



Expert Panel on Religious Freedom

Religious Freedom Review
February 2018

Joint Submission by

Christian Schools Australia (CSA)

Adventist Schools Australia (ASA)

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Introduction

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

In combination, CSA and ASA schools educate around 80,000 students across more than 180 locations nationally. 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. ASA schools are part of the wider Adventist Church, which educates around 2 million students globally.

The schools within Australia are geographically, culturally and educationally diverse, although they serve predominantly middle to lower socio-economic communities. While mainly in the metropolitan or outer suburban fringe suburbs of major cities a number are located across regional and rural areas. 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. ASA schools operate on a systemic basis, with small systems established in line with wider Adventist Church governance arrangements.

Religious formation and culture

CSA and ASA 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.¹ All jurisdictions across Australia are signatories 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.

¹ 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>.

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 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 organisations, 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 schools² 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 and ASA 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.³

Context of Submission

This document is our initial submission to the Expert Panel. We are more than willing to provide further analysis and comment either in response to other submissions or more generally. We would welcome the opportunity to participate in any public hearings that Panel may conduct.

It should also be noted that our submission seeks to focus on issues directly affecting Christian schools. Wider issues of religious freedom, while possibly touched on, we understand will be covered in submissions by a wide range of other groups, including church bodies which may be associated with these schools.

² The term ‘Christian schools’ is used in this submission to encompass both CSA member schools, which may be associated with a wide range of Christian denominations or be inter-denominational and ASA schools associated with and part of the Adventist church structures.

³ See Appendix One for relevant extracts.

The nature of 'faith'

The central role of God

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

This understanding is captured, in part, within the CSA Statement of Faith,⁴ which indicates in its opening paragraphs that:

"There is one God and He is sovereign and eternal. He is revealed in the Bible as three equal divine Persons - Father, Son and Holy Spirit. God depends on nothing and no one; everything and everyone depends on Him. God is holy, just, wise, loving and good.

God created all things of His own sovereign will, and by His Word they are sustained and controlled."

The impact of belief on all of life

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

"Out of gratitude for God's grace and in dependence on the Holy Spirit, God's people are called to live lives worthy of their calling in love and unity and in obedience to God in all spheres of life. They are responsible to ensure that the gospel is faithfully proclaimed. Christian parents are required to bring their children up in the discipline and instruction of the Lord and to diligently teach them the truth of God's Word."⁵

⁴ The CSA Statement of Faith is accepted by all member schools and reflects a broad, inclusive statement of foundational Christian beliefs. It can be viewed online <<https://csa.edu.au/statement-of-faith/>>. ASA member schools hold to the beliefs of the Adventist church which can be viewed online <<https://www.adventist.org/en/beliefs/>>. While there are important distinctions between these beliefs the core common elements across both groups of schools remain as outlined in this submission.

⁵ While much more could be said and has been written on the obligations and duties of Christians to lead a faithful life of service these comments are limited to references within the CSA Statement of Faith as an agreed underpinning document for all Christian schools represented in this submission.

The responsibilities of Christian parents

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

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

Non-religious 'faith'

The terms of reference for the Panel focus on religious freedom, and religious belief forms the basis of the faith help by individuals within the communities of Christian schools. We also acknowledge, however, that there are other systems of belief or understandings of the world which are not grounded in 'religion'. Whether described in the form of a 'faith',⁶ or merely as a 'set of beliefs' these deeply held conscientious beliefs in many cases deserve the same protections as those with a religious foundation.⁷

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'.⁸

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

In choosing a CSA or ASA 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. It is a choice to journey together as part of a community, a community which is often rich and diverse in its backgrounds, race, ethnicity and occupation but drawn together by the common bond of faith.

Schools represented in this submission understand that spirituality, or religious formation, permeates all that is lived out in the daily life of the school and its community. The pedagogical underpinning of

⁶ While atheists and secularists, for example, may object to the use of the term 'faith' to describe their beliefs these 'world views' share many common characteristics with religious faith systems and have been in many respects legally 'equated' with a faith.

⁷ This approach is consistent with the broad interpretive technique proposed in UN Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Article 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) ('*General Comment 22*').

