



ACHEA

Australian Christian Higher Education Alliance

SUBMISSION TO THE AUSTRALIAN LAW
REFORM COMMISSION IN REGARD TO THE
INQUIRY INTO RELIGIOUS EDUCATIONAL
INSTITUTIONS AND ANTI-
DISCRIMINATION LAWS

24TH FEBRUARY 2023

Introduction

1. The Australian Christian Higher Education Alliance (ACHEA) is pleased to have the opportunity to submit to the inquiry into Religious Educational Institutions and Anti-Discrimination Laws and comment on the Consultation Paper released by the Australian Law Reform Commission (ALRC).
2. ACHEA is a national association of faith-based higher educational institutions (FBHEI) who are involved in discussions internally and with Government about the developing needs and service requirements of Christian Higher Education.
3. ACHEA's members are all multi-disciplinary Protestant Christian higher education institutions and include Alphacrucis University College, Avondale University, Christian Heritage College, Eastern College Australia, Excelsia College, Morling College, Sheridan Institute of Higher Education and Tabor College of Higher Education.

Religious freedom is vital for faith-based higher educational institutions

4. Faith-based higher education institutions (FBHEI) make up an important section of the rich diversity across tertiary education in Australia. It is a sector which engages over 56,000 students and 2,000 staff each year, with a rapidly expanding international market (including many in minority religions).
5. ACHEA members offer unique forms of education within Australia. Historically, universities were founded as close communities of religious instruction, demonstrating a pattern of life conducive to higher learning of the earthly and the divine. The monastic model of scholarship was particularly influential in the development of such institutions where a devoted heart, virtue-led character and purity of life were developed alongside the expansion of intellect. Likewise, ACHEA institutions are not only places of learning, but are also '**communities of faith seeking understanding**' which educate in the context of nurturing spiritual life and formation. The emphasis upon communal growth, servant leadership, innovative wisdom, holistic teaching, and a continuance of historical tradition - all within a Judeo-Christian framework.
6. ACHEA holds that enabling different beliefs and views to be held and practiced across various educational institutions and that allowing those beliefs to be honestly followed is an important part of what makes Australian education so successful in a multicultural society. For minority and marginalised groups, religion is often intermeshed with ethnic and cultural roots and provides strong cultural diversity that is an asset in liberal democracies. This diversity requires the ability to not only teach from convictions and beliefs, but also to have the freedom to shape community and institutional life according to those beliefs.
7. FBHEI provide significant contributions to the wellbeing and economic resilience of the social fabric in times of crisis, such as COVID19. There is considerable evidence of the relationship between faith/religious commitment, philanthropy and charitable organisations that provide support and aid.

FBHEI form a central part of this support through equipping students with resilience skills, professional integration of virtue, civic responsibility, and readiness for events that affect the social, psychological, spiritual and economic health of the society. FBHEI's strong communal networks also allow them to assist churches and religious organisations in providing tangible responses to welfare and community needs.¹

8. There are however unique aspects in the sphere of higher education, many of which are directly impacted by anti-discrimination laws and the degree of religious freedom available. These challenges are a result of characteristics such as:
 - a. a specific underlying religious ethos of FBHEI which define the mission and impacts the teaching focus of all academic disciplines and student engagement;
 - b. a strong emphasis in FBHEI on the formation of positive communal relationships between executives, academics, staff and students;
 - c. a pastoral focus on vocational support and mentoring in FBHEI with greater resources dedicated to the development of character, service and faith;
 - d. an emphasis on community service and learning programs, as well as involvement in strong civic networks (e.g. churches, mosques, temples);
 - e. the voluntary nature of adult education and the freedom for HE students to choose an institution which reflects their values and beliefs;
 - f. the relationships with professional qualification bodies required for student career aspirations which can be affected by religious teaching in FBHEI;
 - g. the provision of adult residential arrangements in FBHEI's based on sex and relational status;
 - h. the inherent connection between freedom of speech in universities and student's personal religious beliefs;
 - i. the multiple opportunities for higher education student association through student unions, clubs, religious groups and activist organisations; and
 - j. the necessity for broader freedom of thought and expression in higher education due to the high intellectual nature of courses studied.

