

JOINT CHURCHES SUBMISSION
QUEENSLAND HUMAN RIGHTS COMMISSION
REVIEW OF QUEENSLAND'S ANTI-DISCRIMINATION ACT

I. INTRODUCTION

1. This joint submission is made by the following Christian churches:
 - Acts 2 Alliance (Catalyst)
 - Anglican Church of Southern Queensland
 - Anglican Church of North Queensland
 - Australian Christian Churches (Queensland and Northern Territory)
 - Baptist Union of Queensland
 - Catholic Archdiocese of Brisbane
 - Churches of Christ Queensland
 - International Network of Churches
 - Lutheran District Queensland
 - Presbyterian Church of Queensland
 - Uniting Church in Australia (Queensland Synod).
2. As Christians, we affirm that all human beings are made in the image of God and are equal in dignity and worth (*Genesis 1:27*). We believe that the saving love of God is made manifest in the person of Jesus Christ and that his grace is freely available to all peoples of the world without discrimination (*Galatians 3:28*).
3. We note that the Queensland Parliament has acknowledged in the *Human Rights Act* the “inherent dignity and worth” and the “equal and inalienable human rights” of all human beings. We also note that the *Anti-Discrimination Act* recognises “the need to protect and preserve the principles of dignity and equality for everyone”.
4. We therefore welcome the review being undertaken by the Queensland Human Rights Commission (the **Commission**) into whether the *Anti-Discrimination Act* is compatible with the *Human Rights Act* and whether there may be better ways of addressing the root causes of the discriminatory conduct prohibited in the *Anti-Discrimination Act*.
5. We begin this submission by drawing attention to the vital connection between human dignity and human community (**Part II**). We wish to emphasise that human beings are

not merely isolated individuals, but are members of communities at familial, local, regional, national and global scales. Respect for human dignity and human rights requires respect for the many social contexts in which human beings find meaning and purpose for their lives.

6. From this perspective we then address what we consider to be priorities that should guide any review of the *Anti-Discrimination Act*, based on international human rights principles (**Part III**). Alongside the value of equality, we wish to emphasise that responsible freedom, communal solidarity and the cardinal principle of human dignity need to be at the forefront of our thinking. We wish to submit that while legal and regulatory measures can generate external and formal compliance, they are unable to address the underlying causes of prejudice and discrimination.
7. As Christian churches, we are committed to the formation of the character qualities that contribute to the flourishing of our local communities. We firmly believe in the capacity of religious groups, charities and other welfare organisations, on their own initiative, and in terms of their own faith traditions, to promote respect for human dignity and advance human welfare in an inclusive and compassionate environment. Rights to freedom of association and freedom of religion are not abstract or theoretical rights. They are crucial to enabling families, associations, charities, schools and religious organisations to provide for human needs and contribute to human flourishing.
8. To this end, we draw attention to the full panoply of human rights protected by international law principles, including fundamental freedoms of expression, religion, assembly and association, as well as economic, social and cultural rights, including the special rights attaching to families, parents and children.
9. On these foundations we next seek to address some of the specific questions raised by the Commission's Discussion Paper (**Parts IV-VIII**). These include:
 - The inclusion of an objects clause which refers, in addition to the right to equality and non-discrimination, other human rights and freedoms that must be taken into consideration when framing the Act in a manner consistent with international human rights standards, including freedom of religion, expression, assembly and association, the rights of parents to educate their children in accordance with their own religious and moral convictions, and the rights of minorities to enjoy their own culture, and to profess and practise their own religion as a community (**Part IV**).
 - Reframing the definitions of direct and indirect discrimination so that fundamental freedoms of religion, expression, assembly and association are not protected merely by exemptions or exceptions, but are recognised as fundamental human rights that must be protected and that “not every differentiation of treatment will constitute discrimination” (**Part V**).

- The balancing of rights to equality and non-discrimination with rights to freedom of religion, expression, assembly and association needs to be implemented in a manner consistent with the equal status in international law of all human rights, having regard to balancing principles articulated by the UN Human Rights Committee and the Siracusa Principles (**Part VI**).
 - The provisions in the *Anti-Discrimination Act* concerning religious bodies, religious service providers, religious accommodation providers and religious schools should be assessed having regard to the principles articulated above, including the equal status in international law of all human rights and international law principles applicable to the limitation and balancing of rights (**Part VII**).
 - In relation to other matters raised by the Commission, concerning unjustifiable hardship exemptions, imposition of positive duties and non-legislative measures, we respectfully ask the Commission to be mindful of the capacity of religious associations, charities and other welfare organisations, on their own initiative, and in terms of their own faith traditions, to promote respect for human dignity and advance human welfare in an inclusive and compassionate environment (**Part VIII**).
10. Finally we close with some brief remarks about how disagreements about these matters can best be approached in a society committed to human rights, human dignity, human flourishing and the common good (**Part IX**).

