



The Hon Justice Sarah C Derrington AM  
President  
Australian Law Reform Commission

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Dear President Derrington

**Submission: Australian Law Reform Commission Religious Educational Institutions and Anti-discrimination Laws Inquiry 2022**

Thank you for the opportunity to provide a submission regarding the Australian Law Reform Commission (ALRC) Religious Educational Institutions and Anti-discrimination Laws Consultation Paper (the Consultation Paper).

As Commissioner for Children and Young People Western Australia, I have a statutory responsibility under the *Commissioner for Children and Young People Act 2006* (WA) to monitor and review written laws affecting the wellbeing of children and young people under the age of 18 years. All children and young people have the right to be safe, connected, learning, happy and healthy. Everybody, including family, carers, the broader community and children and young people have the responsibility to uphold these rights.

*I think everyone should be able to go to school. It gives you an education and gets you where you want to be. (15-year-old)<sup>1</sup>*

It is within the context of my role as an independent, statutory office that I have responded to the Consultation Paper. This response focuses primarily on Proposition A, and the technical proposals that most directly impact the wellbeing of children and young people. The following principles also guide this feedback:

- The best interests of children and young people should be the paramount consideration.<sup>2</sup>
- Children and young people should be consulted, and their opinions should be a primary consideration in determining what is in their best interest.
- All children and young people have a right to education on the basis of equal opportunity.<sup>3</sup>
- All children and young people have the right to feel, and be, safe and supported.

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<sup>1</sup> Commissioner for Children and Young People WA (2015), *This is Me: Aboriginal young people's stories*, Commissioner for Children and Young People WA, Perth

<sup>2</sup> *Commissioner for Children and Young People Act* (2006) WA

<sup>3</sup> United Nations (1989) *Convention on the Rights of the Child*, Article 28, United Nations Human Rights, Office of the High Commissioner, Geneva, Switzerland



In developing this submission particular reference has been given to:

- The United Nations Convention on the Rights of the Child (the CRC).<sup>4</sup>
- The views of children and young people shared with me through advisory groups and consultations conducted by my office.
- The National Principles for Child Safe Organisations.

In summary, I am supportive of the intent of the reforms, the general direction of the consultation paper propositions, and limiting the scope of Proposal 7 to the religious education curriculum. I recommend further consultation with diverse children and young people regarding the reforms and their implementation.

### **Proposition A(1)**

Proposition A (1), states that religious education institutions should not be allowed to discriminate against current or prospective students on the grounds of sexual orientation, gender identity, marital or relationship status or pregnancy. It also states that students should not be discriminated against if their family or carer has one of those attributes. The proposition aligns with Article 28 of the CRC, which recognises the right of every child to education provided on the basis of equal opportunity.<sup>5</sup> Proposition A(1) therefore has my full support.

*Where I live, the only school that offered ATAR subjects was the religious school, so you had to go there if you wanted to go on to university. This means if you were excluded there, you couldn't go on and continue your education and achieve your goals. (Young person)<sup>6</sup>*

My office has consistently raised concerns about exceptions to anti-discrimination legislation that allow religious educational institutions to discriminate against students, teachers and staff.<sup>7</sup> Submissions from my office to previous inquiries have highlighted the impact that the legal exceptions have on children and young people's rights, including access to education, feelings of safety, health and wellbeing.<sup>8</sup>

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<sup>4</sup> Ibid

<sup>5</sup> United Nations (1989), *Convention on the Rights of the Child*, Article 28, United Nations Human Rights, Office of the High Commissioner, Geneva, Switzerland

<sup>6</sup> Commissioner for Children and Young People (2018) Youth Advisory Committee Member

<sup>7</sup> Commissioner for Children and Young People (2018), *Submission to Senate Legal and Constitutional Affairs Committee submission-to-senate-legal-and-constitutional-affairs-committee-november-2018*.pdf (ccyp.wa.gov.au)

<sup>8</sup> Commissioner for Children and Young People (2021) *Submission on the Review of the Equal Opportunity Act 1984 (WA)*, Commissioner for Children and Young People (2019), *Submission on the Religious Discrimination Bill (Cth) – Exposure draft*, Commissioner for Children and Young People (2018), *Submission to the Religious Freedom Review (Cth)*, available from Commissioner for Children and Young People, Perth.



