jurisdictions

The scope of the exemptions provided to faith-based schools vary in the various pieces of anti-discrimination legislation across Australia as follows (emphasis added):-

Commonwealth discrimination legislation

#### *Sex Discrimination Act 1984 (Cth)*

Section 38 of this Act provides an exemption for 'an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' that allows that body 'to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of' staff where the discrimination is '**in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.**'

#### *Australian Human Rights Commission Act 1986 (Cth)*

Section 3(1) of this Act excludes from the definition of unlawful discrimination matters relating to:

'Employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in **good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.**'

State Discrimination Legislation

#### *Anti-Discrimination Act 1977 (NSW)*

This Act provides exemption in a number of sub-sections in relation to a number of forms of unlawful discrimination. This exemption is in the form that the relevant sections deeming an act to be unlawful discrimination 'do not apply to employment' by a 'private educational authority'. No exemption is provided to 'private educational institutions' in relation to:

- racial discrimination
- sexual harassment
- vilification
- discrimination in relation to carers responsibilities
- age discrimination

The general exemption to religious bodies in relation in section 56 of the Act to '*any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion*' provides another possible avenue for exemption.

*Anti-Discrimination Act 1991 (QLD)*

Section 25 deals with 'genuine occupational requirements' and includes specific requirements in relation to employment in religious schools. The threshold test is that the school is 'under the direction or control of a body established for religious purposes' provided firstly that the actions are done 'in a way that is not unreasonable'. Determining whether the discrimination is not unreasonable depends 'on all the circumstances of the case', including 'whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person's actions' and 'the consequences for both the person and the employer should the discrimination happen or not happen.'

Provided that the actions are prima facie reasonable the actions are lawful when responding to situations where 'the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs' and 'it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person's work, act in a way consistent with the employer's religious beliefs'. The section makes it clear that these provisions do not authorise the seeking of information contrary to section 124, which prohibits seeking 'information on which unlawful discrimination might be based'.

*Discrimination Act 1991 (ACT)*

Section 33 provides an exemption for 'an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' if that body discriminates '**in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.**'

*Equal Opportunity Act 2010 (Vic)*

This Act provides in section 83 in relation to the employment of people in any educational institution '*conducted in accordance with religious doctrines, beliefs or principles*'. This section exempts actions by such an institution when it '**conforms with the doctrines, beliefs or principles of the religion or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.**'

*Anti-Discrimination Act 1998 (TAS)*

The Act provides in section 51(2) an exemption '**on the ground of religious belief or affiliation or religious activity** in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is 'in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.'

*Equal Opportunity Act 1984 (SA)*

The exemption in Section 34 of the South Australian Act is a limited exemption in relation to 'chosen gender, sexuality or same sex couple domestic relationships' for and educational institution '**administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion**' where that school has a written policy on the matter which is made available to prospective applicants and other interested parties.

*Equal Opportunity Act 1984 (WA)*

The Act provides an exemption in Section 73 for 'an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' where such a body 'discriminates **in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed**'

*Anti-Discrimination Act 1992 (NT)*

This Act was amended in 2004 with a new section 37A providing an exemption for an educational institution that operates 'in accordance with the doctrine of a particular religion' to discriminate on the grounds of religious belief or activity and sexuality provided that it is '**in good faith to avoid offending the religious sensitivities of people of the particular religion**'.

Other Legislation

The principles of non-discrimination have also traditionally be found in the majority of 'unfair dismissal' provisions in industrial legislation around Australia. The *Fair Work Act 2009 (Cth)* provides that 'adverse action' on the grounds of 'race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin' is unlawful (s351(1)). Section 351(2)(c) provides an exemption from these particular grounds for 'an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' where employment is terminated '**in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed**'.