9. In light of the above characteristics, ACHEA holds that there are four fundamental requirements for the authentic existence of FBHEI. These are:
 - A. The freedom to teach and impart doctrine and beliefs around metaphysics, epistemology, human identity, morality, spirituality, sexuality, social structure, and legal and political theory.**
 - B. The freedom to employ all staff around a specific religious culture and ethos.**
 - C. The freedom to optionally require ongoing commitments from staff and students to uphold community standards of public and private moral conduct around behaviour, character traits, communication, relationships, sexual activity, substance use and religious belief.**
 - D. The freedom to resolve moral and ethical decisions which detrimentally affect the community within itself with reference to its sacred teachings and texts.**

¹ Evidence for these claims can be found in Oslington, P. 2020 [The Economic Benefits of Australian Theological Education](#), and [Building the Economy and the Common Good: The National Impact of Christian Higher Education in the United States](#), CCCU, 2018.

ACHEA Feedback on the consultation paper draft

10. It is ACHEA's view that all eleven of the ALRC substantive reform propositions fail to provide adequately protections for FBHEI and undermine the four fundamental requirements for the authentic existence of FBHEI (above). ACHEA is deeply concerned that the reforms outlined by the ALRC seems to not adequately understand and/or protect the rights required for religious freedom for our institutions which have served the diversity and plurality of the Australian community for many years.
11. ACHEA also recognises that this is partly due to the problematic terms of reference released by the Australian Government on 4th November 2022 that come with limited assumptions around discrimination and religious educational institutions. ACHEA would suggest that these terms of references should be revised in light of the ALRC struggle in determining an appropriate balance.
 - I. Religious educational institutions should not be allowed to discriminate against students (current or prospective) on the grounds of their sexual orientation, gender identity, marital or relationship status, or pregnancy, or on the grounds that a family member or carer has one of those attributes.
12. ACHEA institutions do not discriminate, or seek to discriminate, against students based on individuals' personal attributes or that of their family members. However, for some FBHEI to function they do necessitate the requirement that an individual uphold the religious beliefs, ethos and mission of the FBHEI in both word and conduct.
13. Proposition I. would potentially create an unworkable situation where although a FBHEI may make a decision on current or prospective students based primarily on whether that student (regardless of attribute) were able to uphold the religious mission and ethos of the institution; however, if the student identified with a protective attribute then they would be able to claim discrimination.
 - II. Religious educational institutions should be permitted to train religious ministers and members of religious orders, and regulate participation in religious observances or practices, unfettered by sex discrimination laws. Where applicable, religious educational institutions should also continue to benefit from the exception available to charities in relation to the provision of accommodation.
14. Although proposition II. contains some welcome protections, it is simply too narrow to capture the wide range of students who study theologically-infused subjects at FBHEI, the reasons for their study, and the way they are taught by staff.

15. Different religious traditions have different conceptions of the role of religious work and leadership in religious communities. Many do not rely on a full-time religious minister or member of a religious order, and hence modern theological training needs to support students for many other kinds of roles. For example, this section would not include missionaries, youth pastors, chaplains, teachers or pastoral care workers – despite their roles being central to the functioning of religious communities.
16. This proposition II. gives the impression that the ALRC is basing their concept of religion on what is arguably an outdated and stereotypical understanding of worship and religious life. A religious community is not simply about whether one can go to a church, mosque or temple and hear from a full-time religious minister/iman/rabbi, but rather whether one can live out faith and beliefs in all areas of life – including vocationally.
17. In the ALRC examples [p19] it also makes clear that the accommodation provision of FBHEI could not restrict accommodation to married couples (understood traditionally). Forcing religious communities to incorporate antithetical sexual and relational moral behaviours into their most intimate of spiritual communal experiences is deeply injurious to the essence of religious institutional autonomy and the formation of faith.

III. Religious educational institutions should be permitted to teach religious doctrines or beliefs on sex or sexual orientation in a way that accords with their duty of care to students and requirements of the curriculum.

