



Review of Queensland's *Anti-Discrimination Act 1991*

March 2022

Introduction

The Queensland Catholic Education Commission (QCEC) welcomes the opportunity to provide a submission on the Review of Queensland's *Anti-Discrimination Act 1991* (the Act).

QCEC is the peak strategic body with state-wide responsibilities for Catholic schooling in Queensland. This submission is provided on behalf of the five Diocesan Catholic school authorities and 17 Religious Institutes and other incorporated bodies (Catholic School Authorities) which, between them, operate a total of 313 Catholic schools that educate more than 156,000 students in Queensland.

Catholic education is strongly focused on the principles of inclusivity and accessibility for all who seek a Catholic education. The striving to serve and educate all is a key way in which its mission is fulfilled. In practice this means a diverse student body, with a variety of particular needs and requirements. For example, in 2021 Catholic education in Queensland had 26,290 enrolled students with disability.

Catholic School Authorities, in their engagement with students, staff and school communities, seek to implement practices and arrangements that actively promote equality and exclude bias and prejudice. To this end, QCEC agrees that as the Act has been in place for more than thirty years, it is timely for the Act to be reviewed to ensure that it can effectively deal with the issue of discrimination in today's different context.

QCEC also agrees that rather than having reactive and narrowly compliance-based approaches to discrimination, positive and proactive strategies and structures will be better able to produce more comprehensive and sustainable changes. Preventative and educative focuses are favoured by Catholic education as particularly effective ways to address the issue of discrimination in school contexts.

The QCEC submission is prefaced by some general observations and then further review of the discussion questions from the *Review of Queensland's Anti-Discrimination Act Discussion Paper* that are relevant to Catholic education. Where QCEC has not addressed discussion questions, this should not be interpreted as agreement or disagreement with any of the propositions contained in the Discussion Paper with respect to those matters.

QCEC notes and supports the *Joint Churches Submission* put forward to the Commission which expands on a number of the matters discussed in this submission and we refer the Commission to the matters raised in that submission as relevant.

General observations

In reviewing the current Act and considering this submission, QCEC asks the Queensland Human Rights Commission (the Commission) to consider the following guiding principles which are of importance to the Catholic school sector:

- Queensland laws should continue to respect the inherent dignity of the human person irrespective of personal attributes, values or beliefs and their inalienable right to freedom, while supporting the common good.
- Queensland laws should appropriately ensure religious rights are protected in the same way as other rights and, at the same time, ensure a fair and reasonable balance with other protected rights.
- Recognition of the universal right of freedom of religion and the harmonisation of relevant laws in Queensland (and across Australia) would support entities operating in these contexts.
- Specifically, Queensland laws should (or should continue to) respect and protect:
 - the right of parents who choose to send their children to a faith-based school where they will be taught in accordance with their religious beliefs and values
 - the right of faith-based schools to operate according to their religious beliefs, values and teachings
- In seeking protection of the freedom to operate in accordance with their religious beliefs, Catholic schools do not discriminate or seek to discriminate based on an individual's personal attributes.

Catholic schools make a significant contribution to the educational, moral and social fabric of Queensland. Our schools ensure that parents can choose an affordable education that is consistent with Catholic beliefs, values and teachings. Catholic schools are committed to educational excellence and are underpinned by charisms of prayer, witness, catechesis, social justice and pastoral care.

In seeking the freedom to operate in accordance with their religious beliefs, Catholic schools do not discriminate or seek to discriminate. The current protections (expressed as exemptions or exceptions in the Act) do not give Catholic schools the right to discriminate based on personal attributes, and Catholic schools are not seeking to do this.

The Act simply enables Catholic schools to preference the employment or enrolment of people of the Catholic faith, and those willing to support the ethos and mission of their schools. This is reasonable and fair in a free, pluralist society.

At all times, Catholic schools seek to engage on any issue that might arise regarding staff or the enrolment of students pastorally, with respect and care in recognising the dignity of each individual as a fundamental principle.

Discussion Question 1:

Should the Act clarify that direct and indirect discrimination are not mutually exclusive?

QCEC supports clarification of definitions that assist both the complainant and respondent to respect, protect, and fulfill their obligations.

It is agreed that direct and indirect discrimination are not mutually exclusive. This should be clarified within the Act and in instances where both are evident, they should be able to be dealt with at the same time within the context of individual cases or disputes/complaints.

