Submission to the ALRC

Consultation Paper on Religious Schools and Anti-Discrimination Laws

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Summary

The Terms of Reference required the ALRC to work within the parameters of the Labor Party's election promise that faith-based schools would continue to be able to select or prefer staff who adhere to the beliefs of the faith. This is a cornerstone of Australian multicultural policy, since it preserves the right of parents from a variety of different ethnic and religious communities to choose an education for their children in conformity with their values.

Ignoring almost every submission made over the last few years by faith groups to multiple inquiries, failing to mention mainstream positions on international human rights that contradict its views, and citing almost none of the relevant Australian literature from a religious freedom perspective, the Commission has come up with a consultation paper that adopts an aggressive policy to secularise faith-based schools and to deprive them of their purpose. This is supposed to follow inexorably from their understanding of international human rights, as if this predetermines the answer to the questions the Government has referred to them. However, the authors of the Consultation Paper make basic errors in their analysis of the relevant human rights principles, and in any event fail to acknowledge that when it comes to balancing different rights, compromises may be found at a number of different points along a spectrum. The choice where along that spectrum to strike that balance is a matter for political decision amongst a range of different alternatives. The ALRC's human rights analysis disguises the authors' personal opinions, values and viewpoints on faith-based education under the cloak of an objective and logical conclusion from human rights premises. A particular fallacy in their reasoning in relation to Proposition C is that faith-based schools exist to give jobs to non-religious staff, not to educate children in the context of a lived-out faith.

The Commission also fails to address the major issues for schools concerning children and young people who identify as 'trans'. Its proposals allow Islamic schools to segregate boys and girls for prayers but is silent on whether girls will have to accept female-identifying teenage males in their changing rooms for gym or sport. For this and other reasons, the Consultation Paper is wholly inadequate, and many of its proposals should be rethought or abandoned.

Introduction

I read this consultation paper with utter dismay. Having engaged with the ALRC now over several years on religious freedom issues, beginning with its inquiry on how the law gives effect to common law rights and freedoms, and in recent years after it began its reference on the exemptions to the Sex Discrimination Act when Christian Porter was Attorney-General, I could find almost nothing in this consultation paper which reflected the input that I and other religious freedom experts have provided. Along with others, I have written scholarly articles engaging directly with the issues in this consultation paper, and have made submissions together with faith leaders to a large number of inquiries in recent years on religious freedom issues. We have engaged with these inquiries in good faith, and there is much in our submissions and scholarly writings which draws upon a thorough analysis of human rights

principles. Yet there is scarcely any evidence in this consultation paper that the authors of this Consultation Paper have read anything we have written.

I refer to the "authors of this Consultation Paper" throughout for a reason. The paper's authorship is unknown. Surprisingly, the highly respected judge who was appointed as a part-time commissioner for this reference is not named at all in the paper, neither is the immediate past President of the ALRC nor the Acting President, both also well-respected judges. I have never seen a consultation paper from a law reform commission before that does not name, or bear the signatures of, the commissioners responsible.

The only people named are legal academics who are thanked for their 'contributions'. All, as it happens, come from Victoria which is the state with laws most hostile to religious freedom. Perhaps this helps explain why the Consultation Paper adopts the controversial approach recently enacted in Victoria, against the strong protests of faith communities.

Whoever wrote the Consultation Paper, what seems clear is that they made fundamental errors in their application of international human rights principles, especially in relation to Proposition C. As will be discussed below, the authors do not even claim that the restrictions they propose under Proposition C are necessary to protect the fundamental rights and freedoms of others, as required by Article 18.3 of the ICCPR and the Siracusa Principles. This is in contrast to the discussion of Propositions A and B.

Failure to follow the Terms of Reference

I understand completely that the Terms of Reference asked the Commission to make recommendations within the confines of the policy that Labor took to the election, and with reference to our international human rights commitments. I and others have long been in dialogue with federal Labor, and particularly the current Attorney-General, on these issues, and this dialogue has done much to bridge the gap between our different views and positions and to find workable compromises between different interests. However, the proposals made by the authors of this paper cannot be reconciled with the policies that Labor took to the election and the promises it made.

The Terms of Reference required the Commission to take account of submissions to previous inquiries. It says it has done so:

> Since November 2022, the ALRC has, in line with the Terms of Reference, reviewed the many past reports of reviews and inquiries on this issue, and a large number of submissions made to them.

It also reports:

> The ALRC has also conducted targeted consultations with a broad cross-section of stakeholders, meeting more than 80 individuals in approximately 35 meetings and roundtables.