II. HUMAN DIGNITY AND HUMAN COMMUNITY

11. Respect for the dignity of all human beings can be traced to the teachings and practices of the early church. As Professor John Milbank has observed, the Christian church understood itself to be a radically new community that was open to all human beings without any distinction on the basis of nationality, language, status or sex.¹ Although there were suggestions of the universality of human dignity in Cicero’s writings (106-43 BCE), it was in early Christian teaching and practice that the Latin term *dignitas* was for the first time systematically applied to all human beings without distinction.
12. Gregory of Nyssa (c. 335-95 CE), for example, taught that everyone has “the dignity of royalty”, for all human beings “equally bear in themselves the Divine image” and “we are all of the same stock, all brothers and sisters”.² Gregory insisted that this applied to every human being without distinction, whether rich or poor, slave or free. Many other

¹ John Milbank, “Dignity Rather than Rights” in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) p 198.

² Gregory of Nyssa, “On the Making of Man” in Philip Schaff & Henry Wace (eds), *Nicene and Post Nicene Fathers of the Church (Second Series)* (1893) Vol 5, I.1.

Christian leaders and theologians taught similarly, including Pope Leo I (c. 400-461), Bernard of Clairvaux (1090-1153), Thomas Aquinas (1225-1274), Martin Luther (1483-1546), John Calvin (1509-1564) and, more recently, Pope Paul VI (*Dignitatis Humanae*, 1965), Jurgen Moltmann (*On Human Dignity*, 2007) and the Russian Orthodox Church (*Basic Teaching on Human Dignity, Freedom and Rights*, 2008).³

13. The *Universal Declaration on Human Rights* (1948) (**UDHR**) affirms, similarly, that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. The *International Covenant on Civil and Political Rights* (1966) (**ICCPR**) and the *International Covenant on Economic, Cultural and Social Rights* (1966) (**ICECSR**) begin with the same remarkable statement.
14. This reference to the “human family” evokes images of the most intimate of human relationships: bonds of marriage, nurture of children, ties of kinship. Rather than use words that individualise and universalise in abstract terms, the UDHR describes humanity as an extended family, knit together by ties that are personal, natural and communal. The rights protected by the UDHR and similar international instruments should be understood in this way. Human beings are not merely isolated individuals, but are members of communities at familial, local, regional, national and global scales.
15. Human dignity and human flourishing is realised in community. As Professor Mary Ann Glendon has observed, while the rights contained in the UDHR are enjoyed by “everyone”, all such persons are “portrayed as situated in families, communities, workplaces, associations, societies, cultures, nations, and an emerging international order”.⁴
16. Respect for human dignity therefore requires respect for the many social contexts in which human beings find meaning and purpose for their lives. As Charles Malik, one of the founders of international human rights, pointed out, the relationship between the individual and the state must always be understood in the context of the “innumerable other intermediate loyalties which the individual must respect”, such as families, professions and associations. “Real freedom”, he said, “must spring from the loyalty of the individual not to the state but to these intermediate forms”, and these forms must therefore “find their place in the general social picture”.⁵

³ For more detail, see Remi Debes, *Dignity: A History* (Oxford University Press, 2017).

⁴ Mary Ann Glendon, “Knowing the Universal Declaration of Human Rights” (1999) 73(5) *Notre Dame Law Review* 1153, 1172.

⁵ Cited in Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 2010) p 242.