We further support the recognition of freedoms to religion, expression, assembly and association not merely as exemptions or exceptions within the statutory framework, but as fundamental human rights which are explicitly and positively protected.

We note and support the *Joint Churches Submission* put forward to the Commission which expands on these matters and refer the Commission to the matters raised in that submission as relevant.

Discussion Question 2:

Should the test for direct discrimination remain unchanged, or should the ‘unfavourable treatment’ approach be adopted? Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?

The test of direct discrimination that uses the ‘hypothetical comparator’ to compare a student with disability to other students can be problematic given the complexity and highly individualised nature of the manifestation of the impact of disability.

In practical terms, the comparative exercise often necessitates consideration of the unfavourable treatment approach. It requires consideration of two issues: was the relevant student treated unfavourably and, if so, was the reason a protected characteristic?

It is highly desirable that the statutory provisions relating to discrimination provide certainty and clarity to schools in undertaking and managing their interactions with a large and diverse student population.

Balancing all of these factors, it is our view that while the current test for direct discrimination remains appropriate, it could be enhanced by reference to the use of the ‘unfavourable treatment’ approach.

Discussion Question 3:

Should the test for indirect discrimination remain unchanged, or should the ‘disadvantage’ approach be adopted? Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?

Changing the test for indirect discrimination to consideration of ‘whether a requirement, condition, or practice has, or is likely to have, the effect of unreasonably disadvantaging persons with an attribute’ is more supportive of students with disability than the test to ‘comply’. The latter requirement is difficult to establish, explain and interpret. For example, a complainant would need to know the ‘pool of people who do not have the attribute and who are able to comply’. The ‘disadvantage’ approach is more easily understood, interpreted and applied.

It remains very important in employment contexts that, in considering the test for both direct and indirect discrimination, it is made clear that a person must be able to fulfil the role requirements even after reasonable adjustments are made.

Discussion Question 4:

Do you support a unified test for both direct and indirect discrimination? Why or why not?

Retaining separate tests for direct and indirect discrimination is useful for students with disability who can be affected by both, and arguably more so affected by indirect discrimination. The distinction is instructive for a context such as education where direct discrimination is likely to be understood, however practices that are indirect may not be as well understood and viewed as unintentional. Retaining the separation supports an educative function as well as legislative protection for students with disability.

That said, from the perspective of schools that are required to comply with these requirements, it is just as important that the statutory distinctions and tests for both forms of discrimination are made very clear and are easily understood and applied in practical contexts.

Discussion Question 5:

Should an exemption of unjustifiable hardship relating to the supply of special services or facilities be retained? If so, in which areas? Should the factors relevant to determining unjustifiable hardship be redefined, and if so, how? How can the compliance costs for business and organisations be appropriately considered and weighed?

The exemption of unjustifiable hardship relating to supply of special services or facilities should be retained given the potential for this to have significant financial implications for a school or schooling system. The factors relevant to determining unjustifiable hardship remain relevant and should be retained, however this section may benefit from more detailed explanation and/or examples. Compliance costs for business and organisations seeking to meet these requirements should be considered and weighed on a case-by-case basis e.g. a State Government organisation versus a small business or not-for-profit organisation will have vastly different capacity to accommodate the required supply.

Discussion Question 6:

Should the Act adopt a positive duty to make ‘reasonable adjustments’ or ‘reasonable accommodations’? If you consider that this approach should be adopted: Should this be a standalone duty? What factors should be considered when assessing ‘reasonableness’ of accommodations? Should it apply to disability discrimination, other specific attributes, or all attributes? Should it apply to specific areas of activity or all areas? For example, should it apply to goods and services, work, education, and accommodation? How would any amendments interact with exemptions involving unjustifiable hardship? Would there be a need to retain the concept of unjustifiable hardship at all?

An express positive duty may provide clarity and greater certainty regarding obligations and entitlements for all parties. The duty should apply to all areas and all attributes. The definition of reasonable requires clarification. The component of ‘unjustifiable hardship’ should be retained due to the variety of contexts that are impacted, the potential for significant cost and/or impact on others depending on the context.

Discussion Question 7:

Is there a need to protect people from discrimination because of the effect of a combination of attributes? If so, how should this be framed in the Act? Should other legislative amendments be considered to better protect people who experience discrimination on the basis of combined grounds? What are some examples of where the current law does not adequately protect people from discrimination on combined grounds?

