

**Submission
No 117**

ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOMS AND EQUALITY) BILL 2020

Organisation: Christian Schools Australia Limited

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The Hon. Gabrielle Upton, MP
Chair
Joint Select Committee on the
Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020
via email: ReligiousFreedomsBill@parliament.nsw.gov.au

Dear Ms Upton

RE: Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

Thank you for the opportunity to make this brief submission to the Committee's inquiry into the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (the Bill).

This submission focusses on issues of direct relevance to Christian schools and does not seek to comment on the broader issues raised in relation to the Bill. We do, however, acknowledge and support the submissions of other faith-based groups on the Bill and, in particular, the need for greater protections for people of faith within New South Wales.

INTRODUCTION

Christian Schools Australia (CSA) is a national body that supports and represent schools for whom religious formation is an integral part of the education process. CSA has 134 member schools educating over 66,000 students and employing nearly 10,000 staff at 168 locations across Australia, as part of a global ACSI network of 24,000 schools educating in excess of 5.5 million students in over 108 countries around the world. Within NSW we have 40 member schools educating around 14,000 students.

The schools are geographically, culturally and educationally diverse, although they serve predominantly middle to lower socio-economic communities. They range in size from around 50 students on one campus, to more than 2,200 spread across three campuses. While mainly in the outer suburban fringe suburbs of major metropolitan areas a number are located across regional and rural Australia. There are also some specialist and indigenous schools in various locations across the country.

THE NEED FOR THE BILL

The Expert Panel Report: Religious Freedom Review (2018) clearly identified the need for protections from religious discrimination in New South Wales, Recommendation 16. It must be noted though that this recommendation is merely the most recent in a long series of reviews recommending greater protections against religious discrimination, from the NSW Law Reform Commission *Report 92 - Review of the Anti-Discrimination Act 1977* (NSW) in 1999 through to the Joint Standing Committee

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on Foreign Affairs, Defence and Trade, *Interim Report, Legal Foundations of Religious Freedom in Australia* in 2017.

The need to provide greater protection for religious freedom was highlighted during the course of the recent Australian Marriage Law Postal Survey. Attacks upon those holding opposing views during this period were well publicised. Churches were vandalised and employees sacked as a result of public statements they made in some of the more high-profile scenarios. Christian schools who expressed concerns about possible consequences to parent communities were subject to abuse and, in at least one instance, negative comments from an education minister.¹

While this process has concluded, and the outcome accepted by those who opposed change, many are still reporting that the consequences continue. Anecdotally, some educators have reported being shunned by colleagues in professional bodies because of their connections to Christian schools. In at least one jurisdiction activists have used the outcome as the basis for attempts to reduce religious freedoms.²

The need for greater protections for religious freedom were widely acknowledged during the Survey. Both the Prime Minister and Opposition Leader made strong commitments to protecting religious freedom during the public discussion while the Survey voting was taking place.³ Indeed, the establishment of the Expert Panel is a direct response to the acknowledged need to address concerns raised regarding religious freedom in the discussion around the Survey.

While the Commonwealth Government has released two exposure drafts of proposed religious discrimination legislation not bill has been introduced into Parliament. The need to address the current global pandemic has resulted in the bill being removed from the Cabinet agenda and its immediate future is extremely uncertain. There is nothing to be gained in terms of protection of religious freedom in New South Wales by delaying consideration of the Bill in favour of very uncertain possible Commonwealth protections.

IMPACT ON CHRISTIAN SCHOOLS

Within the *Anti-Discrimination Act 1977* (NSW) (the Act) there are a range of exemptions for Christian schools as a “private educational authority”, which form part of the fundamental legislative approach of the Act. The Bill does not seek to amend these provisions which is appropriate and sensible.

The proposed section 3 of the Act to be inserted by the Bill provides a useful and welcome addition to the Act as a whole. Consistent with Recommendations 2 and 3 of the Expert Panel Report this interpretative clause will greatly assist in the understanding of the Act as a whole and, particularly the need for “balancing’ rights. The extensive and established international jurisprudence provides a sound basis for such a process.

¹ Emily Baker, ‘ACT Education Minister Yvette Berry cautions schools on same-sex marriage’, *The Canberra Times* (Canberra) 21 September 2017

² See comments in Western Australia by Brian Grieg, reported here and elsewhere, Phoebe Wearne, ‘WA Government seeks legal advice on religious schools’ right to discriminate against LGBTI teachers and students’, *The West Australian* (Perth) 9 November 2017.

