



Submission to Religious Educational Institutions and Anti-Discrimination Laws Review

Executive Summary

- Proposition B is an attack on religious freedom.
- Propositions B.1 and B.3 are inconsistent.
- Christian education is an important way in which Christians manifest their religious beliefs in observance, practice, and teaching.
- The primary right engaged by Christian education is the right to educate one's children in accordance with one's sincerely held religious beliefs (ICCPR article 18.4).
- This right is an absolute right that cannot be limited under article 18.3 of the ICCPR.
- It is necessary for Christian schools to be able to employ staff whose lives are consistent with Christian teaching.
- The right to non-discrimination is not absolute.
- Schools should retain the right to set policies in relation to matters which bear on sex, sexuality and gender.

The Presbyterian Church of Victoria

This submission to the Australian Law Reform Commission's (ALRC) *Review of Religious Educational Institutions and Anti-Discrimination Laws* has been prepared by the Church and Nation Committee of the Presbyterian Church of Victoria. The Church and Nation Committee is assigned the responsibility to speak on behalf of the denomination in matters of faith and culture. *We welcome the opportunity to make this submission.*

The Presbyterian Church of Victoria (PCV) represents 136 congregations, representing approximately 10,000 people under our care and ministry. In addition, we have five schools that educate 4,300 students, one aged care facility and one theological college.

The PCV is part of the Presbyterian Church of Australia (PCA) which comprises over 500 congregations and over 30,000 members throughout all Australian States and Territories. In addition, many members of our congregations send their children to various Christian schools and faith based schools. The Presbyterian Church has been part of Australian society since 1803 and formed as the PCA in 1901.

As members of the Presbyterian Church of Victoria we hold strongly to the teaching of the Bible and its interpretation through our subordinate standard, the *Westminster Confession of Faith*. We hold to the belief that **all of life is the service and worship of God**, and therefore that belief or faith in God without actions is dead (James 2:14–26). Therefore, it is vital that

staff in our denominational Christian schools in all educational disciplines adhere to a Christian worldview. In living out our faith, we seek the whole counsel of God to live our whole lives in worshipful obedience to Him.

Focus of this submission

The Consultation Paper contains proposals to reform the law relating to the exceptions contained in the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth) that apply to religious educational institutions.

In this submission we focus on the ALRC's Proposition B.1 in the context of religious schooling, which is as follows:

Religious educational institutions 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.

A key focus of the Terms of Reference and the Consultation Paper is the consistency of the proposed reforms with international human rights law.

The Terms of Reference ask the ALRC to recommend reforms to Federal anti-discrimination laws "in a manner that is consistent with the rights and freedoms recognised in the international agreements to which Australia is a party including the International Covenant on Civil and Political Rights".

The Consultation paper notes that, "In formulating its proposals, the ALRC must consider how the policy objectives set out in the Terms of Reference can be achieved, to the extent practicable, in a way that is consistent with Australia's international legal obligations" (p 10).

For this reason, our submission focuses primarily on the consistency of the ALRC's proposals with Australia's international legal obligations, especially the *International Covenant on Civil and Political Rights* (ICCPR).

The ARLC has characterised the right to religious freedom in a manner that is inconsistent with the ICCPR.

Theological principles relating to Christian education

Under Christian theology, there is no separation between belief and practice. There is a close connection between religion and morality, given that Christianity (similar to many other religions) sets out ethical and moral standards which Christians are expected to adhere to.

It is essential for Christians both to believe correct theology and to live out their faith with consistent behaviour and practice. It is not consistent with Christian belief for a person simply to believe correct theology but fail to live out his or her life in accordance with Christian teaching.

Another fundamental aspect of Christianity is that Christian teaching applies to all of life: everything a Christian does is to be pursued in obedience to Christ. There is no aspect of a Christian's life that is exempt from this obedience. For the Christian, there is no "secular" or neutral sphere, and a Christian's practice of his or her religion is not to be relegated to a private sphere.

This includes education: Christians are to pursue education to the glory of God and in accordance with Christian teaching. There is a distinctively Christian approach to education. This principle underlies and provides the rationale for Christian education.

In addition, it is essential for Christians to live out their faith in community with other believers. The "lone Christian" is a contradiction in terms.

Christian education is an important way in which Christians, especially Christian parents, demonstrate obedience to Christ by ensuring that their children are educated in accordance with their fundamental beliefs. They do so by ensuring that their children are enrolled in a school community which teaches students from a Christian basis and where staff provide a role model in living lives which are consistent with Christian teaching and practice.