18. No ACHEA institution would deny that it owes a duty to be careful in its teaching so as not to cause physical or psychological harm to students. However, this qualification seems to assume that the mere conveying of religious doctrine *might* cause relevant harm. Considering the fact that the ALRC appears to believe that requiring a staff member to affirm a doctrine of ‘homosexuality as a sin’ is discriminatory (p24), then this also means that FBHEI would not be permitted to teach their religious doctrines on sex, sexual orientation or gender identity as it would be interpreted on this standard as harmful to students.

IV. 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.

19. ACHEA institutions do not discriminate, or seek to discriminate, against staff based on individuals’ personal attributes (current or prospective). However, as outlined above, for some FBHEI to function they do necessitate the requirement that an individual uphold the religious beliefs, ethos and mission of the FBHEI in both word and conduct. This is especially true for all staff in a FBHEI who act as manifestations of the belief system and faith tradition.

20. Proposition IV. would potentially a situation where staff were not able to be assessed according to faith character suitability. For example, under the proposition a President of a Christian University, one which oversees the faith formation and career training of all students, who enters into an adulterous relationship would not be able to be removed from their position. It is not difficult to see that such an arrangement would make the mission, ethos and religious formation of FBHEI with a high view of fidelity completely unworkable.

V. Religious educational institutions should be able to select staff involved in the training of religious ministers and members of religious orders, and regulate participation in religious observances or practices, unfettered by sex discrimination laws. Where applicable, religious educational institutions should also continue to benefit from the exception available to charities in relation to the provision of accommodation.

21. Although proposition V. contains slight protections, it is once again simply inadequate in capturing the reality of religious training in FBHEI on a number of levels:

- A. Firstly, most religious vocations today are not full-time and don't fit neatly into the category of religious ministers and members of religious orders including missionaries, youth pastors, chaplains, or pastoral care workers;
- B. Secondly, the concept of training is limited as FBHEI would consider that all staff are involved in 'training' students in some capacity through a manifestation of personal faith and values;
- C. Thirdly, courses at FBHEI are largely all theologically-infused as well as involving prayer, and therefore it is difficult to identify which courses might **not** involve the training of religious ministers (or para-church ministries) in some capacity.

22. Echoing point 17 above, the ALRC examples [p21] make clear that the accommodation provision of FBHEI could not restrict accommodation to married couples (understood traditionally). Forcing religious communities to incorporate antithetical sexual and relational moral behaviours into their most intimate of spiritual communal experiences, particularly when it comes to staff as the role models and standard bearers of those values, is deeply injurious to the essence of religious institutional autonomy and the formation of faith.

VI. Religious educational institutions should be able to require staff involved in the teaching of religious doctrine or belief to teach religious doctrine or belief on sex or sexuality as set out by that institution and in accordance with their duty of care to students and staff, and requirements of the curriculum.

23. The ALRC indicated that although staff can be required to teach the FBHEI doctrine on relational, sexual and identity issues, they must also be allowed to teach any other viewpoints they wished, even if they undermine the religious mission and ethos of the FBHEI.

24. The outcome of proposition VI would be that the Government is essentially prescribing alternative religious curriculum being taught in FBHEI. Considering the Government's limited expertise in religious

and theological matters, this suggestion is deeply problematic. It also goes against **Fundamental Requirement A** (above) of being able to ‘impart doctrine’ in the sense of bestowing a specific belief.

VII. In relation to selection, appointment, and promotion, religious educational institutions should be able to preference staff based on the staff member’s religious belief or activity, where this is justified because:

- participation of the person in the teaching, observance, or practice of the religion is a genuine requirement of the role;
- the differential treatment is proportionate to the objective of upholding the religious ethos of the institution; and
- the criteria for preferencing in relation to religion or belief would not amount to discrimination on another prohibited ground (such as sex, sexual orientation, gender identity, marital or relationship status, or pregnancy), if applied to a person with the relevant attribute.

25. Once more, although at first glance proposition VII provides protections to select staff according to religious beliefs, the ALRC makes clear there is a list of beliefs that FBHEI are not allowed to hold (and thereby get their staff to affirm) such as those around relationships, sexuality, and gender identity. This is not a balancing of rights, but on the contrary a subtle statement by the State on what religious beliefs are lawful and unlawful – thereby restricting the free exercise of religion.

