

Catholic Schools NSW

Response to the
NSW Law Reform Commission Consultation Paper:

Review of the Anti-Discrimination Act 1977 (NSW)
Unlawful Conduct

19 August 2025

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Executive Summary

- Catholic Schools NSW supports maintaining the existing exemptions for Religious Bodies and Private Educational Authorities in the *Anti-Discrimination Act 1977* (NSW) (the ADA); however, religious freedom, both as an individual right and as an associational right, requires more appropriate recognition and protection in NSW law.
- The better recognition and protection of the free exercise of religion in NSW requires the explicit incorporation of Article 18 of the International Covenant on Civil and Political Rights (ICCPR) into NSW law. Specifically, people have the right to express freedom of conscience and religion both ‘individually or in community with others and in public or private’, and authorities ought to respect the liberty of parents to ‘ensure the religious and moral education of their children in conformity with their own convictions.’
- The NSW Government should both preserve section 56, Religious Bodies, of the ADA and affirm its application to faith-based schools.
- In any redrafting of the ADA, the NSW Government must observe the principle that the communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organisations, including faith-based schools.
- CSNSW provides this response consistent with its original 2023 submission to the Review, and in conjunction with the 2020 submission of the Catholic Bishops of NSW and the Bishops of the Australasian-Middle East Christian Apostolic Churches to the Joint Select Committee of The NSW Parliament on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*; see submission No. 72.
- School sport is an integral part of a school’s curriculum. It should therefore retain exemptions to anti-discrimination law on the same basis as any other school activity, allowing schools to make decisions in accordance with their beliefs, values and ethos.
- The NSW Government should not disturb the well-understood application of the Commonwealth *Disability Discrimination Act* and its Standards to NSW schools and their students by the imposition of potentially inconsistent or confusing State statutory requirements. The Review should recommend that the Commonwealth retain responsibility to “Cover the Field” concerning the operations of NSW non-government schools.
- If the NSW Law Reform Commission (NSW LRC) recommends that ‘Religion’ be added as a protected attribute under the ADA, any such provisions must recognise that religious associations and organisations, including schools founded by a faith community, do not discriminate when they act consistent with their religion or as required by the susceptibilities of the adherents of the religion.
- CSNSW requests that the NSW LRC release an exposure draft of any proposed amendments to the ADA for further comment.

Part A: Catholic Schools in NSW

The Role of Catholic Schools NSW

The Catholic Bishops of NSW/ACT established Catholic Schools NSW Limited (CSNSW) as the peak body for Catholic education in NSW. CSNSW takes a leadership role, coordinating and representing Catholic education in NSW at the state and national levels, and acting as the Approved System Authority under Commonwealth and NSW legislation.

An Overview of NSW Catholic schools

Catholic schools have been part of Australia's education landscape for more than 200 years. Today, NSW's 595 Catholic schools enrol more than 260,000 students or one in five of the state's students. Employing over 31,000 teachers and other staff, Catholic schools play a critical role in the delivery of school education in NSW.

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

Part B: The Guiding Principles of this submission

The key principle guiding this submission is the imperative for any redrafted *Anti-Discrimination Act 1977* (NSW) (ADA) to give effect to Article 18(4) of the International Covenant on Civil and Political Rights (ICCPR):

The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

In this regard, CSNSW reminds the Review that the right of parents to determine the religious and moral education of their children is so fundamental a human right that the ICCPR (which Australia has ratified) provides that it cannot be suspended or limited even "in time of public emergency which threatens the life of the nation."¹

Moreover, CSNSW reminds the Review that Australian domestic law recognises the centrality of religious freedom to any appreciation of human rights. To this end, the Australian High Court observed: "Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society".²

It is both in recognition of, and to give effect to, this "paradigm principle" that the current ADA contains "balancing clauses" providing exemptions and exceptions to protect the expression and manifestation of religious belief by NSW faith-based schools.³

In this context, CSNSW argues that given Catholic schools are both a school and a religious body, Catholic schooling is entitled to a presumption of human rights protection by virtue of both ICCPR Article 18(4) and the above-cited imperative identified by the High Court.

