

12 August 2025

New South Wales Law Reform Commission

By e-mail: nsw-lrc@justice.nsw.gov.au

Submission to Anti-Discrimination Act review

Who are we?

1. This submission is on behalf of, and co-signed by:
 - Australian Christian Churches
 - Anglican Church Diocese of Sydney
 - NSW & ACT Baptist Churches
 - Presbyterian Church of Australia in NSW
 - Seventh-day Adventist Church
2. The submission was coordinated by Freedom for Faith, a Christian legal think tank that exists to see religious freedom for all faiths protected and promoted in Australia and beyond. Freedom for Faith is led by people drawn from a range of denominational churches including the Anglican Church Diocese of Sydney, The Catholic Church, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, and the Seventh-day Adventist Church in Australia. It has strong links with, and works co-operatively with, a range of other faith groups in Australia.
3. We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows.

Freedom for Faith

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Executive Summary

4. Religious freedom is a fundamental human right which is recognised by international law. It protects the rights of individual religious believers and religious institutions.
5. Critical to the continuing success of NSW, as a multifaith, multicultural and pluralist society, is not only that people of all religious faiths be free from discrimination, but also that they are free to live out their faith both as individuals and in their religious institutions and organisations.
6. The position of religious believers and religious organisations in NSW has changed significantly since the *Anti-Discrimination Act 1977 (NSW)* (ADA) was enacted.
7. The Ruddock Religious Freedom Review correctly recommended the inclusion of religious belief as a protected category in Commonwealth and NSW anti-discrimination law. It still has not happened.
8. Commonwealth and NSW anti-discrimination laws are presently defective because they fail to include religious belief as a protected characteristic and because such protections, as are afforded, are by way of exemptions or exceptions rather than positive rights. The use of exemption or exception language is a consequence of the drafting and the originally – and subsequently – identified protected attributes. This is problematic as it presents religion and religious belief as attributes which do not attract protection as a primary right. It is also problematic because, as the Consultation Paper itself does in places, it considers rights warranting primary protections as if they are somehow aberrations and unfair impositions on other rights.
9. The ADA should be redrafted to provide positive rights for the free exercise of religious beliefs and activity, rather than protecting religious freedoms through mere exceptions. The ADA should provide that religious ethos organisations do not discriminate in circumstances where they engage in conduct that they genuinely believe is necessary to maintain the religious traditions, beliefs, customs and mission or ethos of the organisation.
10. The passage of amendments to the ADA in NSW to better protect religious belief and activity – and not to reduce the current protections - should not be delayed pending any progress by the Commonwealth in this area.
11. Answers to specific questions from the Consultation Paper are provided.

Introduction

The changing context of the ADA

12. The Paper and review process is timely (if not past due) given, as this submission will highlight, much has changed in the nearly 50 years since the passage of the ADA. In particular, the Act requires modernisation to better promote “the equal enjoyment of rights” of religious believers and religious organisations given the changes which have occurred in NSW, since that time, which have adversely impacted on that enjoyment. Some of those changes, in summary, include:

- very significant changes in the geographic, cultural and racial background of the population, which have made New South Wales (NSW) an increasingly more multi-cultural community;
- whilst the religious make up of NSW has changed considerably it remains the most religious state in Australia. There has been a significant fall in the numbers of people identifying as Christians, a huge growth in the numbers of people identifying as being of no religion and a substantial growth in adherents to non-Christian religious faiths;
- following the 11 September attacks on the Twin Towers in New York, there has been a growth in anti-Islamic rhetoric and behaviours;
- since 7 October 2023, there has been an alarming growth in anti-Semitism;
- the seriousness and number of attacks on religious believers and places associated with religion have dramatically increased in the last 12 months;
- equally, there has been a significant growth in negative perceptions of Christianity and a growth in discrimination against Christians;
- the number of religious schools has grown and the tertiary education landscape has changed with two Catholic universities and a number of Christian colleges beginning operations;
- there is pervasive religious discrimination and rampant bullying against religious students in public schools;¹
- there has been a significant decline in volunteering in our society²; and
- there has been a significant increase in mental health issues in our society.

¹ Zehavit Gross and Susan Rutledge, “Research finds ‘pervasive’ religious bullying in Australian public schools” 30 August 2022 (updated March 2024) *The Jewish Independent* <https://thejewishindependent.com.au/research-finds-pervasive-religious-bullying-in-australian-public-schools>

² Volunteering Australia, “Volunteering in Australia” <https://www.volunteeringaustralia.org/wp-content/uploads/Volunteering-Australia-Key-Volunteering-Statistics-2024-Update.pdf>

13. NSW has significant differences from other Australian States which necessitates caution in considering law reform and law reform reports from those States as providing sound models for NSW. Each of the developments referred to above are considered below:

Multi-cultural NSW

14. NSW is a multi-cultural community and it is increasingly so.³ There have been very significant changes in the geographic, cultural and racial background of the population. More than 25% of Australians were born overseas, and another 25% have at least one parent born overseas. In NSW, these proportions are even higher – 34.6% of people were born overseas, and 56.3% have at least one parent born overseas.⁴ There are suburbs in Sydney such as Fairfield that have more than 150 different ethnic groups in the one local government area, speaking a multitude of languages at home. In the last three decades, relatively few new migrants have come from Europe or countries of the Anglophone world, where religious adherence has declined in recent decades.
15. Many migrants and refugees are devoutly religious and, even if they are not, most have come from cultures with quite traditional views about sex and family life. The proportion of the population that holds to traditional moral positions on sex and family life will only increase in the next three decades. This is not only because current migration patterns are very likely to continue, but because people from these cultures have much higher birth rates than secular Caucasian Australians.

Religious NSW

16. There has been a significant fall in the numbers of people identifying as Christians, a huge growth in the numbers of people identifying as being of no religion and a substantial growth in adherents to non-Christian religious faith.⁵ Whilst the religious make up of NSW has changed considerably, importantly it remains the most religious state in Australia with only 33.2% selecting no-religion in the latest census, compared to 38.9% nationally.⁶

Increase in attacks on all religions

17. In the last year or so Australia, and NSW in particular, has witnessed an unprecedented rise in anti-religious behaviours. The Scanlon–Monash Index of Social Cohesion, which measures the social cohesion rate of Australia every year, has reported its lowest result since inception in 2023-2024. The ASIO director-general has also stated that Australia is

³ Australian Bureau of Statistics, “Cultural Diversity: Census” <https://www.abs.gov.au/statistics/people/people-and-communities/cultural-diversity-census/2021>

⁴ <https://www.abs.gov.au/census/find-census-data/quickstats/2021/1>

⁵ Australia Bureau of Statistics, “Religious Affiliation in Australia.” <https://www.abs.gov.au/articles/religious-affiliation-australia>

⁶ Australia Bureau of Statistics, “Religious Affiliation in Australia.” <https://www.abs.gov.au/articles/religious-affiliation-australia>

becoming “more volatile and unpredictable” with an increase in “extremism, division, and elevated intolerance”.⁷

18. The State has also seen a spate of anti-Semitic behaviours including:

- the occupation of public university spaces, ostracism, jostling and insulting of Jewish students on public university campuses, the public disclosure of Jewish academics, the invasion and cancellation of classes of Jewish academics and the display of an anti-Semitic chart at a conference held at a public university,⁸
- the December 6, 2024 firebombing of the Adass Israel Synagogue in Melbourne's south-east,⁹
- a hoax plot to target Sydney's Great Synagogue and the Sydney Jewish Museum with explosives the mastermind of which appears to hold anti-Semitic views and which caused real fear and anxiety in Sydney's Jewish community,¹⁰
- an arson and anti-Semitic graffiti attack on a Maroubra childcare centre, 180 metres from Maroubra Synagogue on 21 January, 2025,¹¹
- the dousing with red paint of the Dover Heights home of the co-chief executive of Australian Jewry, Alex Ryvchin on 17 January, 2024,¹²
- cars being set alight, the graffitiing of swastikas and anti-Semitic messages on homes, businesses, cars and the facade of a synagogue,¹³
- a Jewish man being refused service at an Officeworks store in Elsternwick in Melbourne by a pro-Palestinian staff member in March 2024,¹⁴ and
- two Sydney nurses threatening to kill Jewish patients in February 2024.¹⁵

19. At the same time, a record number of Islamophobic incidents have been recorded by the Islamophobia index and Monash University.¹⁶

⁷ <https://www.sbs.com.au/news/article/conspiracy-theories-gaza-and-political-violence-what-to-know-as-terror-threat-raised/6q68y8o64>

⁸ Greg Craven, “Uni chieftains can have no defence on anti-Semitism” *The Weekend Australian* February 1-2, 2025 22

⁹ <https://www.abc.net.au/news/2024-12-14/jewish-community-fears-synagogue-terror-attack-anti-semitism/104717278>

¹⁰ Matthew Knott, Alexandra Smith and David Crowe, “PM battles anger over terror plot response” *The Sydney Morning Herald*, February 1. 2025 1; Sally Rawathorne, Perry Duffin, “Man arrested on warrant for caravan plot ‘hid kill cars’ *The Sydney Morning Herald*, February 1. 2025 6

¹¹ Marilyn Rodrigues and Tara Kennedy, “Sydney bishops call for an end to anti-Semitism as ceasefire begins “ *Catholic Weekly*, 26 January , 2025, 1

¹² Ibid 6

¹³ Ibid 6

¹⁴ <https://www.australianjewishnews.com/jew-refused-service-by-pro-palestine-staff-member/>

¹⁵ <https://www.timesofisrael.com/second-australian-nurse-charged-for-threatening-to-kill-israeli-patients-in-viral-clip/>

¹⁶ Carland et al, *Islamophobia In Australia*, Report V 2023 – 2024. <https://islamophobia.com.au/wp-content/uploads/2025/03/Islamophobia-in-Australia-Report-5.pdf>

- The Index received an 150% increase in in-person incidents reported from the previous period
 - Women and girls are particularly affected, suffering 75% of all in-person abuse
 - In February 2025, two Muslim women were assaulted in a suburban Melbourne shopping centre—one pushed violently to the ground.¹⁷
 - Another woman reported “I was sitting in the food court in a shopping centre with my 5 kids when an unknown lady yelled out ‘F*** Muslims’ and punched me in the head, knocking me out... My nose was broken. Me and my kids are seeing a psychologist for the trauma.”¹⁸
 - In May 2025, vandals sprayed Islamophobic messages on the fence of the Australian Islamic College of Sydney.¹⁹
 - There has also been a 250% increase in online Islamophobic incidents reported
 - A 16-year-old was charged after posting a threat referencing the Christchurch shooting against Masjid Al-Bayt Al-Islami at Edmondson Park via Instagram.²⁰
 - Following that incident, a comment on Lakemba Mosque’s official TikTok said, “Christchurch again please,” prompting an urgent police investigation.²¹
20. Christians have also experienced an increase in hostility, including:
- The stabbing attack on an Assyrian bishop whilst celebrating mass.²²
 - St Charbel’s College in Punchbowl received an anonymous bomb threat on April 4, 2024.²³
21. There has been a significant growth in negative perceptions of Christianity and a growth in discrimination against Christians since the ADA was introduced. In 2022, McCrindle published the results of a survey in a paper titled “The changing faith landscape of Australia.”²⁴ It showed that, whilst 30% of Australians considered themselves Christian, about the same percentage were cold to Christianity with 6% passionately opposed to it,

¹⁷ <https://www.theguardian.com/australia-news/2025/feb/19/pm-praises-khawaja-as-a-great-australian-but-rejects-suggestion-he-is-ignoring-islamophobia-ntwnfb>

¹⁸ Carland et al, p.26

¹⁹ <https://www.news.com.au/national/nsw-act/crime/vandals-spray-racist-graffiti-on-the-australian-islamic-college-of-sydney/news-story/3c1b60028d3d90a4bd22a288cd02985d>

²⁰ <https://www.news.com.au/national/nsw-act/news/christ-church-20-online-threat-sparks-fears-in-australianmuslim-community/news-story/92f49d0687882d6a52ad34adc81cf5d8>

²¹ <https://www.dailytelegraph.com.au/newslocal/the-express/lakemba-mosque-second-alleged-mass-shooting-threat-after-christchurch-again-comment/news-story/7d04cbe62f3b392d0d28fe6cf0a0d88e>

²² <https://www.theguardian.com/australia-news/2024/apr/29/sydney-church-stabbing-bishop-loses-eye-mari-emmanuel>

²³ <https://www.news.com.au/national/nsw-act/crime/students-and-teachers-at-st-charbels-college-in-punchbowl-evacuated-after-bomb-threat/news-story/d4f9362e968844744f6df887f70796c9>

²⁴ <https://mccrindle.com.au/app/uploads/reports/The-changing-faith-landscape-of-Australia-Report-2022.pdf>

13% having strong reservation or no interest in Christianity and 9% having some issues with Christianity.²⁵

22. Historically, despite periods of sectarianism between the Protestant and Catholic populations, differences in belief have not prevented the people of NSW largely being able to live harmoniously. Increasingly that common understanding has been replaced by distrust and worse.
23. Today in Australia, there is not only an “astonishing level of religious ignorance and oblivion,”²⁶ as Christian Brugger has observed, but the country has seen increasing division among those with differing with moral approaches to life – particularly as regards sexual morality.