³ See, e.g., David Crowe and Dennis Shanahan, ‘Turnbull’s focus on religious freedom after Howard SSM blast’, *The Australian* (Canberra) 16 September 2017.

In relation to the new Part 2B proposed to be inserted in the Act by the Bill we firstly note the definitions of religious belief and activity and the mechanism for determining when a belief is held in the proposed section 22KA. These provisions provide a sound and well considered approach to determining the possible *scope* of protections, in a manner consistent with the decisions of the High Court of Australia as well as superior courts in other Anglophile nations. Noting, of course, that merely being within the scope of protections does not necessarily ensure protection in all circumstances – this being a common misconception.

As a “a private educational authority that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion” a Christian school would fall within the proposed definition of religious ethos organisation (REO).

This recognition of a religiously motivated and directed organisation, acknowledges the need to ‘live out’ an individual’s faith is itself an essential element of faith. In a complex contemporary society this is often done ‘in community with others’ through a variety of means, including corporate structures. Christian schools, for example, are required to be incorporated by funding legislation,⁴ but are no less a communal expression of faith. The importance of the community element of the protections have been recognised by the European Court of Human Rights commenting that they lay ‘at the very heart of the protection’ of religious freedom.⁵

A challenge that this creates, however, is determining the applicable “doctrines, tenets, beliefs or teachings” for such a REO. Indeed, even the notion of corporate entities having “doctrines, tenets and beliefs” has been questioned in some case law.⁶

It is imperative, therefore, that the Bill include a mechanism for determining the applicable “doctrines, tenets, beliefs or teachings” for such a REO. Recommendations made in relation to the proposed Commonwealth legislation proposed that a corporate entity may adopt a religious doctrine, tenet, belief, or teaching by:

- (a) including the doctrine, tenet, belief, or teaching in its governing documents, organising principles, statement of beliefs or statement of values; or
- (b) adopting a doctrine, tenet, beliefs, or teaching of another body or institution which include the doctrine, tenet, belief, or teaching; or
- (c) adopting doctrine, tenet, belief, or teaching from a document or source which include the doctrine, tenet, belief, or teaching; or
- (d) acting consistently with that doctrine, tenet, belief, or teaching.

A simple amendment to include such a provision in an expanded definition of “genuinely believes” when applied to a REO could achieve this outcome.

⁴ See, e.g., *Australian Education Act 2013* (Cth) s75(2).

⁵ *Hasan and Chaush v Bulgaria*, App No 30985/96, (2002) 34 EHRR 55, [62] quoted in Andrews Committee interim report [3.31].

⁶ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75 per Maxwell P, 308, 317-21

A critical element of the proposed Part2B for Christian schools is the proposed section 22M. This section serves to ensure that people of faith coming together in a REO can live out their faith through that means without being subject to limitations which would not arise if acting individually. It also serves to ensure that the expression of faith through a REO is not discrimination against other faiths, but merely an expression of that faith which underpins the REO.

Equally important is the exemption in the proposed section 22V(6) which is essential to the ability of Christian and other faith based schools to continue to operate in accordance with their “doctrines, tenets, beliefs or teachings”. Once again, this cannot be properly characterised as discrimination against other faiths, but as a means of the expression and propagation of that faith which underpins the REO.

Finally, and critically important in relation to Christian schools which cannot operate without registration under the *Education Act 1990* (NSW), the proposed section 22Z provides an essential safeguard for Christian schools and other REOs.

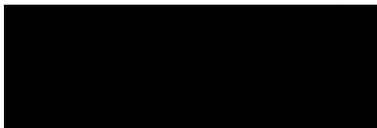
RECOMMENDATION

Subject to the relatively minor amendment noted above to allow the determination of the beliefs of a REO, Christian Schools Australia **strongly supports the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020***.

This Bill is long overdue for New South Wales and provides sensible and balanced protections for people of faith consistent with the protections available to other residents in the State.

The objectives of the Bill are valid, and the terms of the Bill are largely appropriate for securing its objectives. **We urge the Committee to recommend the passage of the Bill** with only the minor amendment noted.

Your faithfully



Mark Spencer
Director of Public Policy