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

Catholic schools must be free to be authentically Catholic. Catholic schools operate in the knowledge that, as Pope St. Paul VI said, we listen “more willingly to witnesses than to teachers”. Catholic schools exist to be witnesses of a Catholic mission and ethos, with all staff supporting, teaching and exemplifying a Catholic approach to life. Catholic schools exist to provide this education to their students and to parents who choose to send their children to be educated in an environment that upholds and exemplifies a Catholic ethos. In this way, Catholic schools provide an attractive option, freely chosen, by staff and families.⁴

Part C: Key Consultation Paper Questions Respecting Religious Freedom and Schooling Identified for Response by CSNSW

Consistent with its identified “Guiding Principles”, as set out above, Catholic Schools NSW has identified the following eight review questions that speak to ICCPR Article 18(4) rights and relate to the delivery of education in Catholic schools:

Question 7.1: Religious Personnel Exceptions

Question 7.2: Other Acts and Practices of Religious bodies

Question 7.5: Private Educational Authorities Employment Exceptions

Question 7.6: Discrimination Against Students and Prospective Students

Question 7.7: Exceptions Relating to Sport

Question 3.9: Intended Future Discrimination.

Question 4.3: Disability Discrimination

Question 5.2: Potential New Attribute - Religion

Consultation Question 7.1: Religious Personnel Exceptions

1. *Should the ADA provide exceptions for:*
 - a) *The training and appointment of religious orders?*
 - b) *The appointment of any other person in any capacity by a body established to propagate religion?*
2. *If so, what should these exceptions cover and when should they apply?*

In responding to these questions, as well as subsequent related Review issues, CSNSW places on record its concern that the Consultation Paper frames the matter of Religious Freedom in dismissive or negative terms. Paragraph 7.5 of the Consultation Paper opines that, “One of the most controversial issues in discrimination law is whether and, if so, when, religious bodies should be granted exceptions that allow them to discriminate”.

This framing of Religious Freedom contradicts and undermines:

- Article 18 of the ICCPR
- Article 26 of the Universal Declaration of Human Rights (UDHR)
- Article 27 of the ICCPR
- Article 29 of the ICCPR
- Section 116 of the Australian Constitution.
- The Siracusa principles on derogation from rights.

And it ignores the express acknowledgement by the High Court of Australia of religious freedom as the paradigm of freedom of conscience.

As Mason ACJ and Brennan J found:

Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and act in accordance with his belief without legal restraint. (emphasis added)⁵

This principle of Australian law is consonant with International Law as synthesised in the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, of the United Nations General Assembly. It is these imperatives of both domestic and international law that in 2017 led the Joint Standing Committee of the Australian Parliament on Foreign Affairs, Defence and Trade to observe:

There has been general agreement about the need to formally implement the right to freedom of religion or belief... The sub-committee notes that the preponderance of evidence from all sides of the issue support the claim that religious freedom should be specifically protected in Commonwealth Law, however this is achieved.⁶

Accordingly, ADA exemptions serve as balancing provisions necessary for the reasonable accommodation of the right to religious freedom as declared in Article 18 of the ICCPR. Even though the ADA frames these rights as ‘exemptions’, they are legitimate expressions of religious freedom rights.⁷ Consequently, the NSW Government must maintain the existing exemptions to strike an appropriate balance between religious freedom and other human rights.⁸

Regarding the scope and applications of these exceptions, CSNSW submits that any redrafting of the current ADA must both preserve the wording and application of section 56 “Religious Bodies”, as interpreted and applied in the NSW Court of Appeal Wesley Mission Case⁹, while removing any doubt (through appropriate drafting) that faith-based schools are recognised for the purposes of anti-discrimination law as “Religious Bodies”.¹⁰

Further, any redrafted ADA exemptions and/or exceptions are appropriately described as “protections of religious freedom”. The NSW LRC must also consider including a general provision (in addition to section 56 “Religious Bodies”) that expressly states that nothing in the legislation is intended to impede or diminish religious freedom, or the right of religious agencies, including faith-based schools, to practice and publicly manifest their beliefs and teaching, such a clause would also benefit from a specific reference to ICCPR Article 18.

