

24 February 2023

The Hon Justice Stephen Rothman AM
Chair
Review of Religious Educational Institutions and Anti-Discrimination Laws
Australian Law Reform Commission
PO Box 12953
George Street Post Shop
Queensland 4003

Uploaded to <https://www.alrc.gov.au/inquiry/anti-discrimination-laws/submission/>
Emailed to antidiscriminationlaw@alrc.gov.au

Dear Justice Rothman,

Review of Religious Educational Institutions and Anti-Discrimination Laws

The Association of Heads of Independent Schools of Australia (AHISA) appreciates the opportunity to make a formal response to the Australian Law Reform Commission's (ALRC) consultation paper. We also appreciate initial consultations held with the ALRC in December 2022 and February 2023.

In both consultations with the ALRC, prior to and following the release of the Commission's consultation paper, AHISA advocated the value to schools and principals of concrete examples of the application of proposed amendments to anti-discrimination laws. Such examples are essential in helping schools to gain an understanding of the practical implications of proposed legislative changes on school operations. This in turn makes it possible for schools to point out where the boundaries of the law may be ill-defined or unnecessarily restrictive. AHISA's submission reflects this approach.

A major concern expressed throughout this submission is that the ALRC's proposals as they stand, and if passed into law, may create situations where schools are forced to engage in expensive and time-consuming litigation to establish test case interpretations of the law. We believe it is in the best interests of schools and those in their communities that the ALRC in its recommendations to the Australian Government, and the Government in its amendments to federal laws, make every effort possible to identify and avoid unnecessary cause for litigation.

AHISA welcomes any inquiries the Commission may have about this submission. These may be directed to me at telephone (02) 6247 7300, or via email at ceo@ahisa.edu.au.

Yours faithfully,

Dr Chris Duncan

AHISA Chief Executive Officer

ABOUT AHISA

AHISA Ltd is a professional association for Heads of independent schools.

The primary object of AHISA is to optimise the opportunity for the education and welfare of Australia's young people through the maintenance of collegiality and high standards of professional practice and conduct amongst its members.

AHISA's 460 members lead schools that collectively account for over 450,000 students, representing 70 per cent of Australia's independent sector enrolments and over 11 per cent of total Australian school enrolments. AHISA members' schools also educate a significant proportion of senior secondary students: 20 per cent of Australia's Year 12 students attend AHISA members' schools.

AHISA's members lead a collective workforce of over 44,000 teaching staff and almost 30,000 support staff.

Over 80 per cent of AHISA members lead schools with a single religious affiliation, including schools affiliated with the major Christian denominations, Jewish schools and Islamic schools. A further 16 per cent lead schools that identify as non-denominational, inter-denominational or ecumenical. Anglican (31 per cent) and Catholic (21 per cent) affiliations account for over 50 per cent of AHISA members' schools. Less than 1 per cent of AHISA members' schools formally identify as secular.

The socio-economic profile of AHISA members' schools is diverse. Over 20 per cent of members lead schools serving low- to very low-SES communities. The geographic spread of members' schools is also diverse, with schools located in major city, inner regional, outer regional, remote and very remote areas. School size varies from less than 200 students to over 3,000 students, with most members' schools falling within the range 600 to 1400 students.

AHISA believes that a high-quality schooling system in Australia depends on:

- Parents having the freedom to exercise their rights and responsibilities regarding the education of their children
- Students and their families having the freedom to choose among diverse schooling options
- Schools having the autonomy to exercise educational leadership as they respond to the emerging needs of their communities in a rapidly changing society.

RECOMMENDATIONS

Recommendation 1

AHISA recommends that, following receipt of the final report of the ALRC's Review, the Australian Government undertakes the development of a range of scenarios to rigorously test the impact of the ALRC's proposed amendments if they were to be enacted. The scenarios should be released publicly and time allowed for affected organisations and individuals to respond. This further period of consultation would aim to avoid any unnecessary testing of enacted amendments via litigation.

