

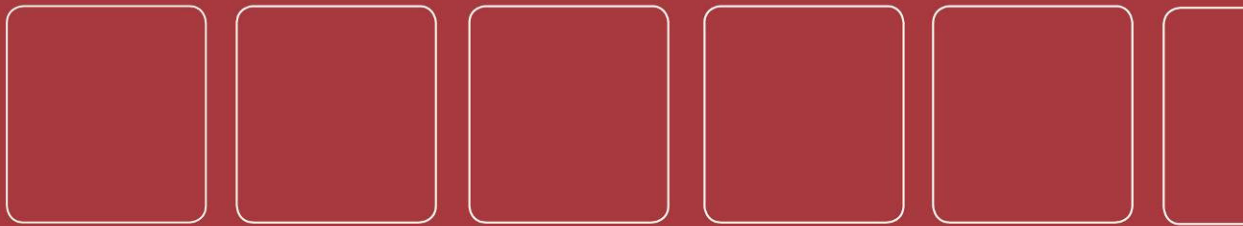


AISSA

Response to the Consolidation of Anti-Discrimination Law Discussion Paper

Report to | Attorney-General's Department

February 2012



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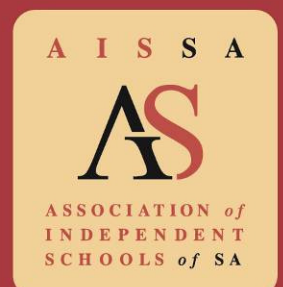


Table of Contents

Executive Summary	3
1.0 Introduction	8
1.1. Submission Outline	8
1.2. Profile of the Sector	8
1.2.1. About the Independent School Sector	8
Chart I Percentages of South Australian Independent School Students by Schools' Religious Affiliation and Educational Philosophy 2011	9
1.2.2. Application of Ethos to Employment of Staff Across all Occupations and Volunteers	10
2.0 Meaning of Discrimination	11
2.1. What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved?	11
2.2. How should the burden of proving discrimination be allocated?	12
2.3. Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes?	13
2.4. Should public sector organisations have a positive duty to eliminate discrimination and harassment?	15
2.5. Should the prohibition against harassment cover all protected attributes? If so how would this most clearly be expressed?	15
3.0 Protected Attributes	16
3.1. How should discrimination against a person based on the attribute of an associate be protected?	16
3.2. Are the current protections against discrimination on the basis of these attributes appropriate?	17



Table of Contents

3.3.	How should the consolidation bill protect voluntary workers from discrimination and harassment?	18
3.4.	What is the best approach to coverage of clubs and member-based associations?	18
4.0	Protected Areas of Public Life	18
4.1.	Should discrimination in sport be separately covered? If so, what is the best way to do so?	18
4.2.	How should the consolidation bill prohibit discriminatory requests for information?	19
4.3.	Can the vicarious liability provisions be clarified in the consolidation bill?	19
5.0	Exceptions and Exemptions	20
5.1.	Should the consolidation bill adopt a general limitations clause? Are there specific exemptions that would need to be changed?	20
5.2.	How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?	20
6.0	Interaction with Other Laws and Application to State and Territory Governments	22
6.1.	Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act?	22
6.2.	Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws?	22





| Executive Summary

This response is presented by the Association of Independent Schools of South Australia (AISSA). The AISSA represents the interests of all 95 South Australian Independent schools, with an enrolment in excess of 44,500. The AISSA is recognised as the peak body for Independent schools (non-Catholic) by governments, other education and training sectors and key interest groups within the community in South Australia.

It is evident from the Discussion Paper that the Australian Government is considering widespread changes to anti-discrimination law through the consolidation of Commonwealth anti-discrimination legislation.

Legislative changes should only be made in cases where deficiencies have been clearly demonstrated in current law, there is a demonstrated overall benefit to the community arising from the changes and the potential impact of the changes on the community have been clearly identified.


The Discussion Paper does not address the potential widespread practical impact of the changes on society, including schools, freedom of speech, freedom of religion or the impact on organisations of changes in compliance obligations.

It should be recognised that many Australians have deeply and legitimately held views on some matters covered by discrimination legislation that are not consistent with the legislation. In many cases, these views arise from a belief in a particular faith. If Australia is to remain a diverse, multi-faith and multi-cultural society, and abide by its international treaty obligations, it is essential that the religious and cultural belief systems of Australians continue to be respected.

Australia has ratified or otherwise indicated its support for a number of international human rights instruments which provide for the right to freedom of religion and belief, including in the area of education, which attracts specific consideration in those instruments.