Consultation Question 7.2: Other Acts and Practices of Religious Bodies

Should the ADA provide an exception for other acts or practices of religious bodies? If so, what should it cover and when should it apply?

CSNSW now addresses the following challenge set out at paragraphs 7.49 and 7.50 of the Consultation Paper.

...some preliminary submissions suggested that faith-based bodies should not be permitted to discriminate when providing public services or receiving public funding (and a South Australian review (in 2016) recommended clarifying that an existing exception does not apply to discrimination by religious bodies in the provision of public services, such as health and education.

As CSNSW earlier articulated, this line of argument would aggravate an existing unjustifiable imbalance between religious freedoms and Australian anti-discrimination law. This would impede access to public funding by Australian religious bodies, consequently treating religious freedom as a secondary right that is not equal to other human rights.¹¹

If the ADA were to deny religious bodies access to government funding for the purpose of service delivery in the area of health and education, it would effectively set aside the reasoning of the High Court of Australia in the 1981 section 116 validity of federal assistance for religious schools case – the DOGS case.¹²

As the High Court observed, government funding for schooling provided by religious bodies can, in effect, sustain pluralism.¹³ Conversely, the argument that governments should only fund services reflective of a singular set of “Community Standards” would institutionalise majoritarianism¹⁴ and remove the diversity and difference that are essential to a pluralistic society.¹⁵

Article 27 of the ICCPR provides that ethnic, religious, and linguistic communities have two key rights:

- 1) The right of freedom of association.
- 2) The related right to educate their children in accordance with their religious or cultural identity.¹⁶

To give effect to these rights, liberal pluralist democracies typically include in their anti-discrimination laws provisions that balance these associational rights with other rights, such as equality rights.¹⁷

However, the NSW LRC identifies an argument at paragraph 7.77 of the Consultation Paper that: “There is also a view that religious schools should be subject to secular laws as they receive public funding”. With respect to this “view”, CSNSW makes two observations:

- 1) First, all NSW schools are already “subject to secular laws”. The better question is: How should the law balance conflicting rights in a pluralist society?¹⁸

- 2) Second, “public funding” is an artefact of taxation of citizens by citizens, and therefore, as a consequence of an application of the principles of the “Common Good” and “Distributive Justice”, all citizens should benefit from “public funding”.¹⁹

To conclude these observations on the proper autonomy of Religious Bodies, including faith-based schools, CSNSW cites the observation of Justice Sachs of the Constitutional Court of South Africa concerning the meaning of equality:

Equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgement and acceptance of difference.²⁰

Religious Bodies are part of this difference, and as such, the role of Religious Bodies must not be impeded by “a grinding form of convergence”.²¹

Consultation Question 7.5: Private Educational Authorities Employment Exceptions

Should the ADA contain exceptions for private educational authorities in employment? Should these be limited to religious educational authorities? If you think the Act should provide exceptions in this area:

- i. What attributes should the exceptions apply to?*
- ii. What requirements, if any, should duty holders meet before an exception applies?*

CSNSW believes that Australian domestic law that regulates schooling must give effect to Article 18(4) of the ICCPR:

The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Likewise, Australian domestic law must give effect to Article 26(3) of the UDHR, “Parents have a prior right to choose the kind of education that shall be given to their children”.

In this context, CSNSW restates the following 2023 advice of the Australian Catholic Bishops to the Commonwealth Inquiry into Religious Education Institutions and Anti-Discrimination Law that:

Preferencing the appointment of staff who adhere to the faith or support its values does not constitute discrimination at all. This is consistent with the view of the UN’s Human Rights Committee in paragraph 13 of the Human Rights Committee’s General Comment 18 (Non-Discrimination), which states 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.”²²

In the context of the above statement, and concerning the imperatives of the free exercise of religion; the reasonable accommodation of religious belief and practice; and the proportionate balancing of equality rights, associational rights, and religious rights;²³ CSNSW argues that the

review of the NSW Anti-Discrimination Act should continue to allow the differentiation of treatment to ensure staff support and uphold the values and ethos of a school.

