



**CONSOLIDATION OF COMMONWEALTH
ANTI-DISCRIMINATION LEGISLATION**

Submission of
ASSOCIATED CHRISTIAN SCHOOLS

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To:

Assistant Secretary
Human Rights Policy Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
Barton ACT 2600

Contact:

Lynne Doneley
Executive Officer
P O Box 2238
Mansfield DC QLD 4122

INTRODUCTION

Associated Christian Schools (ACS) was established in 2010 by Principals of Independent faith-based schools, who strongly desired to be associated together as peers engaged in similar roles. It was established as a non-profit organisation to encourage, represent and promote the welfare of independent faith-based schools. Associated Christian Schools (ACS) recognises the diversity in organisational structure of our member schools. Some of our schools are connected with standalone churches, others with traditional denominations, others are completely independent. Associated Christian Schools (ACS) currently represents 29 member schools, with approximately 18,500 students enrolled.

Associated Christian Schools (ACS) members are also members of Independent Schools Queensland, and support the activities of this organisation. Associated Christian Schools (ACS) also has Associate members located in other Australian states.

FOUNDATIONAL PRINCIPLES OF ASSOCIATED CHRISTIAN SCHOOLS

Associated Christian Schools are characterised and informed by the following principles:

- 1.** We value the diversity of Australian faith based schools, with respect to governance, diversity of faith, and independence, and the respect of parents in their choice of school for the education of their children.
- 2.** That faith based schools continue to be autonomous and independent, in the interpretation and instruction of schools and the ability to teach within their own educational and faith based interpretation, while remaining compliant with accountability requirements to state and federal governments.
- 3.** We support the ability of faith based schools to be innovative in their practices to demonstrable improvements in student learning.

Associated Christian Schools acknowledges and appreciates the support provided by the Australian Government of independent faith-based schools. We also value the opportunity to make this response, on behalf of Associated Christian Schools, to the Discussion Paper on the Consolidation of Anti-Discrimination Laws.

Summary

Associated Christian Schools ('ACS') recommends as follows:

1. There is utility in looking to the State Anti-Discrimination and Human Rights legislation to inform the practice of any Commonwealth Act. Such approach is desirable firstly because the States' generally take a balanced approach to Anti-Discrimination practice, and secondly such approach would provide more consistency overall ('Uniformity with State Acts').
2. 'Inherent Requirements' should be defined and deployed as an exempted attribute under the definitions of discrimination. Further, the Commonwealth ought apply the exemptions utilised in Queensland under s 25 *Anti-Discrimination Act 1991 (Qld)* ('Inherent Requirements Exemption').
3. The Commonwealth should deploy a definition of Discrimination which is consistent with all current definitions provided by the International Agreements and the definition deployed in the *Anti-Discrimination Act 1991 (Qld)* ('Consistency with Established Principles').
4. When articulating the areas of public life to which Anti-Discrimination law applies the Commonwealth should look to the areas already expressed by the States and Territories, and ACS particularly notes the conditions relating to volunteers.
5. 'Genuine Occupational Requirements' and 'Acts Consistent with Religious Conscience' ought to be deployed as specific exemptions under the Act which extend to any enactments concerning sexual orientation and gender identity ('Religious exemptions').
6. The conception of 'employment' used by the Acts is broadened to include marginal categories such as volunteers and Religious Education instructors ('Employment Definitions').

Introduction

Associated Christian Schools ('ACS') endorses the aims which the Commonwealth Department of the Attorney General announced in the release of its discussion paper: to 'explore the opportunities to improve the effectiveness of the legislation to address discrimination and provide equality of opportunity to participate and contribute to the social, economic and cultural life of our community'.

ACS also endorses the assessment that principles of human rights and discrimination law can be made easier to understand, to comply with and to administer through consistency between the Commonwealth and State Acts. This can be achieved in part by making the definition of discrimination simpler, clearer, easier to understand and more effective.

At the same time, it is submitted that the principles must remain just. Accordingly, ACS sets out below certain principles which must be incorporated into any Consolidated Act in order to accord due fairness to all effected.

1. Uniformity with State Acts

In a Federal System there are positives and negatives in the legislative approach which spreads power across multiple sites. However it is said the Human Rights and Anti-Discrimination are principles of a universal character. Accordingly it is submitted that such legislation should seek consistency between the Commonwealth and the States and Territories. In such circumstances, a uniform set of principles will be allowed to develop, but the administrative burden would remain diffuse.

It is submitted that a significant step in the unification of Human Rights and Anti-Discrimination principles is the step of the Commonwealth seeking to utilise the approaches taken by several States, yet avoiding the implementation of unjust principles. Such step could be seen as a statement of principles as to the interests and values Australia shares in terms of liberty, equality and fraternity and must accordingly guide the States in their like processes.

