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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to contribute to this inquiry by the Australian Law Reform Commission (ALRC), specifically in response to the ALRC's consultation paper entitled *Religious Educational Institutions And Anti-Discrimination Laws* ('the/this Consultation Paper') and the proposals contained therein to amend federal anti-discrimination legislation – primarily the *Sex Discrimination Act 1984* (Cth) ('*Sex Discrimination Act*') and the *Fair Work Act 2009* (Cth) ('*Fair Work Act*').
2. The ALA notes that the proposals in this Consultation Paper are a vast improvement on the reforms proposed under the previous Federal Government, about which the ALA made multiple submissions from 2019 to 2021 expressing our deep concerns about the rationale behind and consequences of those proposed changes.
3. The ALA submits that the purpose of discrimination laws is to provide appropriate protections for people who may be disadvantaged by the fact that they may experience or possess a particular attribute or particular attributes.
4. Legislative protection against discrimination on the basis of that particular attribute is based on a clear, well-established and evidence-based rationale that people who possess that attribute would be otherwise disadvantaged and vulnerable to significant hardship without such protections. In other words, a major rationale for such discrimination laws is to 'level the playing field'.
5. Federal anti-discrimination and employment laws prohibit discrimination in a wide range of settings and on a variety of grounds. These laws currently provide broad exceptions for religious educational institutions, including early childhood education centres, schools, colleges, and universities.
6. The ALA has long advocated for the balancing of rights recognised under international agreements to which Australia is a party, such as the *International Covenant on Civil and Political Rights* (ICCPR).

7. The ALA's submission will respond to the ALRC's Consultation Paper thematically, focusing on:

- discrimination against current students or prospective students;
- discrimination against current or prospective staff, including through employment processes via 'preferencing' and termination;
- cohesion and consistency between federal and state/territory legislation; and
- further reform by way of enacting a federal Human Rights Act.

8. The ALA has also had the opportunity to review the submission to this inquiry authored by the Australian Discrimination Law Experts Group (ADLEG).² ADLEG has undertaken a very technical and detailed analysis of the 14 proposals outlined in the Consultation Paper. The ALA agrees with ADLEG's thorough analysis of those proposals and shares ADLEG's concerns about some of the proposals (namely Proposals 7–10). The ALA endorses ADLEG's nine recommendations, especially:

- removing the term 'ethos' from the proposals;
- accepting Proposals 1–6 and 11–14 (subject to the removal of any discourse around 'ethos');
- rejecting Proposal 7 regarding school curriculum exclusions;
- rejecting 8 and 9 in their current forms; and
- offering alternative drafting of the legislative amendments in Proposals 8, 9 and 10.

² Australian Discrimination Law Experts Group, Submission to the Australian Law Reform Commission, *Inquiry into Religious Education Institutions and Anti-Discrimination Laws* (17 February 2023) <<https://www.adleg.org.au/submissions/alrc-inquiry-into-religious-educational-institutions-2023>>.

Discrimination against current or prospective students [Proposition A; Proposals 1, 3, 4 and 6]

9. The ALA supports reforms detailed in the Consultation Paper at Proposition A (and the accompanying proposals) to remove the existing potential for direct and indirect forms of discrimination against current students and prospective students at religious educational institutions, or the imposition of practices that are less favourable to certain students.
10. Proposal 1 in the Consultation Paper is designed to implement Proposition A “by removing the specific exception available to religious educational institutions that allows discrimination against students and prospective students on the grounds of sexual orientation, gender identity, marital or relationship status, and pregnancy”.³ This specific exception is in the *Sex Discrimination Act* at section 38(3).
11. The ALA submits that the operation of the section 38(3) exception to section 21 of the *Sex Discrimination Act* causes significant disadvantage to and discrimination against LGBTQ+ students, current or prospective. The exemption also serves to cause significant disadvantage and discrimination to current students and prospective students on the basis of their marital/relationship status or pregnancy.
12. Further, the ALA is concerned that the exception offered by the *Sex Discrimination Act* at section 37(1)(d) that allows faith-based educational institutions to discriminate against certain students is potentially even more broad than that which is currently provided by section 38(3). Accordingly, merely repealing the exemption contained in s 38(3) will, by itself, not prevent discrimination against LGBTIQ+ students. The ALA supports amendments to section 37 to clarify that the exception provided in section 37(1)(d) does not apply to faith-based educational institutions.
13. **The ALA thus strongly supports the repeal of the *Sex Discrimination Act* section 38(3) exemption (as per Proposal 1 in the Consultation Paper), as well as other amendments to ensure the consistent application of these reforms throughout the**

³ Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper* (Consultation Paper, January 2023) 29. (‘Consultation Paper’)

Sex Discrimination Act, including but not limited to the repeal of section 37(1)(d) in that piece of legislation (as per Proposals 3 and 6 in the Consultation Paper).

14. Such reform would not impinge on the right of any educational institution to discriminate against students on the grounds of sex in relation to enrolment at single-sex schools or in the provision of accommodation where it is solely provided for students of one sex. This is affirmed in the Consultation Paper through Proposal 4.
15. The ALA contends that this change would successfully balance the right to freedom of religion or belief with rights to non-discrimination under the ICCPR and the *Sex Discrimination Act*. The ALRC's own analysis of Proposition A also signals compliance with international human rights norms by applying the requisite tests of necessity and proportionality in determining whether the reform is justifiable.⁴

Discrimination against current or prospective staff, including through employment processes via 'preferencing' and termination [Propositions B, C and D; Proposals 2, 3, 4, 8, 9 and 10]

16. The ALA welcomes the proposals made in accordance with Proposition B such that a religious educational institution "should not be allowed to discriminate against any staff (current or prospective) on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy",⁵ nor could it impose policies or practices that had the effect of disadvantaging prospective or current staff with those identities or characteristics.⁶
17. **The ALA thus supports Proposal 2 of the Consultation Paper, which repeals subsections 38(1) and (2) of the *Sex Discrimination Act*. As articulated earlier in this submission, the ALA also supports Proposals 3 and 4.**

⁴ Ibid 19.

⁵ Ibid 20 [Proposition B].

⁶ Ibid.

18. The ALA notes, however, that under the ALRC’s proposals a religious educational institution would still be able to discriminate in employment decisions when a particular religious belief or affiliation is an inherent requirement of the role – also known as ‘preferencing’.⁷
19. This criterion would be applied to the selection, appointment and promotion of staff of religious educational institutions. For example, where a job had explicitly religious or doctrinal content like a chaplain. Proposition C envisages that the “nature and religious ethos of the educational institution should be taken into account in determining whether participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role” in order to justify ‘preferencing’.⁸
20. To clarify the application of ‘preferencing’, the ALA notes and appreciates the ALRC’s intention that a religious educational institution would not be allowed to use ‘preferencing’ on the grounds of religion to justify discrimination on grounds that would otherwise be prohibited under the *Sex Discrimination Act*.⁹
21. A religious educational institution could still, however, “impose reasonable and proportionate codes of staff conduct and behaviour relating to respect for the institution’s ethos” and “take action to prevent any staff member from actively undermining the institutional ethos”, as per Proposition D.¹⁰ This could include a religious educational institution terminating an employee’s employment, where it is “necessary to prevent an employee from actively undermining the ethos of the institution”, as per Proposal 9.¹¹
- 22. Consequently, the ALA maintains our concerns about Propositions C and D, as well as Proposals 8, 9 and 10 of the Consultation Paper to amend the *Fair Work Act*, including our strong reservations about the framing of the reforms in those**

⁷ See Consultation Paper, 22 [Proposition C] and 30.

⁸ Ibid 22 [Proposition C].

⁹ Ibid 23.

¹⁰ Ibid 25.

¹¹ Ibid 34 [Proposal 9].

proposals around subjective concepts like ‘ethos’ – or phrases like ‘religious ethos’ or ‘institutional ethos’, none of which appear in discrimination legislation in Australia – and any ‘damage’ to that ethos that might be alleged to have been caused by that employee.

23. This is all detailed extensively in ADLEG’s submission and the ALA endorses ADLEG’s redrafting of the legislative provisions in Proposals 8, 9 and 10.

