



**Senate Standing Committee  
on  
Legal and Constitutional Affairs**

**Inquiry into the effectiveness of the  
Commonwealth Sex Discrimination Act 1984  
in eliminating discrimination and promoting  
gender equality**

**Submission by  
Christian Schools Australia Ltd**

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# Summary of Conclusions

**CONCLUSION 1:** Christian schools are committed to upholding the value of every person and respecting and supporting the rights of all members of the school community.

**CONCLUSION 2:** Religious freedoms are a fundamental aspect of Australia's international human rights obligations and must be protected in the Act.

**CONCLUSION 3:** The existing exemptions reflected in sections 38 of the Act should be retained.

**CONCLUSION 4:** The existing formulation of the exemptions in section 38 of the Act should be reviewed to ensure that the 'doctrines, tenets, beliefs or teachings' of the particular faith community operating a school are the relevant standard for the assessment of their actions.

**CONCLUSION 5:** In the event of the widening of the scope of the Act the existing exemptions for the expression of religious freedom may also need to be expanded.

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## **1. Introduction**

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Christian Schools Australia Ltd (CSA) is an association of over 150 schools, with around 60,000 students and more than 3,000 teaching staff. CSA's commitment is to see Christian beliefs and values impact on all aspects of practice and community life in its member schools. With Biblically based beliefs as our foundation CSA provides leadership, services and resources for its members, and generally works to advance the cause of Christian schooling.

Our member schools have a goal to provide an educational environment in which children can be educated in a Christian learning community based on the beliefs and values of its supporting Christian community.

While most of these schools are operated by a particular Protestant church almost all serve the wider Christian community and attract teachers and students from a variety of denominational backgrounds.

Many schools also attract enrolments from outside the Christian community, from parents and families wishing to receive an education that is based upon Christian beliefs and values.

The member schools have all signified agreement to a common statement of faith (see Appendix 2), which is based on an acceptance of the truth of the Bible.

We have set out below our initial response to the Review. In doing so we reserve the right to provide further analysis and comment. In particular we would wish to make a response to any proposed legislative change which may be recommended by the Committee.

## **2. Elimination of discrimination and promotion of gender equity**

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

Many Christian schools, along with other employers in the education sector, have been at the forefront of initiatives to promote the full participation of women in the school workplace.

Approaches to this issue include flexible localised approaches built around individual need, through to formalised paid maternity leave provisions in workplace agreements. Some of the less 'formal' but effective local arrangements include:

- part-time 'job-sharing' arrangements;
- provision of extended maternity leave;
- graduated return to work arrangements following maternity leave;

- restructuring of teaching loads and timetabling to accommodate family responsibilities;

These initiatives have often been undertaken at considerable cost to the school community, not only in financial terms. The nature of the school environment and particularly the structures of teaching often make such arrangements not only administratively complicated but also having significant potential detriment to the educational outcomes for students. These competing demands are often difficult to balance yet much has been achieved in this area.

This approach is consistent with the proposed National Employment Standards, which aim to provide a benchmark for employers in some areas relating to effective promotion of gender equity within a workplace. In particular Division 3 relates to requests for flexible working arrangements and Division 4 relates to parental leave and related entitlements.

These provisions will provide a clear and consistent minimum standard across Australia that will address a number of very real issues for working families and particularly women seeking to participate in the workforce, a process which has our support.

The current Productivity Commission public inquiry into *Paid Maternity, Paternity and Parental Leave* is also noted. This inquiry is certainly expected to address more of the practical obstacles to realising greater gender equity in the workplace. Certainly there appears to be an expectation that this inquiry will lead to some form of nationally-funded paid maternity leave scheme.

Both the proposed National Employment Standards and the Productivity Commission inquiry must be considered by the Committee in the current inquiry. Attempts to evaluate the effectiveness of the *Sex Discrimination Act 1984* (the Act) in eliminating discrimination and promoting gender equity without referencing these processes would be incomplete and potentially lead to a lack of policy coordination.

