Legal and Constitutional Affairs Legislation Committee

Inquiry into the Human Rights and Anti-Discrimination Bill 2012

Submission by

Christian Schools Australia Ltd

For further discussion regarding this submission please contact:

Stephen O'Doherty
Chief Executive Officer

This submission has been prepared by:

Stephen O'Doherty
Chief Executive Officer

Mark Spencer
Executive Officer, National Policy

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

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

This publication is provided as a submission to the Legal and Constitutional Affairs Legislation Committee's *Inquiry into the Human Rights and Anti-Discrimination Bill 2012* and may be used in accordance for the purposes of that Inquiry and in accordance with the terms of that process.

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

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

1. Introduction

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

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

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

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

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

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

We have set out below our submission to the Legal and Constitutional Affairs Legislation Committee's *Inquiry into the Human Rights and Anti-Discrimination Bill 2012*. In doing so we reserve the right to provide further analysis and comment either in response to other submissions or more generally.

2. The nature of Christian Schools

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

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

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

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

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

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

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

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

3. Human Rights and Christian Schools

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

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

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

> *'…the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people'*
>
> *Preamble to Universal Declaration on Human Rights*

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

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

4. The Human Rights and Anti-Discrimination Bill 2012

Against the background and context outlined above the following specific points are made in relation to the Exposure Draft legislation.

Section 3 - Objects

As pointed out in our submission to the Attorney-General's Department review it is a widely accepted notion that anti-discrimination law inherently involves a balancing of human rights. This balancing effect is acknowledged in international and domestic law, both Commonwealth and in the States and Territories.

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

> *'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'*
>
> *International Covenant on Civil and Political Rights Article 18(3)*

The text of the Covenant itself provides a very narrow scope for limitation of religious freedom. This is further reinforced by the Siracusa Principles[1] relating to the conditions and grounds for permissible limitations and derogations enunciated in the International Covenant. Together the Covenant and the Siracusa Principles provide a high level of protection for these rights and allows their limitation in only certain circumstances.

The objects of current Commonwealth anti-discrimination legislation however seem to be inconsistent with the internationally recognised approach. The current objects are generally described in the form: *'to eliminate, so far as is possible, discrimination against persons on the ground of...'* This formulation of the objects of the legislation seems out of step with the imperative to recognise the legitimate and fundamental need to balance different human rights within and broader overall framework of rights. In other words it falls short of the imperative to guard against limitations on the *freedom to manifest one's religious beliefs*. Note that the freedom expressed in the international instruments is not just to *hold* a religious belief, but to *manifest* that belief. This is a key issue for faith-based institutions in Australia, such as Christian schools.

The Exposure Draft legislation goes some way to addressing this issue by framing the objects as '*to eliminate discrimination … consistently with Australia's obligations under the human rights instruments and ILO instruments …*'. While pointing to the obligations under human rights instruments, including therefore the obligations in

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

terms of protecting religious freedom and balancing rights, this wording may not provide sufficient clarity about these obligations. Explicit recognition within the objects of the need to balance different aspects of human rights and achieving anti-discrimination outcomes in a manner that reflects and protects other rights, such as freedom to have and manifest religious beliefs may eliminate potential uncertainty in this area.

Section 17 – The protected attributes

As indicated in our earlier submission Christian schools are **not** seeking to add 'religion' as a protected attribute alongside those currently covered under the consolidated anti-discrimination laws. We note the significant range of views on this issue across religious organisations. In jurisdictions where religion is a protected attribute, both within Australia and overseas, the experience of faith organisations has often been that it is used in a way that reduces religious freedom rather than supports it. Contrary to the intention of those who introduced the provisions freedom *of* religion has effectively become freedom *from* religion in many cases.

The lack of a strong desire for the inclusion of religion as a protected attribute, based in part on experiences where religion *is* a protected attribute, suggest that caution is needed in this regard. We remain of the view, on balance, that religion should not be a protected attribute and this section should be amended accordingly.

Section 19 – When a person discriminates

The approach taken in the Exposure Draft legislation is to replace the current 'comparator test' with a 'detriment test'. While there has been some support for this change the support is not overwhelming and the former remains the approach taken in the majority of states, as well as currently at the Commonwealth level. The adoption of a different approach at the Commonwealth level risks introducing uncertainty and confusion and potential conflict between State and Commonwealth law, for organisations that may operate across different jurisdictions (or even for those operating in one jurisdiction).

The inclusion within the definition of discrimination of '*other conduct that offends, insults or intimidates'* is of even greater concern. The potential breadth of the definition is now staggering. Irrespective of the defences or exceptions that may subsequently be found to apply the extremely low bar applied in this definition will almost certainly lead to a significant increase of complaints and create an environment where fear of such complaints curtails essential freedom of speech and expression.

