



Catholic Schools NSW

Submission to The Review of The NSW Anti-Discrimination Act

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Executive Summary

- This submission argues for a legislative framework supportive of Catholic schools pursuing their Mission in alignment with their ethos and providing parents with an education choice that reflects their own values.
- In reviewing the Anti-Discrimination Act 1977 (NSW), the NSW Government must ensure that any amendments uphold the *International Convention on Civil and Political Rights* (ICCPR), which states that “The State 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.”
- Any legislative amendment should provide appropriate support for the right of religious communities, including faith-based educational institutions, to operate in accordance with the beliefs of their religious community and a concomitant right to appoint staff who share these beliefs and commitments. Staff in Catholic schools have a professional obligation to be supportive of the teachings of the Catholic Church, and their commitment to Catholic values is critical to maintaining the institutional integrity of Catholic schools.
- The religious values of a Catholic school are a key reason parents choose a Catholic school. This view is supported by available research. A majority of parents, and a significant majority of Catholic school parents, believe religious schools should also be entitled to require employees to uphold the ethos and values of that faith.
- Any new legislation should include a general provision (in addition to section 56, “Religious Bodies”) that should expressly state that nothing in the legislation is intended to impede or diminish religious freedom or the right of religious agencies, including faith-based schools, to practice and publicly manifest their beliefs and teaching.
- Catholic Schools NSW makes this submission noting the earlier comments of the Hon Chris Minns MP that a review of the *Anti-Discrimination Act 1977* (NSW) conducted by his government will ensure that the review does not proceed without “consulting and taking advice from people of faith and their religious leaders.”

The Role of Catholic Schools NSW

Catholic Schools NSW Limited was established by the NSW and ACT Catholic Bishops and is the peak body for Catholic education in NSW. Catholic Schools NSW takes a leadership role, coordinating and representing Catholic education in NSW at the state and national levels.

While Catholic Schools NSW represents the interests of all Catholic schools, being the Approved System Authority for NSW Catholic school systems under the *Australian Education Act 2013* (Cth) and the *Education Act 1990* (NSW), it has a particular funding coordination role on behalf of Catholic systemic schools.

Catholic schools have been part of Australia's education landscape for 200 years. Today, NSW's 592 Catholic schools enrol more than 260,000 students, or one in five of the state's students. Employing over 31,000 teachers and other staff, Catholic schools play a critical role in the delivery of school education in NSW.

Catholic education is characterised by the integration of Catholic faith and culture and is committed to the education of the "whole person", which includes the spiritual, intellectual, physical, and emotional aspects of an individual's development.

The Focus of this Submission

The focus of this submission is the imperative for any redrafted *Anti-Discrimination Act 1977* (NSW) (the ADA) to give effect to Article 18 (4) of the International Convention on Civil and Political Rights (ICCPR): "The State 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."¹

To this end, this submission will directly address Review Terms of Reference 1 and 2, and related issues, which individually and collectively raise issues and serious concerns relevant to the operation of Catholic Schooling in NSW.

In this regard, Catholic Schools NSW reminds the review that the right of parents to determine the religious and moral education of their children is so fundamental a human right that the ICCPR (which Australia has ratified) provides that it cannot be suspended or limited even "in time of public emergency which threatens the life of the nation."²

Moreover, Australian domestic law recognises religious freedom's centrality to any human rights appreciation. The High Court of Australia has observed: "Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society".³ It is both in recognition of, and in order to give effect to, this "paradigm principle" that the current ADA contains "balancing clauses" (provisions) by way of exemptions and exceptions to protect the expression and manifestation of religious belief by NSW faith-based schools.

The Importance of Religious Values of Schools for Parental Choice

The religious values of a school are an important factor that parents take into account when choosing a school for their children. A study by the Australian Council for Educational Research, *Why parents choose public or private schools*, identified some key factors influencing parental choice of a school:

¹ Article 18 (4), International Covenant on Civil and Political Rights, United Nations, 1966,

<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

² Refer United Nations, Economic and Social Council, UN 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 (1984).