It is suggested that one approach would be to express overarching aspirational goals in the Act while allowing the specific administrative outcomes to other processes.

Christian schools actively desire to see the full participation of women in senior roles and to actively encourage female students into school and community leadership positions. Increasing numbers of women are being appointed to executive positions, including Principal roles, within member schools across Australia. Among the executive team at CSA four of the five State Executive officer positions are held by women.

Christian schools have been participants in a range of gender equity programmes within the school community in order to see all students achieving to their full capacity in a safe and supportive environment, free of the limiting effects of gender stereotyping, bullying and other forms of harassment. This includes efforts to ensure the full participation by female students across the range of curriculum offerings. It also includes boys education strategies.

Much of the remainder of this submission will focus on the exemptions available to Christian schools within the Act, reflecting the concerns of schools regarding those exemptions.

It is important to note, however, the commitment of Christian schools across many areas to eliminate discrimination and promote gender equity. These initial observations reflect that commitment and provide a context for understanding the concerns expressed below.

## **CONCLUSION 1:**

Christian schools are committed to upholding the value of every person and respecting and supporting the rights of all members of the school community.

### **3. Concerns regarding existing exemptions**

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The reference to the Committee requires consideration of:

*The effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality, with particular reference to:*

...

n. *scope of existing exemptions;...*

The Inquiry's terms of Reference acknowledge that the Act seeks to implement Australia's obligations under various International Covenants and Conventions. We invite the Committee to recognise that in any democracy which upholds such freedoms as are contained in the various international instruments to which Australia is a party there are likely to be conflicting or overlapping rights. The success of a pluralist democracy sometimes depends on goodwill and may require a 'light touch' in the instruments of law. Accordingly the Act presently under review needs to be cognisant of and strike a workable balance between rights which may appear to overlap.

One of the key rights enshrined in international law and various International Covenants and Conventions is the right to religious freedom. The extracts from some of the relevant international instruments shown in Appendix 1 reflect the importance given to religious freedom. In particular the instruments provide for:

- freedom, alone or in community with others and in private or in public, to manifest a religion or belief in teaching, observance, practice and worship;
- respect for the liberty of parents to ensure the religious and moral education of their children in conformity with the parents' own opinions;
- freedom to impart religion or belief to one's children including the right of children to access a religious education consistent with the wishes of their parents.

CSA and its member schools are concerned that any proposed changes to the scope of the existing exemptions may have significant adverse impact on some important human rights and freedoms. This particularly includes the freedom currently enjoyed by parents who have the right under international law *'to choose for their children institutions other than those maintained by the public authorities ... to ensure ... the*

*religious and moral education of the children in conformity with their own convictions...<sup>1</sup>.*

The importance of this right has been upheld by successive governments in Australia and hence it is reflected in the current exemption found in section 38 of the Act. We believe the exemption to be appropriate and important.

The Sex Discrimination Act, while upholding and protecting one set of rights and freedoms, should not at the same time destroy other rights and freedoms which are an equally important part of a successful pluralistic democracy.

## **CONCLUSION 2:**

Religious freedoms are a fundamental aspect of Australia's international human rights obligations and must be protected in the Act.

### **4. *The nature of Christian Schools***

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Christian schools were established out of a desire by parents and others to see young people grow up in a Christian teaching/learning environment where they could be nurtured in their faith. The Christian faith is the foundation upon which all aspects of a Christian school are based. Structures and practices, both formal and informal, work together to provide a faith-based community within which learning takes place. In our schools religion is not simply taught as a stand-alone subject, it permeates all that takes place and is lived out in the daily lives of the community of the school.

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

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

Staff members, including both administrative and teaching staff, are role models and exemplars for the students whose educational, social and spiritual development is the school's purpose. Their work is to do with teaching-by *modeling* and instruction – the doctrines and values of the faith. In this respect they are no different from a pastor or minister in a church setting.

