

1. This submission is made by Melos Education Limited (Melos) in respect of the New South Wales Law Reform Commission (NSWLRC) referral from the NSW Attorney-General to report on wholesale review of the *Anti-Discrimination Act 1977* (NSW) (the ADA). The NSWLRC recently released a Consultation Paper, which can be found [here](#) (the Paper). The Paper raises a number of proposals that if effected into law would detrimentally impact on the operations of religious schools. We address our concerns according to the following headings:

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Who is Melos?

2. Melos Education Ltd (the Melos Group – www.melos.education) is a charitable, not for profit company with the sub types, ‘advancing education’ and advancing religion’. Launched in 2020 to support Christian educational entities to flourish the Group currently consists of 6 member schools in NSW, two of which it launched in the past three and a half years. The Group has plans to launch 3 more schools in the next 18 months and has interest from existing Christian schools to join the Group. Committed to an evangelical, Biblically based perspective in its delivery of quality education, the Group has a commitment to only employing staff who are personally committed to living a Christian lifestyle, who can model that to students and embed it into curriculum perspectives.

The Legitimate Exercise of Religious Freedom is not Discrimination

3. We commence our submission with an analysis of the applicable international human rights law concerning religious schools. We consider this is necessary as the Paper makes no reference to the applicable law. First, we observe that the Paper consistently makes the claim that, '[e]xceptions in the ADA allow private educational authorities to discriminate ...'¹ This automatically weights the analysis so to favour claims to equality over religious freedom; casting the latter as a subordinate right in the balancing exercise that is called for under international human rights law. However, framing religious freedom as enabling a right to discriminate misunderstands a fundamental principle of international law. Where a religious body exercises rights protected under Article 18 of the *International Covenant on Civil and Political Rights* ('ICCPR'),² it is not discriminating.
4. The right to equality is protected by Article 26 of the ICCPR. Interpreting that standard, the Human Rights Committee has stated that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and the aim is to achieve a purpose which is legitimate under the Covenant'.³ Where a religious body exercises a right protected under Article 18, it is engaging in a reasonable and objective form of differentiation whose 'aim is to achieve a purpose which is legitimate under the Covenant'.

Religious Schools and Human Rights Law

5. The right to establish private schools is protected by international human rights law that Australia has ratified, most directly of Article 18(4) of the *International Covenant on Civil and Political Rights (ICCPR)*. The *United Nations Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child* also provide relevant protections to children and their parents.

¹ NSW Law Reform Commission *Review of the Anti-Discrimination Act 1977 (NSW) Unlawful Conduct Consultation Paper* (24 May 2025) ('Paper') 145 [7.87].

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

³ *Human Rights Committee, General Comment No 18: Non-discrimination, 37th sess, (10 November 1989)*, [13].

6. The freedom to establish independent religious schools has been recognised by the United Nations Human Rights Committee in *William Eduardo Delgado Páez v Colombia*⁴ and is grounded in the long-standing international human right of parents to ‘ensure the religious and moral education of their children in conformity with their own convictions’ found at Article 18(4) of the ICCPR.⁵ Bodies exercising jurisdiction under the European Convention of Human Rights have recognised this right as being ‘indispensable for pluralism in a democratic society’,⁶ as protecting the ‘guaranteed ... right to think freely’,⁷ the presence of which provides a bulwark against State education systems where students are ‘led to think only in the directions that are decided by the political majority of the Parliament’.⁸ The right to establish private religious schools is the human right that protects against State imposed uniformity and guarantees pluralism in the provision of education as a means to ensure freedom of thought within a society.

7. The former United Nations Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt has affirmed that ‘private schools constitute a part of the institutionalised diversity within a modern pluralistic society’.⁹ He emphasises that ‘the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding ... is not just an external aspect of marginal significance.’ Without ‘an appropriate institutional infrastructure’, he writes, ‘their long-term survival options as a community might be in serious peril’. He acknowledges that the means by which religious bodies ‘institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects.’¹⁰ For these reasons the Special Rapporteur concludes that ‘[t]he autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief.’¹¹ These principles also apply to religious schools, as he noted that limitations on the ability to incorporate

⁴ *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990).