Consultation Question 7.6: Discrimination Against Students and Prospective Students

Should the ADA contain exceptions for private educational authorities? Should these be limited to religious educational authorities? If you think it is necessary for the ADA to provide exceptions in this area:

- i. What attributes should the exceptions apply to?*
- ii. Should they apply to prospective students, existing students, or both?*
- iii. What requirements, if any, should duty holders meet before an exception applies?*

Article 18(1) of the ICCPR states:

Everyone has the right to freedom of thought, conscience and religion. This right (includes the) ... freedom, either individually or in community with others, and in public or private, to manifest his / her religion or belief in worship, observance, practice and teaching.

Commenting on Article 18(1) rights, the United Human Rights Committee declared that “Freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts”.²⁴

In examining Article 18, the European Court of Human Rights also observed that: “The maintenance of pluralism is dependent on maintaining freedom of religion”; and “Were the organisational life of the community not protected, all other aspects of the individual’s freedom of religion would become vulnerable.”²⁵

Consistent with the above observations on ICCPR Article 18(1) rights, CSNSW argues that when members of a faith community come together to build a school, they have the right to operate it in accordance with the beliefs of their religious community. They therefore have the right to appoint staff who share their beliefs, as well as the concomitant right to preference for enrolment of children and young persons whose families either belong to, or support the purposes of, the school’s faith community.²⁶ CSNSW notes that the findings of the Ruddock Review support this position.²⁷

CSNSW therefore submits that religious schools, as works of their faith communities and as a consequence of their communal and associational rights, must be able to determine their own enrolment policies.²⁸

Regarding the question of whether non-religious “Private Schools” should enjoy the same rights as faith-based schools with respect to the application of anti-discrimination law, CSNSW submits that, in respect of shared public spaces, in a pluralistic, liberal society, there should be a presumption of inclusivity (equality and a duty of reasonable accommodation). However, in the private sphere of associations, the presumption should be the opposite.²⁹

CSNSW would be concerned if the Review recommended that the application of anti-discrimination law should be extended beyond the “public sphere” into the “private sphere”.

Such an extension would be an act of “Intersectional Theory” in a manner prejudicial to difference, diversity and pluralism.³⁰

Consultation Question 7.7: Exceptions Relating to Sport

Should the ADA provide exceptions to discrimination or vilification in sport? If so, what should they cover and when should they apply?

Each year, CSNSW coordinates approximately 150 statewide events involving some 20,000 students across Primary and Secondary school settings. With this experience as a sports administrator for children and young people, CSNSW identifies the need to better align the purpose of school sport with the requirements of discrimination law.

CSNSW is of the view that when a school organises sporting programmes, they are implemented as an integral part of each school’s curriculum, recognised in the educational law and regulatory framework – they are not separate. As an essential part of the school’s curriculum, anti-discrimination law should apply to school sport on the same basis as any other school activity.

Consequently, a faith-based school should be able to administer sporting activities according to its own values and ethos. The legal paradigm in “the private sphere should not be reasonable accommodation and equality rights, but rather (it) should be reasonable association rights and collective rights.”³¹ The principles that should govern the administration of school sport by a faith-based school are the same principles that apply to the school taken as a whole: legal pluralism, social diversity, and associational autonomy rather than “majoritarian” orthodoxy.³²

Consistent with the above, the ADA should apply to the conduct of Catholic school sport to ensure school sporting programmes can complement both the educational purposes and the ethos of each school.

Consultation Question 3.9: Intended Future Discrimination

Should the Tests for Discrimination Capture Intended Future Discrimination? Why or why not? If so, how could this be achieved?

CSNSW approaches the suggestion that future (unrealised) discrimination should be justiciable with great concern. Key fears relate to:

- Uncertainty for duty holders;
- The potential chilling effect on the exercise of religious freedom rights; and
- The punitive potential of the complaint process on duty holders.

CSNSW envisages that future-based actions could effectively negate the rights sought about employment and enrolment in respect of faith-based schools.

With respect to the punitive potential of an expanded horizon for complaints, CSNSW notes that while the complaint process comes at no cost to a complainant, the respondent must pay for both the direct and indirect costs in terms of time, resources and funding for their defense. CSNSW also requests that, in the context of “Intended Future Discrimination”, proposals that the current Review should give close and active consideration to the ‘Report into the Anti-

Discrimination Amendment (Complaint Handling) Bill 2020' as published by NSW Legislative Council Portfolio Committee No 5 September 2020, with particular reference to paragraphs 2.55 to 2.60.