26. An example used in point 59 is that a FBHEI could not refuse to consider a person as a ‘practising’ member of its religion if they were in a same-sex relationship, where the person adhered to other religious criteria that the institution reasonably applied. The idea that Government legislation might have the authority to dictate who is and is not considered a practicing member of its religion, and according to which beliefs, is a significant breach of the Church/State relationship and the essential right to religious freedom and freedom of association.

27. Additionally, the inclusion of the concept of ‘genuine occupational requirements’ [p23] creates a plethora of unintended consequences. Firstly, it creates a division within staffing bodies where some designated roles would be viewed as more important, holy or spiritual, while others were less so. This potentially undermines the fundamental principal of equality of worth and value that undergirds the Christian approach to employment.

28. Secondly, it would put the government in a position where they would be able to determine the validity of a FBHEI claim that religious compatibility is an inherent requirement of the employment position, and that any differential treatment is ‘proportionate’. This would create significant issues for a court or tribunal unfamiliar with intricate religious doctrine that determine such decisions and would have to rely on external theological experts interpretations on the vocational genuineness – often who represent only one of a range of theological interpretations.

29. Thirdly, adherence to the moral and ethical frameworks of a religious body is arguably an inherent requirement of a position in itself. Therefore, attempting to demarcate roles apart from the requirement would undermine the religious freedom to adopt a religion or belief 'in community' as the ICCPR indicates.²
30. Lastly, proposition VII. Is only in relation to the selection, appointment and promotion, and therefore does not cover the termination of staff. Therefore, if a theology lecturer at a Christian University converted to Buddhism while employed, the University could not remove them from their role despite their beliefs no longer uphold those of the institutions.

VIII. 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.

31. Although this proposition VIII acknowledges an important aspect of framing laws that can maintain the religious autonomy of FBHEI, the previous propositions and examples have already significantly undermined it to such an extent that such expressions lose all meaning. ACHEA has very little confidence, based on the draft paper, that the ALRC has a mature understanding of the actual nature and ethos of FBHEI.
32. Echoing points 27 above, the inclusion of 'genuine requirement' of a role is deeply problematic in FBHEI. Additionally, although the ALRC quotes numerous untested State legislation where this has been included, and claim to have examined overseas jurisdictions, they appear to have neglected examining significant cases in the US and Europe where the issues have been explored at a more comprehensive level than the State governments including:

- A. [Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos \(1987\)](#)
- B. [Lombardi Vallauri v Italy \(2009\)](#)
- C. [Fernandez Martinez v. Spain \(2014\)](#)
- D. [Gordon College v. DeWeese-Boyd \(2022\)](#)

IX. 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.

33. This proposition IX. provides the lowest possible standard to which FBHEI can hold staff, simply that they must 'respect' the values and not actively undermine the institutional ethos. That means staff would not have to live the faith, nor even hold the faith, as long as they didn't actively undermine the

² *International Covenant on Civil and Political Rights* (1966), Art 4.

faith. It reflects a somewhat duplicitous approach to faith education, as it requires a separation from the virtues of truth, honesty, integrity which are integral to the character and faith formation in FBHEI.

34. The expectation that teachers of a religious or philosophical school will act in accordance with what they teach is not new, dating back at least to the Ancient Greeks. Further, considering much of the abuse and misconduct for which the Church has (rightly) been castigated for stems from a number of its leaders and teachers not behaving in a manner consistent with the Church's teaching, then the priority on accountability should be increased, not diminished and disconnected.
35. The legislative mechanism proposed to embed these protections are also extremely weak, containing only a provision which allows terms like these lines to be included in modern awards and enterprise agreements. Compared to the previous propositions, IX provides little reassurance that FBHEI will actually be able to choose staff according to their religious mission and ethos.