Growth in religious schools and tertiary education providers

24. The percentage of students choosing to attend religious schools has grown considerably over the lifetime of the ADA. In 1974, 22% of students were enrolled in non-Government schools.²⁷ In 2024, that percentage had grown to 37%.²⁸ Independent religious schools have seen the biggest growth, expanding by 30% in the past decade.²⁹ The vast majority of non-Government schools are faith-based.
25. Since 1977, there have also been significant developments in the faith-based tertiary sector, The University of Notre Dame Australia (Notre Dame) has been established (by an Act of the Western Australian parliament,³⁰ and subsequently began operations in Sydney). The Australian Catholic University (ACU), has also been established (in Victoria as Australian Catholic University Limited (Corporation) and begun operations in NSW being recognised by the *Australian Catholic University Act 1990* (NSW).³¹ Recently, the Australian College of Theology became the Australian University of Theology. In addition to these universities there are many faith based providers of tertiary education in NSW including Campion College, Alphacrucis University College,³² Bedford College³³ and Excelsior University College.³⁴

Discrimination and bullying against religious students

26. Gross and Rutledge’s research has identified school-based prejudice, bias and bullying against religious students in public schools and experienced particularly by those who

²⁵ ibid

²⁶ Quoted in <https://www.ncregister.com/features/lifting-up-the-faith-down-under>

²⁷ <https://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/80fbc4826c05c115ca2570ec001b193c!OpenDocument>

²⁸ <https://www.abs.gov.au/statistics/people/education/schools/2024>

²⁹ <https://www.theguardian.com/australia-news/2025/jul/31/nsw-religious-schools-rise-enrolments-education>

³⁰ *University of Notre Dame Australia Act 1989* (WA)

³¹ <https://www.acu.edu.au/about-acu/leadership-and-governance/governance/corporation>

³² <https://www.ac.edu.au/>

³³ <https://www.bedford.edu.au/>

³⁴ <https://excelsia.edu.au/>

adhere to the Abrahamic faiths and Hinduism.³⁵ This accentuates the need for faith-based schools not only to continue in operation but to continue to be able to operate in a manner consistent with their religious tradition mission and ethos.

Decline in volunteering

27. Volunteering rates are in significant decline from 36.2% in 2010 for those 18 and over, to 28.8% in 2019.³⁶ The volunteering contribution measured by hours fell by 20% from 2014 to 2019 and by a further 18% in 2020.³⁷ There are many benefits to individuals and the community from volunteering.³⁸ Just to name one, the 2010 General Social Survey (GSS) showed “ 82% of volunteers were delighted, pleased or mostly satisfied with their lives, compared to 75% of non-volunteers.”³⁹

Prevalence of mental health issues particularly among young people

28. According to the National Study of Mental Health and Wellbeing (NSMHW) about 43% of Australians reported a lifetime mental illness in 2020–2022 and about 22% of people reported having a 12-month mental disorder in the same period.⁴⁰ Of concern for the future is that the prevalence of a 12-month mental disorder is increasing in prevalence among young adults. For those aged 16–24 with 26% reporting a 12-month mental disorder in 2007 compared with 39% in 2020–2022.⁴¹ No doubt there are many things which may be contributing to mental health rates in Australia and in NSW but it is important to recognise that many studies have linked religion with positive health and mental health outcomes and with happiness. For example, in 2019 The Pew Research Centre published a paper titled “Religion’s Relationship to Happiness, Civic Engagement and Health Around the World.”⁴² It found:

Whatever the explanation may be, more than one-third of actively religious U.S. adults (36%) describe themselves as very happy, compared with just a quarter of both inactive and unaffiliated Americans. Across 25 other countries for which data are available, actives report being happier than the unaffiliated by a statistically significant margin in almost half (12 countries), and happier than inactively religious adults in roughly one-third (nine) of the countries.

³⁵ <https://thejewishindependent.com.au/research-finds-pervasive-religious-bullying-in-australian-public-schools>

³⁶ Volunteering Australia “Key Volunteering Statistics” March 2024 <https://www.volunteeringaustralia.org/wp-content/uploads/Volunteering-Australia-Key-Volunteering-Statistics-2024-Update.pdf>

³⁷ Volunteering Australia “Key Volunteering Statistics” March 2024 <https://www.volunteeringaustralia.org/wp-content/uploads/Volunteering-Australia-Key-Volunteering-Statistics-2024-Update.pdf>

³⁸ Volunteering Australia, “Key Volunteering Statistics” March 2024

³⁹ Volunteering Australia “Key Volunteering Statistics” March 2024 <https://www.volunteeringaustralia.org/wp-content/uploads/Volunteering-Australia-Key-Volunteering-Statistics-2024-Update.pdf>

⁴⁰ Australian Government, Australian Institute of Health and Welfare, “Prevalence and impact of mental illness” <https://www.aihw.gov.au/mental-health/overview/prevalence-and-impact-of-mental-illness#changeovertime>

⁴¹ Australian Government, Australian Institute of Health and Welfare, “Prevalence and impact of mental illness” <https://www.aihw.gov.au/mental-health/overview/prevalence-and-impact-of-mental-illness#changeovertime>

⁴² <https://www.pewresearch.org/religion/2019/01/31/religions-relationship-to-happiness-civic-engagement-and-health-around-the-world/>

The gaps are often striking: In Australia, for example, 45% of actively religious adults say they are very happy, compared with 32% of inactives and 33% of the unaffiliated. And there is no country in which the data show that actives are significantly *less* happy than others (though in many countries, there is not much of a difference between the actives and everyone else).

Religion in the ADA

29. As is clear above, there has been significant change in the environment in NSW for religious believers and their organisations since the ADA was enacted without including religious belief as a protected characteristic. The ADA is not just about its specific terms and the protections they afford. Decisions about which attributes are protected by the ADA send a very clear message about the value that the State puts on people who share that attribute. The exclusion of religious belief and activity from those attributes protected by the ADA sends a clear message that religious belief is not considered as valuable or important an attribute as those attributes protected by the ADA.
30. The amendments made to the ADA to add protected attributes have failed to add religious belief and activity to those protected attributes. In 1999, the NSWLRC recommended that religion be added as a ground of discrimination⁴³. This recommendation was opposed at the time by faith groups, because of the combined impact of other recommendations to limit significantly the scope of the exemption for religious bodies in s56,⁴⁴ and to restrict the exception for religious educational authorities where this is genuine occupational qualification.⁴⁵ The NSWLRC proposals in 1999 protected the religious beliefs and activities of the individual at the expense of the religious beliefs and activities of religious bodies.⁴⁶
31. To the extent that religious belief or activity garners any protection in the ADA it is via the language of exemption or exclusion. This is a consequence of the drafting and the originally – and subsequently – identified protected attributes. This is problematic as it presents religion and religious belief as attributes which are not themselves attributes which attract protection as a primary right. It is also problematic because, as the Paper itself does in places, it impacts on the approach to considering what are in fact rights warranting primary protections as if they are somehow aberrations and unfair.
32. The ADA should be redrafted so as to provide positive rights protections for the free exercise of religious beliefs and activity, rather than protecting religious freedoms through mere exceptions.

⁴³ Recommendation 38

⁴⁴ Recommendation 46

⁴⁵ Recommendation 16

⁴⁶ <https://lawreform.nsw.gov.au/documents/Publications/Reports/Report-92.pdf>

Legal Context

A) The international human rights context

33. Australia is party to a number of international agreements which recognise the right to freedom of religion. For example, Article 18 of the 1948 *Universal Declaration of Human Rights* provides that:

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.

34. The Paper correctly references the *International Covenant on Civil and Political Rights (ICCPR)*, to which Australia has been a party since 1980. It sets an international standard on the rights of freedom of religion, association, and the rights of ethnic minorities. The words of the ICCPR must be given very careful attention with respect to reforming the ADA. Article 18 which is set out below is particularly important. Specific regard need be given to the very limited circumstances in which the freedom to manifest one's religion or beliefs may be curtailed as set out in Article 18.3

Article 18

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. [emphasis added]
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.

35. The United Nations Human Rights Committee, established under Article 29 of the ICCPR, has recognised that:

The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts

...⁴⁷

36. Under Article 2 of the ICCPR, Australia undertook to respect and ensure that everyone within Australia and subject to Australian jurisdiction, recognises the rights in the ICCPR.

⁴⁷ General comment no 22 [4]

Article 9 of the European Convention on Human Rights (ECHR), which recognises the right to freedom of thought, conscience and religion, is in substantially the same terms as Article 18(1) of the ICCPR.

37. Australia is a pluralist, multi-faith, multi-racial society.⁴⁸ The European Court of Human Rights has observed that the maintenance of pluralism is dependent on maintaining freedom of religion.⁴⁹ In *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 EHRR 10 the Grand Chamber of the European Court of Human Rights stated that:

[136] The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. **Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable.**⁵⁰ [emphasis added]

38. The European Commission and the European Court of Human Rights have both recognised that the freedom of religion guaranteed by ECHR Article 9 is a right enjoyed both by individuals and by churches on their behalf.⁵¹ As the Full Court of the Federal Court of Australia noted in *Iliafi*:

the European Commission of Human Rights [has recognized] that the right to freedom of worship required protection of both the possibility to worship alone and in community with others: see, for example, *X v United Kingdom* (1982) 4 EHRR 126 at [5].⁵²

This is explained by the nature of a church. A church is, as the European Commission stated, in *Prussner v Germany* (1984) 8 EHRR 45 at 79 (*Prussner*), "an organised religious community based on identical or at least substantially similar views" and is "itself protected in its right to manifest its religion, to organise and carry out worship, teaching practice and observance, and it is free to enforce unanimity in these matters" (emphasis added). In *Church of Bessarabia* [118], the European Court expressly linked individual religious freedom to the protection of the autonomy of the collective church, stating that:

[118] [S]ince religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference ... **Indeed the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Articles 9 affords** ... [Citation omitted;

⁴⁸ Australian Bureau of Statistics, Report 2071.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013 available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>. This has been recognised by a number of Australian Courts see e.g. *Canterbury Municipal Council v Moslem Alawy Society* (1985) 1 NSWLR 525 at 543 [E] and *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2014] VSCA 75 at [560] per Redlich JA.