17. It is from this perspective that we seek to contribute to discussion about reform of the *Anti-Discrimination Act*, particularly in light of the underlying values expressed in the *Human Rights Act*, the UDHR, the ICCPR and the ICECSR.
18. The Commissioner's foreword (page 4) identifies two issues that appear to be priorities for the Commission. They are whether the *Anti-Discrimination Act*:
 - protects and promotes *equality* to the greatest extent possible; and
 - should have a more *preventative* focus in order to address systemic discrimination and inequality.
19. We firmly agree that *equality* is a vastly important value in international human rights law. In our respectful submission, however, we propose that three other principles of international human rights law should receive a similar level of consideration, namely *communal solidarity*, *responsible freedom* and the cardinal principle of *human dignity*. We believe that a more fulsome understanding of these principles can shed light on how a more preventative approach can best be promoted and secured.
20. The cardinal principle of human dignity helps to ensure that human rights and human responsibilities are kept in healthy balance. The principles of equality and freedom (both of which are strongly affirmed in international law) need to be understood in a manner that does not prioritise one over the other. While the inviolable rights of each individual person are fundamental, these rights need always to be understood in the context of the responsibilities of mutual human love, community and solidarity.
21. It is appropriate that law and government policy have a preventative focus. However, we query whether governmental policies and laws are able to generate the most effective preventative responses to social problems. We respectfully submit that while legal and regulatory measures can generate external and formal compliance, they are unable to address the underlying causes of prejudice and discrimination.⁶ It is on a much smaller scale—within families, neighbourhoods, schools, workplaces and religious communities—that human motivations, priorities and values are shaped and formed.
22. As Christian churches, we are committed to the formation of the character qualities that contribute to the flourishing of our local communities. It is within contexts such as these that individuals learn to understand, respect, love and care for others.

⁶ The Discussion Paper rightly acknowledges the complex social issues that underlie discriminatory attitudes and practices and the limited capacity of the law and regulation to address them: at pp 22, 27. Legalistic approaches to addressing these problems has resulted in a highly technical and complex statute, as noted at p 26. These complexities contribute to protracted delays for both complainants and respondents: pp 21, 57-59, noting that there can be a delay of up to six months before the commission can assess a complaint: p 23.

III. INTERNATIONAL HUMAN RIGHTS

23. The Terms of Reference require the Commission to consider whether there is a need for any reforms to enhance and update the *Anti-Discrimination Act*, taking into account Australian and international best practices, to best protect and promote equality, non-discrimination and the realisation of human rights (para 2). In undertaking this review, the Commission is required to consider, among other things:
- the compatibility of the *Anti-Discrimination Act* with the *Human Rights Act* (para 3(a));
 - whether the functions, processes, powers and outcomes of the Commission are appropriately suited to ensuring it can further the objective of eliminating discrimination and other objectionable conduct under the *Anti-Discrimination Act*, to the greatest possible extent (para 3(j)).
24. It appears from the Commissioner’s Foreword, that the Terms of Reference have been interpreted to require the Commission to consider whether the *Anti-Discrimination Act* “protects and promotes equality to the greatest extent possible” (page 4).
25. For the reasons indicated above, we welcome the Commission’s focus on the need to protect and promote equality, but we would urge the Commission in doing so to place equivalent weight on the need to ensure protection of all human rights, including the fundamental freedoms protected by the ICCPR and the economic, social and cultural rights protected by the ICESCR, understood in light of the cardinal principle of human dignity.
26. Under the ICCPR, Australia has obligations to ensure the protection of human civil and political rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (ICCPR article 2), as well as to prohibit discrimination on any such grounds (ICCPR article 26).
27. At the same time, international human rights principles recognise and protect the capacity of families, local communities, charities, associations and religious groups to contribute to human flourishing through guarantees of freedom of religion, expression, assembly and association (ICCPR articles 18-22), as well as through protections of the rights of families, parents and children (ICCPR articles 17, 23-24), and with special attention to the rights of minorities to enjoy their own culture, and to profess and practise their own religion as a community (ICCPR article 27).

28. It is a fundamental principle of international human rights law that human rights are universal, indivisible, interdependent and interrelated.⁷ There should be no conceptual hierarchy in which some rights are given priority to others. The international covenants place freedom, equality and community rights on an equal footing.
29. The *Human Rights Act* recognises the importance of the rights recognised and protected by the UDHR, ICCPR and other international instruments (section 12) and affirms that international law may be considered when interpreting laws enacted by the Queensland Parliament (section 48), including the *Anti-Discrimination Act*. Under section 95, the first review of the *Human Rights Act* must include consideration of whether additional human rights recognised by the ICESCR and other international instruments should be protected under the Act.
30. In this context, we express concern lest the Commission's review of the *Anti-Discrimination Act* against the standards expressed in the *Human Rights Act* may be hamstrung by the fact that the *Human Rights Act* is in some respects selective in the international human rights that it acknowledges and protects.
31. There are four principal ways in which the *Human Rights Act* fails to recognise and protect all of the human rights that are recognised and protected by international law.
32. Firstly, the Act does not seek to recognise and protect the **economic, cultural and social rights** enshrined in the ICESCR except for the right to education and the right to health services (sections 36 and 37). Important rights are entirely unmentioned. Many of these overlooked rights are vital for the flourishing of human communities at a local, regional, national and international level. These include:
 - the right to just and favourable conditions of work (article 7);
 - the right to form trade unions at a local, federal and international level (article 8);
 - the right to social security (article 9);
 - the right of the family, as “the natural and fundamental group unit of society”, to the widest possible protection and assistance (article 10.1) and to an adequate standard of living (article 11.1);
 - the right of parents “to choose for themselves schools, other than those established by the public authorities, to ensure the religious and moral education of their children in conformity with their own convictions” (article 13.3); and the associated