⁸ Ministerial Council on Education, Employment, Training and Youth Affairs, above n 1.

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. Faith is lived out *in* community and *through* relationships – these are essential elements of a Christian school education.

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

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

Similarly, administrative and general ancillary staff are required to both embrace, and act in accordance with the values, beliefs, 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.⁹

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

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

In many situations this must also include the right to select students, or possibly more correctly, families, based on religious criteria. Faith communities, including Christian schools, must be able to take action that separates individuals from that community when their actions undermine the community. While not a preferred outcome this option remains a necessary response to situations determined by a community to be a threat to that community.

⁹ 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.

Religious freedom as a fundamental human right

Freedom of religion truly is, as indicated by Acting Chief Justice Mason and Justice Brennan, ‘the essence of a free society’¹⁰. 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 instruments¹¹ and domestic law of older European nations¹².

Modern international human rights instruments are founded upon the *Universal Declaration of Human Rights 1948*.¹³ 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

Freedom of speech and belief is undoubtedly at the core of a pluralist liberal democracy. There can be no diversity without a multiplicity of belief and no freedom without the liberty to express those beliefs. True diversity and equality come not from the imposition of a narrow conformity but by the embracing and celebration of difference. While we may disapprove of what others believe and say, we must defend to the death their right to say it.¹⁴ This is at the very heart of Australian culture, reflecting our shared commitment to ‘*a fair go*’.

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. The most prominent of these protections is undoubtedly Article 18 of the International Covenant on Civil and Political Rights (ICCPR).¹⁵ The ICCPR was signed by Australia in 1972 and ratified in 1980.

The United National Human Rights Committee has provided additional interpretative guidance on Article 18 in its General Comment 22.¹⁶ As noted in the recent Andrews Committee interim report,¹⁷ this Comment gives the freedom a ‘broad scope’ and reinforces the ‘fundamental’ nature of the right.

Importantly, both Article 18 itself and the General Comment recognise the right to ‘manifest’ religion in ‘worship, observance, practice and teaching’ including ‘in community with others’.¹⁸ This recognition of the need to ‘live out’ an individual’s faith is an essential element of faith as noted above. In a complex contemporary society this is often done ‘in community with others’ through a variety of

¹⁰ *Church of the New Faith v Commissioner of Pay-roll Tax (Vic.)* (1983) 154 CLR 30.

¹¹ See, e.g., Peace of Westphalia 1648

¹² See, e.g., 1598 Edict of Nantes

¹³ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

¹⁴ To appropriate the quotation of Evelyn Beatrice Hall writing as S. G. Tallentyre in her 1906 book *The Friends of Voltaire* and often misattributed to Voltaire.

¹⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976) (*‘the ICCPR’*).

¹⁶ UN Human Rights Committee, above n 6.

¹⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report, Legal Foundations of Religious Freedom in Australia* (2017) (*‘Andrews Committee interim report’*)

¹⁸ ICCPR Article 18(1)

means, including corporate structures. Christian schools, for example, are required to be incorporated by funding legislation,¹⁹ but are no less a communal expression of faith. The importance of the community element of the protections have been recognised by the European Court of Human Rights commenting that they lay ‘at the very heart of the protection’ of religious freedom.²⁰

A number of other international instruments explicitly include recognition of the right to establish faith based schools.²¹ This builds on the rights of parents recognised in the ICCPR to ‘ensure the religious and moral education of their children in conformity with their own convictions’.²² Similar rights are also recognised in the *Convention on the Rights of the Child* (CROC) to which Australia is also a signatory.²³

Existing Protections for religious freedom in Australia

As the Andrews Committee interim report notes, the ICCPR has not been adopted into Australian domestic law.²⁴ Protections for religious freedom within Australian law are sparse and limited in scope, often providing much lesser protection than is required to meet Australia’s international obligations.

Commonwealth Protections

The Australian Constitution provides a prima facie protection for religious freedom in section 116. This incorporates a prohibition on the Commonwealth making any law ‘for prohibiting the free exercise of any religion’. Not only is this protection limited to Commonwealth legislation but these provisions have been interpreted narrowly in the few examples of High Court jurisprudence.

