

NSW LAW REFORM COMMISSION  
REVIEW OF THE ANTI-DISCRIMINATION ACT 1977 (NSW)  
UNLAWFUL CONDUCT

SUBMISSION FROM  
THE CATHOLIC ARCHDIOCESE OF SYDNEY

15 AUGUST 2025

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The Catholic Archdiocese of Sydney welcomes the opportunity to provide a submission to the review of the *Anti-Discrimination Act 1977 (NSW)* (**Act**).

New South Wales has the highest religious affiliation in the country, with 54.3 per cent of the population professing a faith, and 22.4 per cent of the state identifying as Catholic.

The Catholic Church provides the state's largest non-government grouping of hospitals, aged and community care services. There are close to 600 Catholic schools providing education to more than 275,000 students and employing in excess of 30,000 staff. This is in addition to two Catholic universities, 11 Catholic hospitals and more than 60 Catholic nursing homes, all of which are reliant on robust protections for religious freedom in order to operate in accordance with their ethos.

Protection of the right to freedom of thought, conscience and religion and the connected rights of freedom of speech and association are necessary for the flourishing of the human person and, as such, for the promotion of the common good.

As the NSW Law Reform Commission (**Commission**) would be aware, the Act currently offers no protection against discrimination on the basis of religious belief or activity and protects religious freedoms by way of exceptions only. While this has afforded very clear protections for positive religious freedoms, it has also contributed to religious freedom being framed as a concession to religious institutions and individuals of faith, rather than the protection of a right in and of itself.

Until very recently, the importance of the free exercise of religion to Australia's social fabric has been largely uncontroversial. People of all faiths and none once recognised the contribution of Judeo-Christianity to Australia's laws and customs, and of religious believers to Australian society more generally. Even if not believers themselves, Australians committed to our nation's unwritten virtue of a 'fair go' were content to let people of faith practice their beliefs without interference from state or society. Many who are proudly Australian, or who aspire to be after fleeing persecution, treasure the generous space traditionally allowed in our law and culture for people to believe different things and practice their most deeply held beliefs.

However, there has been a recent shift in the openness of some elements of Australian society to religion and religious believers. For all its talk of tolerance, there are powerful influences in our culture less and less tolerant of religion and who are advocating for the removal of existing protections for religious freedom under the Act. Such a removal would be problematic, as it would place religious organisations at risk regarding their ceremonies and sacred spaces, their employment, enrolment and accommodation policies, the message they preach or curriculum they teach, or eligibility for government grants and contracts.

While the protection of religious freedom must ultimately be found not in our laws, but in a society that recognises and values the significant contribution that religious institutions and individuals of faith make to our community, robust protections for religious freedoms in the Act will assist in upholding the right of each Australian to hold religious beliefs and to live their lives in accordance with those beliefs.

Yours sincerely,

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# Introduction

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Religious freedom is recognised as a universal human right, encompassing theistic, non-theistic and atheistic beliefs, the freedom to not profess any belief, and the freedom to change those beliefs as a person chooses.<sup>1</sup> It is recognised in international human rights instruments, limited domestic legislation, and church pronouncements.

The protection of religious freedom is interdependent with other fundamental human rights, and upholding religious freedom necessitates respect for, and protection of, those rights. In its report on traditional rights and freedoms, the Australian Law Reform Commission (**ALRC**) noted that religious freedom is linked to the freedom of thought and the freedom of conscience, and that its exercise directly involves the freedom of speech and the freedom of association.<sup>2</sup> The proper protection of religious freedom thus requires the protection of freedom of thought and conscience, speech and association, for without these, freedom of religion cannot be enjoyed.

## Catholic perspective on religious freedom

St John Paul II said that freedom consists not in doing what we like, but in having the right to do what we ought.<sup>3</sup> In Catholic understanding, religious freedom does not find its basis in personal autonomy, but rather in personal duty.

The Second Vatican Council taught that human beings, endowed with reason and free will, both enjoy the privilege and bear the obligation of seeking truth, especially religious truth. In order to discharge these responsibilities, the individual person and the communities they form require immunity from external coercion as well as psychological freedom. Providing for religious freedom is part of the government's role to make provision for the common welfare of the people.

The right of religious freedom belongs not only to individuals, but to communities, because it is within religious communities that individuals seek religious truth. For this reason, the Council taught that:

*“Provided the just demands of public order are observed, religious communities rightfully claim freedom in order that they may govern themselves according to their*

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<sup>1</sup> UN Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4. [online] Refworld. Available at <https://www.refworld.org/legal/general/hrc/1993/en/13375> [Accessed 15 Aug 2025], paragraph 1.

<sup>2</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129, 2015. [online] Australian Law Reform Commission. Available at <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/> [Accessed 15 Aug 2025].

<sup>3</sup> John Paul II, Homily for Eucharistic Celebration at Oriole Park at Camden Yards, Baltimore, 8 October 1995. [online] Vatican. Available at [https://w2.vatican.va/content/john-paul-ii/en/homilies/1995/documents/hf\\_jp-ii\\_hom\\_19951008\\_baltimore.html](https://w2.vatican.va/content/john-paul-ii/en/homilies/1995/documents/hf_jp-ii_hom_19951008_baltimore.html) [Accessed 15 Aug 2015]

*own norms, honour the Supreme Being in public worship, assist their members in the practice of the religious life, strengthen them by instruction, and promote institutions in which they may join together for the purpose of ordering their own lives in accordance with their religious principles.”<sup>4</sup>*

It is worth noting that, in congruence with international human rights instruments, the Catholic Church does not claim manifestation of religious belief as an absolute right but acknowledges that limitations for the just demands of public order are appropriate.

## Religious freedom in international law

The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, provides in Article 18 that:

*“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>5</sup>*

Article 18 of the International Covenant on Civil and Political Rights (ICCPR) provides:

*“1. 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.*

*“2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*

*“3. 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.*

*“4. 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.”<sup>6</sup>*

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<sup>4</sup> Vatican II, *Declaration Dignitatis Humanae*, 7 December 1965. [online] Vatican. Available at [https://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html) [Accessed 15 Aug 2025], paragraph 4.

<sup>5</sup> United Nations, *Universal Declaration of Human Rights*, 10 December 1948. [online] United Nations. Available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights> [Accessed 15 Aug 2025], Article 18.

<sup>6</sup> United Nations, *International Covenant on Civil and Political Rights*, 16 December 1966. [online] Office of the High Commissioner for Human Rights. Available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> [Accessed 15 Aug 2025], Article 18.

