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NSW Law Reform Commission  
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## **Submission to the NSWLRC Review of the *Anti-Discrimination Act 1977***

### **Part 1 – Introduction and Executive Summary**

#### **Who are we?**

1. This submission is on behalf of the Anglican Church Diocese of Sydney (the Diocese). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. The Diocese is an unincorporated voluntary association comprising 260 parishes and various bodies constituted or incorporated under the Anglican Church of Australia Trust Property Act 1917 (NSW) and the Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW). These bodies include 38 Anglican schools, Anglicare Sydney (a large social welfare institution, which includes aged care), Anglican Youthworks and Anglican Aid (which focusses on overseas aid and development). The Diocese, through its various component bodies and through its congregational life, makes a rich contribution to the social capital of our nation, through programs involving social welfare, education, health and aged care, overseas aid, youth work and not least the proclamation of the Christian message of hope for all people.
2. The Diocese has a direct interest in this Bill, both for the sake of individual 'Anglicans in the pew' and for our 800 or so Anglican 'religious bodies' that seek to operate in accordance with the doctrines, tenets, beliefs and teachings of the Anglican Church in the Diocese of Sydney. However, we also have a significant broader interest, on behalf of all people of faith 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.

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## EXECUTIVE SUMMARY

4. The questions and issues discussed in the Consultation Paper in relation to the *Anti-Discrimination Act 1977* (ADA) affect people of faith in NSW for many different reasons. We set out below our key recommendations in response to the Consultation Paper and its questions. These key recommendations are broadly described with reference to paragraphs containing our detailed submissions. This summary does not include all the recommendations made in our submission, and this summary should be read in light of the detailed analysis in the full submission.

### Key Recommendations

- A. The objects clause of an amended ADA should reference the ‘equal status and indivisibility’ of human rights as a means to ensure religious freedom is not placed as a second order right – see paragraphs 18, 22, 26 and 35.
- B. The ADA should be interpreted according to international legal standards on human rights and in particular, religious freedom rights – see paragraphs 24 to 26.
- C. Discrimination on the grounds of religious belief and religious activity should be made unlawful – see paragraphs 59 to 69. Individuals should be protected against religious discrimination in relation to their ‘genuinely held’ religious beliefs, not merely ‘lawful’ religious beliefs – see paragraphs 70 to 75.
- D. Religious bodies should be protected from religious discrimination through their association with religious individuals – see paragraphs 59 to 61.
- E. The indirect discrimination ‘inability to comply’ test should recognise that religious conviction is a valid reason why a person may be unable to comply, and therefore that it would be religious discrimination to require a person to act contrary to their religious convictions – see paragraph 32.
- F. The indirect discrimination test should explicitly list the factors to consider in determining reasonableness, modelled on s7B(2) of the *Sex Discrimination Act 1984* (Cth) as extended to recognise Siracusa Principles 10 (‘in pursuit of a legitimate aim’) and Principle 11 (‘least restrictive means’) – see paragraphs 33 to 35
- G. The ADA should move away from an ‘exceptions clause’ model and towards a ‘general limitations clause’ model for religious bodies, by making a positive statement that certain acts engaged in by religious bodies are ‘not discrimination’. We recommend that the current exception in s56 be divided into two clauses – one that covers the selection, training and appointment people to perform or participate in religious practices, and the other that covers the other acts and practices of a religious body (including employment) - see paragraphs 81 to 100.
- H. The ADA should give consideration to the model for protecting religious belief and activity recommended by the New South Wales Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 – see paragraphs 67 to 70.

- I. Neither the ‘inherent requirements test’ nor the ‘reasonable and proportionate test’ for employment by religious bodies and religious educational institutions are appropriate because they do not permit religious institutions to continue to operate in accordance with their doctrines, tenets and beliefs – see paragraphs 101 to 111.
- J. Faith-based bodies and charities should be able to continue to provide services in accordance with their doctrines, tenets and beliefs. This should not be dependent on whether they are in receipt of government funding – see paragraphs 112 to 123.
- K. Religious education institutions should be able to preferentially hire staff and conduct their activities in accordance with their doctrines, tenets and beliefs – see paragraphs 124 to 130.
- L. Judges should not be asked to determine the reasonableness of religious belief – see paragraphs 73, 110 and 168.
- M. Religious freedoms should be properly balanced against protections against vilification and any changes to prohibitions against vilification under the ADA must ensure that religious expression is protected, including by retaining the existing religious bodies exception for civil vilification prohibitions to ensure that preaching is not subject to civil complaints by members of the public – see paragraphs 135 to 148.
- N. ‘Reasonable adjustments’ provisions should apply to the test for religious discrimination, requiring an employer to make reasonable adjustments for an employee’s genuine religious beliefs unless to do so would cause the organisation substantial hardship – see paragraphs 155 to 160.
- O. The current exemption system under s126A should be replaced with a special measures provision akin to s7D of the *Sex Discrimination Act 1984* (Cth). However, neither an exemption under s126A nor a ‘special measures’ provision is the appropriate mechanism to enable women-only spaces such as women’s gyms and refuges for women - see paragraphs 161-166. Sex in the ADA is, and should remain, a binary biological category – see paragraphs 47 to 53.

## Part 2 – General Principles

- 5. We thank the NSW Law Reform Commission (NSWLRC) for the opportunity to respond to the questions posed by the Review of the Anti-Discrimination Act 1977 (NSW) Unlawful Conduct Consultation Paper, May 2025 (CP). The CP questions appear below in framed boxes, followed by our comments on each question or group of questions.
- 6. This submission has a particular focus on those matters which impact people of faith, religious institutions in general, and religious educational institutions in particular. For precision we first wish to offer a definitional clarification. The CP makes a distinction between ‘exceptions’ and ‘exemptions’. The CP calls the ongoing provisions within the Act that disapply certain provisions on the fulfilment of certain conditions ‘exceptions’; while provisions that enable a person to make application to a decision-maker to have certain provisions disapplied are called ‘exemptions’. In

common parlance both mechanisms are referred to as 'exemptions'. Unless the context otherwise requires, in this submission when we use the word 'exemption' that reference encompasses both mechanisms described in the CP as 'exceptions' and 'exemptions'.

7. The CP acknowledges that the issues in relation to religious discrimination are complex. The CP notes that, notwithstanding recommendations of previous reviews that religious discrimination be unlawful, 'attempts at enacting such protections have so far been unsuccessful.'<sup>1</sup> In relation to exemptions for religious bodies, the CP also notes that 'One of the most controversial issues in discrimination law is whether and, if so when, religious bodies should be granted exceptions that allow them to discriminate'.<sup>2</sup> Framing the question in this way is unhelpful, because it incorrectly predisposes that the human right to non-discrimination is a higher human right than the human right to religious freedom. While there is no formal hierarchy of human rights (they are 'indivisible'), it is noteworthy that Article 4 of the ICCPR includes the religion freedom right among the very few human rights from which there can be no derogation by a State Party even in times of public emergency that threaten a nation.
8. Nonetheless, we agree that these matters are complex. The 2017-18 Commonwealth Expert Panel on Religious Freedom (the 'Religious Freedom Review'), which addressed these issues in depth, received almost 16,000 submissions and conducted 90 meetings with more than 180 organisations and individuals. The Religious Freedom Review's recommendations led to 6 iterations of a federal Religious Discrimination Bill and a referral to the Australian Law Reform Commission. The extensive discussions over the past 8 years with people of faith and religious institutions have been productive.
9. A welcome (and uncontroversial) feature of the Religious Discrimination Bill (in all its iterations) is the reframing of the paradigm for religious bodies away from an 'exceptions' model to a 'general limitation clause' model, that makes a positive statement that certain acts are not discrimination.<sup>3</sup>
10. The Religious Discrimination Bill (RDB) provided that a religious body **does not discriminate** against a person by acting, in good faith, either in accordance with the doctrines, tenets, beliefs or teachings of its religion, or to avoid injury to religious susceptibilities. This expressly included giving preference to persons of the same religion as the religious body in employment.
11. The difference between the two models can be seen, for example, when an Islamic school from a particular tradition chooses to employ a believing and committed Muslim from that tradition to be

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<sup>1</sup> NSWLRC CP para [5.73].

<sup>2</sup> NSWLRC CP para [7.5].

<sup>3</sup> As the report of the Religious Freedom Review explains on p.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.'

a maths teacher over a non-Muslim. An ‘exceptions’ based model would define this action as religious discrimination, and (perhaps) provide an exception that allows the Muslim school to ‘discriminate’ (and bear the opprobrium attached to the negative connotations of that description). In contrast, the positive formulation reflected in the drafting of the Religious Discrimination Bill recognises that a faith-based school acting in pursuit of its religious purpose **does not discriminate** in employment by preferencing the Muslim teacher. This latter approach reflects international human rights law. The UN Human Rights Committee has observed 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’.<sup>4</sup>

12. This feature of the RDB 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.
13. One such intersection occurs when there is a tension between the religious beliefs of the individual, and the beliefs of a religious body created by a group of believers associating to pursue a religious purpose. In the interest of preserving institutional integrity and diversity in an open democratic polity, the RDB resolved this tension in favour of the religious body. 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.<sup>5</sup>
14. The model proposed by the RDB was embraced by faith groups because it solved a key point of contention that had blocked previous proposals to proscribe religious discrimination. Previous proposals, such as the proposals from the NSWLRC in 1999 were rejected by faith groups because the protection for the individual diminished the rights of the religious association to such an extent that it posed an existential threat to the religious character of the association.<sup>6</sup> That proposal, if effected, would undermine individual freedoms within society as a whole, as individuals would be deprived of the ability to express, or explore, their religion in association with like-minded or similarly convicted individuals. For example, a Christian school that is not permitted to preference committed Christians in employment unless the Christian faith is an ‘inherent requirement’ or ‘general occupational requirement’ of the role will ultimately result in a school in which only the chaplain, the Christian Studies teacher and (perhaps) the Principal are Christians. This is because each time a person who is not an adherent fills a role, even on a temporary basis, evidence is created that the holding of the belief is not an inherent requirement for that role. In these circumstances, the school ceases to be a Christian school in anything but name only. The Federal

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<sup>4</sup> Human Rights Committee, general comment No. 18 (1989), [13].

<sup>5</sup> See, for example, the summary of international Human Rights law in *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26, paragraphs [78]-[81].

<sup>6</sup> See, for example, paragraphs 5.151-5.152 in NSWLRC, *Review of the Anti-Discrimination Act 1977*, Report 92 (1999), which summarises the view of the Anglican Church Diocese of Sydney at that time.

Government, both under Coalition and Labor, recognised that this was unacceptable. At a Federal level, there continues to be bipartisan commitment to the principle that a religious school should be able to preference in employment staff who share a belief and commitment to the religious faith of that school.

15. In light of all this, the approach taken in the CP is deeply disappointing, in as much as it fails to engage in any substantive way with what has been happening in relation to religious discrimination at a Federal level for the past 8 years, and consequently fails to take the benefit of the mutual understanding that has taken place to date.
16. There is no consideration as to whether exceptions clauses are an appropriate way to balance the intersection of the right to non-discrimination with the right to freedom of thought, conscience and belief, or whether a general limitation clause (such as the approach taken in the RDB) is a better approach. Rather the CP (possibly unwittingly) declares on one side of the discussion, compounding the misconception by stating that ‘exceptions may also apply, permitting what would otherwise amount to unlawful discrimination.’<sup>7</sup>
17. Furthermore, the CP does not engage with the report of the Joint Select Committee inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020. That Bill had the broad support of religious institutions in NSW and also bipartisan support from members of both the Labor and Liberal Parties. This Bill is the only legislative model ever presented to an Australian Parliament that expressly attempted to balance the competing rights of equality and freedom of religion according to the Siracusa Principles on the Limitation and Derogation Provisions (‘the Siracusa Principles’) so that one right is not elevated above another. The Bill should have been given substantial consideration by this Consultation Paper.
18. The CP also fails to engage with the recommendation of the Religious Freedom Review that the objects clause of discrimination legislation reference the ‘equal status and indivisibility’ of human rights as a means to ensure religious freedom is not placed as a second order right. That recommendation was reflected in the Human Rights Legislation Bill 2022 (Cth), which recognised the ‘indivisibility and universality of human rights, and their equal status in international law’, and passed the Commonwealth House of Representatives with support of the Labor Party.
19. The first option proposed in the CP to limit the religious exception clause revisits the NSWLRC’s prior proposal from 1999 (which did not receive support then and is unlikely to receive support from faith groups now), ‘to only allow discrimination in employment if the teaching, observance or practice of religion is an inherent requirement of the position or a genuine occupational requirement.’<sup>8</sup> See section 7 for our explanation as to why an ‘inherent requirements’ test is inappropriate as a means to balance the rights of religious individuals and religious associations.
20. The CP also proposes for consideration the recommendations of the ALRC’s 2023 report on Religious Educational Institutions and Anti-Discrimination Laws, notwithstanding the fact that the

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<sup>7</sup> NSWLRC CP 21-2 [3.3].

<sup>8</sup> NSWLRC CP para [7.23].

Federal Government that commissioned the review has not proceeded with these recommendations, and the chair of that commission, Justice Rothman, has proposed a different solution. The ALRC proposals failed to acquit the Albanese Government's promise, which was reaffirmed as an election commitment in 2025, that religious educational institutions would continue to be able to preference in employment staff who share the religion of institution.

21. The Community Summary, in respect to the *Anti-Discrimination Act 1977 (ADA)*, notes that '[t]he ADA has broad exceptions for religious bodies. This is a complex and sensitive issue. **It raises questions about the best way to accommodate intersecting human rights.**'<sup>9</sup> Given this observation, it is disappointing that the CP gives no consideration of ways to 'accommodate intersecting human rights' that goes beyond the current exception-based model. There is scant consideration of the well-developed international human rights framework that establishes how to accommodate intersection human rights. This deficiency unhelpfully skews the questions asked in the CP and also results in a failure to ask key questions.
22. The following key points are either missing or insufficiently recognised in the human rights framework that underpins the CP. These must be taken into account in the current discussion, because of intersecting human rights.

#### A. **Equal Status of Religious Freedom**

As the Religious Freedom review notes:

'freedom of religion sits alongside and interacts with the broad suite of human rights found in the international instruments to which Australia is committed. These include well known civil and political rights, such as freedom of expression, non-discrimination, freedom of association, and protections against torture and slavery. They also include social and cultural rights, including, for example, the right to found a family and the right of every child to an education.

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. It must do both under its international obligations.<sup>10</sup>

Although the CP makes the statement 'Human rights are indivisible, interdependent and interrelated',<sup>11</sup> this does not seem to have any implications for the subsequent analysis.

As noted above, recommendation 3 of the Religious Freedom Review was that State and Federal anti-discrimination Acts should contain an **objects clause** that references the 'equal status and indivisibility' of human rights as a means to ensure religious freedom is

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<sup>9</sup> NSWLRC Community Summary, p.22, emphasis added.

<sup>10</sup> Religious Freedom Review, paras 1.36-1.37, p.13.

<sup>11</sup> NSWLRC CP para [2.21].

not placed as a second order right. The rationale offered by the Expert Panel was ‘the importance of ensuring that the right to religious freedom is given appropriate weight in situations where it is in tension with other public policy considerations, including other human rights.’<sup>12</sup> The Panel had noted concerns from submitters that religious freedom was treated as a ‘lesser’ right than equality. This resulted in a proposal to amend the objects of all Federal discrimination statutes to recognise the ‘indivisibility and universality of human rights, and their equal status in international law’ in the Human Rights Legislation Bill 2022 (Cth) passing the Federal House of Representatives with the support of both major parties.

Why is there no consideration of this recommendation in the CP?

**B. Freedom of Religion is a fundamental human right.**

The UN Human Rights Committee (HRC) describes freedom of religion as being ‘far-reaching and profound’ and of a ‘fundamental character’.<sup>13</sup> One implication of this fundamental nature is that a state party to the International Covenant on Civil and Political Rights (ICCPR) cannot derogate from its obligations under Article 18 (which spells out rights of religious freedom), even in times of public emergency.

**C. Freedom of religion is both an individual and an associational right**

The UN Human Rights Committee’s General Comment No 22, states that the freedom to manifest, practice and teach religion includes ‘acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, [and] the freedom to establish seminaries or religious schools’.

Similarly, Article 6 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) affirms that freedom of religion includes activities that are unavoidably communal in their expression, such as the freedom to establish worshipping communities and to ‘establish and maintain appropriate charitable or humanitarian institutions’.

**D. ICCPR 18(3) sets out the way to ‘accommodate intersecting human rights’.**

We agree with this analysis of the Religious Freedom Review:

‘Article 18(3) allows for balance between the right to manifest one’s religion or belief and other fundamental rights and freedoms of others.

The Siracusa Principles, while non-binding, provide some guidance on the interpretation of specific limitations clauses contained in various articles of the ICCPR (including article 18(3)). These include the principle that for a limitation of a particular right to be ‘necessary’ it must:

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<sup>12</sup> Expert Panel on Religious Freedom *Final Report* (May 2018) [1.423].

<sup>13</sup> HRC, General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (1993) [1] - <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

- be based on one of the grounds recognised in the relevant article as justifying a limitation
- respond to a pressing public or social need
- pursue a legitimate aim and be proportionate to that aim.

It is also stated in the Siracusa Principles that '[i]n applying a limitation, a State shall use no more restrictive means than are required for the achievement of the purpose of the limitation'.<sup>14</sup>

Recommendation Two of the Religious Freedom Review was 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'.

In paragraph 7.12, the CP makes the broad comment 'Under international human rights law, this aspect of the right [*to manifest belief*] can be limited in certain circumstances, including to protect other people's human rights.' At this critical point, the CP fails to 'have regard to' the Siracusa Principles (in fact, the CP does not refer to the Siracusa Principles at all, notwithstanding that multiple reviews into religious freedom have pointed to the Principles as a central model for reform).<sup>15</sup> Indeed, the Religious Freedom Review stated: 'The Panel is of the view that the Siracusa Principles form a sound basis for parliaments to assess whether a law limiting the operation of freedom of religion or other rights is unduly burdensome.'<sup>16</sup> However, the CP does not explore the limits on what these 'certain circumstances' are, and at no point does the CP acknowledge the high bar imposed by the condition that restrictions be 'necessary'. For the multiple reasons we identify below, the failure of the CP to accurately record the relevant human rights law has fatally impacted upon its subsequent identification of options for reform that will limit religious manifestation.

**E. The mechanism by which the ADA currently balances the right to religious freedom with other rights is by the (admittedly unsatisfactory) means of exception clauses.**

This is acknowledged in the CP – once – in paragraph 5.72: 'The complex system of exceptions is another way the ADA indirectly protects freedom of religion.' However, this point is entirely ignored in the discussion in chapter 7. The question posed at the outset of chapter 7 is 'whether and, if so when, religious bodies should be granted exceptions that allow them to discriminate.'<sup>17</sup> The answer to this question is conditioned by the earlier citation of the 1999 NSWLRC report: 'because discrimination law protects fundamental human rights, the prohibitions should not be lightly displaced. There must be good

<sup>14</sup> Religious Freedom Review, paragraphs [157]-[158], [160].