2. Inherent Requirements Exemption

ACS submits that it should be lawful for an employer to impose certain conditions on persons who seek to enter specific classes of employment. This principle is embodied in Queensland by s 25 *Anti-Discrimination Act 1991 (Qld)*:

(1) A person may impose genuine occupational requirements for a position.

(2) Subsection (3) applies in relation to—

(a) work for an educational institution (an employer) under the direction or control of a body established for religious purposes; or

(b) any other work for a body established for religious purposes (also an employer) if the work genuinely and necessarily involves adhering to and communicating the body's religious beliefs.

(3) It is not unlawful for an employer to discriminate with respect to a matter that is otherwise prohibited under section 14 or 15, in a way that is not unreasonable, against a person if—

(a) the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs—

(i) during a selection process; or

(ii) in the course of the person's work; or

(iii) in doing something connected with the person's work; and

(b) 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 membership of ACS are typically schools who seek to provide education from a Christian perspective. In the cases of some schools, one aspect of the provision of such services is that teachers live in such a way as reflects the religious convictions of the school/organisation/denomination to which they attach. In the case of such schools, this is typically an expectation of parents, which is consistent with their rights as parents enshrined under Article 18 of the *International Covenant on Civil and Political Rights*:

“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.”

“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.”

It is of essential importance that an organisation be allowed to determine how best to manage its own operations and how best to provide goods or services to its patrons. In the case of Christian Schools, any prohibition on deciding who best fits its ideal staff profile (and accordingly any restriction on its religious conscience) impacts not only on the values of that particular school, but also on the rights of those parents who have selected that school on the basis that its principles conform with their convictions.

Accordingly, the Commonwealth should allow organisations to define and decide the inherent requirements of an occupation where freedom of religion or association is the operative value which informs that decision making process. In terms of Religion, ACS makes the following two submissions:

1. The Constitutional basis of the Commonwealth’s legislative power recognises that Australia requires a separation between State and Religion.

It is submitted that the appropriate construction of such which seems otherwise consistent with the jurisprudence of the High Court of Australia is the Berlinian approach to positive liberty - an approach which provides for a significant degree of self-determination amongst social elements. Substantively, and as is recognised by the High Court, there is a distinction between fostering religious liberty and ‘establishment of religion’.¹ Unlike in the USA, this distinction has been adopted by the High Court of Australia. Accordingly, the Constitutional protection of the free exercise of religion, being the only express right of broad scope in the Constitution, must be understood to provide a guarantee of neutral treatment in respect of religion and its associated conscientious matters. It is invalid for the Commonwealth to cause legislation to stand-in for religious conscience.

2. A practical approach is to treat religion in market terms.

There is a history of Federalist thought which constructs religion as a Constitutionally guaranteed ‘free market’.² The neutral treatment in terms of the Australian Constitution

¹ *Attorney-General (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559

² Ahdar, R. and I. Leigh. (2005) *Religious Freedom in the Liberal State*. Oxford: Oxford University Press. At

and its resulting jurisprudence is consistent with the treatment of religion as a marketplace. It is submitted that, accordingly, the market principles of decision-making be applied to religion (in accordance with Company law) - a *bona fide* decision made in pursuance of religious conscience is essentially analogous to a *bona fide* business management decision made for a proper purpose.³ In a free religious marketplace it is necessary to allow religious decision-makers the right to make undisturbed conscientious decisions.

3. Conformity with Established Principles

The principles of the International Instruments and the State Acts all note that discrimination is understood in terms of differential treatment on the basis of a specific protected attribute. The International definitions are derived from Article 7, *Universal Declaration of Human Rights*:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

This construction is made more specific by Articles 2 and 26 of the *International Covenant on Civil and Political Rights*:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Then each ground is then specified by each of the more specific instruments such as the *Covenant on the Elimination of Discrimination Against Women* (‘CEDAW’), the *Covenant on the Elimination of All Forms of Racial Discrimination* (‘CERD’), the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (‘DEDBRB’), and several other like instruments. Two important notes are:

1. Discrimination under these covenants is based on differential treatment to a person’s detriment based on a particular attribute.
2. Detriment is considered in terms of the denial to a person of particular human rights or civil and political rights.

In general terms, state signatories to the Covenants have adopted an approach which is consistent with these principles. However consistency requires a proportionate response -

p 93; Eisgruber, C. ‘Madison’ s Wager: Religious Liberty in the Constitutional Order’ (1995) 89 *Nw U L Rev* 347;

³ Section 180(2) *Corporations Act 2000 (Cth)*

each of the basic rights outlined in these documents must be balanced against each other in some manner. Further, each Covenant has an individual purview - the CERD and CEDAW construct principles by which the differential treatment on the basis of gender and race can be eliminated, whereas other Covenants may look to prevent detriment on the basis of particular attributes.⁴ To a large extent, it is submitted that the current approach taken by most State legislation approaches the issues raised by the Conventions in a manner consistent with the principles of the Covenants.