⁵ In the European context the equivalent right is contained in Article 2 of the First Protocol to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ('ECHR').

⁶ *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000) (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000'). See also *Serif v. Greece* (ECtHR, App. No. 38178/97, 14 December 1999).

⁷ *Ingrid Jordebo Foundation of Christian Schools v Sweden* (European Commission of Human Rights, Application No. 11533/85, 7 May 1985).

⁸ *Ibid.*

⁹ Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/16/53 (15 December 2010) [55].

¹⁰ Heiner Bielefeldt, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/68/290 (7 August 2013) [57].

¹¹ Heiner Bielefeldt, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/69/261 (5 August 2014) [41].

private religious schools ‘may have negative repercussions for the rights of parents or legal guardians to ensure that their children receive religious and moral education in conformity with their own convictions.’¹²

NSWLRC Proposals

The NSWLRC Appears Unaware of Recent Failed Reform Efforts

8. Having provided this high-level overview of the relevant international human rights law, we turn to consider the proposals being considered by the NSWLRC in respect of religious schools, as detailed in the Paper. We first note that the options being considered rely heavily upon the reforms to the Victorian *Equal Opportunity Act 2010* (Vic) (EOA) in 2021¹³ and the subsequent recommendations of the Queensland Human Rights Commission (QHRC) and the Law Reform Commission of Western Australia (LRCWA) in support of the Victorian regime. Both the QHRC and the LRCWA recommended regimes that were, almost identical, iterations of the Victorian regime. For the reasons we set out herein, as articulated by Associate Professor Mark Fowler in his article ‘The Position of Religious Schools Under International Human Rights Law’ (2023) 2 *The Australian Journal of Law and Religion* 36, the Victorian regime does not comply with the relevant human rights.
9. The QHRC and the LRCWA did not engage with the academic critiques of the Victorian regime outlined herein, but simply and uncritically accepted the Victorian analysis. The NSWLRC has adopted the same approach. The support expressed for the Victorian model by the NSWLRC, the QHRC and the LRCWA does not add substantive weight to the Victorian Government’s analysis of the consistency of that regime with the relevant human rights law. To date, none of these bodies have engaged with the applicable law. In addition, on account of the backlash that the same reforms inspired from Queensland religious institutions (for the reasons that are outlined below), the QHRC’s proposed purported implementation of the Victorian regime was abandoned by the prior Government. The NSWLRC appears to be unaware of the clear public opposition to the Victorian regime.

¹² Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/19/60 (22 December 2011) [47].

¹³ Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic).

10. Further, the Paper at times cites the Australian Law Reform Commission's Report *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* as authority for various potential reform models. However, the Albanese government has distanced itself from the recommendations of the ALRC review chaired by Justice Rothman. Primarily this is understood to be because the ALRC proposals fail to acquit the government's commitment that religious schools 'must continue to be able to build and maintain communities of faith',¹⁴ which the Commonwealth Government reaffirmed in its election commitments in 2025. Although the Paper maintains numerous references to the Australian Law Reform Commission's Report, it does not mention that shortly after its release Justice Rothman publicly distanced himself from the Report, instead calling for on positive protections for religious freedoms.¹⁵

Misinterpretation of Victorian Law

11. Because of the heavy reliance placed by the NSWLRC on the Victorian EOA, it is first necessary to correct incorrect interpretations of the Victorian law applied in the NSWLRC Paper. The Victorian *Equal Opportunity Act 2010* was amended by the Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic) to introduce new section 82A concerning religious bodies. Last year the QHRC recommended amendments to the Queensland *Anti-Discrimination Act 1991* that sought to implement what the QHRC incorrectly understood to be the position in Victoria. The NSWLRC makes the same mistakes. Associate Professor Mark Fowler has analysed those errors in his submission to the Queensland Department of Justice and Attorney-General on the Bill that resulted from the QHRC Paper, available here: [More issues with the Queensland Anti-Discrimination Bill 2024 – Law and Religion Australia](#). We