<sup>15</sup> Ibid; Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into the status of the human right to freedom of religion or belief*, Interim Report, 10.

<sup>16</sup> Religious Freedom Review [1.149].

<sup>17</sup> NSWLRC CP para [7.5].

justification for any genuine exception'.<sup>18</sup> Putting the question in this way privileges non-discrimination over religious freedom and frames the debate pejoratively – the onus is on religious bodies to justify why they should be 'allow[ed] to discriminate'.

The CP fails to take into account its own observation that the reason for the current religious exceptions is because earlier iterations of the ADA used an exceptions model as the mechanism to balance the right to manifest one's religion and other fundamental rights of others.<sup>19</sup>

If the CP had 'had regard to' the Siracusa Principles, the discussion in chapter 7 would have been framed in the reverse, commencing with an acknowledgement along the following lines – 'Religious freedom is a fundamental human right, and should not be lightly displaced. It should only be restricted when this is necessary to protect the fundamental rights of others. Currently, the right to manifest religious beliefs is protected by a complex system of exceptions. If these exceptions are removed or reduced, what other mechanism (if any) is necessary to ensure that religious freedom is not limited beyond that which is strictly necessary?' That approach would see the NSWLRC have regard to the 'equal status' of religious freedom under international law.

**F. A general limitations clause, such as that proposed in the Religious Discrimination Bill, is a better model for addressing intersecting human rights**

We recommend replacing the existing 'exception' model with a general limitations clause, which more accurately reflects the principle of international law that when a religious body acts in accordance with its religious beliefs it is 'not discrimination'. This gives expression to the UN Human Rights Committee's observation (cited above) 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'<sup>20</sup> and also recognises the 'indivisibility and universality of human rights, and their equal status in international law', as recommended by the Expert Panel on Religious Freedom. As the CP notes, Justice Sarah Derrington, when President of the Australian Law Reform Commission also released drafting that reflected this principle.<sup>21</sup>

**G. Judges should not be asked to determine the reasonableness of religious belief**

Judges are not trained to assess or evaluate religious doctrines and therefore should not be required by the law to determine whether a religious teaching is 'reasonable' or whether an action is 'required by' a religion. As Associate Professor Neil Foster has noted,

'There are good reasons to be cautious about courts making pronouncements on religious questions. While these questions are not always as 'irrational' as

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<sup>18</sup> NSWLRC CP [2.34], citing NSWLRC, *Review of the Anti-Discrimination Act 1977*, Report 92 (1999) [6.2].

<sup>19</sup> NSWLRC CP [5.72].

<sup>20</sup> Human Rights Committee, general comment No. 18 (1989), [13].

<sup>21</sup> Sarah Derrington, 'Of Shields and Swords – Let the Jousting Begin!' Speech, Freedom19 Conference, 4 September 2019, <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904>.

has sometimes been suggested, it is certainly true that most secular judges are not really competent to make detailed findings about the content and interpretation of theological truths.<sup>22</sup>

Similarly, Professor Carolyn Evans warns,

‘I am cautious about a test for determining whether an action is protected by freedom of religion with reference to distinguishing what is required by a religion from what is merely motivated by it. Such a test engages the judiciary in disputes and debates that most judges are not well equipped to adjudicate. These matters often are, and should be, contested within religions and within different sects or denominations of religion. Courts should, wherever possible, avoid developing tests that require them to engage in adjudicating the objective religious rules and instead focus on the subjective genuineness with which those beliefs are held.’<sup>23</sup>

Associate Professor Mark Fowler has shown that the consensus among leading anglophone courts on preferred models for judicial engagement with assertions of religious belief comprises:

- a) Regard to the ‘genuineness’ or ‘sincerity’ of a person’s belief as the evidentiary standard for identifying belief;
- b) As a subcategory of the foregoing, an avoidance of tests that assess the validity of a religious belief against the consensus interpretations of other adherents to that belief;
- c) An avoidance of distinctions between valid ‘core’ and invalid peripheral religious belief; and
- d) That the foregoing conditions are necessary to:
  - i. ensure that the task of identifying religious belief does not become the back-door means by which limitations are imposed, and
  - ii. thus guarantee claimants subjected to limitations are given publicly available reasons determined according to objective limitation standards.<sup>24</sup>

Fowler and Deagon survey judicial decisions in which the sincerity test has been applied to the determination of the religious beliefs associated with religious bodies, concluding:

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<sup>22</sup> Neil Foster, ‘Respecting the Dignity of Religious Organisations’ (2020) 47(1) *University of Western Australia Law Review* 175, 218. See also Alex Deagon, ‘The “Religious Questions” Doctrine: Addressing (Secular) Judicial Incompetence’ (2021) *Monash University Law Review* 47(1) 1-29.

<sup>23</sup> <https://law.uq.edu.au/files/88519/Evans%20Religious%20Freedom%20Paper.pdf>, p.11.

<sup>24</sup> Mark Fowler, ‘Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill’, in Michael Quinlan and A. Keith Thompson (eds) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia*, (Shepherd Street Press, 2021).

‘...an appropriate solution for evidencing the religious belief of a corporation is to accept the testimony of the religious corporation as to its sincerity, and the content and nature of its belief, as expressed by those within the corporation who possess the recognised authority to speak on behalf of the corporation.’<sup>25</sup>

#### H. **Receipt of public funding does not nullify the religious character of an institution**

Although the ICCPR imposes no obligation on states to fund religious institutions or schools, the United Nations Human Rights Committee has said that if a state decides to do so, the funding should be offered without discrimination and subject only to such differentiation as is justified by reasonable and objective criteria.<sup>26</sup> The CP proposes removing the exceptions within the Act that apply to religious institutions if an institution is in receipt of government funding. This amounts to a differentiation between religious and non-religious institutions that is not justified by reasonable and objective criteria. It also ignores the fact that taxes are paid by both religious and non-religious citizens, so that it cannot be said that all taxes must be devoted to purely ‘secular’ ends. As such it amounts to discrimination against religious believers through detrimental action against their associated institutions that non-religious equivalent institutions are not subject to. Non-religious institutions are not subject to the withdrawal of funding that religious institutions are proposed to be made subject to. Moreover, there is no reason to resile from this position when a religious institution offers services to non-adherents of their faith. The decision to provide a service to the wider community may well be completely aligned with the doctrines, tenets and beliefs of that institution, and thus would make it no less a religious institution. The religious character of a body does not change simply because the government has recognised the contribution to social good it makes and seeks assistance from that religious body to provide services to the community. The motivation for the charitable works comes from the religious purpose of the body, not because of the government funding.

## Part 3 – Tests for Discrimination

23. The CP asks a series of questions addressing the requirements placed upon a claimant in order to successfully establish discrimination. For the reasons stated below at Part 4, we welcome the proposal to expand the Act to protect against discrimination on the basis of religious belief and religious activity. However, the experience of religious discrimination law internationally is one marked by disappointment. For example, in the United Kingdom a magistrate has been held to not be able to recuse himself from facilitating a same sex adoption<sup>27</sup> and a civil registrar was lawfully disciplined for refusing to officiate a same-sex civil partnership,<sup>28</sup> despite prior assertions by

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<sup>25</sup> Mark Fowler and Alex Deagon ‘Recognising Religious Groups as Litigants: An International Law Perspective’ (2024) *Laws* 13, 18, see also 18-20.

<sup>26</sup> Human Rights Committee, Views: Communication No 694/1996, 67th sess, UN Doc CCPR/C/67/D/694/1996 (5 November 1999) [10.6] (*Waldman v Canada*).

<sup>27</sup> *McClintock v Department of Constitutional Affairs* [2008] IRLR 29.

<sup>28</sup> *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 (15 December 2009) on unsuccessful appeal in *Eweida v United Kingdom* European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013)

legislators that such persons would be protected under discrimination law. Similarly, religious anti-discrimination law has not protected a prison chapel volunteer affirming the traditional view of marriage,<sup>29</sup> a Christian counsellor from a requirement to supply sexual counselling to a same sex couple<sup>30</sup> or protected a midwife from compelled participation in an abortion.<sup>31</sup> This is notwithstanding the fact, acknowledged by the Ontario Supreme Court in the context of marriage, that these are matters where internal arrangements (i.e., ‘reasonable adjustments’: paragraphs 155-160) could be effected to allow a balancing between religious conviction and service supply, without the need for notification of the concern to the recipient of the service supply.<sup>32</sup> In light of this experience, in the following answers to questions concerning the tests for discrimination we express our view that our adherents would benefit from a clarification and strengthening of standard tests for discrimination. We do however note the important value of consistency and clarity with existing law.

24. However, prior to considering the specific questions raised in the CP, it is necessary to state the general proposition that where the Act operates to limit religious manifestation (whether through the direct or indirect discrimination test), it will need to comply with the requirements for limitation of religious manifestation under international law. To illustrate this principle, take the example of a religious employee who is disciplined or otherwise treated adversely by their secular employer for refusing to participate in a workplace ‘LGBTQA+ pride’ celebration. If the religious employee makes a direct or indirect discrimination claim against their employer that ultimately fails, employers similarly situated will be able to impose a limitation on the religious manifestation of similarly placed employees into the future. There is thus a need to ensure that, in so far as religious belief and religious activity are protected by the Act, the Act aligns with the obligations of international law that fall upon NSW. In respect of the ICCPR, these obligations arise under Article 18 and are applicable to NSW pursuant to Article 50.
25. To address this concern we propose that the Act adopt the following provisions found in the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 [NSW]:

### **3. Principles of Act**

- (1) In carrying out functions and making determinations under this Act, the Minister, Board, President, Tribunal and Courts shall have fundamental regard to the following—
- a. the International Covenant on Civil and Political Rights,

<sup>29</sup> *Trayhorn v Secretary of State for Justice* UKEAT/0304/16/RN.

<sup>30</sup> *McFarlane v Relate Avon Ltd* [2010] IRLR 872, on unsuccessful appeal in *Eweida v United Kingdom* European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013).

<sup>31</sup> *Doogan and another, Re judicial review* [2012] CSOH 32.

<sup>32</sup> *Marriage Commissioners Appointed Under the Marriage Act (Re Marriage Commissioners)*, 2011 SKCA3 (CANLII) at para 85, <http://canlii.ca/t/2f6ng>.

- b. the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the UN General Assembly on 25 November 1981; and
  - c. the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.
- (2) In particular, in interpreting the requirement of the International Covenant on Civil and Political Rights, Article 18(3), that limitations upon a person’s right to manifest their religion or belief must only be made where such are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights provide that limitations must, amongst other matters—
- a. be prescribed by law,
  - b. respond to a pressing public or social need,
  - c. pursue a legitimate aim and be proportionate to that aim, and
  - d. be applied using no more restrictive means than are required for the achievement of the purpose of the limitation.
- (3) So far as it is possible to do so consistently with their purpose, all provisions of this Act must be interpreted in a way that is compatible with the international instruments referred to in subsection (1).

This proposal was endorsed by members of both major political parties in The Report of the New South Wales Joint Select Committee Report on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 dated 31 March 2021 (the Committee Report).

26. This is consistent with recommendation 3 of the Religious Freedom Review that State and Federal anti-discrimination Acts should contain an **objects clause** that references the ‘equal status and indivisibility’ of human rights as a means to ensure religious freedom is not placed as a second order right. This resulted in a proposal to amend the objects of all Federal discrimination statutes to recognise the ‘indivisibility and universality of human rights, and their equal status in international law’ in the Human Rights Legislation Bill 2022 (Cth) passing the Federal House of Representatives with the support of both major parties. A similar provision should be contained within the NSW Act.

**Question 3.1: Direct discrimination:** Could the test for direct discrimination be improved or simplified? If so, how?

27. The CP proposes that consideration be given to replacing the ‘comparator’ test in direct discrimination with an ‘unfavourable treatment’ test.<sup>33</sup> The CP cites *Re Prezzi and Discrimination Commissioner* (‘Prezzi’)<sup>34</sup> as providing an example of that test. However, on the basis of their rigorous analysis, Campbell and Smith have rightly questioned ‘whether moving to a test of unfavourable treatment eliminates the need to consider a comparator.’<sup>35</sup> Their review of *Prezzi* ‘suggests that it will be very easy for a complainant to establish an unfavourable treatment on the setback to interests test’, with the result that that test becomes ‘radically overinclusive.’<sup>36</sup> Analysing the reasoning in *Prezzi* they provide the following illustrations of claims that the test would not, of itself, prevent:

‘A claim that a governmental refusal to satisfy a request from a disabled person to travel on a six week cruise to London is discriminatory; or

A claim that a refusal to offer an excessive raise to an employee is discriminatory (because the test does not require any comparator refusal).’

28. Furthermore, the ability of the test to overcome the need for comparative analysis is overstated. For example in *Slattery v Manningham CC (Human Rights)*<sup>37</sup> VCAT held that the meaning of ‘unfavourable’ ‘may be informed by consideration of the treatment afforded to relevant others, particularly in circumstances where it is not clear whether the treatment is unfavourable.’<sup>38</sup> Affirming that view in *Tsikos v Austin Health*, the Supreme Court of Victoria noted that in many cases ‘a comparison will provide evidence that is probative of whether a person was treated unfavourably, and whether the treatment was because of a particular attribute’.<sup>39</sup>

29. For these reasons we do not support replacing the comparator test with an unfavourable treatment test.

30. The CP also queries whether under the current Act ‘the respondent must have made a conscious decision to treat the complainant less favourably.’ It proposes addressing this uncertainty ‘by adopting an aspect of the Victorian approach to causation. Victorian discrimination law states that it is not relevant whether the respondent was aware of the discrimination or if they considered the treatment to be unfavourable.’<sup>40</sup> We support this recommendation. By way of illustration, take the example of a religious employee who is disciplined or otherwise treated adversely by their secular employer for refusing to participate in a workplace pride celebration. The employer should not be able to discipline the employee solely because the employer claims that they did not make a conscious decision to treat the complainant less favourably because of their religious belief.

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<sup>33</sup> NSWLRC CP 25 [3.22].

<sup>34</sup> (1996) 39 ALD 729 [24], EOC 92-803 [24].

<sup>35</sup> Colin Campbell and Dale Smith, ‘Direct Discrimination without a Comparator: Moving to a Test of Unfavourable Treatment’ (2015) 43(1) *Federal Law Review* 91, 93-4.

<sup>36</sup> *Ibid* 101, 91.

<sup>37</sup> [2013] VCAT 1869.

<sup>38</sup> *Ibid* [53].

<sup>39</sup> [2022] VSC 174 [47].

<sup>40</sup> NSWLRC CP 26 [3.32]-[3.33].

**Question 3.2: The comparative disproportionate impact test:** Should the comparative disproportionate impact test for indirect discrimination be replaced? If so, what should replace it?

31. In respect of indirect discrimination, the CP states that '[o]ne option could be to refocus the test. In several parts of Australia, the test for indirect discrimination does not assess disproportionate impact by reference to a comparator group. Instead, the issue is whether a requirement or condition disadvantages a person with a protected attribute.'<sup>41</sup> The current indirect discrimination test requires assessment of whether the requirement or condition has a disproportionate impact, on the basis that it is more easily satisfied by a substantially higher proportion of people who do not have the complainant's protected attribute than it is by people with that attribute. As Rees, Rice and Allen note, unless the court takes judicial notice of the fact that people will be disproportionately affected, 'relying on statistical evidence' proving the effect on the two hypothetical groups 'is potentially complex and expensive, a real barrier to a complainant who is attempting to prove discrimination.'<sup>42</sup> For that reason, we would support adoption of a test that has regard to whether a requirement or condition disadvantages a person with a protected attribute.

**Question 3.3 Indirect discrimination and inability to comply:** What are your views on the 'not able to comply' part of the indirect discrimination test? Should this part of the test be removed? Why or why not?

32. The CP notes 'The Queensland Human Rights Commission (QHRC) was concerned that the term "not able to comply" might be interpreted literally. This could exclude complainants who are capable of complying but choose not to because the requirement would be detrimental to them.'<sup>43</sup> It is sometimes asserted that a person's religious convictions can be acquitted by withdrawing from conduct that would cause them to breach their religious convictions. The reasoning is that the person was able to comply. Their ability to comply is found in their ability to withdraw from the workplace. This is clearly inconsistent with protection of religious freedom, and is an argument that would not be accepted in relation, for example, to a sex discrimination claim. We thus agree that clarification is needed to ensure that the 'not able to comply' test cannot have that outcome. Religious persons or entities should not be required to engage in, or affirm, acts which are contrary to their genuine religious beliefs when the only other option is to remove themselves from employment or undergo another form of detriment, such as disciplinary procedures, demotion or being overlooked for future promotion. This is not diverse, equitable or inclusive. In light of the watering-down of standard-form religious discrimination legislation by judicial interpretation

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<sup>41</sup> NSWLRC CP 29 [3.46].

<sup>42</sup> Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018) 153.

<sup>43</sup> NSWLRC CP 30 [3.52].

overseas as outlined above, to offer adequate protection, the Act should also clarify that compulsion to act contrary to religious convictions is religious discrimination.

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

(1) Should the reasonableness standard be part of the test for indirect discrimination? If not, what should replace it? (2) Should the ADA set out the factors to be considered in determining reasonableness? Why or why not? If so, what should they be?

**Indirect Discrimination - Reasonableness**

33. Indirect discrimination tests in the ADA include the test that a requirement is ‘not reasonable having regard to the circumstances of the case’ (see s7, s24, s38B, s39, s49B, s49T, s49ZG and s49YZA). The CP asks whether ‘an option could be to list factors to consider when determining whether a requirement is reasonable.’<sup>44</sup>
34. We recommend that a list of factors to consider in determining reasonableness be modelled on s7B(2) of the *Sex Discrimination Act 1984* (Cth), with two additional subclauses (shown in bold below). As Rees, Rice and Allen note in adopting the reasonableness standard legislators have ‘delegat[ed] very broad responsibility and discretion to courts and tribunals.’<sup>45</sup> They also note that this test does not have regard to the applicable human rights obligations that are imposed upon Australia.<sup>46</sup> The ‘reasonableness’ defence to indirect discrimination gives the decision maker a very broad discretion as to how to weight any factors it takes into account. This devolves significant matters of policy to the courts, in the absence of sufficient guidance. Commonwealth law should only permit religious manifestation to be limited where such is consistent with the international standard Australia has ratified. Under the standard indirect discrimination test where it is claimed that a burdensome condition has been imposed on believers, this condition will be justified if it is ‘reasonable’. However, this standard does not reflect the appropriate test for interference with religious freedom under international law, which requires that claims should be balanced according to the ‘necessary’ limitations standard set out in the ICCPR. Where a court rejects a religious believer’s religious discrimination claim, that believer will be prevented from acting in the same way in similar circumstances in the future. This imposes a limitation on the religious beliefs and activity of the applicant. All limitations are to comply with the relevant international standard. The drafting provided below will ensure that the reasonableness standard has regard to NSW’s obligations under the ICCPR (which arise because of Article 50). We also note that Recommendation 2 of the Expert Panel on Religious Freedom provided that State governments should have regard to the Siracusa Principles in relation to laws that limit the right to freedom of

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<sup>44</sup> NSWLRC CP [3.58].