Most notably, Australia is a party to the International Covenant of Civil and Political Rights (ICCPR). Article 18 of the ICCPR guarantees to everyone 'the right to freedom of thought, conscience and religion', prohibiting coercion which would impair this right. It stipulates that the freedom to manifest religion may only be subject to those limitations which are prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. It specifically safeguards the right of parents and legal guardians to determine the religious and moral education of their children.





Australia has also agreed to be bound by the United Nations Covenant on Economic, Social and Cultural Rights, Article 13 of which recognises the right of parents and legal guardians to choose schools other than those established by public authorities and to ensure the religious and moral education of their children in conformity with their own convictions.

These international obligations have been recognised by the Australian Human Rights Commission in research papers published in 1998 and 2011¹.

For adherents to a faith, matters of religious belief are of the highest personal significance. For many people, they rest at the very core of their existence, informing all of their conduct and decision-making. Understandably, people of faith have very strong views on matters of religion or belief from which they are unable to resile and on which they are reluctant to compromise. The freedom to hold, express and manifest these views is a fundamental human right.


It is accepted that this human right is not absolute, and that privately held religious views should not be imposed on individuals in the public sphere. However, the area of education of children is so inextricably linked with the right of parents to organise private family life in accordance with their religion or belief-system that international human rights law has recognised that it is an area warranting special dispensation. The education of children is intrinsic to the manifestation of religious freedom and special provision for religious institutions has been accepted.

In the absence of Australian legislation specifically prohibiting discrimination on the grounds of religious freedom (such as the *Religious Freedom Act* recommended by the Human Rights and Equal Opportunity Commission in 1998), and the relatively weak protection afforded by s116 of the Constitution of Australia, religious freedom has been protected in Australia by specific exclusions included into legislation the operation of which would otherwise allow injury to the religious susceptibilities of religious institutions, and offend their right to religious freedom.

It is accepted that these exclusions from Australian law ought not be absolute (consistent with the qualification contained in Item 3 of ICCPR Article 18). For example, inciting hatred or violence under the protection of religious freedom ought never be tolerated.

¹ HREOC: Article 18 – Freedom of religion and belief (1998); AHRC: 2011 – Freedom of religion and belief in 21st century Australia (2011).





Anti-discrimination legislation applicable in South Australia, including the *Australian Human Rights Commission Act 1986* and the *South Australian Equal Opportunity Act 1984* has historically enabled faith-based schools to operate in accordance with the religious tenets and beliefs upon which they have been founded. This must be maintained.

Dilution or withdrawal of the current exclusions will remove the protections that are currently in place to respect and protect religious freedom. Any such dilution or withdrawal would not only be contrary to Australia's international obligations, but would be contrary to the government's stated intention of preserving current protections in any consolidation of legislation. As stated above, because of the relatively weak protection for religious freedom in Australia, the exclusions from the operation of other anti-discrimination laws serve as the fundamental protection for religious freedom, particularly in the essential area of education, in this country.

In a democracy it is to be expected that world views or value/belief systems will at times come into conflict and on some matters there will be significant disagreement. However, matters of religious faith are of such significance to personal identity that private organisations should enjoy reasonable exemption from prohibitions on discrimination to permit the manifestation of genuine religious faith.


A significant number of schools operate according to a faith which is inconsistent with some areas that may be covered by areas of discrimination addressed in the discussion paper.

Parents choose individual Independent schools because they meet the education needs of their children and have values and an ethos consistent with the belief systems of their family. Independent schools have an excellent reputation for creating learning communities that encourage the emotional, physical, mental, social and spiritual development of young people.

Independent faith-based schools are 'in loco parentis' and are responsible for education of children in accordance with the school's ethos. Any legal obligations on these schools, inconsistent with their ethos, jeopardises their capacity to educate students according to the wishes of parents and would be religious discrimination.

Religion in religious Independent schools is not an 'accessory' or an 'add-on'. It is embedded in the very essence of the school including, school policies and practices, pedagogy, the curriculum and the co-curricular activities of the school. The potential impact on the capacity of Independent schools to operate according to their ethos is not restricted to exemptions on employment related to religion or sexuality.





Other areas where commitment to the school's ethos may be relevant include the suitability of families to be a member of the school community, volunteers, membership of school governing bodies and the associations that 'own' schools, and engaging in commercial activities such as hire of school facilities.

Any restriction associated with expression of views relating to areas covered by discrimination legislation, for example, has the potential to restrict the education of students attending Independent schools. In the past, some people have claimed that expression of such opinions is harassment.

The AISSA has significant concerns that a number of contemplated changes would have a negative impact on the operation of Independent schools and their ability to operate and educate students according to their ethos.

The AISSA appreciates the assurances that the Government does not intend to reduce current protections and would strongly oppose any reduction in protections for schools such as exemptions relating to sexuality and same-sex relationships in faith-based schools.