While there is some form of protection for religious freedom in exemptions in Commonwealth legislation there are no positive protection provisions. Express Commonwealth protection for freedom of religion is indeed, as the Andrews Committee interim report noted, ‘limited’.²⁵

Protections for free speech are equally limited if not more so. After early cases suggested that the High Court might take an expansive view,²⁶ the implied protection for ‘political communication’ within the Australian Constitution has tended to be view more narrowly.²⁷ It has clearly been determined not to be an individual right in latter cases.²⁸

¹⁹ See, e.g., *Australian Education Act 2013* (Cth) s75(2).

²⁰ *Hasan and Chaush v Bulgaria*, App No 30985/96, (2002) 34 EHRR 55, [62] quoted in Andrews Committee interim report [3.31].

²¹ 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 One.

²² ICCPR Article 18(4).

²³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Australia ratified the Convention on 17 December 1990.

²⁴ Andrews Committee interim report [2.33].

²⁵ *Ibid* [4.76].

²⁶ See, e.g., *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106.

²⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

²⁸ See, e.g., *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

State and Territory Protections

Of the States and Territories only Tasmania provides any constitutional protection of religious freedom.²⁹ It must be noted though that this is an ordinary act of the Tasmanian Parliament and may be overridden by subsequent legislation. Its efficacy is also largely untested. There is no equivalent protection in other jurisdictions, nor would any implied right of religious freedom be likely to be found.³⁰

The ACT and Victoria both have a 'bill of rights' type instrument.³¹ Both contain a form of protection for religious freedom modelled on Article 18 of the ICCPR and providing the basis for subsequent legislation to be declared to be 'incompatible' with human rights if these, or other freedoms, are not protected. Such a declaration does not, however, invalidate the law in question.

These again provided largely ineffectual protections as demonstrated in some of the provisions of the *Abortion Law Reform Act 2008* (Vic) which clearly require doctors to act in contradiction to their religious or conscientious beliefs. More recently in seeking amendments to equal opportunity legislation the Victorian Attorney-General asserted that 'only human beings have human rights' under the Victorian Charter, thus effectively vitiating the 'in community' nature of religious freedom where a corporate entity is involved.³²

Some jurisdictions have a positive protection for religious freedoms in anti-discrimination or equal opportunity legislation but the major form of 'protection' is through exemptions or exceptions in that legislation. The efficacy of this form of protection is discussed further below.

Protecting religious freedom while 'balancing' human rights

'Balancing' rights under International law

It is accepted that anti-discrimination or equal opportunity law inherently involves a balancing of human rights. No human right is absolute, including non-discrimination and equality. General Comment 18 concluding that not every differentiation of treatment is discrimination.³³ The Comment notes that **differentiation aimed at achieving a legitimate purpose under the ICCPR using reasonable and objective criteria will not constitute discrimination**. Effectively the desire for equality must at times be balanced.

Within international law the limitations upon the balancing process provide very significant protection for certain rights such as religious freedom. The ICCPR provides in this regard 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.'*³⁴

²⁹ *Constitution Act 1934* (Tas) section 46.

³⁰ *Grace Bible Church v Reedman* (1984) 36 SASR.

³¹ *Human Rights Act 2004* (ACT) and *Charter of Human Rights and Responsibilities Act 2006* (Vic) respectively.

³² Victoria, *Parliamentary Debates*, Assembly, 31 August 2016, 3234 (Martin Pakula, Attorney-General).

³³ *General Comment No. 18: Non-discrimination*, 37th sess (10 November 1989).

³⁴ ICCPR 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'*. General Comment 22 provides further guidance on the permissible restrictions on the 'manifestations' of religion or belief.³⁵ The Comment outlining that:

'Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted.'

This is further reinforced by the Siracusa Principles,³⁶ relating to the conditions and grounds for permissible limitations and derogations enunciated in the International Covenant. Together the Covenant, General Comment 22 and the Siracusa Principles, provide a high level of protection for the freedom to hold and manifest religion or beliefs.