It must also be noted, in terms of consistency, that the Commonwealth is limited in its legislative power in this respect by s 51(xxix) of the Constitution. Given that the Commonwealth's access to human rights and discrimination legislation is through the external affairs power, the Commonwealth is required to remain faithful to the Covenants which give it power to legislate. The Covenants must be implemented proportionately,⁵ it is invalid for the Commonwealth to attempt to use a Covenant as a foundation on which to build any such legislation as it pleases - the Commonwealth must remain within the framework which the Covenant establishes. It is submitted that, where the Commonwealth seeks to implement legislative provisions that are otherwise consistent with the Covenants, the States' legislation and international practice. Such Consistency provides a higher degree of certainty and allows actors to make appropriate policy decisions in good faith that they should not fall foul of one of the many systems of Anti-Discrimination legislation to which they must comply.

4. Religious Exemptions

The 'Genuine Occupational Requirements' section of the *Anti-Discrimination Act 1991 (Qld)* has been outlined above. In terms of selecting employees or staff, it is submitted that the employment of a substantially similar exemption is essential to the free exercise of religion in Christian schooling. As has also been noted above, parents are entitled to ensure that their children are educated in accordance with their moral convictions. However it is submitted that a broader paradigm shift should occur. Not only should Christian schools be 'excused' from complying with the general principles of Anti-Discrimination, but there should be a sense that society supports religious freedom.

It is submitted that some nature of exclusive measure be extended to acts which are consistent with the religious conscience of the decision-maker or person engaging in particular conduct. The rationale for such measure is that questions of religion are not determinable by the Courts,⁶ but by the conscience of the individual, organisation or body corporate and by the manner in which it is considered that religious convictions ought to be exercised. This is consistent with Australia's neutral treatment of religion. Any consolidated Act must provide for the freedom of persons to engage in, abstain from, condone or prohibit conduct which is the result of religious convictions.

It is noted that this remains necessary in terms of sexual orientation and gender identity. The organs of State cannot determine the truth or falsity of religious conviction in such

⁴ *Discrimination (Employment and Occupation) Convention* (' DEOC'), *Convention on the Rights of Person With Disabilities* (' CRPWD')

⁵ *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 487-488 (per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ)

⁶ *Attorney-General (NSW) v Grant* (1979) 135 CLR 587 at 512 (Murphy J).

terms.⁷ Whilst ACS does not condone discrimination on grounds of sexual orientation or gender identity, it submits that many of its members hold certain religious convictions concerning the same grounds. Conduct in pursuance of religious conviction is not appropriately constructed as conduct designed to injure persons. This is consistent with the proposition that the Constitutional immunity provided to religion overrides any powers to make other enactments. Free exercise of religion is a good in itself which is given priority in Australia.

5. Employment Definitions

In terms of employment, it is submitted that both the protections and exemptions should extend not only to remunerated employees, but also those who engage voluntary or *ad hoc* work or assistance. In general terms, voluntary work is an unquantified good - whilst it is difficult to track the level of engagement and the level of satisfaction, it is generally acceptable that voluntary work is 'rewarding'. To this end, those who seek to engage in voluntary work should not generally be excluded on the basis of any ground which would constitute unlawful discrimination.

Nonetheless, it must be noted that an organisation must be afforded the freedom to ensure that those who engage in voluntary work ought to be appropriate for that organisation's needs. In terms of a Christian school, one element of a parent's civil right 'to ensure the religious and moral education of their children in conformity with their own convictions' is the presumption and trust that any person with whom their child may interact will also conform to those convictions. Many Christian schools outline a certain set of principles with which staff members must comply in pursuance of such expectation of parents. It is appropriate that Christian Schools should monitor and determine those persons who come into contact with students.

Conclusion

ACS affirms the development of Human Rights and Anti-Discrimination and is generally supportive of any move to make the laws regarding Anti-Discrimination easier to understand and more consistent across the jurisdictions. The reservations held by ACS in terms of the discussion paper released by the Commonwealth are in terms of respecting the fundamental freedom of religious observance by individuals and organisations.

It is submitted that the correct balance must pay due regard to the balance of human rights and civil and political rights principles as well as the fundamental position with respect to the Australia's Constitution. The primacy of free exercise of religious conscience with respect to the range of International Conventions and s 116 of the Constitution is a guarantee that individuals and organisations will be allowed to act in accordance with their conscience free from the intervention of the State. Other forces than law act upon religious institutions – these forces must be allowed to take their effect.

⁷ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 150 (per Murphy J)

It is otherwise in the public interest to develop a consistent approach to promoting human rights and anti-discrimination. Given that the Commonwealth was not originally imbued with the power to legislate in respect of human rights and discrimination, it is submitted that there ought never to have been any more than one level of governance and thus one set of principles in operation for the resolution of any one dispute. ACS affirms the approach of developing a consistent system for the resolution of disputes as well as the prevention of discrimination which can be relied upon by all Australians.