³ *Church of the New Faith v Commission of Pay-Roll Tax* (1983) 154 CLR 120, per Mason ACJ and Brennan J

For parents with students in a Catholic school, discipline, the religious values of the school, the traditions of the school and the requirement of wearing a school uniform were considered important. Selection of a Government school was influenced most by parents' perceptions of the importance of academic and social and cultural security... and [the] religious or moral values of the school were considered less important.⁴

The importance of the religious values of the school as an important determinant of parents' choice was reflected in another recent survey conducted on behalf of the National Catholic Education Commission in 2019. The study of 1662 parents found that out of fourteen selection criteria, the "religious values" criteria showed the most significant variance. Fifty-nine per cent of parents selecting a Catholic school identified religious values as extremely important or very important for their choice of schooling compared to 34 per cent of parents selecting a government school. The difference between both cohorts for the religious values criteria was 25 per cent, while for the remaining 13 criteria, the next largest difference was 4 per cent.⁵

An unpublished survey conducted by Resolve on behalf of Catholic Schools NSW in October 2020 found that the proportion of parents for whom the religious component of the school was an important factor in their discernment was 3.6 times higher for those who enrolled their children in a Catholic school compared to parents who considered a Catholic school but ended up choosing a government or Independent school for their children.⁶

The Nature of Catholic Schooling and its Right to Religious Freedom

Catholic Schools NSW argues that Catholic schooling is entitled to the ongoing presumption of human rights protection by virtue of both ICCPR Article 18 (4) and the above-cited imperative identified by the High Court, given the religious nature of Catholic schools, that is a Catholic school is both a school and a "Religious Body".

As the Australian Catholic Bishops Conference (ACBC) has argued in the context of the current Australian Law Reform Commission Inquiry into Education Institutions and Anti-Discrimination Laws:

Catholic schools must be free to be authentically Catholic. Catholic schools exist to be witnesses of a Catholic mission and ethos by all staff supporting, teaching and exemplifying a Catholic approach to life. Catholic schools exist to provide this education to their students and to parents who choose to send their children to be educated in an environment that upholds and exemplifies a Catholic ethos. In this way, Catholic schools provide an attractive option, freely chosen, by staff and families.⁷

Implications from Altering the *NSW Anti-Discrimination Act 1977* (Term of Reference One)

Any redrafting of the ADA must take into account the following foundational principles and beliefs as derived from international human rights law:

1. The right to religious freedom is grounded in respect for human dignity.
2. Individuals should not be forced to act in a manner contrary to their religious beliefs, nor should they be restrained from acting in accordance with their religious beliefs.

⁴ Beavis, A. *Why Parents Choose Public or Private Schools*. Australian Council for Educational Research, Research Developments, Vol. 12 [2004], Art. 3.

⁵ *The Guardians of School Choice: The Case for Catholic Schools, Volume 2*. Katherine Burrow Institute, September 2020, page 14 -15, <https://www.csnsw.catholic.edu.au/wp-content/uploads/2020/12/The-Case-for-Catholic-Schools-Volume-2-1.pdf>

⁶ G. Miller, *Planning for the Future: Enrolments and Demographics*, CSNSW Education Law Symposium, 6 July, 2023, Sofitel Sydney Wentworth.

⁷ Australian Catholic Bishops Conference (ACBC). *Submission to the Australian Law Reform Commission Inquiry into Religious Education Institutions and Anti-Discrimination Laws* (March 2023), page 2.

3. Religious bodies have a right to demonstrate and teach the social relevance of their religious beliefs.
4. Religious bodies have a right to manifest their religious beliefs by corporately establishing and maintaining institutions and services, and conducting them in accordance with those religious beliefs and values.
5. Because the right to religious freedom is exercised within society, it ought to be subject to certain ordinary laws designed to safeguard justice and civility.
6. Governments do not have a right to command or inhibit [religious belief and activity], which are outside their proper competence.⁸

As a consequence of applying these above-cited principles, when members of a faith community provide a school or other service for the wider community, they have the right to operate it in accordance with the beliefs of their religious community and a concomitant right to appoint staff who share these beliefs and commitments. This is because religious freedom is not a gift of the State but rather it is a fundamental right that governments and human rights tribunals are obliged to respect and protect.⁹