<sup>45</sup> Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3<sup>rd</sup> ed, 2018) 155.

<sup>46</sup> *Ibid.*

religion. Subclause (c) recognises Siracusa Principle 10 (in pursuit of a legitimate aim) and subclause (e) recognises Principle 11 (least restrictive means).

***Considerations relating to reasonableness***

Whether a condition, requirement or practice is reasonable depends on all the relevant circumstances of the case, including the following:

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice;
- (b) the feasibility of overcoming or mitigating the disadvantage;
- (c) the extent to which the imposition, or proposed imposition, of the condition, requirement or practice is consistent with the protections afforded to a right or freedom recognised or declared by an instrument referred to in the definition of *human rights* in the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*;**
- (d) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice, and
- (e) whether in imposing, or proposing to impose, any limitation the condition, requirement or practice uses the least restrictive means necessary to achieve a legitimate goal.**

35. This provision accompanies, but is not a substitute for, the proposed objects clause endorsed by the Report of the New South Wales Joint Select Committee Report on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 dated 31 March 2021 and the further objects clause recommended by the Religious Freedom Review, as outlined above.

**Proportionality**

36. In respect of indirect discrimination the CP notes that ‘The Equality Act 2010 (UK) has a proportionality test. It requires an assessment of whether a requirement or a condition is “a proportionate means of achieving a legitimate aim”<sup>47</sup> However, it is important to notice that a proportionality test is also relevant to determinations of *direct discrimination* under UK law in relation to age, disability and religious discrimination. The Equality Act 2010 expressly applies a proportionality test to age (s 13(2)) and disability (s 15(1)). Furthermore, because of the application of the European Convention on Human Rights (ECHR) in domestic UK law, respondents to claims of direct discrimination against religious believers must demonstrate compliance with Article 9 of the Convention, namely that both direct and indirect discrimination was a proportionate means of achieving a legitimate aim. Thus, in determining whether actions ‘necessarily amounted to direct discrimination’ a decision-maker needs ‘to assess whether those

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<sup>47</sup> NSWLRC CP 32 [3.63].

actions were prescribed by law, and were necessary for the protection of the rights and freedoms of others' under the ECHR.<sup>48</sup>

37. The current NSW prohibitions on direct discrimination do not entail any consideration of the proportionality of the application of the law to any given set of circumstances. In this respect they do not align with the standard for discrimination under the ICCPR. Pointedly, as the United Human Rights Committee has acknowledged: 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'<sup>49</sup> This principle applies to both direct and indirect discrimination. As the CP states, direct discrimination is prohibited under the Act when it satisfies a range of statutory tests (for example, causal connection to an attribute, 'on the basis of', the comparator test, 'detriment' etc), none of which entail considerations of proportionality. In that respect, the NSW direct discrimination test does not accord with the relevant human rights law.
38. We recommend that the direct discrimination test be aligned with international human rights law, and include a proportionality test.

**Question 3.5: Indirect discrimination based on a characteristic:** Should the prohibition on indirect discrimination extend to characteristics that people with protected attributes either generally have or are assumed to have?

39. In respect of Question 3.5, we note that existing anti-discrimination law provides that if an employee who, without religious reasons, acted in the same way as a person with religious reasons would have been treated the same, their employer has not discriminated. To illustrate, take, for example, an employee who expresses a traditional view of marriage that is grounded in their religious beliefs and who is disciplined for that expression. If an employee who expresses the same view, where that view is *not grounded in a religious belief*, would be subjected to the same disciplinary treatment, then the employer has not discriminated. This is the effect of judgements such as *Purvis v New South Wales*,<sup>50</sup> where (simply stated) a school was held to not discriminate because it treated a person with disability in the same manner as a person who had the same symptoms, but no disability. This is how the comparator test in direct discrimination can prevent protections extending to religious believers: respondents can claim 'I would have treated any non-believer who behaved in that way identically'. Some courts have avoided this outcome by the use of the 'characteristics extension'. We have included below some examples that might assist in addressing the concern, by clearly setting out the kinds of characteristics that may attach to a religious believer. To the same substantive effect, the Rudd Government introduced an equivalent amendment in the *Disability Discrimination Act 1992* by also adding a clarification (with the same Bill introducing the reasonable adjustments amendments) that a disability includes a manifestation of a disability: 'To avoid doubt, a disability that is otherwise covered by this

<sup>48</sup> *Higgs v Farmor's School* [2023] EAT 89 [83] ('*Higgs v Farmor's*').

<sup>49</sup> Human Rights Committee, general comment No. 18 (1989) [13].

<sup>50</sup> [2003] HCA 62.

definition includes behaviour that is a symptom or manifestation of the disability.’ Like the reasonable adjustments test, this was also introduced to deal with the *Purvis v Commonwealth* comparator issue. An equivalent clarification should be made for the protected attribute of religious belief as follows: ‘To avoid doubt, a religious belief that is otherwise covered by this definition includes behaviour that is a manifestation of the religious belief.’ This clarification would apply to both direct and indirect discrimination (and can assist with further clarity in addressing certain concerns with the comparator test for the latter).

40. There is precedent for clarifying what characteristics attach to a protected attribute in Commonwealth anti-discrimination law. For example, s 5(1A) of the *Sex Discrimination Act 1984* states ‘to avoid doubt, breastfeeding (including the act of expressing milk) is a characteristic that appertains generally to women.’ These additional examples are styled consistently with the examples provided in the *Queensland Anti-Discrimination Act 1991*. Similar to that Act, the examples are not to be read to affect the remaining relevant discrimination tests that must be satisfied under other sections.

Example: A religious student club on a university campus has its access to facilities suspended following its opposition to rules that ban religious groups from contributing to public discussion on campus concerning matters of government or university policy. For certain religious traditions, the characteristic of contributing to discussion on matters of public policy may be a characteristic that persons who have that religious belief generally have, or are generally presumed to have.

Example: A characteristic that many religious faiths have is to refrain from participating in, contributing to, or affirming practices that are not permitted under the religious faith.

In light of the above, to reply to Question 3.5, the prohibitions on both direct and indirect discrimination should extend to characteristics that people with protected attributes either generally have or are assumed to have.

**Question 3.6: Proving indirect discrimination:** (1) Should the ADA require respondents to prove any aspects of the direct discrimination test? If so, which aspects? (2) Should the ADA require respondents to prove any aspects of the indirect discrimination test? If so, which aspects?

41. The current arrangements regarding burden of proof in the current anti-discrimination regime should not be changed. The claim that a person has engaged in discrimination is a serious allegation, that if proven, carries detrimental reputational and social consequences. Accordingly, we believe that it should still fall to the complainant to prove on the balance of probabilities that the alleged discrimination has in fact taken place, rather than shifting the burden in any sense to a respondent.

**Question 3.7: Direct and indirect discrimination:** (1) How should the relationship between different types of discrimination be recognised? (2) Should the ADA retain the distinction between direct and indirect discrimination? Why or why not?

42. The CP states ‘some think the ADA should acknowledge that direct and indirect discrimination can overlap. For example, the Discrimination Act 1991 (ACT) states that ‘discrimination occurs when a person discriminates either directly or indirectly, or both, against someone else’.<sup>51</sup> It is our view that the current distinction between direct and indirect discrimination should be maintained. This distinction, the jurisprudence for which is now well established, has allowed for a significant body of case law to accrue defining the boundaries of each category. While this law is not entirely settled, the fifty or so years of precedents have developed to a point where a degree of relative clarity may now be said to be available to litigants and those desiring to diligently observe the legal requirements placed upon them. It is in the best interests of complainants and respondents that they be able to continue to act with relative certainty. Collapsing the distinction will ‘wipe the slate’ of existing jurisprudence clean and commence a new period of uncharted legislative prohibitions. Religious bodies that seek to diligently comply with the current regime would face significant uncertainty if the distinction between these two categories were to change, given that policies and procedures that they establish are designed to allow them to operate in accordance with their doctrines, tenets and beliefs in light of the ADA.

**Question 3.8: Intersectional discrimination:** (1) Should the ADA protect against intersectional discrimination? Why or why not? (2) If so, how should this be achieved?

43. We do not believe that the current protections against discrimination should be changed to provide protection against ‘intersectional discrimination’. The CP cites the AHRC report, ‘Free and Equal: A reform agenda for federal discrimination laws’ as an example of a call for including protections for ‘intersectional discrimination’.<sup>52</sup> However, the recommendation in that report for introducing such protection was muted, and largely the consequence of the fact that protections against discrimination at the federal level are distributed across multiple pieces of legislation, which is not the case in NSW, where all the protected attributes are subject to the one statutorily enshrined complaint mechanism.<sup>53</sup> Furthermore, the ‘Free and Equal’ report notes that the actual *practice* of discrimination claims at the federal level when dealing with claims on the grounds of multiple protected attributes is not problematic: ‘When complaints are made to the Commission alleging discrimination on the basis of more than one attribute, or on the basis of a combination of attributes, the complaints can be treated pragmatically by the Commission and handled together’.<sup>54</sup> This approach is also possible in NSW. We note that ADNSW currently accepts complaints from complainants on multiple grounds. The Anti-Discrimination NSW complaint form allows a complainant to select multiple grounds of discrimination and this will then be taken

<sup>51</sup> NSWLRC CP, 37, para [3.89].

<sup>52</sup> NSWLRC CP, para [3.95].

<sup>53</sup> AHRC, ‘Free and Equal: A reform agenda for federal discrimination laws’ (December 2021), 301.

<sup>54</sup> *Ibid* 302.

by ADNSW and treated as one complaint and conciliation process.<sup>55</sup> It is our view that there is no functional distinction both during the ADNSW process and if it is later adjudicated at Tribunal, between considering each ground of discrimination in turn, though grouped together, and having a new ground of ‘intersectional discrimination’ that would presumably only increase complexity of the test. It may make the application of a comparator test even more difficult to employ.

**Question 3.9: Intended future discrimination:** Should the tests for discrimination capture intended future discrimination? Why or why not? If so, how could this be achieved?

44. We support the extension of the Act to prevent intended future discrimination. In respect of the direct discrimination test this could be done through the inclusion of the words ‘proposes to treat’, consistent with other State and Territory based discrimination law. In respect of the indirect discrimination test this could be done through the inclusion of the words ‘proposes to impose’, consistent with other State and Territory based discrimination law. We note that in both cases the burden would remain on the complainant to marshal the evidence necessary to substantiate that a sufficient intention either to ‘treat’ or to ‘impose’ exists on the part of the respondent. This however is simply a measure to afford justice to complainants, avoiding the absurd conclusion that they must first encounter a discriminatory act in order to complain of it, without any ability to prevent it. Most notably, such a reform will enhance the protections available to persons on the basis of their religious belief and activity on the inclusion of that attribute in the ADA. For example, an employee who refused to participate in a ‘LGBTQA+ pride’ celebration for religious reasons could take action to prevent their termination prior to its occurring, rather than only be afforded protection after they have been dismissed.

## Part 4 – Discrimination: protected attributes

**Question 4.1: Age discrimination:** (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of ‘age’? (2) What changes, if any, should be made to the age-related exceptions?

**Question 4.2: Discrimination based on carer’s responsibilities:** (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of ‘responsibilities as a carer’? (2) Should the ADA separately protect against discrimination based on someone’s status of being, or not being, a parent?

**Question 4.3 Disability discrimination:** (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of ‘disability’? (2) Should a new attribute be created to protect against genetic information discrimination? Or should this be added to the existing definition of disability? (3) What changes, if any, should be made to the public health exception?

<sup>55</sup> ADNSW, *Complaint form* (last accessed 29/07/2025), <https://antidiscrimination.nsw.gov.au/complaints/how-to-make-a-complaint.html>; ADNSW, *Fact Sheet* (last accessed 29/07/2025), [https://antidiscrimination.nsw.gov.au/documents/fact-sheets/ADNSW\\_General\\_Fact\\_Sheet\\_Final\\_version.pdf](https://antidiscrimination.nsw.gov.au/documents/fact-sheets/ADNSW_General_Fact_Sheet_Final_version.pdf).

**Question 4.4: Discrimination based on homosexuality:** What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of ‘homosexuality’?

**Question 4.5: Discrimination based on marital or domestic status:** What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of ‘marital or domestic status’?

**Question 4.6: Racial discrimination:** (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of ‘race’? (2) Are any new attributes required to address potential gaps in the ADA’s protections against racial discrimination?

**Question 4.7: Sex discrimination:** (1) What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of ‘sex’? (2) Should the ADA prohibit discrimination based on pregnancy and breastfeeding separately from sex discrimination?

**Question 4.8: Discrimination on transgender grounds:** What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of ‘transgender grounds’?

45. When the ADA was first passed in 1977, it only protected against discrimination on the ground of race, sex and marital status. Since that time, the protected attributes of disability (1981), homosexuality (1982), carer’s responsibilities (1982), age (1993) and transgender (1996) have been added.
46. In the past almost 30 years since ‘transgender’ was added as a protected attribute, there has been a significant shift (and confusion) in the terminology related to sex, gender and sexuality. These definitions continue to be contested, as are the implications of these definitions for anti-discrimination law. For that reason, it is vital that the ADA uses clear and non-circular definitions.
47. ‘Sex’ in the ADA is, and should remain, a biological category. For example,
  - A. Section 23 states that ‘man means a member of the male sex irrespective of his age’ and ‘woman means a member of the female sex irrespective of her age.’
  - B. Section 31 outlines a range of jobs where biological sex is a genuine occupational requirement, such as fitting of a person’s clothing to a person of that sex, conducting a bodily search of a person of that sex, entering a changeroom used by persons of that sex while in a state of undress or while bathing or showering and so on.
  - C. Section 31A(4) provides that a single-sex school that enrolls a transgender person who identifies with the sex of persons for whom the school is conducted does not alter its status as a school conducted solely for students of the same sex. If a transgender person enrolling at school had become a member of the sex which they identify (e.g., a trans-male enrolling at a boys’ school), then this provision would be redundant. The purpose of this provision is to allow a boys’ school to admit a student who is biologically female but identifies as a male, without compromising its status as a boys’ school.

- D. Section 35 recognises that granting a woman rights or privileges in connection with pregnancy, childbirth or breastfeeding is not sex discrimination against a man.
- E. Sections 36 and 37 provide exceptions in relation to superannuation and insurance to allow differentiation on the basis of biological sex in the calculation of premiums etc. where there is reasonable actuarial or statistical data on which to base this differentiation (e.g., The difference in life expectancy between males and females is 4.0 years).<sup>56</sup>
- F. Section 38 permits the exclusion of persons of the one sex from participation in any sporting activity. This enables clubs to have separate men's and women's teams. There is a separate provision (s38P), that permits the exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies. This would not be necessary if a transgender person had in fact become the sex with which they identify.
48. In any revision of the ADA, sex should continue to be defined as a biological category. This is consistent with The Australian Government Guidelines on the Recognition of Sex and Gender, which state that 'sex refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex' whereas gender 'refers to each person's deeply felt internal and individual identity and the way a person presents and is recognised within the community.'<sup>57</sup> This understanding of sex as a biological concept was endorsed by the Western Australian Law Reform Commission's 2022 report.<sup>58</sup>
49. It is also consistent with the definitions of sex and gender reaffirmed in Dec 2023 by the Royal Australian and New Zealand College of Psychiatrists (RANZCP),
- 'Sex refers to the biological characteristics that define humans as female or male. While these sets of biological characteristics are not mutually exclusive, as there are individuals who possess both, they differentiate humans as males and females in the vast majority of people.
- Gender* refers to the state of being male, female, or other, and/or masculine, feminine and other, with regard to personal, social and cultural characteristics, rather than genetic, hormonal or anatomical characteristics.'<sup>59</sup>
50. Sex and gender must not be confused or conflated for the purposes of the ADA. The Australian Bureau of Statistics in January 2021 released the Standard for *Sex, Gender, Variations of Sex*

<sup>56</sup> <https://www.abs.gov.au/statistics/people/population/life-expectancy/latest-release>

<sup>57</sup> <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/australian-government-guidelines-recognition-sex-and-gender>

<sup>58</sup> [https://www.wa.gov.au/system/files/2022-08/LRC-Project-111-Final-Report\\_0.pdf](https://www.wa.gov.au/system/files/2022-08/LRC-Project-111-Final-Report_0.pdf) at p.113

<sup>59</sup> <https://www.ranzcp.org/clinical-guidelines-publications/clinical-guidelines-publications-library/role-of-psychiatrists-working-with-trans-gender-diverse-people>

*Characteristics and Sexual Orientation Variables 2020*, which recommends statistical standards for four variables: Sex, Gender, Variations of sex characteristics and Sexual orientation.<sup>60</sup>

51. The ADA should protect an expanded category of transgender persons from discrimination under the category of ‘gender identity’ (see below) but do this in a way that does not blur the category of sex as a biological category or undermine exemptions the rationale for which is the biological differences between men and women.
52. This issue has become complicated by the amendments to the *Births, Deaths and Marriages Registration Act 1995* introduced by Alex Greenwich which came into force on 1 July 2025. Section 32B allows an adult (or, if a child, their guardians – s32C) to change the sex recorded on the birth register to a chosen sex descriptor. Section 32H provides that ‘A person whose record of sex is altered under this part is, for the purposes of a law of this State, a person of the sex stated in the altered record.’ However, the legislative note to 32H states ‘Nothing in this part changes access to toilets, change rooms, sport or allocation in correctional facilities, women’s refuges or any other place.’ This note suggests that s32H is not intended to alter the operation, for example, of section 31 and 38 described above. How s32H interacts with this note is unclear. While statutory notes are not formally part of the Act, under s 35(2)(c) of the *Interpretation Act 1987* (NSW), s34(2)(a) of that Act allows such notes to be taken into account in interpreting a provision which is ‘ambiguous or obscure’. The resulting uncertainty needs to be clarified so that ‘sex’ in the ADA is, and remains, a biological category.
53. It is also unclear whether there will be discrimination implications for a Minister of Religion, who is only permitted by his or her religion to solemnizing a marriage between a biological male and a biological female, who refused to solemnise a marriage between two biological males, one of whom has an altered birth certificate that states that, for all legal purposes in the State of NSW, this person is female. While arguably this could not be regarded as unlawful given the religious freedom recognition provided in s 47(3) of the *Marriage Act 1961* (Cth) (subject to the implications of the final determination in the *Tickle v Giggle* litigation), this also needs to be clarified to avoid confusion.
54. The ADA should include a definition of intersex and prohibit discrimination on this ground:

**intersex status** means having an innate variation of primary and secondary sex characteristics that differs from norms for female or male bodies.