⁷ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (25 June 1993) para [5].

liberty of individuals and bodies to “establish and direct educational institutions” (article 13.4).

33. Secondly, the Act is selective in the particular **civil and political rights** enshrined in the ICCPR that it recognises and protects. Some of these neglected civil and political rights have an important social and cultural dimensions. These include:
 - the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions (article 18.4);
 - the right of the family, as the natural and fundamental group unit of society, to protection by society and the state (article 23.1).
34. Thirdly, the Act restricts the scope of human rights to individual rights, contrary to the protections of the rights of associations, groups and communities expressly acknowledged and protected by the ICESCR and the ICCPR, as well as by other international instruments. In addition to the examples given above, the ICESCR affirms, for example, that all peoples have the right to self-determination and to freely pursue their economic, social and cultural development (article 1.1).
35. Fourthly, the Act adopts a general limitations clause which permits limitations to be placed on the exercise of human rights on the basis of a statutory test which establishes a lower standard of protection of human rights. The fundamental criterion adopted by the Act is that the limitation must be “reasonable” (section 13(1)). By contrast, the ICCPR and the ICESCR both require that the limitation must be “necessary” (eg, ICCPR, articles 18.3, 19.3, 21.3, 22.2). As explained below, international law has adopted strict standards to be applied to proposed interferences with the exercise of human rights.
36. For these reasons we respectfully express concern lest the *Human Rights Act* is interpreted in a manner that fails to offer a sufficiently comprehensive basis for assessment of the *Anti-Discrimination Act*. We note, however, that the *Human Rights Act* itself states that a right or freedom not included, or only partly included, in the Act must not be taken to be abrogated or limited (section 12). The *Human Rights Act* specifically refers to rights under the ICCPR, the UDHR and other international conventions (thus including the ICESCR). Our submissions are therefore based not only on the rights expressly recognised by the *Human Rights Act* but by the fully panoply of rights recognised and protected by the UDHR, ICCPR and ICESCR.
37. **Discussion Question 56** specifically addresses the compatibility of the *Anti-Discrimination Act* with the *Human Rights Act*. The Discussion Paper (at page 130) asks whether there are any provisions in the Act that are inconsistent with human rights and whether there are any restrictions on rights that cannot be justified because they are unreasonable, unnecessary or disproportionate.

38. In our respectful submission, the Discussion Paper prepared by the Commission does not adequately consider the relevance of the rights to freedom of religion, expression, assembly and association (ICCPR articles 18-22), the rights of families, parents and children (ICCPR articles 17, 23-24) and the rights of minorities (ICCPR article 27) in its discussion of several issues raised in the Discussion Paper. There is a very brief reference to the requirements of ICCPR article 18.1 (page 114), but no discussion of the principle that the right includes freedom to manifest religion “either individually or in community with others” and “in public or in private” (ICCPR article 18.1). Nor is there discussion of the requirement of ICECSR article 13.3 to have respect for “the liberty of parents ... to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions”.⁸
39. These are not abstract or theoretical rights. The capacity of families, associations, charities, schools and religious organisations to operate in accordance with their moral, philosophical and religious convictions is foundational to their ability to provide for human needs and contribute to human flourishing. According to a report commissioned by the Australian Charities and Not-for-profits Commission, Australia’s 48,000 registered charities employ 1.38 million people and are supported by the work of 3.6 million volunteers (more than half of all charities operate without any paid staff).⁹ The majority of registered charities operate on budgets of less than \$250,000 per year.¹⁰ They are at the forefront of providing education, social services and aged care to the most vulnerable in our communities.