⁴⁹ *Case of Eweida And Ors v The United Kingdom* ECHR 48428/10,59842/10,51671/10 and 36516/10 15 January 2013 (*Eweida*) 30 [79]

⁵⁰ *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 EHRR 10 [136] as quoted in *Iliafi v Church of Jesus Christ Of Latter Day Saints Australia* (2014) 311 ALR 354 (*Iliafi*) [77]

⁵¹ *Ibid* [76]

⁵² *Ibid* [75]

emphasis added.]

The European Court of Human Rights has repeatedly affirmed this statement.⁵³

39. Religious communities and individuals do not only need to be protected from discrimination, which is the particular focus of the ADA. There is also an equally, if not more important, need for religious communities to be protected from the negative effects of antidiscrimination laws. These laws should not interfere with the manifestation of fundamental freedoms in the public sphere, such as freedom of religion and association, except in extremely limited circumstances as discussed in UN General Comment No.22.1

Extent of limitation of religious freedom and proportionality tests

40. Under international law, freedom to manifest one's religion or beliefs is not to be curtailed when it might be considered to be reasonable by a legislator or a Court for it to be limited or when a Court might consider it to be a proportionate response but only where it is "prescribed by law and are **necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." [emphasis added]. The *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (1984)* (the *Siracusa Principles*) explain that limitations on rights need to be necessary, proportionate to the aim, and the least intrusive means available.⁵⁴
41. Importantly, the necessity test is not replaced by the proportionality test. Restrictions on religious activity require clear evidence that the specific religious activity poses a specific, concrete risk to public health, safety, or the rights of others. They also require that any limitations on religious freedom are the least intrusive possible to address the specific, concrete risk. In balancing competing rights, the *Siracusa Principles* give priority to the most fundamental rights – including religious freedom – stating:

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 rights not subject to limitations in the Covenant.⁵⁵

42. Finally, the *Siracusa Principles* require that any limitation of rights is non-discriminatory and does not target particular groups (including religious groups) disproportionately.⁵⁶

Protections for collective religious freedom

43. It is important to highlight that the protection of religious freedom includes the protection of religious organisations and institutions as expressions of faith. As UN HRC General Comment No. 22 states:

⁵³ see also J Rivers, "Religious Liberty as a Collective Right" (2001) 4 *Law and Religion: Current Legal Issues* 227.

⁵⁴ *Siracusa Principles* s10-11, 23-31

⁵⁵ *Siracusa Principles* s37

⁵⁶ *Siracusa Principles* s8-9

States should accommodate the religious identity of institutions where this forms part of the manifestation of religious belief.

44. This position is supported by the UN's Special Rapporteur on freedom of religion and belief. In 2014, Heiner Bielefeldt, the Special Rapporteur at that time, wrote an important report on religious freedom in the workplace. He argued that discrimination on the basis of religious belief in the workplace should be unlawful, but "religious institutions constitute a special case. As their *raison d'être* and corporate identity are religiously defined, employment policies of religious institutions may fall within the scope of freedom of religion or belief, which also includes a corporate dimension."⁵⁷ Such legislative provisions confer what Hohfeld called a liberty right for a faith-based organisation to select staff on the basis of religious belief should it choose to do so.⁵⁸ This is an appropriate application of the rights of freedom of religion and association.

B) The context of Australian Law

45. The ADA is NSW law and it needs to be fit for purpose for this State. While acknowledging that the situation in NSW is not identical to the situation of other States and Territories, the context of federal and other state legislation cannot be ignored.
46. The inclusion of a religious freedom provision in the *Australian Constitution* itself demonstrates that this freedom was considered one of particular moment in Australia at Federation. Whilst the *Australian Constitution* gives the Commonwealth powers in "what may be broadly described as public economic or financial subjects"⁵⁹ and protects or confers very few rights on individuals, s116 contains a proscription on the Commonwealth establishing a state religion or imposing any religious test for the holding of any Commonwealth office. It also prevents the Commonwealth from prohibiting the free exercise of religion.⁶⁰
47. The Articles of the ICCPR, the Universal Declaration of Human Rights and other potentially relevant international instruments⁶¹ have not been domesticated in Australia or in NSW. Rather than introducing over-arching protections of freedom of religion of the type contemplated by the ICCPR and other international instruments, Australia and NSW have instead provided some protections in specific legislation in designated areas.⁶² These

⁵⁷ Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2014 [68]. Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays* (WW Cook, ed, Yale UP, 1923).

⁵⁸ Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays* (WW Cook, ed, Yale UP, 1923).

⁵⁹ *Russell v Russell* [1976] 134 CLR 495, 546 (*Russell v Russell*)

⁶⁰ Section 116 of the Australian Constitution provides that "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

⁶¹ Such as the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based On Religion or Belief, G.A.Res. 36/55, U.N.GAOR, 36th Sess. Supp. No.51, U.N. Doc. A/RES/36/55 (Nov 25, 1981) [*Religion Declaration*]

⁶² For example, although voting is compulsory in Australia if an elector has a religious belief that it is his or her

examples of the accommodation of religious freedom and belief are some of very few good examples in Australia. This approach is to be contrasted with the approach that the Commonwealth and NSW have each taken towards protecting other characteristics via anti-discrimination law.

48. Whilst law cannot resolve every conflict, it does have an important role to play in identifying what is important to people and to a society. Where a society creates rights and protects people with certain characteristics without recognising those of others, it is sending a message to its citizens and to those visiting or examining that society about what is important to it. As the Australian Bahai Community noted in their Submission to Australian Human Rights Commission, *Inquiry Into Freedom of religion and Belief in 21st Century Australia* in 2011:

[T]here is a tendency to treat the right to freedom of religion or belief as less important than certain other civil and political rights and this right is often treated as a 'second class citizen' in the sphere of human rights.⁶³

Ruddock Review

49. In 2018 The Ruddock Religious Freedom Review recommended that:

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.⁶⁴

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.⁶⁵

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.⁶⁶

religious duty to abstain from voting this will constitute a reasonable excuse under s 245(14) of the *Electoral Act* and s 45(13A) of the *Referendum Act* see Australian Electoral Commission, "Electoral Backgrounder: Compulsory voting" [41] available at http://www.aec.gov.au/About_AEC/Publications/backgrounders/compulsory-voting.htm

Exemptions are provided to religious bodies from a range of discrimination provisions to enable them to operate schools and to comply with their own doctrines in managing their own operations (e.g. *Sex Discrimination Act, 1984* (Cth) ss 5, 5A, 14, 21(3), 23(3)(b), 37(1)(a), 37(1)(d), 37(2) and 38, *Age Discrimination Act 2004* (Cth) s35, the *Anti Discrimination Act, 1977* (NSW) ss 8, 38S(2)(c), 49ZT(2)(c), 49ZXB(2)(c), 49ZYB, 49Y and 56()) and the *Equal Opportunity Act, 2010* (Vic) ss 83(1)-(2). For a summary of the exemptions from various discrimination provisions which are afforded to religious (and other) schools in Australia see Greg Walsh, *Religious Schools And Discrimination Law* (Central Press, 2015) 1-11.

⁶³ Submission No 1921

⁶⁴ Recommendation 2, the Ruddock Religious Freedom Review, <https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf>

⁶⁵ Recommendation 3

⁶⁶ Recommendation 16

The Commonwealth should amend the Racial Discrimination Act 1975, or enact a Religious Discrimination Act, 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 appropriate exceptions and exemptions, including for religious bodies, exemptions, including for religious bodies, religious schools and charities.⁶⁷

50. It is significant that the Ruddock Religious Freedom Review recommended changes to both Commonwealth and to NSW anti-discrimination law. It did not envisage one Commonwealth law in this area over-arching all State and Territory laws. It envisaged amendments to legislation at a Commonwealth and State level with neither being dependent on the other.
51. NSW should not delay adopting these recommendations of the Ruddock Religious Freedom Review in the expectation that the Commonwealth may enact reform to protect religious believers. The recommendations are independent and NSW and South Australia were singled out because they, unlike other States, have not protected religious believers from discrimination. NSW ought do so. The possibility that the Commonwealth may enact a *Religious Discrimination Act* and there may be further Commonwealth law reform should not stymie the NSW parliament from progressing long overview reform in this area.

Federal Religious Discrimination Bill

52. In response to the Ruddick Review, the Morrison Government introduced the first Exposure Draft of the Religious Discrimination Bill in August 2019. Following extensive consultation with stakeholders, the Government released two further Exposure Drafts in late 2019 and 2021. The final iteration of the Bill, introduced in February 2022, passed the House of Representatives but was stalled in the Senate after the introductions of last-minute amendments that disrupted the careful balance negotiated – notably the removal of s38 of the Sex Discrimination Act.
53. An important element of the Bill, which gained wide acceptance, was the movement away from an “exceptions” model for religious freedom and adopting a ‘general limitation clause’ model, that makes a positive statement that certain acts are not discrimination. For example:

...a religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.⁶⁸

...a religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.⁶⁹

⁶⁷ Recommendation 15

⁶⁸ Religious Discrimination Bill 2022 (Cth), 7(2)

⁶⁹ Religious Discrimination Bill 2022 (Cth), 7(4)

54. The strength of this approach is that it recognises that a faith community or organisation is not discriminating when it operates according to its faith and seeks to function as a gathering of people who hold to the same faith.
55. This model was an accurate implementation of the declaration from the UN The Human Rights Committee:

Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and the aim is to achieve a purpose which is legitimate under the Covenant.⁷⁰

Australia Law Reform Commission Review

56. Following the failure of the Religious Discrimination Bill (RDB) and the subsequent election and change in government, the new Attorney General asked the Australian Law Reform Commission (ALRC) to consider how to:

amend the Sex Discrimination Act 1984 (Cth) and other Federal anti-discrimination laws (as necessary), including the Fair Work Act 2009 (Cth), to ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

- must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
- must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy;
- can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.⁷¹

57. The ALRC recommended significantly restricted protections for faith-based schools to employ based on faith. The recommendations included:⁷²

- Repealing s38 of the Sex Discrimination Act completely, removing any protection for religious schools in that Act.
- Excluding religious schools from Religious schools from protections in the Fair Work Act and replace them with the protection allowing schools to:

... give preference, in good faith, to a person of the same religion, where the giving of such preference:

- is reasonably necessary to build or maintain a community of faith;

⁷⁰ Human Rights Committee, general comment No. 18 (1989), para. 13.

⁷¹ Australian Law Reform Commission, Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws, p5

⁷² Ibid p13

- is proportionate to the aim of building or maintaining a community of faith, including in light of any disadvantage or harm that may be caused to any person or persons not preferred; and
 - does not amount to conduct that is unlawful under the Sex Discrimination Act 1984 (Cth).⁷³
58. These recommendations were widely criticised and rejected by faith communities. As discussed above, limiting protection of religious freedom to “reasonable” and “proportionate” does not acquit Australia’s responsibilities under international law.
59. On tabling the review, the Attorney General seemed to distance himself and the Government from the recommendations, saying “The Australian Law Reform Commission’s report tabled today is not a report from the Government. It is advice to the Government, and we will continue to consider it.”
60. The Commissioner who led the inquiry, Justice Stephen Rothman, subsequently stated that the terms of reference constrained the Commission by not permitting it to consider the broader scope of a Religious Discrimination Act, and that he would have preferred to have recommended a “positive right” for faith-based schools to hire based on their ethos.

If there weren’t the constraints associated with the (ARLC) report and you were looking at religious discrimination more generally then they should have a positive right...