Consultation Question 4.3: Disability Discrimination

What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of “disability”?

What changes, if any, should be made to the public health exception?

According to Commonwealth NCCD³³ definitions, NSW Catholic schools currently enrol 59,066 students with disability, representing 22.3% of the total student population of NSW Catholic Schools.

Catholic schools approach the provision of schooling for students with disabilities as a faith-driven, moral obligation, as well as a duty of civil law. They approach the questions in the Consultation paper on the following basis:

- The underpinning principle of all Catholic schools regarding disability is clear: “Persons with disabilities are fully human subjects with rights and duties”,³⁴ and it is the responsibility of families, communities and governments to provide for their needs where persons with disabilities cannot do so themselves.
- All NSW Catholic schools currently comply with the requirements of the Commonwealth *Disability Discrimination Act 1992* and the complementary Commonwealth *Disability Standards for Education 2005*.
- Disability status is integral to the national schools funding model as established by the *Australian Education Act 2013* (Cth), see section 36 “Students with Disability Loading”.
- The relevant application of the Commonwealth’s Disability Discrimination Act criteria determines National Disability Insurance Scheme eligibility.

Given the existing nexus between school enrolment, school-based reasonable adjustments, and school funding³⁵, the NSW Government would create regulatory dysfunction if it disturbed the well-understood application of the Commonwealth *Disability Discrimination Act* and its Standards to NSW schools and their students by imposing potentially inconsistent or confusing State statutory requirements.

Consequently, CSNSW is of the strong view that the current Review should recommend that the Commonwealth be left to “Cover the Field” with respect to the operations of NSW non-government schools.

In this context, which is the jurisdictional question, CSNSW also cites the following two Consultation Paper issues for specific comment:

- The issue of whether the definition of disability should reflect a social model, rather than a medical model, of disability. (See Consultation Paper at paragraphs 4.38 to 4.41)

- The issue of whether the definition of disability should more clearly include psychosocial disability, mental illness and addiction. (See Consultation Paper at paragraphs 4.46 to 4.48).

Any legislative action by NSW to redefine disability with respect to either or both social models of disability and psychosocial impairments would result in radical inconsistency with Commonwealth Disability Law. Such a conflict of laws would overly burden schools with respect to compliance, and it would create gaps in Commonwealth funding criteria between State-based adjustment obligations and Commonwealth funding criteria, both for schools and NDIS eligibility. In this context, it should be noted that the Commonwealth is the majority government funding source for all non-government schools in NSW.³⁶

Concerning the issue of duty holder burden, CSNSW notes that the recognition of psychosocial injury in the context of Workers' Compensation claims is a matter of current public controversy, resulting in the State government moving to restrict compensation in this space (refer to *Workers Compensation Legislation Amendment Bill 2025 (NSW)*).

In summary, any action by NSW to reconceptualise State disability law by adopting social and psychosocial paradigms would result in unacceptable structural, policy, statutory and funding misalignments between Commonwealth and State disability obligations and support for school-based duty holders. It would also result in significant uncertainty for children with disabilities and their families.

The Consultation Paper also raises the matter of "The Public Health Exception" (See Consultation Paper at paragraphs 4.63 to 4.66).

During the recent Covid-19 pandemic, schools, regulators, and school leaders discussed whether it is lawful to discriminate in relation to both employees (teachers as well as other staff) and students regarding infectious disease management when a school authority believes it is reasonably necessary to take action for the protection of public health.

For the purpose of giving school authorities greater certainty of decision-making in respect of infectious disease management, CSNSW believes that the following principles, as expressed by the NSW LRC in 1999, should guide the drafting of a public health exception application to schools:

- The disability involves a condition that is transmissible in the circumstances that might arise if a specific act is not done, and
- The act is based on medical or expert opinion, upon which it is reasonable to rely in the circumstances, and
- The act is proportionate to the identified risks. (See Consultation Paper at paragraph 4.65).