There is a need to protect people from discrimination due to intersectionality of attributes e.g. disability and gender identity, disability and race etc. It may be the combined effects of multiple attributes that is the subject of discrimination, and this lowers the burden on the complainant to confine the complaint to one attribute alone that may not reach the required evidentiary threshold when attributes are considered in isolation. It could be framed in the Act in the same way it is framed in the ACT i.e. 'one or more protected attributes'.

Discussion Question 8:

Should the onus of proof shift at any point in the process? If yes, what is the appropriate approach?

The aim of the process should always be to provide appropriate opportunities for all parties involved to fairly and reasonably access just, equitable and efficient outcomes.

Any proposed changes to the onus of proof should be balanced against the need for organisations such as schools to have certainty as to their obligations under law.

Where an allegation of discrimination is made, it is appropriate that such an allegation is able to be substantiated in a meaningful way by the complainant, initially, so that the respondent can appropriately investigate and meaningfully respond to the matter.

The shifting burden of proof adopted by the UK in 2010 may assist in consideration of this matter. Under that approach, a case is established by the complainant and then the burden of proof shifts to the respondent. Given that students with disability continue to experience discrimination, despite this being unlawful, the shifting of the onus of proof at this juncture may better support relevant students and families. In the 2020 review of the Disability Standards for Education (DSE) people said 'education providers had more power than them.'

Any shift of onus of proof needs to carefully consider how this will impact schools' obligations and responsibilities. An appropriate balance needs to be achieved between the complainants and schools' positions.

Discussion Questions 10 - 18

Discussion questions about right of access to Tribunals and Tribunal processes

It is not agreed that a complainant or respondent should have an entitlement to refer a complaint directly to a tribunal. QCEC believes the role of conciliation is key in ensuring that both parties are able to access a process that is fair and reasonable and leads to just, equitable and efficient outcomes.

The role of conciliation processes prior to tribunal or other court proceedings gives parties an opportunity to meaningfully engage in conciliation and alternate dispute resolution without entering a "costs jurisdiction at an early stage". This can provide more supportive and practical environments for both complainants and respondents to seek resolutions to issues raised.

Complaint-based terminology could be enhanced by use of alternate terminology that takes the emphasis away from 'complaining' and 'responding/defending' to focus on resolution with more neutral language e.g. 'dispute resolution'. The complaints-based model can be problematic for families of students with disability due to the energy and time required to engage in another 'battle'.

Non-written requests, such as by video or audio, for complaints could be considered to make access to the complaints process more accessible. However, such processes should ensure that adequate information is provided to enable respondents to fairly and appropriately respond to matters raised. To further enhance accessibility the Commission should provide reasonable support for people to put their complaint in writing if they wish to, however, to maintain the integrity of the process, this should be accompanied by the original source e.g. the meeting is audiotaped/videotaped to ensure the Commission had no influence in adding/altering the content of the complaint.

A more flexible approach to resolving complaints is warranted, including identification of different levels of response e.g. informal such as telephone conversation, early intervention, conciliation etc. dependent on the nature of the complaint and its urgency to be resolved. The nature of the complaint and its urgency should also determine the timeline for resolution with more urgent cases clearly needing faster resolution. Criteria for determining urgency would need to be developed.

It is considered that a tailored approach to prioritising complaints and approaching resolution could be adopted as policy by the Commission or included in the Act. The timeframes should be 'maximum time', with the intention of enhancing efficiency in whatever approach is adopted.

Discussion Question 19:

What should be the overarching purposes of the Anti-Discrimination Act? Should an objects clause be introduced? If so, what are the key aspects that it should contain? If the purposes of the Act change, should the name of the legislation change to ensure it reflects those purposes?

Consideration could be given to updating the references to international human rights instruments and ensuring the Act is aligned with the rights protected by the *Human Rights Act 2019* (Qld) and relevant international instruments (such as the ICCPR and ICESCR). An objectives clause would be helpful to assist the interpretation of the legislation and to 'guide the Commission's functions and allocation of resources'.

We note the *Joint Churches Submission* put forward to the Commission which expands on these matters and refer the Commission to the matters raised in that submission as relevant.