Recommendation 2

As the ALRC's proposed amendments stand, there is a lack of clarity on the extent to which religious schools would have any freedoms to build communities of faith through staff recruitment and retention practices or the extent to which they could maintain their religious ethos through enforceable staff codes of conduct and behaviour. Proposition D of the ALRC consultation paper appears, in part, to link maintenance of a religious ethos with future enactment of religious anti-discrimination laws. AHISA recommends that the ALRC clarify in its final report to the Australian Government its expectations of how its proposed amendments might interact with future religious anti-discrimination laws to avoid any unnecessary weakening of religious schools' ability to build and maintain communities of faith.

Recommendation 3

AHISA recommends that the Australian Government establish as soon as possible the office and role of a Religious Discrimination Commissioner within the Australian Human Rights Commission via amendment of the *Australian Human Rights Commission Act 1986*.

Further detail on these recommendations is found in the following sections.

1. RELIGION AND AUSTRALIAN SCHOOLING

As previously described, the vast majority of AHISA’s 460 members lead schools that are either formally affiliated with a religion or denomination, or that describe themselves as having a religious albeit non-denominational or ecumenical ethos. While most members lead schools affiliated with Christian denominations, some members lead Islamic and Jewish schools.

In its latest report on characteristics of independent schools¹, Independent Schools Australia (ISA) notes that in 2021 84 per cent of Australia’s independent schools sector had a religious affiliation, reflecting a range of Christian denominations, as well as Jewish and Islamic schools, and Ananda Marga and Hare Krishna schools.

Taking account of the most recent (2022) Schools Australia data release from the Australian Bureau of Statistics (ABS)², the independent (15.9 per cent) and Catholic (19.7 per cent) school sectors together account for 35.6 per cent of total Australian school enrolments. Over 40 per cent of Australia’s secondary school students are enrolled in Catholic or independent schools; that is, around two in every five Australian students receives at least part of their education in a school with a religious affiliation.

ABS Schools Australia 2022 accompanying information³ notes that, over the past decade, enrolments in independent schools increased by over 25 per cent, Catholic school enrolments rose by 8 per cent and government school enrolments rose 11 per cent. Growth in enrolments has contributed to the increase in the overall proportion of Australian students in non-government schools, as observed in the chart below.⁴