These two understandings are central to the international human rights framework. The understanding that not all differentiation is discrimination and that rights must be carefully balanced if diversity and freedom are to be protected. Any claim for absolute 'equality', or for equality to be sought above all else, is not only misguided but is fundamental inconsistent with international law.

'Balancing' rights under Australian law

Balancing under 'rights instruments'

In the two jurisdictions with a 'bill of rights' type instrument both also contain explicit 'balancing' provisions.³⁷ As acknowledged elsewhere, these provisions in domestic law merely require that limitations be 'reasonable' a far lower standard than that of necessity contained in international law.³⁸ A majoritarian view of reasonableness is far less likely to protect the rights of minorities than the, arguably, more objective and certainly higher standard of necessity.

Balancing through exceptions and exemptions

As noted above the most common form of 'protection' for religious freedoms are the exemptions or exceptions in anti-discrimination or equal opportunity legislation. This form of protection is inherently problematic.

This approach invites exactly the type of erroneous perceptions reflected in numerous submissions to reviews of these forms of legislation across a number of jurisdictions, including those in the recent Andrews Committee interim report.³⁹ This form of protection suggests that religious freedom is not a fundamental right but are merely tolerated as a form of aberration. The suggestion that such permanent exceptions, at least in terms of the exceptions for employment in Christian schools, could be 'arbitrary, inflexible, broad and unreasonable', as included recently in an 'Audit Paper' prepared by

³⁵ General Comment 22 [8].

³⁶ 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).

³⁷ *Human Rights Act 2004 (ACT) s28, Charter of Human Rights and Responsibilities Act 2006 (Vic) s7.*

³⁸ See, e.g., discussion in Andrews Committee interim report [5.16].

³⁹ *Ibid*, see [7.22] ff.

a State law reform body, reflect a clear lack of understanding of their nature and purpose.⁴⁰ Later in the Audit Paper, the ‘issue of equality of treatment’ is described as the ‘principle underpinning the entire anti-discrimination and equal opportunity framework’, without any acknowledgement of the need to balance this principle with other coexisting human rights.⁴¹

Raising the ‘issue of equality of treatment’ in such a manner as an objection to the exceptions seriously erodes the broader human rights framework with its established checks and balances. While equality may be an underpinning principle of the equal opportunity legislation it is merely one of a number of fundamental human rights recognised more widely.

This is an unfortunately all too common [mis-]understanding of human rights principles. A contributing factor to this view is often the objects set out in the relevant legislation which commonly merely speak in terms of seeking to ‘eliminate discrimination’. Such language 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.

Existing exceptions and exemptions are also limited in scope. While employment by religious bodies is generally addressed, the coverage of the activities of those bodies and the use of their facilities is subject to much more limited, if any, protection. For Christian and other faith-based schools it may be necessary from time to time to separate from families where the education provided by the school, and the values and beliefs imbedded in that education, are not consistent with those of the family. The ability to do so is often dependent upon having appropriately framed exceptions or exemptions in equal opportunity or anti-discrimination legislation. Unfortunately, this is not always the case, with exceptions or exemptions relating to the provision of education often very narrow in scope if they exist at all.

The use of the facilities of a Christian school by those who may support, or indeed actively promote, alternative values and beliefs can be equally concerning to many within that community. Often facilities are made available on far less than commercial terms to provide support to the wider community. Despite this, in many jurisdictions Christian schools have little scope to regulate the character of the groups who may use their facilities in such circumstances, or the nature of the activities which may be conducted.

Balancing through an ‘inherent requirements’ test

An alternative, and even narrower, form of exemption for employment has been proposed in many reviews incorporating an ‘inherent requirements’ test. Alone of all jurisdictions in Australia, Queensland legislation applies an ‘inherent requirements’ test rather than a permanent exemption or exception in relation to employment in a faith-based school.⁴² This approach represents a further erosion of religious freedom, a less effective balancing of fundamental rights. It is a weaker protection than even the exceptions approach. Like the exceptions approach, the ‘inherent requirements’ test

⁴⁰ South Australian Law Reform Institute, *Discrimination on the grounds of sexual orientation, gender, gender identity and intersex status in South Australian legislation*, *Audit Paper* (September 2015), 101 [310].

⁴¹ *Ibid* 21 [46].