Like other religious workers (for whom exemption should also continue to apply if changes were made to the existing Act) teachers in our schools are also called upon to be pastor/mentor to the students in their care. Likewise administrative staff are often called upon to pastorally care for school families in their many dealings with

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<sup>1</sup> Convention against Discrimination in Education Article 5(b) –See Appendix 1

them. Parents have chosen our schools precisely for this reason – that the staff is known to have a pastoral role from a distinctly Christian point of view.

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

Schools commonly require that staff are able to attest to a statement of faith (such as that contained in Appendix 2), can demonstrate they are active and participating members of the Christian community (usually demonstrated through membership of a church) and can bring evidence of their commitment to live according to the doctrines and teachings of their faith (often through a reference from a pastor or other senior member of a recognised church).

## **5. Current safeguards for religious expression in faith-based schools**

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CSA upholds the right of all recognised religions to operate schools in accordance with the principles outlined above and therefore to be protected by the current exemption.

Section 38 of the Act currently provides in relation to the employment of staff<sup>2</sup> and contract workers<sup>3</sup> that discrimination on the grounds of sex, marital status or pregnancy is not unlawful when it is undertaken by:

*‘an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’*

if that educational institution;

*‘so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’*

This type of exemption along with similar exemptions in the *Human Rights and Equal Opportunity Commission Act 1986*<sup>4</sup>, the *Workplace Relations Act 1996*<sup>5</sup> and corresponding state and territory legislation, provides an essential safeguard for Christian and other faith based schools by allowing the school to select staff who can teach and model the values and beliefs of the school. These exemptions strike an appropriate balance between the desire for the elimination of discrimination and the right to religious freedom.

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<sup>2</sup> Section 38(1)

<sup>3</sup> Section 38(2)

<sup>4</sup> Section 3(1)

<sup>5</sup> Section 659(4)

It is worth recognising that the issue at hand has been referred to legislative and other review processes in many other jurisdictions under both Labor and Coalition governments. No persuasive case has been made for the removal of similar exemptions in state law and no major political party has accepted the need for change to the present arrangements, which are working well. CSA and its members believe there is no case for amending the Commonwealth legislation as it relates to exemptions for faith-based schools.

### **CONCLUSION 3:**

The existing exemptions reflected in sections 38 of the Act should be retained.

## **6. Consistency with other Commonwealth and state and territory discrimination legislation and options for harmonisation**

The particular formulation of the exemption in the Act currently under review, namely that it must be exercised *‘in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’*, is the most common form of exemption currently in force in both state and commonwealth legislation<sup>6</sup>. Where a different test is used in other comparable legislation it is usually broader in wording than the current exemption in the Act.

The ubiquitous nature of this wording clearly suggests that it represents a sound and considered expression of an appropriate safeguard for religious freedoms. The current exemption balances well the objects of the elimination of other discrimination with the need for the protection of genuine religious freedom and the expression of that freedom through the appointment of appropriate staff.

While this wording has served its purpose well, we have become somewhat concerned as a result of a recent decision by the NSW Administrative Decisions Tribunal<sup>7</sup> in relation to similar wording in the *Anti-Discrimination Act 1977* (NSW).

The concerns relate to the interpretation of what constitutes ‘a particular religion or creed’. After acknowledging that there are a number of ‘streams’ within Christianity the Tribunal reached the view that the *“religion”* referred to in the law was *Christianity* rather than any particular denomination or other grouping within Christianity – which theologically speaking is a very broad description, and not entirely adequate to the purposes at hand.

Despite there being no argument about the issue in the proceedings before it the Tribunal adopted as its standard a very general standard - the religious creeds of the Uniting Church generally, rather than those of the agency before it, namely the Wesley Mission and its creeds and doctrines.

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<sup>6</sup> This formulation is also used in the *Workplace Relations Act 1996 (Cth)* and many state industrial relations laws.

<sup>7</sup> *OV and anor v QZ and anor (No.2) [2008] NSWADT 115 (1 April 2008)*



While there is ample common ground between Christians about the basis of the faith there are issues about which there is theological debate or discussion; such is the nature of religious adherence in the Christian tradition.