¹⁴ Mark Dreyfus KC MP 'Statement on the tabling of the Australian Law Reform Commission's report on religious educational institutions and anti-discrimination laws' (21 March 2024) <https://markdreyfus.com/media/media-releases/statement-on-the-tabling-of-the-australian-law-reform-commission-s-report-on-religious-educational-institutions-and-anti-discrimination-laws-mark-dreyfus-kc-mp/>. See also Paul Karp 'PM reaffirms commitment to allow religious schools to hire staff based on faith' *The Guardian* (14 February 2025) <https://www.theguardian.com/australia-news/2023/feb/14/pm-reaffirms-commitment-to-allow-religious-schools-to-hire-staff-based-on-faith>

¹⁵ Rosie Lewis 'Catholic Church leaders say faith laws "going backwards"' *The Australian* (30 May 2024) [https://www.theaustralian.com.au/commentary/is-religious-discrimination-reform-to-die-without-a-whimper/news-story/08b951f8929db4245785ea92082af444](https://www.theaustralian.com.au/nation/politics/catholic-church-leaders-say-faith-laws-going-backwards/news-story/df9cbd237082ba297cf3ebadb5688597#:~:text=Two%20of%20Australia's%20most%20senior,go%20a%20long%20way%20backwards%E2%80%9D; Mark Fowler 'Is religious discrimination reform to die without a whimper?' <i>The Australian</i> 21 August 2024 <a href=)

first set out the errors made by the NSWLRC that parallel those made by the QHRC and then provide extracts from Associate Professor Fowler's submission to the QHRC which identify those errors. The NSWLRC makes two serious errors when interpreting the Victorian law, which if left uncriticued could seriously impact on its ultimate recommendations.

12. First, the NSWLRC incorrectly states that religious bodies in Victoria may only discriminate on the basis of 'religious belief and activity' and cannot discriminate on the basis of any other attribute:

For example, religious bodies in Victoria can discriminate based on religious belief or activity if:

- conformity with the doctrines of the religion is an inherent requirement of the position, and
- the discrimination is reasonable and proportionate in the circumstances.¹⁶

The NSWLRC compounds the mistake by the following reference to the QHRC:

The Queensland Human Rights Commission (QHRC) similarly recommended that religious organisations should only be able to discriminate based on religious belief or activity in relation to work if:

- it was reasonable and proportionate in the circumstances, and
- participation in the teaching, observance or practice of a particular religion was a genuine occupational requirement.¹⁷

13. However, as the following extract from Associate Professor Mark Fowler's submission commenting on reforms to the Queensland *Anti-Discrimination Act 1991* proposed by the Queensland Government shows, Victorian law permits religious bodies to discriminate on the basis of a wider range of attributes than merely 'religious belief and activity'. The proposal of the Queensland Government is in all material respects identical to what the NSWLRC and the QHRC erroneously understand to be the position in Victoria:

the proposal is that religious bodies and schools may only discriminate on the grounds of religious belief or religious activity in relation to the selection and dismissal of workers if:

¹⁶ Paper 134 [7.25].

¹⁷ Paper 134 [7.27].

- *participation in the teaching, observance or practice of the religion concerned is a genuine occupational requirement of the work; and*
- *the other person cannot satisfy the genuine occupational requirement because of the other person's religious belief or religious activity; and*
- *the discrimination is reasonable and proportionate in the circumstances.*

The Government clarifies that 'discrimination on the basis of a protected attribute other than religious belief or religious activity will not be permitted under this exception.' It therefore states that the proposal 'narrow[s] the grounds on which a religious body can discriminate in the area of employment to religious belief and activity'.

In this respect the Queensland Government proposal differs from the Victorian law on which it is said to be based. The Victorian Government has clarified that a religious institution or school may discriminate on any ground provided that the reason for the discrimination is the inconsistent religious belief of the prospective employee or employee in question. Victorian law does not 'narrow the grounds on which a religious body can discriminate'. The proposed Queensland law is much more limited than the Victorian law because it permits the religious institution or school to only discriminate on the basis of the protected attribute of religious belief or activity where the person has an inconsistent belief or engages in an inconsistent religious activity. Under the Queensland proposal, an act of discrimination cannot relate to any of the other protected attributes, which include 'gender identity', 'relationship status', 'sex', 'sex work activity' and 'sexual orientation'.