This principled position is also reflected in public opinion. A recent survey by Utting in 2021 on school perceptions showed that 63 per cent of the general population, 82 per cent of Catholics, and 79 per cent of Catholic school parents believe religious schools should be ‘entitled to require employees to act in their roles that uphold the ethos and values of that faith’ and the school should be free to favour hiring employees who share these values.¹⁰

In the context of these foundational human rights, Catholic schools are entitled to protect their institutional integrity. Consequently, the Australian Catholic Bishops have stated:

Staff in Catholic schools have a professional obligation to be supportive of the teachings of the Catholic Church, to act as role models to students and to do nothing publicly that would undermine the transmission of those teachings, so they can help form a community of faith. Parents of Catholic school students trust that their school will pursue its mission faithfully, regardless of the personal faith, or none, held by those parents.¹¹

Therefore, in accordance with the requirements of international human rights instruments and the guidance provided by the Siracusa Principles¹², existing statutory provisions for the protection of religious freedom should be given an expansive reading to take into account the indivisibility of faith and service for Christians generally, and Catholics particularly.

Specifically, any redrafting of the current ADA must both preserve the wording and application of section 56 “Religious Bodies”, as interpreted and applied in the NSW Court of Appeal Wesley Mission Case¹³, while removing any doubt (through appropriate drafting) that faith-based schools are recognised for the purposes of anti-discrimination law as “Religious Bodies”.

Furthermore, any redrafted ADA exemptions or exceptions should be described as “protections of religious freedom”. Attention also needs to be given to including in any new legislation a general

⁸ NSW/ACT Catholic Bishops Statement on Religious Freedom (April 2001), page 7.

⁹ Peter D Lauwers “Liberal Pluralism and the challenge of Religious Diversity” published in Religion, Liberty and Jurisdictional Limits of Law edited by Benson and Bussey, Lexis Nexis (2017), page 29.

¹⁰ *Catholic education welcomes bipartisan support for faith-based schools in Religious Discrimination legislation*, National Catholic Education Commission, Media Release, 9/2/23, <https://ncec.catholic.edu.au/wp-content/uploads/2022/02/Catholic-education-welcomes-bipartisan-support-for-faith-based-schools.pdf>

¹¹ ACBC Submission to the ALRC Inquiry into Religious Education Institutions and Anti-Discrimination Laws, page 7.

¹² Op cit see note 2 above and note 10.

¹³ Wesley Mission Case, see Corney and Lind “NSW Anti-Discrimination Case Sheds Light on The Meaning of Religion” at <https://www.corneyandlind.com.au/resource-centre/nsw-anti-discrimination/> and see *OV and OU v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (July 2010). See also note 15 below.

provision (in addition to section 56, “Religious Bodies”) which should expressly state that nothing in the legislation is intended to impede or diminish religious freedom, or the right of religious agencies, including faith-based schools, to practice and publicly manifest their beliefs and teaching. This, “for the avoidance of doubt”, clause should specifically reference ICCPR Article 18.

Religious Belief as a Protected Attribute (Term of Reference 2)

The ADA does not include religion as a ground for discrimination.

With respect to the Commonwealth jurisdiction and current proposals for a Commonwealth Human Rights Act, the ACBC has noted the lack of provisions for the protection of religious freedom found in the current framework of Australian Human Rights Legislation, with the consequent need for a Commonwealth Religious Freedom Act.¹⁴

Consistent with this ACBC analysis of Australia’s Human Rights Legislation, the review of the ADA should consider including religion as a ground of discrimination provided this ground includes practice/manifestation as well as belief, and that it proceeds based on codifying the outcomes of the NSW Wesley Mission Case.¹⁵

Any redrafting of the ADA will also need to specifically engage with two exceptions respecting freedom of religion, which are found in most Australian anti-discrimination legislation. These are the “inherent requirements” and “religious susceptibilities” exceptions.