The (legislation) would simply say it’s lawful for a religious education institution to discriminate in favour of a person on the basis of their religious beliefs or adherence to religious tenets.⁷⁴

61. In the following years, the Federal Government has refused to act on the recommendations of the ALRC.

NSW Religious Freedoms and Equality Bill

62. In 2020, the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) was introduced, and received strong support from faith communities. The Bill made religious belief or activity a protected attribute, and notably included a ‘general limitation clause’ similar to that of the Federal RDB:

22M For the purposes of this Part, a religious ethos organisation is taken not to discriminate against another person on the ground of the person’s religious beliefs or religious activities by engaging in conduct if the organisation genuinely believes the conduct—

- (a) is consistent with the doctrines, tenets, beliefs or teachings of the religion of the organisation, or
- (b) is required because of the religious susceptibilities of the adherents of the

⁷³ Ibid p15

⁷⁴ <https://www.theaustralian.com.au/nation/politics/nsw-supreme-court-judge-stephen-rothman-urges-anthony-albanese-to-grant-positive-rights-to-faith-schools/news-story/05ea33192eeb1f78f82c1a29ce262152>

religion of the organisation, or

- (c) furthers or aids the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation.⁷⁵

- 63. A Joint Select Committee “found that the terms of the Bill were valid and succeeded in protecting people of religious faith and no faith from discrimination”⁷⁶. They also found that, of the 19,403 responses to the Committee’s online survey, 68.1% supported the Bill, and 5.8% supported it with amendments. “The Bill also attracted support from the peak Christian, Islamic and Jewish bodies in NSW.”⁷⁷
- 64. The Committee recommended “that the NSW Government introduce a Government Bill inserting discrimination on the grounds of religious belief or activity”⁷⁸, adding:

The Committee recommends that the Government Bill should include the following:

- (a) principles that give equal weight to all protected attributes under the *Anti-Discrimination Act 1977* (NSW) (the Act) while recognising the special characteristics and protection requirements of religion
- (b) reference to relevant international instruments (to the extent ratified) that protect the rights and interests of individuals and protected attributes under the Act
- (c) consideration of relevant recommendations of the Ruddock Review, including having regard to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* to guide the operation of competing rights when limitations are imposed on them
- (d) defined terms for religious beliefs, religious activities and religious organisations
- (e) recognition that religion is an attribute that involves the expression of religious beliefs and lawful actions motivated by religious beliefs and the association of individuals and organisations in accordance with their religious doctrines, tenets, beliefs or teachings
- (f) protection for not-for-profit religious organisations from discrimination on the grounds of religious beliefs or activities by engaging in certain lawful conduct because of their religious doctrines, tenets, beliefs or teachings
- (g) provisions that balance the participation of religious organisations in State functions or programs and universal access to publicly funded goods and services

Commonwealth Fair Work Act

- 65. Under the *Fair Work Act 2009* (Cth), protections exist against “adverse action” by an employer on the basis of religion. However, section 351(1) of the Act includes a carve-out: these protections do not apply if the adverse action is not unlawful under any anti-discrimination law in force in the place where the action is taken.

⁷⁵ Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW), 22M

⁷⁶ JSR Report page v

⁷⁷ Ibid

⁷⁸ Ibid [vii]

66. Since NSW currently lacks specific protections for religious belief in its anti-discrimination legislation, this effectively nullifies federal Fair Work protections for religious employees within NSW. As a result, religious individuals in NSW are uniquely disadvantaged compared to other jurisdictions.

Other state and territory law

67. In referencing the ACT, Victoria and Queensland human rights legislation the Paper fails to note that the language used in each is at odds with Australia's international law obligations under Article [18.3] of the ICCPR. As noted above, freedom to manifest one's religion or beliefs is not to be curtailed when it might be considered to be reasonable by a legislator or a Court for it to be limited but only where it is "prescribed by law and are **necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" [emphasis added]. As a result they do not provide a good model for reform of the ADA.

Australian Jurisprudence

68. Many Australian Courts have made numerous statements recognising the importance of religious freedom. It has been described as "the paradigm freedom of conscience,"⁷⁹ "the essence of a free society,"⁸⁰ "a fundamental concern to the people of Australia,"⁸¹ "a fundamental freedom"⁸² and as "a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity."⁸³ Australian Courts have recognised "the importance of the freedom of people to adhere to the religion of their choice and the beliefs of their choice and to manifest their religion or beliefs in worship, observance, practice and teaching."⁸⁴
69. The nature of the right to freedom of religion in Australia was considered by Kenny, Greenwood and Logan JJ of the Full Court of the Federal Court of Australia in *Ilaifi*. This case concerned the rights of a church to determine the language to be used in its religious services. As the Court there noted:

The right to freedom of religion is a complex right regarding religious beliefs and practices of worship. In *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHHR 13 (*Church of Bessarabia*), the European Court of Human Rights described religious freedom in the following way (at [114] and [117]):

⁷⁹ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vict)* 154 CLR 120 [1982-1983] 130 per Mason ACJ and Brennan J and *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, 557

⁸⁰ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vict)* 154 CLR 120 [1982-1983] 150 per Murphy J

⁸¹ *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 543

⁸² *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, 552 and 555

⁸³ *Christian Youth Camps Ltd v Cobaw Community Health Services Limited* [2014] VSCA 75 [560] per Redlich JA.

⁸⁴ *Evans v New South Wales* 168 FCR 576 [2008], 580

[114] While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to “manifest [one’s] religion” alone and in private or in community with others, in public and within the circle of those whose faith one shares. Bearing witness in words and deeds is bound up with the existence of religious convictions. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion ... Article 9 lists a number of forms which manifestation of one’s religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief ...

[117] [I]n principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. [Citations omitted.] ⁸⁵

70. As is evident from the events described (particularly in paragraphs 11 to 25, above, the situation for religious believers and organisations have certainly not improved since the enactment of the ADA. The ADA was passed at a time of less religious diversity and less conflict between belief systems than there is today and it betrays a failure to respect religious believers. As Laycock and Berg have observed:

[C]ommitted religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with the demands of the Being that they believe made us all and holds the whole world together.⁸⁶ No religious believer can change his understanding of divine command by any act of will...Religious beliefs can change over time...But these things do not change because government says they must, or because the individual decides they should ... [T]he religious believer cannot change God’s mind. ⁸⁷

71. Since religious belief is such an integral part of a person, a religious person can only flourish when they are freely able to worship and live their faith.
72. Whilst the Commonwealth and NSW have both passed anti-discrimination legislation protecting persons with a range of characteristics from discrimination, there is currently no overarching Commonwealth or NSW law protecting religious freedom or proscribing religious discrimination in NSW or by the Commonwealth. It is an important principle both in Australian and international law. Amending the ADA to include religious beliefs in the characteristics protected from discrimination by the Act is an obvious step which ought to have been taken long ago. It is regrettable that protections of persons with this attribute were not included in the ADA when it was passed by the Wran government in 1977 and that, despite recommendations from the Ruddock Religious Freedom Review in 2018 and many other inquiries which have identified the manifest deficiencies in protection for

⁸⁵ *Iliafi* [74]

⁸⁶ Douglas Laycock and Thomas Berg, “Same-Sex Marriage and Religious Liberty” 99 *VIR. L.REV.* 1.[2013], 3

⁸⁷ *Ibid* 4

religious freedom in this country and State, reform of this nature has not already been progressed.

Intersecting human rights in NSW

73. One of the most complex areas of protecting religious freedom is navigating the situations where competing rights intersect. As Anthony Lester has observed:

Reconciling equality and religious freedom is particularly difficult. In a plural democratic society, cultural differences should be accorded equality for respect unless they are abusive or repressive. What to one group is praiseworthy to another group may seem anti-social; for example, wearing a niqab from head to toe.⁸⁸

74. The Consultation Paper and accompanying documents give an initial acknowledgement of this complexity:

This is a complex and sensitive area, which raises issues about the best way to accommodate intersecting human rights. These include the right to non-discrimination (including based on sex, sexual orientation, gender identity, marital or relationship status, pregnancy, race, or religion). They also include the right to freedom of thought, conscience, and religion.⁸⁹

75. However, little time is given to discussing the complexity and the international precedent (as discussed above). The Paper briefly considers the

The freedom to manifest beliefs, such as through worship, observance, practice and teaching, includes the freedom to choose religious leaders and teachers, and to establish religious schools. Under international human rights law, this aspect of the right can be limited in certain circumstances, including to protect other people's human rights. United Nations guidance explains that freedom of religion or belief should never be used to justify ends that are inconsistent with any human rights instruments.⁹⁰

76. The Paper does not go on to explore the precedent in international law as to what the "certain circumstances" are for limiting religious freedom, or indeed the circumstances for limiting other rights in order to protect the right of religious freedom. The references to "United Nations guidance" is extremely selective, and does not cover the full content of that guidance, as discussed above.

77. The language and structure of the Paper's discussion suggests that religious freedom is expected to give way to other human rights, but gives no discussion for other rights giving way to religious freedom. This places religious freedom – one of the few non derogable rights – as a second-order right, in contradiction to the ICCPR and the Expert Panel on Religious Freedom:

Importantly, there is no hierarchy of rights: one right does not take precedence over another. Rights, in this sense, are indivisible... Australia does not get to choose, for example, between protecting religious freedom and providing for equality before the law.

⁸⁸ Anthony Lester, *Five Ideas To Fight For* (OneWorld, 2016) 56

⁸⁹ Para 7.9

⁹⁰ Para 7.12

It must do both under its international obligations.

A) The weakness of exemptions

78. Currently, to the extent that religious belief or activity garners any protection in the ADA it is via the language of exemption or exclusion. This is a consequence of the drafting and the originally – and subsequently – identified protected attributes.
79. The language of ‘exemption’ is problematic as it presents religion and religious belief as attributes which do not themselves attract protection as a primary right. It is also problematic because, as the Paper itself does in places, it impacts on the approach to considering what are in fact rights warranting primary protections as if they are somehow aberrations and unfair.
80. The model of discrimination-and-exception makes religious freedom – a fundamental and non-derogable human right – a footnote to other human rights and protected attributes.
81. There are many manifestations of religious beliefs in the public square that are clearly religious freedom protected by international law, but in the current drafting of the ADA would involve unlawful discrimination if not for the provision of exemptions in anti-discrimination law (s56 of the ADA).
82. For example, the fact that the Catholic church only ordains unmarried biological males as Priests would equate to discrimination under sex, gender identity and marital status. Under a discrimination-exception model, this long-standing practice of one of the world’s largest faiths is declared to be unlawful as discrimination, and then only grudgingly allowed as an exception to that law.
83. In contrast, as noted earlier, the *Siracusa Principles* outline the framework for balancing competing rights, and give priority to the most fundamental and non-derogable rights, including religious freedom:

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 rights not subject to limitations in the Covenant.⁹¹

84. A particular problem with the reliance on exemptions and exceptions in drafting legislation is that they have come under sustained attack from those who (wrongly) characterize them as a “license to discriminate”. Although there are some examples where the claims that religious believers make can be characterised in such terms, it is for the most part a gross distortion of the issue.
85. People of religious faith want to be able to ‘live and let live’ with other members of the community, neither claiming privileges not open to the rest of society, nor accepting that their rights be subordinated to those of other members of the community. The issue for most faith groups is not the right to discriminate, but the freedom to select on the basis

⁹¹ *Siracusa Principles* s37

of religious belief and practice, and freedom to take adverse action against a member or employee where issues of personal conduct are incompatible with the mission and ethos of the organisation. That freedom to select should be expressed as a right, not an exception.

86. Consistent with international Human Rights law, protecting an individual's freedom of religion does not require that a religious body modify its beliefs to accommodate the divergent religious beliefs of the individual. The individual's religious freedom is their freedom to leave a religion or disassociate from a religious body whose beliefs they no longer share.

B) A Positive Right

87. For the reasons noted above, exceptions are not the most appropriate way to draft protections for religious bodies.
88. **The preferable mechanism is for the ADA to recognise a positive right for religious expression and association, and declare that it is not discrimination for a religious body to pursue its religious purpose by, for example, employing people of the same faith.**
89. As discussed above, this is the approach taken by the federal RDB, in its various drafts over the past decade. The RDB provided for the introduction of a 'general limitation clause' that made a positive statement that certain acts are not discrimination.⁹²

“a religious body **does not discriminate** against a person under this Act by engaging, in good faith, in conduct that is undertaken to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body [... which ...] includes giving preference to persons of the same religion as the religious body.”

