



Australian Law Reform Commission

Traditional Rights and Freedoms— Encroachments by Commonwealth Laws

Submission by

Christian Schools Australia Ltd

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1. Introduction

Christian Schools Australia Ltd (CSA) is an association of over 135 schools, with over 56,000 students and more than 3,000 teaching staff. CSA's commitment is to see Christian beliefs and values impact on all aspects of practice and community life in its member schools. With Biblically based beliefs as our foundation CSA provides leadership, services and resources for its members, and generally works to advance the cause of Christian schooling.

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

The schools provide for the education of families from a broad range of Christian denominations. Many CSA members are affiliated with a local church, others with Christians from a number of churches in their local area.

Most CSA schools also attract significant enrolments from the wider community, from parents who, while not attending a Christian church, nonetheless want their children to receive an education that is based upon Christian beliefs and values.

The member schools have all signified agreement to a common statement of faith which is based on an acceptance of the truth of the Bible.

We have set out below our initial response to the Issues Paper in relation to Chapter 3 – Freedom of Religion. In doing so we reserve the right to provide further analysis and comment either in response to other submissions or more generally. In particular we may wish to make a response to any proposed legislative change which may be recommended by the Inquiry.

4. The nature of Christian Schools

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

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

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

Staff members, including both administrative and teaching staff, are role models and exemplars for the students whose educational, social and spiritual development is the school's purpose. Their work is to do with teaching - by *modelling* and instruction – the doctrines and values of the faith. In this respect they are similar to a pastor or minister in a church setting.

Like other religious workers teachers in our schools are also called upon to be pastor/mentor to the students in their care. Likewise administrative staff are often called upon to pastorally care for school families in their many dealings with them. Parents have chosen Christian schools precisely for this reason – that the staff is known to have a pastoral concern from a distinctly Christian point of view.

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

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

2. Foundational Principles

We have outlined below a number of foundational principles that we believe are of crucial importance in the consideration of any proposed amendments to legislation regarding religious freedom.

The importance of religious freedom should not be undervalued.

Freedom of religion is, as indicated by Acting Chief Justice Mason and Justice Brennan, 'the essence of a free society'¹. Legislation or other proposed changes to public policy in such an essential aspect of our society should only be undertaken after wide ranging and open consultation with both the general public and more specifically those groups likely to be affected by the proposals. Freedom of religion is far too important a right for action to be taken with undue haste and it is preferable to err on the side of caution when developing any proposals for change. CSA looks forward to further opportunities to make comments on any reports or recommendations that may arise as a result of this Inquiry.

¹ *Church of the New Faith v Commissioner of Pay-roll Tax (Vic.)* (1983) 154 CLR 30 (the *Scientology case*)

Equity and balance must be sought

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

The need to balance rights must, however, be acknowledged. In so doing it must be remembered that freedom of religion is not a nice afterthought but is at the very heart of the essential human rights. Acknowledgement of the need to protect freedom of belief has a history longer than any other human right in both international instruments² and domestic law of older European nations³.

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

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

Preamble to Universal Declaration on Human Rights

Any balancing of ‘rights’ must recognise and respect these fundamental rights. In incorporating recognition of these rights it is critical to ensure that both the right to hold beliefs and the right to act upon those beliefs, individually or corporately, are protected. Both are essential elements of religious freedom and both aspects are clearly recognised in international law.

Our Christian heritage must be acknowledged and respected

Subsequent to white settlement the foundational moral, ethical and cultural influence within Australia has been Christianity. This has resulted in a substantial legacy for our nation in many areas and has shaped the moral and ethical underpinning of our society. Christian beliefs themselves promote tolerance and understanding towards other faiths and views and this has been reflected in the general level of tolerance and acceptance within our society. The great Australian tradition of ‘a fair go’ itself owes much to our Christian heritage.

In the area of education the Christian church has played a leading role. The Christian church established the first school in Australia and it was not until nearly a century later that ‘secular instruction’ in the sense of non-sectarian instruction was introduced⁴. It was not until very much later that ‘secular instruction’ became more

² eg Peace of Westphalia 1648

³ eg 1598 Edict of Nantes

⁴ Roberts, Allen S, (1989) *Australia’s First Hundred Years: The Era of Christian Schools Understanding our Christian Heritage Vol 2*. McLennan G (Ed) Christian Heritage Research Institute

narrowly interpreted to mean ‘non-religious’ instruction, this being a product of the 1960’s and early 1970’s.