The ICCPR insists that the Article 18 rights are rights from which no derogation may be made, even “in time of public emergency which threatens the life of the nation.”<sup>7</sup>

Notably, the language of Article 18 is consistent with the teaching of the Second Vatican Council outlined above, that is, that the right to freedom of religion extends beyond an individual’s personal right to privately believe, but to publicly or privately manifest their belief, individually or in community.

The UN Human Rights Committee (**UNHRC**) described this right as “far-reaching and profound,”<sup>8</sup> stating that it encompasses a broad range of acts which include ritual and ceremonial acts, the observance of dietary regulation, wearing of distinctive clothing, and the freedom to choose religious leaders and teachers, establish seminaries or religious schools, and prepare and distribute religious publications and texts.<sup>9</sup>

The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion reiterates the protections outlined in the ICCPR, but pays particular attention to the right of people to be free from discrimination on the basis of religious belief. It provides:

*“1. No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs.*

*“2. For the purposes of the present Declaration, the expression “intolerance and discrimination based on religion or belief” means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.”<sup>10</sup>*

## Permitted limitations on religious freedom in international law

While the right to hold a belief is absolute, the ICCPR does provide for legitimate limitations on the manifestation of religious beliefs “as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>11</sup>

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<sup>7</sup> Ibid, Article 4.2.

<sup>8</sup> UN Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4. [online] Refworld. Available at <https://www.refworld.org/legal/general/hrc/1993/en/13375> [Accessed 15 Aug 2025], paragraph 1.

<sup>9</sup> Ibid, paragraph 4.

<sup>10</sup> United Nations, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981. [online] Office of the High Commissioner for Human Rights. Available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-all-forms-intolerance-and-discrimination> [Accessed 15 Aug 2025], Article 2.

<sup>11</sup> United Nations, *International Covenant on Civil and Political Rights*, 16 December 1966. [online] Office of the High Commissioner for Human Rights. Available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> [Accessed 15 Aug 2025], Article 18.3.

In its guidance on this right, the UNHRC provides the following:

*“The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18.*

*“The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.”<sup>12</sup>*

In addition to this, the United Nations has provided guidance as to the interpretation and application of the permissible limitations outlined in Article 18 in its Economic and Social Council’s Principles on the Limitation and Derogation Provisions in the ICCPR (**Siracusa Principles**).

The Siracusa Principles assert that limitation clauses shall be interpreted strictly and in favour of the rights at issue. It also states that the reference to “necessary” implies that the limitation:

- (a) “is based on one of the grounds justifying limitations recognised by the relevant article of the Covenant,*
- (b) responds to a pressing public or social need,*
- (c) pursues a legitimate aim, and*
- (d) is proportionate to that aim.”<sup>13</sup>*

It goes further to say that when applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

The Siracusa Principles reaffirm the position outlined in Article 4.2 of the ICCPR that the right to freedom of thought, conscience and religion is a non-derogable right. They also address the issue of conflict of rights, stating:

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<sup>12</sup> UN Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4. [online] Refworld. Available at <https://www.refworld.org/legal/general/hrc/1993/en/13375> [Accessed 15 Aug 2025], paragraph 8.

<sup>13</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4. [online] Refworld. Available at <https://www.refworld.org/legal/resolution/unchr/1984/en/57200> [Accessed 15 Aug 2025], Article 10.

*“When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to the rights from which no derogation may be made under article 4 of the Covenant.”<sup>14</sup>*

This important interpretative provision declares that in the balancing of rights, especial weight is given to those rights named in the ICCPR as non-derogable. The freedom of religion is such a right. It is clear that the UN intends that the ability of a state party to limit guaranteed freedoms, including the freedom of religion, should be narrow, and proportionate to a legitimate end.

These are also echoed in the teaching of the Second Vatican Council, which wrote:

*“The right to religious freedom is exercised in human society: hence its exercise is subject to certain regulatory norms. In the use of all freedoms the moral principle of personal and social responsibility is to be observed. In the exercise of their rights, individual men and social groups are bound by the moral law to have respect both for the rights of others and for their own duties toward others and for the common welfare of all. Men are to deal with their fellows in justice and civility.*

*“Furthermore, society has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection. However, government is not to act in an arbitrary fashion or in an unfair spirit of partisanship. Its action is to be controlled by juridical norms which are in conformity with the objective moral order. These norms arise out of the need for the effective safeguard of the rights of all citizens and for the peaceful settlement of conflicts of rights, also out of the need for an adequate care of genuine public peace, which comes about when men live together in good order and in true justice, and finally out of the need for a proper guardianship of public morality.*

*“These matters constitute the basic component of the common welfare: they are what is meant by public order. For the rest, the usages of society are to be the usages of freedom in their full range: that is, the freedom of man is to be respected as far as possible and is not to be curtailed except when and insofar as necessary.”<sup>15</sup>*

The common theme amongst these interpretations of the permissible limitations in Article 18(3) must be necessary to respond to a specific need and not a theoretical one. As will be explored later in this submission, while the existing exceptions for religious institutions are broad, there is little evidence to suggest that these are being abused. This reality is not, as

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<sup>14</sup> Ibid, Article 36.

<sup>15</sup> Vatican II, Declaration Dignitatis Humanae, 7 December 1965. [online] Vatican. Available at [https://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html) [Accessed 15 Aug 2025], paragraph 7.

some might suggest, a reason to narrow these exceptions but rather to preserve them and, in doing so, preserve the protections for religious freedoms contemplated by international law.

## Religious freedom in Australia

Australia is party to a number of human rights instruments, but not all of these have been ratified into Australian law. Notably, Australia has not adopted the ICCPR into domestic law, despite signing the covenant in 1980.<sup>16</sup> There are, however, some limited protections for religious freedom under Australian law, but these are not sufficient to comply with Australia's obligations under international law.

The restrictions on laws prohibiting the free exercise of religion found in section 116 of the Constitution apply only to Commonwealth laws and so leave it open to the states to pass legislation that would restrict the free exercise of religion.<sup>17</sup>

Common law in Australia provides little protection for freedom of religion.<sup>18</sup> The limited protection it provides relates to a general common law principle of statutory interpretation that assumes parliament does not intend to interfere with a fundamental human right or freedom unless that intention is clearly manifested by unambiguous language. This is, however, a rebuttable presumption and so does not provide strong protection for religious freedom.<sup>19</sup>

Unlike the majority of states and territories in Australia, anti-discrimination laws in New South Wales do not list 'religious belief or activity' as a protected attribute. The ACT offers protection against discrimination on the basis of race, sex, sexual orientation, gender identity, marital status, disability and age, but not for religious belief or activity.