55. The current definition of homosexuality is too limited, because it does not include other sexual orientations, like heterosexuality, bisexuality and asexuality. Discrimination on the basis of homosexuality should be redefined to be discrimination on the basis of sexual orientation. The

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<sup>60</sup> <https://www.abs.gov.au/statistics/standards/standard-sex-gender-variations-sex-characteristics-and-sexual-orientation-variables/latest-release>.

definition of sexual orientation should be modelled on the definition in the *Conversation Practices Ban Act 2024*, amended as shown below to remove the circularity of the definition

**sexual orientation—**

(a) means an individual's sexual ~~orientation~~ **attraction** towards—

(i) individuals of the same sex, or

(ii) individuals of a different sex, or

(iii) individuals of the same sex and individuals of a different sex, and

(b) includes having a lack of sexual attraction to any individual of any sex.

56. The ADA should replace the discrimination on 'transgender grounds' with the protected attribute of gender identity, defined consistently with s4 of the *Sex Discrimination Act 1984* and s93Z of the *Crimes Act 1901*.

**Gender identity** means the gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

57. There needs to be legislative clarity about the difference between sex and gender identity. As noted above, the confusion (or perhaps incoherence) reflected in the note to s32H of the *Births, Deaths and Marriages Registration Act 1995* needs to be resolved.
58. We do not, in principle, oppose the inclusion of new protected attributes of pregnancy or breastfeeding, as discussed at paragraph 4.102 of the CP. Given that these attributes are exclusively possessed by members of the female biological sex, if they are included in the ADA, then consistent with the principles that we have outlined above, they should be so included in a way that maintains their connection to biological sex.

**Question 4.9: Extending existing protections:** (1) Should the ADA protect people against discrimination based on any protected attribute they have had in the past or may have in the future? (2) Should the ADA include an attribute which protects against discrimination based on being a relative or associate of someone with any other protected attribute?

59. The ADA should protect religious bodies against discrimination on the basis of their association with a religious believer. The Religious Discrimination Bill 2022 (Cth) protected religious bodies from religious discrimination by means of an associates clause, recognising that while a corporate body itself does not have human rights, discriminating against a religious body can effectively be the same as discriminating against the people represented by that body. Associate Professors Mark Fowler and Alex Deagon have written a lengthy analysis of the bases on which

corporate bodies may be recognised as being protected by religious discrimination protections, as vehicles that express individual's rights to not be discriminated against under international law.<sup>61</sup> They conclude that such is necessary in order to give adequate protection to the rights of individuals against discrimination. Clause 16 of the Religious Discrimination Bill 2022 (Cth) protected religious bodies from discrimination on the basis of their 'association' with a religious believer – see 16(3) below. The same protection should be afforded religious bodies under New South Wales law.

60. The model that we propose is not dissimilar to the 'relatives and associates' clause proposed by the NSWLRC in 1999. Subsection 15(2) expressly extended protection to incorporated bodies.

**15 Unlawful discrimination under secs 9 and 10—relatives and associates**

(1) For the purposes of sections 9 and 10, it is unlawful to discriminate against a person because he or she is a relative of, or associates with, another person and because that other person has an irrelevant characteristic.

(2) A person, being an incorporated body, associates with another person if the other person is a member or officer of the incorporated body.

**Example.** If an incorporated association applies for a lease of premises and is refused the lease because its officers are homosexual, or of a particular race, the lessor will have discriminated unlawfully against the incorporated association.

61. We propose a version of Clause 16 in the *Religious Discrimination Bill 2022* (Cth) passed by the House of Representatives with bipartisan support.

**16 Discrimination extends to persons associated with individuals who hold or engage in a religious belief or activity**

1) This Act (other than section 15 and Part 2) applies to a person who has an association with an individual who holds or engages in a religious belief or activity in the same way as it applies to a person who holds or engages in a religious belief or activity.

Note: It is therefore unlawful under this Act to discriminate against a person (irrespective of whether they hold or engage in a religious belief or activity) in the areas of public life that the Act covers on the basis of the person's association with someone who does hold or engage in a religious belief or activity.

Example: It is unlawful, under section 19, for an employer to discriminate against an employee on the ground of a religious belief or activity of the employee's spouse.

2) Without limiting subsection (1), a person that is an individual has an **association** with another individual if:

<sup>61</sup> Mark Fowler and Alex Deagon, 'Recognising Religious Groups as Litigants: An International Law Perspective' (2024) *Laws* 13, 16.

- a. the other individual is a near relative of the person; or
  - b. the person lives with the other individual on a genuine domestic basis; or
  - c. the other individual is in an ongoing business relationship with the person; or
  - d. the other individual is in an ongoing recreational relationship with the person; or
  - e. the person and the other individual are members of the same unincorporated association.
- 3) For the purposes of subsection (1), a person that is a body corporate has an **association** with an individual if a reasonable person would closely associate the body corporate with that individual.

This approach is to be preferred over the NSWLRC’s proposal in 1999 as it enables greater flexibility in recognising the varying array of relationships between an institution and its associates. This is because the definition of ‘associate’, to give adequate protection, should ensure that it encompasses the wide range of possible associations, including for example, association based on individuals sharing religious belief, observance or expression or attendance, and associations between institutions and their governing committee members, directors, trustees, employees, contractors, goods, service or facility providers and recipients, members, volunteers and attenders and related bodies corporate, and those whom a reasonable person would otherwise associate a religious institution with.

## Part 5 – Discrimination: potential new protected attributes

**Question 5.1: Guiding principles:** What principles should guide decisions about what, if any, new attributes should be added to the ADA?

**Question 5.2: Potential new attributes:** (1) Should any protected attributes be added to the prohibition on discrimination in the ADA? If so, which what should be added and why? (2) How should each of the new attributes that you have identified above be defined and expressed? (3) If any of new attributes were to be added to the ADA, would any new attribute specific exceptions be required?

**Question 5.3: An open-ended list:** Should the list of attributes in the ADA be open-ended to allow other attributes to be protected? Why or why not?

62. As noted above, we support the inclusion of religious belief and religious activity as protected attributes in the Act. However, we do not support making the list of attributes open-ended, as this would represent a fundamental adjustment to the way in which the list of protected attributes works. This is unnecessary and creates significant uncertainty for individuals and institutions seeking to comply with the law. Religious belief and religious activity, on the other hand, must be

included as the most significant gap in the NSW anti-discrimination regime's compatibility with international human rights law. The patchwork protection afforded to human rights, provided by federal and state-based anti-discrimination statutes, is the primary way Australian lawmakers have chosen to legislatively protect human rights. The conspicuous gap in NSW's protection of religious freedom rights fails to follow the ICCPR in providing protections from discrimination on the basis of religious belief and activity and inadequately providing protections for religious individuals and communities to manifest their religious beliefs through religious institutions.

63. Freedom of religious belief and activity is a fundamental human right enshrined in the ICCPR. Article 18 sets the nature and boundaries of that right, and these boundaries are not recognised by the NSW Act. This should be implemented in this reform process so that the Act is in alignment with the international standard. The international standard is that nothing can detract from the right to religious belief and only very limited derogation from the right to manifest religious belief is permitted when *necessary*, 'to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.'<sup>62</sup> Furthermore, 'the liberty of parents and guardians to ensure religious and moral education cannot be restricted'.<sup>63</sup>
64. Parents exercise their 'liberty ... to ensure the religious and moral education of their children in conformity with their own convictions' under Article 18(4) of the ICCPR by associating with others to form religious education institutions or by choosing to send their children to a religious educational institution of their choice. Religious individuals regularly exercise their religious rights and freedoms through the formation and activities of religious bodies and formal institutions such as churches, schools and charities. It is for this reason that protections against discrimination on the basis of religious belief and activity should extend to religious bodies. Religious believers can experience discrimination through discriminatory behaviour directed to the institutions they comprise, through denial of service provision for example. One way that protection from discrimination could be extended to religious institutions is through an associates clause (as described above), which would allow religious institutions to claim associate status of the religious individuals that are the ultimate targets of the discriminatory treatment.
65. NSW needs to include protections for religious believers in the Act by protecting against discrimination on the basis of religious belief and activity and improving the protections for religious institutions because the evolving NSW context requires this change now more than ever:
  - A. NSW is increasingly multicultural and multi-religious and remains the most religious state in Australia by census figures.<sup>64</sup>

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<sup>62</sup> Forty Eighth Session of the Human Rights Committee, *UN General Comment No.22: Article 18 (Freedom of Thought, Conscience or Religion)* (30 July 1993) [8].

<sup>63</sup> *Ibid.*

<sup>64</sup> Australian Bureau of Statistics, 'Cultural Diversity: Census' <https://www.abs.gov.au/statistics/people/people-and-communities/cultural-diversity-census/2021>; Australia Bureau of Statistics, Religious Affiliation in Australia.' <https://www.abs.gov.au/articles/religious-affiliation-australia>

- B. The negative perception of Christianity and Christians has steadily grown,<sup>65</sup> and there has been a marked increase in the number of serious attacks on religious individuals and communities over the last year.<sup>66</sup>
- C. Though there is an increasing gap in community understanding and in secular animus towards religious communities, there is at the same time a rapidly rising demand for authentic religious communities, especially independent religious schooling.<sup>67</sup>

These factors indicate a context in NSW that has the potential for increased tensions across the secular/faith divide, and yet, there remain no protections against religious discrimination in the ADA. This must change.

- 66. As the CP notes, more than 20 years ago the New South Wales Law Reform Commission recommended the inclusion of religion as a protected attribute in New South Wales anti-discrimination legislation. Amendment to the *New South Wales Anti-Discrimination Act 1977* to include the protected attribute of ‘religious belief or activity’ was proposed by the Commonwealth Expert Panel on Religious Freedom (Religious Freedom Review) in May 2018. The recommendation was made by the Religious Freedom Review in response to its task of assessing whether Australian law ‘adequately protects the human right to freedom of religion’.
- 67. The Report of the New South Wales Joint Select Committee Report on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 dated 31 March 2021 (the Joint Select Committee Report) has already undertaken the necessary consideration in respect of the much-needed protection of ‘religious belief and activity’. It is therefore surprising that the NSWLRC Consultation Paper does not refer to the substance of this bipartisan report at all.
- 68. The Bill considered by the Joint Select Committee Report provided a very good model for such a law because it thoughtfully considered a range of issues about individual and group religious expression and the need for religious organisations to be free to authentically maintain their ethos, for example, in their conduct and their employment policies.
- 69. A key virtue of the Committee’s model is that it recognises that protecting religious belief and activity requires a bespoke approach, rather than merely substituting ‘religion’ for ‘age’ or ‘disability’ in stock standard anti-discrimination amendments. Religious discrimination is different, because it relates to prohibiting discrimination on the grounds of speech and action based on convictions (as opposed to discrimination on the grounds of physical or mental

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<sup>65</sup> <https://mccrindle.com.au/app/uploads/reports/The-changing-faith-landscape-of-Australia-Report-2022.pdf>.

<sup>66</sup> Greg Craven, ‘Uni chieftains can have no defence on anti-Semitism’ *The Weekend Australian* February 1-2, 2025 22; Syan Vallance, Danuta Kozaki and Kate Ashton, ‘After suspected terror attack on synagogue, Australia’s Jewish community is feeling unsettled but supported’ 14 December, 2024 ABC <https://www.abc.net.au/news/2024-12-14/jewish-community-fears-synagogue-terror-attack-anti-semitism/104717278>; 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.

<sup>67</sup> Australian Bureau of Statistics, ‘Schools’ <https://www.abs.gov.au/statistics/people/education/schools/2024>; <https://isa.edu.au/wp-content/uploads/2022/07/ENROLMENT-TRENDS-INFOGRAPHIC-2022-edition.pdf>

attributes) and discrimination against groups and organisations (organised around religious convictions) as well as against individuals.

70. The key features of the committee's model are as follows:

- A. **A mechanism by which the conflict between the right to manifest religious belief and other human rights may be reconciled.** Notably, this is found at clause 3 of the Bill 'Principles of Act' (replicated above), which provides specific legislative direction that requires regard to the international consensus. Rather than remaining silent as to how competing claims are to be reconciled, enabling a void to be filled by the personal preferences of decision-makers, legislative direction should be provided in the interests of justice. In this regard, we consider that the Committee's recommendation provides a best-practice model for the reform of anti-discrimination law precisely because it requires that all human rights be treated in accordance with international consensus, consistent with the recommendations of the Ruddock Review. This will provide clarity for all parties, by requiring that a fair balance be struck having regard to the respective concerns of the parties in accordance with the protections to equality and the principles for limiting rights in international law.<sup>68</sup>
- B. **A definition of 'religious activities' that includes activities** motivated by religious beliefs and protects activities in secular contexts.<sup>69</sup> Courts have sometimes taken restrictive views of what comprises 'religious activity', confining that notion to prayer, worship or the observance of religious rituals or customs. To address such findings, the protection should extend to refusals to perform acts that are contrary to religious beliefs. Such a clarification is necessary to give effect to the Religious Freedom Review's concern that protections to 'freedom of religion or belief' must also 'make sure that no one is exposed to any pressure, especially by the State, to confess or practice a religion or belief against one's own convictions'.
- C. **A test for 'religious belief' that has regard to the claimant/respondent's 'sincerely' held convictions**, thus avoiding judges having to interpret religious doctrines to determine if a belief conforms to religious doctrine.<sup>70</sup> This was effected through the following clause:

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<sup>68</sup> See Committee Report [1.47], [2.8]-[2.10], [2.11]-[2.16], [2.25]-[2.29], [2.37]. Note the comment at [2.10] is to be read in light of the formal recommendation at [2.37(d)].

<sup>69</sup> See Committee Report [2.47], [2.83]-[2.84] and definition of 'religious activities' in the Explanatory Notes to the Bill, page 4. For an illustration of why such is required see the decision of Maxwell P in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75 at [264]: 'Quite different questions arise if the body in question engages in an activity which is wholly secular. There may, of course, be a religious motivation for the activity but, if the activity does not have an intrinsically religious character, it is difficult to see how questions of doctrinal conformity or offence to religious sensitivities can meaningfully arise.'

<sup>70</sup> See Committee Report [1.9], [2.71]-[2.73], [2.83]-[2.84]. The Australian High Court, the House of Lords, the United States Supreme Court and the Supreme Court of Canada have each developed a sincerity test to avoid courts taking it upon themselves to interpret the correct form of a religious movement's beliefs. For Australian examples *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 129-130 (Mason ACJ and Brennan J), 174 (Wilson and Deane JJ) ('*Scientology Case*'); *Kumar v Satsang Hindu Maha Sabha of NSW Incorporated (No 2)* [2019] NSWSC 325, [21] (Kunc J). For international authorities see *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, 267 (Lord Walker); *Employment*

For the purposes of this Act, a person holds a religious belief (inclusive of the person's beliefs as to the actions, refusals, omissions or expressions that are motivated or required by, conflict with, accord or are consistent with, that belief) if the person genuinely believes the belief.

- D. **Recognition that religious freedom should be positively protected via a general limitation clause approach**, rather than through exemptions, by acknowledging that acting in pursuit a religious purpose is not 'discrimination'.<sup>71</sup>
- E. **The test for determining conformity with religious belief avoids courts imposing arbitrarily restrictive readings** of the requirements of religious beliefs.<sup>72</sup> This is done through the use of the terms 'consistent with' (as opposed to 'conform with' used in similar legislative exceptions); conduct that is 'required *because of* the religious susceptibilities of the adherents of the religion' (as opposed to conduct necessary to 'avoid injury') and conduct that 'further or aids the organisation'.<sup>73</sup> This responds to strict readings of the word 'necessary', as applied, for example, in *Cobaw*. In *Cobaw Maxwell P* placed the following interpretation on the phrase 'necessary to avoid injury to religious susceptibilities': that the harm be "significant" and "unavoidable", and to require the harm caused to be "real harm".<sup>74</sup> That test places severe limitations on religious institutions and calls into question their ability to engage in voluntary undertakings such as offering charitable services or even education.
- F. **Specific protections offered to employees, professionals and students for statements made outside the workplace.**<sup>75</sup>
- G. **Clarification that secular workplaces cannot impose 'genuine occupational requirements tests'** to stifle religious expression.<sup>76</sup>

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*Division, Department of Human Resources of Oregon v Smith*, 494 US 872, 886-7 (Scalia J) (1990) ('Smith'); *Holy Spirit Association for the Unification of World Christianity v Tax Commission* 435 N E 2d 662, 668 (NY 1982); *Syndicat Northcrest v Amselem* (2004) 2 SCR 551 and those authorities summarised in Fowler, Mark 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill', in Michael Quinlan and A. Keith Thompson (eds) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia*, (Shepherd Street Press, 2021). See also Neil Foster, 'Respecting the Dignity of Religious Organisations' (2020) 47(1) *University of Western Australia Law Review* 175. As to how Courts have permitted a religious institution to evidence a belief through the sincere testimony of its leaders see the overview on pages 18-20 of Mark Fowler and Alex Deagon, 'Recognising Religious Groups as Litigants: An International Law Perspective' (2024) *Laws* 13, 16 available at <https://www.mdpi.com/2075-471X/13/2/16>.

<sup>71</sup> See Committee Report [2.87].

<sup>72</sup> The decision in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75 provides a leading example of such a restrictive reading at paragraphs [260]-[306] (Maxwell P).

<sup>73</sup> See Committee Report [2.93], [2.126].

<sup>74</sup> *Cobaw* (n 7) [300] (Maxwell P).

<sup>75</sup> See Committee Report [2.187].

<sup>76</sup> See Committee Report [2.195]-[2.197],[2.215]. See Explanatory Notes to the Bill, page 7, example 2.

- H. **Clarification that the State Government would be bound by the Act**, thus protecting, for example, the religious body that was told by the Principal of the State school whose hall it hires that it cannot teach its religious view of marriage.<sup>77</sup>
- I. **Avoidance of the unintended consequence** that if an employer asserts it would discipline both a religious and non-religious employee for doing and/or saying the same thing, there must have been no discrimination against the person of religious belief.<sup>78</sup>
- J. **Recognition that institutions may themselves be the subject of discrimination**, thus protecting religious bodies, schools and charities.<sup>79</sup>

### Only 'lawful' religious belief and activity?

71. Limiting protection of religious belief and activity to 'lawful' religious belief and activity isn't necessary and is highly undesirable. Six out of eight State and Territory anti-discrimination laws do not require religious activities to be lawful for the persons engaging in them to be protected from discrimination. All kinds of legislation, including subordinate and delegated legislation, can make an act unlawful. For example:
- A. a local government could make the expression of certain religious views or certain religious activities unlawful on council operated premises or in streets and parks, with the penalty being a fine. A street preacher fined for breaching this regulation should not also have to face discriminatory acts because of their religious acts (such as being sacked from their job or rejected as a tenant in a residential lease because of their 'unlawful' street preaching);
  - B. if a religious group discriminated unlawfully against a person on the basis of that person's religious activity, then it would not be unlawful religious discrimination for anyone else like a landlord or supplier or funder to then discriminate against the religious group because it had engaged in that unlawful religious activity.