IV. OBJECTS CLAUSE

40. **Discussion Question 19** addresses possible inclusion of an objects clause into the *Anti-Discrimination Act*. Consistently with the focus on the protection of equality rights expressed in the Commissioner’s Foreword (at page 4), the Discussion Paper (at page 68) proposes an array of objects that focus on the elimination of discrimination and the protection of the right to equality.

⁸ ICCPR article 18.4 is in similar terms but does not refer expressly to the establishment of schools. However, the UN Human Rights Committee, in its *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, has observed that the freedom to manifest religion “includes acts integral to the conduct by religious groups of their basic affairs, such as ... the freedom to establish ... religious schools”.

⁹ ACNC, *Australian Charities Report* (7th ed) pp 11-12. Taking small unregistered not-for-profit associations also into consideration, the Productivity Commission estimated that in 2006-7 volunteers contributed \$14.6 billion in unpaid work to numerous community and charitable causes: Productivity Commission, *Contribution of the Not-for-Profit Sector* (Research Report, January 2010) pp 64-65.

¹⁰ ACNC, *Australian Charities Report* (7th ed) p 4.

41. While we support the references to the right to equality and the elimination of discrimination that are already expressed in the preamble and section 6 of the Act, we respectfully submit that these objects should be supplemented with references to the protection of the other human rights and freedoms that must be taken into consideration when framing the Act in a manner consistent with international human rights standards. These include:

- freedom of religion, expression, assembly and association (ICCPR articles 18-22),
- the rights of parents to educate their children in accordance with their own religious and moral convictions (ICCPR articles 17, 18.4, 23-24; ICECSR articles 10.1, 13.3 and 13.4); and
- the rights of minorities to enjoy their own culture, and to profess and practise their own religion as a community (ICCPR article 27).

42. In this respect, we note the findings of national inquiries into the protection of fundamental rights and freedoms, including the Australian Law Reform Commission's report on *Traditional Rights and Freedoms* (ALRC Report 129)¹¹ and the Prime Minister's Expert Panel *Religious Freedom Review*.¹² These reports emphasise the need to ensure that all human rights, including fundamental freedoms, are adequately protected in anti-discrimination laws, so that an appropriate balance is maintained between equality, freedom and community rights. The *Religious Freedom Review* specifically recommended that:

Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion (Recommendation 3).

43. We therefore respectfully submit that the Act should be amended to include the following object:

“to ensure that, in eliminating discrimination and promoting equality, freedoms of expression, religion, association and assembly, and the rights of parents in respect of the education of their children in accordance with their own religious and moral convictions, are also protected, consistently with the equal status in international law of all human rights”.

¹¹ <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/>

¹² <https://www.pmc.gov.au/domestic-policy/taskforces-past-domestic-policy-initiatives/religious-freedom-review>

44. The inclusion of such objects in the *Anti-Discrimination Act* will help to ensure that the *Anti-Discrimination Act* is interpreted in a manner that will best achieve these objects.¹³ In addition, it will ensure that the interpretive provisions of the *Human Rights Act* will also apply appropriately to the interpretation of the *Anti-Discrimination Act*. The *Human Rights Act* requires that “statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights” (section 48(1)). If the *Anti-Discrimination Act* is not amended to include among its purposes the protection of these other rights, the application of section 48(1) could be artificially restricted in a manner inconsistent with the equal status in international law of all human rights.

V. DEFINITION OF DISCRIMINATION

45. The Terms of Reference require the Commission to consider whether there is a need for any reform regarding the definitions in the *Anti-Discrimination Act*, including the definitions of discrimination, unjustifiable hardship and genuine occupational requirements (para 3(e)). The Terms of Reference also require consideration of exemptions that apply to the prohibition on discrimination (para 3(h)).
46. Exemptions and exceptions are included in anti-discrimination laws for various reasons, including to protect other rights and freedoms, such as freedom of expression, religion, assembly and association. However, protecting these fundamental freedoms merely through “exceptions” to general prohibitions on discrimination structurally elevates equality rights over liberty rights and social rights. The right to non-discrimination is treated as fundamental, while freedom of expression, religion, assembly and association are treated as merely exceptional.
47. The UN Human Rights Committee, in *General Comment No. 18: Non-discrimination*, has defined discrimination as “any distinction, exclusion, restriction or preference ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms” (para 6).¹⁴ Framed in this way, the right to non-discrimination includes not only the right not to be discriminated against on the basis of particular attributes, but also the right to the enjoyment and exercise, on an equal footing, of all human rights and fundamental freedoms, including freedom of expression, religion, assembly and association.