In its May 2018 report, the Expert Panel on Religious Freedom (**Expert Panel**) recommended that this be rectified. Recommendation 16 of the Expert Panel's report provides:

*"New South Wales and South Australia should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's 'religious belief or activity' including on the basis that a person does not hold any religious belief. In*

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<sup>16</sup>Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report: Legal Foundations of Religious Freedom in Australia*, 2017. [online] Parliament of Australia. Available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Freedomofreligion/Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion/Interim_Report) [Accessed 15 Aug 2025].

<sup>17</sup> *Chedy on behalf of the Yindjibarndi People v State of Western Australia* (2011) 194 FCR 562

<sup>18</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129, 2015. [online] Australian Law Reform Commission. Available at <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/> [Accessed 15 Aug 2025].

<sup>19</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report: Legal Foundations of Religious Freedom in Australia*, 2017. [online] Parliament of Australia. Available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Freedomofreligion/Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion/Interim_Report) [Accessed 15 Aug 2025].

*doing so, consideration should be given to providing for the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.”<sup>20</sup>*

## Balancing competing rights

The Act is important not only in prohibiting discrimination, but also in striking the correct balance amongst different rights when they inevitably conflict, in light of the guidance on limitations of rights outlined above.

The Expert Panel addressed this issue, recommending that:

*“Commonwealth, state and territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.”<sup>21</sup>*

A potential way to indicate this would be through an objects clause, similar to the one included in the second exposure draft of the *Religious Discrimination Bill 2019*. That read:

*“In giving effect to the objects of this Act, regard is to be had to:*

- (a) the indivisibility and universality of human rights, and their equal status in international law; and*
- (b) the principle that every person is free and equal in dignity and rights.”<sup>22</sup>*

The Expert Panel also recommended:

*“Commonwealth, state and territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.”<sup>23</sup>*

For this reason, it would also be beneficial to include reference to the Siracusa Principles in the same objects clause.

It is only after ensuring the objects clause for the Act sets the interpretive tone for anti-discrimination laws and affirms the need for consistency with international instruments that particular provisions can be considered.

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<sup>20</sup> Expert Panel on Religious Freedom, *Religious Freedom Review*, 2018. [online] Australian Government, Attorney-General’s Department. Available at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf> [Accessed 15 Aug 2025].

<sup>21</sup> *Ibid*, Recommendation 3.

<sup>22</sup> Australian Government, *Religious Discrimination Bill 2019 (Cth)*. [online] Attorney-General’s Department. Available at <https://www.ag.gov.au/sites/default/files/2020-03/second-exposure-draft-religious-discrimination-bill-2019.pdf> [Accessed 15 Aug 2025], section 3(2).

<sup>23</sup> Expert Panel on Religious Freedom, *Religious Freedom Review*, 2018. [online] Australian Government, Attorney-General’s Department. Available at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf> [Accessed 15 Aug 2025], Recommendation 2.

# Answers to specific questions

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The remainder of this submission will provide answers to some of the specific questions outlined in the Consultation Paper.

## 3. Tests for discrimination

### *Question 3.4: Indirect discrimination and the reasonableness standard*

The maintenance of a reasonableness standard is preferable to the introduction of a proportionality test as, despite concerns raised in the Consultation Paper, the concept of reasonableness is well understood legal principle. The onus of proof of a reasonableness standard should remain on the complainant and not on the respondent.

Additionally, rather than listing factors to consider when determining whether a requirement is reasonable, it would be helpful to require consideration of existing international instruments, particularly the Siracusa principles.

### *Question 3.6: Proving indirect discrimination*

The onus of proof should not be reversed in complaints of direct or indirect discrimination because it would place an unacceptable burden on respondents, especially in circumstances where the complaints process is open to inappropriate use.

The Legislative Council Portfolio Committee inquiry into the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020* noted that “some individuals have the ability to use the complaints process inappropriately” and noted its concern “about the unfair pressure this places on respondents, and how this goes against the very principles of fairness anti-discrimination legislation aims to achieve.”<sup>24</sup>

A reversal of the onus of proof would only add to this burden.

Additionally, the Consultation Paper focuses on the difficulties endured by a complainant to meet the burden of proof, particularly if they encounter difficulties gathering evidence or do not have legal representation. There is no mention, however, of the potential impact on respondents who are individuals or small entities who may not have the resources to defend against a complaint.

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<sup>24</sup>Parliament of New South Wales, *Report No. 55 - Portfolio Committee No. 5 - Legal Affairs: Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, 2020. [online] Parliament of New South Wales. Available at [https://www.parliament.nsw.gov.au/lcdocs/inquiries/2583/Report%20No%2055%20-%20PC%205%20-%20Anti-Discrimination%20Amendment%20\(Complaint%20Handling\)%20Bill%202020.pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2583/Report%20No%2055%20-%20PC%205%20-%20Anti-Discrimination%20Amendment%20(Complaint%20Handling)%20Bill%202020.pdf) [Accessed 15 Aug 2025], paragraph 2.100.

## 4. Discrimination: protected attributes

### *Question 4.2: Discrimination based on carer's responsibilities*

The existing definition of “responsibilities as a carer” contained in section 49S of the Act should be updated, as it does not take into account kinship care, which is important to many Aboriginal and Torres Strait Islander peoples, or care for extended family, which is common amongst some migrant communities. It would be appropriate to adopt the suggestion in paragraph 4.25 of the Consultation Paper, which is to make the definition consistent with that included in section 5 of the *Carers (Recognition) Act 2010*.

### *Question 4.3 Disability discrimination*

While acknowledging the deficit-based language in the definition of disability, the consistency with the *Disability Discrimination Act* is useful and should be maintained.

The Act should also maintain a medical model of disability, as the proposed extension to a social model of disability, including addiction, would result in the attribute being so broad that it would become meaningless and risk watering down the protection of those it originally intended to assist.

### *Question 4.4: Discrimination based on homosexuality*

It is acknowledged that the definition of homosexuality currently contained within the Act is insufficiently broad to encapsulate other forms of sexual attraction. For the sake of consistency, it would be beneficial to use the phrase ‘sexual orientation’ and adopt the definition of the same from Schedule 2 of the *Conversion Practices Ban Act 2024*.

### *Question 4.5: Discrimination based on marital or domestic status*

It is submitted that the current definition of ‘marital or domestic status’ is sufficient. However, if it is to be amended, it should be done by adding the categories in 4.79 of the Consultation Paper, rather than including an open-ended attribute such as ‘relationship status.’ This would safeguard the ability to discriminate in cases where a relationship might be legal, but otherwise improper (eg, a couple having an affair.)