If the Act only protected 'lawful' religious activity, then it would not be prohibited discrimination for government or private sector businesses or any other group or individual to discriminate against the individual who expressed those views or engaged in those religious activities.

72. The existing State and Territory laws that do not impose a 'lawful' limitation within the definition of 'religious belief and activity' have not given rise to mischief or abuse. This is because these existing laws allow courts to have regard to whether a religious believer's actions breach other

<sup>77</sup> See Committee Report [2.221]-[2.235], [2.243].

<sup>78</sup> See Committee Report Recommendation 2 at [1.10], [2.40] Explanatory Notes to the Bill, page 2; page 4; and examples 2 and 3 page 5.

<sup>79</sup> See Committee Report [1.8], [2.40], [2.222]. See various examples at Explanatory Notes to the Bill, pages 7-8. Subclause (b) of the definition of 'religious ethos organisation' at clause 22K should insert the following words after 'of the Commonwealth': '(including, but not limited to, a public benevolent institution)'. This is because there is some concern that a court may hold that it is not possible for a PBI to be 'conducted in accordance with a religion' due to the 'secular' nature of its activities (see for example *Walsh v St Vincent de Paul's Society* (No 2) (2008) QADT 32 and *Spencer v World Vision, Inc*, 633 F.3d 723 (9th Cir. 2011), per Circuit Judge Berson). This edit will clarify that that type of entity is retained as a type of charity that is intended to be covered in the wider category of charities.

laws (including subordinate or delegated legislation) in considering their claim of religious discrimination, but do not require those courts to automatically conclude that the religious believer's acts are not to be protected from discrimination by other private parties simply because of the existence of the other law. Further, to only protect 'lawful' acts would give Parliament the automatic right, including through subordinate or delegated legislation, to override religious freedom protections, even where that was an unintended consequence of the apparently neutral legislation. Particularly having regard to the range of local and State laws, bylaws and regulations, that are law and may be law in this State, there is a real risk of laws being enacted without the relevant legislator being aware of, let alone acting consistently with, the requirements of ICCPR Article 18(3). The result of this proposal is that 'whether the religious practices burdened by the law of the land are protected is thus dependent on the political process.'<sup>80</sup>

73. The CP suggests at paragraph [5.82] that the attribute of religious belief and activity be broadened to include freedom of thought, conscience and religion. We oppose this suggestion because religious belief has an objectively ascertainable institutional and doctrinal framework that is absent from thought and conscience particularly as understood today, religious belief is unique compared to the demands of conscience or the freedom to exercise one's thought. This distinction is reflected in international law. While the freedoms to adopt a religion or a conscientious worldview are absolute and cannot be subject to limitation (under Article 18(1)), it is only religious manifestation as opposed to conscientious manifestation that receives dedicated protection against State imposed limitations (under Article 18(3)). In the UK the belief that the BBC should be publicly funded is now protected as a philosophical conviction. While views may vary on the question of the role of publicly funded broadcasters, we do not think that such a view should receive the benefits of protection in discrimination law. Our view is that the defining characteristics of 'religion' for the purposes of Australian law given by Justices Mason and Brennan in the *Scientology Case* render 'religion' distinct from 'philosophy', 'ethics' or 'ethos'.<sup>81</sup> That formulation also addresses sham or insincere claims. Accordingly, the ADA should clarify that it protects 'genuine' or 'sincere' claims to religious belief, which will also address judges making determinations on whether an adherent's claims are doctrinally correct.<sup>82</sup> individuals should be protected against religious discrimination in relation to their **genuinely held religious beliefs**, rather than limiting the protections to only those religious beliefs which a court or tribunal considers a reasonable interpretation of the applicable beliefs, as occurred for example in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*.<sup>83</sup> We believe that this legal taxonomy accurately reflects the real distinction between religious belief and mere philosophical belief. The ADA should state that the definition of religious belief and religious activity adopted is that articulated by Justices Mason and Brennan in the *Scientology Case*. It should not go beyond that definition. Given the focus on 'sincere' belief maintained by their honours, such would avoid

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<sup>80</sup> Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013), p 114.

<sup>81</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* ('*Scientology Case*') [1983] HCA 40, [17].

<sup>82</sup> Neil Foster, 'Respecting the Dignity of Religious Organisations' (2020) 47(1) *University of Western Australia Law Review* 175, 218; Mark Fowler, 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill', in Michael Quinlan and A. Keith Thompson (eds) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia*, (Shepherd Street Press, 2021).

<sup>83</sup> *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* 308 ALR 615 ('*Cobaw*').

judges having to interpret religious doctrines to determine if an individual's or institution's belief conforms to religious doctrine.

74. Consistent with the common law, the ADA should also provide protection for individuals and organisations from being required by another person to express, publish, associate with or support statements or opinions which contravene the individual's or organisation's religious beliefs.<sup>84</sup> For example in *Lee v. Asher's Bakery*<sup>85</sup> the Supreme Court of the UK held that a Christian baker could not be compelled by anti-discrimination law to create a cake with the message 'Support Gay Marriage' where that was contrary to the baker's religious convictions. By the same principle, a Jewish or Muslim artist should be able to refuse a requirement to print the phrase 'God is not Great' (or an atheist printer should be able to refuse to print signs that 'Jesus is Lord') without being subject to a discrimination complaint. A possible drafting approach is as follows:

(1) It is unlawful for a person or entity to:

- a. require another person or entity to engage in relevant conduct in relation to a statement or opinion; or
  - b. treat another person or entity unfavourably because the other person or entity refuses or omits to engage in relevant conduct in relation to a statement or opinion;
- if the other person or entity holds a religious belief and genuinely believes that the statement or opinion is not consistent with that belief.

(2) In subsection (1) relevant conduct in relation to a statement or opinion means:

- a. expressing, publishing or disseminating the statement or opinion;
- b. producing or distributing a thing which expresses or supports or endorses the statement or opinion;
- c. associating with the statement or opinion;
- d. endorsing or supporting the statement or opinion; or
- e. acting consistently with, or to give effect to, the statement or opinion.

75. Provision should also be made to protect statements of traditional religious teaching on matters such as marriage, classically illustrated by the vilification complaint against Catholic Bishop Julian Porteous accepted by the Tasmanian Anti-Discrimination Commissioner. An example of such a protection was provided by clause 12 of the Religious Discrimination Bill 2022 (Cth). Qualifying bodies for professionals, students and tradespeople should not be able to make rules imposing restrictions on the expression of religious beliefs unless the rule is an essential requirement of the profession or trade. Further, to protect bodies such as schools and charities against discrimination, the definition of 'services' in the ADA should clarify that the protected 'field' of 'services' clearly includes the determination of accreditation, funding and the allocation of permits, contracts and tenders by the State and Local Governments.<sup>86</sup> Also,

<sup>84</sup> See Committee Report [1.8], [2.40], [2.222]. See various examples at Explanatory Notes to the Bill, pages 7-8.

<sup>85</sup> [2018] UKSC 49.

<sup>86</sup> Authority for such a proposition may be found in *IW v City of Perth* [2007] FCA 1059 [13] McHugh J and Brennan CJ and [43]-[44] Gummow J.

religious businesses should be able to rely on the protections from discrimination against them. It is arbitrary to permit a sole trader to benefit from the protections against discrimination, but remove those protections where the business has taken another incorporated or unincorporated form on sound legal or tax advice. One mechanism to do this will be via an associates clause, as discussed above. It is also important that businesses such as medical practices or law firms retain the ability to maintain their ethos by preferring employees who share their faith, not just in respect of senior leadership roles, but across the entire organization. The Bill also should clarify that secular workplaces cannot impose ‘inherent requirements tests’ of secular beliefs to stifle religious expression by employees. This should be limited to the case where holding or engaging in a particular religious belief or activity is an inherent requirement e.g. a public hospital advertises for persons of particular religions to be chaplains to people of that religion.

## Part 6 – Discrimination: Areas of public life

**Question 6.1: Discrimination at work — coverage:** (1) Should the definition of employment include voluntary workers? Why or why not? (2) Should the ADA adopt a broader approach to discrimination in work, like the way the Sex Discrimination Act 1984 (Cth) approaches harassment? Why or why not? (3) Should local government members be protected from age discrimination while performing work in their official capacity? Why or why not?

**Question 6.2: Discrimination in work — exceptions:** What changes, if any, should be made to the exceptions to discrimination in work?

**Question 6.3: Discrimination in education:** (1) What changes, if any, should be made to the definition and coverage of the protected area of ‘education’? (2) What changes, if any, should be made to the exceptions relating to: (a) single-sex educational institutions, and (b) disability and age discrimination in educational institutions?

**Question 6.4: The provision of goods and services — coverage:** What changes, if any, should be made to the definition and coverage of the protected area of ‘the provision of goods and services’?

**Question 6.5: Superannuation services and insurance exceptions:** What changes, if any, should be made to the exceptions applying to insurance and superannuation?

**Question 6.6: The provision of goods and services — exceptions:** What changes, if any, should be made to the exceptions to sex, age and disability discrimination in relation to the provision of goods and services?

**Question 6.7: Discrimination in accommodation — coverage:** What changes, if any, should be made to the definition and coverage of the protected area of ‘accommodation’?

**Question 6.8: Discrimination in accommodation — exceptions:** What changes, if any, should be made to the exceptions for private households, age-based accommodation and charitable bodies in relation to discrimination in accommodation?

**Question 6.9: Discrimination by registered clubs — coverage:** What changes, if any, should be made to the definition and coverage of the protected area of ‘registered clubs’?

**Question 6.10: Discrimination by registered clubs — exceptions:** What changes, if any, should be made to the exceptions for registered clubs in relation to sex, race, age and disability discrimination?

**Question 6.11: Discrimination based on carer’s responsibilities:** (1) Should discrimination based on carer’s responsibilities be prohibited in all protected areas of public life? If not, what areas should apply and why? (2) In general, should discrimination be prohibited in all protected areas for all protected attributes? Why or why not?

**Question 6.12: Additional areas of public life:** (1) Should the ADA apply generally ‘in any area of public life’? Why or why not? (2) Should the ADA specifically cover any additional protected areas? Why or why not? If yes, what area(s) should be added and why?

76. We do not recommend that the definition of employment be extended to include volunteers. A large proportion of the activities of religious bodies are conducted by volunteers, whether that be in thousands of local churches, temples, mosques or synagogues or in large faith-based charities. Religious bodies should be able to prefer volunteers who support the religious ethos of the organisation, and to remove those who undermine its ethos. If the ADA is amended in the direction suggested below (see ‘Employment by a Religious Body’ in Part 7), then it would become necessary for a religious body to make each volunteer aware of the relevant doctrines, tenets, beliefs or teachings of that religious body before they commenced their volunteer service. It would be completely unworkable if every volunteer on a morning tea roster or a flower roster was required to sign a statement of faith in order to join the roster.
77. We support the retention of current exemptions for single-sex schools (or equivalent provisions in a different form). The majority of single-sex schools in NSW are religious education institutions.<sup>87</sup> Many religions hold, as a doctrine, tenet or belief of that religion, that there are two sexes – male and female – which are biologically determined. The existing exemptions allow a single-sex school not to enrol a student of the opposite sex. Furthermore, as noted above in Part 4, the exemption in s31A permits a single-sex school to admit a transgender student who identifies with the sex of the school, but who is biologically not of that sex, to do so without altering its status as a single-sex school. This exemption is permissive, not mandatory – a single-sex school *may* – not *must* – enrol a transgender student. This flexibility should remain, to allow a single-sex school to act in the best interests both of the transgender student and the wider student body.
78. In relation to the provision of goods and services, there are some potential issues not canvassed by the CP. If, as we argue, religious belief and activity is added as a protected attribute and it is therefore unlawful to refuse to provide goods or services to another person on the ground of religious belief or activity, then ‘services’ will need to be defined in such a way that it does not

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<sup>87</sup> According to data from <https://www.goodschools.com.au/>, there are 131 single-sex schools in NSW – 86 private and 45 government. Of this 79 (92%) are identified with a religion. This represents over 60% of single-sex schools.

include religious services. Otherwise, it may be religious discrimination for a Christian to refuse to baptise a person because they are not a Christian. A similar issue arose when the *Marriage Act 1961* (Cth) was altered to permit same-sex marriages. Section 47(3) of the *Marriage Act* permits a Minister of Religion to decline a same-sex marriage. To ensure that the Minister of Religion who did this is not unlawfully denying a service on the basis of sex, sexual orientation etc, s40(2A) was added to the *Sex Discrimination Act 1984*.

(2A) A minister of religion (as defined in subsection 5(1) of the Marriage Act 1961) may refuse to solemnise a marriage despite anything in Division 1 or 2, as applying by reference to section 5A, 5B, 5C or 6, if any of the circumstances mentioned in paragraph 47(3)(a), (b) or (c) of the Marriage Act 1961 apply.

79. As noted above, we support the suggestion that the NSW government should have to comply with its own discrimination standards, and therefore that the ADA should prohibit discrimination in the administration of state and local government laws and programs, and the functions and powers of local government.
80. We do not support the ADA being extended to any other additional areas of public life or that it applies to 'any area of public life'. This would introduce uncertainty and blur the distinction between public and private spheres.

## Part 7 – Wider exceptions

**Question 7.1: Religious personnel exceptions:** (1) Should the ADA provide exceptions for: (a) the training and appointment of members of religious orders? (b) 'the appointment of any other person in any capacity by a body established to propagate religion'? (2) If so, what should these exceptions cover and when should they apply?

**Question 7.2: Other acts and practices of religious bodies:** Should the ADA provide an exception for other acts or practices of religious bodies? If so, what should it cover and when should it apply?

**Question 7.3: Exceptions for other forms of unlawful conduct:** Should the general exceptions for religious bodies continue to apply across the ADA, including to all forms of unlawful conduct under the Act?

81. As argued above, we believe the ADA should not use the mechanism of exceptions to allow religious bodies to manifest their religious beliefs and practices. The questions in Part 7 of the CP presume the current exception regime, and we have framed the answers below in response to these questions, though where appropriate we will recommend a better approach that does not rely on an exception framework.
82. The current exception in s56 conflates two different categories – the appointment of people to perform **religious functions**, and the acts and practices of **religious bodies** (including employment). The conflation is unhelpful, because the current clause (c) covers both appointment for, or participation in, a religious practice *and* employment by a religious body.

83. In relation to the former category, it is wholly inappropriate for anti-discrimination law to dictate to a religion who may perform religious rituals or participate in religious practices. As noted by the ALRC in its 2023 Report, ‘an important aspect of the right to freedom of religion or belief is respecting the autonomy of religious organisations to manage their internal affairs’.<sup>88</sup> *The United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* affirms the right to appoint religious personnel as one of the freedoms of belief covered by the Charter.<sup>89</sup> Some religions require that a priest must be a celibate biological male. Some religions require that men and women who participate in worship sit in different parts of the church/synagogue/mosque. Some religions restrict certain roles on the basis of caste or race. Those who do not accept these aspects of their religion’s teachings are free to leave that religion. They should not, however, be able to use anti-discrimination law to force their religion to change its doctrines or practices. Such would be an unacceptable intrusion of the state in religion and is a hallmark of repressive and authoritarian regimes.
84. We recommend that the two different categories currently covered by s56 be separated. To delineate the first category, the scope of the existing 56(c) should be narrowed from ‘the appointment of any other person in any capacity’ to ‘the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice’. This drafting comes from s37(1)(c) of the *Sex Discrimination Act 1984* (Cth) (‘SDA’), and is similar in effect to s.82(1)(c) of the *Equal Opportunity Act 2010* (Vic) (‘EOA’). We recommend that the aspects of religious practice covered by this (narrowed) provision should not come within the scope of the ADA, consistent with the current s56 (‘Nothing in this Act affects...’) There is a similar exclusion from scope in both the SDA and the EOA for the equivalent provisions in relation to religious practices.
85. For illustrative purposes only, this markup shows our proposed changes to the existing section 56, as if this were to continue to be expressed as an exception (which is not our preference). If it is expressed in this form, then, consistent with the principles we have outlined above, a legislative note, such as the one below, should also be included to make the positive statement that appointing people to perform religious practices on the basis of religious belief is ‘not discrimination’.

Nothing in this Act affects:

(a) the ordination or appointment of priests, ministers of religion or members of any religious order,

(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order, **or**

(c) ~~the appointment of any other person in any capacity by a body established to propagate religion~~ **the selection or appointment of persons to perform duties or**

<sup>88</sup> Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-discrimination Laws, ALRC Report 142, 2023, p.170

<sup>89</sup> Article 6(g).

**functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice.**

*Note: It is a legitimate aim, and therefore not discrimination, for religious institutions to determine who may be appointed to perform religious functions or engage in religious practices.*

86. The CP contemplates amendments to s56 ‘so that it better reflects the diversity of descriptions of religious leaders across religions.’<sup>90</sup> We would welcome changes to (a) and (b) to broaden the descriptions to be more inclusive of other religions.

### **Acts and practices of religious bodies (including employment)**

87. The second category, currently addressed by both s56(c) and 56(d) should be in a separate clause, which should be expressed positively.

A body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion **does not discriminate** against a person under this Act by engaging in conduct that is consistent with the doctrines, tenets, beliefs or teachings of that religion or is required because of the religious susceptibilities of the adherents of that religion.

88. This clause retains the breadth of the existing s56(c) and (d) as it applies to bodies established to propagate religion. It covers all acts and practices (including employment) of a religious body where these are done consistent with that religion or done because of the religious susceptibilities of adherents. However, it is more limited than the current s56 in that it does not provide an exception in relation to vilification or harassment. To the extent that there needs to be an exception to ensure that religious speech does not get proscribed by the prohibitions against vilification, this should be a part of the vilification provisions of the Act (see further below).
89. We recognise that the breadth the existing s56 (and therefore the breadth of this proposed drafting) gives religious bodies the apparent capacity to discriminate on far wider grounds than religious bodies need to operate consistent with their religious ethos. If this is a concern, then it would be possible to instead replace the existing s56 (as it applies to religious bodies) with a series of bespoke provisions that relate to the specific areas of public life covered by the ADA, including employment, education, adoption, provision of accommodation, and charities.
90. The purpose of these bespoke provisions is to provide legislative clarity about what is ‘not discrimination’ because it is a proportionate measure to achieve a legitimate aim in furtherance of another human right. This clarity is necessary to avoid years of contentious and expensive litigation for the courts to reach a settled position on – for example – whether a Muslim school

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<sup>90</sup> NSWLRC CP 132, [7.17].

from a particular tradition can prefer to employ believing and practicing Muslim teachers from the same tradition. We do not recommend or support a generic provision that would require a religious body to argue on a case-by-case basis that to require religious belief for a particular employee was a proportionate measure to achieve a legitimate aim in furtherance of the religious purposes of the body.

