

24 February 2023

Australian Law Reform Commission
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Dear Commissioners

ALRC Religious Educational Institutions and Anti-Discrimination Laws Inquiry Consultation Paper

The Association of Independent Schools of South Australia (AISSA) welcomes the opportunity to respond to the ALRC Religious Educational Institutions Inquiry Consultation Paper.

The AISSA represents the interests of 104 Independent schools with an enrolment of 52,700 students. Independent schools provide choice, diversity, innovation and excellence in educating students within a curriculum underpinned by a diverse range of religious beliefs (Anglican, Baptist, Christian, Christadelphian, Greek Orthodox, Islamic, Lutheran, Seventh-day Adventist, Uniting) and educational philosophies (Montessori, Waldorf Steiner). The sector also includes a number of secular schools, special assistance schools and two special schools which educate students with severe disabilities. 95% of students are educated in faith-based schools.

The AISSA notes that the ALRC has been specifically tasked to consider reforms that can be made to Federal anti-discrimination laws to give effect to the Government's commitment to amend the *Sex Discrimination Act 1984 (Cth)* and other relevant legislation. While the AISSA acknowledges the limited remit under which the ALRC was tasked with this work, it is our considered view that the proposals and propositions represent legislative overreach into the operations of faith-based schools, are unworkable from an industrial standpoint and are likely to be divisive in the school context.

The AISSA makes no comment in relation to the proposals regarding students which appear to be consistent with the requirements under the South Australian *Equal Opportunity Act 1984*. All member schools which provided feedback in the preparation of this response emphasised the care they held for all students, regardless of sexuality or chosen gender, and the support they provided to these students.

It is the AISSA's view that legislative changes should only be made in cases where deficiencies have been clearly demonstrated in current law, there is a demonstrated overall benefit to the community arising from the changes and the potential impact of the changes on the community have been clearly identified. It is our view that no such case has been made in this regard. The proposals and propositions represent a significant challenge to the longstanding and substantial legislative precedence across Australia. These current provisions recognise the right of religious bodies and institutions to operate in accordance with the (religious) principles and beliefs that the institution is founded on.

It is of significant concern to the AISSA and its members that the proposals and propositions are underpinned by a serious misunderstanding of the nature of school communities. In addition, there appears to be an implication that all faiths, or expressions of faith, and those who seek to practice it in their communities pose some kind of "threat" to society. We propose that it would be more useful to adopt the stance of seeking a workable framework that enables the rights of all parties to be respected. The language in the consultation paper suggests an underpinning assumption that faith is subjective while all other beliefs are objective. This latter view is unacceptable in a pluralist society where a diversity of views should be accepted.

The AISSA strongly opposes any proposed amendments to Commonwealth legislation which would override the provisions in the *South Australian Equal Opportunity Act*. These provisions enable Independent schools to lawfully discriminate in employment or engagement, subject to meeting specific conditions and provided that the school is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion. It should be noted that the South Australian exemption related to employment is not considered by a number of member schools to be ideal, however, it has proved to be a workable compromise. It is necessary to emphasise that exemptions are only applicable in cases where there is a genuine commitment by the institution to religious tenets and beliefs and that the actions are in accordance with those beliefs.

The proposed amendments will create inconsistencies and unnecessary confusion for faith-based schools and their employees. The South Australian legislation respects and recognises the central tenet of Independent schools that staff across all occupations, and the wider school community, will be committed to the underlying philosophies (educational and/or religious) and principles of the school. For the majority of Independent schools in South Australia, it is critical that they have the freedom to engage staff and volunteers across all occupations who share the religious values of the school and who are able to practice deeply embedded teaching and learning practices. In the Independent school sector, staff perform what is, in essence, a ministerial role as a number of schools have been formed as extensions of ministries.

Religion in faith-based Independent schools is not an 'accessory' or an 'add-on'. Nor is it considered the sole responsibility of a person or persons in the pastoral role of Chaplain, Pastor or similar. It is embedded in the very essence of the school, including policies and practices, pedagogy, the curriculum and co-curricular activities. The values and ethos of the school provide the context for all aspects of school life including the educational programs. Therefore, in many religious Independent schools, it is a necessity that staff be committed to the religion of the school and model their lives on its values and beliefs. There is an expectation that staff embody the values of the school at all times. This necessitates that school employees conduct themselves in a manner consistent with the principles of the school both within and outside of school hours.

In addition, the proposals pose an unacceptable challenge to the autonomy of Independent schools and are a breach of the fundamental right of parents to choose an education for their child/ren that best meets their needs and values, and has an ethos consistent with the belief system of their family. The growth in Independent schools and Independent school enrolments, as evidenced in the Schools, Australia 2022 report, demonstrate the continued value placed by families on a faith-based education.

Of most significant concern are the industrial implications that are very likely to result from the introduction of the proposed changes. Specifically, member schools have identified that Propositions B, C and D compromise the ability of schools to continue to offer an integrated faith across their academic and pastoral offerings. It is individuals who have a 'lived' faith that, according to member schools, have the capacity to support, understand and deliver deeply embedded faith-based teaching and learning practices, regardless of their teaching area(s). The engagement of staff who do not share a 'lived' faith has the real risk of creating mixed messaging to students and also disharmony in the workplace.

Employees are already protected against discrimination under the *Fair Work Act 2009* which prohibits employers, including religious schools, from taking 'adverse action' against, or terminating the employment of, employees on the basis of certain protected attributes, with limited exceptions available. The limited case law in this area will place an unnecessary burden on faith-based schools in dealing with an employee who is in breach of these obligations and to establish whether an employee has offended the religious ethos of their school.

The Consultation paper also makes reference to Proposition C having the effect under *the Fair Work Act* of allowing enterprise agreements to have terms relating to the selection criteria for senior leadership positions or teachers of religion. Such terms could give preference to members of the relevant religion. However, it is unclear how the Fair Work Commission would view this as it is a matter that does not form part of the Commission's consideration in applying the better off overall test for approval of enterprise agreements. It is also not clear how individual members of the Commission would view this in light of the prohibition of discriminatory terms in enterprise agreement making. This proposal will add to the complexity of approving enterprise agreements in an already complicated bargaining system.

The AISSA considers that the current legislative framework, both in South Australia and nationally, provides an appropriate balance, and strongly opposes any attempts to reduce the current legislative protections which enable a religious school to operate in accordance with the ethos upon which the school was founded. If Australia is to remain a diverse, multi-faith and multi-cultural society, and abide by its international treaty obligations, it is essential that the religious and cultural belief systems of Australians continue to be valued and respected.

Yours sincerely



Anne Dunstan
Chief Executive