### *Question 4.7: Sex discrimination*

The Act should maintain the reference to sex discrimination and ‘sex’ should remain a binary concept. While the circumstances in which distinctions based on biological sex are reducing, they are still relevant in areas such as single-sex schooling and single-sex sport.

It would be appropriate to add ‘indeterminate sex’ as another protected attribute, rather than amending the definition of sex.

### Question 4.9: Extending existing protections

Existing protections should not be extended in the way proposed in the Consultation Paper.

The current protections for past or future disability or carer's responsibility correctly identify that it is appropriate for these attributes, but this is not true for other protected attributes. For example, referring to past or future is irrelevant for the attributes of age or race, and sex, homosexuality, marital or domestic status and transgender status all have past and future protections inherent in the existing law (eg, a person's past or future sex is protected under transgender status, and the protections for marital or domestic status already cover past marital and domestic circumstances.)

Additionally, it is understandable that the protection against direct discrimination for relatives and associates of those with protected attributes do not extend to carers, because the relevant relationship – that is, the relationship of care – is already covered.

## 5. Discrimination: potential new protected attributes

### Question 5.1: Guiding principles

The guiding principle for decisions about new attributes should be consistency with international human rights instruments to which Australia is a party.

### Question 5.2: Potential new attributes

Religious belief or activity should be a new attribute added to the Act.

Its addition would be consistent with the 2018 recommendations of the Expert Panel on Religious Freedom<sup>25</sup>, the 1999 NSWLRC review of the Act<sup>26</sup> and the joint parliamentary committee inquiry into the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*<sup>27</sup> (Bill). The appropriate definition of this attribute, the extent of coverage and exceptions are all contained in the Bill.

Importantly, protections against discrimination on the basis of religious belief or activity should include protections for religious ethos organisations the Bill. While some might object to associational rights for religious groups, the ICCPR is explicit that the right to freedom of religion has an associational aspect, that is, the right “either individually or in community with others and in public or private, to manifest his religion or belief in worship,

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<sup>25</sup>Expert Panel on Religious Freedom, *Religious Freedom Review*, Recommendation 16, 2018. [online] Australian Government, Attorney-General's Department. Available at <https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf> [Accessed 15 Aug 2025], Recommendation 16.

<sup>26</sup>New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Recommendation 38, Report 92, 1999. [online] NSW Law Reform Commission. Available at <https://lawreform.nsw.gov.au/documents/Publications/Reports/Report-92.pdf> [Accessed 15 Aug 2025], Recommendation 38.

<sup>27</sup>New South Wales Parliament. (2021). Report on Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020. [online] Available at: [https://www.parliament.nsw.gov.au/ladocs/inquiries/2603/Report%20on%20JSC%20on%20the%20Anti-Discrimination%20Amendment%20\(Religious%20Freedoms%20and%20Equality\)%20Bill%202020.pdf](https://www.parliament.nsw.gov.au/ladocs/inquiries/2603/Report%20on%20JSC%20on%20the%20Anti-Discrimination%20Amendment%20(Religious%20Freedoms%20and%20Equality)%20Bill%202020.pdf) [Accessed 15 Aug 2025]

observance, practice and teaching.”<sup>28</sup> Due to the associational aspect of religion, religious persons often seek the supply of goods and services in the name of a religious organisation rather than any of its individual members. Doing so should not deprive such individuals from protection against discrimination on religious grounds, and so protection for religious organisations is required to protect the rights guaranteed under international law.

Paragraph 5.32 proposes adding “irrelevant criminal record” as a protected attribute, including a record relating to an alleged offence where the proceedings were not finalised. If this was to be included, the exceptions outlined in paragraph 5.35 would need to be included to allow institutions to exclude those who have been credibly accused of an offence, but for whom the proceedings were not finalised for some reason that was not related to the merits of the case.

Paragraph 5.42 proposes using the ‘health status’ attribute to protect those who use (presumably illicit) drugs and/or alcohol. Similar to comments above relating to disability discrimination, moving to a social model of health status rather than a medical model risks making the protection so broad that it becomes meaningless.

Paragraph 5.96 proposes adding protections for sex workers specifically, while paragraph 5.102 proposes adding the attribute of “profession, trade, occupation or calling.” The addition of these categories would mean the expansion of anti-discrimination laws far beyond innate factors like age and race, or deeply personal and often permanent choices like relationship status and religious belief to choices that are quite variable.

### *Question 5.3: An open-ended list*

The list of attributes under the Act should remain defined and not open-ended.

For laws to be just and consistently applied, they should be clear and predictable, with those expected to abide by them having the necessary certainty of the nature of the law and how it will be applied. Any open-ended list would be necessarily subjective and potentially lead to arbitrary results and inconsistency in application.

Additionally, by communicating expectations, the law has an educative function. In its 1999 review of the Act, the NSWLRC acknowledged the argument that “the normative power of a clear legislative expression that the community disapproves of certain behaviours will militate in favour of a more tolerant society.”<sup>29</sup> For this to be effective, the legislation needs to clearly identify problematic behaviours.

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<sup>28</sup>United Nations, *International Covenant on Civil and Political Rights*, 16 December 1966. [online] Office of the High Commissioner for Human Rights. Available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> [Accessed 15 Aug 2025], Article 18.1.

<sup>29</sup>New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW), Report 92, 1999*. [online] NSW Law Reform Commission. Available at <https://lawreform.nsw.gov.au/documents/Publications/Reports/Report-92.pdf> [Accessed 15 Aug 2025], paragraph 7.67.

## 6. Discrimination: Areas of public life

### *Question 6.1: Discrimination at work — coverage*

If the definition of employment is explained to include volunteers, then exceptions for religious bodies and other community organisations should be provided.

While the Consultation Paper rightly recognises the importance of work experience, vocational placement and apprenticeships, particularly for young people, it should also be recognised that many religious organisations rely heavily on volunteers. Indeed, in many local Catholic parishes, paid staff are usually only one or two people, with volunteers making up the overwhelming majority of contributors to the life of a parish community. Given that holding a role in a church community, even if it is on a voluntary basis, can often involve a measure of authority and decision-making, it will remain important for a church community to be selective about its volunteers.

### *Question 6.2: Discrimination in work — exceptions*

The most recent data from the Australian Bureau of Statistics suggests that 43.2 per cent of NSW small businesses employing 1-4 people in NSW fail in the first three years<sup>30</sup>. The right to non-discrimination in these cases needs to be balanced with the need to not provide too many disincentives for a person to establish a small business.