The drafters claim that the Bill's treatment of religious institutions is consistent with Victorian law. With respect, they appear to have misunderstood the effect of that law. Given maintaining consistency with Victorian law appears to be a paramount motivation, detailed consideration of that law is warranted. The Victorian Equal Opportunity Act 2010 was recently amended by the Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic) to introduce new section 82A concerning religious bodies:

82A Religious bodies-employment

(1) A person may discriminate against another person in relation to the employment of the other person in a particular position by a religious body if—

(a) conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the position; and

(b) the other person cannot meet that inherent requirement because of their religious belief or activity; and

(c) the discrimination is reasonable and proportionate in the circumstances.

(2) The nature of the religious body and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account in determining the inherent requirements of a position for the purposes of subsection (1)(a).

(3) This section does not permit discrimination on the basis of any attribute other than as specified in subsection (1).

An exception in equivalent terms is provided for religious schools at new section 83A. As Minister Hutchins clarified on Hansard, to the extent that the amended Victorian Equal Opportunity Act 2010 permits religious schools and educational institutions to continue to maintain their religious ethos in respect of their employment practices, institutions must now satisfy a three-fold test:

conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position, the person cannot meet that inherent requirement because of their religious belief or activity, and the discriminatory action is reasonable and proportionate.

It is important to note that the chapeaus to subsections 82A(1) and 83A(1) extend the sections to any form of discrimination under the Act when they state: 'A person may discriminate ...' ... As the Minister said 'a person may discriminate' where the three elements to the exemption at section 83A are satisfied, being:

a. conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position,

b. the person cannot meet that inherent requirement because of their religious belief or activity, and

c. the discriminatory action is reasonable and proportionate.

On that analysis, the Consultation Paper is in error in positing that clause 29 of the Queensland Bill reflects the Victorian model. On the above analysis the Victorian model permits a religious institution or school to select persons on the basis of religious faith, where they have an inconsistent religious belief, regardless of the presence of any protected attribute. In Victoria the relevant consideration is whether the person has an inconsistent religious belief or engages in an inconsistent religious activity.

The following example provided by the Queensland Government in the accompanying Consultation Paper – Exceptions for Religious Bodies illustrates what it considers to be the position as a result of clause 29:

Faith-based schools, for example, will be able to discriminate on the basis of religious belief or religious activity when appointing staff if the teaching, observance or practice of a religion is a genuine occupational requirement of the role. However, discrimination based on other protected attributes such as sexual orientation or relationship status will not be permitted in any employment decisions.

This is inconsistent with the Victorian provisions, as outlined above. Moreover, the example in the Queensland Consultation Paper is not limited to schools, it applies equally to churches, synagogues, mosques, and other religious institutions. As a result, where the duties of a religious leader are ‘work’ under the Bill, a religious institution could not ensure fidelity to its beliefs where one of its leaders publicly engaged in an extra-marital affair (whether heterosexual or homosexual) or undertook a gender transition or engaged in sex work.

14. We note that the concluding illustration would obtain under New South Wales law if the NSWLRC were to recommend that religious bodies may only discriminate ‘on the basis of religious belief and activity.’ If the NSWLRC does recommend the addition of ‘sex work’¹⁸ to the list of protected attributes, a religious body could not take action were one of its leaders found to be engaged in sex work.