### Employment by religious body

91. If there is not a provision in the ADA that covers all acts and practices of a religious body (as proposed above), then it will be necessary to include a bespoke clause in the section of the ADA that deals with employment that states positively that a religious body ‘does not discriminate’ in employment by requiring an employee to believe in, act consistently with or support the religious ethos of the body.

#### **Religious bodies can preference people of the same faith in employment etc**

A body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion does not discriminate on any ground against a person under this section [i.e. *Employment*] by taking any action in good faith in relation to the matters described in this section, including by giving preference in employment, on the grounds of whether the person:

1. believes and conducts themselves in accordance with the doctrines, tenets, beliefs or teachings of that religious body; or
2. does not engage in any conduct that contradicts or undermines the doctrines, tenets, beliefs or teachings of that religious body; or
3. does both (1) and (2).

92. The clause permits what would otherwise be discrimination on the ground of religious belief or activity. It does not allow a religious body to discriminate on the ground of, for example, sex, sexual orientation, marital status or gender identity, because acts permitted by the clause are not discrimination. If the inconsistent religious belief or activity of the employee is the ground for action by the religious body, the religious body ‘does not discriminate on any ground’. This is necessary to address the difficulty caused by the breadth of indirect discrimination in relation to multiple grounds. For example, suppose a religious body requires all employees to affirm their support for the religion of that body by signing a statement of faith that, *inter alia*, affirms that ‘God created two biological sexes, male and female’, and a potential employee who was transgender was not willing to sign the statement because they did not believe that tenet of the religion. The primary ground of action is the inconsistent religious belief, but the current drafting of the indirect discrimination provisions of the ADA leaves open the possibility that this could also be indirect discrimination on the basis of transgender status. The positive declaration in this clause that a religious body ‘does not discriminate on any ground’ resolves this issue. The ability to ‘preference’ in employment is also important to address the problem where a religious body may have temporary difficulty in filling certain positions with people of the relevant faith, but otherwise seeks to prefer such persons in order to advance its religious ethos.

93. This drafting produces a similar outcome to s82A (religious bodies) and s83A (religious educational institutions) of the *Equal Opportunity Act 2010* (Vic) with respect to multiple protected attributes (though noting that these provisions also include an inherent requirement test and a proportionality test, both of which we do not support for the reasons outlined below). Contrary to the understanding expressed in the CP, the effect of s82A and s83A is that, if a person is unable to conform to the doctrines, beliefs or principles of the religious body/educational institution, then the religious body/educational institution does not discriminate in employment. This extends to any form of discrimination under the Act. This is to be contrasted, for example, to the exemption in subsection 83(2) with respect of students at religious educational institutions, which only pertains to acts performed ‘on the basis of a person’s religious belief or activity’, and which the Minister clarified is intended to not apply to acts performed on the basis of any other attribute.
94. Sections 82A and 83A thus contemplate the scenario that where an employee has an inconsistent religious belief, this will negate consideration of any other protected attribute. In effect, a person’s unsuitability ‘because of’ their ‘religious belief or activity’ will override consideration of any other protected attribute. To the extent that non-religious actions can be relevant, they would only be relevant to the extent that they demonstrate the absence of a religious belief (for example where non-religious actions determinatively conclude that the person no longer shares the religious belief of the institution or school).
95. That such is the result under the section was clarified by the Minister in the following two statements in the Second Reading Speech for the Bill introducing the provisions:
- ‘A person being gay is not a religious belief. A person becoming pregnant is not a religious belief. A person getting divorced is not a religious belief. A person being transgender is not a religious belief. Under the Bill, a religious body or school would not be able to discriminate against an employee **only on the basis** that a person’s sexual orientation or other protected attribute is inconsistent with the doctrines of the religion of the religious body (emphasis added).’<sup>91</sup>
96. The Minister then goes on to note:
- ‘Many religions have specific beliefs about aspects of sex, sexuality, and gender. For example, some religions believe marriage should only be between people of the opposite sex. If a particular religious belief about a protected attribute is an inherent requirement of the role, and a person has an inconsistent religious belief, it may be lawful for the religious organisation to discriminate against that person.’<sup>92</sup>
97. As already noted, we do not support the ‘inherent requirements’ aspect of the Victorian Act, and we recommend the positive framing – ‘does not discriminate’ – rather than the negative framing of the Victorian Act – ‘may discriminate’. Nonetheless, in relation to resolving whether a religious

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<sup>91</sup> Victoria, *Parliamentary Debates* (Legislative Assembly, 28 October 2021) 4375, Hutchins MP (*Equal Opportunity (Religious Exceptions) Amendment Bill 2021*, Second Reading Speech).

<sup>92</sup> *Ibid.*

institution may act on the ground of an employee's inconsistent religious belief where another protected attribute is engaged, the outcome is similar.

98. We recommend that our proposed clause apply to all religious bodies, including religious educational institutions. The requirement that the religious body act 'in good faith' ensures a form of protection to employees. The following sub-clause could be added to add further protection that will provide religious educational bodies with a motivation to clarify requirements in their documentation:

In determining whether a religious educational institution has acted in good faith regard may be had as to whether it has a written policy that:

(a) outlines the religious educational institution's position in relation to particular religious beliefs or activities; and

(b) explains how the position in paragraph (a) is or will be enforced by the religious educational institution; and

(c) is available to employees or prospective employees or contract workers or prospective contract workers, including at the time employment or contract work opportunities with the religious educational institution become available.

99. The CP suggests slightly different approach - 'that the law could require institutions to have a written policy. Employers would only be allowed to terminate employees under this exception if they breach a written agreement to conduct themselves in accordance with the ethos of the institution.'<sup>93</sup> However mandating contractual undertakings in this manner effectively delegates the primacy of a protected human right to the competency of the drafter of a contractual undertaking, which will prejudice smaller religious institutions (such as thousands of local parishes) who are not able to engage qualified representation. For that reason, our proposal above only applies to religious educational institutions, and provides that a court may 'have regard to' whether a policy had been made available (rather than requiring a policy) in determining whether a person had been afforded basic elements of procedural fairness (i.e., acting 'in good faith').
100. Our proposal arrives at a similar result to the model proposed by Justice Sarah Derrington when she was President of the ALRC which was (as summarised in the CP) 'to allow religious institutions (potentially including religious educational institutions) to discriminate by preferring a candidate or refusing to hire them, or in the allocation of duties and responsibilities, depending on whether they adhere to the religious beliefs and practices of the institution, or themselves consistently with the religious beliefs and practices of the institution.'<sup>94</sup>

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<sup>93</sup> NSWLRC CP 134 [7.29].

<sup>94</sup> NSWLRC CP 134 [7.28].

## An inherent requirements test?

101. The CP canvasses an alternative approach in relation to employment by a religious body, based on an inherent requirements test.<sup>95</sup> This is wholly unsuitable. An inherent requirements test is a generic test for all (secular) organisations, and is not designed (or indeed suitable) to maintain the religious ethos of religious bodies.
102. Under such a test religious institutions would lose their ability to create a community that embodies their religious beliefs. In some contexts, it may not be possible to demonstrate that religious belief or activity was an inherent requirement for the vast majority of persons employed by or volunteering with the religious institution, placing in real peril the authentic maintenance of its distinct ethos.
103. An inherent requirements test does not align with the applicable human rights law concerning the employment practices of religious institutions. As distinguished academics Nicholas Aroney and Paul Taylor summarise:
- ‘In its determinations in a number of cases the ECtHR [European Court of Human Rights] has found there to have been no violation of the rights of the employee, without applying narrow occupational requirements, even when the ethos requirements of the employer organisation impinge on the employee's fundamental human rights.’<sup>96</sup>
104. They conclude their review of the relevant human rights law with the following summary: an ‘inherent requirements test exists to meet the generic needs of all organisations, whatever their nature or purpose. It is not a substitute for the specific protections accorded to religious organisations under the *European Convention on Human Rights* as interpreted by the ECtHR.’<sup>97</sup> The inherent requirements test is drawn from the law applying to secular workplaces and is ill-suited for the unique considerations that present within religious institutions, especially when framed in the light of their unique contribution to wider democratic society owing to the imperatives of religious and associational freedom.
105. As the CP notes, the proposal that religious bodies (including faith-based charities and religious schools) should be subject to an inherent requirements test is modelled on reforms to the Victorian *Equal Opportunity Act 2010* enacted in 2021. Dr Mark Fowler has undertaken a thorough review of those reforms to investigate their alignment with the relevant human rights law applying to religious schools in particular.

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<sup>95</sup> NSWLRC CP 100.

<sup>96</sup> Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia' (2020) 47(1) *University of Western Australia Law Review* 58.

<sup>97</sup> *Ibid* 57.

106. Fowler summarises the potential of the test to ‘white-ant’ religious schools as follows:<sup>98</sup>

‘If the temporary occupation of a teaching position by a person who is not able to perform religious devotions can provide evidence that such an activity is not an ‘inherent requirement’, there is nothing limiting that evidence from applying to all equivalent teaching positions.<sup>99</sup> Thus, any equivalent teacher that no longer shares the religious beliefs of the school could assert the temporary employment of an equivalent teacher as evidence for their subsequent unlawful dismissal. Over time such a test has the distinct potential to ‘white-ant’ an institution through the amassing of evidence arising from the temporary placement of non-adherents in response to transitory staff shortages. With the passage of time, the maintenance of the school’s ethos would be relegated to roles such as the chaplain and the leadership of the school (presuming such persons also retain the religious beliefs of the school). This risk is particularly pronounced for those schools experiencing difficulty in recruiting suitably-qualified persons who hold the relevant faith.<sup>100</sup> Such an outcome would risk frustrating the operations of those schools who seek, as recorded by the Expert Panel, to inculcate an institutional ethos by applying a preference for staff that share their faith across the employee cohort wherever possible, operating on the notion that faith is ‘caught not taught’.<sup>101</sup>

107. The same concern applies to religious institutions more broadly. If a parish must fill a staff office role temporarily with a person who does not share the faith of the institution, should it be precluded from preferring persons who do share that faith into the future? That is the effect of an inherent requirements test.

108. In his analysis Fowler responds to other academic literature that, he argues, incorrectly claims that an inherent requirements test is consistent with international human rights law. Analysing the ECHR’s jurisprudence Fowler offers the following pertinent observations:

- A. ‘The Court’s regard for a religious institution’s own assessment of what will impact upon the maintenance of its ethos, and its engagement with the wider public, is in opposition to an ‘inherent requirements’ style test that would have regard to the particular ‘work duties’ assigned to a role without regard to the wider institutional context in which the employee is placed.’
- B. ‘Seen as a whole, the Court has placed great weight on the effect of the conduct or private belief on the credibility of the religious institution, having regard to the self-conception of the institution, against the backdrop of the principle that the Court is not competent to

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<sup>98</sup> Mark Fowler, ‘The Position of Religious Schools Under International Human Rights Law’ (2023) 2 *The Australian Journal of Law and Religion* 36-55 at 51.

<sup>99</sup> Such an approach was adopted by the Queensland Anti-Discrimination Tribunal in *Walsh v St Vincent de Paul Society Queensland (No.2)* [2008] QADT 32.

<sup>100</sup> Greg Walsh, ‘The Right to Equality and Employment Decisions of Religious Schools’ (2014) 16 *University of Notre Dame Australia Law Review* 107, 123-4.

<sup>101</sup> *Religious Freedom Review* (n 10) 56 [1.210]

undertake ‘any assessment on the part of the State of the legitimacy of religious beliefs or of the means of expressing them’.

- C. ‘the authorities do not accord with the simplistic distinction between teaching roles that demonstrate an inherent requirement and those more functional non-teaching roles that do not.’
- D. ‘if the jurisprudence of the ECtHR is to provide any guide, the adoption of such a test will lead to non-compliance.’
- E. ‘the Court expressly disavowed an ‘inherent requirements’ test as a determinative feature of the law concerning religious institutional autonomy’.<sup>102</sup>

109. For the foregoing practical and legal reasons, we do not consider that an inherent requirements test, or the akin ‘genuine occupational requirements’ test formerly recommended by the NSWLRC in 1999, are suitable for application to religious bodies (including faith-based charities) or religious schools.

### **Reasonableness and Proportionality?**

110. The CP considers as an option the recommendation of the ACT Law Reform Advisory Council that the religious body employment exception only apply where ‘reasonably justified.’ Similarly, the NSWLRC points to the Victorian EOA and the recommendations of the LRCWA and the QHRC that religious bodies be required to prove that their actions are ‘reasonable and proportionate’. The implication of this would be that all employment actions taken by a Church body, no matter how senior, would be required to demonstrate that they were ‘reasonable’ and ‘proportionate’ to a degree sufficient to satisfy a secular judge.

111. This extraordinary proposal would represent a significant expansion of the State’s power over religious appointments that is simply unprecedented within New South Wales. The proposal represents inordinate interference by the State in the operations of Church bodies which is inconsistent with international law. As the Full Court of the Federal Court of Australia noted in *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia*:

‘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 EHHR 126 at [5].

Decisions, both of the European Commission and the European Court of Human Rights, establish that, under the ECHR, a church enjoys and may exercise article 9 rights on behalf of its adherents: see, for example, *X and Church of Scientology v Sweden* (1979) 16 Eur Comm HR 68. 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’

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<sup>102</sup> Mark Fowler, ‘The Position of Religious Schools Under International Human Rights Law’ (2023) 2 *The Australian Journal of Law and Religion* 36, various.

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'. 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:

[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; emphasis added.]

The European Court of Human Rights has repeatedly affirmed this statement: see, for example, [78] below; see also Julian Rivers, 'Religious Liberty as a Collective Right' (2001) 4 *Law and Religion: Current Legal Issues* 227.<sup>103</sup>

**Question 7.4: Exceptions for providers of adoption services:** Should the ADA have a specific exception for providers of adoption services? If so, what should it cover and when should it apply?

**Question 7.8: The charities exception:** Should the ADA provide exceptions relating to charitable benefits? If so, what should they cover and when should they apply?

**Question 7.10: Aged care accommodation providers exception:** Should the ADA provide an exception for aged care accommodation providers? If so, what should it cover and when should it apply?

112. As discussed above, if the ADA does not have a broad provision that covers all acts and practices of a religious body (as proposed above), then it will be necessary to include bespoke clauses to enable these religious bodies to provide goods and services (such as adoption services, medical care, accommodation, residential aged care and camp sites) and otherwise conduct their activities in accordance with their doctrines, tenets and beliefs.
113. The definition of a 'religious body' should be broad so that it includes, but not necessarily exclusively:
- A. traditionally understood religious bodies such as churches and mosques;
  - B. non-profit bodies and charities with a religious purpose;
  - C. institutions that provide services to religious and non-religious persons; and
  - D. for-profit faith-based bodies (such as faith-based medical practices, counselling services and youth-training services).

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<sup>103</sup> [2014] FCAFC 26 at [75]-[76].

114. Determining whether a religious body has adopted a religious belief should be a matter of fact evidenced by the policies and documents of that body. A possible drafting approach is as follows:

- (1) For the purposes of this Part, a religious body holds a religious belief or doctrine if it has adopted that belief or doctrine, including beliefs as to the actions, refusals, omissions or expressions that are consistent with, required by, or because of, that belief or doctrine.
- (2) Without limiting subsection (1), a religious ethos organisation may adopt a religious belief or doctrine by:
  - (a) including the belief or doctrine in its governing documents, organising principles, statement of beliefs or statement of values; or
  - (b) adopting principles, beliefs or values of another body or institution which include the belief or doctrine; or
  - (c) adopting principles, beliefs or values from a document or source which include the belief or doctrine; or
  - (d) acting consistently with that belief or doctrine.

115. Religious bodies, charitable or otherwise, that provide services both essential and non-essential in accordance with their religious purposes should be able to do so free from potential claims under the ADA. There is no material distinction to be drawn between religious institutions and faith-based charities in international law.<sup>104</sup> Article 6 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) recognises a range of rights that are by their nature necessarily expressed through corporate vehicles.<sup>105</sup> These include the right ‘to establish and maintain appropriate charitable or humanitarian institutions’, the maintenance of places of worship, and the observance of ceremonies and holidays.<sup>106</sup> The employment provisions proposed above for religious bodies should apply equally to faith-based charities.

116. Courts have recognised that compelling faith-based bodies to provide goods or services for which they have a religious objection may have serious impacts upon their ethos.<sup>107</sup> Such bodies should be able to apply religious-based conditions on the terms on which they provide services to all persons (see for example, the Queensland and South Australian Government’s proposal to allow

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<sup>104</sup> Fowler, Mark ‘The Position of Religious Schools Under International Human Rights Law’ (2023) 2 *The Australian Journal of Law and Religion* 36.

<sup>105</sup> *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzinger of Sri Lanka v Sri Lanka*, Communication No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005) [7.2].

<sup>106</sup> UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, Article 6.

<sup>107</sup> *OV and OW v Wesley Central Mission* [2010] NSWCA 155 (involving a faith-based charity); *Ontario Human Rights Commission v Brockie* (2002) 22 DLR (4th) 174 (involving a faith-based commercial printing business); *Lee v Asher’s Bakery* [2018] UKSC 49 (involving a commercial bakery).

faith-based aged care providers to refuse to permit euthanasia on their premises where such is provided in their relevant contractual documents). The freedom of such bodies to be inspired by or reflect a religious ethos, and the freedom of the public to prefer to engage entities that are faith-based, should be preserved.

117. The CP suggests possible changes to the ADA that would mean that faith-based charities are no longer able act in accordance with their religious belief if this leads to discrimination on any other ground except religion,<sup>108</sup> pointing to the law in Victoria and to recommendations made by the QHRC and the South Australian Law Reform Institute.<sup>109</sup> This proposal would adversely impact the ability of religious bodies to provide a wide range of services such as adoption, fostering, counselling services, education, health and aged care. Potential practices that may be impacted include: the ability to refuse a request to perform Voluntary Assisted Dying on the premises of a faith-based hospital, a refusal to supply IVF, fostering or adoption services to single or LGBTIQ+ persons.
118. The limitations being considered in the CP on the practices of religious bodies including faith-based charities are inconsistent with international law and with the judgment of the NSW Court of Appeal in *OV & OW v Members of the Board of the Wesley Mission Council*.<sup>110</sup> Attempting to use anti-discrimination law to compel a religious body to act contrary to religious convictions will be ineffective. Instead, it will force religious bodies to withdraw entirely from providing a vital service to the community. This would be a wholly negative outcome with no upside. For example, foster care services in NSW are provided by a combination of faith-based bodies (e.g., Wesley Mission, Anglicare and Catholic Care), secular institutions (e.g., Barnardos and The Benevolent Society) and the Department of Communities and Justice, with non-government bodies providing the majority of foster carers.<sup>111</sup> Foster carers who do not want to, or who are not eligible to, partner with a faith-based agency have no shortage of other options to be foster carers. If faith-based bodies were forced to withdraw because of anti-discrimination laws, the number of foster carers activated and supported by faith-based networks would collapse. This would be catastrophic for foster care in NSW, and it would not lead to any increases in choice for those currently partnering with non-religious agencies. The welfare of children would have been sacrificed on the altar of anti-discrimination ideology.
119. The decision of the NSW Court of Appeal in *OV & OW v Members of the Board of the Wesley Mission Council* on this issue turned on the breadth of s56. If our proposed, broad replacement for s56(d) is not adopted, then it will be necessary to add a provision that declares that it is 'not discrimination' for a religious body to provide goods and services in accordance with the doctrines, tenets, belief and practices of its religion.