However, the discussion paper does not recognise that many of the contemplated changes would, in effect, reduce protections for schools. For example, the expansion of restrictions on religious discrimination could inhibit the capacity and current protection of schools to operate according to their faith, including in regard to enrolment of students, membership of school associations, provision of goods and services, engagement of volunteers and potentially the education provided to students.

In order to provide clarity to schools it is essential that exemptions that apply to faith based schools are explicitly included in legislation and not left to interpretation of general exemptions by Courts and tribunals.

The AISSA has other major concerns about changes canvassed in the discussion paper.

The paper does not address the potential consequences of contemplated changes on school's obligations to students with disabilities. Currently, schools have major obligations arising from current legislation, which can have massive financial and operational implications for schools. Unfortunately, financial support from governments to meet these obligations is often significantly inadequate. This can have significant adverse implications for the school's capacity to meet its obligations and to educate other students. This is an example where changes in legal obligations can have unforeseen consequences. In this case, Independent schools are committed to supporting students with disabilities but need significantly additional financial support. This is particularly so in light of the fact that all of AISSA's members are not-for-profit organisations.





The AISSA has concerns about the potential impact of many of the specific proposals, including changes to direct and indirect discrimination, additional attributes and onus of proof. They could have adverse implications for schools and consequently education, be unjust and unreasonable and not significantly assist in meeting the objectives of the legislation.

The AISSA is concerned that the widespread changes may result in “tidier” legislation from the Government’s perspective, but in practice any changes would result in a reduction in clarity with regard to both organisation and individual rights and obligations, particularly until the legislation is interpreted through the Courts. In practice, there will still be inconsistency in legislation because of the operation of State laws.

A change in discrimination legislation has significant implementation costs for organisations such as schools as they seek to become aware of any changes in obligations and implement changes. Therefore, changes should only occur if they are of substantial benefit. The AISSA is not convinced that having a consolidated act is of such substantial benefit as to warrant the changes.



1.0 | Introduction

1.1. | Submission Outline

The Association of Independent Schools of South Australia (AISSA) represents the interests of all 95 South Australian Independent schools with an enrolment in excess of 44,500. The South Australian non-government school sector educates over one-third of all school-age students in South Australia and the Independent sector is now the second largest provider of senior secondary school education in South Australia.

The AISSA welcomes the opportunity to respond to the *Consolidation of Anti-Discrimination Laws Discussion Paper*. The AISSA response is focussed on the issues raised in the Discussion Paper as they relate to the SA Independent school sector. The AISSA assesses the proposed changes against their potential practical impact on the operation of Independent schools. This includes the ability to operate according to their ethos in a range of areas including employment practices, membership requirements of associations which own schools, the provision of goods and services and freedom of speech. It also includes the implications for students with disabilities.

1.2. | Profile of the Sector

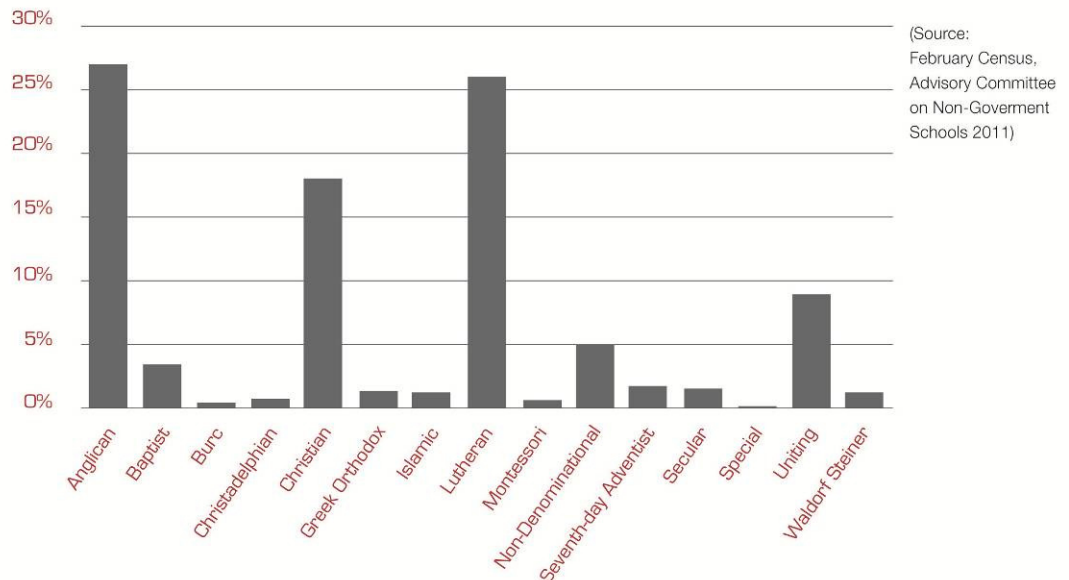
1.2.1. | About the Independent School Sector