Employment

15. Turning to the precise reforms being proposed in respect of employment by religious schools, as noted above, the Paper raises the prospect that the provisions contained in the Victorian *Equal Opportunity Act 2010* (Vic) (EOA) will be adopted:

Private educational authorities can discriminate in work ... Some think these exceptions are too broad. They think they should either be removed or changed so they apply more narrowly. Some argue there should be safeguards in place before an exception can apply. For instance, the ADA could require duty holders to show the discrimination **is reasonable and proportionate**. ... some say it should only apply if the teaching, observance or practice of religion is an **inherent requirement** of the role or a genuine occupational requirement.¹⁹

These tests would introduce significant uncertainty for religious schools. They are highly imprecise and open to the subjective inclinations of judges. Laws that apply the proportionality test to institutions (both secular and religious) have been subject to forceful critique for its ability to confer subjective and opaque discretion upon judges.²⁰

16. Further, in his analysis of the consistency of the Victorian Act with international human rights law, Associate Professor Mark Fowler has critiqued the application of an inherent requirements test to religious schools on account of its potential to ‘white-ant’ those institutions:

If the temporary occupation of a teaching position by a person who is not able to perform religious devotions can provide evidence that such an activity is not an ‘inherent requirement’, there is nothing limiting that evidence from applying to all equivalent teaching positions.²¹ Thus, any equivalent teacher that no longer shares the religious beliefs of the school could assert the temporary employment of an equivalent teacher as evidence for their subsequent unlawful dismissal. Over time such a test has the distinct

¹⁹ NSW Law Reform Commission *Review of the Anti-Discrimination Act 1977 (NSW) Consultation Paper: Unlawful Conduct Community Summary* (24 May 2025) (‘Summary Paper’) 24.

²⁰See for e.g., Grégoire Webber, ‘Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship’ (2010) 23 Can JL & Jur 179, 179. See also Stavros Tsakyrakis, ‘Proportionality: An assault on human rights?’ (2009) 7 *Int’l J Const L* 468.

²¹ Such an approach was adopted by the Queensland Anti-Discrimination Tribunal in *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32.

potential to ‘white-ant’ an institution through the amassing of evidence arising from the temporary placement of non-adherents in response to transitory staff shortages. With the passage of time, the maintenance of the school’s ethos would be relegated to roles such as the chaplain and the leadership of the school (presuming such persons also retain the religious beliefs of the school). This risk is particularly pronounced for those schools experiencing difficulty in recruiting suitably-qualified persons who hold the relevant faith.²² Such an outcome would risk frustrating the operations of those schools who seek, as recorded by the Expert Panel [on Religious Freedom], to inculcate an institutional ethos by applying a preference for staff that share their faith across the employee cohort wherever possible, operating on the notion that faith is ‘caught not taught’.²³

17. In that analysis Fowler critiques other academic literature that has claimed that an inherent requirements test is consistent with international human rights law. His observations are directed to the European Court of Human Right’s jurisprudence:

The Court’s regard for a religious institution’s own assessment of what will impact upon the maintenance of its ethos, and its engagement with the wider public, is in opposition to an “inherent requirements” style test that would have regard to the particular “work duties” assigned to a role without regard to the wider institutional context in which the employee is placed ...

Seen as a whole, the Court has placed great weight on the effect of the conduct or private belief on the credibility of the religious institution, having regard to the self-conception of the institution, against the backdrop of the principle that the Court is not competent to undertake “any assessment on the part of the State of the legitimacy of religious beliefs or of the means of expressing them” ...

the authorities do not accord with the simplistic distinction between teaching roles that demonstrate an inherent requirement and those more functional non-teaching roles that do not ...

if the jurisprudence of the ECtHR is to provide any guide, the adoption of such a test will lead to non-compliance ...

²² Greg Walsh, 'The Right to Equality and Employment Decisions of Religious Schools' (2014) 16 *University of Notre Dame Australia Law Review* 107, 123-4.

²³ *Religious Freedom Review* (Report, 18 May 2018) 56 [1.210].

the Court expressly disavowed an “inherent requirements” test as a determinative feature of the law concerning religious institutional autonomy ...²⁴

For these reasons, neither an inherent requirements test, nor the similar ‘genuine occupational requirements’ test recommended by the NSWLRC in 1999, are suitable for application to religious schools.