The Consultation Paper provides no evidence whatsoever that it has taken any account of the submissions and proposals that have been made from a faith perspective, or any of the consultations it has had with experts on religious freedom as a human right. Freedom for Faith, as a peak body on these issues, is not cited, nor is any submission from any faith community or group representing faith-based schools. With only one or two exceptions, the literature cited is international and very general in its discussion of issues. There is no evidence that the authors of the paper have made any attempt to understand the Australian context, to think through the issues in the context of Australia's longstanding commitment to multiculturalism or to take account of the human rights of the large number of parents who choose faith-based schools. Nor is there any evidence that they have considered the different points of view and ways of balancing different human rights that faith communities have proposed, including recently, in discussions with the Commission, by Freedom for Faith.

A recurring theme of the paper is that the rights of non-religious staff to teach in faith-based schools, and in particular the rights of staff who identify as one or more of L, G B, T, Q, I, or + (LGBTQI+ for short) should prevail over the rights of faith-based institutions and parents. This is supposed to follow from a neutral and dispassionate examination of international human rights principles. As I will show, the authors of this paper are somewhat selective in terms of the human rights principles they cite or to which they seek to give effect.

Applying international human rights norms

One of the most troubling and objectionable aspects of the Consultation Paper is the line of argument that supposes that the ALRC's conclusions follow inexorably from its analysis of various international human rights conventions.

Human rights are expressed as quite abstract principles; and when human rights conflict, balances have to be found. Where they are to be found is a matter of opinion and on which reasonable minds may differ. One of the surprising features of the Consultation Paper is just how selective it is. Consider, for example, that on p. 18, it cites the 1994 report of the ALRC; but what about the 1999 report of the Human Rights and Equal Opportunity Commission on religion and belief? HREOC commented in 1999 that "special provision for religious institutions is appropriate. It is reasonable for employees of these institutions to be expected to have a degree of commitment to and identification with the beliefs, values and teachings of the particular religion…Accommodating the distinct identity of religious organisations is an important element in any society which respects and values diversity in all its forms."[1]

This is supported by a UN Special Rapporteur on freedom of religion and belief. In 2014, Heiner Bielefeldt, the Special Rapporteur at that time, wrote an important report on religious freedom in the workplace. He argued that discrimination on the basis of religious belief in the workplace should be unlawful, but "religious institutions constitute a special case. As their raison d'être and corporate identity are religiously defined, employment policies of religious

[1] Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999) p.109.

institutions may fall within the scope of freedom of religion or belief, which also includes a corporate dimension." [2]

A faith-based organisation must have the right to select staff on the basis of religious belief should it choose to do so. This is what Hohfeld called a liberty right.[3]. It is an appropriate application of the rights of freedom of religion and association. Article 6 of the UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion (1981) specifically provides for the right to "establish and maintain appropriate charitable or humanitarian institutions" and Article 18.4 of the ICCPR supports the right of parents to educate their children in faith-based schools.

The propositions given by HREOC and Heiner Bielefeldt are mainstream and orthodox applications of human rights jurisprudence, balancing different rights. They have underpinned state and federal laws since the 1970s. If human rights have any degree of permanence, and are not just ideas that change with every new gust of progressive wind, then these mainstream propositions should have been explained in the body of the Consultation Paper. Furthermore, the ALRC's proposed departure from these long-standing principles should have been justified.

A technical paper?

The ALRC claims in one sentence that

> The task of this Inquiry is relatively narrow and technical in scope, and the ALRC is not tasked with assessing the relative importance of religion and equality, nor of related human rights such as the rights to privacy and the rights to freedom of association.

However, it goes on to say:

> The ALRC is required by the Terms of Reference to formulate a legislative approach that is consistent with Australia's human rights obligations.

That requires it to consider the balances between "religion and equality", and "related human rights such as the rights to privacy and the rights to freedom of association" *within the confines of the Government's policy*, including, notably, the third aspect of the Terms of Reference. And this is what the ALRC paper does. Throughout the paper the authors take a view on these issues, adopting proposals that are at one end of a spectrum of possible views on the balance to be found between religion and equality which could fulfil the Government's policy commitments, but so extreme that it departs from the position that the Government took to the election.

To say that this is a merely technical paper is misleading. My reading of this Consultation Paper is that the Government's position, which will wipe out long-standing protections for a divergence of opinion on human sexuality, including faith-based views, was simply not radical

[2] Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2014 at [68].