The need for the drafting of any such “exceptions”, i.e., balancing provisions, in any new NSW Anti-Discrimination Legislation to be such as to provide full protection for the fundamental right to freedom of religion. In this context, Catholic Schools NSW opposes any statutory drafting based on an artificial and vague separation between private and public life, together with any arbitrary distinctions between “core” and “non-core” religious beliefs and practices.¹⁶

As the Australian Catholic Bishops have argued in the Commonwealth jurisdiction, staff selection for a religious educational institution should be “based on the consistency of the beliefs and conduct of any applicant, employee or contractor with the tenets of the religion of the school. Or there should be a rebuttable presumption for school staff to act as role models for students and do nothing publicly that would undermine the transmission of those teachings”.¹⁷

In this context, Catholic Schools NSW restates the following advice of the Australian Catholic Bishops to the Commonwealth Inquiry into Religious Education Institutions and Anti-Discrimination Laws:

Preferencing the appointment of staff who adhere to the faith or support its values does not constitute discrimination at all. This is consistent with the view of the UN’s Human Rights Committee in paragraph 13 of Human Rights Committee’s General Comment 18 (Non-Discrimination), which states that “not every differentiation of treatment will

¹⁴ Australian Catholic Bishops Conference. *Submission to The Inquiry Into Australian’s Human Rights Framework*. (June 2023) at sections 36 and 37. Accessible at www.catholic.org.au

¹⁵ *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010). This decision of the NSW Court of appeal remitted some rulings concerning the application of protections for religious freedom under the Anti-Discrimination Act 1977 (NSW) (ADA NSW) to the Equal Opportunity Division of the Administrative Decisions Tribunal (ADT) for reconsideration. The court of Appeal ruled that, in considering whether the conduct of the Wesley Mission (in declining to consider the application of a homosexual couple to become foster carers) was conduct necessary to avoid injury to the religious susceptibilities of its adherents, the ADT must have regard to the doctrines and tenets of the Wesleyan tradition to which Wesley Mission adheres (rather than those of a generic or omnibus “Christianity” which the ADT used when it first heard the case). The court also ruled that while the protection for church agencies in appointing staff under s56(c) of ADA NSW does not extend to the appointment of foster carers, the meaning of “appointment” under this section should not be read narrowly and “limited {only} to functions or capacities relating to religion” or “functions having a religious character”.

¹⁶ Refer note 4 above being the ACBC submission to the Australian Law Reform Commission Inquiry into Religious Educational Institutions and Anti-Discrimination Laws at page 7.

¹⁷ *Ibid*, pages 7 and 8.

constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant". Section 153(2) of the Commonwealth Fair Work Act 2009 is to similar effect, and, being consistent with international human rights law, should be maintained.¹⁸

Other matters

Catholic Schools NSW would also like to comment further with respect to complaint handling. Catholic Schools NSW supports the report arising from the 2020 NSW Legislative Council Inquiry into the NSW *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*.

This inquiry made it clear that the existing exceptions contained within the NSW ADA do not shield a respondent, such as a faith-based school, from the requirement to participate in an investigation. As a consequence, respondents to a complaint are exposed to a punitive process even if the complaint is not upheld.

That is, while the complaint process comes at no cost to the complainant, the respondent must pay for both the direct and indirect costs in terms of time, resources and funding of their defence. As a consequence, Catholic Schools NSW requests that the current review should give active consideration to the 'Report into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020' as published by NSW Legislative Council Portfolio Committee No. 5, September 2020, with particular reference to paragraphs 2.55 to 2.60.

Summary of Advice

Catholic Schools NSW seeks an approach to revision of NSW anti-discrimination law premised on dialogue, proportionate balancing of rights and an acknowledgment of the role that associational rights play in the support of religious freedom.

Specifically, Catholic Schools NSW has presented an analysis derived from Review Terms of Reference 1 and 2, which focus on the following principles and propositions, including:

- the imperative of ICCPR Article 18-4 and the complementary Siracusa Principles;
- the High Court's acknowledgement of religious freedom as the paradigm freedom of conscience;
- the presumption for the protection of Religious Freedom as a human right;
- the need for Catholic schools to employ staff who can promote the religious character of a Catholic school;
- the need to preserve section 56 of the NSW ADA and clarify its application to faith-based schools, that is faith schools as Religious Bodies; and
- the need for any revised ADA to give effect to the findings of the NSW Court of Appeal in the Wesley Mission Case, *OV and OW v Members of The Board of The Wesley Mission Council* [2010] NSWCA 155.

Catholic Schools NSW would be pleased to meet with review staff to explain and explore the above-cited principles and propositions.

¹⁸ Ibid, page 6.