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<sup>108</sup> See, e.g., *Equal Opportunity Act 2010* (Vic) s 82B.

<sup>109</sup> NSWLRC CP 138-9 7.50]-[7.52].

<sup>110</sup> *OV & OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606.

<sup>111</sup> <https://ocg.nsw.gov.au/statutory-out-home-care-and-adoption/carers-register/key-statistics-nsw-carers-register>

120. Where the law prevents a faith-based charity from acting in accordance with the religious convictions of the movement it is associated with, this impacts the religious manifestation of those persons associated with the charity and decreases the level of donor support that the charity would otherwise elicit. Members, employees and volunteers of faith-based charities are not able to express their faith in association with others through that charity. Those who seek a faith-based supply will be detrimentally impacted by the withdrawal of the service. As a result, the community is denied an important service and the exercise of choice within the wider community is diminished. This also amounts to a form of discrimination against religious believers, who are prevented from congregating to serve the community as an expression of their religious beliefs.
121. The CP asks whether a religious body should lose access to exemptions if it is in receipt of government funding. This is wholly inappropriate. The religious character of a body does not change simply because the government has recognised the contribution to social good it makes and seeks assistance from that religious body to provide services to the community. The motivation for the charitable works comes from the religious purpose of the body, not because of the government funding. Seeking to use Anti-discrimination law to subsequently force a body to act contrary to its religious principles will backfire – the religious body may be forced to withdraw, and the state will bear the full burden of providing the essential service that is currently subsidised by the religious body.
122. It is a public policy decision of the government of the day – not a matter of legal principle – that should determine whether a government will partner with non-government agencies in the provision of public services, and if so on what terms. It is currently open to governments, for example, to withdraw public funding from all private educational institutions or for the Department of Communities and Justice to provide 100% of foster care in NSW. But if a government does not do this, and instead partners with non-government agencies to provide services, then it must do so without discriminating between religious and secular entities or between different kinds of religious entities. The government of the day can determine on what terms it will partner with a non-government agency, and will be answerable at the ballot box for the policy position adopted. It is not appropriate to embed a pre-determined policy outcome in anti-discrimination legislation, as though it were a matter of legal principle.
123. Although the ICCPR does not impose any obligation on states to fund religious institutions or schools, the United Nations Human Rights Committee has said that if a state decides to do so, the funding should be offered without discrimination and subject only to such differentiation as is justified by reasonable and objective criteria.<sup>112</sup> The CP proposes removing the exceptions within the Act that apply to religious institutions on the basis of whether they are in receipt of government funding. For the foregoing reasons, this amounts to a differentiation between religious and non-religious institutions that is not justified by reasonable and objective criteria. As such it amounts to discrimination against religious believers through detrimental action against their associated institutions that non-religious equivalent institutions are not subject to. Non-religious institutions are not subject to the withdrawal of funding that religious institutions are

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<sup>112</sup> Human Rights Committee, Views: Communication No 694/1996, 67th sess, UN Doc CCPR/C/67/D/694/1996 (5 November 1999) [10.6] ('Waldman v Canada').

proposed to be made subject to. Charitable benefits and purposes that are motivated by religious belief and have a religious purpose should continue to receive the coverage of the protections under the Act.

**Question 7.5: Private educational authorities employment exceptions:** (1) Should the ADA contain exceptions for private educational authorities in employment? Should these be limited to religious educational authorities? (2) If you think the Act should provide exceptions in this area: (a) what attributes should the exceptions apply to? (b) what requirements, if any, should duty holders meet before an exception applies?

124. It is appropriate to limit the exemptions (or other forms of special consideration) to religious educational providers rather than all private educational providers, because it is the religious purposes of the body that warrants the special consideration. Religious educational providers must be defined widely, to include (for example) kindergartens and the tertiary sector.
125. A religious educational institution needs to be able to choose to employ staff who hold to and model the religious faith of the school. Religious schools do not seek to discriminate against staff because of the *presence* of a protected attribute, but because of the *absence* of religious belief or because they engage in activities that offend those beliefs. They seek to prefer staff who either adhere to their beliefs or are willing to not act publicly in a manner that is inconsistent with those beliefs. Both are consistent with Justice Rothman’s recently articulated ‘positive right’ for religious schools that would operate in respect of both the direct and indirect discrimination tests in the *Sex Discrimination Act 1984*, which has been referred to above.
126. The model proposed above in relation to employment by a religious body should apply equally to religious educational institutions. This will permit a school to require staff to believe and/or conduct themselves in accordance with the beliefs of the school. As noted above, this is broadly consistent with the model proposed by Justice Sarah Derrington.

**Question 7.6: Discrimination against students and prospective students:** (1) Should the ADA contain exceptions for private educational authorities in education? Should these be limited to religious educational authorities? (2) If you think it is necessary for the ADA to provide exceptions in this area: (a) what attributes should the exceptions apply to? (b) should they apply to prospective students, existing students, or both? (c) what requirements, if any, should duty holders meet before an exception applies?

127. For the reasons outlined above in answer to question 7.5, we recommend that special arrangements should only apply to religious educational authorities rather than all private educational authorities.
128. If there is not a provision in the ADA that covers all acts and practices of a religious body (as proposed above), then it will be necessary to include a bespoke clause to permit religious

educational institutions to teach and act consistent with their religious ethos without this being indirect discrimination against students on other grounds. These arrangements need to recognise the diversity of practice in schools. Most religious educational institutions have an open enrolment policy, meaning that they do not require students or prospective students to share the faith of the institution. Within this group, some schools will nonetheless give preference to students who are of that faith (e.g., Catholic students at Catholic schools). A very limited number of schools (Christian and otherwise) require students or prospective students to share the faith of the institution and/or act in ways that are consistent with it (a closed enrolment policy). There are also tertiary religious educational institutions such as theological colleges which require an active faith on the part of students. The bespoke clause will need to be sufficiently broad to cover these variations in practice.

129. In relation to schools with an open enrolment policy, the primary concerns are that the school is able to provide teaching consistent with its religious beliefs or ethos without this being discrimination, and that the school can make and enforce rules of student conduct to preserve the religious ethos of the school without this being discrimination.
130. This could be achieved by differentiating between a school acting on the basis of a person's adherence or conduct (which is permitted), and acting on the basis of a protected attribute (which is not permitted). Schools should not be permitted to expel a student because the student has a protected attribute. However, the school should be permitted to act against conduct that would undermine the ethos of the school, even if that conduct was related to a protected attribute (e.g., a homosexual student publishing material that accused the principal of being homophobic merely because the principal believes that marriage is between a man and a woman). This is consistent with Justice Rothman's comments at the Notre Dame Law School Annual Religious Liberty Conference on 12 April 2024. His Honour stated: 'diversity [in religious schools] would decrease' if schools could not impose rules for student conduct in order to preserve their religious ethos. In addressing this he said that 'we have to look at [student] conduct and not belief' where that conduct was 'contrary to the educational institution's religious beliefs'. To comply with the 'good faith' requirement educational institutions can direct court to policies that set out their requirement not to engage in conduct contrary to the educational institution's genuinely held religious beliefs.

**Question 7.7: Exceptions relating to sport:** Should the ADA provide exceptions to discrimination or vilification in sport? If so, what should they cover and when should they apply?

131. The ADA should continue to provide protection measures for sport regarding the following attributes:
- A. Race (to enable continuing selection for certain competitions on the basis of ethnic or national origin);
  - B. age;

- C. sex;
- D. transgender; and
- E. disability;

132. Existing measures that protect the safety and viability of sporting competitions for individuals with different protected attributes recognise the reality of competitive difference and ability. These protective measures should continue to remain in the ADA. In particular, it is our view that biologically female-only sport should continue to be able to continue in NSW in the interests of biological women, prioritising fairness and safety for them over the individual interests of some men. However, where such is desirable, the ability of sporting organisations and codes to voluntarily offer competitions for which entrance is determined irrespective of biological sex should remain, for example, for sport involving young children or where biological sex is irrelevant. The cleanest way to afford these protections is to enable the organisers of a sporting code or event to voluntarily determine whether biological differentiation is to be applied. To this end we propose the following wording for protections for single sex-based sport. The changes would include definitions of ‘man’ and ‘woman’ in the ADA defined with regard to biological sex:

**Subsection 4(1)**

Insert:

**man** means a member of the male sex irrespective of age.

**woman** means a member of the female sex irrespective of age.

Section 59B

Insert:

**59B Female Sports**

Nothing in this Act renders it unlawful to exclude persons of one sex from participating in any sporting activity intended for persons of a different sex.

*Note: For the avoidance of doubt, in this Act **sex** has its ordinary meaning, and, without limiting the ordinary meaning, means the chromosomal, gonadal and anatomical characteristics associated with biological sex.*

**Question 7.9: Voluntary bodies exception:** Should the ADA provide an exception for voluntary bodies? If so, what should it cover and when should it apply?

133. We make no comment in respect of this question.

**Question 7.11: The statutory authorities exception:** Should the ADA provide an exception for acts done under statutory authority? If so, what should it cover and when should it apply?

134. The ADA should not provide an exception for acts done under statutory authority. To fail to do so would permit the State Government or other governmental instrumentality to discriminate against a religious body or individual when administering laws or grants or funding. The state should also be constrained and unable to discriminate against individuals and religious organisations on the basis of religious belief or activity. This means that the state should not be able to override religious institutional practices, ethos or beliefs in a way amounting to discrimination. For example, the state should not be able, either by law or by the terms of a grant or funding contract, to:

- A. restrict the ability of faith-based fostering or adoption charities licensed or funded by the government to preference foster children's access to both mothering and fathering where possible (this would actually take the protection of faith-based charities backwards from the current protections afforded by law in New South Wales);<sup>113</sup>
- B. require a faith-based health or aged care facility to perform abortions or to facilitate the conduct of physician assisted suicide commonly referred to as Voluntary Assisted Dying (VAD);
- C. or require or restrict certain teaching (for example in respect of marriage) or codes of conduct within religious schools where doing so would be inconsistent with the religious faith, ethos or beliefs of the relevant charity, facility or school.

Further the ADA should also make clear that it applies not just to qualifying bodies for individuals (such as fostering or adoption) but also to bodies that qualify religious organisations - e.g., governmental bodies that qualify religious schools, tertiary education providers, incorporated student clubs within universities or accredited service providers under government or other contracts. Such institutions need to be protected from qualifying bodies imposing limitations or requirements on them that discriminate against them on the basis of religious belief or activity.

## Part 8 – Civil protections against vilification

**Question 8.1: Protected attributes:** (1) What changes, if any, should be made to the way the ADA expresses and defines the attributes currently protected against vilification? (2) Should the ADA protect against vilification based on a wider range of attributes? If so, which attributes should be covered and how should these be defined?

**Question 8.2: The test for vilification:** (1) Should NSW adopt a 'harm-based' test for civil vilification? If so, should this replace or supplement the existing 'incitement-based' test? (2) What, if any, other changes should be made to the incitement-based test for civil vilification?

**Question 8.3: The definition of 'public act':** What changes, if any, should be made to the definition of 'public act' in the test for vilification in the ADA?

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<sup>113</sup> See *OV and OW v Wesley Central Mission* [2010] NSWCA 155.

**Question 8.4: Exceptions:** What changes, if any, should be made to the exceptions to the vilification protections in the ADA?

**Question 8.5: Religious vilification:** What changes, if any, should be made to the protection against religious vilification in the ADA?

135. Through a combination of prohibitions and exceptions religious vilification law attempts to balance protection from vilification with the important values of freedom of speech and religion in an open multicultural society. However the interpretation of such laws within the case law of other Australian jurisdictions leaves many questions unanswered. The involvement of senior courts of appeal has not helped to provide clarity.<sup>114</sup> Professor Rex Ahdar summarises the concern when he writes:

‘Precisely at what point along the continuum one violates the law is very difficult to know. In advance it is unknowable and certainly no-one wishes to be the “guinea pig”, so to speak, that sets down the initial marker. Yet even after several cases have been decided, the precedents may still provide scant guidance.’<sup>115</sup>

136. The position adopted in this submission proceed from this difficult reality. Our key concern is that NSW law offer clarity in light of the experience of other Australian jurisdictions. The CP suggests removing the religious bodies exception from the prohibition on vilification.<sup>116</sup> Placing the religious exception within the standard generic ‘genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest’ styled exception is not sufficient. The standard exception is subject to the threshold reasonableness and good faith test. Leaving the religious exception only within the standard generic exception subjects all religious teaching to a judicially determined ‘reasonable and in good faith’ test, which is problematic for the reasons outlined below. In addition to the generic test, a stand-alone religious bodies exception should be provided, as occurs in the recently amended Queensland, NSW and NT vilification regimes. That approach was retained by the current NSW Government when it recently introduced a prohibition on religious vilification. In those regimes the vilification prohibition is, in addition to the generic test, subject to the stand-alone existing religious body exception. Thus, in order to protect religious teaching from the pulpit from civil vilification complaints, a separate exception should be provided that is in the same terms as proposed above for religious bodies and employment (the modified version of section 56(d)).

### Concerns with ‘Reasonable’ and ‘Good Faith’ Tests

137. Within vilification law there is recognition of the uncertainty and ambiguity in the term ‘reasonable’. For example, in *Bropho v Human Rights & Equal Opportunity Commission* (‘*Bropho*’)

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<sup>114</sup> See, for example, the differing opinions expressed by Ashley, Neave and Nettle JJA in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VCA 284 (14 December 2006) (*Catch the Fire Ministries*).

<sup>115</sup> Rex Ahdar, ‘Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law’ (2007) 26 *University of Queensland Law Journal* 293, 298.

<sup>116</sup> NSWLRC CP 140-1 [7.65]-[7.64].

French J recognised the vagaries of the ‘reasonable’ test when his Honour said (with reference to clause 18D of the *Racial Discrimination Act 1975*):

‘the judgment which the Court is called upon to make in deciding whether an act falls within clause 18D has the character of judicial opinion and assessment in the application of legal standards of ill-defined content. In difficult or borderline cases judicial opinions may differ.’<sup>117</sup>

138. Similarly, in declining the appeal from the Federal Court, Gleeson CJ stated: ‘The issue of whether the conduct in question in this case was reasonable and in good faith involved a matter of judgement on which minds might differ.’<sup>118</sup> Furthermore, the International Covenant on Civil and Political Rights permits the limitation of religious speech only as ‘necessary’ in limited circumstances. Applying the standard ‘good faith and reasonable’ test to religious statements would undermine that requirement inconsistently with international law.
139. As noted above, we support the expansion of the list of attributes protected from discrimination to include religious belief and activity, however, given the difficulties associated with applying the reasonable and good faith test mentioned above, we are not in favour of expanding the list of attributes protected under the vilification prohibitions beyond this (noting that the Act was recently amended to prohibit vilification on the basis of religious belief and activity). Given our concern with the uncertain protection afforded by the reasonable and good faith tests above and the potential wider impact on religious teaching, we do not support the expansion beyond the current attributes protected by the vilification prohibitions of the ADA.

### Concerns with Harms-Based Test

140. The CP states: ‘A harm-based test could also lower the threshold for civil vilification complaints. Removing the need to prove the conduct could have incited a third party might reduce the burden on the complainant.’<sup>119</sup> It is our submission that the legal test for vilification should not include the objective assessment of whether the target group, or a hypothetical group sharing the same protected attribute(s) of the target group, would find the public representation offensive, hateful, etc. This effectively makes the test subjective and allows the laws to be misused by activists. The recent proposal to amend Queensland law, cited by the NSWLRC, illustrates the concern. Proposed section 124C introduces a test that depends on the perspective of a person or group having a particular identity. It needs to be understood in the context that the alleged ‘hateful’ or ‘contemptuous’ conduct can be considered from three different perspectives: (a) the person who engages in the conduct; (b) the person against whom the conduct is directed; and (c) the more generic perspective of people generally. Just as it would be one-sided to define ‘hateful’ conduct by reference only to the perspective of the person who engages in the conduct, so it would be one-sided to define it by reference only to the perspective of the person against whom the conduct is directed. This is why the law adopts the ‘reasonable person’ test—to ensure that neither side in a

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<sup>117</sup> *Bropho v Human Rights & Equal Opportunity Commission* (‘*Bropho*’) [2004] FCAFC 16 (6 February 2004) [76] (French J).

<sup>118</sup> *Bropho v Human Rights & Equal Opportunity Commission* HCA Transcript 9 (4 February 2005) (Gleeson CJ).

<sup>119</sup> NSWLRC CP 181 [8.84].

dispute is favoured and to ensure that the law will operate as fairly and objectively as possible as between two parties.

141. The NSWLRC Bathurst Review recommended that a harms based test (one which focusses on the response of the vilified group) not be applied in NSW criminal vilification law. The NSWLRC stated:

‘4.64 We are concerned that the elements of the harm-based test are not sufficiently certain for the criminal law. As we discuss above, it is important for criminal offences to be clear, so they can be understood across the community and applied predictably.

4.65 It is not always possible to objectively determine whether conduct is reasonably likely to insult, humiliate, intimidate and/or ridicule. Similar to ‘hatred’, these terms can be subject to interpretation, and community members do not always agree on their meaning. This uncertainty could make it difficult to determine a reasonable person’s view.’<sup>120</sup>

142. While these comments were made in respect of criminal vilification prohibitions, we consider that the comments have great relevance to civil vilification clauses. In fact, because civil vilification claims can be initiated by any member of the public, the potential impact of the laws on freedom of speech and religious freedom is greatly increased. We therefore consider that the NSWLRC’s comments apply with greater force to civil vilification. We therefore do not think that the bar for successful civil vilification claims should be lowered under the ADA. For the same reasons that the harm-based test should not be adopted due to issues with objective tests assessing the views of a target group, we do not believe that the lowering of the threshold in the ADA’s incitement-based test to include public acts that are ‘likely’ to incite should be adopted. This too requires an inherently difficult objective assessment of the likelihood of an act inducing offense, hatred, or ridicule etc and is very difficult to determine, something on which educated and learned minds may differ on entirely.