### *Question 6.3: Discrimination in education in educational institutions?*

Single-sex educational institutions should retain their ability to enrol students based on their biological sex and also to exclude students of a different sex, even if their birth certificate has been changed pursuant to Part 5A of the *Births, Deaths and Marriages Registration Act 1995*. Co-educational schools that have separate facilities for male and female students should also be able to distinguish them on the basis of biological sex.

These exceptions are not about discriminating on the basis of gender identity, but rather an appropriate balancing of the rights of all students at a single-sex school. These schools often place students in a position of sharing facilities such as bathrooms, change rooms and overnight accommodation, with single-sex boarding schools also housing multiple students in dormitories. Some of these students, especially young women, will not feel comfortable in situations where they are required to change in front of, or sleep in the same room as, a similar-aged student of the opposite sex. Their rights to privacy and to feel safe at school also need to be considered.

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<sup>30</sup> Australian Bureau of Statistics, Counts of Australian Businesses, including Entries and Exits, Data Cube 5, July 2020 - June 2024, 8165DC05.xlsx. [online] Australian Bureau of Statistics. Available at <https://www.abs.gov.au/statistics/economy/business-indicators/counts-australian-businesses-including-entries-and-exits/jul2020-jun2024/8165DC05.xlsx> [Accessed 15 Aug 2025].

In terms of disability discrimination and the proposal in paragraph 6.75 of the Consultation Paper, the Commission should consider carefully the views of parents of children with special needs about what they believe is in the best interests of their children. The recommendation from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability to phase out special schools by 2051<sup>31</sup> was met with mixed reactions from parents of children currently in these schools, with some of the view that they are the best environment for their children<sup>32</sup>.

#### *Question 6.4: The provision of goods and services — coverage*

Paragraph 6.88 of the Consultation Paper raises the possibility of outlawing discrimination in the way a person receives goods and services. However, this could have unintended consequences in spaces where privacy is important. For example, a woman who prefers a female doctor, or who does not wish to have a biological male conduct a body search or a bra fitting should not be forced into an uncomfortable, intimate situation under the threat of anti-discrimination law.

Additionally, the suggestion to either expand the definition of services outlined in paragraph 6.91 of the Consultation Paper, or to add ‘access to premises’ as a separate protected area needs to be considered in light of the need for age-appropriate spaces, particularly for young children, and the continued desire for the preservation of single-sex spaces.

For example, it would be reasonable and appropriate for a children’s activity centre to restrict access to children of a certain age and their parents or guardians and refuse entry to adults who are not entering the premises with a child.

Additionally, it is reasonable and appropriate for the owner or manager of a building open to the public to restrict access to women’s toilets to women only, and to ask a man who sought to use these facilities to leave. Similarly, it is reasonable that women’s only gymnasiums and shelters be allowed to continue to operate without the risk of claims of discrimination.

## **7. Wider exceptions**

#### *Question 7.1: Religious personnel exceptions*

The exceptions for religious personnel should remain broad in terms of discrimination.

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<sup>31</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report: Executive Summary, Our Vision for an Inclusive Australia and Recommendations, 2023*. [online] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. Available at <https://disability.royalcommission.gov.au/system/files/2023-11/Final%20report%20-%20Executive%20Summary%2C%20Our%20vision%20for%20an%20inclusive%20Australia%20and%20Recommendations.pdf> [Accessed 15 Aug 2025], Recommendation 7.14(c)

<sup>32</sup> Australian Broadcasting Corporation, *Disability Royal Commission Recommends Closing Special Schools*, 25 October 2023. [online] ABC News. Available at <https://www.abc.net.au/news/2023-10-25/royal-commission-closing-special-schools/102981714> [Accessed 15 Aug 2025].

In paragraph 7.18, the Consultation Paper suggests that the language around the ordination or appointment of priests, ministers of religion or members of any religious order and the training for the same should be amended to ensure that ministers of religion from non-Christian religions are included, which rightly acknowledges the plurality of religious faiths present in NSW. The proposed language of “the selection, ordination or appointment of persons to perform functions in relation to a religion” is appropriate.

This exception should continue to be wide-ranging, and not subject to the limitation that it be “necessary to comply with the doctrines, tenets or beliefs of that religion” as proposed by the 1999 NSWLRC review<sup>33</sup> and repeated in paragraph 7.18 of the Consultation Paper. This is because religious communities often do make seemingly arbitrary decisions on appointment of ministers of religion and the law should not intrude on this, as there is no “right” for a person to exercise religious ministry, nor to exercise that ministry in a particular way or place. For example, a parish priest is required by Canon Law to submit his resignation to the diocesan bishop at the age of 75, however, the bishop is permitted to “accept or defer it after he has considered all the circumstances of the person and place.”<sup>34</sup> An alteration of the exception could lead to a claim that either the mandatory resignation age provided in Canon Law or a bishop’s differential treatment as to whether to accept a person’s resignation is a form of age discrimination that could be challenged under the Act.

The exceptions should also exist for the appointment of any other person in a religious body, including religious educational, health and welfare institutions.

Pope St Paul VI said: “Modern man listens more willingly to witnesses than to teachers, and if he does listen to teachers, it is because they are witnesses.”<sup>35</sup>

This is because faith-based institutions are communities of faith where, even if not every leader, employee or client is of the same religious faith, still include a sufficient number of persons who do share the religious faith of the organisation so that its religious character is maintained. As the Sacred Congregation for Catholic Education wrote: “[Faith] is principally assimilated through contact with people whose daily life bears witness to it. Christian faith, in fact, is born and grows inside a community.”<sup>36</sup>

The Consultation Paper’s proposal for an “inherent requirement” or “general occupational qualification” test for employment in religious organisations should be rejected, because it

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<sup>33</sup>New South Wales Law Reform Commission, Review of the Anti-Discrimination Act 1977 (NSW), Recommendation 38, Report 92, 1999. [online] NSW Law Reform Commission. Available at <https://lawreform.nsw.gov.au/documents/Publications/Reports/Report-92.pdf> [Accessed 15 Aug 2025], Appendix A, section 66.

<sup>34</sup>Code of Canon Law, 1983. [online] Vatican. Available at [https://www.vatican.va/archive/cod-icris-canonici/cic\\_index\\_en.html](https://www.vatican.va/archive/cod-icris-canonici/cic_index_en.html) [Accessed 15 Aug 2025], 538 §3.