[3] Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays* (WW Cook, ed, Yale UP, 1923).

enough for the authors of this consultation paper. They also advanced the surprising proposition that teachers who identify as LGBTQI+ should have a legal right to teach their own content in a religious studies syllabus, a right which is given to no other teacher in Australia, whether in religious studies, science classes, social studies or otherwise.

The Commission also says in describing its approach that it seeks "a legislative solution that would maximise the enjoyment of all relevant rights by all persons, while being sensitive to the impact on the rights of others." Yet what it proposes restricts the right of Christian schools to employ or prefer staff who share its religious ethos, contrary to principle 3 (p.9). Some allowance is made for schools to preference staff of their own faith, based upon the 'genuine occupational requirements' test, but the risk the schools will take is to be exposed to litigation against a backdrop of huge uncertainty about what the test means in the context of faith-based education.

Australia as a multi-faith and multicultural society

The proposals made in this paper will cause deep division, disharmony and alienation, as the Victorian legislation has done. The proposals on the right of faith-based organisations to appoint, or prefer, staff who adhere to the beliefs and values of the faith represent a radical departure from decades of federal government policy, and a long-standing societal consensus, that have made Australia one of the most successful multicultural nations on earth. Claims are made that the laws in Queensland and Tasmania, amongst the most restrictive in the country, have been 'successful'; but who says? Who did the Commission ask? There is simply no evidence from the consultation paper that the staff have talked to any leaders of faith-based schools in Queensland, Tasmania or elsewhere.

If the federal government adopts these proposals, there will be profound and adverse long-term impacts not only on the education sector but more broadly, on the harmony of this diverse, multi-ethnic and multi-faith society.

More than 25% of Australians were born overseas, and another 25% have at least one parent born overseas. There are suburbs in cities such as Sydney that have more than 150 different ethnic groups in the one local government area, speaking a multitude of languages at home. In the last three decades, relatively few new migrants have come from the 'progressive' post-Christian West. Most migrants and refugees have come from cultures with quite conservative views about sex and family life. Whether we like it or not, some of those cultures are not well-accepting of same-sex relationships, and probably very few migrants accept the new progressive beliefs about gender identity.

The proportion of the population that holds to conservative values on sex and family life will only increase in the next three decades. This is not only because current migration patterns are very likely to continue, but because people from these cultures have much higher birth rates than secular Caucasian Australians. That means that the population of children who need to be educated will increasingly come from culturally conservative family backgrounds.

How we 'live and let live' in such a multicultural society is a complex problem that requires wisdom, tolerance and compromise. The ICCPR-protected rights of freedom of religion, association and the rights of ethnic minorities must be given very careful attention in this respect. The paper that Joel Harrison and I wrote in the Monash University Law Review in 2014[4] sets out a detailed argument for how that balance is to be achieved. It would be fair to say it has been a well-received and influential paper, quoted in previous work by the ALRC. However, there is no indication that the authors of this consultation paper have even read it.

If the law strays too far from the cultural values of those who are governed by it, the long-term effect will be to diminish respect for law and for government. Voluntary obedience to law will decline, and this has long-term implications for the society. It is all very well for academic lawyers to adopt positions that are to one extreme of the spectrum of views in society; but governments need to take account of a wider body of opinion and to make sure that laws promote social harmony rather than division.

The importance of choice of school

One way we manage to 'live and let live' is to accept that parents should have some choice about the education of their children, provided of course that they can manage the fees. A lot of faith-based schools in the suburbs of our cities and beyond have quite low fees, and so this option is affordable for many. Churches have indeed invested a lot in providing faith-based schools in poorer areas of the community, so that the choice of a faith-based education for their children is not only available to the middle class.

A lot of parents from cultures with conservative views on sex and family life worry enormously about state schools because the school's values conflict with their own. Actually, a lot of parents, religious or not, worry about what is being taught and practised in state schools. That is why they choose faith-based schools. These schools are thriving. Christian schools keep increasing in numbers and as a percentage of all children who attend school. A report by the ABC after this consultation paper was released, highlighted the level of demand for places at a low-fee Christian school in the far-west of Sydney, with one expecting mother putting the child down for a place before he or she was born.[5] Enrolments at these Christian schools continue to climb across the country.

The ALRC's proposals are designed, over time, to ensure that the faith-based schools look very similar to the State school next door.. They will be restricted in the extent to which they can insist that the values of their faith be taught in the school.

Christian schools are no doubt the main target; but these policies will affect Jewish and Muslim schools as well. Many parents who want a faith-based education for their children will be

[4] Harrison, J & Parkinson, P, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 413-451.