South Australian Independent schools educate students within curricula underpinned by a diverse range of religious beliefs (Anglican, Baptist, Christian, Christadelphian, Orthodox, Islamic, Lutheran, Seventh-day Adventist, Uniting) and educational philosophies (Burc, Montessori, Waldorf Steiner). The sector also includes a number of secular schools and a special school which educates students with severe disabilities. A number of Independent schools are also members of a system, for example, the Lutheran Schools Association and Adventist Schools Australia.

Over 97% of students educated in the South Australian Independent school sector are educated in schools underpinned by a religious faith.



Chart 1 Percentages of South Australian Independent School Students by Schools' Religious Affiliation and Educational Philosophy 2011



Significant diversity also occurs within schools communities. For example, the majority of faith-based Independent schools have enrolments from outside that faith and a number of schools enrol full fee paying overseas students. The sector educates:

- 4,941 students on School card²
- 1,309 students with a disability (under Commonwealth definitions)
- 6,313 students with Learning Difficulties
- 506 Indigenous students
- 3,163 students with a language background other than English

Independent schools and early childhood services are accountable to parents, the community and to different levels of government. Independent schools are also accountable on a number of State and Commonwealth legislative levels, including the,

² The South Australian School Card scheme provides assistance to parents/caregiver of low income earning families with the costs of materials and services charges and other educational costs.

Children’s Protection Act 1993 (SA), Education and Early Childhood Services (Registration and Standards) Act (SA), Equal Opportunity Act 1984(SA) and the Disability Discrimination Act 1992 (Cth) and through legal obligations such as duty of care. The direct accountability of Independent schools to parents and the wider school community is a key strength of the sector.

1.2.2. | Application of Ethos to Employment of Staff Across All Occupations and Volunteers

It is a central tenet of Independent schools that staff across all occupations, and the wider school community, will be committed to the underlying philosophies (educational and/or religious) and principles of the school. For the majority of Independent schools in South Australia, it is critical that they have the ability to engage staff and volunteers across all occupations who share the religious values of the school. The values and ethos of the school provide the context for all aspects of school life including the educational programs.³

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In faith-based Independent schools religion is embedded in the very essence of the school including school policies and practices, pedagogy, the curriculum and the co-curricular activities of the school.

In many religious Independent schools it is a necessity that staff be committed to the religion of the school and model their lives on the religion’s values and beliefs. This applies to the employment of all persons, including non-teaching staff. In regard to a number of schools in the Independent school sector staff perform what is, in essence, a ministerial role as the schools have been formed as extensions of ministries.

There is an expectation that staff in these schools embody the values of the school both within and outside of school life. This necessitates that school employees conduct themselves in a manner consistent with the principles of the school both within school hours and outside of school hours. Schools are community based organisations and consequently substantial interaction often occurs within the school community outside, as well as inside, of school hours. Moreover, one’s belief system pervades all areas of life. Consequently, a person’s faith affects the whole of their life and actions and cannot be confined solely to their conduct during school hours.

³ However, it needs to be noted that the broader principle applies to other schools in the sector.



In a number of religious schools a commitment to the beliefs and principles of the school, requires that all staff be committed to monogamous heterosexual relationships. However, it needs to be noted that this forms only one part of a commitment to Christian principles that is expected in these schools.

If employees do not meet these requirements then they act contrary to the very essence of the school, which may have a detrimental impact on their ability to fulfill their responsibilities to students, as expected by parents and the school community. Children and young people respect teachers when they see commitment in action. If the commitment is hollow then children and young people are less likely to be respectful, compromising the learning environment of the school. The viability of the school may also be threatened through a potential for loss of student enrolments.

The requirement that an employee is committed to the principles of the relevant organisation is not limited to the school environment and can be seen in other employment areas. For example, the Selection Criteria, for an employment position in one Australian Union, lists ‘A genuine demonstrated commitment to Union principles, and a drive advancing the issues of union members is essential’ under Essential Experience and Qualifications (http://www.labor.net.au/positions/20111221_AMWU.html, accessed 19/01/12).


2.0 | Meaning of Discrimination

2.1. | What is the best way to define discrimination? Would a unified test for discrimination (incorporating both direct and indirect discrimination) be clearer and preferable? If not, can the clarity and consistency of the separate tests for direct and indirect discrimination be improved? Question 1.