⁴² *Anti-Discrimination Act 1991* (QLD) s25.

has the capacity to place unreasonable limitations on the exercise of the religious freedom in education.

The current exemption in Queensland requires a school to act in a way that is 'not unreasonable' which, on face value, seems fair and acceptable. The factors to be considered in meeting this requirement in sub-section 25(5) of the Act are less so. The critical test promulgated by this clause is whether the action is disproportionate bearing in mind the consequences for both the school and the employee. This is a highly subjective standard and requires schools to try and anticipate the subjective value placed on actions and consequences by a subsequent judicial review acting with the full benefit of hindsight and possibly subsequent events. For the applicable Court or Tribunal it requires an assessment and balancing of the impact within a faith-based school of the conduct that gave rise to the action, a hugely problematic exercise in an area where the secular judiciary has traditionally been reluctant to become involved.

The current Queensland exemption also only applies in relation to situations where a person 'openly acts' in a manner contrary to the religious beliefs of the faith-based schools. When this requirement is combined with the prohibition in s124 of the legislation on seeking information in relation to a potentially discriminatory attribute, reinforced explicitly in sub-section 25(4), you have a completely untenable situation. Advice from the Anti-Discrimination Commission of Queensland has, for example, indicated that these provisions mean that faith-based schools 'cannot ask a prospective employee or student what there [sic] religious beliefs are'.⁴³ This is simply untenable and certainly contrary to the stated intention of these amendments.⁴⁴

These provisions taken together are a recipe for hypocrisy. They construct a 'can't ask, don't tell' environment where faith-based schools are forced to accept and may not be able to take any action against staff members who may have a fundamentally antithetical faith position if they are able to comply with the external forms and practices of a faith as expressed in the school. This approach serves to entrench the concern about living 'double lives' raised in submissions to various reviews.⁴⁵ From a school's perspective, leading such a 'double life' undermines the fundamental duty of fidelity and good faith that employees owe to an employer. Duplicity and deceit regarding such foundational matters are not in anybody's interests and are not sustainable.

The current form of exemption in Queensland also reinforces the 'genuine occupational requirement' expectation in a further test which must be met in paragraph 25(3)(b). Once again, advice from the Anti-Discrimination Commission of Queensland is helpful in understanding the concerns of faith-based schools in relation to this provision. In a presentation to schools it was indicated that 'the further

⁴³ Anti-Discrimination Commission of Queensland, 'Discrimination and Independent Schools in Queensland' (Presentation to Associated Christian Schools Roundtable Forum, Citipointe Christian College, Carindale, 17 August 2012).

⁴⁴ The then Queensland Attorney-General, Hon. Rod Welford, claimed that the amendments would provide 'greater clarity' and that the only shift that had occurred as a result of the amendments was to introduce the need for schools to be accountable for how they discriminate. The reality of the amendments has been greater uncertainty in relation to the ability of schools to rely upon the exemption without a sense of proportionate accountability.

⁴⁵ See, e.g., South Australian Law Reform Institute, above n 49, 101 [311] also quoted in South Australian Law Reform Institute, 'Lawful Discrimination': The effect of exceptions under the *Equal Opportunity Act 1984 (SA)* on Lesbian, Gay, Bisexual, Trans, Intersex and Queer (LGBTIQ) South Australians, *Issues Paper* (December 2015), 20 [44].

removed the job is from any essentially spiritual role, the less likely that it will be a genuine occupational requirement'.⁴⁶ Yet again a highly subjective test is being imposed and a secular Court or Tribunal required to adjudicate in what is essentially a matter for the religious body concerned.⁴⁷

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 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.

The concerns of Christian schools in relation to the application of a genuine occupational requirement or inherent requirements test are exemplified by the assertion in the Issues Paper prepared for a recent South Australian review that 'maintenance staff or the school's receptionist has little, if any, effect on the education of students'.⁴⁸ This assertion is a sweeping generalisation, made without supporting evidence nor, as far as we are aware, any engagement with schools in our sector. The assertion is profoundly discriminatory in its application of **one view** about education to schools which take a **different view** and approach.