[5] 'Public school exodus continues as parents go private, despite cost-of-living pressures' https://www.abc.net.au/news/2023-02-15/abs-data-shows-public-private-school-enrolments-divide/101976204.

deeply angered by this. Already highly educated and successful professionals are talking to me about the need to home-school their children, whatever the sacrifice involved.

Proposition A

Proposition A is the least controversial. Faith-based schools do not expel students on the basis of their sexual orientation and have never asked for the right to expel students on this basis. The changes to the SDA in 2013 were made in a rush when a more ambitious consolidation of all federal anti-discrimination laws failed to get support. Little or no consultation occurred on what is now the current version of s.38. Faith-based schools typically have exemplary pastoral care practices – one of many reasons why so many parents choose them.

However there are particular difficulties which the ALRC consultation paper does not address. Christian school leaders are best placed to explain their perspectives. In this submission, I will focus on just one area, which is trans and gender diverse students. The ALRC staff should have been very well aware of these issues from the papers I have sent them. They are completely ignored in the Consultation Paper, without explanation.

The complex issues concerning gender identity in school settings

Any repeal of s.38 must deal with the question of how faith-based schools can offer pastoral care to students who identify as 'trans' or gender diverse while being consistent with their beliefs and the needs of other students. No-one wants to expel such students or treat them adversely. Not at all; but anti-discrimination law is often cited as imposing a legal requirement that schools *affirm* whatever gender identity the child has adopted.[6] Advice from state government education departments supporting affirmation cite the SDA in support.[7]

The context of these concerns is that there has been a massive increase in teenagers, many of them mentally very unwell, who are identifying as transgender or non-binary. Mostly these are teenage girls, contrary to historic patterns of 3-5 times as many boys as girls having gender identity issues, and generally from early childhood. There is much evidence to indicate that adverse childhood experiences, family dysfunction, attachment disorder issues and peer or social media influences go a long way towards explaining this quite sudden rise in adolescent gender dysphoria.

There is an emerging consensus amongst leading health experts that the practice of 'social transition', whereby, for example, a female child adopts a male name and is treated for all intents and purposes as a boy, can be very damaging psychologically and set the child on a pathway to lifelong medication, infertility and impaired sexual function. For many, a transient gender identity, arising from typical adolescent exploration and experimentation, becomes concretised. I have written about how these issues are playing out in schools and why parents

[6] This is discussed in P. Parkinson, 'Adolescent Gender Identity and the Sex Discrimination Act: The Case for Religious Exemptions' (2022) 1 *Australian Journal of Law and Religion* 76 at 89ff.

[7] Ibid at p.90.

need to be able to choose schools that do not pay homage to this new ideology. They have been able to do so because of the exemptions in the SDA.

What happens when the exemptions are removed?

Remove the exemptions and you have to address the problem in both state and faith-based schools. If anti-discrimination law is interpreted as requiring a school to accept whatever identity a child or teenager adopts, including an identity that is neither male nor female, and if it is discrimination to require them, for example, to use gender neutral bathrooms and changing rooms if they will not use the facilities for their sex, then there are huge repercussions, potentially for the physical and mental health of that child, but also for the other children at the school who have their own rights to bodily privacy. It is not just a matter of the individual child's human rights, but the human rights of other children.

In ten years' time, the scale of the public health disaster will become clear; but already, the gender affirming approach is unravelling, and journalists across the political spectrum are beginning to expose the issues and scandals. Yet the ALRC has completely ignored the issue, while recommending the exemptions be removed that have given school principals and boards the discretion to adopt a flexible and pastoral approach that supports the student while maintaining the religious beliefs of the school and which accords with the best medical and scientific evidence.

So when, on p.18, the authors of the Consultation Paper set out proposals for abolishing s.38 in relation to students, consistent with government policy, why is there no consideration at all of what discrimination against students who have a gender identity that differs from their sex, means? There are all sorts of problems with the law concerning whether schools must accept a change of name and gender identity which differs from the birth certificate, the name and sex when the child was enrolled, and the child's genitalia. Is it discrimination against the child to refuse to accept a divergent gender identity if the parents do not support it? What about the rights of other students to bodily privacy? Is it discrimination to require a child to use the changing room of their natal sex or a gender neutral bathroom? These issues are simply not explored. On pp 18-19 there is a long list of examples, but the most pressing issues for all schools, not just faith-based schools, are simply ignored.

Yet one reason for parents to send their children to faith-based schools is discomfort with what is being taught and practised in state schools. The religious freedom of parents to choose a school that has an understanding of sex and gender which is concordant not only with faith but with basic biological science is taken away if the law is not amended to identify what discrimination does and does not mean in a school context.