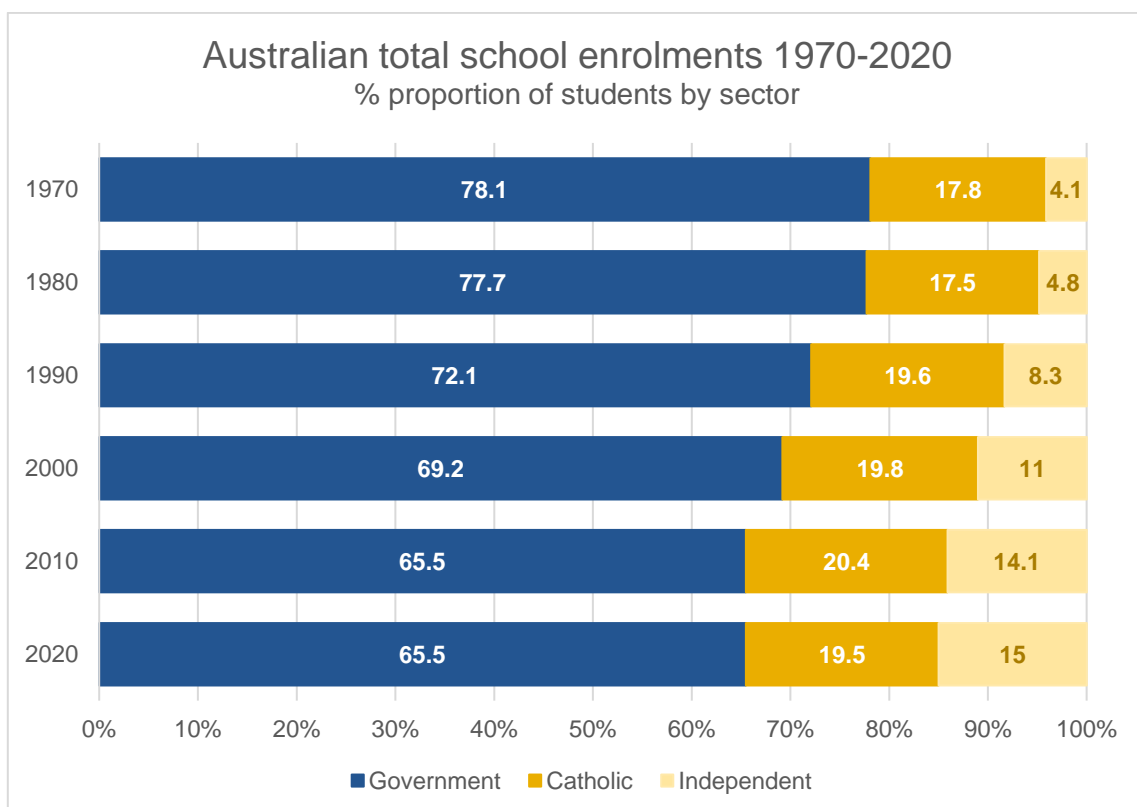


Chart data sourced in Independent Schools Australia’s (ISA) *Snapshot*, 2022 edition.

These enrolment figures attest to the importance parents place on educating their children in schools that uphold religious values.

Recent analysis by the Australian Bureau of Statistics of 2021 Census data⁵ found that students who attended a Catholic or independent school were more likely to have a religious affiliation:

- In 2021, 71.9 per cent of children who attended a Catholic or independent school had a religious affiliation compared to 44.1 per cent of students who went to government schools.
- In 2021, students who were attending Catholic schools were most likely to report being Catholic (61.1 per cent), while almost one in five (19.9 per cent) had no religious affiliation.
- While most independent schools in Australia are affiliated with a religion, 35.1 per cent of students in independent schools in 2021 had no religious affiliation.

Census data indicate that many Australian families who themselves profess a religious affiliation seek to enrol their children in a school with a religious affiliation. That is, the schools have a specifically religious value to families, aside from academic considerations.

Parent surveys indicate that some families who may not prioritise religious observance or profess a particular faith still want their children exposed to 'spiritual development' or 'Christian values' even if they themselves do not feel equipped to impart this. For example, ISA's 2021 survey of parents⁶ found that 85 per cent of parents of children attending independent schools reported that they believe independent schools give them the chance to choose a school in line with their values and beliefs.

As stated on page 2 of this submission, AHISA believes that a high-quality schooling system in Australia depends on parents having the freedom to exercise their rights and responsibilities regarding the education of their children. This freedom is recognised as a right in international laws to which Australia is a party: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the United Nations Universal Declaration of Human Rights.

Transferring from one generation to another what we know and believe about the world and our place in it has been at the heart of educational endeavour for millennia. It is how we prepare our young people for adult life, maintain and build culture, and strengthen social identity. Importantly, it is how we pass on faith traditions, and how we foster new generations as they begin their spiritual journeys.

In modern times, schools have been, and remain, integral to this process, as recognised by all Australian governments in the 2019 *Alice Springs (Mparntwe) Education Declaration*⁷:

Education plays a vital role in promoting the intellectual, physical, social, emotional, moral, spiritual and aesthetic development and wellbeing of young Australians.

It must be recognised, too, that in Australia's multi-cultural society schooling plays an important role in preserving ethnic and cultural traditions – traditions that are often closely aligned with religious or spiritual traditions. Independent schools aligned with the eastern Orthodox traditions are examples of the importance families place on maintaining both religious and cultural identity. The employment of First Nations elders and liaison officers in

schools, and the ongoing efforts of Australian governments and others to train First Nations teachers⁸ can also be understood as a recognition of this role.

Indigenous schools, and other independent schools which aim to maintain ethno-religious or cultural-spiritual connection, including language, are expressions of the health of Australia's multi-cultural social fabric, and should be valued as such. That parents value the freedom to pursue their religious and cultural aspirations for their children by exercising choice among diverse schooling options is evidenced in school enrolment data.

Freedom of choice in schooling is also exercised in favour of single-sex schooling, irrespective of whether the single-sex school has a religious affiliation. AHISA refers again to single-sex schooling in section (4) of this submission.