What standards then should the courts apply when judging a matter on which Christians may disagree along theological or doctrinal grounds? Courts are of course not established for this purpose, and we believe the Acts which rely on a formulation such as *'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'* have been crafted deliberately to ensure that courts do not cross the secular/religious divide which is an important aspect of our rule of law.

In interpreting a matter before it a court should test what are the genuinely-held creeds or beliefs of the church, school, or other religious body involved and apply this as the relevant standard. Adopting a different standard, or a broader standard than that under contention, renders the exemption ineffectual and therefore defeats the purposes of the parliaments which enacted the provisions in order to protect religious freedom.

It is CSA's contention that the decision of the NSW Tribunal is unsound and should not provide a precedent for future interpretation of similar exemptions.

Indeed it may be prudent to consider clarification of the formulation of the existing exemption to include in it the words *'doctrines, tenets, beliefs or teachings of the particular faith community'*. These should be the standard against which is measured the actions of a particular school operated by a faith community in matters relating to discrimination.

#### **CONCLUSION 4:**

The existing formulation of the exemptions in section 38 of the Act should be reviewed to ensure that the *'doctrines, tenets, beliefs or teachings'* of the particular faith community operating a school are the relevant standard for the assessment of their actions.

### ***7. Review of the scope of the Act***

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CSA and its member schools strongly support the principles of equality and justice. We do not condone and indeed vehemently oppose inappropriate and unjust forms of discrimination and any form of vilification that incites harm towards other individuals or groups.

As indicated earlier, however, the need to balance rights must be acknowledged. In so doing it must be remembered that freedom of religion is not a nice afterthought but is at the very heart of the essential human rights. Acknowledgement of the need to protect freedom of belief has a history longer than any other human right in both international instruments<sup>8</sup> and domestic law of older European nations<sup>9</sup>.

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<sup>8</sup> eg Peace of Westphalia 1648

The foundation of modern international human rights instruments is the *Universal Declaration of Human Rights 1948*. In the preamble to this document the centrality of freedom of religion (and also freedom of speech) is clearly established:

*'...the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people'*

*Preamble to Universal Declaration on Human Rights*

Any proposed widening of the scope of the Act or 'the manner in which key terms and concepts are defined' must recognise and respect these fundamental rights. In incorporating recognition of these rights it is critical to ensure that both the right to hold beliefs and the right to act upon those beliefs, individually or corporately, are protected. Both are essential elements of religious freedom and both aspects are clearly recognised in international law.

The existing exemptions, which are necessary for the expression of religious freedom, must be at least maintained if not enhanced. Depending upon any proposed widening of the application of the Act or revision of definitions the exemptions may need to be reviewed and themselves expanded to ensure that existing freedoms are not compromised.

#### **CONCLUSION 5:**

In the event of the widening of the scope of the Act the existing exemptions for the expression of religious freedom may also need to be expanded.

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<sup>9</sup> eg 1598 Edict of Nantes

## **Appendix 1**

### **Relevant International Declarations and Conventions**

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For present purposes the relevant provisions of the applicable international declarations and conventions are as follows.

#### **1 Universal Declaration of Human Rights 1948 (UDHR)**

##### **Article 18**

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

#### **2 International Covenant on Civil and Political Rights (ICCPR)**

**Article 4** No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

##### **Article 18**

(a) 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.

(b) No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.

(c) 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.

(d) 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.

##### **Article 20**

(a) Any propaganda for war shall be prohibited by law.

(b) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law

##### **Article 27**

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

**3            The ICCPR was ratified by Australia on 13 August 1980. Australia acceded to the First Optional Protocol to the ICCPR with effect from 25 December 1991.**

**4            Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief (Religion Declaration)**

**Articles 2 & 3**

These provisions prohibit any act or practice of intolerance or discrimination on the grounds of religion or belief by any person in any capacity whatsoever.

**Articles 4 & 7**

These place obligations on States to take positive measures to counter intolerance and discrimination on the ground of religion and belief.