Males in girls' bathrooms at a Muslim school

This may be tested by a simple example. Will someone's teenage daughter, who is enrolled in a faith-based school, be required to change in the girls' changing room for gym or sports activities with a teenage natal male student who identifies as male? The Consultation Paper

says that boys and girls may be segregated for prayers, and this is presumably a recognition of the position of Islamic schools, yet every Muslim parent in the country will want to know the answer to the question I have put – and the vast majority of parents across the country would like their daughters' bodily privacy to be respected similarly.

It is a completely untenable position to say that the law should allow segregation of males and females for the purposes of Islamic prayer because this is about "religion" while asserting that the right of adolescent Muslim girls not to have to undress in front of adolescent males is not based upon religious precepts. Religion, morality and issues of decency are all deeply intertwined in the Abrahamic faiths.

The mentally unwell teenage boy and uniform policy

Or take another example. Anyone who has looked at the medical and scientific literature on gender incongruence and dysphoria will know that the great majority of children and young people now identifying as 'trans' have a range of serious mental health comorbidities. This a very unwell population of young people. A co-educational school has a boy with a long history of mental health issues who, at the age of 14, decides he is a girl. The mother goes along with his new gender identity, but the father, who is separated from the mother, does not. The school principal and school counsellor consider that the child's new-found gender identity is a manifestation of his mental health issues and do not believe that it is in the best interests of the child to support his social transition. They liken it, in this context, with going along with an anorexic girl's beliefs about her body. Does the ALRC's interpretation of anti-discrimination law require the school to allow the boy to wear the female uniform?

Abolishing s.38

I recognise that the Consultation Paper only gives examples of how it sees the law working. However, its technical proposals for amendment to the Act really don't engage with the nuanced examples given in the paper. Just abolishing s.38 is no answer. That doesn't tell us that Muslim schools can separate boys and girls for prayers. The ALRC's legislative proposals do not represent ways of achieving what it says is the balance to be found in the body of the paper. The ALRC just adopts a bulldozer approach to the religious exemptions.

The fact that the issues which are most pressing concerning gender identity discrimination are not even considered in the examples is telling. It appears that the ALRC just hasn't done its research about the issues and facts 'on the ground', and there is no indication that anyone who wrote the Consultation Paper has even read my paper on the issues, or the proposals that we put forward in writing following Freedom for Faith's meeting with Rothman J in December.

Parents who are concerned about these issues currently have the choice to send their children to faith-based schools because the statutory exemptions give those schools the freedom to use their discretion taking into account not only the best interests of the child who identifies as 'trans' but the other children in the school. Section 38 should not be repealed in its entirety unless and until these issues are properly addressed by clarifying the many legal questions

which arise from the vague language of prohibiting discrimination on the basis of someone's 'gender identity' in the context of school education.

As Freedom for Faith proposed in December (not mentioned in the Consultation Paper), there are ways to address these issues consistent with government objectives:

Recommendation 1

Following s.21(3A), the SDA should be amended to add:

(3B) Nothing in this section affects the right of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, or otherwise established for a religious purpose, to:

(a) establish, apply or enforce a rule or policy in which sex is a criterion;
(b) organise activities or provide facilities (including accommodation) differentiated on the basis of sex; or
(c) confine those activities, or the use of facilities, to students of one sex,

where the differentiation on the basis of sex is in accordance with those doctrines, tenets, beliefs or teachings or for a religious purpose.

<u>The parental consent issue</u>

If the ALRC is going to recommend that schools have to adjust uniform policy for transgender or non-binary children it is going to have to grapple with the issues of parental request or consent, what happens if the parents disagree, or what if the school makes a good faith determination that it is not in the best interests of the young person to go along with his or her newly declared gender identity. It will also need to grapple with the issue of whether it is actually damaging to a child to promote social transition, as Dr Hilary Cass, who has led Britain's big inquiry in this area has found, and as is even being argued by leading figures in America's gender medicine field such as Erica Anderson (herself a transwoman).

On these issues, it cannot be silent, because for now, Commonwealth law provides a refuge for faith-based schools. In state schools these matters are dealt with by education department policy.

The following recommendation is consistent with the principles developed by the Family Court in *Re Kelvin* (2017) 327 FLR 15 and *Re Imogen (no 6)* (2020) 61 Fam LR 344, as extended to the question of 'social transition' of a child.