Young people we have consulted through our state-wide Speaking Out Survey, Advisory Groups and consultations have been clear that schools can be particularly difficult spaces for young LGBTQIASB+ students.<sup>9</sup>

*There is a lot of homophobia and transphobia in schools, it's not okay, they aren't just teasing, it's a serious problem and more need to be done, all of the bullying has been about this. (15-year-old)<sup>10</sup>*

*"Nearly all of my queer friends have been suicidal and at school there is an enormous amount of openly displayed homophobic and transphobic comments made by students and even sometimes teachers." (13-year-old)<sup>11</sup>*

*"LGBTQI hate happens a lot at schools and is never addressed by teachers and it is hard as a student to speak up about it" (14-year-old)<sup>12</sup>*

*"I told [my teacher]... that I was gay at the time... and then she called my dad and then he was like 'I am disowning you'. My history at least is that they definitely care more about what your gender is or who you wanna be in bed with, or not in bed with, than your safety." (13-year-old)<sup>13</sup>*

Without a proactive approach to creating safe, inclusive schools and addressing discrimination and bullying for LGBTQIASB + students and staff, children and young people can be left feeling unsafe and uncomfortable in their identity, which can have a significant impact on their education, employment outcomes and long-term health and wellbeing.<sup>14</sup> Difficulties with educational settings, social rejection or exclusion are identified risk factors for suicidality for LGBTQIASB+ young people.<sup>15</sup> Discrimination against vulnerable minorities also creates a culture where all young people are less safe. As an example, in their findings regarding factors contributing to childhood sexual

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<sup>9</sup> The Commissioner for Children and Young People WA understands that there are a range of terms and definitions that people use to define their gender, sex or sexuality. The Commissioner uses the term LGBTQIASB+ to inclusively refer to all people who are lesbian, gay, bisexual, transgender, queer, intersex, asexual, sistersgirls, brotherboys as well as to represent other members of the community that use different terms to describe their diverse sexuality, sex and/or gender identity.

<sup>10</sup> Commissioner for Children and Young People WA (2021), *Speaking Out Survey 2021: The views of WA children and young people on their wellbeing – a summary report*, Commissioner for Children and Young People WA, Perth.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Commissioner for Children and Young People (2022), *Trans and Gender-Diverse Youth Advisory Group member*.

<sup>14</sup> United Nations (2016), *Living Free & Equal: What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, United Nations. Retrieved from <http://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf>

<sup>15</sup> Strauss, P., Hill, N.T.M., Marion, L., Gilbey, D., Waters, Z., Moore, J.K., Costanza, M., Lamblin, M., Robinson, J., Lin, A., Perry, Y. (2022). *Suicide prevention in LGBTQA+ young people: best practice guidelines for clinical and community service providers*. Telethon Kids Institute: Perth, Australia.



abuse in schools, the Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) reported that homophobia and hyper-masculinity were characteristic of cultures associated with a higher likelihood of boys exhibiting harmful sexual behaviours and furthermore could be a barrier to reporting sexual abuse.<sup>16</sup>

The subsequent recommendations by the RCIRCSA identified the need to uphold equality and respect diverse needs in practice and policy as part of a comprehensive approach to safety<sup>17</sup>. These recommendations have been incorporated in the National Principles for Child Safe Organisations.

In 2020, the UN's Special Rapporteur on Freedom of Religion or Belief reported growing concerns regarding the use of 'religious freedom' arguments to deny women, girls and people from sexual orientation or gender diversity minorities physical and mental integrity, access to appropriate health services and comprehensive sexuality education and argued that States must proactively uphold human rights in order to address harms such as gender-based violence and discrimination.<sup>18</sup>

The Consultation Paper notes that under Article 18(1) of International Covenant on Civil and Political Rights (ICCPR) the right to have or adopt a religion or belief is absolute, however the right to manifest that belief may be limited as prescribed by law where necessary to protect public safety, order, health morals or fundamental rights and freedoms of others Article 18(3)<sup>19</sup>. The Consultation Paper also identifies relevant principles in balancing religious freedoms with other human rights. Drawing on these considerations, in my view there is no 'compelling justification' for the existing exceptions for religious educational institutions in the Act. The exceptions mean children and young people are not able to enjoy the benefit of human rights protections to which are be entitled and therefore should be removed.

Children and young people's autonomy to decide where and how they are educated is often limited. At times young people will have beliefs, values, identity or personal attributes that differ from the religious beliefs and values of their family and/or the policies and practices of their educational institution. It is also evident that children and young people may have strong social and cultural attachment to their school and share the faith-based beliefs of their school. Choosing a different school may not be an option open to them. Children and young people have the right to be supported in their own or their family's faith or community whether or not their personal attributes are consistent with religious teachings on sex, gender or sexuality.<sup>20</sup> Children and young people should therefore have access to the protection of anti-discrimination

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<sup>16</sup> Royal Commission into Institutional Responses to Child Sexual Abuse (2017), Final Report Volume 13, Commonwealth of Australia, Sydney.