Discussion Question 21:

Do you support the introduction of a positive duty in the Anti-Discrimination Act? Should a positive duty cover all forms of prohibited conduct including discrimination, sexual harassment, and victimisation? Why, or why not? Should a positive duty apply to all areas of activity in which the Act operates, or be confined to certain areas of activity, such as employment? Should a positive duty apply to all entities that currently hold obligations under the Anti-Discrimination Act? What is the extent of the potential overlap between Workplace Health and Safety(WHS) laws and a positive duty in the Anti-Discrimination Act? If a positive duty is introduced, what considerations would apply to the interface between existing WHS laws and the Anti-Discrimination Act? What matters should be considered in determining whether a measure is reasonable and proportionate?

While the concept of positive duty across all areas of discrimination is agreed with, it is not agreed that the best approach is necessarily for this to be legislated. Through legislating a positive duty, the intent

behind ‘positive duty’ i.e. ‘a reflection of our values in our actions’ may not be fulfilled, but rather organisations may see this as simply a further compliance burden. The additional delegations and personnel that would be required in the Commission to implement and monitor organisation’s behaviours and determine how to work with or deal with breaches; and the compliance actions that organisations would be required to undertake would become the focus rather than the ‘positive duty’.

Schools currently reference the Commonwealth’s National Disability Standards to ensure proactive elimination of discrimination based on disability.

Such frameworks or standards are one way of engaging organisations in ‘positive duty’; if such a duty is created or adopted, alignment across legislation would be a key consideration – enabling organisations to efficiently engage in positive duty actions.

Similarly, education and public awareness campaigns are considered a way of positively influencing and bringing about change.

Discussion Question 22:

Should the statutory framework be changed to incorporate a role in regulating compliance with the Anti-Discrimination Act and eliminating discrimination? If so, do you consider that the Commission should undertake this regulatory role, or is there a more appropriate entity? What are the strengths and limitations of the Commission undertaking a regulatory role? What should be the core components of the regulatory model, and what mechanisms and powers should it include? What key features should a regulatory approach adopt to ensure it achieves the right balance between supporting organisations to comply with the Act and ensuring organisations, particularly small and medium-sized entities, are not unnecessarily burdened with regulation? If you recommend an expansion of the Commission’s functions and powers, what is the justification for this expansion?

While ensuring compliance with the Act is important, it is considered that further education, public awareness campaigns and practical support for complainants would be a preferable focus of resources in this area.

Discussion Question 24:

What non-legislative measures are required to ensure protections under the law are available to everyone?

The development of clear and easily accessible policies, procedures and practical guidance material for organisations that have obligations under the Act would be beneficial.

It is also recommended that education, promotion and support materials be available for organisations and individuals and key contact points as non-legislative measures that will support positive duty and elimination of discrimination.

Discussion Question 25:

Should the attribute of impairment be replaced with disability? Should a separate attribute be created, or the definition amended to refer specifically to mental health or psychosocial disability? Should the law be clarified about whether it is intended to cover people who experience addiction? Should reliance on a guide, hearing or assistance dog be broadened to be reliance on an assistance animal? Should it

only apply to animals accredited under law? How would this approach work with the *Guide, Hearing and Assistance Dogs Act 2009*?

The attribute of impairment should be replaced with disability as the preferred term. The term 'disability' is the most used and understood in the education context and is used in doctors' reports. Another attribute could be created to include mental health, rather than amend the current definition to include this attribute as it has specific meaning.

The law should be clarified to understand whether the intent is to include people who experience addiction.

The Act should be broadened to include assistance 'animals' rather than 'dog.' The assistance animal should be accredited under law. Cross reference with the *Guide, Hearing and Assistance Dogs Act 2009* would need to be completed to ensure alignment. There is no consistent national training standard for assistance animals to be used in schools.

Some mental health issues while significant have periods whereby an individual returns to their baseline level of functioning, others are more persistent. Mental health disability would need to be considered in the context of 'unjustifiable hardship' and 'reasonable adjustments'. Whilst Catholic School Authorities seek to include students with a broad range of mental illness diagnosis, there are instances in which some of the behaviours arising from the symptomatology are unable to be mitigated in a specific school context. In such cases, schools seek to balance the safety of the individual and the community, and actively support a student to access education support that best fits with their individual needs.

Discussion Question 34:

Is there a need for the Act to cover discrimination on the grounds of physical features?

This could be relevant to students with disability where the impact of the disability has an impact on physical features. This would intersect with and support the Disability Standards for Education that prohibit harassment and victimisation.