Recommendation 2

Add a further s.21(3B) along the following lines:

(3C) Nothing in this section requires an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, or otherwise established for a religious purpose, to make accommodations for the gender identity of a pupil except on the written request of both parents, and on the

basis of advice from a suitably qualified mental health practitioner who has diagnosed the child with gender dysphoria in accordance with established diagnostic criteria.

Proposition B

To a large extent these proposals are givens, as they represent federal government policy as expressed in the second limb of the Terms of Reference. However, the authors of this paper go on to offer extraordinary propositions as well.

One of the proposals is that the "school could require a LGBTIQ+ staff member involved in the teaching of religious doctrine or beliefs to teach the school's position on those religious doctrines or beliefs, as long as they were able to provide objective information about alternative viewpoints if they wished." This is very broadly expressed. It is not even confined to a right to present alternative beliefs on issues of sexuality or gender.

There are four objections to this. First, it goes way beyond the ALRC's terms of reference. It is not discrimination against a lesbian member of staff who teaches religious studies to require her to teach the school's or denomination's religious view. The school is entitled to maintain its religious viewpoints.

Second, the authors of this paper adopt a strange view that the content of the school's teaching program in religious studies should depend on the sexual orientation or gender identity of the staff member. So a cisgender heterosexual teacher who believes that there are 60 genders or that sex is a social construct would not be free to express this view in a religious studies class if it was contrary to the beliefs of the school, but a religious studies teacher who happens to be gay would have a legal right to teach his beliefs on sex as a social construct or that there are 60 genders as well. To say the least, this is a curious position.

Third, the authors of this paper propose to impose a burden on religious schools that they do not say should be borne by state schools. State schools are under no legal obligation to allow their teachers, in any subject, to go freelance in terms of what is taught. Schools are entitled to determine what is taught in any subject, as long as they teach the established curriculum.

Fourth, nothing in the technical proposals gives effect to the ALRC's stated policy position concerning religious studies teachers. This is true of a lot of the examples. If you bulldoze a building, nothing is left standing. The ALRC's proposed legislative repeal of almost all religious exemptions is inconsistent with either balance between different human rights or nuance.

Recommendation 3

The ALRC should withdraw its contention that religious studies teachers who happen to be gay should have a special right to teach whatever beliefs they like.

Bible colleges

The examples acknowledge that bible colleges training ministers of religion and members of religious orders should be exempt. They should be able to maintain their religious values as they consider appropriate. This reflects s.37 of the SDA, which was drafted at a time when the Act only concerned sex discrimination, not all the protected attributes to which it has now been extended. Back then, the only issue concerning a conflict between gender equality expectations and religious faith was in selection of people to be priests, rabbis, imams and members of religious orders.

Now, the SDA is much broader in its application, and the s.37 exemptions must therefore address a much wider range of issues than just sex discrimination. Furthermore, the religious landscape has changed. Almost no-one trains to become a member of a religious order in Australia anymore; but many students attend bible college without a desire to be ordained in the traditional sense characteristic of the episcopal churches. They are, nonetheless, training for Christian ministry of various kinds, such as youth work. Any new legislative provisions concerning exemptions for bible colleges and equivalent institutions in other faiths must reflect the current religious landscape, not what was seen as necessary back in 1975.

Recommendation 4

Examples that refer to tertiary institutions involved in the training of 'ministers' should be replaced with reference to theological colleges or bible colleges that train staff for any form of ministry in the faith).

Proposition C

These proposals are inconsistent with the third limb of the terms of reference which provides that educational institutions "can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff." They also violate the principles the authors of this paper themselves laid down in paragraph 25, which is as follows:

> Because human rights are fundamental to human dignity, the rights themselves are to be interpreted generously and any limitations require 'a compelling justification'. Treaties set out the permissible limits of such justifications. These are further elaborated in the Siracusa Principles, which — while not binding — are authoritative and have been endorsed by the Attorney-General's Department (Cth), the Australian Human Rights Commission, and the Parliamentary Joint Committee on Human Rights (Cth) ('PJCHR'). In general, a limitation on a right recognised in the ICCPR must:
>
> - be provided for by law;
> - pursue a legitimate goal, as set out in the relevant article;
> - be necessary — that is, respond to a pressing social need; and

- be proportionate to the specific need it is aimed at addressing.

With respect to propositions A and B the authors of this paper at least make some attempt to explain why the proposed limitations on the autonomy of faith-based schools are both necessary and proportionate. The words 'necessary' and proportionate are placed in bold. In any event, the terms of reference stipulate what must be done.