The Discussion Paper outlines a range of arguments in support of one unified test incorporating direct and indirect discrimination. These positions do not provide sufficient justification for changing current practice. The AISSA agrees with the alternate position that ‘adoption of a fundamentally revised test may give rise to uncertainty as to the scope of the test, given the lack of Australian jurisprudence on its meaning and scope.’ (p 14) and recommends the current distinction between direct and indirect discrimination remain.

The AISSA does not support substituting the current test with one of assessing ‘detriment’ without regard to a comparator. A failure to consider comparators could lead to the test losing the important element of objectivity.





With regard to the application of the ‘reasonableness’ test for indirect discrimination, the AISSA considers that the alternative option to ‘adopt a “legitimate and proportionate” test’, in line with the current position in the United Kingdom, is worthy of further consideration.

A related issue is that of actions undertaken for one or more reasons where one of those reasons may be discriminatory. As it currently stands, at least in relation to the SDA, section 8 provides that where an act is done for two or more reasons and one of the reasons contravenes the SDA, that the prohibited reason is taken to be the reason for the action regardless of whether it was the dominant or substantial reason.

The AISSA submits that in a consolidated bill the approach taken in the SA EO Act should be preferred and that is that:

For the purposes of this Act, a person acts on a particular ground referred to in this Act if the person in fact acts on a number of grounds, one of which is the ground so referred to, and that ground is a **substantial reason** for the act. (see section 6(2), our emphasis added)

2.2. | How should the burden of proving discrimination be allocated? Question 2.

The AISSA supports the retention of existing provisions in relation to burden of proof. The discussion paper cites an alternative example, Section 361 of the Fair Work Act:

(1) If:


(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

The AISSA does not agree with the assertion that the operation of the Fair Work Act provisions do not appear to have ‘created significant problems in practice’ (p 16). While the *Fair Work Act* (Cth) has been in operation for 18 months, there is still very limited case law dealing with these types of claims and it is premature to hail the approach as a success. A number of commentators from the legal profession have noted the problem





with the jurisdiction⁴. Anecdotally, information from AISSA members is that the Act has enabled potential threats of action for discrimination on the basis of attributes, such as Union membership, even if there is no basis to the assertion, placing an unfair burden on employers in defending frivolous and vexatious claims.

No change should be made to the current provisions for burden of proof. If there is to be any change to the burden of proof, more should be required than a mere allegation. A prima facie case at the very least ought be made out before a respondent is made to discharge any evidentiary onus.

Paragraph 53 of the discussion paper states that '[m]odelling a provision of the Fair Work Act approach would harmonise the burden of proof for employment discrimination at the Federal level and would enable case law about both provisions to develop together'. The AISSA disagrees, if anything this statement demonstrates the unnecessary overlap between the Fair Work Act provisions and discrimination legislation in the area of employment based discrimination, and it is AISSA's position that the Fair Work Act provisions should be narrowed to cover only those areas not already covered in the Federal discrimination legislation.

2.3 | Should the duty to make reasonable adjustments in the DDA be clarified and, if so, how? Should it apply to other attributes? Question 4.

Independent schools are accountable under the *Disability Discrimination Act 1992* (DDA) and the accompanying *Standards for Education*. The Standards attempt to provide some clarity around the terms '*reasonable adjustment*' and '*unjustifiable hardship*' in relation to education providers. However, there remains significant confusion in schools relating to the application of these concepts. The lack of case law on this subject further complicates this matter.

The AISSA would not support clarification through increased legislation. It is the primary position of the AISSA that the range and complexity of disabilities in school communities and individual school circumstances mean that it is more appropriate to clarify the application of reasonable adjustment through more extensive guidelines supporting the *Standards for Education* rather than prescriptive legislation.

⁴ see HRdaily web article:

http://www.hrdaily.com.au/nl06_news_selected.php?act=2&stream=All&selkey=2060&hlc=2&hlw=adverse&s_keyword=adverse&s_searchfrom_date=1136034000&s_searchto_date=1328101140&s_pagesize=10&s_word_match=2&s_articles=All&stream=All



There remains a significant gap between the intent of legislation, such as the DDA, and the resources provided to assist schools in meeting their obligations and, hence, meeting the needs of students with disabilities. SA Independent schools, which are not-for-profit, are heavily reliant on funding from the Australian Government to support the needs of students with disabilities. However, this funding does not adequately support the complex needs of a significant proportion of students with a disability.