The Australian Attorney-General has asked the ALRC to review anti-discrimination legislation with a focus on religious educational institutions. AHISA is concerned that, as well as inhibiting the freedom of schools to develop and express themselves as faith-based communities, the legislative amendments proposed by the ALRC may have negative and possibly unintended consequences for single-sex schools without a religious affiliation as well as for what might be described as ethno-spiritual or cultural-spiritual schools – particularly Indigenous schools or schools seeking to employ people on the grounds of their specific ethnic, cultural and spiritual or religious characteristics, such as First Nations teachers, liaison officers and elders.

These concerns are discussed in the following sections and reinforce AHISA's call for clarification of some of the ALRC's proposals and further examples to illustrate the impact of proposed legislative amendments on schools.

2. RELIGIOUS BELIEFS AND RELIGIOUS ETHOS

A lack of definition of some terms in the *Sex Discrimination Act 1984* makes it difficult to fully assess the implications of the ALRC's proposals. In its discussion of the ALRC's proposals, AHISA's main focus is therefore to attempt to tease out areas of uncertainty and whether, given the diversity of the sector, the proposals could have unintended consequences for independent schools.

How important is it to define terms?

The *Sex Discrimination Act 1984* uses the following words and terms either separately or in combination with other words such as 'minister' and 'celebrant': 'religion'; 'religious belief'; 'creed'; 'religious body'; 'religious order'; 'religious purposes'; 'religious observance or practice'; 'religious susceptibilities'; 'institutions established for religious purposes'; and 'a body established for religious purposes that conforms to the doctrines, tenets or beliefs of that religion'. There is no specific definition of what is meant by 'religious belief' or 'creed' or even of 'religion' in the Act.

In its published guidance to the Commonwealth public sector, the Australian Attorney-General's Department notes⁹:

Article 18 of the ICCPR [International Covenant on Civil and Political Rights] protects the right to think freely and to entertain ideas and hold positions based on conscientious or religious or other beliefs. This entails protection against brainwashing or indoctrination. The right also protects the right to demonstrate or manifest religious or other beliefs, whether individually or collectively, and whether through worship, observance, practice or teaching.

The guidance further notes:

The UN Human Rights Committee has interpreted religion to include theistic, non-theistic and atheistic beliefs, and has stated that the right includes the right not to profess any religion and belief. The right includes the right to adopt a religion or belief of a person's choice, including the right to leave a religion and convert to another.

AHISA questions whether, if definition of 'religion' and related terms and phrases are not included in a revised *Sex Discrimination Act*, any litigation brought under the amended Act might leave open these terms (and other terms such as 'reasonable' or 'genuine') to interpretation by magistrates and commissioners. If so, could this be detrimental to schools with a religious affiliation, such that the future legality of any attempt to build a religious community could remain uncertain until tested by litigation?

On the other hand, could inclusion of a definition of 'religion' and related terms prove detrimental to Indigenous schools, or schools with a majority Indigenous student enrolment¹⁰, which may wish to give preference to employment of First Nations staff who adhere to Indigenous spiritualities? Could such schools find themselves having to defend the appointment of First Nations staff to roles which are deemed not to encompass an 'inherent' or 'genuine' spiritual component? Could a remote Indigenous community school be deemed an 'institution established for religious purposes' and, if so, would this change the current operations and freedoms of such schools?

The ALRC's consultation paper does not broach the application of its proposed amendments to what might be termed ethno-religious and cultural-spiritual schools, and there is nothing in the consultation paper to suggest that the questions posed above were specifically considered by the ALRC in reviewing anti-discrimination laws and their application in other countries and in international courts and commissions. If not yet undertaken by the ALRC, such a review and any resulting opinions or recommendations could be helpful for ethno-religious and cultural-spiritual communities to consider in assessing how proposed amendments to Australia's anti-discrimination and employment laws might affect their schools.

Is it important to indicate what might be recognised by the Fair Work Commission as undermining of a school's religious ethos?

Proposition D in the ALRC's consultation paper (commencing page 25) states:

1. Religious educational institutions should be able to expect all staff to respect their institutional ethos. A religious educational institution should be able to take action to prevent any staff member from actively undermining the institutional ethos of their employer.
2. Religious educational institutions should be able to impose reasonable and proportionate codes of staff conduct and behaviour relating to respect for the institution's ethos, subject to ordinary principles of employment law and prohibitions of discrimination on other grounds.
3. Respect for an educational institution's ethos and codes of conduct or behaviour should not require employees to hide their own sex, sexual orientation, gender identity, marital or relationship status, or pregnancy in connection with work or in private life, or to refrain from supporting another person with these attributes.