By way of contrast, in the brief explanation of proposition C (para 68), no attempt is made to show that the restrictions are necessary – only that they are 'proportionate'. There is no discussion of the Siracusa Principles. No 'pressing social need' is identified, and nor could it be.

Paragraph 69 offers more of a defence in terms of necessity, but it is a weak one, given that teachers who do not accept the values and ethos of a conservative religious school have any number of other teaching options where there is no likelihood of conflict between their values and lifestyle and the beliefs of the school.

The Siracusa Principles and the justification for proposition C

What the authors' view comes down to is that when Article 18.3 of the ICCPR says that the manifestation of religious freedom can be limited by reference to the fundamental rights and freedoms of others, one of those 'fundamental' rights is for non-Christian teachers to be employed in Christian schools. It is not good enough that they can work in state schools or a large number of independent schools that do not preference religiously devout teachers.

This is quite simply an untenable proposition. General Comment 22 is clear on this.[8]

> States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and *must not be applied in a manner that would vitiate the rights guaranteed in article 18*. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant.

Restrictions are not allowed on grounds not specified in Article 18. Yet this is precisely what the authors of this paper propose. Maximising the employment options of non-religious teachers is given priority over the freedoms of religion and association of Christian schools, for no other reason than non-Christian teachers might be 'disadvantaged'.

The authors of this paper certainly do not pretend that the right they say should be given preference to religious freedom is 'fundamental'. The word 'fundamental' in Article 18.3 is a little difficult in human rights law because contemporary interpretation insists that all rights

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8 Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion, Article 18*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) at [8].

are equal; however, the ICCPR does not reflect that point of view, because it designates some rights, including Article 18 as non-derogable, while others are not given the same designation. Religious freedom is one of the few non-derogable human rights which cannot be suspended even in a national emergency.

Whatever the meaning of 'fundamental', there is no fundamental right to be given a job by a particular employer. Yes, protection from discrimination on the basis of religious or non-religious belief is within the panoply of anti-discrimination provisions, but as the former Special Rapporteur Hans Bielefeld explained, religious institutions are a legitimate exception to this, given their mission and purpose.

The Human Rights Committee's General Comment 18 (Non-Discrimination), para 13, states that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant". So the selection or preference of Christian staff for a Christian school does not constitute discrimination in international law.

This meaning of 'discrimination' is reflected in s.153 of the *Fair Work Act 2009 (Cth)*. It defines differentiation based upon a religious ground to be not discrimination at all. Section 153(2) provides:

> **Certain terms are not discriminatory**
>
> (2) A term of a modern award does not discriminate against an employee:
>
> (a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or
>
> (b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
>
> (i) in good faith; and
>
> (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

The genuine occupational requirements test

The footnotes provide some indication of what the authors of this Consultation Paper might mean by a genuine occupational requirement. 'Genuine occupational qualifications' have been described as a way of identifying the character of the work "such that it is better or preferably done by someone with a particular attribute, for reasons of, say, modesty, empathy, or authenticity", according to the authors. On one view of this, any role in a Christian school is better fulfilled by someone who shares the beliefs, values and mission of the school; but evidently that is not at all what the authors mean, and in any event, in the next footnote there are indications that different state courts have interpreted the test in different ways.

The authors seem to want to restrict the freedom of Christian schools to employ or prefer staff who share the beliefs, values and mission of the school to those who teach 'religion' (or

perhaps, those who are required to engage in religious observance or practice). This involves a particular secular understanding of what is, and is not, religious, that has very little support in the religious traditions that have the most faith-based schools. This is the kind of problem that emerges when Consultation Papers are written without any input from the people whose rights are most at stake in the matter under consideration.

Litigation costs

The authors of this paper want to replace the existing rules with a vague test. In one of their examples, they say that the principles will need to be worked out "on a case by case basis". With respect, some academic lawyers love the idea that principles will be developed on a case by case basis because they work on an implicit assumption that litigation costs nothing – not time, not stress and not money. The reality is otherwise. Litigation to establish a legal interpretation can be hugely expensive, because the case cannot, by definition, be settled. The more uncertain and vague the law is, the greater the cost in settling principles. Different judges take different views; an appeal is lodged in one case which brings an authoritative ruling on that issue, but sensibly the appeal court declines to comment on what the application of the rule is in a different context. In addition to the financial cost, litigation is a time sink, and for those involved, often hugely stressful.

Schools are charities. The cost of expensive litigation is ultimately born by parents and children in terms of higher school fees. Charities, and the people they support, deserve clear rules, not vague tests that satisfy academic lawyers' sensibilities.