¹³ *Acts Interpretation Act 1954* (Qld), section 14A.

¹⁴ HRI/GEN/1/Rev.9 (Vol. I) pages 195-198. The Human Rights Committee drew on the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).

48. Furthermore, the UN Human Rights Committee has observed that the enjoyment of rights and freedoms on an equal footing “does not mean identical treatment in every instance” (paragraph 8) and that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant” (para 13).
49. Having regard to the equal status in international law of all human rights, we respectfully submit that the definitions of direct and indirect discrimination in the *Anti-Discrimination Act* should be amended so that they recognise and implement the principle that “not every differentiation of treatment will constitute discrimination”. We submit that the definitions should make clear that differential treatment based on criteria that are reasonable and objective is not unlawful discrimination if the aim is to achieve a purpose which is legitimate under the ICCPR, ICESCR and other international human rights conventions.¹⁵ Among the sorts of treatment that should not constitute discrimination are actions based on reasonable and objective criteria for the purposes of exercising fundamental rights such as freedom of expression, religion, assembly and association, as defined in ICCPR articles 18-22.
50. Reforming the *Anti-Discrimination Act* along these lines would better recognise the equal status in international law of all human rights. It would still remain necessary, however, also to enact an appropriate balance between all of the human rights that need to be protected.

VI. BALANCING RIGHTS

51. Balancing human rights involves recognition that particular human rights may be limited in order to protect other human rights. However, in assessing such limitations, it is important that recognition is given to the equal status in international law of all human rights. This means that each right should receive fundamental protection and limitations on each right should be scrutinised to ensure that they are no more than is necessary to protect other fundamental human rights.
52. There are two dimensions to the balancing of human rights to equality and freedom. On one hand, the interface between the right to non-discrimination and other human rights (such as the rights to freedom of expression, religion, assembly and association) is governed by the principle that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant” (HRC, *General Comment No. 18*, para 13). On the other hand, the interface between freedom of expression, religion, assembly and association and other human rights (such as the right

¹⁵ We note that this is the approach of the *Religious Discrimination Bill 2021* (Cth).

to non-discrimination) is governed by the principle that the freedom “may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others” (ICCPR article 18.3).¹⁶

53. The UN Human Rights Committee has observed in relation to limitations on freedom to manifest religion:

- the requirements of ICCPR article 18.3 are to be “strictly interpreted”;
- permissible limitations on the freedom to manifest religion should be based on the need to protect human rights, including the right to equality and non-discrimination, but such limitations “must not be applied in a manner that would vitiate the rights guaranteed in article 18”;
- unlike other aspects of freedom of religion which can be limited under ICCPR article 18.3, “the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions” under article 18.4 “cannot be restricted”.¹⁷

54. The interpretation of the requirements of the ICCPR in relation to limitations on human rights was closely examined by a group of distinguished international human rights experts who met in Siracusa, Italy in 1984 under the auspices of the International Commission of Jurists and other international organisations.¹⁸ The *Siracusa Principles* were subsequently circulated as an official document of the Commission on Human Rights of the UN Economic and Social Council.¹⁹ In relation to the limitation clauses in the ICCPR, the *Siracusa Principles* state, among other things:

- “The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.” (I.A.2)
- “All limitation clauses shall be interpreted strictly and in favour of the rights at issue.” (I.A.3)

¹⁶ This is the particular a test that applies to freedom to manifest religion or belief. See also the similarly worded requirements of ICCPR articles 19.3, 21, 22.2 in relation to freedom of expression, assembly and association.

¹⁷ UN HRC, *General Comment No 22*, para 8.

¹⁸ *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*

¹⁹ E/CN.4/1985/4 (28 September 1994).

- “Whenever a limitation is required in the terms of the Covenant to be ‘necessary’, this term implies that the limitation ... is proportionate.” (I.A.10)
- “In applying a limitation, a State shall use no more restrictive means than are required for the achievement of the purpose of the limitation.” (I.A.11)
- “The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the State.” (I.A.12)
- “... especial weight should be afforded to the rights from which no derogation may be made under article 4 of the Covenant” (I.B.36), including “freedom of thought, conscience and religion” (II.D.58).