A further problem with an 'inherent requirements' test is that, once again, it takes the form of a reluctant concession rather than a recognition of the need to protect a genuine human right. Ultimately, it asks the state, in the form of a tribunal or some other judicial authority, to sit in judgement on essentially religious questions such as whether this subject or that, one position or another 'needs' to be filled by a member of the religion. This is a fundamentally fraught process and one that the judiciary is ill-equipped to undertake.

The need for great protection for religious freedom

Australia's international obligations

It is well established that Australia is not meeting its international obligations in relation to the protection of religious freedom. The Commonwealth has 'failed to implement the range of ICCPR rights' it has committed to.⁴⁹ Commonwealth protection for religious freedom in particular, is 'limited'.⁵⁰

⁴⁶ Anti-Discrimination Commission of Queensland, above n 43.

⁴⁷ By way of contrast and illustration no such subjective assessment seems to be implied in Example 2 to subsection 25(1) of the legislation dealing with genuine occupational requirements broadly. It seems implied in the example that any role in a political party or the office of a Member of Parliament is automatically capable of a political belief test, a common provision standing in stark contrast to the approach taken to religious bodies.

⁴⁸ South Australian Law Reform Institute, above n 45, 21 [47].

⁴⁹ Andrews Committee interim report, [2.33].

⁵⁰ Ibid, [4.76].

State & Territory responses are likewise inadequate. The jurisdictions with ‘bill of rights’ type instruments allow restrictions and limitations on religious freedom far beyond that permissible under international law. Positive protections for religious freedom are found in only limited jurisdictions and the main form of ‘protection’, exceptions and exemptions, are problematic in their scope and effectiveness.

Despite the complexities and nuances of our federated polity, the onus is on the Commonwealth to ensure Australia is meeting its international obligations. There are examples of it acting to do so in the light of opposition from State Governments in a range of areas. Such an approach has become relatively commonplace and uncontroversial. It would seem to be the preferable and appropriate solution to addressing this issue.

Increasing religious intolerance

The need to provide greater protection for religious freedom was highlighted during the course of the recent Australian Marriage Law Postal Survey. Attacks upon those holding opposing views during this period were well publicised. Churches were vandalised and employees sacked as a result of public statements they made in some of the more high-profile scenarios. Christian schools who expressed concerns about possible consequences to parent communities were subject to abuse and, in at least one instance, negative comments from an education minister.⁵¹

While this process has concluded, and the outcome accepted by those who opposed change, many are still reporting that the consequences continue. Anecdotally, some educators have reported being shunned by colleagues in professional bodies because of their connections to Christian schools. In at least one jurisdiction activists have used the outcome as the basis for attempts to reduce religious freedoms.⁵²

The need for greater protections for religious freedom were widely acknowledged during the Survey. Both the Prime Minister and Opposition Leader made strong commitments to protecting religious freedom during the public discussion while the Survey voting was taking place.⁵³ Indeed, the establishment of the Expert Panel is a direct response to the acknowledged need to address concerns raised regarding religious freedom in the discussion around the Survey.

A further, and growing, concern for Christian schools is the lack of proportionality increasingly reflected in many of the calls for removing current exemptions and exceptions. In balancing rights there 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,⁵⁴ is what is at stake here.

⁵¹ Emily Baker, ‘ACT Education Minister Yvette Berry cautions schools on same-sex marriage’, *The Canberra Times* (Canberra) 21 September 2017

⁵² See comments in Western Australia by Brian Grieg, reported here and elsewhere, Phoebe Wearne, ‘WA Government seeks legal advice on religious schools’ right to discriminate against LGBTI teachers and students’, *The West Australian* (Perth) 9 November 2017.

⁵³ See, e.g., David Crowe and Dennis Shanahan, ‘Turnbull’s focus on religious freedom after Howard SSM blast’, *The Australian* (Canberra) 16 September 2017.

⁵⁴ ICCPR Article 18(4).

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.

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 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 international law. In these circumstances, it **cannot be considered 'necessary' to infringe religious freedom** as required under international law.