Similarly the development of the law within Australia owes much to Biblical principles. The Constitution was proclaimed ‘under Almighty God’. The common law our country inherited from Great Britain was based on Christian beliefs. Further, it has been said, at least in relation to the common law in New South Wales, that ‘Christianity is part and parcel of our general law’ and that, ‘all revealed or divine law, so far as enacted by the Holy Scriptures to be of universal obligation, is part of our colonial law’⁵. While it is acknowledged that the nature of Australian society has changed over the last century the immense contribution of Christianity to the development of the law should not be brushed aside. The comments of Samuel Taylor Coleridge are worth remembering ‘*If men could learn from history, what lessons it might teach us! But passion and party blind our eyes and the light which experience gives is a lantern on the stern, which shines only on the waves behind us!*’.

Due recognition of the contribution of Christianity to our society should not impinge upon the exercise of freedom of religion by other faiths or on the exercise of non-religion. To deny Australia’s Christian heritage, however, is not only a distortion of historical fact but also an affront to members of the Christian faith and the contribution made by Christians in the past. Recognition of the pre-eminent historical role of Christianity also does not preclude appropriate recognition of the contributions made by other religions groups to our society. The heritage and religious views of the indigenous peoples of Australia as well as those of the many other ethnic and cultural groups who have come as settlers to Australia should be recognised and respected. People should be encouraged to understand the differing beliefs and practices and to accept the right of people to hold these views.

Our Christian schools work within this very principle. Part of the learning experience in a Christian school is to recognise the important to national and community life of the values and tenets of faith, and hence learn respect for people of all faiths. This includes the important contribution of cross-cultural awareness for the sake of a rich and peaceful society.

Minority views must be protected

Over the years both the High Court and the United Nations Human Rights Committee have expressed the need to define the term religion broadly particularly in order to safeguard those holding minority views who ‘stand in need of special protection’⁶. It is vital that majority opinion should not be used coercively against minority views or their religious practices except in cases where there is demonstrable and serious physical or psychological harm and the individual was not in a position to protect himself or herself.

Further, ‘[u]nder our law, the State has no prophetic role in relation to religious belief; the State can neither declare supernatural truth nor determine the paths through

⁵ *Ex Parte Thackeray* (1874) 13 SCR (NSW) L 1 at 61 per Hargrave J

⁶ n 1 at 132 per Mason ACJ and Brennan J

which the human mind must search in a quest for supernatural truth⁷ Religious beliefs and values are no less valid or worthy of protection merely because they are held by a minority religion or a minority denomination within a larger religious grouping. Within the Christian church, for example, there are a wide range of theological positions and interpretations. The validity of the views of one denomination should not be judged by reference to the views of another denomination.

The freedom to act on religious belief is essential

The so called ‘action-belief dichotomy’ which seeks to distinguish between holding to a belief and acting upon that belief is an inappropriate, arbitrary and contrived distinction that fails to recognise the implicit need to act arising from religious beliefs. This distinction which grants States the right to legislate over the actions arising from religious beliefs has the potential to undermine the whole principle of freedom of religion.

The United Nations Human Rights Committee, acknowledge this potential for harm. While Australian courts have tended to take this distinction as a ‘self evident principle’⁸ it is not without limitations, at least at the Commonwealth level. The test for determining the legitimacy of a law under section 116 proposed by Latham CJ in *Adelaide Company of Jehovah’s Witnesses V Commonwealth* was whether the law ‘can be fairly regarded as a law to protect the existence of the community’⁹. This would seem, on face value, to provide a very strict test regarding the Commonwealth’s right to legislation in relation to religious ‘actions’. No such constraints are, however, applicable to the State governments (with the exception of Tasmania) as demonstrated in *Grace Bible Church v Reedman*¹⁰.

The courts in the United States have gone further that the Australian High Court and have discarded the action/belief dichotomy in *Wisconsin v Yoder*¹¹ where Chief Justice Burger determined that:-

‘Where fundamental claims of religious freedom are at stake ... we must searchingly examine the interest that the State seeks to promote [by its legislation] ... and the impediment to those objectives that would flow from recognizing the claimed ... exemption.’¹²

⁷ n. 1 at 134 per Mason ACJ and Brennan J

⁸ Moens, G, (1989) The Action-Belief Dichotomy and Freedom of Religion 12 Sydney Law Review 195 at page 203

⁹ (1943) 67 CLR 116 at 132

¹⁰ (1984) 36 SASR

¹¹ [1972] 406 U.S. 205

¹² *ibid* at 221

This test would seem to implicitly acknowledge that there might be some situations where the right of the State to legislate regarding religious 'actions' is not absolute.

CSA, its member schools, their affiliated churches and Christian communities, view Christian education as a fundamental part of the tenets of their faith. As indicated above the dichotomy between the sacred and the secular in education is explicitly rejected as false. The operation of the school, the educational and disciplinary practices within the school, and the relationships within the school community are based upon, and consequentially flow from, the religious beliefs held by the members of the church and school communities.