90. This is also the approach taken by the NSW Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill.
91. In both cases, this approach had near-unanimous support from faith groups because it acknowledged the legitimacy of the right of people of faith to manifest their faith in association with others through a religious institution, and for this to be taken into account where there are potentially intersecting human rights.
92. This approach is also the most effective way of implementing to the Human Rights Committee's observation that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and the aim is to achieve a purpose which is legitimate under the Covenant' and also recognising

⁹² Ruddock – 1.130 – page 42 – “General limitations clauses are intended to set out the broad circumstances in which conduct that might be construed as discriminatory does not, in fact, amount to discrimination. Typically, such clauses have the following basic features:

- Conduct undertaken in good faith will not be discriminatory if it is undertaken to achieve a legitimate aim defined, for example, by reference to furtherance of another human right.
- The conduct has been engaged in with the intention of achieving the legitimate aim.
- The conduct must be a <proportionate means of achieving that aim.”

the ‘indivisibility and universality of human rights, and their equal status in international law’, as recommended by the Expert Panel on Religious Freedom.

C) A note on existing Australian exception regimes

93. It can be argued that NSW law has been somewhat successful from a multi-faith perspective to date, because the exceptions in the current law mean that the ADA only encroaches to a limited degree on the autonomy of faith-based organisations, such as Christian schools and welfare organisations, to maintain their religious identity, ethos and mission.
94. By way of contrast, the State of Victoria is now in a position of continuing conflict with many of its religious faith communities – Christian, Jewish and Muslim – because it has amended its *Equal Opportunity Act* to wipe out, or otherwise severely restrict, most religious exemptions. Laws which fail to allow for a healthy multi-faith, pluralist, multiculturalism will exacerbate social and religious tensions and create deep divisions. If the law strays too far from the cultural traditions and beliefs of those who are governed by it, including the traditions and beliefs of religious and cultural minorities, the long-term effect will be to diminish respect for law and for government. Voluntary obedience to law will decline, and this has long-term implications for the society.
95. The Paper quotes from and appears to endorse a legislative approach followed in the ACT and common in States and Territories which have enacted Charters of Rights, or similar, which are at odds with Australia’s international law obligations under Article 18.3 of the ICCPR. Freedom to manifest one’s religion or beliefs is not to be curtailed whenever it might be considered to be reasonable by a legislator or a Court for it to be limited but only where it is “prescribed by law and ... necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” [emphasis added]
96. While, to date, NSW law has managed well to protect the religious freedom of faith communities by way of exceptions and exemptions, this is not ideal as a way of legislating for the protection of fundamental human rights. Rights that are said in the ICCPR to be non-derogable should not be protected in law only by way of exceptions to otherwise applicable rules.

Conclusion

97. Rather than using an exceptions model for religious freedom, the ADA should be redrafted so as to provide positive rights protections for the free exercise of religious beliefs and activity.
98. **The ADA should provide that religious ethos organisations are taken not to discriminate in circumstances where they engage in conduct that they genuinely believe is necessary to maintain their religious traditions, beliefs, customs, mission or ethos.**

Answers to questions

5.1: Guiding Principles

99. There are a number of key guiding principles that would assist in considering the inclusion of religion as a protected attribute, and in balancing the right to religious freedom with other rights. These principles are considered in detail in the previous section.
100. In summary, these principles are: the changing shape of multi-cultural and multi-faith Australia; the international treaties to which Australia is a signatory, particularly the International Covenant on Civil and Political Rights; the current absence of protection of religious freedom both at a federal and state level; and the deficiencies of religious discrimination regimes in other jurisdictions.

5.2: Potential new attributes

101. Religious belief and activity should be added as protected attributes from discrimination. Adverse behaviours towards religious believers have dramatically increased since the ADA was introduced and these amendments will bring NSW into line with international law and the recommendations of the Ruddock Religious Freedom Review.
102. As religious belief is an attribute which requires religious actions and restraints from action from believers, it would be insufficient for the ADA to provide protections from discrimination for religious belief or affiliation (or lack thereof) alone. The ADA must also protect religious believers from discrimination arising from their engagement or lack of engagement in religious activity.
103. The protected attributes should preclude discrimination against an individual, group of people or religious body based on their religious belief or affiliation (or lack thereof) or engagement, or lack of engagement in religious activity.
104. The ADA should provide that religious ethos organisations are taken not to discriminate in circumstances where they engage in conduct that they genuinely believe is necessary to maintain their religious traditions, beliefs, customs, mission or ethos.

5.3: An open-ended list

105. An open-ended list of attributes should not be included. Additions to the ADA should be intentionally and carefully considered as every introduction of new protected attributes risks conflicting with existing established rights.

6.3: Discrimination in education

106. In the answers to the following questions on exceptions or exemptions, the approach that will best fulfill international obligations is the implementation of a positive right in the form of a general limitation clause.
107. However, if the ADA does not provide this positive recognition of the legitimacy of religious purposes then it is essential that the protections afforded by s56 ADA to religious bodies are maintained. They provide important protections to enable religious bodies to perform their works.
108. It is important to be clear about the restrictions at international law on a state impeding freedom of manifestation of religion or belief. As ICCPR Article 18(3) makes clear, this can only be done where it is **necessary** to protect public safety, order, health, or morals or the **fundamental** rights and freedoms of others and only where any such limitations are set out in law.
109. The human rights that require such protection also importantly include “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”.⁹³
110. It should be lawful for single-sex religious schools to refuse or fail to accept an application from someone who is from the opposite sex or who is experiencing gender incongruence.
111. The consistent teaching of the Abrahamic faiths is that there are two sexes: male and female. They have sought to hold onto this core truth while adopting a caring and pastoral approach to anyone in their congregations or communities who experiences gender incongruence. Religious communities, as well as ethnic minorities, have generally been consistent in holding to the scientific position that, despite natural human variation and abnormalities such as disorders of sex development, there are just two sexes.⁹⁴ For example, the Chinese-Australian population in New South Wales circulated a petition against the Safe Schools program in 2016, complaining that it promoted a particular ideology which was contrary to their culture and beliefs. It attracted over 17,000 signatures.⁹⁵
112. Other children at school are impacted by students who claim to have a gender identity different to natal sex. For girls in particular, there are issues about having to share bathrooms and changing rooms with natal males, issues about sleeping accommodation at camps, and safety concerns when physically larger and stronger males want to participate in female-only sports.

⁹³ ICCPR Article 18(4).

⁹⁴ Congregation for Catholic Education, ‘Male And Female He Created Them’: Towards A Path Of Dialogue On The Question Of Gender Theory In Education (2019); Anglican Diocese of Sydney, Social Issues Committee, Gender Identity (2017).

⁹⁵ <https://www.abc.net.au/news/2016-08-23/safe-schools-mp-lodgespetition-against-program-signed-by-17000/7777030> (last accessed, July 31st 2023).

6.10: Discrimination by registered clubs — exceptions

113. Clubs established for people of a particular religion or belief ought to be protected so as to enable them to maintain their ethos and identity.

7.1: Religious personnel exception

114. In the answers to the following questions, the approach that will best fulfill international obligations is the implementation of a positive right in the form of a general limitation clause.
115. However, if the ADA does not provide this positive recognition of the legitimacy of religious purposes then it is essential that the protections afforded by s56 ADA to religious bodies are maintained. They provide important protections to enable religious bodies to perform their works.
116. It is important to be clear about the restrictions at international law on a State impeding freedom of manifestation of religion or belief. As ICCPR Article [18.3] makes clear this can only be done where it is **necessary** to protect public safety, order, health, or morals or the **fundamental** rights and freedoms of others and only where any such limitations are set out in law.⁹⁶
117. The ADA should provide that religious ethos organisations are taken not to discriminate in circumstances where they engage in conduct that they genuinely believe is necessary to maintain their religious traditions, beliefs, customs, mission or ethos.
118. The language of exceptions and exemptions in the ADA is not the preferred approach but if it is maintained in the ADA, the ADA should provide exceptions for:
- the training and appointment of members of religious orders
 - the appointment of any other person in any capacity by a body established to propagate religion
119. It would be appropriate to include further language in s56 ADA to ensure that all religious traditions receive the benefits of those provisions.
120. The adjustments suggested by the 1999 NSWLRC and referred to in 7.18 of the Paper would be appropriate.
121. The discussion in 7.22 of the Paper does not explain what it does and does not consider to be a role with a “religious character” in a religious body. Clearly as was found in *OV*

it refers to the appointment of “any other person”, that is, other than the appointment of persons as priests, ministers of religion or members of a religious order, being the subject matter of paragraphs (a) and (b) [of s56 ADA]...⁹⁷

⁹⁶ ICCPR Article 18(3).

⁹⁷ *OV v Wesley Mission Council* [2010] NSWCA 155, 19 NSWLR 606 [70]

122. S56 would capture “an appointment as an officer of the relevant body, or to carry out activities on behalf of the body” including the appointment of a chief executive officer or a principal officer.⁹⁸ This is appropriate and necessary protection for religious bodies.

Inherent requirements, reasonableness and proportionality tests

123. Inherent requirements and genuine occupational requirements are an inadequate means of protecting religious bodies. This is because for some religious bodies to maintain their ethos and identity all staff need to be active in their faith, and for others, a certain “critical mass” percentage is needed. For example, as discussed in more detail below, Catholic universities seeking to operate in accordance with *Ex Corde Ecclesia* need to have at least half of their staff who are Catholic
124. As has been noted above, freedom of religion necessitates freedom of religious bodies. As Mason ACJ and Brennan J observed in the Scientology case, the existence of codes of conduct which adherents of particular religious faiths are called upon to follow is a feature of religions.⁹⁹ An inherent aspect of religions is that they take moral positions including their tenets and doctrines that their adherents seek to follow. Part of being an adherent of a religious faith is therefore that followers are called upon to act differently to those who do not follow that religion. Those who choose not to follow those proscriptions and prescriptions are not obliged to maintain their religious affiliation. In contemporary society – as in any age – some moral traditions and requirements of religious faiths are different to the moral positions of others in society – sometimes many others. It is in historical periods such as this that religious organisations are in most need of State protection.
125. It is a mischaracterisation to consider a religious body’s need – or objective, where that need cannot be met from applicants – to employ persons who share and manifest their religious faith through their activities, as discrimination against those of other religious faiths or who otherwise to not adhere to the faith in their activities. It is important that staff working in any mission or Objects driven institution recognise that. As Levin has observed:

[T]here is...an important role for understanding ourselves as formed by institutions and acting accordingly – for asking ourselves, in little moments of decision, “What should I do here, give my role or my position... And there is a dire need, as well, for men and women at every level in each of our society’s institutions to channel their energies into that institution’s objectives and purposes – defining their ambitions by its distinct modes of integrity, seeing it aspirations as theirs, adopting its ethos for their own, and understanding its boundaries and not just its powers as formative.¹⁰⁰

⁹⁸ *OV v Wesley Mission Council* [2010] NSWCA 155, 19 NSWLR 606 [71]

⁹⁹ *Church of the New Faith v Commissioner of Pay-roll Tax* (1984) 57 ALJR 785, 789

¹⁰⁰ Yuval Levin, *A Time To Build*, Basic Books, 2020,42

126. Requiring religious bodies to employ staff who do not share their religious tradition and ethos – or who reject the tenets and doctrines of the faith – is to deny religious bodies their capacity to remain “religious”.
127. The Victorian, ACT and Queensland legislation referenced include a *reasonable and proportionate* test which is in contradiction of the *necessity* test set by ICCPR Article 18(3) which makes clear that infringement of the right to manifest religious belief is permissible only where it is **necessary** to protect public safety, order, health, or morals or the **fundamental** rights and freedoms of others and only where any such limitations are set out in law.¹⁰¹

Adherence to religious beliefs and/or practices

128. The approach laid out in 7.28 of the Paper is to be preferred.
129. The ACT approach focusses only on religious conviction and, in excluding manifestation through action, fails to adequately protect religious bodies from those who claim a belief but effectively deny it by their actions.
130. Excluding religious education institutions and religious bodies whose sole or main purpose is commercial – unless they receive adequate protection elsewhere – is problematic. For some religious believers both activities are a manifestation of their religious faith. Consider for example a religious newspaper or magazine which operates for profit and publishes only content which is theologically consistent with the governing religious ethos of that publication. This test would not appear to provide such a publication with any ability to operate effectively.