55. In our respectful submission, consideration of reforms to the *Anti-Discrimination Act*, particularly where they involve balancing of human rights, should be assessed strictly and carefully in terms of these international human rights principles, as recommended by the *Religious Freedom Review*.²⁰

VII. RELIGIOUS BODIES

56. ***Discussion Questions 41 and 43*** address religious bodies and religious accommodation providers.
57. The Discussion Paper (page 110) points out that the purpose of exemptions to general discrimination prohibitions is to recognise that treating someone differently may be justified in some circumstances. While acknowledging that exemptions are needed, it considers whether the scope of each exemption remains reasonable and necessary. It is said that this may involve narrowing exemptions to apply only to specific areas of activity or particular attributes, or broadening exemptions to respond to contemporary issues not previously anticipated.
58. The Discussion Paper (pages 114-115, 116) discusses exemptions for religious bodies and religious accommodation providers in particular. It notes that the right of freedom of thought, conscience, religion and belief is protected in international human rights law, the *Human Rights Act* and the Australian Constitution. However, as noted above, it does not observe that this right, under article 18 of the ICCPR, includes the right to manifest one’s religion “in private and in public”, as well as “individually and in community with others”.
59. With these aspects of article 18 of the ICCPR in view, the *Religious Freedom Review* recommended that “Commonwealth, State and Territory governments should have

²⁰ *Religious Freedom Review*, Recommendation 2.

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” (Recommendation 2).

60. We respectfully request that the Commission:

- have regard to the Siracusa Principles when assessing aspects of the *Anti-Discrimination Act* that involve limitations on rights to freedom of expression, freedom of association, freedom of assembly and freedom of religion;
- consider whether the protection of these fundamental freedoms in discrimination laws should not be treated as “exemptions” to discriminatory conduct but rather as positive measures to promote those freedoms;²¹
- consider whether the protections given to “bodies established for religious purposes” (sections 25(2), 90 and 109) should also be given to “bodies conducted in accordance with religious beliefs, doctrines or principles”;²²
- consider whether the protections should not depend on conduct being shown to be *both* in accordance with the doctrine of the religion *and* being necessary to avoid offending the religious sensitivities of people of the religion, but that *either* of these grounds should be sufficient.²³

61. **Discussion Question 42** considers religious service providers. The Discussion Paper (at pages 115-116) proposes that religious bodies should not be permitted to rely on religious exemptions when receiving public funds to provide essential services such as aged care or hospitals.

62. We respectfully request the Commission to consider the extent to which the capacity of religious bodies to provide beneficial services to the community is dependent upon the religious motivations and commitments of the organisations and individuals who commit their resources, time and energy – and indeed their entire lives – to the provision of welfare services to those in need. We also ask that the Commission consider that such bodies need to be able to maintain their religious convictions, and engage staff and volunteers who share those convictions, in order to continue to provide such essential services with such commitment and compassion.

²¹ We note that this is the approach of the *Religious Discrimination Bill 2021* (Cth).

²² We note that this is the approach of the *Equal Opportunity Act 2010* (Vic).

²³ We note that this is the approach of the *Religious Discrimination Bill 2021* (Cth), *Anti-Discrimination Act 1977* (NSW), *Equal Opportunity Act 2010* (Vic) and *Equal Opportunity Act 1984* (WA).

63. **Discussion Question 44** addresses work exemptions for religious bodies. The Discussion Paper (at pages 117-118) notes the limited exemption available to an educational institution operating under the direction or control of a body established for religious purposes (section 25).
64. We would respectfully draw attention to the fact that the Queensland exemption is the among the most limited and most complex of all Australian jurisdictions. We submit that the protections for religious educational institutions should be expanded so as to protect their ability to conduct themselves, in good faith, in accordance with their religious purposes, principles and doctrines. We request that the Commission, in considering reforms to this aspect of the *Anti-Discrimination Act*, give due attention to the international human rights principles concerning:
- the rights of the family, as “the natural and fundamental group unit of society”, to the widest possible protection and assistance (ICECSR article 10.1; ICCPR article 23.1); and
 - “the liberty of parents ... to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions” (ICECSR article 13.3; ICCPR article 18.4).
65. **Discussion Question 52** addresses non-for-profit entities providing goods and services. We respectfully submit that the existing exemption for not-for-profit entities providing goods and services should be retained, noting the beneficial services provided by op-shops and similar social enterprises often depend on the support of volunteers and operate on very limited budgets.
66. In making these submissions, we wish to emphasise that we do not regard freedoms of expression, religion, assembly and association as ends in themselves, but as means of ensuring that families, associations, charities, schools and religious organisations are able to attend to fundamental human needs and to contribute to a flourishing and harmonious society committed to human dignity and the common good.