Given these principles, it is necessary for Christian schools to be able to employ staff who not only believe Christian doctrine, but also live lives which are consistent with that profession.

Were staff employed by a Christian school to disregard Christian ethical practice, this would undermine the basis of Christian education. Any suggestion that Christian schools should be required to employ staff whose lives are not consistent with the Bible's teaching fundamentally undermines the ability of that school, and the parents of children to practice their religion consistently.

This is precisely what is proposed in the Consultation Paper. The Consultation Paper states as follows:

Implementing laws in accordance with Proposition B would mean that, outside the remaining narrow exceptions, a religious educational institution could not treat staff members (prospective or current) less favourably because they were (among other things) of a particular sex, LGBTQ+, divorced or in a de facto relationship, or pregnant (direct discrimination). It would also mean that a religious educational institution could not impose policies or practices that had the effect of disadvantaging prospective or current staff with those characteristics, unless the policy or practice was reasonable and proportionate in the circumstances (indirect discrimination)

In addition, Propositions B.1 and B.3 are inconsistent for these same reasons. It is not consistent with Christian doctrine or practice for a person to teach religious doctrine or belief on sex or sexuality but undermine that teaching through his or her life.

The Christian religion is central to the identity of Christians. An essential aspect of this identity is the ability of Christians to live every aspect of their lives consistent with Christian teaching.

Christian beliefs about sex and sexuality are not an optional extra. They are non-negotiable beliefs, core to the mission and identity of the church and Christian schools. Denying Christians, the right to establish schools and educate their children in accordance with their beliefs is a significant attack on the ability of Christians to live their lives consistently with their identity.

Students

The ALRC proposition A.1 is that religious educational institutions should not be allowed to discriminate against students on the grounds of their sexual orientation, gender identity, marital or relationship status, or pregnancy.

There is no evidence that this is a problem which warrants legislative intervention. Christian schools are caring institutions and have not sought to discriminate against students on this basis.

Further, proposition A.1, if enacted, is likely to result in added difficulties for Christian schools. Christian schools do, and are entitled to, set policies relating to sexual expression, uniform requirements, the provision of bathrooms, changerooms, and accommodation, which students are expected to comply with, as well as including teaching the traditional view of Christianity in areas of sex, gender and marriage within their curriculum.

If proposition A.1 is enacted, it should allow schools to retain the right to set and enforce compliance with policies in relation to these matters.

Proposition B is an attack on the human right to religious freedom

Proposition B.1 is an attack on religious freedom and is inconsistent with international human rights law. The ALRC's Consultation paper significantly mischaracterises the right contained in article 18.4 of the ICCPR.

Article 18.1 of the ICCPR states that everyone shall have the right to freedom of thought, conscience and religion, and that this right includes the "freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching".

One essential aspect of the human right to religious freedom is the right of parents and legal guardians "to ensure the religious and moral education of their children in conformity with their own convictions": ICCPR article 18.4.

In comparison with other rights, the freedom of religion is one of the few rights listed in the ICCPR from which derogation is not permitted, which is a strong indication of the importance of the right to freedom of religion and belief.¹ Freedom of thought, conscience and religion are rights which are "not derogable under any conditions".² This includes article 18.4.

Article 18.3 states that "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".

Importantly, this permissible limitation clause does *not* apply to the right contained in article 18.4. That is, the parental right to ensure the moral and religious education of their children in accordance with their convictions is an absolute right that cannot be limited. As UN General Comment 22 notes: "the liberty of the parents and guardians to ensure religious and moral education cannot be restricted".³

In a recent book chapter, Nicholas Aroney and Benjamin B Saunders made the following comments about the right to freedom of religion under international human rights law:⁴

Although the ICCPR permits states to limit the manifestation of religion, limitations are permitted in narrowly prescribed ways, and international law imposes a very high threshold on the imposition of limitations on the manifestation of religion.⁵ Under Article 18.3 of the ICCPR, limitations may be imposed only on the grounds permitted by the terms of the ICCPR; limitations clauses must be 'interpreted strictly and in favour of the rights at issue'; when a limitation is required by the ICCPR to be

¹ ICCPR, art 4.2; Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion* (Art 18), 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) ('General Comment 22') [1].

² United Nations Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (28 September 1984) [58] ('*Siracusa Principles*').