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In many cases the application of reasonable adjustment and tests for unjustifiable hardship are not considered reasonable by schools given the extensive additional costs in educating some students with disabilities, the lack of adequate government support and the cost implications for schools and other students. In the frequent cases where the costs to schools are significantly in excess of the funding received, Independent schools indicate that they feel a moral and social obligation to support the students with disabilities due to the school’s commitment to its school community. However, the cost implications can have consequent significant adverse implications for the education of other students due to the costs being met from other sources of funding, such as fees and fundraising, and a consequent reduction in resources and support for other students. If governments are serious about eliminating discrimination for students with a disability it is essential that they increase funding to adequately support these students and not pose unreasonable obligations on schools.

In the alternative the AISSA would support clarification of the existing test to focus the attention of Courts on the factors contributing to the reasonableness (or not) of measures. Such factors should certainly include (but is not necessarily limited to):

- the cost of implementing a measure;
- the organisation’s capacity to meet that cost;
- the effect on others within the organisation;
- the effect on the organisation's service delivery and
- any other relevant consideration

While not directly on point, section 18 of the *Work Health and Safety Act 2011* (Cth) provides a definition of the term ‘reasonably practicable’ and includes consideration of the cost of a safety measure and whether the cost is disproportionate to the risk. It is the position of AISSA that a similar approach could be taken in relation defining the term ‘reasonable adjustments’.



Application to other attributes

Given the significant problems experienced with the applications of reasonable adjustment and unjustifiable hardship under the DDA, the AISSA would have serious concern with regard to an extension of the concept of reasonable adjustment to cover other attributes.

It is also relevant that reasonable adjustments in the area of disability tend to be related to facilities and services required by disabled persons, hence it is easier to make an objective judgment about the practicalities on a cost-benefit basis. It remains to be seen if the concept of reasonable adjustment would lend itself to such analysis so readily in other areas of discrimination.

2.4. | Should public sector organisations have a positive duty to eliminate discrimination and harassment? Question 5.

The AISSA cautions that imposing a positive duty through legislation will not necessarily lead to a reduction in discrimination and harassment and may place an unnecessary regulatory burden on employers, in particular if the provision was extended to the private sector.


There is a range of alternative and potentially more effective strategies which can be undertaken by governments to eliminate discrimination. As noted above current government resourcing for students with disabilities is inadequate, particularly in the non-government school sector. Increased funding to support the additional needs of students with disabilities would enhance access to schooling. Government funded sustained and widespread advertising and education programs are further strategies to assist in eliminating discrimination.

2.5. | Should the prohibition against harassment cover all protected attributes? If so how would this most clearly be expressed? Question 6.

It is not clear from the Discussion Paper how 'harassment' would be defined in a consolidated Act. The AISSA would be concerned if a broader application of harassment to cover all protected attributes restricted faith-based schools in school-based discussions regarding religion and sexuality and other matters linked to the school's ethos. Any restriction associated with religious expression has the potential to restrict many Independent schools which have a learning environment underpinned by a religious belief and thereby could impact adversely on the education of students.

Experience shows from the difficulty experienced by legislatures in seeking to define harassment or bullying, that these concepts are highly subjective, 'in the eye of the beholder' and thus ripe for dispute. Current direct discrimination laws already protect





individuals from unfavourable or less favourable treatment on prohibited grounds, and can adequately address issues of 'harassment'.

In a democracy it is to be expected that world views or value/belief systems will at times come into conflict and on some matters there will be significant disagreement. However, all members of society have a right to express their views with some limitations. Any changes to legislation should not inhibit the right of faith-based Independent schools to operate according to their religious beliefs or restrict their freedom of speech, beliefs which are also widely supported within the Australian community.

3.0 Protected Attributes

3.1 | How should discrimination against a person based on the attribute of an associate be protected? Question 8.

AISSA supports the general principle that discrimination on the ground of the characteristics of a person's associate should be protected. However, on occasions there may be characteristics of an associate, for example spouse, that are relevant to employment practices in the Independent school sector.

The AISSA would have particular concern in this regard if there is an extension of the range of protected attributes (discussed below), for example, to include criminal records. An employee spouse's conviction for child abuse, for instance, may have implications for the safety and welfare of students in Independent schools and the school's obligation to provide a child safe environment. Independent schools operate as communities and in some schools there is a significant scope for interaction between family members of employees and students. Moreover, AISSA recommends that schools be able to take into account the characteristics of an employee's spouse to ensure the protection of students. In some cases school supplied accommodation may be situated on school grounds further increasing the possibility for interaction and abuse. Other aspects of a spouse's character and suitability may be relevant depending on their level of involvement in the school community.

As is explained in further detail below, schools are exempt from the operation of South Australian spent conviction legislation when determining suitability of persons who have the care, control or supervision of children and AISSA maintains that this exclusion is necessary and appropriate.



3.2. | Are the current protections against discrimination on the basis of these attributes appropriate? Question 9.