The ALRC also states that 'Proposition D is intended to clarify the extent to which the general law duties of loyalty and fidelity to an employer can be imposed in a way that is reasonable and proportionate in the context of regulating the behaviour of staff in religious educational institutions, and the extent to which interference with an individual employee's individual rights to non-discrimination in the exercise of their freedom of thought, conscience, and religion may be justified' (pages 25-26).

Other than the actions noted in point (3) above, there is little guidance in the consultation paper as to what might constitute active undermining of a school's ethos or, for employees, what might constitute boundaries on their expression of alternative views to the religious ethos of the institution. Time and place, for example, might affect the degree to which a school considered the expression of alternative views as undermining of their religious ethos. Without further clarification, however, schools – and employees – might find themselves engaged in litigation as behavioural boundaries are defined on a case by case basis.

The ALRC also notes in relation to Proposition D (page 27) that:

The ALRC expects that under any future religious anti-discrimination legislation, for instance, provisions on indirect discrimination would operate so that:

- a school could impose reasonable and proportionate requirements for all staff in a code of conduct that staff cannot publicly denigrate or ridicule the religion of the institution (as practised in that institution); and

- a school could impose reasonable and proportionate requirements for all staff in a code of conduct that appropriate respect be given by staff to religious observances and practices with the school.

This raises questions as to whether – should the ALRC’s proposed amendments to the *Sex Discrimination* and *Fair Work Acts* be accepted and enacted by the Australian Government – institutions will be adequately protected in imposing a code of conduct to support their religious ethos, and whether all staff members will be adequately protected in the expression of their beliefs or religious practices, unless religious anti-discrimination laws are in place.

The ALRC clearly argues the rationale for its proposed amendments to the *Sex Discrimination Act* and *Fair Work Act* in its consultation paper. The full impact of those amendments on how religious schools maintain their religious ethos, however, remains unclear. It is also unclear to what extent religious schools must be prepared to dilute their ethos if maintaining a religious ethos is in some part to be dependent on expectations of as yet non-existent religious anti-discrimination legislation.

It is uncertainty and lack of clarity that contribute to divisive public debate. In this instance it is also raising concerns that schools may not know the boundaries of the law, and the extent of their religious freedoms, until that law is tested in the courts. While many legal definitions seem inevitably to rely on case law, any further examples the ALRC is able to offer on application of its proposals – and their possible interaction with future religious anti-discrimination laws – would at this point be very welcome to assist the Government and the community to forge together the best way forward.

3. RELIGIOUS DISCRIMINATION

The ALRC's proposals aim to abolish or curtail the exemptions currently afforded to religious schools under the *Sex Discrimination Act* which allow otherwise discriminatory action in the enrolment of students and the hiring and firing of staff.

The ALRC acknowledges that its proposals in relation to potential and current staff members in schools with a religious affiliation have the potential 'to interfere with institutional autonomy connected to the right of individuals to manifest religion or belief in community with others, parents' freedoms in relation to their children's religious education, and freedoms of expression and association of those connected with religious educational institutions' (pages 21-22). The ALRC argues in favour of the competing rights of those with protected attributes under the *Sex Discrimination Act*.

Although outside the immediate scope of the ALRC's review, AHISA wishes to point out that schools with a religious affiliation and those who attend them are often the targets of vicious religious discrimination.

A number of AHISA members' schools have benefited from grants under the federal government's Safer Communities Fund to enhance security at the school or to support measures to prevent religious discriminatory behaviours. It is deeply concerning that in Australia religious intolerance is expressed in anti-social and even criminal behaviours, many of which are aimed at young children attending religious schools. Safer Communities Fund grants have been a practical means to help schools address these behaviours, and are much appreciated.

AHISA recommends that to help bridge the time until a federal religious anti-discrimination law is enacted, the Australian Government should quickly move to create the office and role of a Religious Discrimination Commissioner through an amendment to the *Australian Human Rights Commission Act 1986*. Such an action would help balance a perception that, if the Government were to adopt the ALRC's proposals, it was attempting to erode religious freedoms in Australia.