Despite this disproportionate impact Government anti-discrimination agencies continue to promote the removal of exemptions. Most recently the Northern Territory Anti-Discrimination Commissioner has proposed the removal of exemptions for religious bodies in that jurisdiction on the basis that the removal 'would make the system fairer by ensuring people of certain attributes have the same opportunities under the Act'.⁵⁵ No consideration seems to have been given to the impact on religious freedom or the need to comply with international law.

The changes are proposed without consideration or discussion of proportionality and, indeed, with a likely benefit a tiny proportion of the population of the Northern Territory. A review of the most recent Annual Report⁵⁶ from the Northern Territory Anti-Discrimination Commission suggesting that, as a percentage of the total population of the Territory,⁵⁷ the number of enquiries received outside the scope of the current Act in the last year, if each came from a different person, reflects a mere 0.026%. This miniscule number of enquiries falling outside the scope of current provisions seems to be the justification to 'make the system fairer' and profoundly damage religious freedom, a hugely disproportionate response.

The impact of public policy on individuals is certainly profoundly important. Examples of that impact cannot, however, be the sole or dominant determinant of policy approaches. This is particularly the case where fundamental principles, such as freedom of religion or speech or conscience are at stake.

⁵⁵ Department of the Attorney-General and Justice, Northern Territory *Discussion Paper, Modernisation of the Anti-Discrimination Act* (September 2017), 22.

⁵⁶ Northern Territory Anti-Discrimination Commission, 'Annual Report 2016 - 2017', (September 2017).

⁵⁷ Australian Bureau of Statistics, 3101 - Australian Demographic Statistics, Mar 2017, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>.

Recommended approaches for the protection of freedoms

There is much that can be done and indeed there is much to do to protect religious freedom in Australia. These approaches, consistent with our obligations under international law and increasingly essential seek to ensure that Australians holding a religious belief have the same rights within our society as others. Some are broad, drawing on emerging understanding over decades and others are specific, incorporating issues identified and given currency during the recent public discourse surrounding amendments to the definition of marriage.

Appointment of a dedicated 'Freedoms Commissioner'

To be effective over the longer term all of the approaches outlined below must have a 'champion', a person dedicated to advocating for the protection or indeed possible expansion of the essential freedom of religion and the concomitant freedoms of speech and conscientious belief. This would come about through **the appointment of a dedicated 'Freedoms Commission'**. We would see this role within the existing Australian Human Rights Commission structures but focussed on:

- Leading the national discussion regarding the importance of these fundamental freedoms, including conducting research, undertaking consultations and meeting with key interest groups;
- Advocating for legislative changes to enhance protections for these fundamental freedoms;
- Advising Commonwealth and State and Territories governments and agencies on approaches to protecting these freedoms and monitoring and reporting on those protections; and
- Intervening in 'landmark' or 'test' cases to support those parties who may find their freedoms are threatened.

Appropriately defining discrimination

A critical first step in protecting religious freedom is appropriately defining discrimination - **not all differentiation is discrimination**.

Consistent with the broader human rights framework and reflecting the need for balancing rights, we argue that protection for religious freedom should be firstly tackled as a definitional issue (rather than as if often the case currently, an exemption) in equal opportunity or anti-discrimination law. This approach has been promoted and developed in submissions by a number of individuals and groups over recent years. The most widely discussed example is that proposed by Professors Parkinson and Aroney reproduced in Appendix Two.⁵⁸

We believe this should be considered as a preferred approach to protecting the communal expression of religious freedom through Christian schools. Determination of whether discrimination has occurred would involve discussions of a different kind, allowing a more even-handed sense of balancing sometimes competing rights. This change in the definition of discrimination would be expected to allow Christian schools to:

- Employ staff it determines as reasonably necessary to protect its religious character or fulfil its religious purpose;

⁵⁸ Patrick Parkinson and Nicholas Aroney, Submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, January 2012

- Disengage from students and their families where this is necessary to protect the religious character of the school community; and
- Teach in accordance with the doctrines, tenets and beliefs of the school.

It is possible immediately for the Commonwealth Parliament to take such an approach and apply it to Commonwealth legislation, such as the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth). This would certainly be a positive first step. It would not, however, provide the comprehensive protections that seem now to be required.