<sup>17</sup> Australian Human Rights Commission (2018), National Principles for Child Safe Organisations, Sydney, Retrieved from <https://childsafe.humanrights.gov.au/national-principles/download-national-principles>

<sup>18</sup> Ahmed Shaheed, Report of the Special Rapporteur on freedom of religion or belief, UN Doc A/HRC/43/48 (24 August 2020) [53], citing Heiner Bielefeldt and Michael Wiener, Religious Freedom Under Scrutiny (University of Pennsylvania Press, 2020), 18.

<sup>19</sup> United Nations (1966), International Covenant on Civil and Political Rights, United Nations. Retrieved from <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>20</sup> United Nations (1989), *Convention on the Rights of the Child*, Article 14, 30, United Nations Human Rights, Office of the High Commissioner, Geneva, Switzerland



laws and Human Rights Commissions they are entitled to regardless of which educational institution they are attending.

The current blanket exceptions for religious education institutions in anti-discrimination legislation impose disproportionately restrictive limitations on the realisation of human rights of students (and staff) to freedom from discrimination on the grounds of sex, sexuality and gender identity. The proposed changes to the Act and related legislation are not only justifiable in terms of international human rights law principles of reasonableness and proportionality; they are both fair and are necessary if we are to respect the human rights of children and young people.

With the exceptions for religious educational institutions removed, schools will become accountable for balancing the manifestation of religious beliefs their faith community with their responsibility for ensuring children and young people are protected from discrimination that may prevent them from enjoying their rights to education, safety and community.

### **Propositions A.2, A.3, B, C, D**

Removing the exceptions to the *Sex Discrimination Act 1984 (Cth)* and the *Fair Work Act 2009 (Cth)* for religious education institutions is important for upholding the human rights of staff. The reforms are important to demonstrate to children and young people that everyone has a right to equality.

Exceptions within the legislation for staff where religious affiliation is a genuine requirement of the role are proportional and appropriate.

### **Technical Proposals**

I support broadly the technical proposals in the Consultation Paper to extend the protections of anti-discrimination legislation to children, young people and staff in religious education institutions through amendments or removal of blanket exemptions to the Act and other relevant legislation.

**Proposal 6:** That the Act should be amended to protect students and prospective students on grounds that family member/carer has a protected attribute.

I note the Consultation Paper's comments regarding the technical complexity of implementing this proposal, however this is an important reform and is required to uphold CRC Article 2:

"State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."<sup>21</sup>

Children and young people should not be penalised for the attributes or actions of people who have responsibility for them, particularly where the child or young person has an established and supportive connection to their school and school community.

**Proposal 7:** Amend the *Sex Discrimination Act 1984 (Cth)* to clarify that the content of the curriculum is not subject to the Act.

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<sup>21</sup> United Nations (1989), *Convention on the Rights of the Child*, Article 2(2), United Nations Human Rights, Office of the High Commissioner, Geneva, Switzerland



A narrower restriction that limits the exemption to the act to 'curriculum for cultural, religious or faith education' would be more proportionate to balancing protections for religious freedoms with upholding rights to equality.

**Proposal 11:** Amend the *Australian Human Rights Commission Act 1986* (Cth) so that religious educational institutions are subject to the Act.

I support the amendment of the *Australian Human Rights Commission Act 1986* (Cth) to ensure that religious education institutions are subject to the Act.

**Proposal 13:** AHRC in consultation with the Attorney-General's Department should develop guidance for schools and the community to comply with new provisions

I support the proposal that guidance developed, and this should be informed by the child-centred rights and strengths-based approach of the National Principles of Child Safe Organisations.<sup>22</sup> As such, children and young people should be informed about their rights, and their views should be considered seriously in developing guidance that will support school communities in implementing required changes.

Any such guidance for schools and communities should reiterate the importance of implementing child-friendly complaints systems. Child friendly complaints systems uphold children and young people's rights express their views and to be safe when they do so.<sup>23</sup>

*"We need way more information. If you do not feel like you are being heard, who else there is you can go to? Know who you could talk to; know the consequences like what might happen, that you won't get in trouble or kicked out things like that." Young person<sup>24</sup>*

Consultation with children and young people involved in developing the guidance should reflect the diverse and intersectional identities of young people and children in the community. The perspective of children and young people who may have been excluded from education as a result of past discriminatory practices is particularly important.

I commend the ALRC for undertaking broad consultation with stakeholders and recommend that children and young people continue to be consulted extensively in the development of legislation that will affect them.

Yours sincerely,

  
Jacqueline McGowan-Jones  
Commissioner

27/02/23

<sup>22</sup> Australian Human Rights Commission (2018), *National Principles for Child Safe Organisations*, Sydney, Retrieved from <https://childsafe.humanrights.gov.au/national-principles/download-national-principles>

<sup>23</sup> Commissioner for Children and Young People WA (2021), *Child-friendly Complaints Guidelines*, Commissioner for Children and Young People WA, Perth

<sup>24</sup> Ibid.