VIII. OTHER MATTERS

67. **Discussion Questions 5 and 6** concern unjustifiable hardship exemptions and reasonable accommodation requirements. The Discussion Paper (at page 39) specifically asks whether the Act :

strike[s] the right balance between the rights of people with disability and the competing interests of employers, schools, accommodation providers and

others, having regard to the overarching goal of promoting equality and inclusion.

68. While the Act appropriately requires consideration of relevant financial circumstances in assessments of unjustifiable hardship, we would ask the Commission to take into special consideration the particular circumstances of most religious associations, charities and welfare organisations, noting their limited finances, not-for-profit status, dependence on donations and volunteers and beneficial charitable purposes. As Christian churches, we seek to be at the forefront of providing services to people with disabilities. We ask the Commission to be mindful of the financial circumstances in which our many humanitarian initiatives must operate when considering unjustifiable hardship exemptions and reasonable accommodation requirements.
69. **Discussion Question 21** asks whether the law should impose positive duties on organisations to take reasonable steps to eliminate discrimination and sexual harassment and raises questions about the entities to which such an obligation might apply.
70. While we are very supportive of proactive action to prevent discrimination and sexual harassment, we respectfully submit that consideration should be given to ensuring that debilitating administrative or regulatory burdens are not imposed on religious organisations, charities and welfare organisations, noting their beneficial charitable purposes, limited resources, dependence on donations and volunteers, and not-for-profit status.
71. **Discussion Questions 10 and 11** address the handling of disputes by the Commission. The Discussion Paper (at page 55) draws attention to possibility that the use of the terms “complainant” and “respondent” may contribute to the adversarial nature of the process and create a perception that the Commission takes the side of the complainant, which can be counterproductive to resolving the complaint.
72. We would respectfully draw the attention of the Commission to the use of phraseology in the Discussion Paper which could contribute to such perceptions, such as observations quoted in the Discussion Paper (at p 50) which assume the existence of discrimination in cases undergoing conciliation, rather than regarding them as situations where the existence of discrimination is alleged but contested.
73. **Discussion Question 24** addresses non-legislative measures that may contribute to providing protection against discrimination and sexual harassment.
74. In response, we would respectfully draw attention to the capacity of religious associations, charities and other welfare organisations, on their own initiative, and in terms of their own faith traditions, to promote respect for human dignity and advance

human welfare in an inclusive and compassionate environment. In this respect, we would urge the Commission to consider the need for such organisations to be allowed to pursue these beneficial goals without excessive regulatory and financial burdens in an adaptable, efficient and tailored manner.

IX. CONCLUSIONS

75. In conclusion, we wish to repeat our support for the review being undertaken by the Commission and our commitment, as Christian churches, to the inherent dignity and worth and the equal and inalienable human rights of all human beings. We are conscious that the issues raised by the Commission's inquiry involve some issues on which there is significant disagreement. We would therefore close with some brief comments on how such disagreements are best addressed in a society committed to human rights, human dignity, human flourishing and the common good.
76. Professor Alasdair MacIntyre, one of the most distinguished and respected philosophers of our time, has noted that social disagreements can often arise between groups who have very different but well-worked-out conceptions of what is good for human beings.²⁴ He points out that exchanges between such groups can involve four different attitudes and approaches: firstly, enthusiastic embrace of another's perspective because it supports and perhaps helps to refine one's own perspective; secondly, willing acceptance of another's perspective because it contributes to a constructive disagreement through which a shared approach to addressing social issues may be developed; thirdly, sharp disagreement with another's perspective leading to attempts to respond with reasons intended to try to convince them otherwise; and, fourthly, outright denial of another's right to pursue their own conceptions of the good and refusal to engage in dialogue with them about how the common good can best be pursued.
77. We would close by urging all of those involved in such discussions, including ourselves, to avoid focussing only on viewpoints that reinforce our own perspectives and to reject approaches that would deny the rights of others to pursue their own conceptions of the good. It is far better, we submit, to engage in constructive and reasoned disagreement in pursuit of human rights, human dignity, human flourishing and the common good.

25 February 2022

²⁴ Alasdair MacIntyre, "Toleration and the Goods of Conflict" in *Ethics and Politics* (Cambridge University Press, 2006) p 207.

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