<sup>35</sup> Pope Paul VI. (1975). *Evangelii Nuntiandi: Apostolic Exhortation on Evangelization in the Modern World*. [online] Available at: [https://www.vatican.va/content/paul-vi/en/apost\\_exhortations/documents/hf\\_p-vi\\_exh\\_19751208\\_evangelii-nuntiandi.html](https://www.vatican.va/content/paul-vi/en/apost_exhortations/documents/hf_p-vi_exh_19751208_evangelii-nuntiandi.html) [Accessed 15 Aug 2025], paragraph 41.

<sup>36</sup> The Sacred Congregation for Catholic Education, *The Catholic School*, 19 March 1977. [online] Vatican. Available at [https://www.vatican.va/roman\\_curia/congregations/ccatheduc/documents/rc\\_con\\_ccatheduc\\_doc\\_19770319\\_catholic-school\\_en.html](https://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_19770319_catholic-school_en.html) [Accessed 15 Aug 2025], paragraph 53.

is based on an incorrect assumption that authentic religious belief and practice is only necessary for roles related to leadership, religious education or religious observance.

This is not the case.

While leadership does set the cultural tone for a workplace, it can only do so if all employees share the same mission as the organisation and its leadership. This is not a controversial proposition. While other jurisdictions prohibit discrimination based on political belief or activity, exceptions are provided for political staffers. For example, the Victorian *Equal Opportunity Act 2010* offers an exception for the employment of ministerial advisers or members of staff of a political party<sup>37</sup> while the ACT's *Discrimination Act 1991* allows broader exceptions for the employment of advisers to, or members of the staff of members of the Legislative Assembly, officers, employees or workers for a political party, electoral staff or any other similar employment or work<sup>38</sup>. In many instances, these exceptions are not used to ensure that every member of staff is a registered member of that political party, nor that they agree with every aspect of the party platform, but rather to provide the organisation with the tools to exclude a person who is actively seeking to undermine that mission.

Anti-discrimination laws need to provide all organisations, including faith-based institutions, with the ability to exclude or remove activists, that is, those who might seek out employment in a religious institution in bad faith, in order to undermine that institution's ethos. This is not a hypothetical concern, but there are numerous examples of activists who have deliberately targeted churches and schools in this manner. A selection of these examples can be provided to the Commission on a confidential basis upon request.

Additionally, implicit in an "inherent requirement" or "general occupational qualification" test is also the suggestion that religious faith is only relevant to the items listed in a position description and that a person's conduct outside work is irrelevant to fulfilling their role. However, the Christian faith is something that permeates every aspect of a person's life, even if imperfectly; it is not something that can be compartmentalised. The way a person spends their time outside of working hours, including their participation in church communities, is relevant to their ability to undertake their work within a religious organisation. As St John Paul II wrote:

*"[The] lay faithful will know how to overcome in themselves the separation of the Gospel from life, to again take up in their daily activities in family, work and society, an integrated approach to life that is fully brought about by the inspiration and strength of the Gospel."*<sup>39</sup>

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<sup>37</sup> *Equal Opportunity Act 2010* (Vic), s27.

<sup>38</sup> *Anti-Discrimination Act 1991* (ACT), s45.

<sup>39</sup> John Paul II, Apostolic Exhortation *Christifideles Laici*, 30 December 1988. [online] Vatican. Available at [https://www.vatican.va/content/john-paul-ii/en/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_30121988\\_christifideles-laici.html](https://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici.html) [Accessed 15 Aug 2025], paragraph 34.

Anti-discrimination laws should not undermine this understanding of the Christian life by mandating the contrary.

The question of whether adherence to religious beliefs and practices is an inherent requirement of a role will be a question of fact. This would make an external body, in this case Anti-Discrimination NSW in the first instance, the decision-making authority as to what is and is not an inherent requirement for a role within a religious organisation. It is not clear that external bodies that have no expert knowledge in religious beliefs are the most appropriate or competent forum to decide – on behalf of a religious organisation – what is and is not a genuine requirement for a role.

A similar objection can be made to the proposal in paragraph 7.25 of the Consultation Paper that, in addition to being in “conformity with the doctrines of the religion is an inherent requirement of the position,” a test of reasonableness and proportionality be included in any exception for a religious body. Such a test would have the effect of subjecting religious doctrine to a reasonableness and proportionality assessment from a non-religious authority. This is not appropriate, because there are some requirements of religious bodies, such as celibacy, that will seem unreasonable if held up against a non-religious worldview but which are voluntarily and happily accepted by those who hold a religious belief.

This could result in tests of reasonableness and proportionality that are inappropriate for religious organisations. For example, the ALRC opined that:

*“it would be reasonable and proportionate for a school to preference an applicant for the position of religious education teacher who was willing to teach the school’s particular beliefs around sexuality, as long as the teacher was permitted to objectively discuss the existence of alternative views about other lifestyles, relationships or sexuality in a manner appropriate to the context.”<sup>40</sup>*

What was proposed by the ALRC – that it would not be reasonable and proportionate to require even a religious education teacher to teach religious beliefs in a religion class – demonstrates the danger of this proposition.

Additionally, in its explanation of what might be reasonable and proportionate, the ALRC did not limit the matters about which alternate views could be taught to sexuality, but also proposed that teachers of diverse sexualities be permitted to teach alternate views about other religious matters as well. The ALRC wrote further that:

*“a school could require a LGBTQ+ staff member involved in the teaching of religious doctrine or beliefs to teach the school’s position on those religious*

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<sup>40</sup> Australian Law Reform Commission, *Anti-Discrimination Laws: Consultation Paper, 2023*. [online] Australian Law Reform Commission. Available at <https://www.alrc.gov.au/wp-content/uploads/2023/01/ALRC-Anti-discrimination-Laws-CP-2023.pdf> [Accessed 15 Aug 2025], page 24.

*doctrines or beliefs, as long as they were able to provide objective information about alternative viewpoints if they wished.”<sup>41</sup>*

The idea that even the content of religious education classes would fall within the remit of external adjudication would be an extraordinary intrusion upon the religious freedoms envisioned in Article 18 of the ICCPR.

While it is acknowledged that a consultation paper from the ALRC is not legal precedent, its content should be given weight as indicative of how a new reasonable and proportionate test might be interpreted in ways unfavourable to religious organisations.

The proposal of providing an ability for religious institutions to prefer candidates depending on whether they adhere to the religious beliefs and practices of the institution or conduct themselves consistently with the religious beliefs and practices of the institution outlined in paragraph 7.28 of the Consultation Paper is a much more appropriate way to address this matter. If this is recommended by the Commission, it is proposed that this be expressed as a positive right of religious institutions, rather than an exception.