The AISSA supports the current limitations in regard to protected attributes and does not recommend any extension. The AISSA would be concerned with regard to the potential impact of any broader application on a member school's capacity to meet its duty of care obligations. In some cases a criminal record may be indicative of the character of the person seeking employment. For example, if a school is reliant on teachers to transport students to events such as sporting carnivals then conviction/s for speeding or driving under the influence could be relevant as it may indicate a level of recklessness in regard to driving behaviour and consequently may be a risk to the schools' duty of care obligations to its students. The individual school is in the best position to assess this.

At present, the relevant EO Act (SA) does not make reference to criminal history, or irrelevant criminal history as a ground of unlawful discrimination. The only legislative measure in this area applicable to South Australia is contained in section 10 of the *Spent Convictions Act 2009* (SA). Importantly, Schedule 1 to the *Spent Convictions Act* contains an exclusion for the assessment of the fitness of a person to "care, control or supervise children" or to work in close proximity to children. It is the position of AISSA that the *Spent Convictions Act* contains adequate protections against discrimination on the ground of irrelevant criminal history. However, if criminal record is to be included in consolidated discrimination legislation, then exclusions consistent with the *Spent Convictions Act (SA)* must also be included to recognise the special considerations relevant to schools and other organisations working with children and vulnerable persons.

Religion is not an unlawful ground in the current state based EO legislation in South Australia. The AISSA does not support any expansion to include religion as an attribute. The AISSA believes that the inclusion of religion could inhibit the capacity of schools to operate according to their faith, including in regard to enrolment of students, membership of school associations, provision of goods and services, engagement of volunteers and potentially the education provided to students.

The EO Act in SA currently prohibits discrimination on the basis of religious appearance or dress, with some qualifications, and it is the submission of the AISSA that this is an adequate measure and should not be expanded.

AISSA agrees that in general a person's occupation or trade is irrelevant to their access to goods and services. Nevertheless, it may be relevant in some instances in relation to the provision of education, for example, if it is indicative of character.

In some instances the occupation or trade of a parent/s could also be a factor in determining whether a school is prepared to have a contract to educate their child. For example, if part of the enrolment agreement is that the family/ parents support a



particular ethos, and the occupation of the family/ parents is contrary to the ethos (such as running an Escort Agency), then the occupation may be of legitimate relevance.

Further implications for schools may occur in the area of business relationships including the provision of goods and services. For instance, it would clearly not be acceptable for schools to hire a school hall to an Escort Agency.

3.3. | How should the consolidation bill protect voluntary workers from discrimination and harassment? Question 13

If volunteers are to be protected from discrimination then it is the submission of the AISSA that the same considerations should apply to volunteers as with employees (as discussed elsewhere in this submission), including in relation to:

- the assessment of a person's fitness to work with or in connection with children;
- requests for information to determine a person's suitability to work with or in connection with children; and
- religious exemptions.

3.4. | What is the best approach to coverage of clubs and member-based associations? Question 15.


The majority of South Australian Independent schools are formed as associations in accordance with the *Associations Incorporations Act 1985 (SA)*. Hence, in line with current exemptions in regard to faith-based schools and sexuality it is fair to seek adherence to a particular belief/set of values to join these associations. It is essential that membership of the association that owns and operates the school can be restricted to people who share and live their life by a common view of the school's ethos, which is often faith based.

4.0 Protected Areas of Public Life

4.1. | Should discrimination in sport be separately covered? If so, what is the best way to do so? Question 17.

The EO Act (SA) provides exemptions in regard to 'participation in a competitive sporting activity in which the strength, stamina or physique of the competitor is relevant' and in relation to disability. In general these exemptions appear to work well and provide an appropriate balance for all parties. In the school context the key issue is the capacity of a person to contribute in a safe manner. It should be noted that schools have significant





legal duty of care obligations to all students and also obligations under occupational health and safety legislation.

4.2. | How should the consolidation bill prohibit discriminatory requests for information?
Question 18.

Schools seek information from parents, students and employees on protected attributes for a range of legitimate reasons, primarily to enhance student and employee welfare and meet regulatory requirements. For example, the Australian Government requires schools to collect a range of data relating to parents and students including parental occupation and education levels, Indigenous status, language background other than English and sex to inform the reporting of national assessments such as NAPLAN. Information on student disability is also collected for the purposes of accessing government funding. The current provisions which enable Independent schools to request information, when there is a legitimate reason for doing so, should be maintained.

4.3. | Can the vicarious liability provisions be clarified in the consolidation bill? Question 19.

It is reasonable to accept in the context of current Australian society that all employees will commence employment with a general awareness that a number of behaviours, such as sexual harassment, disability discrimination and racial discrimination, are unacceptable in Australia.