Duties relating to religious observance or practice

131. The approach in 7.32 of the Paper does not provide adequate protection. Consider for example the same religious newspaper or magazine which publishes only content which is theologically consistent with the governing religious ethos of that publication. This test would not appear to provide such a publication with any ability to operate effectively.

7.2: Other acts and practices of religious bodies

132. Whilst exceptions are not the most appropriate way to draft protections for religious bodies, as discussed above, it is appropriate that the protections afforded by s56 ADA to religious bodies are maintained.
133. Some religious traditions do not recognise marriage other than between two persons of the opposite sex and maintain a traditional sexual morality proscribing sexual activity between any couple other than one licitly married. The ALRC recommendation would effectively undermine the ability of those religious education institutions from such

¹⁰¹ ICCPR Article 18(3).

traditions who seek to ensure that all staff – or staff in specific roles – model their faith in private and in public from continuing to operate. It should not be adopted in the ADA.

134. In regards to the discussion on the ALRC report, the ALRC recommendations have not been accepted by the Federal Government, and ought not be adopted in the ADA. The current exemptions in the *Sex Discrimination Act* and *Fair Work Act* are appropriate.
135. Whilst s56(d) is broad it is appropriate as a means to protect the wide range of religious bodies in NSW subject to the below.

Limit the exception to certain attributes

136. It would be appropriate to exclude ‘disability’ from the exception.
137. It may not be appropriate to exclude ‘race’ from the exceptions as matrilineal descent, for example, is important in some religious traditions.¹⁰²

Require reasonableness and proportionality

138. A reasonable and proportionate test would be in contradiction of the necessity test set by ICCPR Article 18(3) which makes clear that infringement of the right to manifest religious belief is permissible only where it is **necessary** to protect public safety, order, health, or morals or the **fundamental** rights and freedoms of others and only where any such limitations are set out in law.¹⁰³ It would also create uncertainty by leaving such questions to be determined by a Court.

Special rules for religious bodies providing public goods and services

139. Australia – and NSW in particular – has a long and mutually beneficial history of religious bodies providing public services in a wide range of health, aged care, education, hostels, housing and so on. The State and its residents benefit from the provision of these services which owe their existence to the religious imperative of service. To exclude religious organisations from their ability to function as religious bodies would be to imperil the continuation of such organisation leading to the loss of the services that they provide. The treatment of the Calvary Hospital by the ACT Government is indicative here – the services provided by that religious ethos hospital have been lost as the Territory elected to compulsorily acquire the hospital. The government hospital which will – at very considerable cost (\$1 billion) – replace Calvary will be a different institution.¹⁰⁴ This is an

¹⁰² Rabbi Navah L. Levine, “My wife isn’t Jewish but we are raising our children Jewishly. I’ve heard that Judaism is passed down through the mother traditionally. Where did that come from? Is it true? Does it matter?” *Jewish Boston* <https://www.jewishboston.com/read/ive-heard-that-judaism-is-passed-down-through-the-mother-is-it-true-does-it-matter/>

¹⁰³ ICCPR Article 18(3).

¹⁰⁴ Natasha May, “Calvary public hospital takeover by ACT government a ‘pre-dawn raid’, Catholic healthcare CEO says.” *The Guardian* <https://www.theguardian.com/australia-news/2023/may/31/calvary-public-hospital-takeover-by-act-government-a-pre-dawn-raid-catholic-healthcare-ceo-says>

inefficient outcome and if adopted in this State for all religious bodies providing public services would bankrupt the State.

140. ICCPR Article 25 does not require public services to be equally accessible from everybody providing public services and it is not at all inconsistent with religious bodies receiving protection as Article 18 envisages. Where a religious body might not provide some aspect of a public service the State can provide that through other means. Article 25 relevantly provides as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and **without unreasonable restrictions**:

(c) To have access, **on general terms of equality**, to public service in his country.

Replace the exception with area-specific exceptions

141. Section 56(d) ADA appears to be working appropriately and should be retained.
142. The introduction of protections of sacred sites would be appropriate. For example, some religious traditions have rules as to who can access their religious sites.¹⁰⁵

7.3: Exceptions for other forms of unlawful conduct

143. Exemptions from harassment and victimisation claims are inappropriate and should be removed.
144. The protection from vilification should be maintained to protect the ability of genuine religious teaching and religious freedom. It preserves the ability of religious instruction to be presented without fear of claims of vilification which might stymie clarity.

7.4: Exceptions for providers of adoption services

145. The ADA should have a positive right for adoption agencies to operate within their religious context. If a framework of exceptions is maintained, the current ADA exceptions are appropriate.
146. We recognise the sensitivity and difficulty of discussion on any area where the rights of same-sex attracted or transgender people may be limited in order to allow a religious body to act in accordance with its doctrines and tenets. However, difficulties would arise if the decision of the NSW Court of Appeal in *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 is overturned by legislation.
147. The Wesley Mission and Anglicare both run foster care services funded by the NSW Government. These organisations do outstanding work. They play a vitally important role in the network of foster care services on which the NSW government relies to provide

¹⁰⁵ See for example “Temples of the Church of Jesus Christ of Latter Day Saints”
<https://churchofjesuschristtemples.org/about/#inside>

much needed out of home care services for children in NSW. Demand for foster homes already outstrips supply. There are, in all probability, many Christian foster carers who would not volunteer for such an arduous role unless they were recruited and supported by a trusted Christian organisation.

148. Since the decision in the landmark case against Wesley Mission, the NSW Government has accepted the position of these organisations not to accept applications by same-sex couples to be foster carers. These couples can become foster carers through a number of other organisations such as Barnardos, so there is no practical impediment for them to become involved in out-of-home care, supported by an organisation which does not have issues about their same-sex relationship.
149. We believe that it is in the public interest to continue to allow diversity of opinion and practice in this area. Same-sex fostering and adoption raises complex issues. There are different views about whether children are best fostered by a male and female together, who can bring complementary but different attributes to the care of children. Religious views on these issues should be accepted as part of our commitment, as a society, to pluralism and multiculturalism.

7.5: Private educational authorities employment exceptions

150. The ADA should contain positive rights, in the form of a general limitations clause, for religious educational authorities to enable them to operate in accordance with their tradition, ethos and mission.
151. If the structure of exceptions is maintained they should be limited to *religious* educational authorities.

Private educational authorities

152. Religious schools require protections in order to be religious schools. This is consistent with ICCPR Article 18.
153. There does not appear to be a justification for the exclusion of disability protection and that should be removed.
154. The fact that religious schools receive public funding and tax benefits is not a sound basis for arguing for the removal of the exceptions that enable them to actually be religious schools. Parents who choose to send their children to religious school contribute to the tax base. Religious schools have also been an essential part of the means by which NSW students are educated which the State could not provide on its own.
155. The Report states the combined government funding to non-government schools but not that they provide good value for money to government, as government provides about \$14,000 in funding per public school student but only about \$12,000 for each Catholic

school student and \$10,000 for each student at an Independent (or other non-government) school.¹⁰⁶

The exceptions cover a wide range of educational bodies

156. The definition of 'private educational authorities' might be reformed to exclude from its reach educational authorities which are not religious.
157. The term 'private education authorities' should cover all tertiary education providers that are religious whether they are universities, business colleges or other private post-secondary institutions irrespective of the form of their establishment. The term 'private education authority' is currently defined in the ADA as follows:

private educational authority means a person or body administering a school, college, university or other institution at which education or training is provided, not being—

- (a) a school, college, university or other institution established under the Education Act 1990 (by the Minister administering that Act), the Technical and Further Education Commission Act 1990 **or an Act of incorporation of a university**, or
 - (b) an agricultural college administered by the Minister for Agriculture. [emphasis added]
158. Applying the *Interpretation Act 1987* (NSW) (see s12 extracted below) a university established by a Federal, State or Territory Act other than a NSW Act of incorporation of a university would be included within part 9(a) of the definition, but a university established by a NSW Act would be excluded:

12 References to New South Wales to be implied

- (1) In any Act or instrument—
 - (a) a reference to an officer, office or statutory body is a reference to such an officer, office or statutory body in and for New South Wales, and
 - (b) a reference to a locality, jurisdiction **or other matter or thing** is a reference to such a locality, jurisdiction **or other matter or thing in and of New South Wales**.
 - (2) In any Act or instrument, a reference to a body constituted by or under an Act or instrument need not include the words "New South Wales" or "of New South Wales" merely because those words form part of the body's name or title
159. If this interpretation is correct, Notre Dame, ACU and The Australian University of Theology (AUT) are all included within the definition of 'private education authority.' This is because Notre Dame was established by an Act of the Western Australian parliament.¹⁰⁷ It was not established by a NSW Act.

¹⁰⁶ Courtney Facts, "Are private schools better than public schools?" 20 January 2023, *ABC News* <https://www.abc.net.au/news/2023-01-20/are-private-schools-better-than-public-schools/101867070>

¹⁰⁷ *University of Notre Dame Australia Act 1989* (WA)

160. ACU was established in Victoria not by an Act of the NSW Parliament but as Australian Catholic University Limited (Corporation), a public company, limited by guarantee. Whilst ACU is recognised by three State Acts of Parliament: *Australian Catholic University Act 1990* (NSW), *Australian Catholic University (Victoria) Act 1991* (Vic) and *Australian Catholic University (Queensland) Act 1991* (Qld) the university was not “established” by those Acts.¹⁰⁸
161. AUT has a history dating back to 1891 which is set out briefly below but key here is that it was not established “by an Act of incorporation as a university.” AUT was established by the General Synod of the Church of England in Australia and Tasmania in 1891 as Australian College of Theology (the ACTh) ‘to foster and direct the systematic study of Divinity, especially among the clergy’. For this purpose it provided courses, subject outlines and reading lists and set examinations for clergy and lay people who studied as private candidates or in Anglican theological colleges around Australia. The ACTh remained an Anglican institution to the 1960s when its main awards became accessible to non-Anglicans. During the following decade the ACTh Board began approving non-Anglican institutions to deliver its courses and the College was approved to award degrees by the NSW government. ACTh was later approved as a Higher Education Provider (HEP) under the *Higher Education Support Act* of 2003 and became a public company limited by guarantee. In 2022, ACT’s Constitution was revised to include a broader group of stakeholders including Anglican, Baptist, Presbyterian and Reformed denominations, and mission organisations such as CMS Australia, OMF International and Pioneers Ministries.¹⁰⁹ The new constitution incorporates a statement of Christian identity. In 2022, TEQSA registered ACT as a University College and on 20 December 2024, TEQSA registered the ACT as an Australian University (with a specialised focus).¹¹⁰
162. Whilst this would appear to be the correct construction of the definition of ‘private education authority’ it would be preferable for the drafting to be clearer so that the particular historical means by which a university with a religious faith foundation was established does not determine whether or not it gains appropriate protections to enable its operations. There is no basis on which universities created by Acts of Parliament should be excluded from the protections of the ADA if they are otherwise a “private education authority.” The intention behind the exclusion of certain universities from the definition of “private educational authority” is unclear. It seems not to respond to the current Australian environment in which some religious ethos organisations have been created by Acts of State Parliaments (such as Notre Dame) and others (such as ACU and AUT) have not. There seems no logical reason why the establishment of a university by an Act ought exclude it from the protections provided given that universities can be established in a number of ways.