Cohesion and consistency between federal and state/territory legislation

24. The ALA strongly believes that all amendments to anti-discrimination legislation must facilitate cohesion and consistency between federal and state/territory legislation, and their objectives.

25. In the Consultation Paper at Proposition A, the ALRC notes that its position and proposals on discrimination against current or prospective students is consistent with existing and proposed provisions in the ACT, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia.¹² This is similarly noted for Proposition B and its related proposals.¹³

26. The ALA welcomes this harmony between federal and state/territory-based anti-discrimination provisions.

27. However, the ALA notes that Propositions C and D (and their related proposals) are explicitly framed as taking a “different approach” to federal legislation as compared to state/territory laws.¹⁴

28. The ALA is concerned that restrictive federal laws might override current state/territory provisions that are designed to more comprehensively protect students and staff from discrimination in religious education institutions. As the duty

¹² Ibid 18.

¹³ Ibid 20–21.

¹⁴ Ibid 26 at [66].

holders, religious educational institutions would be entitled to follow those federal anti-discrimination provisions over the relevant state/territory laws.¹⁵

29. **As such, the ALA recommends that the ALRC and the Federal Government review the proposals in the Consultation Paper and make necessary amendments before any of the proposals are progressed to prioritise consistency between federal and state/territory legislation. This is especially important where revised federal provisions, when enacted, would override sound state/territory provisions in a way that then negatively impacts students and staff.**

Further reform: Enacting a federal Human Rights Act

30. The ALA notes the ALRC's proposal that "the Australian Government should consider and consult on further reforms to simplify and strengthen Commonwealth antidiscrimination law",¹⁶ which includes:

options for the enactment of a Human Rights Act that comprehensively implements the seven core human rights treaties to which Australia has agreed, to protect human rights and provide a more comprehensive and effective way of managing the interactions between individual human rights.¹⁷

31. The ALA contends that the Australian legal system currently provides an inadequate level of protection for human rights.
32. While the Australian legal system provides some protections for particular individual rights and a limited range of remedies where those rights are infringed, the ALA submits that these protections are piecemeal and located in a range of different pieces of legislation, regulations, the *Australian Constitution* and the common law. As result, there are significant gaps in human rights protections within the legal framework

¹⁵ Ibid 13.

¹⁶ Ibid 36 [Proposal 14].

¹⁷ Ibid 37.

which make it difficult to give effect to Australia's international human rights obligations.

33. The ALA submits that the significant gaps in human rights protections in Australia would be largely addressed through the development of a federal legislative human rights instrument ('Human Rights Act'). Such an instrument would provide additional protection to human rights in Australia, enhance our democracy by building a stronger human rights culture in Australia and give expression to important Australian values such as equality, diversity, respect and inclusion.

34. The following demonstrates how legislative human rights instruments work:

They require public authorities, including government departments, public servants, local councils, police and other agencies, to:

- properly consider human rights when making laws, developing policies, delivering services and making decisions; and
- act compatibly with human rights.¹⁸

35. The ALA submits that a federal legislative human rights instrument would also give domestic effect to Australia's international human rights obligations, and we note that Australia is the only western democracy without a national human rights instrument.

36. The ALRC has recommended that the Federal Government consider a Human Rights Act at 'Stage 2' of the ALRC's proposed two-step process for broader law reform.¹⁹

37. The ALA contends, however, that enacting a Human Rights Act should be a priority reform for the Federal Government with stakeholder consultation on a draft Human Rights Act at the earliest opportunity in this term of government.

¹⁸ Human Rights Law Centre, *Charters of Human Rights Make Our Lives Better* (Report, 2022) 6 <<https://www.hrlc.org.au/reports/2022/6/2/charters-of-human-rights-make-our-lives-better>>.

¹⁹ Consultation Paper, 37.

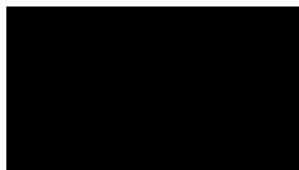
Conclusion

38. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Australian Law Reform Commission's inquiry.

39. The ALA is available to provide further assistance to the ALRC on the issues raised in this submission.



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