It is our strong submission that any legal constraints predicated upon this false dichotomy that may be placed upon the activities of the schools within the CSA membership would almost certainly impinge upon the religious beliefs held by those schools.

The limitations of the law must be recognised

While the law may be able to regulate behaviour to some degree it is impotent to change attitudes and beliefs. Elimination of intolerance will not eventuate as a result of the implementation of legislation but rather as the result of changes to social attitudes and values. We have grave concerns that the introduction of very individualistic, rights based legislation may lead to greater levels of intolerance rather than reductions. We are concerned that excessive emphasis on individual rights will be at the expense of genuine care and concern for the rights of others. This methodology is also extremely legalistic in its nature and is incompatible with the need to adapt to changing and individual circumstances and situations.

In synthesising the views of the U.N. Human Rights Committee, the High Court of Australia and the Supreme Court of the United States in the previous point it also becomes evident that there is a need to provide very strict constraints on the ability of the State to legislate on actions flowing from religious beliefs. This is, in many ways, the crucial element in ensuring freedom of religion. The greatest threat to freedom of religion comes not from other individuals or groups but from the State. The State has the greatest opportunity effectively to constrain the actions of those rightfully following their religious beliefs, and hence the greatest responsibility not to do so.

In view of these two concerns we believe that any proposals arising from this discussion paper should not neglect the need to appropriately limit or constrain the actions of the State rather than attempting to impose a certain set of static rights on individuals and groups within society. In this regard the comments of Mason ACJ and Brennan J in the Scientology case bear repeating, '[t]he law seeks to leave man as free as possible in conscience to respond to the abiding and fundamental problems of human existence'¹³.

It is also a mistaken view to consider that a person who is convinced about the correctness of his or her beliefs is necessarily intolerant of the views of others. Christians in general defend the rights of all people to hold religious views.

¹³ n. 1 at 133

3. *Unjustifiable Interference*

As indicated above schools affiliated with CSA operate out of expressly religious motives and often in an overtly religious manner. This is most commonly manifested in relation to staffing and curriculum. Presently the ability to exercise religious freedom in this area is possible as a result of exceptions or exemptions in legislation.

We believe that this approach is inherently problematic. It leads itself to a conclusion, reflected in the Issues Paper itself, that the employment practices of Christian schools have merely ‘been tolerated¹⁴’ rather than recognised as a fundamental right.

There is an alternative approach to the protection of religious freedom. The protection could be tackled as a definitional issue, such that *activities done in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, undertaken in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed, would not constitute discrimination.*

We believe this approach has considerable merit and should be considered as a preferred approach to this issue. It would reinforce the ‘balancing’ that is implicit in any determination of discrimination and help to establish that this ‘balancing’ is at the heart of dealing with competing rights.

There is a further weakness in relation to the exceptions or exemptions approach to protection. This relates to the objects of discrimination or equal opportunity type legislation and the impact that has on interpretation or review.

The current objects are generally described in the form: *‘to eliminate, so far as is possible, discrimination against persons on the ground of...’¹⁵* This formulation of the objects of the legislation seems out of step with the imperative to recognise the legitimate and fundamental need to balance different human rights within and broader overall framework of rights. In other words it falls short of the imperative to guard against limitations on the *freedom to manifest one’s religious beliefs*. Note that the freedom expressed in the international instruments is not just to *hold* a religious belief, but to *manifest* that belief. This is a key issue for faith-based institutions in Australia, such as Christian schools as indicated above.

This formulation of objects reinforces the view that religious freedom is merely tolerated. It has very practical implications where legislation of this type is subject to periodic review to ascertain whether it is having the effect of generating progress to fulfilling its objects. Almost invariably such reviews will conclude that the existence of an exemption is an impediment to achieving those objects, which we contend reflects that the objects themselves are poorly conceived.

Any recommendation to amend Commonwealth anti-discrimination legislation should recognise within the objects the need to balance different aspects of human rights and achieving anti-discrimination outcomes in a manner that reflects and protects other rights, such as freedom to have and manifest religious beliefs.

¹⁴ Issues Paper paragraph 3.23 p31

¹⁵ See, for example, *Sex Discrimination Act 1983* (Cth), section 3(b)

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In summary, while existing exemptions provide a level of protection for religious freedoms to be exercised in Christian schools there is room for improvement. Re-formulation of the objects of applicable Commonwealth legislation and the definitions of discrimination therein to recognise the need to balance competing rights provides a more robust means of securing these freedoms.