This provision should be removed to provide a more appropriate balance in the legislation. Failing this, the provision should at the very least be amended such that the exception in section 51(4) in relation to racial vilification applies to all commentary and discussion. This provision makes it clear that it is not unlawful in that context, for a person:

> *'to say or do something, reasonably and in good faith:*
>
> *(a) in the performance, exhibition or distribution of an artistic work; or*
>
> *(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or*
>
> *(c) in making or publishing:*

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.'

Section 23 – Exceptions for justifiable conduct
Section 24 – Exception for inherent requirements

As foreshadowed in the Discussion Paper that formed part of the consultative process leading to the Exposure Draft legislation a 'general limitations' type exception has been introduced in section 23. This is complemented in section 24 by an inherent requirements exemption, consistent with the usual approach of similar legislation in other jurisdiction and internationally.

We remain strongly of the view that the reductionist approach discussed as part of the consultation which would see, the replacement of many, if not all, existing exceptions and exemptions with such general provisions would not assist in reducing the complexity of the consolidated legislation. Rather than achieving 'simplicity', we believe that such an approach will actually increase operational complexity. Existing well established understandings of specific exemptions would be lost under such an approach.

It is pleasing to note that in addition to these general exceptions specific exceptions remain in the Exposure Draft legislation. We believe that the purposes of the legislation are best served by the *continued* inclusion of additional specific exemptions where these are long-standing and settled: such as those in relation to religious freedom.

Section 33 – Exceptions for religious bodies and educational institutions

The exception for faith based schools in section 33(4) is consistent with our earlier submission, equivalent law in many jurisdictions and the *Fair Work Act 2009*. We appreciate the Government for honouring its commitment in this regard.

For the reasons noted below in relation to section 47, we repeat, however, our preference that the balancing of freedom of religion with other human rights is best achieved by mean other than an exception.

An alternative approach to the issue of religious exemptions not in the Discussion Paper was canvassed during the Consultations. The issue could be tackled as a definitional issue, in the same way as section 21 excludes 'special measures' from the definition of discrimination, a clause could be included such that *activities done in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, undertaken in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed*, would *not* constitute discrimination.

We believe this approach has considerable merit and should be considered as a preferred approach to this issue. This approach would be consistent with the discussion regarding the proposed objects of the legislation outlined above. It would reinforce the 'balancing' that is implicit in any determination of discrimination.

Section 47 – Review of Exception

The Exposure Draft legislation requires the exceptions for faith based schools in section 33(4), along with the other exceptions to be reviewed within three years of the commencement of the Act. According to the Explanatory Memorandum this is to enable consideration of whether these specific exceptions are still necessary, taking into account the operation of the new general justifiable conduct exception

As noted above we are strongly of the view that despite the inclusion a general exception the purposes of the legislation are best served by the *continued* inclusion of additional specific exemptions where these are long-standing and settled: such as those in relation to religious freedom.

The inclusion of a review of the exceptions provides further evidence of why the alternative approach discussed in relation to section 33 of accommodating religious freedom as a definitional issue has significant merit. Religious freedom is a fundamental human right and must be accorded appropriate protection. Doing so through a potentially temporary exception we believe is far from the preferred approach and may not be sufficient to meeting international obligations.

Section 52 – Requesting or requiring information

Recent interpretations of similar provisions in state legislation have raised concerns within Christian schools about the impact of provisions such as this. Recent advice from the Anti-Discrimination Commission of Queensland has, for example, indicated that equivalent provisions in the *Anti-Discrimination Act 1991* (QLD) mean that faith-based schools *'cannot ask a prospective employee or student what there [sic] religious beliefs are'*. This is simply untenable and certainly contrary to the intention of these provisions.

Clarification would be helpful to ensure that faith based schools can make appropriate enquiries to give effect to the exceptions in the Exposure Draft legislation.

Section 53 – Publishing material indicating intention to engage in unlawful conduct

On a regular basis newspapers and other publishers have expressed concern in relation to the publication of advertisements by faith-based schools seeking staff who share their beliefs. Once again this is clearly not the intention of these provisions but as an unintended outcome has potentially significant consequences.

Once again clarification would be helpful to ensure that faith based schools can publish advertisements consistent with the exceptions in the Exposure Draft legislation.

Section 124 – Burden of proof in proceedings

There was considerable discussion during the consultations that led to the Exposure Draft legislation in relation to the challenges faced by all parties in relation to the burden of proof. This debate has continued publically following the circulation of the Exposure Draft legislation with many commentators raising serious concerns in relation to this change.

Given the fundamental shift that this amendment represents our view is that this change should be subject to an automatic review, just as exceptions are to be

reviewed, within three years of the commencement of the Act this change. This would allow a reflective and informed consideration of the impact of this change in the burden of proof.