18. Further, the Paper states: ‘Some Australian discrimination laws are narrower and only permit religious educational institutions to discriminate in work based on religious belief or activity.’²⁵ We addressed the misapplication of this contention to Victorian law above. As noted above, if implemented this test would mean that religious schools in NSW would lose their ability to select staff that act consistently with their religious beliefs. Last year, a similar proposal by the Queensland Human Rights Commission was abandoned by the former Queensland Labor Government after strong opposition from religious institutions. That opposition stemmed from the impact the reform would have on the freedom of those institutions to prefer staff that not only hold their beliefs, but are also able to provide authentic representations of those beliefs. A similar outcome has obtained in respect of reforms to the Commonwealth *Sex Discrimination Act 1984*.

19. Having outlined these matters, we are now in a position to respond to the relevant questions posed in the Paper:

Question 7.5: Private educational authorities employment exceptions

(1) Should the ADA contain exceptions for private educational authorities in employment? **Yes.**

Should these be limited to religious educational authorities?

The views of non-religious educational authorities should be sought.

(2) If you think the Act should provide exceptions in this area:

(a) what attributes should the exceptions apply to?

The attributes that the exception applies to should not be limited to religious belief and activity but instead should enable religious institutions to act sincerely in accordance with the articles of their faith.

(b) what requirements, if any, should duty holders meet before an exception applies?

²⁴ Mark Fowler, ‘The Position of Religious Schools Under International Human Rights Law’ (2023) 2 *The Australian Journal of Law and Religion* 36, various.

²⁵ Paper 146 [7.94].

20. The NSWLRC has failed to engage with the bipartisan recommendations of the Joint Select Committee inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020. That Committee provided the most recent detailed consideration of reform to NSW anti-discrimination law that has been undertaken by the Parliament. The Committee scrutinised the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 and found it to be 'valid'.²⁶ Many of the most significant provisions recommended by the cross-party Committee for adoption in a Government Bill represent the first occasion in which such a protection has been recommended by any State, Territory or Commonwealth Parliamentary Committee in the history of Australian anti-discrimination law.

21. The Committee recommended protections for religious ethos bodies for any conduct which is consistent with, or furthers or aids the organisation in acting in accordance with, the doctrines, tenets, beliefs or teachings of the religion of the organisation. This was found at clause 22M of the Bill:

22M Religious ethos organisations taken not to discriminate in certain circumstances

(1) For the purposes of this Part, a religious ethos organisation is ***taken not to discriminate*** against another person on the ground of the person's religious beliefs or religious activities by engaging in conduct if the organisation ***genuinely*** believes the conduct—

(a) is ***consistent with*** the doctrines, tenets, beliefs or teachings of the religion of the organisation, or

(b) is ***required because of*** the religious susceptibilities of the adherents of the religion of the organisation, or

(c) ***furtheres or aids*** the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation.

(2) Without limiting subsection (1), conduct referred to in that subsection includes giving preference to persons of the same religion as the religion of the religious ethos organisation.

22. There are several propositions that may be offered in support of this provision:

²⁶ New South Wales Parliament *Joint Select Committee Report on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* ('Joint Select Committee Report') (31 March 2021), <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=267>

- a. The words ‘taken not to discriminate’ reflect the principle of international law that we described above at paragraphs 3 and 4. This same approach was adopted in the Religious Discrimination Bill 2022 (Cth), which received bipartisan support in its passage through the House of Representatives.²⁷ That Bill used the words ‘does not discriminate’ in the exception clause for religious bodies. Again, such terminology would be consistent with the recognition of the United Human Rights Committee ‘that not every differentiation of treatment will 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.’²⁸
- b. The use of a ‘genuineness’ or ‘sincerity’ test was commended by the Committee for its alignment with the reasoning in the High Court’s ruling in *Church of the New Faith v Commissioner of Payroll Tax (Vic)*.²⁹
- c. The Bill contained the following definition for a religious school, contained within the definition of a ‘religious ethos body’: ‘a private educational authority that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.’ That phrase is drawn from section 38 of the *Sex Discrimination Act 1984* (Cth). It has proved to be a workable definition for many years.
- d. The Bill uses a ‘consistent with’ test for determining the compliance with doctrines, tenets, beliefs or teachings, rather than a ‘conformity’ test, which has been subject to very strict interpretation. For example, in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (‘Cobaw’) the Victorian Court of Appeal interpreted the phrase ‘conforms with the doctrines of the religion’ as follows: ‘the doctrine requires, obliges or dictates that the person act in a particular way when confronted by the circumstances which resulted in their acting in the way they did’³⁰ and ‘as requiring it to be shown that conformity with the relevant doctrine(s) of the religion gave the person no alternative but to act (or refrain from acting) in the particular way.’³¹