**Article 5**

Freedom to impart religion or belief to one's children - children have a right of access to a religious education that is consistent with the wishes of their parents.

**Article 6**

Religion and belief in practice - provides a list of minimum freedoms, including freedom to teach religion and belief and freedom to establish and maintain appropriate charitable institutions and freedom to assemble and worship.

This Declaration has been declared to be a 'relevant international instrument' for the purposes of the Commonwealth Human Rights and Equal Opportunity Commission Act 1986.

**5            Convention on the Rights of the Child**

**Article 28**

Provides for education to develop the child to his or her fullest potential, but this article is not to be construed so as to "interfere with the liberty of individuals and bodies to establish and direct educational institutions..."

**6            Convention against Discrimination in Education**

**Article 5(b)**

"it is essential to respect the liberty of parents ... firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as ... approved by the competent authorities and secondly, to ensure ... the religious and moral education of the children in conformity with their own convictions..."

## **Appendix 2**

### **Statement of Faith (from CSA Constitution)**

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The Statement of Faith of the Company is as follows:

#### **God**

There is one God and He is sovereign and eternal. He is revealed in the Bible as three equal divine Persons - Father, Son and Holy Spirit. God depends on nothing and no one; everything and everyone depends on Him. God is holy, just, wise, loving and good.

God created all things of His own sovereign will, and by His Word they are sustained and controlled.

God is the God and Father of our Lord Jesus Christ. He is also Father of all whom He has adopted as His children. Because of God's faithfulness and His fatherly concern, nothing can separate His children from His love and care.

The Lord Jesus Christ is the eternally existing, only begotten Son of the Father. He is the Creator and Sustainer of all things. He was conceived by the Holy Spirit and born of a virgin, truly God and truly man. He lived a sinless life and died in our place. He was buried, rose from the dead in bodily form and ascended to heaven. Jesus is King of the universe and Head of the Church, His people whom He has redeemed. He will return to gather His people to Himself, to judge all people and bring in the consummation of God's Kingdom.

The Holy Spirit proceeds from the Father and the Son. He convicts people of their sin, leads them to repentance, creates faith within them and regenerates them. He is the source of their new sanctified life bringing forth His fruit in the life of believers. He gifts believers according to His sovereign will, enabling them to serve the Lord.

#### **The Bible**

The Bible, which is comprised of the books of the Old and New Testament, is the inspired, inerrant and infallible Word of God, and the only absolute guide for all faith and conduct. It is indispensable and determinative for our knowledge of God, of ourselves and of the rest of creation.

#### **God's World**

Adam and Eve, the parents of all humankind were created in the image of God to worship their Creator by loving and serving Him, and by exercising dominion under God's rule by inhabiting, possessing, ruling, caring for and enjoying God's creation. Consequently the purpose of human existence is to glorify God and enjoy Him forever.

Sin entered the world through Adam's disobedience, because of which all people are alienated from God and each other and, as a result, they and all creation are under God's judgement.

All people have sinned and, if outside of Christ, are in a fallen, sinful, lost condition, helpless to save themselves, under God's condemnation and blind to life's true meaning and purpose.

God holds each person responsible and accountable for choices made and actions pursued. Human responsibility and accountability do not limit God's sovereignty. God's sovereignty does not diminish human responsibility and accountability.

Salvation from the penalty of sin is found only through the substitutionary, atoning death and resurrection of the Lord Jesus Christ. As the sinless One, He took upon Himself the just punishment for our sins.

Through His death and resurrection, the Lord Jesus has destroyed the power of Satan, who is destined to be confined forever to hell along with all those who reject Jesus as Lord.

Out of gratitude for God's grace and in dependence on the Holy Spirit, God's people are called to live lives worthy of their calling in love and unity and in obedience to God in all spheres of life. They are responsible to ensure that the gospel is faithfully proclaimed. Christian parents are required to bring their children up in the discipline and instruction of the Lord and to diligently teach them the truth of God's Word.