The AISSA's position in relation to the availability of defences to a finding of vicarious liability, is that any legislative test of reasonable steps should include consideration of the size of the organisation. While the size of AISSA's member schools varies, on the whole member schools are not large employers. In considering whether an employer has taken reasonable steps to prevent one employee from engaging in harassing or discriminating behaviour against another employee, the size of the employer should be a material consideration. Relatively small employers should not be held to the same standard of 'reasonableness' as large employers with many hundreds or thousands of employees and with access to dedicated in house human resource and training expertise.



5.0 Exceptions and Exemptions

5.1. | Should the consolidation bill adopt a general limitations clause? Are there specific exemptions that would need to be changed? Question 20

The AISSA would be wary of relying on the interpretation of courts in relation to school matters if a general limitations clause was to be adopted, in particular as the nature of schools and the importance of school ethos may not be fully appreciated by courts.

Appropriate clarification and legislative protection in the form of specific exemptions for schools in State and Commonwealth law are essential to minimise any doubt in this area.

Specific exemptions in relation to educational institutions in the area of religion are also consistent with international treaty obligations.

The further complication is that the application of a general limitation will only be confirmed by a Court in the event of a dispute. While the concept of a general limitation is supported by the AISSA, it is essential that there also be a mechanism to seek specific exemptions in advance to allow certainty for AISSA's member schools in appropriate situations.

5.2. | How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity? Question 22.

It is clear that there is significant legislative precedence across Australia for recognising the right of religious bodies and institutions to operate in accordance with the (religious) principles and beliefs that the institution is founded on.

South Australian legislation, for example, recognises the significance of sexuality and chosen gender for schools and enables Independent schools to operate according to the 'precepts' of their religion, upon which the school has been founded and is administered and applies as follows:

34(3) This Division does not apply to discrimination on the ground of chosen gender or sexuality in relation to employment or engagement for the purposes of an educational institution if—

- (a) the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion; and



- (b) the educational authority administering the institution has a written policy stating its position in relation to the matter; and
- (c) a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and
- (d) a copy of the policy is provided on request, free of charge—
 - (i) to employees and contractors and prospective employees and contractors of the authority to whom it relates or may relate; and
 - (ii) to students, prospective students and parents and guardians of students and prospective students of the institution; and
 - (iii) to other members of the public. (South Australian Equal Opportunity Act 1984, clause 34(3)).

The South Australian exemption is not considered by a number of member schools to be ideal, however, it has proved to be a workable compromise. The AISSA recommends that similar exemptions apply in Commonwealth legislation. It should be noted that respect for ‘freedom of religion and belief’ has also been recognised on Federal and (other) State levels within Australia through various legislation including the *Australian Human Rights Commission Act 1986* under Section 3 (1).

It is necessary to emphasise that exemptions are only applicable in cases where there is a genuine commitment by the institution to religious tenets and beliefs and that the actions are in accordance with those beliefs. AISSA considers that this provides the appropriate balance between the rights of all parties.

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The AISSA would strongly oppose any attempt to reduce current legislative protections for Independent schools.

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The AISSA would strongly oppose any attempt to reduce current legislative protections for Independent schools and appreciates the assurances that this is not the Government’s intention. If Australia is to remain a diverse and multi-faith and multi-cultural society it is essential, that the religious and cultural belief systems of Australians relating to sexuality and same-sex relationships, continue to be respected in any legislative reforms.



6.0 Interaction with Other Laws and Application to State and Territory Governments

- 6.1. | Should the consolidation bill make any improvements to the existing mechanisms in Commonwealth anti-discrimination laws for managing the interactions with the Fair Work Act? Question 28

The current interactions with the Fair Work Act are appropriate and reasonable and the AISSA recommends no change. It is also noted that the Fair Work Act has only been in operation for a relatively brief period of time and its application is still in development.

- 6.2. | Should the consolidation bill make any amendments to the provisions governing interactions with other Commonwealth, State and Territory laws? Question 29

The AISSA strongly supports the position as outlined in the discussion paper at 240 that:

where a person has made a complaint or initiated proceedings under a State or Territory anti-discrimination law, that person is not entitled to make a complaint or initiate proceedings under the Commonwealth scheme. This ensures that litigants cannot bring multiple discrimination actions against a respondent arising from the same facts by commencing actions under both the State and Commonwealth schemes.

Any legislative change which enabled claimants to bring multiple discrimination actions could result in an organisation having to respond to the same complaint and seek resolution in two jurisdictions, which would be unjust, time-consuming and place an unnecessary burden on respondents. Further it may inhibit the resolution of complaints with uncertainty regarding whether a complaint may be pursued elsewhere.