

## Australian Law Reform Commission Inquiry into Religious Educational Institutions and Anti-Discrimination Laws

### Submission

3 March 2023

1. The submission's authors thank the Commission for the opportunity to submit to the Review of Religious Educational Institutions and Anti-Discrimination Laws.
2. This submission is made by the Australian Section of the International Commission of Jurists (ICJ(AS)) and the International Commission of Jurists Victoria (ICJV). Both are non-governmental organisations composed of judges, lawyers, law students, and academics which exist to advance human rights and the rule of law within our jurisdictions. ICJ(AS) and ICJV are independent affiliates of the Geneva-based International Commission of Jurists.
3. This submission addresses and commends Propositions A and B (with Technical Proposals 1, 2, 3, 4, 5, 6, 7, and 14) outlined in the Commission's Consultation Paper. While it focuses on Propositions A and B, the submission also commends the adoption of reforms of Propositions C and D in line with international human rights law and international best practice.
4. Preventing discrimination against students and staff on the basis of sexual orientation, gender identity, marital or relationship status, or pregnancy, or on the grounds that family member or carer has one of those attributes brings Commonwealth law in line with either current law in the majority of Australian jurisdictions or the proposed law in the majority of Australian jurisdictions. As reflected in the Commissions' proportionality analysis, the proposed changes are also in line with international human rights principles and best practice.
5. It is further submitted that the adoption of these reforms is important for the coherence of anti-discrimination law within Australia. The term 'coherence' is used here to refer to logical consistency and clarity across state, territory, and Commonwealth systems. Coherence is necessary for effective protection of human rights and the predictability, legitimacy, and fairness required of the rule of law.
6. In particular, this submission argues that coherence is important for three reasons related to the promotion of human rights and the rule of law.
7. **First, protecting the freedom from discrimination requires coherence.** Non-discrimination is a "basic and general principle relating to the protection of human rights".<sup>1</sup> It is equally as important as, and fundamentally connected to, equality before the law and equal protection of the law without discrimination.<sup>2</sup> Coherence is necessary to ensure these protections because neither the protection nor the responsibility for upholding that protection change due to one's geographic location within an obligated State.<sup>3</sup> To the extent that differences in legal protections persist, this leaves room for the substantive content of the 'freedom from discrimination' to be interpreted differently dependent on where an individual studies or works. It also potentially legitimises discriminatory practices in reference to Commonwealth law. Adequate protection of the freedom from discrimination requires protected grounds of identity

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<sup>1</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, [1].

<sup>2</sup> *Ibid.*

<sup>3</sup> 'State', here, refers to the international legal entity. On the immediacy of ensuring non-discrimination measures as a right, see UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, Part II.

to be the same across all Australian jurisdictions. This is a necessary step to ensure that all Australians can fully enjoy their human rights, regardless of geographic location.

8. **Second, adequate accessibility to the law requires coherence.** In describing the rule of law, Lord Bingham argues that a crucial element is that ‘the law must be accessible and so far as possible intelligible, clear, and predictable.’<sup>4</sup> Increasing the number of Australian jurisdictions with the above protections ensures one’s rights can be similarly interpreted and enforced. This increases the likelihood that Australians know and understand their rights—as the substance of the right is the same across the country. In turn, knowing and understanding one’s rights increases the likelihood that Australians will know to seek redress if those rights are infringed. This further contributes to a stronger general human rights environment.
9. **Third, the Commonwealth’s ability to ensure effective remedy for violations of one’s rights requires coherence.** Since the Commonwealth government—not the state and territory governments—is the signatory to the *International Covenant on Civil and Political Rights*, the Commonwealth government retains the obligation to ensure effective remedy for violations of one’s rights under Article 2(3)(a).<sup>5</sup> The Commission recognises the importance of the reforms to fully protecting the freedom from discrimination and as such, a remedy can only be made available if the freedom is also adequately protected under Commonwealth law.
10. In summary, this submission argues that ensuring the right to equality and to be free from discrimination, the ability to know and assert one’s right, and the Commonwealth’s international legal obligation to provide an effective remedy for violations of one’s rights require the coherence as proposed. The strengthening anti-discrimination laws at the federal level will not only safeguard students’ fundamental rights, but it will also uphold Australia’s commitment to the rule of law.
11. The authors thank the Commission for their time and consideration.<sup>6</sup> If further assistance is requested, please contact Jennifer Keene-McCann, Executive Member, International Commission of Jurists Victoria, at [REDACTED] or [REDACTED].

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<sup>4</sup> Lord Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 37. See also on the importance of equality, clarity, and a focus on protection of rights within the rule of law, Hon Michael Kirby AC CMG, ‘The Rule of Law Beyond the Law of Rules’ *Australian Bar Review*, based on part of address to 15th Malaysian Bar Association Conference, Kuala Lumpur (29 July 2010) [https://www.michaelkirby.com.au/images/stories/speeches/2000s/2010\\_Speeches/2471-ARTICLE-AUST-BAR-REVIEW-RULE-OF-LAW.pdf](https://www.michaelkirby.com.au/images/stories/speeches/2000s/2010_Speeches/2471-ARTICLE-AUST-BAR-REVIEW-RULE-OF-LAW.pdf). Notably, Justice Kirby is past president of the International Commission of Jurists (Geneva) (1995-1998).

<sup>5</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 2(3)(a); see also Justice Kevin Bell, ‘Certainty and Coherence in the Charter of Human Rights and Responsibilities Act 2006 (Vic)’ *Monash University Faculty of Law Legal Studies Research Paper* (5 August 2021) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3899704](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3899704).

<sup>6</sup> This submission was drafted by ICJV Executive Members Jennifer Keene-McCann and Celine Lau. The authors thank ICJ(AS) for their further comments.