²⁸ *Human Rights Committee, General Comment No 18: Non-discrimination, 37th sess, (10 November 1989)*, [13].

²⁹ Joint Select Committee Report (n 26) 131.

³⁰ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] 308 ALR 615 (Maxwell P, [286]).

³¹ *Ibid.*

- e. Uses a 'required because of religious susceptibilities' test, rather than an 'necessary to avoid injury to religious susceptibilities' test, which also has been subject to very strict interpretation.³² Applying such a test in *Cobaw*, the Victorian Court of Appeal held that that test required demonstration of various matters, including that the harm be 'unavoidable'.
 - f. The test of actions that 'further or aid' the body to act in accordance with its beliefs is to be commended for its recognition that secular acts or roles are at times necessary as a means to further religious belief.
23. Importantly, and consistent with the examples provided in the Explanatory Notes to that Bill, to protect bodies such as schools and charities against discrimination any reform should clarify that the protected 'field' of 'services' clearly includes the determination of funding and the allocation of contracts and tenders by the State Government. In addition, again consistent with the examples provided in the Explanatory Notes to the Bill, the Government Bill should make clear that it applies not just to qualifying bodies for individuals but also to bodies that qualify religious organisations - e.g., religious schools, tertiary education providers, or accredited service providers under government or other contracts.
24. The NSWLRC identifies the proposal publicly released by Justice Sarah Derrington when she was President of the ALRC as a potential model for reform. In his submission to the ALRC's Inquiry on Religious Schools Associate Professor Mark Fowler recommended a model for reform that drew upon Justice Derrington's model. That submission may be found on the ALRC's website here: [201.-Assoc-Prof-M-Fowler-ADL-submission.pdf](#). We also commend that model for your consideration.

Students

25. In respect of students within religious schools the paper states 'under the ADA, a private school can expel a student based on their disability or because they identify as transgender. As with the work exceptions, some argue the education exceptions should be removed, made narrower and/or include additional safeguards.'³³ Our schools do not seek the ability to expel a student simply because they disclose their sexuality or transgender status. Our schools will address student conduct that seeks to

³² See, eg, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* 308 ALR 615.

³³ Summary Paper (n 19) 25.

undermine our distinct religious ethos, for example publicly advocating against our beliefs, or subjecting them to derision. The unique, loving ethos of religious schools, which is so desirable to the wider community, can only be maintained if the connection to its source, fidelity to our sincerely held beliefs, remains untrammelled. In this respect, religious schools require the ability to take actions that will preserve their distinct religious ethos. This ability should continue to be protected in law. Failing this, religious schools will cease to be able to define their own character, and be lost as an alternative to other forms of schooling.

26. Having outlined these matters, we are now in a position to respond to the relevant questions posed in the Paper:

Question 7.6: Discrimination against students and prospective students

Should the ADA contain exceptions for private educational authorities in education?

Yes.

Should these be limited to religious educational authorities?

The views of non-religious educational authorities should be sought.

(2) If you think it is necessary for the ADA to provide exceptions in this area:

(a) what attributes should the exceptions apply to?

(b) should they apply to prospective students, existing students, or both?

(c) what requirements, if any, should duty holders meet before an exception applies?

The attributes that the exception applies to should not be limited to religious belief and activity but instead should enable religious institutions to act sincerely in accordance with the articles of their faith. Religious schools should retain the ability to address student conduct that seeks to undermine their distinctive religious beliefs or ethos.