The office and role of a Religious Discrimination Commissioner would have symbolic and practical significance regarding religious discrimination and religious freedom beyond any specific oversight of religious anti-discrimination laws. Institution of such an office would signal to the community that Australia values religious freedom and diversity and is prepared to act against religious discrimination. It would also establish a point of contact for those experiencing religious discrimination as well as provide leadership of research on religious activity in Australia and of promotion of religious tolerance.

4. SINGLE-SEX SCHOOLS

In previous sections, AHISA's focus has been on ALRC's proposed amendments that would affect the hiring and retention of staff in religious schools. However, as discussed in AHISA's consultation with the ALRC earlier in February, the changes proposed by the ALRC could affect same-sex schools – irrespective of whether they do or do not have a religious affiliation – in terms of how they are able to maintain their same-sex provision. That is, the proposed amendments could have unintended consequences on the enrolment practices of single-sex schools and potentially on their single-sex status.

As mentioned in section (1) of this submission, single-sex schools remain a valued choice of schooling for parents across all school sectors – government, Catholic and independent. Among AHISA members' schools, while co-educational schools are the predominant type of school, there are 53 boys' schools, 97 girls' schools and four co-educational schools offering parallel classes.

Currently, schools seek exemptions under state/territory discrimination laws for permission to preference the enrolment of students of a particular sex (for example, to maintain a gender balance in overall school enrolments) or to establish or maintain their single-sex status.

As discussed with the ALRC, further clarity would be welcome on how the ALRC's proposed amendments to the *Sex Discrimination Act* would affect single-sex schools in cases such as:

- If a student who was assigned male at birth but who identifies as female makes application to enrol in a girls-only school
- If a student who was assigned male at birth but who is in the process of transitioning or intending to transition to become female makes application to enrol in a boys-only school. (AHISA members' schools which are single-sex have accommodated transitioning students if they were already enrolled and it was the wish of the student and the student's parents that they remain in the school.)

Could such enrolments leave the schools open to vexatious litigation if they then decline an application from a cisgender student of the opposite sex to the school's advertised single-sex status? Could such enrolments affect schools' future exemptions to preference enrolments of students of a particular sex?

Clarification of whether schools' single-sex status is at risk and, if so, how they might protect their single-sex status would be much appreciated. ■

NOTES

¹ ISA (2022) *Snapshot*, accessed at <https://isa.edu.au/documents/snapshot/>.

² ABS (2023) *Schools Australia 2022*, accessed at <https://www.abs.gov.au/statistics/people/education/schools/latest-release>.

³ ABS (2023) 'Independent schools lead rise in enrolments for 2022'. Media release. Accessed at <https://www.abs.gov.au/media-centre/media-releases/independent-schools-lead-rise-enrolments-2022>.

⁴ Data sourced at ISA (2022) *Snapshot*, op. cit.

⁵ ABS (2022) 'Education in Australia - from abc to A's, B's and C's'. Accessed at <https://www.abs.gov.au/articles/education-australia-abc-bs-and-cs>.

⁶ ISA (2021) *School Choice Survey 2021 Report*. Accessed at <https://isa.edu.au/documents/school-choice-survey-report/>.

⁷ Accessed at <https://www.education.gov.au/alice-springs-mparntwe-education-declaration/resources/alice-springs-mparntwe-education-declaration>.

⁸ All Australian education ministers agreed to the National Teacher Workforce Action Plan on 16 December 2022. Point 10 of the Plan commits governments to developing and implementing a strategy to attract and retain more First Nations teachers. Accessed at <https://www.education.gov.au/preview-link/node/14758/358159af-bb59-4676-9a3c-58e43996802b>

⁹ Accessed at <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-freedom-thought-conscience-and-religion-or-belief>

¹⁰ Independent Schools Australia notes on its website that in 2021 there were 44 independent schools with Indigenous students comprising more than 50 per cent of their total enrolment. Accessed at <https://isa.edu.au/our-sector/diversity/aboriginal-and-torres-straight-islander-students/>.