Any changes to the Act in relation to discrimination on the grounds of physical features would need to be carefully considered. The examples provided of tattoos and piercings would be problematic in a school setting, where codes of dress/appearance are applied to both staff and students.

Discussion Question 35:

Should an additional attribute of 'gender' be introduced? Should it be defined, and if so, how?

The addition of an additional attribute gender may support the promotion of the inherent worth of every individual and their right to a safe and supportive environment. However, the inclusion and consequences of the addition of an attribute of gender would need to be carefully considered in the context of the intersection between existing attributes of 'gender identity' and 'sex'.

Discussion Question 40:

Should the sport exemption be retained, amended, or repealed? Should competitive sporting activity be more clearly defined? Is strength, stamina or physique the appropriate consideration when restricting access to competitive sporting activity based on sex, gender identity, and sex characteristics? If not, what would be an alternative test to ensure fairness and inclusion in sporting activities?

We would support a clearer definition of competitive sport and that any exemptions reflect contemporary research and understanding.

Discussion Question 41:

Should the scope of the religious bodies' exemption be retained or changed? In what areas should exemptions for religious bodies apply, and in relation to which attributes?

It is strongly considered that the current exemptions in relation to religious bodies should be retained.

We note and support the *Joint Churches Submission* put forward to the Commission which expands on these matters and refer the Commission to the matters raised in that submission as relevant.

Discussion Question 44:

Should the religious educational institutions and other bodies exemption 330 be retained, changed, or repealed? If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race, or impairment)?

QCEC strongly supports the retention of the current exemptions in relation to religious educational institutions and other bodies with no further removal of attributes from the scope.

The current exemptions carefully balance the rights of individuals against the particular beliefs and ethos of religious based educational institutions. They expressly recognise and enable employing authorities to require employees to be of a particular religion to teach in a school established for students of that religion where this is a genuine occupational requirement (section 25).

Furthermore, while Catholic schools are welcoming and inclusive environments for students from diverse backgrounds, the Act does (and should continue to) provide scope for an educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular religion to preference applicants who are of that particular religion (section 41).

Equally, the attribute of sex should continue to apply to the exemptions provided in current section 41. Given the large number of Catholic schools that operate for students of a particular sex, this provision continues to enable an educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex to be able to exclude applicants who are not of that sex.

Finally, we also support the retention of section 89 which provides that an educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion may provide accommodation wholly or mainly for students of that particular sex or religion.

Conclusion

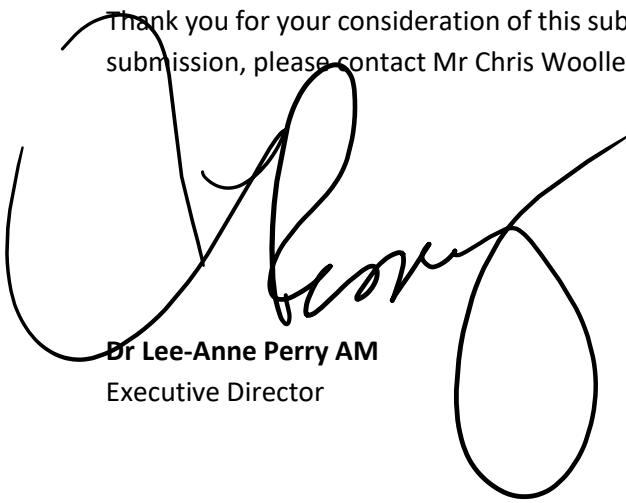
The focus of this submission has been limited to those parts of the review that are related to Catholic schools and school systems.

As noted above, QCEC supports the relevant parts of the *Joint Churches Submission* put forward to the Commission and we refer the Commission to these matters as relevant.

In conclusion, while Catholic schools seek freedom to operate in accordance with their religious beliefs, Catholic schools do not discriminate or seek to discriminate against any person. Catholic schools do seek to preference the employment or enrolment of people of the Catholic faith, and those willing to support

the ethos and mission of their schools but only in accordance with established legal frameworks in Queensland which operate effectively. This is reasonable and fair in a free, pluralist society and consistent with the human right to freedom of thought, conscience, religion and belief.

Thank you for your consideration of this submission. Should you wish to discuss further any aspect of the submission, please contact Mr Chris Woolley, Chief Operating Officer, QCEC.

A large, stylized handwritten signature in black ink, appearing to read 'Lee-Anne Perry'.

Dr Lee-Anne Perry AM
Executive Director