LGBTQI+ religious studies teachers

The Consultation Paper says it "would be reasonable and proportionate for a school to preference an applicant for the position of religious education teacher who was willing to teach the school's particular beliefs around sexuality, as long as the teacher was permitted to objectively discuss the existence of alternative views about other lifestyles, relationships, or sexuality in a manner appropriate to the context". The objections made above to this proposition apply equally here.

Furthermore, the authors of this paper cannot justify this as necessary. If a religious education teacher doesn't agree with the teachings or ethos of the school, he or she should not apply for a teaching post there. The education system offers a myriad of other employment opportunities. There is no pressing social need identified in the Consultation Paper.

Proposition D

Like the rest of the paper, this adopts the Animal Farm approach to equality by treating the rights of LGBTQI+ people as, in every conflict of rights, superior to the right of faith-based institutions to maintain their ethos. That is made explicit in the examples on p.26. So an Islamic school cannot be permitted to remain Islamic in its ethos and values if this conflicts with the rights of a non-religious transgender staff member who has been employed at the school (perhaps before he or she identified as 'trans'). It is very difficult to square this either with

Labor Party policy that faith-based schools are permitted to maintain their religious identity and ethos or with the principles of international human rights law that I have cited above.

Recommendation 5

Propositions C and D, and the "technical" proposals flowing from them, should be deleted as being inconsistent with Article 18.3 of the ICCPR and the Siracusa Principles.

Recommendation 6

The ALRC should give serious consideration to the proposals previously made by Freedom for Faith for amendments to the Fair Work Act which will give effect to the third limb of the ALRC's Terms of Reference.

The use of examples from "comparative" jurisdictions

Throughout the paper, the authors use the rhetorical trick of identifying the laws of jurisdictions that agree with their values and politics, and using those to 'show' that their proposals are consistent with Australia's international human rights obligations. So they cite Victorian law, which is consistent with their view of international human rights, while not citing NSW law, which shows much more respect for Article 18 of the ICCPR, and which inferentially is not consistent with their view.

Vague references are also made to the laws of other countries as consistent with the ALRC's preferred approach; but it really isn't clear to me which countries. For example, would the proposed policies survive the First Amendment in the USA? I doubt it. There is quite a range of approaches to religious freedom around the world, and some countries do not respect it at all. The ALRC's proposals lean towards the latter end of that spectrum.

Queensland and Tasmania come in for special praise. For example, this paragraph on p.19:

> Similar reforms in states such as Queensland and Tasmania over more than two decades appear to have been experienced positively. Religious educational institutions in those jurisdictions have continued to run successfully under the more restrictive regimes in place there, and staff and administrators associated with them have expressed support for such laws.

So, apparently, everyone loves the restrictions on their religious freedom in the authors' preferred jurisdictions, especially the staff and administrators of the schools that are thereby restricted. Needless to say, the ALRC provides no evidence whatsoever to support its claims.

The authors of this paper are, nonetheless, rather selective even in terms of the jurisdictions they cite. So for example, s.51 of the *Anti-Discrimination Act* 1991 (Tas.) offers two different bases for the protection of employment in faith-based institutions:

> (1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in

> the teaching, observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.
>
> (2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.

No mention is made by the ALRC of the second test, presumably because it is a little more respectful of religious freedom than the law in Victoria.

The technical proposals

When it comes to the 'technical' proposals, effectively they amount to wiping out religious freedom so far as it concerns most educational institutions in the Sex Discrimination Act, and strictly limiting it in the Fair Work Act.

This, we are meant to be assured, is consistent with Australia's international human rights obligations and is directed to achieve the goal to "maximise the enjoyment of all relevant rights by all persons, while being sensitive to the impact on the rights of others".

Nothing could be further from the case.

Conclusion

The Consultation Paper is very disappointing. Different points of view from those of the authors on the balance to be found between various human rights are not given any space in the main body of the paper. One point of view and one only, is given consideration, and that is a view that has been advanced quite recently by anti-discrimination law and human rights scholars who want to impose severe restrictions on religious freedom in Australia.

Something seems to have gone seriously wrong with the ALRC's processes. The Consultation Paper is highly damaging to the reputation of the ALRC, and profoundly disrespectful to all people of faith who have engaged, with goodwill, with the Commission on these issues.

I can only hope that in the final recommendations of the Commission, these issues are rectified.

I should add that I endorse the submission from Freedom for Faith and reiterate the proposals we made following the meeting with the Commissioner in December 2022.

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