Consultation Question 5.2: Potential New Attribute - Religion

Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, what and why?

If any new attribute were to be added to the ADA, would any new attribute specific exceptions be required?

CSNSW addresses these questions by adopting and affirming the advice which the NSW Catholic Bishops and the Bishops of the Australasian-Middle East Christian Apostolic Churches presented to the NSW Parliament's Joint Select Committee on The *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (see Submission 72).

The Bishops' 2020 advice emphasised two propositions that the current Review should take cognisance of:

If passed, this Bill will implement one of the key recommendations of the Expert Panel on Religious Freedom, which... [in 2018], recommended an amendment to anti-discrimination laws in New South Wales be made to render it unlawful to discriminate on the basis of a person's religious belief or activity.

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, the passage of this Bill with the amendments outlined in this submission will assist in upholding the right of each Australian to hold religious beliefs and to live their lives in accordance with those beliefs.

In this context, we submit Recommendation 16 of the Ruddock Review is relevant to the Review:

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 doing so, consideration should be given to providing for the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

For the avoidance of doubt, CSNSW brings to the attention of the current Review the need, as recognised in the international instruments which deal with Religious Freedom, for any new protected Attribute of Religion to recognise religious belief as both an individual right and an associational right.³⁷

Any legislative amendments to protect the attribute of Religion must recognise that religious associations, organisations, including schools founded by a faith community, will be taken not to discriminate when they act for one or more of the following reasons:

- Consistency with the doctrines, tenets, beliefs or teachings of the religion.
- As required because of the religious susceptibilities of the adherents of the religion.
- To further or aid the organisation (school) in acting in accordance with the doctrines, tenets, beliefs or teachings of the organisation (school).

As the NSW Bishops noted in 2020, such provisions for religious associations are equivalent to existing protections for political parties that allow them to discriminate on the basis of political opinion or activity.

Finally, in the context of cases such as *Medical Board of Australia v Kok*³⁸ and the Canadian Trinity Western University Case³⁹, the protections against discrimination on the basis of religious belief

or activity in respect of individuals need to extend to the conduct and decisions of Qualifying Bodies such as Teacher Accreditation agencies.

Part D: Summary of Advice

In summary, CSNSW advises that the following legal dictum should guide any redrafting of the ADA in respect to its application to Catholic and other faith-based schools:

The communal character of religion means that protecting religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious bodies ... Canadian and International jurisprudence supports this conclusion.⁴⁰

Consistent with this statement of legal principle, which speaks to Article 18 of the ICCPR, CSNSW submits that any redrafting of the ADA must address the following matters:

- ICCPR Article 18 imperatives must drive any consideration of how a revised NSW Anti-Discrimination Act will apply to faith-based schools generally and Catholic schools specifically.
- The acknowledgement by the High Court of Australia of religious freedom as the paradigm freedom of conscience must be a guiding principle for statutory law reform.
- Anti-Discrimination Act law reform must reflect a presumption for the protection of religious freedom as both an individual right and an associational right.
- The necessity for each Catholic school to select staff who can both uphold and promote the religious character and purpose of the school must be reflected in the drafting of any new ADA.
- Respect for the communal nature of the Catholic school as an associational entity, together with its concomitant right to select students who seek a Catholic educational experience and milieu, must be reflected in the drafting of any new ADA.
- The need to both preserve section 56 of the ADA and clarify its application to faith-based schools, that is, faith-based schools as Religious Bodies, consistent with the Wesley Mission Case, must be reflected in the drafting of any new ADA.
- The oversight of school sport as an integral aspect of a school's curriculum and educational purpose.
- Intended future discrimination must not become a cause of action since such provisions will facilitate legal processes that are likely to fall disproportionately and unequally on persons and organisations of faith.
- Qualifying Bodies such as Teacher Accreditation Agencies must be required to respect and uphold ICCPR Article 18 Rights.
- Given the intersection between Disability discrimination law and both the national, *Australian Education Act 2013* (Cth), funding model for schools, as well as NDIS eligibility for students, the Commonwealth *Disability Discrimination Act 1992* should continue to "Cover the Field" with respect to disability provision by NSW non-government schools.
- An amendment to the ADA to render it unlawful to discriminate on the basis of a person's religious belief or activity must also recognise the right of religious communities to govern themselves according to their own norms.