X. 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.

36. Although once again claiming to address balancing the institutional autonomy in a 'reasonable' and 'proportionate' way, the examples and outworking of such a proposition when read against the propositions I – IIX limits the ability of FBHEI to require staff conduct that upholds the religious mission and ethos. If a FBHEI is seeking to orientate their educate primarily guided by the Person and teaching of Jesus Christ, yet have staff who by their words or conduct intentionally undermine that teaching, then the FBEHI needs to have the authority to address the matter within their communities without then being charged with discrimination.

XI. 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.

37. ACHEA supports the proposal for publicly available policies on required code of conduct to be available, as long as these requirements are combined with protections against religious discrimination for FBHEI (who have been the target of abuse and vandalism due to faith-based policies).
38. ACHEA does not endorse the idea that staff should need to 'hide' attributes and would provide pastoral care to all staff who are facing difficulties. However, staff will be required to continue to

uphold the beliefs, mission and ethos of the FBHEI irrespective of any personal circumstance. This would include staff who provide pastoral support to students.

Proportionality with State-based legislation

39. Additionally, the consultation paper argues [p47] that these changes are consistent with the law as it applies (or has been enacted) in the ACT, Northern Territory, Queensland, South Australia, Tasmania and Victoria (and proposed in Western Australia). However, these relatively recent changes in State legislation cannot be used as a justification or template for Federal changes to discrimination law due to the fact that:

- a. many of these State reviews and changes blatantly disregarded the input from religious educational institutions (see for example the comments of Bishop Gauci in November 2022 on the NT law changes where he indicated Catholic schools may have to close);³
- b. there have been no (as far as ACHEA is aware) legal cases brought against religious education institutions in Australia surrounding these new anti-discrimination changes. There has been a hesitancy to enforce such laws, particularly when the Federal Sex Discrimination Act provides ongoing exemptions in contrast to the State laws.
- c. On this point, the ALRC make a bold assertion that if a State or Territory law on a topic is more restrictive than a Commonwealth law on the same topic, “*duty holders must apply with [sic] the most restrictive law*” [p13]. Not only is the grammar wrong, but the concept itself is highly contested where under s109 of the Constitution a Commonwealth law must be given priority if there is a clash with State law.⁴
- d. The laws therefore remain untested and hanging like the sword of Damocles, creating a chilling effect on religious institutions without their legitimacy actually being implemented.
- e. The ALRC also claim that ‘staff and administrators associated with them (REI) in those jurisdictions have expressed support for the laws’. However, no detail has been provided on which staff and administrators (ACHEA certainly didn’t express support) and it begs the question as to which religion, denomination, sector, or individual school or FBHEI expressed support [p19]. Surely just because one or two staff or administrators, most likely at a more liberal end of religious belief, expressed support then it does not necessary follow that all support or that the laws have been ‘successful’.
- f. The argument of consistency by the ALRC that such changes would have ‘minimal or no effect in practice’ due to the example of existing State laws is therefore deeply misleading.

³ <https://catholicleader.com.au/news/protest-against-nt-anti-discrimination-bill-that-could-force-catholic-schools-to-close/>

⁴ Further argued here by Dr Neil Foster in the Australian Journal of Law and Religion - <https://ausjlr.com/wp-content/uploads/2022/07/Volume-1-Foster.pdf>

Recommendations

40. Therefore, for the reasons outlined above, ACHEA views these propositions by the ALRC as inadequate and significantly interfering with the mission and ethos of religious educational institutions. They fail to find a balance of rights (recognising part of the problem lays with the terms of reference themselves) and propose reforms which would substantially burden the institutional autonomy of FBHEI.

41. For the reasons outlined above, ACHEA would recommend:

- A. The Government review the terms of reference and its basic assumptions around religious educational institutions
- B. The Attorney-General and Education Minister and ALRC take the opportunity to visit ACHEA members institutions to better understand the essential nature of FBHEI
- C. The ALRC fundamentally redraft the report before release, this time incorporating advice from the sector and relying less on flawed and untested State legislation
- D. The Government launching a parallel consultation process around religious discrimination legislation

42. Thank you for your time and consideration. We would be pleased, if requested, to have the opportunity to provide further assistance to the ALRC and Government as it proceeds.



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