While faith-based institutions will often employ people of various levels of faith and even no faith, others will wish to offer an environment where all staff are committed members of a faith community as its value proposition. It is critical that the Act allows an institution to make this decision at a local level, rather than mandating a one-size-fits-all for religious organisations.

Additionally, the proposed requirement that those institutions have a written policy in relation to these matters could be problematic because it risks having a religious institution targeted on the basis of those written policies.

For example, the requirement of a written, publicly available policy was part of the requirements of the failed federal *Religious Discrimination Bill 2022*.

In January 2022, prior to debate commencing on the bill, Citipointe Christian College in Brisbane revised its student enrolment policy. The policy said that the school would treat children based on biological sex when it came to enrolment, uniforms, sporting teams, bathroom use and pronouns and that those who could not abide by this could have their enrolment terminated. Its Statement of Faith also declared adultery, pre-marital sex and homosexual acts as sinful, offensive to God and destructive to human relationships and society.

This drew immediate public and political criticism, with then- Prime Minister Scott Morrison and then- Queensland Education Minister Grace Grace opposing the policy. Citipointe faced vandalism, its principal received death threats and students were vilified, with the school

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<sup>41</sup> Ibid, page 21.

removing logos from school buses to protect the students<sup>42</sup>. Additionally, the policy was withdrawn and an apology issued, the school principal resigned, the school was subject to several complaints to the Queensland Human Rights Commission and subjected to a review by the Non-State Schools Accreditation Board. This targeting of the school was a direct result of the publication of a policy that conformed to the doctrines, tenets and beliefs of the school and mainstream Christianity, and so the Commission should be wary of recommending an obligation for an institution publish a policy in order to access exceptions under anti-discrimination law.

### *Question 7.3: Exceptions for other forms of unlawful conduct*

The present exceptions for unlawful conduct should be narrowed by excluding allowing for harassment or victimisation by religious bodies. The question of vilification is considered separately below.

### *Question 7.4: Exceptions for providers of adoption services*

It is appropriate for protections for faith-based adoption and foster care providers to continue, whether as a specific exception or within a general exception for faith-based bodies. Overseas experience has demonstrated that the amendment of anti-discrimination laws to require faith-based adoption services to place children with same-sex couples has resulted in the closure of those services<sup>43</sup> rather than compliance with the new law. The result was that fewer children were assisted because of the reduction in adoption services.

### *Question 7.5: Private educational authorities employment exceptions*

The Act should continue to provide exceptions for religious education institutions, including colleges and universities.

The responses to Question 7.1 above are also applicable to this question and should be taken to be repeated here, in particular, the need for a religious educational institution to prefer that all staff members adhere to the institution's religious beliefs and conduct themselves consistently with those beliefs.

Students desire authenticity and they are aware when it is lacking. Staff members who are contractually obligated to teach certain doctrines but who make no attempt to live by them will be ineffective in transmitting anything more than academic knowledge of religion to students. But religious schools are not simply places where academic education is offered, they are small communities of faith where religious belief is both taught and modelled. The

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<sup>42</sup> Brisbane Times, *Death threats, vandalism at college as Brisbane mayor pleads for tolerance*. [online] Brisbane Times. Available at <https://www.brisbanetimes.com.au/national/queensland/death-threats-vandalism-at-college-as-brisbane-mayor-pleads-for-tolerance-20220208-p59un6.html> [Accessed 15 Aug 2025].

<sup>43</sup> United States Conference of Catholic Bishops, *Discrimination Against Catholic Adoption Services*. [online] USCCB. Available at <https://www.usccb.org/committees/religious-liberty/discrimination-against-catholic-adoption-services> [Accessed 15 Aug 2025]; - Catholic Care, *About Us: History*. [online] Catholic Care. Available at <https://catholic-care.org.uk/about-us/history/> [Accessed 15 Aug 2025].

culture of a school and the quality of the religious education it provides depends greatly on the sincerity of its staff.

As the Sacred Congregation for Catholic Education wrote:

*“The achievement of this specific aim of the Catholic school depends not so much on subject matter or methodology as on the people who work there. The extent to which the Christian message is transmitted through education depends to a very great extent on the teachers. The integration of culture and faith is mediated by the other integration of faith and life in the person of the teacher. The nobility of the task to which teachers are called demands that, in imitation of Christ, the only Teacher, they reveal the Christian message not only by word but also by every gesture of their behaviour. This is what makes the difference between a school whose education is permeated by the Christian spirit and one in which religion is only regarded as an academic subject like any other.”<sup>44</sup>*

The need for a religious school to select staff that uphold its beliefs was recognised by the Expert Panel.

In its report, the Expert Panel described the right for religious groups to establish their own private schools conducted according to the beliefs of their religion “a key aspect of the right to manifest one’s belief in article 18(1) of the ICCPR.”<sup>45</sup>

The Expert Panel went on to cite a decision of the Human Rights Committee that confirms the right of church authorities to “decide who may teach religion and in what manner at a religious school”<sup>46</sup> and noted Australia’s obligations under article 18(4) of the ICCPR to “respect the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”<sup>47</sup>

In doing so, the Expert Panel confirmed that the freedom for religious groups to establish religious schools and conduct them in accordance with their beliefs corresponds to the right of the individual to manifest their religious belief and the right of parents to ensure the religious and moral education of children in accordance with their faith.

It also observed that “very few formal complaints have been made to the [anti-discrimination] commissions” regarding discrimination in employment in religious schools<sup>48</sup>.

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<sup>44</sup> The Sacred Congregation for Catholic Education, *The Catholic School*, 19 March 1977. [online] Vatican. Available at [https://www.vatican.va/roman\\_curia/congregations/ccatheduc/documents/rc\\_con\\_ccatheduc\\_doc\\_19770319\\_catholic-school\\_en.html](https://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_19770319_catholic-school_en.html) [Accessed 15 Aug 2025], paragraph 43.

<sup>45</sup> Expert Panel on Religious Freedom, *Religious Freedom Review, 2018*. [online] Australian Government, Attorney-General’s Department. Available at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf> [Accessed 15 Aug 2025], paragraph 1.225.

<sup>46</sup> *Ibid*, paragraph 1.226.

<sup>47</sup> *Ibid*, paragraph 1.227.

<sup>48</sup> *Ibid*, paragraph 1.241.