### Concerns with a ‘Reasonable Person’ Test

143. However, in adopting a ‘reasonable person’ test care must be taken to ensure that religious speech is not subjected to sanction by the ‘views of the majority’. As Hayne J stated in *Monis v The Queen*:<sup>121</sup>

‘The very purpose of the freedom [of implied political communication] is to permit the expression of unpopular or minority points of view. Adoption of some quantitative test inevitably leads to reference to the ‘mainstream’ of political discourse. This in turn rapidly merges into, and becomes indistinguishable from, the identification of what is an ‘orthodox’ view held by the ‘right-thinking’ members of society. And if the quantity or even permitted nature of political discourse is identified by reference to what most,

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[https://lawreform.nsw.gov.au/documents/Publications/Reports/Report\\_151\\_Serious\\_racial\\_and\\_religious\\_vilification.pdf](https://lawreform.nsw.gov.au/documents/Publications/Reports/Report_151_Serious_racial_and_religious_vilification.pdf)

<sup>121</sup> (2013) 249 CLR 92 [122] (Hayne J).

or most ‘right-thinking’, members of society would consider appropriate, the voice of the minority will soon be stilled. This is not and cannot be right.’

144. In light of these concerns, any reform to civil vilification law should expressly exclude any assessment of whether the religious belief statements *themselves* are reasonable according to general community standards. The ADA should clarify that nothing is therefore intended that would limit claims that a religion offers the ultimate and exclusive form of truth, or that moral behaviour can have eternal consequences. As Justice Morris stated in *Fletcher v Salvation Army (Fletcher)* a ‘genuine religious purpose may include asserting that a particular religion is the true way, and that any way but the true way is false.’<sup>122</sup> As His Honour recognised, ‘criticism of a religion or religious practice is not a breach of the Act; the Act is concerned with inciting hatred of people on the basis of race or religion.’<sup>123</sup> The following comment from Justices in the *Catch the Fire Ministries* litigation are also apposite:

‘[t]he legislation aims to strike a balance between protecting freedom of speech and protecting people from vilification on the grounds of their ... religious belief. It would be inconsistent with this aim to interpret the legislation so as to make it impossible for people to proselytise for their own faith or to criticise the religious beliefs of others.’<sup>124</sup>

‘[n]o doubt the purpose of the Act is to promote religious tolerance. But the Act cannot and does not purport to mandate religious tolerance. People are free to follow the religion of their choice, even if it is averse to other codes.’<sup>125</sup>

145. Anti-vilification laws should also include a truth defence. If public recitation of the truth legitimately invites serious ridicule or serious contempt for a group because that truth is morally repugnant, then the law should not prevent this.
146. The definition of a ‘public act’ in the ADA, of which section 20B is an example, is already sufficient, as suggested by the CP at paragraph 8.113. The current definition in the ADA is already broad in its scope and to widen it any further only increases the risk of restricting legitimate religious activity, such as preaching, teaching and pastoral counsel.
147. We are concerned that by broadening the scope of the definition the ADA will capture religious speech and teaching in contexts that are private, but where the public may technically gain access. Religious teaching that is conducted in the context of private or semi-private religious spaces, in good faith, amongst religious group members that is not inciting hatred should not be unduly subjected to possible complaints of vilification under the ADA for failure of a member of the public to understand the context, doctrine or meaning of that teaching.
148. We further note that broadening the definition of public act could have an undesirable ‘chilling effect’ on religious speech and activity amongst religious communities who do not understand

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<sup>122</sup> *Fletcher* (n 3) [9].

<sup>123</sup> *Ibid* [14].

<sup>124</sup> *Catch the Fire Ministries* (n 1) [173] (Neave JA).

<sup>125</sup> *Ibid* [34] (Nettle JA).

the nuances of prohibitions against vilification under the ADA, but are overly cautious for fear of complaints that could reach into their church gatherings or the pulpit.

## Part 9. Harassment

**Question 9.1: The definition of sexual harassment:** (1) Should the reasonable person test be expanded to include the ‘possibility’ of offence, intimidation or humiliation? Why or why not? (2) Should the ADA expressly require consideration of an individual’s attributes, or the relationship between the parties, in determining whether a person would be offended, humiliated or intimidated by the conduct? Why or why not? (3) Does the ADA need to define ‘conduct of a sexual nature’? Why or why not?

**Question 9.2: Other sex-based conduct:** (1) Should harassment on the ground of sex be expressly prohibited by the ADA? Why or why not? (2) Should the ADA prohibit workplace environments that are hostile on the ground of sex? Why or why not? (3) Are there any other options or models to prohibit conduct which may fall in the gap between sex discrimination and sexual harassment? What could be the benefits of these options?

**Question 9.3: Sexual harassment in the workplace:** Should the ADA adopt the Sex Discrimination Act’s approach of prohibiting sexual harassment in connection with someone’s status as a worker or person conducting a business or undertaking? Why or why not?

**Question 9.4: Workplace-related laws regulating sexual harassment:** (1) Are workplace-related sexual harassment laws and the ADA currently working well together, in terms of the definitions of sexual harassment? (2) Should the ADA and workplace-related sexual harassment laws be more aligned?

**Question 9.5: Expanding the areas of life where sexual harassment is prohibited:** (1) Should the ADA continue to limit the areas of life where sexual harassment is unlawful? Why or why not? (2) Should sexual harassment be unlawful in other areas of life? For example: (a) areas of life that are protected from discrimination (b) all areas of public life, or (c) any area of life, public or private?

**Question 9.6: The private accommodation exception:** Should sexual harassment be prohibited in private accommodation? Why or why not? If an exception for private accommodation is required, how wide should it be?

**Question 9.7: Attribute-based harassment:** If the ADA was to prohibit attribute-based harassment, which attributes and areas should it cover?

149. The NSWLRC proposes removing the exception for religious bodies from the prohibition on harassment while at the same time contemplating broadening the list of protected attributes that are covered by the prohibition on harassment.<sup>126</sup> The ACDS does not engage in, nor does it condone, any form of unlawful harassment. However, expanding the scope of harassment to all protected attributes, combined with poorly drafted prohibitions on harassment, could capture religious speech that the ordinary Australian would not consider should be unlawful. Much turns

<sup>126</sup> NSWLRC CP 140-1 [7.61]-[7.64] & [9.88]-[9.93].

on the precise legal definition of ‘harassment’. The Federal Court has provided the following definition of harassment:

‘The word ‘harass’ implies the instillation of fear or the infliction of damage; as is indicated by the definition of the term in the Macquarie Dictionary: ‘1. to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid. 2. to disturb persistently; torment, as with troubles, cares, etc.’”<sup>127</sup>

150. If it was an offence to harass a person based on any protected attribute including religious belief, the repeated affirmation of the Bible’s claim to exclusive eternal truth could fall within the scope of harassment. For example, simply stating in conversations with a co-worker in lunch breaks (with no intention to harass) that the only way to be saved is to follow Jesus might still lead the co-worker to claim harassment on the basis of ‘the instillation of fear’ (i.e., fear of going to hell). For this reason, either the expression of a religious belief or principle should be outside the scope of the harassment provisions, or the scope of harassment provisions should not be expanded beyond the existing scope of sexual harassment.

## Part 10. Other unlawful acts and liability

**Question 10.1: Victimisation:** (1) Should the prohibition of victimisation in the ADA expressly extend to situations where a person threatens to victimise someone? Why or why not? (2) Should the ADA provide that victimisation is unlawful even if it was done for two or more reasons? If so, how best could this be achieved?

**Question 10.2: Advertisements:** Should it be a defence to publishing an unlawful advertisement that the person reasonably believed publication was not unlawful? Why or why not?

**Question 10.3: The forms of liability:** What, if any, concerns or issues are raised by the ADA’s approach to the various forms of liability?

**Question 10.4: The exceptions for liability:** Should the ADA continue to provide two exceptions to vicarious liability (that is, the ‘reasonable steps’ and ‘unauthorised acts’ exceptions)? Or is a single ‘reasonable steps’ exception sufficient?

**Question 10.5: Liability and artificial intelligence:** Does the use of AI challenge the ADA’s approach to liability? If so, how could the ADA be amended to address this?

151. Given the predominate approach to exceptions for vicarious liability of employers in anti-discrimination law around Australia has been the ‘all reasonable steps’ approach, we believe that the NSW approach should be the same and that the current section 53 exceptions should be amended to remove the ‘unauthorised acts’ exception.

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<sup>127</sup> *Re Susan Hall; Dianne Susan Oliver and Karyn Reid v A & A Sheiban Pty Ltd; Dr Atallah Sheiban and Human Rights and Equal Opportunity Commission* (1989) 85 ALR 503, 531; [1989] FCA 72; 20 FCR 217 (15 March 1989) [9].

152. As the CP points out at [10.35], NSW is the only discrimination law in Australia that contains this exception and its treatment in the courts has resulted in outcomes that create ongoing uncertainty for employers regarding the level of scrutiny and decision making required to satisfy the requirement of ‘not authorising’ an activity through omitting to act. Therefore, the ‘reasonable steps’ approach is to be preferred because it takes into account the context of the organisation and its ability to monitor and constrain employee and agent activities.
153. This is preferable for religious bodies because the scale and sophistication of these bodies varies widely. We therefore support an approach that will treat the resources and abilities of a small church or charity differently to a large non-profit religious enterprise in ensuring compliance with policies and procedures when assessing whether that body has taken ‘all reasonable steps’ to prevent an employee or agent from contravening the Act.
154. Religious bodies should not be held liable for unlawful acts taken by their employees, associates, volunteers or agents where those individuals have acted contrary to the religious body's policies and the body has taken all reasonable steps to ensure that its employees, volunteers, associates and agents do not engage in those activities.

## Part 11. Promoting substantive equality

**Question 11.1: Adjustments:** (1) Should the ADA impose a duty to provide adjustments? If so, what attributes should this apply to? (2) Should this be a separate duty, form part of the tests for discrimination, or is there another preferred approach? (3) Should a person with a protected attribute first have to request an adjustment, before the obligation to provide one arises?

155. We support the expansion of the ADA to require ‘reasonable adjustments’ for persons on the basis of their religious belief. Such a protection has been recommended by the United Nations Special Rapporteur on Freedom of Religion or Belief, who has concluded that ‘there can be no reasonable doubt that the right to freedom of thought, conscience, religion or belief also applies in the workplace’ and that ‘eliminating indirect discrimination may require measures of “reasonable accommodation”’.<sup>128</sup> This proposal is not novel in Australian law and would bring NSW into alignment with Australian Capital Territory and the Northern Territory.<sup>129</sup> This should follow the model in s.5 and s.6 of the *Disability Discrimination Act 1992* (Cth) by including ‘reasonable adjustments’ as part of the definition of direct and indirect disability discrimination. There should not be a positive duty to provide reasonable adjustments. (see further below on positive duty). Under such a proposal organisations would be obliged to make reasonable adjustments for a

<sup>128</sup> Heiner Bielefeldt, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/69/261 (5 August 2014) (*Interim report of the Special Rapporteur on freedom of religion or belief*). <<https://digitallibrary.un.org/record/781563?ln=en>, [31], [70]. See also discussion at [49]-[66], [70]-[72], [77]-[78].

<sup>129</sup> Discrimination Act 1991 (ACT) s74, Anti-Discrimination Act 1992 (NT) s24(1).

person's genuine religious beliefs unless to do so would cause the organisation substantial hardship.

156. Reasonable adjustment provisions should apply to discrimination on the basis of religious belief or activity, to require an organisation to make reasonable adjustments to accommodate a person's genuine religious belief or activity unless to do so would cause the organisation substantial hardship. Merely prohibiting discrimination 'on the ground of' religious belief or activity is not sufficient. For example, if a religious person (such as an employee) acts in a particular way based on their religious belief or activity (e.g., a Muslim is absent from a work setting for 20 minutes at a particular time for prayer as part of a religious obligation) and another non-religious employee acts in the same way in the same circumstances but without a religious belief or activity (a non-religious employee is absent from a work setting for 20 minutes at the same time for a 'smoko') and the employer applies the same detrimental treatment to both employees because of their absence, the employer will argue that they have not discriminated against the religious person on the ground of their religious belief or activity but on the ground of their absence.
157. With respect to disability discrimination, the strict application of the rule of detriment 'on the ground of disability' has been found to provide insufficient protection. If, for example, a disabled employee is slow at a task and makes errors because of their disability and a non-disabled employee is similarly slow and makes errors because they don't care about their work quality, the employer who sanctions each employee the same will claim that the sanction is on the ground of poor work standard, not disability. For this reason, the DDA includes 'reasonable adjustments' provisions both in relation to direct discrimination (s5) and indirect discrimination (s6).
158. The same principles ought to apply to religious belief and activity, and require an employer to make reasonable adjustments for an employee's genuine religious beliefs unless to do so would cause the organisation substantial hardship. For example, where there are sufficient staff to allow flexible rostering that would accommodate those whose religion does not permit them to work on Saturdays, such as Jews and Seventh Day Adventists, it would be discrimination if the employer refuses to make the reasonable adjustments. Conversely, if it was not reasonable – for example, if an emergency requires all staff to work a full weekend – then an employer would not be required to adjust rosters to accommodate the religious obligations of some employees.
159. Such a 'reasonable adjustments' provision would be functionally similar to Title VII of the *Civil Rights Act* of 1964 (USA), which requires employers to 'reasonably accommodate an employee's or prospective employee's religious observance or practice' unless this would impose 'undue hardship on the conduct of the employer's business.'<sup>130</sup>
160. A reasonable adjustment provision should not require a religious body to act contrary to its religion. For that reason, the exception for religious bodies outlined above should apply, notwithstanding the reasonable adjustments requirement. Such is the approach adopted for

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<sup>130</sup> <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>, SEC. 2000e.(j).

reasonable adjustments clauses in the jurisdictions that apply that requirement to accommodate persons who seek an adjustment on account of their religious belief.<sup>131</sup>

**Question 11.2: Special measures:** (1) Should the ADA generally allow for special measures? Why or why not? (2) If so, what criteria for a special measure should the ADA apply? (3) If a general special measures section is added to the ADA, should it replace the existing exemption and certification processes? Why or why not?

161. There are provision for ‘special’ or ‘specific’ measures designed to promote the equal enjoyment of rights in three of the international human rights treaties to which Australia is a signatory – article 1.4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), article 4.1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDW) and article 5.4 of the Convention on the Rights of Persons with Disabilities (CRPD). For example, article 1.4 of CEDW states:

‘Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.’

162. Gender quotas in employment or board appointments are examples of this kind of a special measure. However, arguably the concept has gone beyond this definition in its application in Australian law. The Federal Court of Australia in *Walker v Cormack* held that a women-only gym class was non-discriminatory because it was a special measure to achieve substantive equality between men and women.<sup>132</sup> This is the right outcome for arguably the wrong reason.

163. As noted above, s.31 the ADA recognises a range of jobs where biological sex is a genuine occupational requirement, such as fitting of a person’s clothing to a person of that sex, conducting a bodily search of a person of that sex, entering a changeroom used by persons of that sex while in a state of undress or while bathing or showering and so on. These are not, and should not be categorised as, temporary ‘special measures’ to overcome inequality between men and women. Women-only spaces should be treated in the same way. It is anomalous that it is ‘not discrimination’ for a women-only gym to employ only women to work as changeroom attendants, but the same gym requires an exemption certificate under s126A to operate for women-only.

164. Neither an exemption under s126A nor a ‘special measure’ provision is the appropriate mechanism to enable women-only spaces such as women’s gyms and refuges for women,

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<sup>131</sup> See, eg, Western Australia and the Australian Capital Territory.

<sup>132</sup> *Walker v Cormack* [2011] FCA 861

notwithstanding the fact that most current exemptions under s126A are for this purpose.<sup>133</sup> The rationale for exemption certificates and special measures is to respond to unlawful discrimination through positive actions that restore equality, until such time as those measures are no longer needed. The biological differences between men and women are not going to change, and therefore this issue should be dealt with by specific legislative provisions in a consistent manner.

165. These legislative provisions which allow women-only spaces should be drafted to ensure that they also include the religious practices of some faiths that require separate areas for women for worship and/or ritual cleansing.
166. However, there are other areas of life where some form of affirmative action is appropriate on a temporary basis. For these, the current exemption system under s126A should be replaced with a special measures provision akin to s7D of the SDA. Section 7D provides that acts that are special measures are not discriminatory and thus do not require any exemption. Section 7D, which was introduced in 1995, replaced an exemption model in the old s33. Consistent with comments elsewhere, the approach in 7D is preferable, because it means that special measures are not to be treated as exempted forms of discrimination, but considered as part of the threshold question of whether there was discrimination at all.

**Question 11.3: A positive duty to prevent or eliminate unlawful conduct:** (1) Should the ADA include a duty to take reasonable and proportionate measures to prevent or eliminate unlawful conduct? Why or why not? (2) If so: (a) What should duty holders be required to do to comply with the duty? (b) What types of unlawful conduct should the duty cover? (c) Who should the duty holders be? (d) What attributes and areas should the duty apply to?

167. We do not support the proposal to introduce additional positive duties to take reasonable and proportionate measures to prevent or eliminate unlawful conduct. Religious bodies in NSW are already under positive duties under other NSW legislation to take reasonable and proportionate measures to eliminate discrimination and harassment on the basis of sex, to eliminate or minimise psychosocial risks in the workplace and to eliminate or minimise other risks to workplace health and safety. These existing duties are likely to encompass a positive duty to protecting employees against discrimination, harassment or vilification on the basis of any protected attribute. To extend this coverage beyond employees would place an onerous burden on religious bodies, particularly if the scope extended to include volunteers, or to include the vague tests of ‘reasonable and proportionate’ or ‘inherent requirements’.
168. We are concerned that a positive duty may be interpreted by courts in a way that requires a religious body to act contrary to its religion, because of judicial arbitration of what is ‘reasonable and proportionate in all the circumstances’. Our concern is that this will require judges to do what they are ill-equipped to do: assess the reasonableness of a religious belief as a rationale for taking

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<sup>133</sup> <https://antidiscrimination.nsw.gov.au/organisations-and-community-groups/exemptions-and-certifications/current-certifications.html>

or not taking a certain action. Moreover, if a 'reasonable and proportionate' requirement is placed within the religious body exception, a positive duty would compel religious institutions to anticipate what a judge may find to be 'reasonable and proportionate' and then ensure that no person acts in a manner that would be unreasonable or disproportionate. In what circumstance, for example, would a judge consider it unreasonable for a parish to refuse communion to a person? That, as we have said above, would be an unprecedented incursion of the State into religious practice and create great uncertainty for religious institutions and schools within New South Wales. The same uncertainties arise in respect of a positive duty to police the application of an inherent requirements test.

**Bishop Michael Stead**

11 August 2025