¹⁰⁸ ACU website “Corporation” <https://www.acu.edu.au/about-acu/leadership-and-governance/governance/corporation>

¹⁰⁹ <https://aut.edu.au/about/constitution/>

¹¹⁰ Australian University of Technology, “History of the University.” <https://aut.edu.au/about/history/>

163. There are currently 43 universities in Australia comprising 37 public universities and 6 private universities.¹¹¹ Only two of those 43 universities are Catholic: Notre Dame and ACU. They provide students with an option to pursue their university studies in a different context, each with their own particular mission or Objects.¹¹² Notre Dame's Objects are contained in the legislation which established it and specifically requires it to provide "a university education in the context of Catholic faith and values." To abide by its legislative requirements Notre Dame must therefore be "Catholic."
164. The fact that Catholic universities require relief from the operation of other provisions of the ADA or legislative reform to introduce positive rights is clear from a review of the instrument which governs their operation within their Church. Papal encyclicals take their titles from the first few words of their text written in Latin. The opening words of the key Vatican document for Catholic universities are "[b]orn from the heart of the Church" or *Ex Corde Ecclesiae*. *Ex Corde Ecclesiae* is a rich and dense work which has implications for many dimensions of every day life in a Catholic university. It requires a majority of teaching staff to be Catholic. *Ex Corde Ecclesiae* makes real demands on all staff working in a Catholic university but makes very particular demands on Catholic staff.
165. *Ex Corde Ecclesiae* requires a majority of teaching staff to be Catholic:

In order not to endanger the Catholic identity of the University or Institute of Higher Studies, the number of non-Catholic teachers should not be allowed to constitute a majority within the Institution, which is and must remain Catholic.¹¹³

166. *Ex Corde Ecclesiae* requires all staff to be informed of the university's Catholic identity and that they have a responsibility to promote or at least respect that identity. *Ex Corde Ecclesiae* relevantly provides:

All teachers and all administrators, at the time of their appointment, are to be informed about the Catholic identity of the Institution and its implications, and about their responsibility to promote, or at least to respect, that identity.¹¹⁴

Those university teachers and administrators who belong to other Churches, ecclesial communities, or religions, as well as those who profess no religious belief, and also all students, are to recognize and respect the distinctive Catholic identity of the University.¹¹⁵

Christians among the teachers are called to be witnesses and educators of authentic Christian life, which evidences attained integration between faith and life, and between professional competence and Christian wisdom. All teachers are to be inspired by academic ideals and by the principles of an authentically human life.¹¹⁶

¹¹¹ Australian Government, "Study Australia List of Australian Universities"

<https://www.studyaustralia.gov.au/en/plan-your-studies/list-of-australian-universities>

¹¹² ACU, "Our mission" <https://www.acu.edu.au/about-acu/mission-identity-and-values/our-mission>

Notre Dame, "Vision and Objects" <https://www.notredame.edu.au/about-us/vision-and-objects>

¹¹³ *Ex Corde Ecclesiae* Article 4 §4

¹¹⁴ *Ex Corde Ecclesiae* Article 4 §2

¹¹⁵ *Ex Corde Ecclesiae* Article 4 §4

¹¹⁶ *Ex Corde Ecclesiae* [22]

167. *Ex Corde Ecclesiae* requires Catholic staff to be faithful to Catholic doctrine and morality in their work:

In ways appropriate to the different academic disciplines, all Catholic teachers are to be faithful to, and all other teachers are to respect, Catholic doctrine and morals in their research and teaching. In particular, Catholic theologians, aware that they fulfil a mandate received from the Church, are to be faithful to the Magisterium of the Church as the authentic interpreter of Sacred Scripture and Sacred Tradition.¹¹⁷

168. AUT is not a Catholic University and it has its own purpose and objects as a Christian University. It is similarly clear from AUT's purpose and objects, set out below, that it requires relief from the operation of other provisions of the ADA or legislative reform to introduce positive rights for it to operate.

[T]o foster and direct the systematic study of theology and other disciplines related to Christian ministry, thought and practice, primarily through Affiliated Colleges which act consistently with the Christian Foundation of the University. The University pursues the Purpose and Objects of the University by:

- (a) teaching and conducting research at or above world standard;
- (b) awarding higher education qualifications, and delivering the related courses;
- (c) engaging in student-centred teaching and learning that advances knowledge, encourages freedom of speech and academic freedom, and enhances the pursuit of vocational excellence;
- (d) facilitating each Affiliated College's realisation of the full potential of its formational, educative and scholarly endeavour;
- (e) fostering and enhancing a culture of research and scholarship that leads to new knowledge and original creative endeavour;
- (f) promoting the study of theology and other disciplines related to Christian ministry, thought and practice in the wider community;
- (g) maintaining the status and reputation of the University; and
- (h) underpinning the purpose and objects of the University through governance, procedural rules, policies, financial arrangements and planning, and quality assurance processes which are sufficient to ensure the academic integrity of the University's learning and teaching activities, and research,

and doing all other things as may be incidental, ancillary or conducive to the attainment of the Purpose and Objects of the University.¹¹⁸

169. It is important that Australian universities and colleges are not all the same and that students are given real choice.¹¹⁹ A multi-faith, multicultural and pluralist State like NSW

¹¹⁷ *Ex Corde Ecclesiae* Article 4 § 3

¹¹⁸ Australian University of Technology, "Purpose and Objects of the Constitution"
<https://aut.edu.au/about/strategy/>

¹¹⁹ See Glyn Davis, *The Australian Idea of a University*, Melbourne University Press, 2017

should accommodate and encourage the creation of universities and other tertiary institutions from religious faith traditions.

Discrimination in work

170. There are a wide variety of religious educational authorities and they each have their own character. Religious educational authorities seek to operate in accordance with their tradition, ethos and mission and that requires them to have the ability to employ staff who are able to assist in this. The ADA currently provides exemptions which are broad and cater for the wide range of religious educational authorities in their breadth. The ADA would preferably provide religious education authorities with a positive right to select staff in accordance with their tradition, ethos and mission
171. A genuine occupational qualification requirement is not an appropriate means of protecting the ability of religious education authorities' ability to operate in accordance with their tradition, ethos and mission where the occupational qualification requirement is construed without regard to tradition, ethos and mission of the particular authority. For some religious schools all staff are expected not only to share a particular religious faith but also to demonstrate behaviours consistent with that faith and this is appropriate in a multifaith, multicultural and pluralist society.

The relevant attributes

172. The recommendations made by the Australian Law Reform Commission (ALRC) in its Report "Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws"¹²⁰, have aroused enormous opposition across a broad cross-section of religious organisations and faith-based school groups.¹²¹ Indeed, it is difficult to think of any ALRC Report which has been so poorly received by the stakeholders who were most affected by the proposed changes to the law.
173. The Chair of the Inquiry, Justice Stephen Rothman, has himself distanced himself from its recommendation noting that the ALRC was restrained by the Terms of Reference within which it was required to work and that he considered that religious schools should enjoy a positive right to select staff.¹²²
174. The ALRC's Report failed to recognise that the purpose of Christian schools could not be achieved without legislative protections to enable them to employ Christian teachers, subject only to narrow exemptions. The Report fails to recognise the reasons why so many

¹²⁰ Australian Law Reform Commission (ALRC) in its Report "Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws" (ALRC Report 142) <https://www.alrc.gov.au/publication/adl-report-142/>

¹²¹ See for example, Archbishop Anthony Fisher, "Archbishop Anthony Fisher OP: Commission's report ignores faith's contribution to society" *The Catholic Weekly*, 26 March 2024 <https://catholicweekly.com.au/archbishop-anthony-fisher-op-commissions-report-ignores-faiths-contribution-to-society/>

¹²² Cody Mitchell "Religious Freedom Must be a 'Positive Right': ALRC Report Author" 29 April 2024 *The Daily Declaration* <https://dailydeclaration.org.au/2024/04/29/religious-freedom-must-be-a-positive-right-alrc-report-author/>

parents who do not have an active religious faith choose Christian schools for their children, nor the importance to religious faith communities of the schools, through which they seek to educate their children in a context of Christian living and practice. The recommendations of the ALRC Report should not guide reform to the ADA. Rather it is important that the law is drafted carefully so as not to interfere with appropriate religious freedoms insofar as religious faith-based organisations are concerned. They need to be able to maintain their identity and ethos through the freedom to select staff appropriate to the mission of the organisation, or to give preference to the employment of such staff. This approach gains support from the Human Rights and Equal Opportunity Commission report on religion and belief which commented in 1999 that “special provision for religious institutions is appropriate. It is reasonable for employees of these institutions to be expected to have a degree of commitment to and identification with the beliefs, values and teachings of the particular religion.”¹²³

175. The extent to which conformity with every teaching, doctrine or belief of a religious faith would need to be held and exhibited by the public life of staff will depend on the tradition, ethos and mission of the particular religious education authority. Where the relevant tradition, ethos and mission was such that conformity with belief in marriage being only between a man and a woman it would be appropriate for the law to enable schools to operate on the basis that all staff aligned with that view.
176. There are a wide variety of religions and education authorities in Australia such that reforms to limit the grounds relevant to staff selection so as to facilitate the continued operation of religious education authorities require very careful consideration. As noted above, for some traditions a characteristic which might be characterised by some as having a racial component may be important.¹²⁴

The circumstances in which an exception applies

177. The approach laid out in 7.102 and 7.103 of the Paper is to be preferred.
178. The requirement for religious education authorities to publish their policy is reasonable.
179. In 7.108, the Paper wrongly describes limitations on religious education authorities to engage appropriate staff as “safeguards.” The observation of the Victorian Attorney General set out in the Report is a demonstration of the deficiencies with an inherent requirement test. For some religious education authorities all staff need to demonstrate their alignment with the mission of the authority through their belief and conduct. As noted above, for Catholic universities seeking to operate in accordance with *Ex Corde Ecclesia* at least half of their staff are required to be Catholic. What the Report refers to as ‘safeguards’ are provisions which undermine the ability of some religious education

¹²³ NSW Law Reform Commission Report 92, Review of the Anti-Discrimination Act 1977 (NSW) (1999) [4.128] and [6.433].

¹²⁴ https://www.chabad.org/library/article_cdo/aid/601092/jewish/Why-Is-Jewishness-Matrilineal.htm

authorities to act within their tradition, ethos and mission. These ‘safeguards’ create a role for Courts in assessing the significance of religious matters which they are ill-equipped to perform.

180. In regards to the recommendations of the ALRC report, see comments above. The recommendations from the ALRC have not been accepted by the Federal Government, have been questioned by the Commissioner responsible, and should not be included in the NSW ADA.
181. See also earlier comments on “proportionality” tests. Such tests do not meet the “necessary” threshold of ICCPR 18.

7.6: Discrimination against students and prospective students

182. The ADA should contain positive rights for religious educational authorities to operate in accordance with their tradition, ethos and mission.
183. The original drafting of the ADA protects religious educational authorities’ ability to maintain a student body aligned with their tradition, ethos and mission not by way of a positive right but by way of exceptions. These are currently broad. Any reform to them should not produce an outcome which prevents religious educational authorities’ ability to maintain a student body aligned with their tradition, ethos and mission.
184. If the language of exclusions is to be maintained there does not appear to be a basis to maintain an exception relating to disability.
185. A reform of definition from “private educational authorities” to “religious education authorities” would be appropriate.
186. Religious educational authorities should be permitted to maintain a student body aligned with their tradition, ethos and mission. This is not inconsistent with international human rights obligations. The public funding of schools is not a legitimate ground for diminishing their ability to attract and retain students aligned with their tradition, ethos and mission. Religious parents, of course, pay taxes and it would not be reasonable for government to provide public funds only to public schools in a pluralist, multi-faith society like NSW.