## *Question 7.6: Discrimination against students and prospective students*

Since the Catholic educational institutions began in Australia, they have been committed to welcoming those who sought to be educated in accordance with the Catholic tradition. Australia's first Catholic school opened in 1821 and was available to non-Catholics from the beginning.

For more than 200 years, Catholic schools have educated millions of Australian students with a preferential option for the most marginalised. Australia's first saint, Mary Mackillop, and her Josephite Sisters provided education to those living in remote parts of the country, especially when there was no government option available.

This proud tradition continues today, with students from all backgrounds and experiencing a variety of different challenges cared for in our schools.

It is unexpected, then, that the Expert Panel found that discrimination against students in faith-based schools was not a significant issue. It stated:

*“As in the area of employment in religious schools, the number of actual complaints of discrimination against students on the basis of these protected attributes appears to be relatively low.”<sup>49</sup>*

The reason for this is that to treat students unfairly would be contrary to the Gospel. Unfortunately, these accusations arise each time a serious attempt is made to amend anti-discrimination laws to protect people of faith. This is both unjust and a gross misrepresentation of the vision and mission of Catholic schools.

While all unjust discrimination against students and prospective students should be rejected, anti-discrimination laws should not operate in a way that would prevent a school from establishing generally applicable rules for students, nor from teaching in accordance with its beliefs.

When it comes to generally applicable rules, a school should be allowed to require separate uniforms and separate bathroom, change room and accommodation facilities for male and female students and for this distinction to be made on the basis of biological sex and not chosen gender identity. The reason for this is outlined in response to Question 6.3 above.

Additionally, changes to anti-discrimination law should not operate in a way that obliges staff or students to address a student by their preferred name or pronouns.

While some are opposed to using a name or pronoun that does not accord with biological reality on religious grounds, others are increasingly aware of the risks that puberty blockers

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<sup>49</sup> Ibid, paragraph 1.262.

pose to children and that countries like the UK<sup>50</sup> and Sweden<sup>51</sup> have prohibited their use, and are reluctant to encourage gender transition in children, even at the initial stage of “social” transition, out of a concern it could facilitate the taking of medical steps and not be in the best interests of the child.

Consider the possible scenario that a teacher refuses to address a transgender student by their preferred name and pronouns on the basis that affirming gender to be fluid poses a greater risk that the child will seek medical intervention for so-called gender-affirmation, and that the teacher did not consider doing so to be in the best interests of the child. Provided the practice was consistently applied, it should not be considered to be unlawful discrimination, otherwise, the school would be placed in a position of having to discipline a staff member acting in accordance with the best interests of the child in order to comply with its legal obligations to the student.

Or consider the scenario where one student refuses to address a transgender student by their preferred name and pronouns on the basis that it is against their religious beliefs. There has recently been public speculation that failing to provide an environment where a person’s preferred pronouns are used can be a form of discrimination<sup>52</sup>. This would create a bizarre situation where a student at a religious school could be disciplined for upholding the faith of that institution in order for the school to comply with anti-discrimination laws.

When it comes to teaching, the Christian understanding of the human person, of the gift and proper use of their sexuality, of marriage, family and gender is life-giving and life-affirming. It is taught to students not only because it is in accordance with religious doctrine, but importantly, because it contributes to their flourishing as individuals. Schools should be permitted to teach their faith with respect to these matters without being subject to a claim of discrimination.

For this reason, any limitation of the existing wide exceptions for religious educational institutions should still allow such an institution to engage in teaching activity, or impose conditions, requirements or practices that are consistent with the doctrines, tenets, beliefs or teachings of a religion.

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<sup>50</sup> O’Dowd, A. 14 Mar. 2024. NHS services in England are told to stop routine prescribing of puberty blockers. *BMJ* 2024; 384 doi: <https://doi.org/10.1136/bmj.g660>

<sup>51</sup> The National Board of Health and Welfare. (2022). Care of children and adolescents with gender dysphoria: summary of national guidelines. [online] Available at: <https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/kunskapsstod/2023-1-8330.pdf> [Accessed 15 Aug 2025].

<sup>52</sup> PerthNow. (n.d.). Non-binary battle after 63-year-old Perth worker sacked for calling colleague 'he' not 'they'. [online] Available at: <https://www.perthnow.com.au/wa/non-binary-battle-after-63-year-old-perth-worker-sacked-for-calling-colleague-he-not-they-c-19601114> [Accessed 15 Aug 2025]

## 8. Civil protections against vilification

### *8.1: Protected attributes*

Paragraphs 8.29-8.39 and 8.53-8.61 of the Consultation Paper outline some inconsistencies between attributes protected against discrimination and those protected against vilification, as well as definitional differences between civil and criminal law. Wherever possible, consistency should be pursued.

### *Question 8.2: The test for vilification*

A harm-based test should not be introduced into the Act.

In addition to its impact on inter-religious discourse, the introduction of a harm-based test could have the effect of criminalising religious teaching. The anti-discrimination claim made against Archbishop Julian Porteous under Tasmania's harm-based civil provisions for issuing a pastoral letter about marriage to parents of students in Catholic schools demonstrated that vilification laws are open to being used by activists to silence views with which they do not agree. While Archbishop Porteous' prosecution may be an extreme example of the use of these laws and the complaint was ultimately withdrawn, the process is too often used as punishment. Cases such as these would only be more inappropriate if these types of complaints also included the threat of a criminal conviction and imprisonment.

## 11. Promoting substantive equality

### *Question 11.3: A positive duty to prevent or eliminate unlawful conduct*

Organisations are already under a positive statutory obligation to ensure, as far as reasonably practicable, the health and safety of its workers<sup>53</sup>, with the definition of "health" meaning physical and psychological health<sup>54</sup>. This would include ensuring, as far as reasonably practicable, that a workplace is free from discriminatory conduct that would have detrimental physical or psychological effects. It is not clear that a separate obligation is necessary.

If a positive obligation was to be included in the Act, it should not require religious organisations to promote ideas or act in a way that is contrary to the beliefs of that organisation.

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<sup>53</sup> *Work Health and Safety Act 2011* (NSW), s19(1).

<sup>54</sup> *Ibid*, s4.

# Conclusion

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The Catholic Archdiocese of Sydney is grateful to the Commission for its work so far in conducting this inquiry. We recognise that constructing our anti-discrimination laws in a way that is consistent with our international human rights obligations and with a vision of the common good of all in mind is a significant undertaking, and we look forward to working with the Commission and all our parliamentarians and others of goodwill in ensuring that anti-discrimination protections in NSW treat each person in accordance with their dignity.