CSNSW further requests that the NSW LRC continue consultation through the release of an exposure draft of any amending legislation, allowing stakeholders to assess further and respond to any changes.

Endnotes

¹ Refer United Nations Economic and Social Council UN, Submission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR: UN DOC E/CN.4/1984

² *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785, 787.

³ Refer NSW Anti-Discrimination Board Report, Discrimination and Religious Conviction (1984) ch 6 “Education”.

⁴ Australian Catholic Bishops Conference, Submission to the Australian Law Reform Commission Inquiry into Religious Education Institutions and Anti-Discrimination Laws (March 2023) (hereinafter cited as ‘Submission to the ALRC’) 2.

⁵ *Church of the New Faith v Commissioner for Pay-Roll Tax* op. cit.

⁶ Joint Standing Committee on Foreign Affairs, Defence and Trade Parliament of Australia, Legal Foundations of Religious Freedom in Australia (Interim Report, 2017) [6.31] – [6.32].

⁷ Quinlan, M., “An Unholy Patchwork Quilt: The Inadequacy of Protections of Freedom of Religion in Australia” in Benson, Quinlan and Thompson, Religious Freedom in Australia – A New Terra Nullius (2019) (hereinafter cited as ‘Religious Freedom in Australia’) 49-50.

⁸ Finlay, Forrester and Zimmermann, “Does Australia Need a Religious Freedom Act” in Religious Freedom in Australia 105-107.

⁹ Wesley Mission Case see Corney and Lind (now Vocare Law) “NSW Anti-Discrimination Case Sheds Light on The Meaning of Religion” at <https://www.corneyandlind.com.au> and see *OV and OU v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155. This decision of the NSW Court of appeal remitted some rulings concerning the application of protections for religious freedom under the Anti-Discrimination Act 1977 (NSW) (**ADA NSW**) to the Equal Opportunity Division of the Administrative Decisions Tribunal (**ADT**) for reconsideration. The court of Appeal ruled that, in considering whether the conduct of the Wesley Mission (in declining to consider the application of a homosexual couple to become foster carers) was conduct necessary to avoid injury to the religious susceptibilities of its adherents, the ADT must have regard to the doctrines and tenets of the Wesleyan tradition to which Wesley Mission adheres (rather than those of a generic or omnibus “Christianity” which the ADT used when it first heard the case). The court also ruled that while the protection for church agencies in appointing staff under s56(c) of ADA NSW does not extend to the appointment of foster carers, the meaning of “appointment” under this section should not be read narrowly and “limited {only} to functions or capacities relating to religion” or “functions having a religious character”.

¹⁰ Congregation for Catholic Education, The Catholic School on the Threshold of the Third Millennium (1977) at section 11.

¹¹ Finlay, Forrester and Zimmermann op. cit.107.

¹² *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559.

¹³ *Ibid* [31] – [34] (Barwick CJ); [13] (Mason J): Noting that while the High Court does not refer to pluralism it does speak to diversity.

¹⁴ See Benson, Iain T., Living Together with Disagreement: Pluralism, the Secular, and the Fair Treatment of Beliefs in Law Today (2012) 3: the ‘totalistic [civic totalism] notion of pluralism views society as moving **towards the articulation of only one public policy**, and such a view is antagonistic to the notion of plurality and tolerance of diversity.’ (Emphasis added). For a discussion of “Civic Totalism” see Benson, Iain T., “Should There Be a Legal Presumption in Favour of Diversity? Some Preliminary Reflections” in Benson, Iain T., and Bussey, Barry W., Religion, Liberty and the Jurisdictional Limits of Law (2017) (hereinafter cited as ‘Religion, Liberty and Law’) 26 and Lauwers, Peter D., “Liberal Pluralism and the Challenge of Religious Diversity” in Religion, Liberty Law 35 quoting Galston, William A., The Practice of Liberal Pluralism (2005) 24-26.