Providing positive protections for Christian schools

To ensure compliance with international obligations, in the face of some of the contemporary challenges outlined above, **positive protections are now necessary**. Such a protection would clearly, by virtue of section 109 of the Australian Constitution, ensure that States and Territories could not, by their actions, erode those protections. This is vitally important in the face of the lack of certainty regarding the ability of an exemption in Commonwealth legislation to constrain State or Territory legislation under these provisions.

The form of such protection is a matter for the Panel. It could form part of existing legislation, such as the *Australian Human Rights Commission Act 1986* (Cth) or as stand alone legislation protecting religious freedom. It is vital, however, that, regardless of the form, certainly is provided through this process with Christian schools, and other faith based organisations, having clear boundaries to work within.

This legislative solution should also address concerns raised prior to the passage of the recent amendments to the *Marriage Act 1961* (Cth) by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). During consideration of that legislation a number of further amendments were proposed by a range of Senators and Members. None of these amendments were extensively considered with the clear view of many Parliamentarians being that this Panel was the appropriate forum for consideration of those proposals.

While in that context focussing on the protections needed arising from a change in the definition of marriage, it is vital for Christian schools that similar protections to those proposed apply more broadly to protect religious freedom. In particular, it is essential that protections be provided:

- relating to the use of the facilities of a Christian school for marriage ceremonies;⁵⁹
- to guide the determination of the beliefs of a religious body;⁶⁰
- that clearly state the Commonwealth's intention to 'cover the field';⁶¹
- guaranteeing free speech where it does not threaten or harass another person or group;⁶²
- securing their charitable status;⁶³

⁵⁹ As outlined, for example in the proposed amendments to the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017*, tabled in the name of Mr Sukkar, item 38.

⁶⁰ Proposed amendments to the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017* tabled in the name of Mr Hastie, proposed section 5AD.

⁶¹ Ibid, proposed section 6(2).

⁶² Ibid, proposed sections 88J, 88JA, 88K, 88KA.

⁶³ Proposed amendments to the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017* tabled in the name of Mr Morrison, proposed section 88O.

- shielding continued education funding;⁶⁴

These protections were expertly drafted in the proposed amendments, and an earlier proposed alternative bill, and supported by an exhaustive Explanatory Memorandum and Statement of Compatibility with Human Rights.⁶⁵

Ensuring ‘believers’ can continue to act on their beliefs

It is relatively easy to construct provisions and protections that protect religious bodies. As discussed earlier, however, for the individuals that make up the communities of Christian schools, and other similar devout believers, religious belief, or ‘faith’, is understood to be at the very core of their identity. Faith is outworked in all of life.

This identifies an arguably more challenging issue for the Panel to consider, how do individual believers express their religious beliefs outside religious bodies? Included in this challenge is how parents ensure an education for their children where a Christian school may not, unfortunately, be a viable option. The workplace provides further obvious potential challenges for people of faith. Similarly, small businesses, often intimately connected with their owners regardless of corporate structures, can face challenges seeking to ensure that the business can operate in a manner consistent with the deeply held religious beliefs of those owners.⁶⁶

Clearly the right to religious freedom in Article 18 is not limited to ‘manifestation’ only in community with others. A Commonwealth protection for individuals is an essential element of ensuring compliance with Australia’s compliance with its international obligations. The most appropriate form of such protection would be a matter for the Panel. The scope of such protection should, however, reflect that proposed in amendments proposed in the debates on the *Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)*.⁶⁷

⁶⁴ Ibid, proposed section 88N

⁶⁵ Accompanying the alternative bill proposed by Senator Patterson, available online <<https://senatorpaterson.com.au/2017/11/13/release-of-draft-bill-to-legalise-same-sex-marriage-and-preserve-freedoms/>>.

⁶⁶ This scenario was addressed by the concept of ‘closely held’ corporations under United States law dealing with religious freedom. See, e.g., *Burwell v. Hobby Lobby*, 573 U.S. ____ (2014) and related decisions of the US Supreme Court.

⁶⁷ Above, n 60, proposed section 88K.

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

A better definition of discrimination

- 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.

Patrick Parkinson and Nicholas Aroney, Submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, January 2012.