³ General Comment 22, [8]. See Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge, Cambridge University Press, 2005) 177–82.

⁴ Nicholas Aroney and Benjamin B Saunders, 'Freedom of Religion' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 289.

⁵ See also Human Rights Committee, *General Comment 27: The Right to Freedom of Movement* (Art 12), 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [11], [14]; Human Rights Committee, *General Comment 34: Freedoms of Opinion and Expression* (Art 19), 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [22].

'necessary', this requires that the limitation must be based on one of the grounds recognised by the relevant article of the ICCPR, must respond to a 'pressing public or social need', pursue a 'legitimate aim', and be 'proportionate to that aim'; and a state must use 'no more restrictive means than are required for the achievement of the purpose of the limitation'.⁶ Limitations may be imposed 'only for those purposes for which they were prescribed' and they must be 'directly related and proportionate to the specific need on which they are predicated'.⁷ In this respect it is important to note that while such limitations may be imposed to protect the rights of others not to be discriminated against as guaranteed by articles 2 and 26 of the ICCPR, the UN Human Right Committee has observed that this does not mean that individuals must be accorded 'identical treatment in every instance', for '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'.⁸

It should be noted from these comments that there is a very high threshold on the imposition of limitations on the manifestation of religion.

Christian education is relevant to article 18.1 of the ICCPR, being an important way in which Christians manifest their religious beliefs in observance, practice and teaching.

However, the primary right engaged by Christian education is article 18.4 of the ICCPR. That is, Christian education is one of the primary ways in which Christians ensure the education of their children in conformity with their beliefs. The right of a religious school to maintain a distinctive ethos is fundamental to the human right of parents to ensure the education of their children in accordance with their beliefs.

As we have noted, the right of parents to ensure the education of their children in conformity with their beliefs is not subject to limitation under article 18.3.

The Consultation Paper analyses Proposition B in accordance with the standard proportionality approach assuming that the relevant right is subject to limitations pursuant to article 18.3 (para [55]). However, as we have noted, the primary right that is relevant to Christian education is the right in article 18.4 of the ICCPR, which is not subject to limitation.

The ALRC's approach is therefore not consistent with the ICCPR. It is not permissible to consider whether proposed limitations on the right of parents to ensure the religious education of their children are necessary and proportionate. This is a non-derogable right which cannot be limited.

The right to non-discrimination

The right to non-discrimination is not absolute. Australian law recognises that not all discrimination is obnoxious, and that not all discrimination is unlawful.

Anti-discrimination laws applicable in Australian jurisdictions contain many exceptions to general prohibitions on discrimination. For example, under Victorian law it is not unlawful to discriminate in the employment of domestic or personal staff in one's home: *Equal*

⁶ Siracusa Principles, [10]–[11].

⁷ General Comment 22, [8].

⁸ Human Rights Committee, General Comment 18: Non-discrimination (Arts 2 and 26), 37th sess UN Doc. HRI/ GEN/1/Rev.8 (10 November 1989) [8], [13].

Opportunity Act 2010 (Vic) s 24. This reflects a legitimate policy position that there is a sphere of private and domestic life which is beyond the reach of state regulation.

Under s 27 of the *Equal Opportunity Act 2010 (Vic)* it is not unlawful to discriminate in the appointment of political staff. This reflects a legitimate policy position that political parties are entitled to maintain a distinctive ethos which reflects the beliefs and tenets of that party; it would (for instance) be unreasonable to attempt to force the Greens to employ a person who does not accept the policy platform of that party.

The *Equal Opportunity Act* also provides that educational institutions for students with particular characteristics may exclude people who do not share those characteristics: *Equal Opportunity Act 2010 (Vic)* s 39. This reflects a legitimate policy position that educational institutions may be established to provide education to specific classes of students or to cater to specific needs.

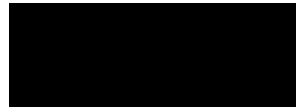
Similar examples could be cited from other Australian jurisdictions. This reflects the principle that the right to non-discrimination is not absolute but can (for example) not apply where necessary to respect the right of various institutions to maintain a distinctive ethos.

As noted above, the UN Human Right Committee has observed 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”.⁹

Kind Regards



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⁹ Human Rights Committee, General Comment 18: Non-discrimination (Arts 2 and 26), 37th sess UN Doc. HRI/ GEN/1/Rev.8 (10 November 1989) [8], [13].