Transgender students

187. Students experiencing gender incongruence or who identify as transgender raise issues for all schools and particularly for single sex schools and religious schools. This is of particular importance in school communities where a child, without or without support from both of their parents, wishes to be called by a new name and to be recognised as being of a gender different from their natal sex. As large numbers of children and teenagers, and particularly teenage girls, are now identifying as ‘transgender’ or ‘non-binary’, demands on schools to recognise their new identity have increased in recent decades. For most of these children and teenagers, the changed gender identity is likely to be transient, as is other experimentation in adolescence; but medical experts around

the world are now expressing concern about the ‘affirmation’ approach to this issue as it may concretise and lock in an otherwise quite temporary identity, causing long-term harm to the child.¹²⁵ There must be a point at which a child is deemed too young or immature to have a legally protected ‘gender identity’. However, legal guidance for state schools in NSW generally encourages or requires school principals to act as if the child is of the gender with which the child identifies. There is scant recognition of the rights and concerns of other children who may be affected by the child’s identification. The focus is on the rights of the gender diverse child only and the assessment of risk relates to him or her alone, not to other children who may be affected. This, for example, is an extract from the NSW legal guidance:¹²⁶

Where reasonably practicable, the student should be treated on the same basis as other students of the same identified gender.... Toilets, showers and change rooms are specific to each school. An assessment of the risk posed to the student by using the toilets of their identified gender must be undertaken. If an identified risk to the student cannot be satisfactorily eliminated or minimised then other arrangements should be made.

The need for the student to be safe is a paramount concern in these circumstances. Students should not be required to use the toilets and change rooms used by persons of the sex they were assigned at birth if they identify as a different gender. Alternative arrangements may include using staff toilets or unisex toilets where possible. The exclusion of students who identify as transgender from the toilet or change rooms of their identified gender must be regularly reviewed to determine its continuing necessity.

188. If other students indicate discomfort with sharing single-sex facilities (toilets or change rooms for example) with a student who identifies as transgender, according to this guideline, this should be addressed through the school learning and support team. According to this guideline this minimises the concerns of girls about sharing toilets or change rooms with boys and the safety risks that might, albeit rarely, arise therefrom. The discomfort of other children is, according to this guideline, to be addressed by educating them (presumably to think differently). A similar approach is adopted in relation to overnight excursions. If this approach is followed it has ramifications for all schoolchildren, but it is reasonably likely that girls from socially conservative backgrounds, including those with an active religious faith, will be most concerned about issues of modesty and bodily privacy.
189. Schools seek to handle these issues sensitively and to act in the best interests of the child and the school community. Sometimes the best outcome is for such students to move to another school, where remaining at the school may be detrimental to the best interests of the child or other children in the school. The ADA permits schools this option in its current drafting. Anti-discrimination laws can be a blunt instrument for addressing complex issues. Any amendments to the ADA in this regard should not seek to preclude

¹²⁵ *Births, Deaths and Marriages Registration Act 1995* (NSW) s32C

¹²⁶ “Transgender students in schools – legal rights and responsibilities”, Legal Issues Bulletin No 55, December 2014 <https://education.nsw.gov.au/rights-and-accountability/legal-issues-bulletins/transgender-students-in-schools>

schools from considering the interests of the child and the interests of the school community as a whole.

The relevant attributes

- 190. Religious educational authorities should be permitted to maintain a student body aligned with their tradition, ethos and mission. The current exceptions permit this to occur.
- 191. The current exception in relation to disability can be removed.

Application to prospective or existing students

- 192. Religious educational authorities should be permitted to maintain a student body aligned with their tradition, ethos and mission. The current exceptions permit this to occur.
- 193. Schools seek to handle issues sensitively and to act in the best interests of the child and the school community. There may be schools and circumstances in which a student after enrolment challenges the ability of the school to provide an environment consistent with their tradition, ethos and mission, and it is in the best interests of the students and the school community for the student to move to another school. The current exceptions permit this to occur.

The circumstances in which the exception should apply

- 194. The proposal at 7.125 of the Paper provides a reasonable basis for admission, but it fails to address the situation for schools in circumstances in which a student after enrolment challenges the ability of the school to provide an environment consistent with their tradition, ethos and mission.
- 195. In regards to the proposal at 7.126 of the Paper, given the range of religious schools and the means by which they interpret and live out their religious nature, it would be preferable to refer to the “tradition, ethos and mission of the religious school” rather than “the precepts of the religion.”
- 196. A test by which school decisions are judged only against the best interests of the student ignores what may be in the best interests of students and the school community and those interests should be considered in this context.
- 197. Religious educational authorities should be permitted to maintain a student body aligned with their tradition, ethos and mission. All religious traditions take moral positions, which may relate to dietary limitations, clothing requirements, prayer and religious service requirements, sacramental requirements and to marriage and sexual behaviours. For many religious traditions sexual behaviour outside of marriage between a man and a woman are considered immoral. There are many religious schools with differing attitudes to student fidelity to their tradition, ethos and mission. This is a positive feature of a multi-faith and pluralist society like NSW. It would be inconsistent with religious freedom to preclude schools from teaching in a manner consistent with that school’s religious

traditions, ethos and mission and from maintaining a student body aligned with their tradition, ethos and mission.

198. Rather than imposing a “reasonableness and proportionate test” which is a subjective test which ultimately Courts would be required to adjudicate on, it would be preferable to permit conduct which aligns with the relevant religious educational authorities’ published policies.
199. The publication of policies is appropriate.

7.8 The charities exception

200. Registered charities and individuals should be permitted to confer charitable benefits on people based on their religious belief and manifestation of that belief should they wish to do so.
201. In regards to donations, donor intention is critical in preserving the autonomy and integrity of charitable giving, particularly where gifts are made for religious or cultural purposes. The principle that individuals should be free to direct their philanthropic resources in accordance with their deeply held beliefs and values is grounded in both the right to freedom of religion and the broader right to property.
202. In the context of charitable bequests or land transfers, respecting the donor's intentions ensures that their legacy is honored and that the gift achieves the purpose for which it was made. Undermining this principle by imposing rigid anti-discrimination rules on all acts of giving—especially private gifts or those made by will—risks eroding the freedom to associate and give in ways that reflect one’s conscience. As long as such gifts do not involve public detriment or coercion, upholding the donor’s specific, faith-aligned intentions is essential for a pluralistic and respectful charitable landscape.

7.9 Voluntary bodies exception

203. The broad exception in the ADA for non-profit bodies should remain. As noted above, there has been a significant decline in volunteering and volunteering is beneficial both to the community and to individuals. Imposing additional requirements on voluntary bodies is likely to further discourage volunteering.

7.10 Aged care accommodation providers exception

204. The ADA should be amended to also permit “housing accommodation for aged persons” to restrict admission to people of a particular religion.

8.2 The test for vilification

A harm-based test

205. We are opposed to the introduction of a “harms-based” test for two main reasons:
- Firstly, the definition and concept of harm is vague and subjective and includes the ambiguous term “hateful”.
 - Secondly, the test looks to the subjective experience and apprehension of the alleged target group when applying the reasonableness test, rather than a broader objective measure.
206. In both of these points, the harm-based test does not meet the standards set by the ICCPR and Siracusa Principles that any impost on a human right – including religious freedom – needs to be strictly necessary and use the least restrictive means possible to prevent a concrete and significant harm. The vague and subjective nature of the harm-based test means that it is restricting freedoms on the possibility that a person might find certain conduct “hateful”.

“Hateful” conduct

207. The existing vilification prohibitions in the ADA and other similar legislation prohibit the *incitement of hatred*. By moving from a verb to an adjective, the Paper proposes to prohibit conduct that is ‘hateful’. This is not the preexisting term used in the civil prohibitions and these terms are not semantically equivalent.
208. The semantic scope for “hateful” is wider than “hatred”. The ordinary English meaning of “hateful” includes:
- arouses hate;
 - deserves to be hated;
 - full of or expressing hate; and
 - unpleasant; dislikable; distasteful.
209. This prohibition would present a serious threat to genuine, good-faith religious speech on issues of serious disagreement in contemporary society.
210. In both the spheres of religion and sexuality, people hold their positions and identities very strongly, and disagreement or criticism would be considered “hateful”. Consider the following statements:
- ‘Religion is for idiots’;
 - ‘Jesus is just your imaginary friend’;
 - ‘Christianity is a scam to get money’;
 - ‘I hate the Church’;

- ‘God designed marriage as a lifelong commitment between one man and one woman’; and
 - ‘God designed sex to be exclusively experienced within the context of marriage’.
211. Under the current proposal, all these statements could be considered to be “hateful” and are therefore open to a complaint.

Subjective test of reasonableness

212. The definition of a “reasonable person” is shifted to only include members of the affected category. This is a significant change, as what an average Australian, or even a judge, may find “reasonable” is not relevant. Only the offended category gets to decide what is “reasonable”.
213. In addition, when considering who is a “reasonable” member of an offended category, there is no guidance as to how broadly or tightly that category is to be defined.
214. For example, what the average “reasonable” Christian finds hateful may be different to a reasonable “Evangelical Christian”, or a reasonable member of the “Closed Brethren”. Simply by defining the category more broadly or tightly will dramatically change the outcome of what is considered “hateful”
215. Further, the Paper proposes to prohibit conduct that would be reasonably likely to be considered “hateful” by this “reasonable” member of the affected category. This compounds subjectivity upon subjectivity.
216. It will be up to a judge to decide in any one case how to define the category in question, how to identify what a “reasonable” member of that category would find “hateful”, and whether the defendant should have “reasonably” known that their behaviour would have been considered “hateful” to that “reasonable” member.
217. This puts the power entirely in the hands of the individual or group claiming offence. It reverses the meaning of the ‘reasonable person’ test in other laws, which were created to ensure that neither side in a dispute is favoured and to ensure that the law will operate as fairly and objectively as possible between two parties.
218. Significantly, for a so-called ‘harm-based’ provision, actual harm does not need to have occurred. It is enough that a member of the category would likely consider the conduct hateful, reviling, seriously contemptuous, or seriously ridiculing.
219. Harm does not even need to be intended by the speaker, or even for the speaker to be reckless (as in the criminal provision). A person could be in violation of the civil harm-based provision even if they did not intend to cause harm, did not have reason to believe they would cause it, and indeed did not cause any harm.
220. This proposal poses real risks of being weaponized by one minority group against another. The scope of what is considered to be hateful, etc., varies dramatically between sections

of society. Would a reasonable Christian person consider a Muslim teaching that ‘Christians are wrong and risk going to hell’ to be ‘hateful’ – or vice versa?

- 221. This proposal will not be a protection for minorities. Instead of being a shield, it creates a sword for one group to use against another.
- 222. A harms based test should not be introduced. Such a test would unjustifiably restrict free speech and prevent legitimate criticism of religion. By doing so it would infringe on the practical ability of persons to “adopt a religion” guaranteed by Article 18(1) ICCPR.
- 223. The threshold for the ADA’s incitement based test should not be lowered. Such a change would unjustifiably restrict free speech and prevent legitimate criticism of religion.

8.3 The definition of “public act”

- 224. No changes should be made to the definition of “public act”

8.4 Exceptions

- 225. The ADA should not prevent religious discussion, teaching or instruction, including in matters of religion, sexuality, gender or marriage.

8.5 Religious Vilification

- 226. No changes should be made to the Religious Vilification protections in the ADA.
- 227. The common law has sufficiently defined religion.¹²⁷ It is not necessary to further define the related terms used in the ADA.

¹²⁷ *Church of the New Faith v Commissioner of Pay-roll Tax (Vict)* (1983) 154 CLR 120.

228. We thank the Commission for the opportunity to submit.



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