¹⁵ Ian T. Benson, Submission in Response to ALRC Consultation Paper: Religious Educational Institutions and Anti-Discrimination Law (January 2023) 2.

¹⁶ Harrison, Joel and Parkinson, Patrick, “Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society”, Monash University Law Review 2014 (Vol 40, No 2) 438.

¹⁷ Finlay, Forrester and Zimmermann, op. cit. 106-108.

¹⁸ Harrison, Joel and Parkinson, Patrick, op. cit. 438.

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- ¹⁹ NCEC Funding Principles for Catholic Schools: ncec.catholic.edu.au/wp-content/uploads/2016/03/Funding-Principles-for-Catholic-Schools-2024.pdf
See Harrison and Parkinson *Ibid* at section VII “Religious Organisations in Receipt of Public Funds” 446-451.
- ²⁰ Finlay, Forrester and Zimmermann op. cit. 107 quoting *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15 (9 October 1998).
- ²¹ Iain T. Benson, *Submission to the ALRC Consultation Paper: Religious Educational Institutions and Anti-Discrimination Law* (January 2023) 6.
- ²² Australian Catholic Bishops Conference, *Submission to the ALRC* (March 2023) 2.
- ²³ Finlay, Forrester and Zimmermann op. cit. 105-107.
- ²⁴ Human Rights Committee *General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights* [4].
- ²⁵ See the discussion of ICCPR Article 18 issues in Quinlan, M. op. cit. 46-49 quoting *Sindicatul “Pastorul Cel Bun” v Romania* [2014] 58 ECHR 10 [136], quoted in *Iliafi v Church of Jesus Christ Of Latter Day Saints Australia* (2014) 311 ALR 354, [77].
- ²⁶ Iain T. Benson, *Submission to the ALRC Consultation Paper: Religious Educational Institutions and Anti-Discrimination Law* (January 2023) 8.
- ²⁷ See Commonwealth of Australia, *Religious Freedom Review, Report of the Expert Panel* (2018) 64-68 for a full discussion of this recommendation.
- ²⁸ This conclusion is supported by the argument of Bussey, Barry W., “The [Canadian] Charter is not a Blueprint for Moral Conformity” in *Religion, Liberty and Law*.
- ²⁹ Benson, Iain T., “The Limits of Law and the Liberty of Religious Associations” in *Religion, Liberty and Law*; Esau, Alvin A.J., “Freedom of Religion, Competing Rights and Spatial Priority Presumption” in *Religion, Liberty and Law* 288.
- ³⁰ *Ibid* Esau, 295; see also Benson, Iain T., “Getting Religion and Belief Wrong by Definition: A Response to Sullivan and Hurd” in *Religious Freedom in Australia* 348 in respect of the importance of associational diversity.
- ³¹ *Ibid* Esau, 288.
- ³² *Ibid* 319.
- ³³ The NCCD is the Australian Government’s annual collection of information about Australian school students with disability see <https://www.nccd.edu.au>
- ³⁴ Quoted by Pope Francis from the Compendium of the Social Doctrine of the Church at [148]. See “Pope Francis Advocates for Inclusion and Dignity for people with Disabilities” *Vatican News* 11th April 2024. <https://www.vaticannews.va/en/pope/news/2024-04/pope-francis-address-academy-social-sciences-disabilities.html>
- ³⁵ See “How NSW Catholic Schools are Funded” (CSNSW September 2024) at <https://www.csnsw.catholic.edu.au/explore-our-community/how-catholic-schools-are-funded>
In 2024 the NSW Catholic system was funded as follows: \$2.9 billion by the Australia Government; \$749 million by the NSW Government; \$550 million in school fees; and \$100 million in private income.
- ³⁶ *Ibid*.
- ³⁷ As discussed in Esau, Alvin A.J., op. cit. 292 and 321.
- ³⁸ *Medical Board of Australia v Kok (Review and Regulation)* [2025] VCAT 650.
- ³⁹ *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 [2018] 2 S.C.R. 453.
- ⁴⁰ Bussey, Barry W., op. cit. 412 quoting *Loyola High School v Quebec* (2015) S.C.J No 12; [2015] 1 S.C.R., [91]. See also notes 25, 26 and 27 above.